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# Director and Officer Liability: *Baker v. Director (MOE)*

*By Alexandria Pike**

When Ontario's Ministry of the Environment ("MOE") faced challenges in enforcing clean-up orders against insolvent companies AbitibiBowater Inc. and Northstar Aerospace (Canada) Inc. ("Northstar"), it looked to former officers and directors to undertake investigatory, monitoring and remediation work to address contamination from the companies' past operations. In the recent decision of the Environmental Review Tribunal ("ERT") in *Baker v. Director, Ministry of the Environment*, the ERT dismissed a motion to stay the order issued against the former officers and directors of Northstar. The decision demonstrates that even where individual directors and officers have challenged the clean-up order issued against them and face significant personal expense, the ERT is prepared to uphold statutory compliance obligations, requiring full satisfaction of the order until the appeal is determined.

Northstar operated a manufacturing facility in Cambridge from 1981 to 2010 during which time various chemicals, including trichloroethylene and hexavalent chromium, were used in its operations. In 2004, environmental investigations identified groundwater impacts of TCE at 4,000 µg/L (as compared to the current MOE standard of 1.6 µg/L). More than 500 residences were identified as requiring ongoing monitoring and mitigation due to vapour intrusion. Both TCE and hexavalent chromium were found to be migrating to the Grand River in an area that relies on surface water for potable use. In 2005, Northstar commenced a voluntary remediation program and continued to carry out such work under MOE oversight until March 2012 when the MOE issued a clean-up order against it, followed by an order in May for over $10 million in financial assurance. Financial assurance was never provided for the remedial work. In June 2012, Northstar was provided creditor protection under the *Companies' Creditors Arrangement Act* ("CCAA").[1]

As is common in CCAA proceedings, a stay was put in place preventing Northstar and any former, current or future directors or officers from being subject to any claims. Although the CCAA stay protected Northstar from the MOE orders, the company continued to conduct remedial work until its assets were sold in July, 2012. In August, the company was bankrupt and a claims procedure was implemented. Due to the risk presented by the groundwater contamination, the Minister of the Environment took the extraordinary step of issuing a "Direction to Cause Work to Be Done" pursuant to s. 146 of the *Environmental Protection Act*

[1] R.S.C. 1985, c. C-36.

("EPA") requiring that the local MOE Director carry out "necessary" work under the March 2012 Northstar order. The direction stated that the MOE was to do the work "until such time as any other person assumes responsibility for the work required…". The MOE commenced work under the direction at the end of August 2012.

On October 31, 2012, the CCAA stay expired and the MOE proceeded to issue a remedial order against Northstar and its former directors and officers. In its order of November 14, 2012, the MOE required thirteen former officers and directors of Northstar to carry out a broad range of investigation and remediation activities under sections 17, 18 and 196 of the EPA, including to:

- prepare and implement a residential indoor air monitoring protocol;
- operate and maintain existing indoor air mitigation systems (in 212 residences);
- operate, monitor and maintain 21 existing soil vapour extraction systems;
- operate, monitor and maintain the existing groundwater pump and treat system;
- undertake the interim remedial action plan prepared by Northstar in September, 2011 and update and implement such plan every 2 years;
- conduct groundwater and surface water monitoring;
- delineate groundwater contamination; and
- report on and implement a preferred remedial option for groundwater contamination.

Twelve of the thirteen former directors and officers appealed the MOE order (the thirteenth former director is insolvent and living outside the country). Notwithstanding that work was to be commenced under the order immediately, none of the former directors and officers undertook any work and the twelve appellants brought a motion before the ERT seeking a stay of the order. In an effort to obtain MOE consent to a stay, the appellants offered to pay into a trust fund for future reimbursement of the MOE's interim clean-up costs, should they be found liable. This offer was rejected by the MOE.

In a stay motion, pursuant to the ERT's Rule of Practice No. 110, moving parties must demonstrate that irreparable harm will result if a stay is not granted and that the balance of convenience, including effects on the public interest, favours granting the stay. The appellants argued that they would suffer irreparable harm if the order was not stayed as they would have to incur costs of approximately $1.4 million per year. They submitted that they could not recover from the $15 million insurance policy intended to indemnify former Northstar officers and directors as it expressly excluded environmental remediation costs. Nor was there certainty that they could recover costs from the $1.75 million charge imposed on the assets of Northstar to indemnify the directors and officers due to ongoing insolvency proceedings that were considering whether the MOE's claim would warrant indemnification. Finally, the appellants argued that the EPA offered them no recourse to recover clean-up costs from the MOE if they were successful in their appeal. The ERT found that the appellants had not proven, on a balance

of probabilities, that irreparable harm would occur as they had established only that they may not be able to recover costs.

Even if irreparable harm were established, the ERT found that the balance of convenience did not favour granting the stay, due to the harm to public interest that would result. Interestingly, the public interest analysis did not focus on the need for remediation. The ERT found (in determining that section 143(3) of the EPA was not triggered to bar the issuance of a stay) that the MOE's ongoing remediation activities alleviated immediate danger to health and impairment to the environment. However, the ERT accepted the evidence of the MOE that it continued remediation efforts only because the appellants did not satisfy their obligations under the order. Such inaction was found to be contrary to the intention of the EPA (section 143(1) states that there is no automatic stay on appeal) and harmful to the public interest: "The conduct of parties is a relevant consideration in the context of a discretionary remedy such as a stay. The Tribunal agrees with the Director that a stay of the Order would be perceived as a reward to the Appellants for their inaction and would sanction disrespect for the statutory scheme."

This decision is a clear warning to directors and officers. Even if an MOE clean-up order against directors and officers has little merit, costly and onerous interim work may nevertheless be expected by the ERT until the appeal of the order is resolved. As the ERT does not typically make cost awards, it can be assumed that funds expended to comply with an order will not be recovered, even if appellants are later successful in challenging the basis for the order. As such, directors and officers should consider the strength of their indemnification protection, as well as other possible recovery options such as the company's insurance. Such cost recovery options should be clarified long before solvency issues arise (preferably at the time an individual accepts a role as officer or director).

While there are numerous issues to be considered before an individual takes steps to conduct remediation activities on a contaminated site (including possible civil liability), the circumstances in this case suggest that some level of interim remedial response might be negotiated with the MOE without an appellant having to satisfy all aspects of an order. In particular, as the MOE was conducting only a portion of the work under the March 2012 Northstar order, it might have been expected that nothing more would be required before the hearing of the directors' and officers' appeal.

The stay decision in *Baker v. Director (MOE)* provides useful guidance with respect to director and officer liability pending an appeal. I await the decision on the appeal with significant interest.

*A copy of the decision discussed can be found here.*

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