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TAB 2



# The Six-Minute Environmental Lawyer 2014

## Directors' and Officers' Environmental Liability Background

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# DIRECTORS' AND OFFICERS' ENVIRONMENTAL LIABILITY BACKGROUND

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# DIRECTORS' AND OFFICERS' ENVIRONMENTAL LIABILITY BACKGROUND

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## 1 INTRODUCTION

Directors and officers ("D&Os") can find themselves exposed to personal environmental liability. Courts are sometimes willing to pierce the "corporate veil" to find individuals liable for the debts and obligations of a corporation. More commonly, D&Os are exposed to environmental regulatory liability from statutory duties, orders or prosecutions. What follows is a summary of the sources of liability and recent case law.

## 2 SOURCES OF LAW

### 2.1 CIVIL LIABILITY

Civil suits personally naming D&Os are not common in environmental law. It is nonetheless possible for Courts to pierce the limited liability feature of a corporation, exposing D&Os to liability. A recent Court of Appeal case, *Shoppers Drug Mart v 6470360 Canada Inc.*, reaffirmed that the corporate veil can be pierced when (1) the company is incorporated for an illegal, fraudulent or improper purpose, or (2) when those in control expressly direct a wrongful thing to be done.[1]

### 2.2 REGULATORY LIABILITY

#### *2.2.1 STATUTORY DUTIES*

D&Os have a duty to take reasonable care to ensure that the corporation complies with CEPA, its regulations and any orders or directions made pursuant to CEPA.[2] Moreover, D&Os are liable for an offence committed by the corporation under CEPA if they were in a position to direct or influence the corporation's activities that led to violation and regardless of whether the corporation was prosecuted or charged.[3] D&Os can escape liability under CEPA if they are able to establish that they were duly diligent in attempting to prevent the offence.[4]

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1 *Shoppers Drug Mart v 6470360*, 2014 ONCA 85, 314 OAC 341.

2 Canadian Environmental Protection Act, 1999, s 280.1 [CEPA].

3 CEPA, s 280(1).

4 CEPA, s 283.

The Ontario *Environmental Protection Act* (EPA) states that all D&Os have a duty to exercise all reasonable care to prevent a variety of violations.[5] Some violations that could result in environmental liability for D&Os include discharging contaminants above the Standards, failing to report a discharge, failing to comply with approvals, permits or orders, and obstructing regulatory officials or providing false information. There are similar provisions found in the *Ontario Water Resources Act.*

Pursuant to Section 17 of the EPA, a person who causes or permits the discharge of a contaminant into the natural environment may be liable for repairing the injury or damage.

Subsection 18(1) of the EPA provides that a person who owns/owned or has/had management or control of an undertaking or property may be ordered to take steps to monitor and record the presence of a discharge of contamination and implement procedures and plans to repair the situation.

Subsection 18(2) of the EPA provides that the MOE may make an order under 18(1) requiring the prevention or reduction of risk of a discharge of a contaminant into the natural environment or the prevention, decrease or elimination of an adverse effect.

Section 93 of the EPA provides that the owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect shall do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.

### *2.2.2 ORDERS*

The Ministry of the Environment (MOE) can also issue orders naming D&Os who had or have "charge, management, or control".[6] The orders are commonly control orders or clean-up orders.

### *2.2.3 PROSECUTIONS*

Contravention of the EPA or its regulations or failure to comply with an order may lead to prosecution. D&Os can be prosecuted even if the corporation is not charged. Convicted D&Os may be fined or imprisoned.

## 3 DEFENCES

## 3.1 DUE DILIGENCE

The primary means for D&Os to respond to prosecution for an offence under an environmental statute is to establish a defence of due diligence. Due diligence is not a ground for appeal of an order that is issued against a director or officer.

The due diligence defence has a reverse onus. D&Os must establish that they relied on a reasonable mistake in fact, or took all reasonable steps to avoid the particular event.

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5 *Environmental Protection Act*, RSO 1990, c. E.19, s 194 [EPA].

6 EPA ss 7, 8, 18, 97, 99.1, 157.1.

Due diligence can be difficult to establish.

To establish due diligence it is helpful if the director or officer can point to an environmental management system or some steps taken to become informed about the environmental issues and steps taken to prevent environmental incidents.

To be duly diligent D&Os should be ready to take immediate personal action when there is a breach of environmental policies, the environmental management system, or environmental laws.

### 3.2 NO CONTROL

The Ontario Environmental Review Tribunal (ERT) has found "control" to encompass formal legal control as well as de facto control. "Control" can incorporate financial control through means other than direct or daily participation in the corporate management and operations. "Control" is not restricted to management of the operations creating the environmental risk.

