Environmental Review Tribunal

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

Baker v. Director,
Ministry of the Environment

In the matter of appeals by Neil W. Baker, Mark Emery, Gordon Flatt, Glenn E. Hess, Donald K. Jackson, David A. Rattee, Greg A. Schindler, Wayne E. Shaw, Michael J. Tkach, James D. Wallace and Colin D. Watson filed November 30, 2012 and Craig A. Yuen filed December 7, 2012 for a hearing before the Environmental Review Tribunal pursuant to s. 140 of the *Environmental Protection Act,* R.S.O. 1990, c. E.19, as amended; with respect to Order No. 5866-8WKU92 issued by the Director, Ministry of the Environment, on November 14, 2012 under s. 17, 18, and 196 of the *Environmental Protection Act*, requiring certain work to be undertaken at, and in the vicinity of, a site located at 695 Bishop Street North, Cambridge; and

In the matter of motions by Neil W. Baker, and by the other appellants, for leave to file an amended notice of appeal and for production of particulars by the Director, heard in writing with supplementary oral submissions heard on April 14 and 27, 2013.

Before: Dirk VanderBent, Panel Chair
John B. Lang, Member

Appearances:

Dianne Saxe, Meredith James and Barry Weintraub	-	Counsel for the Appellant, Neil W. Baker
Paul Guy and Katharine Montpetit	-	Counsel for the Appellants, Mark Emery, Gordon Flatt, Glenn E. Hess, Donald K. Jackson, David A. Rattee, Greg A. Schindler, Wayne E. Shaw, Michael J. Tkach, James D. Wallace, Colin D. Watson and Craig A. Yuen

Nadine Harris, Mario Faieta and Justin Jacob - Counsel for the Director, Ministry of the Environment

Dated this **8th** day of **July, 2013.**

REASONS FOR DECISION

Background

[1] This case relates to the presence of trichloroethylene ("TCE"), hexavalent chromium, both human carcinogens, and contaminants in soil and groundwater on and in the vicinity of property located at 695 Bishop Street North in Cambridge, Ontario (the "Site") that was owned by Northstar Aerospace (Canada) Inc. ("Northstar Canada"). Northstar Canada and its predecessors operated a facility on the Site for the manufacturing and processing of helicopter and aircraft parts from about 1981 to April 2010.

[2] On November 14, 2012, Jane Glassco, Director of the Guelph District Office of the Ministry of the Environment ("MOE"), issued Director's Order No. 5866-8WKU92 (the "Director's Order") under s. 17, 18, 93, and 196 of the *Environmental Protection Act ("EPA")* to Neil W. Baker, Thomas E. Connerty, Mark Emery, Gordon Flatt, Glenn E. Hess, Donald K. Jackson, David A. Rattee, Greg A. Schindler, Wayne E. Shaw, Michael J. Tkach, James D. Wallace, Colin D. Watson and Craig A. Yuen, all former directors and officers of the companies, and to Northstar Canada. This Order requires them to carry out the work that was originally required in an earlier order, dated March 15, 2012, which was issued by the Director to Northstar Canada and to Northstar Aerospace, Inc. ("Northstar Inc."). The work relates to remediation respecting the above described contaminants.

[3] The Director's Order states that Northstar Canada is a wholly owned subsidiary of Northstar Inc.

[4] Further background respecting this matter is set out in the Tribunal's orders dated March 22, 2013, and May 15, 2013. As noted in these orders, legal counsel, Paul Guy, filed appeals on behalf of 12 of the former directors and officers named in the Director's Order except for Mr. Connerty. However, Mr. Baker subsequently retained legal counsel, Diane Saxe and Barry Weintraub to represent him. For ease of reference in this Order, the "11 Appellants" or "the Former D&O Group" refers to the 11 Appellants represented by Mr. Guy. On April 18, 2013, Ms. Saxe requested leave of the Tribunal to amend Mr. Baker's notice requiring a hearing of the Director's Order. On April 19, 2013 she filed with the Tribunal a corrected version of Mr. Baker's amended notice requiring a hearing (the "Amended Notice").

[5] As also noted in the Tribunal's order dated March 22, 2013, Northstar Canada applied for and obtained protection from its creditors in a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*"), which was instituted in the Ontario Superior Court (Commercial Court) on June 14, 2012 (the "Bankruptcy Proceeding"). The parties have advised the Tribunal that the Appellants have brought a motion in the Bankruptcy Proceeding requesting that the Court stay this proceeding before the Tribunal. The parties further advise that the Court heard submissions respecting this motion on April 18, 2013, and has reserved judgment.

