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REGULATORY AND CORPORATE LIABILITY

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This publication provides an important perspective on the liability of organizations in regulatory and criminal contexts, and deals with issues that are relevant to many areas of the law including occupational health and safety, the environment, competition and securities. Expert guidance and insightful analysis is provided on the basis for regulatory and criminal liability, how regulations apply to organizations and individuals, how the principles of sentencing will impact upon a given scenario, and navigating the regulatory and criminal liability systems in Canada.

This release features updates to the Sentencing Table including updates to A:50 Occupational Health and Safety.

- **Sentencing Tables – Occupational Health and Safety – Failure to Ensure, as far as it was Reasonably Practicable to do so, the Health and Safety of a Worker Engaged in the Work of that Employer** – On appeal

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the global sentence of $200,000 was varied to a fine of $175,000 plus costs, and any applicable surcharge. The conviction on Count 1, failing to ensure that the chicots on or near the travel way providing access to a workplace were removed, was conditionally stayed. The appeal against the conviction on Count 2, failing to ensure that a safe means of egress from a workplace was provided to workers, was dismissed. The presence of hazardous chicots on the approved Patrick Trail, as found, had nothing to do with the worker's conduct in exploring an unapproved trail back to the drill site at the end of their shift, and the worker's resulting death. It was the unaddressed muddy and messy trail conditions on the Patrick Trail that drove the workers to explore the off trail, leading to the tragedy; not the unidentified hazardous chicots. It could not therefore be said that the presence of the chicots contributed in any way to the foreseeability of the worker's "misconduct" in exploring the unapproved trail, which resulted directly in the fatality. The trial justice nonetheless apportioned the fines equally between the hazardous chicots and the hazardous miry conditions, i.e. $100,000 per constituent element of culpability, despite a finding that the former basis of culpability, in effect, had nothing to do with the tragedy or the foreseeability of the conduct that lead to it. While they no doubt posed a significant potential hazard, it would nevertheless be disproportionate to maintain an equal $100,000 fine apportionment for the chicots as a reflection of the appellant's culpability in relation to the fatality. Having regard to the fact that the Crown had initially recommended a global sentence in the range of $150,000 to $200,000; the fact that the Crown on appeal conceded that Count 1 should be conditionally stayed; the fact the trial justice had apportioned the global penalty as $100,000 per count; and the fact that the essential elements of the count being stayed had no clear causal connection to the fatality, but rather more to do with the workers decision to explore an unapproved trail, the global sentence should be varied accordingly, albeit to a minor extent, so as to give paramountcy to the principle of general deterrence: *R. v. Orbit Garant Drilling Services Inc*., 2018 CarswellOnt 22527, 2018 ONCJ 935 (Ont. C.J.).

- **Sentencing Tables – Occupational Health and Safety – Failing as an Employer to Provide Training, Information, Instruction and Supervision to a Worker** – The summary conviction appeal judge was correct in finding that the sentencing justice erred in law when imposing sentences of incarceration and that this legal error affected the sentences imposed. This gave the appeal judge the authority under *POA*, s. 122(1)(b), to vary the sentences imposed on Purba and Saini, within the limits prescribed by law. Even if deference is to be given to

sentences imposed by summary conviction appeal judges that have varied erroneous trial sentences, no deference was owed in this case to the varied sentences imposed by the summary conviction appeal judge. The question remained whether the Court of Appeal should vary the sentences that were imposed. Justice Paciocco would not vary the fines imposed on Purba and Saini by the summary conviction appeal judge, or substitute sentences of incarceration even though Justice Paciocco disagreed with the summary conviction appeal judge's conclusion that the sentences of incarceration imposed by the sentencing justice were demonstrably unfit. In Justice Paciocco's view, the sentences of incarceration were entirely fit, and, in the circumstances at the time of sentencing, much to be preferred to the modest fines imposed by the summary conviction appeal judge. Had the sentencing justice not erred in law by choosing to incarcerate the men because of the financial burden of a fine, Justice Paciocco would have found the summary conviction appeal judge to have erred in finding those sentences of incarceration to be demonstrably unfit. However, things had changed since Purba and Saini were originally sentenced. Based on fresh evidence, Purba's health had declined. Saini was a primary caregiver, relied upon heavily and daily to attend to his elderly parents. Although these circumstances alone would not disqualify a sentence of incarceration, it had been close to six years since the incident, the economic fall-out from the incident had been financially difficult for both Purba and Saini, and, given her reasoning, the sentencing justice appeared to have believed a fine would have been a fit sentence, even when she sentenced the men. In these circumstances, Justice Paciocco would not reinstate the sentences of incarceration imposed by the sentencing justice. A fine was the appropriate sentence for Purba and Saini at this point. Although Justice Paciocco considered the $15,000 fines imposed by the summary conviction appeal judge to be lenient, Justice Paciocco could not find under the present circumstances that these fines were demonstrably unfit: *Ontario (Labour) v. New Mex Canada Inc.*, 2019 CarswellOnt 577, 2019 ONCA 30 (Ont. C.A.).