



The Non-polluter Pays: Recent Trends in Clean-up Liability for Innocent Companies, Directors and Officers

These materials are not legal advice. Do not hesitate to contact us if you have an issue you would like to discuss.

Paul Manning, Principal
Manning Environmental Law

*Specialist in Environmental Law
Certified by the Law Society of Upper Canada*

www.manningenvironmentallaw.com

Air and Waste Management Association
Ontario Section
Hamilton, Toronto and Kitchener-Waterloo Breakfast Series
December 2013 – February 2014



Innocent Landowner Kawartha Lakes – The Decision

- *City of Kawartha Lakes v. Director*, MOE, 2012 ONSC 2708
- Neighbouring landowner had caused spill leading to the contamination of and from the City's land
- Polluter had run out of funds to implement the cleanup
- Court of Appeal held that Order is non-fault, premised on need to serve environmental protection objective of EPA
- MOE Compliance Policy 2007 had filled policy vacuum that existed at time of *Appletex* "fairness factors"
- Director and the ERT may choose to let that Policy guide exercise of their discretion, in place of the "fairness" factors"



Innocent Landowner

Kawartha Lakes – Observations

- *Kawartha Lakes* about protection of the public purse as much as protection of environment
- The MOE can protect the environment by carrying out the work itself under Part XIV of EPA
- CA had to choose which innocent section of the public: municipal taxpayers or provincial taxpayers, should bear cost of remediation
- Ministry policy does not substitute for a principled approach in a vacuum once occupied by “polluter pays” and *Appletex* “fairness factors”



Creditor Roulette Abitibi

- *Newfoundland and Labrador v. AbitibiBowater Inc.*
 - Supreme Court of Canada - December 7, 2012,
- Provincial environmental cleanup orders may be "claims" that can be stayed and compromised in a corporate insolvency under the CCAA
- key question for court: can environmental protection orders be translated into monetary terms?
- must be sufficiently certain that the enforcing regulatory body will
 - ultimately perform remediation work; and
 - assert a monetary claim.



Creditor Roulette Nortel and Northstar

- Ontario's Court of Appeal applied *Abitibi* in two cases in 2013
- For order to be a claim that can be compromised under CCAA
 - province must have performed the remediation work and advances a claim for reimbursement, or
 - it is “sufficiently certain” that the province will do the work and then seek reimbursement.
- *Re Nortel Networks Corporation* (2013 ONCA 599)
 - Not “sufficiently certain” province would do work on 4 of 5 properties
 - order not compromisable in CCAA – stay refused
- *Re Northstar Aerospace Inc* (2013 ONCA 600)
 - Sufficiently certain that province would do work
 - Stay allowed



Creditor Roulette - Ramifications

- A "stroke of the pen" risk
 - test based on MOE decision to carry out remediation work
 - MOE may have latitude to manage the timing of decision and protect order from the insolvency process
 - Creates uncertainty for other creditors
 - Prejudices timely protection of the environment by incenting MOE to delay remediation
- What if the MOE can make orders against others?
 - a key factor in *Nortel* decision
 - but in *Northstar* court ignored MOE enforcement action against former directors and officers (see *Baker* below)
 - could prospect of successful enforcement action against directors and officers be a consideration in the future?



Director Liability Baker – the Order

- Baker v MOE (ERT Case Nos: 12-158 to 12-169)
- MOE issued order in 2012
 - to former directors and officers of Northstar
 - under sections 17, 18 and 196 of EPA
 - S. 17 to person who “causes or permits discharge”
 - S. 18 to “person who owns or owned or who has or had management or control of an undertaking or property”
 - to remediate contamination at Northstar Canada's facility in Cambridge, Ontario



Director Liability Baker – the Appeal

- Directors and officers appealed to ERT
- ERT refused to stay Order pending appeal
 - Rejected argument that question whether appellants properly named in the Order should be decided before any liability imposed
 - Appellants left with high irrecoverable monthly outlay
- Appellants settled in October 2013 for \$4.5 million (considerably less than the totals originally touted for cleanup) in return for a release from further liability



Director Liability Baker – the Ramifications

- Uncertainty left by *Baker* settlement suits MOE
- If the MOE correct then
 - Open-ended liability for directors and officers
 - Innocent directors caught
 - even where not appointed until after contamination occurs
 - Liability absolute
 - Contrast defense of due diligence in prosecution of strict liability environmental offences
 - Directors must make financial provision for cleanup
 - whether or not the MOE has requested the company to provide financial assurance in a timely fashion
- ERT stay decision may impose interim liability even where no jurisdiction to make Order



Contact Information

Paul Manning

Phone: (416) 640-6422

pmanning@manningenvironmentallaw.com

Manning Environmental Law

www.manningenvironmentallaw.com