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REGULATORY AND CORPORATE LIABILITY

Archibald • Jull • Roach

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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:40 Offences Against Environment, and A:60 Miscellaneous Regulatory Offences.

- **Sentencing Tables - Offences Against Environment - Offences under Federal Legislation - Depositing Deleterious Substances in Water** - The

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company was fined $900,000 and ordered to undertake an audit with regard to their operations to make recommendations to bring forward changes in either equipment or practices. Mackenzie Pulp did the correct thing by immediately informing Provincial Emergency Program with regard to the incidents, and they had, by virtue of their guilty plea, accepted the corporate responsibility for those errors. The judge accepted that the culpability of Mackenzie Pulp was in the middle range. The incidents occurred in circumstances that could be fairly stated to be the company could have ensured that they had taken remedial steps so that they would not occur. They did not do so and that resulted in what occurred. The judge took into account the fact that there had been previous incidents involving Mackenzie Pulp with government authorities through warning letters and a previous conviction. The judge accepted that no "harm" was proven in this matter. There were no dead fish popping up along the shoreline, but that does not mean that it did not, for example, interfere with the viability of the reproduction of fish that swam through it, or perhaps it caused some fish to lose some of their motor control, so that they were preyed upon by other fish. But there was no huge toxic bloom or anything like that. The penalty suggested was appropriate from a deterrent perspective. It also served as a general deterrence. Pulp mills throughout North America and Western Europe operate in a similar economic and business environment. They compete with each other and will take notice that if they are in breach of the regulations in their particular country, state, or province, that they may be facing similar fines: *R. v. Mackenzie Pulp Mill Corporation*, 2018 CarswellBC 1120, 2018 BCPC 111, 147 W.C.B. (2d) 88 (B.C.P.C.).

- **Sentencing Tables - Offences Against Environment - Offences under Ontario Water Resources Act** - The OWRA establishes a minimum fine of $25,000 for the offence. However, the trial justice fined the respondent a mere $600, invoking s. 59(2) of the *Provincial Offences Act* to relieve the respondent from the minimum fine the OWRA required. The appeal judge increased the respondent's fine to $5,000 - a substantial increase, yet still a fraction of the minimum fine required by the OWRA. A second appeal of a sentence is unusual, but this case had implications that extended well beyond the OWRA and the respondent's offence. Section 59(2) of the POA applies to a wide range of public welfare legislation that prescribes minimum fines. The appeal judge erred in exercising his discretion under s. 59(2) in a manner that undermines the purpose of the OWRA. The discretionary power set out in s. 59(2) must be applied with appropriate restraint, lest it undermine provincial legislative policy governing

public welfare offences, a policy that emphasizes deterrence. Key to the exercise of the discretionary power to provide relief from a minimum fine is not the exceptionality of the circumstances of a case, in general, but the requirement that a minimum fine be either 1) unduly oppressive; or 2) otherwise not in the interests of justice. These requirements are disjunctive and must be understood as addressing different circumstances. "Unduly oppressive" normally will be limited to addressing situations of personal hardship, typically financial, while "the interests of justice" allows consideration of broader residual concerns. The appeal judge properly concluded that the trial justice erred in second-guessing the Crown's decision to prosecute under Part III rather than Part I. That was a decision the Crown was entitled to make in the exercise of its prosecutorial discretion, and the exercise of prosecutorial discretion is not a relevant consideration under s. 59(2). The appeal judge also properly concluded that the trial justice erred in treating the absence of any prior conviction as a mitigating factor. As the appeal judge noted, the absence of an aggravating factor does not count as a mitigating factor. Moreover, in ss. 109(2) and 110.1(1), the OWRA specifically addresses the relevance of prior convictions in setting minimum penalties. However, the appeal judge erred in concluding that the circumstances of this case were exceptional and that it would not be in the interests of justice to impose the minimum fine under the OWRA. His error flowed from his conclusion that "the interests of justice" means no more than "fairness". Unfairness is not the test under s. 59(2). The Legislature has decided what is fair in establishing minimum fines. Trial judges are required to apply those fines unless they conclude, in accordance with the requirements set out in s. 59(2), that relief from a minimum fine is warranted: *Ontario (Environment, Conservation and Parks) v. Henry of Pelham Inc.*, 2018 CarswellOnt 20638, 2018 ONCA 999 (Ont. C.A.).