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THE PROSECUTION AND DEFENCE OF ENVIRONMENTAL OFFENCES

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What's New in this Update:

- On November 8, 2018 the Normal Farm Practices Protection Board gave an important decision in *Dell v. Zeifman Partners Inc.* (November 8, 2018, Ont. N.F.P.P.B.). An application under the *Farming and Food Production Protection Act, 1988*, for a declaration that a large greenhouse operation causing odour and fly disturbances in the Town of Niagara-on-the-Lake was not a normal farm practice was successful. The greenhouse operation had installed an anaerobic digester system to provide a fossil fuel free alternative source of heat and energy to the greenhouse. The area behind the greenhouse where the operation was located was close to the lot lines of abutting neighbours. At the time of building the digestor, the development was within the minimum distance separation requirements. The non-

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agricultural waste received and used as feedstock was subject to a Certificate of Approval issued by the Ministry of Environment and Climate Change and despite numerous complaints of nuisance by the neighbours, the Board found that the operation "remains in compliance with the Certificate." Further, the Board found that "[t]he evidence supports a conclusion that the use of a digester in an agricultural setting is an innovative technology in Ontario although used for many years in Europe and elsewhere." However, the Board concluded that digester operation significantly changed the character of the neighbourhood. This "overriding consideration" proved determinative in its decision that the operation was not a normal farm practice. The Board, in addition to ordering the immediate shutdown of the digester system, went on to order the decommissioning and removal of all the structural components of the system including the feedstock bunkers, anaerobic digesters, above and in ground storage containers. On November 30, 2018. The Chair stated: "[w]hile the decision does not bind a new or future operator, this application was not rendered completely moot when the Respondent ceased to be the operator, as it does offer guidance for other farmers who may succeed Zeifman at the agricultural operation."

- In *R. v. French*, 2018 CarswellAlta 3092 (Prov. Ct.), the Brooks Motocross Club and a vice-president were convicted of offences under the *Fisheries Act* and the *Species at Risk Act*. During a motocross competition involving the crossing of creeks and streams, motocross bikes and equipment harmed species of trout. The Alberta Court addressed the issues of whether the Motocross Club and the vice president could be found to have caused harm to fish; whether the vice president could be culpable in his own right; whether the work or activity was "carried on" by either of the defendants; whether it involved "harassment" of species at risk, the requisite knowledge of a secondary part, as well as the requisite knowledge to establish a viable defence of mistake of fact.

- The Ontario Court of Appeal's decision in *Ontario (Environment and Climate Change) v. Geil*, 2018 CarswellOnt 21137 (C.A.), deals with the standard of proof required by the Crown to support the exercise

of the provincial officer's inspection powers to enter property upon "reasonable belief".

- The BC Supreme Court in *R. v. Executive Flight Centre Fuel Services Ltd.*, 2018 CarswellBC 3379 (S.C.), addressed the question of whether the protection in s. 11(b) of the Charter of Rights against unreasonable delay in a *Fisheries Act* prosecution applied to private prosecutions. Determining that the private prosecution period was covered by s. 11(b), the court went on to address under what circumstances the gap between the stay of the private prosecution and the laying of charges by the Crown was exempted from the 18-month limitation period for summary offences set in the *Jordan* case.
- In *Halton Region Conservation Authority v. Ahmad*, 2018 CarswellOnt 22505 (C.J.), the court addressed the question of when a trial ended for purposes of measuring whether the 18-month and 30-month time limits for unreasonable delay enunciated by the Supreme Court had been complied with. Should a court consider any time taken following the parties' final submissions for the court to determine the verdict? Should the sentencing proceedings be included? The court answered both questions in the negative. The court further considered whether a prosecution motion to amend an information before the end of the trial constituted a discrete, exceptional event justifying an extension of the 18 and 30-month ceilings. Since the development triggering the amendment was unforeseeable and beyond the Crown's control the time period covered by the amendment was excluded from the total lapse of time leading to the final submissions.
- In *R. v. Gubbins*, [2018] 11 W.W.R. 583 (S.C.C.), the Supreme Court of Canada concluded that the maintenance records for the breath-alyzer machine used to measure the readings of alcohol in the accused's' system were not first party but third-party disclosure, thereby placing the onus of proving relevance for purposes of Crown disclosure upon the accused. Since neither accused attempted to provide expert opinion on how the maintenance records might be relevant to the key material issue of determining whether the instrument was malfunctioning or operating improperly, the Court

upheld the dismissal of applications under s. 7 of the Charter of Rights for a stay of proceedings for the non-disclosure of these records.

- The Ontario Court of Appeal in *Ontario (Environment, Conservation and Parks) v. Henry of Pelham*, 2018 CarswellOnt 20638 (C.A.), allowed the Crown's appeal and imposed the mandatory minimum fine of $25,000 under the *Ontario Water Resources Act* concluding that:

  > . . . the discretionary power set out in s. 59(2) (of the *Provincial Offences Act*) must be applied with appropriate restraint, lest it undermine provincial legislative policy governing public welfare offences – a policy that emphasizes deterrence.

- It is argued in this release, relying upon the recent Supreme Court of Canada case of *R. v. Boudreault*, 2018 CarswellOnt 20975 (S.C.C.), which found the victim surcharge unconstitutional , that it is open to argue that mandatory minimum environmental sentences are cruel and unusual punishment under s. 12 of the Charter of Rights. That issue wasn't squarely addressed by the Court of Appeal in *Henry of Pelham*.

- Where the accused is charged with a hybrid offence prosecuted by way of summary conviction, the Crown may seek an amendment of the information to conform to the evidence at trial, creating a new offence without having the effect of instituting new proceedings which would be barred by the six-month limitation period: *R. v. Bidawi* (2018), 142 O.R. (3d) 520 (C.A.).

- In *R. v. The Lake Louise Ski Area Ltd.*, 2018 CarswellAlta 2894 (Prov. Ct.), the defendant was charged with unlawful removal and destruction of flora in a national park without a permit contrary to the *Species at Risk Act* and the *Canada National Parks Act*. The Provincial Court assessed the number of Whitebark Pine, a listed endangered specie under *SARA*, unlawfully removed and destroyed by the defendant, by counting the number of stems destroyed . Each stem was considered an individual flora under *SARA*. The court imposed a fine of $1.6 million for the SARA offence and an additional $500,000 fine under the *National Parks Act*. The court was not prepared to consider the extensive steps to train staff, contractors and volunteers and to fill the gap in communication between senior management and ski hill management and employees after the offence as mitigating the penalty.