

TAB 1



The Six-Minute Environmental Lawyer 2014

Corporate Directors' and Officers' Liability Under Environmental Clean-up Orders – A Backgrounder

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Order Powers under the EPA

Under the *Environmental Protection Act* (EPA), a public official (a provincial officer or a Director) has the authority to issue an order requiring a person to:

- (1) take steps to prevent or remedy contamination and its adverse effects;
- (2) address non-compliance with environmental legislation.

The relevant order provisions are found in sections 7, 8, 17, 18, 157 and 157.1.

Some of the orders can only be directed to persons who cause or permit the discharge of contaminants¹ while others can be directed to persons who own (owned) or have (had) management or control over the undertaking or property from which the discharge has occurred.²

By virtue of the “management and control” provisions, corporate directors and officers can be named in orders even where they did not cause or permit the discharge of contaminants.

Under section 140 of the EPA, corporate directors and officers named in an order by the Director may appeal to the Environmental Review Tribunal. An appeal does not stay the order.³ The appellant may ask the Environmental Review Tribunal to stay the operation of an order pending the outcome of the appeal hearing in certain limited circumstances.⁴

Court and Tribunal Interpretation of Section 18 Order Powers

Corporate directors and officers have been found to be persons in “management or control” under section 18 of the EPA since the early 1990s.

In interpreting section 18 of the EPA, the Tribunal and Courts have held:

- The focus of section 18 is on furthering the purposes of the EPA, namely the protection and conservation of the natural environment.⁵

¹ EPA, s. 17

² EPA, s. 18

³ EPA, s. 143(1)

⁴ EPA, ss. 143(2) and (3)

⁵ *Currie v. Ontario (Ministry of the Environment)*, [2011] O.E.R.T.D. No. 26 [Currie], para. 101

- Management and control are overlapping concepts. It is impossible to state precisely where one leaves off and the other begins.⁶
- Control includes both the power to make things happen and to prevent them.⁷
- Control can incorporate control of the purse-strings through means other than direct or daily participation in the corporation or its business.⁸
- Directors and officers are presumed to be in management and control given their position and the onus is on them to present evidence of their lack of involvement if they wish to avoid being subject to an order.⁹
- The presumption can only be rebutted in a “very convincing case”.¹⁰
- Orders under section 18 (and 157.1) are no fault orders in that they are not premised on a finding of fault on the part of the orderer but on the need to serve the environmental protection objective of the EPA.¹¹
- Where a party had management and control in the past, the issue is not so much whether it maintained "management and control" through to the present time but whether the environmental risk that was present when they did have management and control persisted through to the present time.¹²
- The fact the property had been sold to a third party does not relieve of responsibility the parties that managed and controlled the very risks that were created when they were in charge of the Site.¹³

Compliance Policy

In exercising his/her discretion under section 18 of the EPA, the Director is also guided by the Compliance Policy.¹⁴

The Compliance Policy provides that where a person is properly named in an order (i.e. falls within the class of persons to whom an order can be issued), he/she should not be relieved of the requirements of the order unless the person can demonstrate, on a balance of probabilities, that the purpose of the provision authorizing the issuance of the

⁶ *P&L Tire Recycling Inc. v. Director, Ministry of the Environment*, [1992] O.E.A.B. No. 21 [*P&L Tire Recycling*], p. 14
⁷ *Ibid.*

⁸ *724597 Ontario Inc. (c.o.b. Appletex) v. Ontario (Ministry of the Environment and Energy)*, [1994] O.E.A.B. No. 17, p. 17; confirmed by the Divisional Court, [1995] O.J. No. 3713

⁹ *Caltex Petroleum Inc. v. Ontario (Ministry of the Environment and Energy)*, [1995] O.E.A.B. No. 75 [*Caltex*], p. 9; as confirmed by the Divisional Court, [1998] O.J. No. 825

¹⁰ *Caltex, supra.*, p. 10

¹¹ *Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment)*, [2013 O.J. No. 2096, para. 19

¹² *Currie, supra.*, para. 95

¹³ *Currie, supra.*, para. 101

¹⁴ Compliance Policy – Applying Abatement and Enforcement Tools, May 2007

order and the environmental protection purpose of the statute will be served, and not impaired, by relieving the person from the order.¹⁵

Furthermore, according to the Compliance Policy, when issuing an order to more than one person, it is not the role of the Director to apportion or allocate liability among parties, or make findings of “fault” or “degrees of fault”. Generally, those named in an order are to be held jointly and severally liable to carry out the work specified in the order.¹⁶