The onus is on D&Os to present evidence of their lack of management and control to avoid being subject to an order.

## 4 CASE LAW

### 4.1 CURRIE V DIRECTOR (MOE)

In *Currie v Director MOE*[7], a director with limited involvement in the day to day operations of the company was held liable for an MOE order.

Messrs. Currie, Labatt and Rickerd were directors of a company. Messrs. Currie and Labatt resigned as directors in 2005, leaving Mr. Rickerd as the sole director. The MOE had been involved at the property since 1989, and had issued four separate orders against the company to remove barrels of liquid waste and investigate off-site migration of contamination. In July 2010, the MOE issued an Order against the company, Mr. Currie, Mr. Labatt and Mr. Rickerd. Mr. Currie actively ran the business.

In contrast to Mr. Currie, Mr. Rickerd had very limited involvement in the operations of the company and the environmental condition of the property. Mr. Rickerd's counsel argued that Mr. Rickerd was essentially a passive investor director. Despite Mr. Rickerd's alleged lack of involvement in the company's operations, the ERT found Mr. Rickerd, along with the other directors, liable for the MOE's order.

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7 *Currie v Director, Ministry of the Environment*, 2011 CarswellOnt 5580, 60 C.E.L.R. (3d) 91.

## 4.2 RE NORTHSTAR AEROSPACE INC.

### *4.2.1 NORTHSTAR TARGET OF FIRST CLEAN-UP ORDERS*

Northstar operated a facility in Cambridge, Ontario for the manufacturing and processing of helicopter and aircraft parts from about 1981 to April 2010. In the early years of the plant's operation, tricholoroethylene (TCE) and hexavalent chromium contaminated the soil and groundwater at the property, and migrated from the site affecting some 500 nearby homes.[8] Counsel for the D&Os asserted that it was unlikely that any of contaminants were discharged during the tenure of any of the D&Os named in the MOE Order.

Since the problem was first identified in 2004, Northstar had spent more than a reported $15 million on environmental testing and remediation at and around the site. While the company estimated its liability for future remediation at $7.5 million, it had not set aside these clean-up costs in a special trust account.

By 2010, the Cambridge facility was non-operational and Northstar was experiencing financial difficulties. The MOE became concerned about Northstar's solvency.

To ensure it continued the clean-up work outlined in its remediation plan, in March 2012 the Ministry issued a Director's Order against the financially troubled company. A second Order, issued on May 31, 2012, required Northstar to provide financial assurance of over $10 million to the Ontario Ministry of Finance by June 20, 2012. The company filed for and was awarded protection from its creditors under the Companies' Creditors Arrangement Act in June 2012.

### *4.2.2 MINISTRY TURNS ATTENTION TO D&OS*

When Northstar was adjudged bankrupt in August 2012, following the sale of the bulk of its assets and properties (with the exception of the Cambridge site), the Ministry engaged a contractor to undertake the operation, monitoring and maintenance of the company's remediation systems. Following the expiration of a "Stay Period" imposed by the Superior Court as part of the bankruptcy proceedings, the Ministry issued a new Director's Order on November 14, 2012 against Northstar and 13 former D&Os of Northstar and its parent company under sections 17, 18 and 196(1) of the *Environmental Protection Act*.

### *4.2.3 NEW ORDER BASED ON "MANAGEMENT AND CONTROL" PROVISIONS*

In a witness statement filed with the ERT on September 27, 2013, Jane Glassco, the Ministry Director who made the clean-up Order, said she had the authority to issue an Order to "anyone who is or was in management and control of an undertaking or property." The Director deemed that the board of directors was overseeing the senior managers at Northstar between 2005 and 2012. Accordingly, the Director said the D&Os had "management and control" of the undertaking at the site.

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[8] *Baker v Director, Ministry of the Environment*, 2008 CarswellOnt 11332, ERT Case Nos.: 12-158/12-159/12-160/12-161/12-162/12-163/12-164/12-165/12-166/12-167/12-168/12-169 (Ont. Environmental Review Trib.). Northstar Aerospace Inc. (Re), 2013 ONCA 600, 234 ACWS (3d) 642.

By failing to prevent, the Ministry alleged these directors "permitted" the discharge of the contaminants. The Ministry found that once the magnitude of the contamination was discovered, the D&Os ought to have set aside necessary secured funds to complete remediation.

The Order required that the D&Os carry out the work that was originally set out in the March 2012 Director's Order made against the company, including indoor air monitoring and mitigation at the surrounding residential properties, soil vapour extraction and groundwater pumping operations, and other components of the remediation plan.

### *4.2.4 D&OS APPEAL ORDER TO THE ERT BEFORE SETTLEMENT*

Twelve of the 13 D&Os appealed the Order to the ERT, challenging both its reasonableness and the jurisdiction of the Director to issue it.

In February 2013, the ERT dismissed a motion by the appellants requesting a stay of the Director's Order. In its decision, the ERT considered the bars to granting a stay set out in the EPA. The ERT found that though much of the order was not barred by the EPA from being stayed, the applicants failed to meet the tests for a stay after the Tribunal considered the RJR-MacDonald factors.[9]

An appeal of that Order was also dismissed by the Ontario Superior Court of Justice (Divisional Court).[10]

A full hearing on the appeal before the ERT was scheduled for the fall of 2013. In the interim, the directors continued to pay estimated remediation and monitoring costs of $100,000 a month, in addition to their growing legal bills, with slim likelihood of recovery even if their appeal was successful.

On the first day of the scheduled ERT hearing on October 28, 2013, the parties advised the ERT that the appellants had entered into private mediation with the Director and that they had reached agreement to settle all of the issues raised in their appeals.

While the former D&Os continued to deny any liability, they paid $4.75 million to the Province for the performance of on-going environmental assessment and remediation associated with the site and impacted or potentially impacted off-site properties. In exchange, the Director's Order was revoked against the appellants who are parties to the settlement.

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[9] Section 143(2) of EPA states that the ERT may not grant a stay of an Order to monitor, record, and report. The ERT also considered Section 143(3) of the EPA. It states that the ERT cannot grant a stay if doing so would result in danger to health or safety, impairment or serious risk of impairment of the natural environment, or injury or damage or serious risk to property, plant life or animal life. Since the MOE was ordered to continue the remediation until someone else assumed the work, removing harm, the stay of the order was not barred by Section 143(3).
Rule 110 of the ERT's Procedural Rules sets the test on a stay application, requiring applicants to meet the test for injunctive relief set out in the SCC's decision in RJR MacDonald. The ERT found that the Directors had met the first part of the test – that there was a "serious issue to be tried". The ERT held that the Directors had not proven the second part of the test – that they had suffered "irreparable harm". The ERT found that the Directors failed to meet the third part of the test – balance convenience – finding that there would be "a central harm to the public interest" if the stay were granted.

[10] The Divisional Court said, among other things, that it could only hear an appeal of a final order and the stay refusal was an interim decision. *Baker v Ministry of Environment* 2013 ONSC 4142 paras. 54-55

### *4.2.5 MINISTRY ASSUMES UNFUNDED LIABILITY*

While the $4.75 million will fund the remediation work in the short and intermediate term, the Ministry has confirmed that it will assume responsibility – and provide further funding as required – for managing the long-term mitigation, remediation and monitoring needs "until the contamination is adequately addressed or another person assumes responsibility for the site."

## 4.3 KAWARTHA

In *Kawartha Lakes (City) v Director, MOE*[11] the municipality of Kawartha Lakes was issued an order under the EPA to clean up contaminants that migrated on to municipal property from a spill at a neighbouring site. The City attempted to argue that it was not fair for the City to be ordered because it did not cause the spill. The ERT held that "fairness" is not considered a ground of appeal for an Order unless the EPA objective was met. Since the City could not provide a solution that would protect the environment if the City was removed from the Order, the Order was upheld.

Although Kawartha is not a case involving a director and/or officer, it is important to note that fairness and fault might not be considered to relieve a director or officer from an Order.

## 4.4 ROSENFELD

In *Rosenfeld v Director, MOE*[12], a former corporate director was removed from an Order because he was able to establish that he had no "management or control". The company lawyer, Mr. Rosenfeld, was a director of the operating company. The company had been the contaminator for 15 years prior to its insolvency. Mr. Rosenfeld successfully appealed the MOE Order against him on the basis that he had no involvement in the operations of the company (ERT decision 2011). The son of the sole shareholder, who was incidentally the current owner of the contaminated site, was left liable. His appeal of the order was denied (ERT decision 2013).

# 5 CONCLUSION

D&Os are exposed to serious personal financial risk from environmental enforcement, including prosecution and orders. The MOE has broad powers to issue orders against current and former D&Os with no fault requirement. The potential for liability persists even where D&Os are not involved in the daily operations of the company.

Compliance with orders can have significant costs. Interim cost recovery to comply with an order under appeal is unlikely. Moreover, orders will likely not be stayed pending appeal. It is important to be aware of these risks and develop strategies to inhibit D&O personal liability.

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[11] *Kawartha Lakes (City) v Director, MOE*, 2013 ONCA 310, 228 ACWS (3d) 134.

[12] *Rosenfeld v Director, MOE*, [2011] OERTD No 35, 2011 CarswellOnt 9360 (Ont. Environmental Review Trib.) (2011).