In relations to a previous owner or person previously in management and control, the Compliance Policy states that that person should likely not be named in an order where he/she only had a connection with the site before any contaminating substances became present upon it and has no other connection to the problem leading to the contamination or the contamination itself.¹⁷

Finally, as it relates to the current owner or person in management and control, the Compliance Policy states that that person should be named even if the circumstances leading to the contamination were beyond his/her control except in the rare circumstance where no environmental purpose would be served to name him/her. If there are exceptional and unusual circumstances, the timing and the content of the work to be done by the owner or person in management and control can be adjusted.¹⁸

Recent Cases Involving Corporate Directors and Officers

In *Currie*, the current and former directors of a resin manufacturing company appealed the section 18 order which required them to conduct remediation of the property. The Environmental Review Tribunal applied the principles discussed above to find that the three directors, Mr. Currie, Mr. Labatt and Mr. Rickerd had management and control of the undertaking that created the environmental risks at the site. The Tribunal summarized the evidence as follows:

81 From 1989 to 1996, Mr. Currie, a director of 815, was the "point person" at the Site vis-à-vis the MOE. He was in direct communication with MOE officials, regularly visited MOE offices and generally dealt with various issues, including the May 1, 1996 Field Order. Owing to his background, he was the person who had the best knowledge of the processes pertaining to the resin business.

82 From the evidence, Mr. Labatt, Secretary and director of 815, became directly involved in working with Mr. Currie with respect to the environmental issues at least by 1995 and certainly was fully involved by 1997. He also negotiated issues pertaining to taxes with the County of Haldimand. It was clear that he was often at the Site discussing matters with the MOE concerning the ongoing environmental issues.

¹⁵ Compliance Policy, *supra.*, p. 23

¹⁶ *Ibid.*

¹⁷ Compliance Policy, *supra.*, p. 24

¹⁸ Compliance Policy, *supra.*, p. 25

83 The MOE and the three Appellants held a meeting in April, 1995 in Toronto. Six environmental issues were discussed in some depth. Just over one year later in May 1996, the MOE felt compelled to issue a Field Order to address outstanding concerns at the Site. The evidence shows that both Mr. Labatt and Mr. Currie met with MOE officials to discuss the outstanding problems. It can be presumed that Mr. Rickerd, the Chair of 815 and a director, had some understanding of the environmental issues at the time.

84 Due to the passage of time, Mr. Rickerd had only a vague recollection of the April, 1995 meeting, which was held in his office, but it is not difficult to conclude that he must have been informed at some level of the ongoing challenges at the Site that occupied both Mr. Labatt's and Mr. Currie's time. In fact, various pieces of correspondence were copied to Mr. Rickerd as to the proposed actions that either Mr. Labatt or Mr. Currie committed to the MOE to do. For example, Mr. Rickerd was copied on a letter to the MOE from Mr. Labatt outlining a plan of action to address the May 1, 1996, MOE Field Observation Report. Mr. Rickerd also stated that during that time, he met two to four times a year with Mr. Labatt and Mr. Currie. It was during these meetings that financial decisions were made. It is difficult to conceive, in light of the time and energy that Mr. Labatt and Mr. Currie spent on addressing MOE concerns, that Mr. Rickerd was unaware or uninformed of the continuing environmental challenges at the Site. As well, Mr. Rickerd's name is on the documents pertaining to the sale of the Site.

In *General Chemical*,¹⁹ the Ministry issued orders naming, among others, the directors and officers of General Chemical Canada Ltd., General Chemical Canada Holding Inc. and General Chemical Industrial Products Inc. The directors appealed the order on the basis that they did not have sufficient management and control to attract liability. Ultimately, this matter was settled upon payment of funds to the Province of Ontario to be used as financial assurance for the performance of measures needed to address the contaminated site.

In *Baker*,²⁰ the Ministry issued an order naming, among others, thirteen former directors and officers of Northstar Aerospace (Canada) Inc. and Northstar Aerospace, Inc. in relations to serious trichloroethylene contamination. All but one of the former directors and officers appealed the order. The grounds of appeal included that the former directors and officers did not have management and control of the site. Ultimately, this matter was settled upon the appellants paying the province of Ontario funds for financial assurance for the performance of on-going environmental assessment and remediation associated with the site.

¹⁹ *General Chemical Industrial Products Inc. v. Ontario (Ministry of the Environment)*, [2009] O.E.R.T.D. No. 13

²⁰ *Baker v. Ontario (Ministry of the Environment)*, [2013] O.E.R.T.D. No. 68