[6] In a telephone conference call ("TCC") held April 29, 2013 at 10:00 a.m., the parties advised the Tribunal that the Director opposed Mr. Baker's request for leave to file his Amended Notice, so Mr. Baker indicated that he would bring a motion requesting such leave. On behalf of the 11 Appellants, Mr. Guy indicated that he would also request leave to file an amended notice requiring a hearing. Counsel for the 11 Appellants and for Mr. Baker also indicated that they each intended to bring a motion for particulars. At that time, the Tribunal gave procedural directions for the hearing of these motions in writing, supplemented by oral submissions. The parties subsequently filed their written materials in accordance with these directions, and oral submissions were heard by the Tribunal on April 14 and 27, 2013.

Relevant Legislation and Rules

[7] The relevant legislation and Rules of Practice of the Environmental Review Tribunal (the "Rules") are attached as Appendix A to this Order.

Issues

1. Whether Mr. Baker should be granted leave to file an amended notice requiring a hearing.
2. Whether the 11 Appellants should be granted leave to file an amended notice requiring a hearing.
3. Whether the Director should be required to provide particulars.

Discussion, Analysis and Findings

Issue 1: Whether Mr. Baker should be granted leave to file an amended notice requiring a hearing.

Issue 2: Whether the 11 Appellants should be granted leave to file an amended notice requiring a hearing.

[8] Pursuant to s.142(1)(b) of the *EPA*, in the notice requiring the hearing, an applicant must state the grounds on which the applicant for the hearing intends to rely at the hearing. Section 142(2) states that an applicant is not entitled to rely on a ground that is not stated in the applicant's notice requiring the hearing, except with leave of the Tribunal.

Mr. Baker's request

[9] In the course of the oral submissions, Ms. Saxe indicated that the Amended Notice contains four substantive grounds that have not been raised or expressly stated in the notice requiring a hearing that was originally filed on behalf of Mr. Baker by Mr. Guy.

[10] The first ground raises a jurisdictional issue. Mr. Baker asserts that s. 18 of the *EPA*, at most, allows preventative orders respecting the property over which the person named in the order has management and control. In this regard, Mr. Baker points out that a substantial portion of the work required under the Director's Order is in respect of work on properties other than the Site, as the contaminants have migrated off Site.

[11] The second ground is that the Director does not have jurisdiction to name Mr. Baker in the Director's Order, because he was a director of only the parent company, Northstar Inc. Mr. Baker maintains that Northstar Inc. has never owned the Site.

[12] The third ground is Mr. Baker's assertion that neither s.17 nor s.18 of the *EPA* can apply to him, because he could not have prevented the discharge of the contaminants. In this regard, he maintains that the discharge occurred long before he became a director of Northstar Inc.

[13] The fourth ground is that s. 93 of *EPA* does not apply in the circumstances of this case.

[14] During the course of oral submissions, Nadine Harris, counsel for the Director, did not oppose the inclusion of the above four grounds in Mr. Baker's notice requiring a hearing. She stated that the Director's main concern was that it appeared that the Amended Notice included a further ground disputing the environmental necessity for the work required under the Director's Order. If so, Ms. Harris submitted that the scope of the hearing would be significantly expanded to address this additional ground of appeal, as extensive hydrological and hydrogeological evidence would be required. However, Ms. Saxe confirmed to the Tribunal that Mr. Baker does not challenge the environmental necessity of the work required under the Director's Order. Based on this representation, Ms. Harris confirmed that Director no longer opposes Mr. Baker's request for leave to file the Amended Notice. Mr. Guy also indicated that the 11 Appellants did not oppose Mr. Baker's request.

Request by the 11 Appellants

[15] The motion materials contain a request by the 11 Appellants to file an amended notice requiring a hearing, which is dated May 14, 2013. This amended notice of hearing does not include any additional grounds of appeal. It simply updates the original notice to reflect that Mr. Baker is no longer included in this group of Appellants, and that Mr. Yuen is. It also includes some editorial clarifications. All parties agree that this request for leave should be granted by the Tribunal.

Findings on Issues 1 and 2

[16] Section 142(3) provides that the Tribunal may grant leave to amend a notice requiring a hearing where, in the Tribunal's opinion, it is proper to do so. The Tribunal may also give such directions as the Tribunal considers proper consequent upon the granting of the leave.

[17] In this case, the additional grounds proposed by Mr. Baker are integrally related to the position advanced in his original notice requiring a hearing, which is that the entire Director's Order should be revoked. The other parties do not dispute that Mr. Baker filed his request for leave to amend on a timely basis, so no prejudice will result to them if the requested leave is granted. Consequently, the Tribunal finds that it is proper to grant Mr. Baker leave to file his Amended Notice. The Tribunal does not find that additional directions are necessary, other than to confirm that the Amended Notice

does not include a ground challenging the environmental necessity of the work required under the Director's Order.

[18] The Tribunal grants the 11 Appellants leave to file their amended notice requiring a hearing, as it is not disputed that the amendments are intended to correctly name the 11 Appellants and to make other editorial clarifications.

Issue 3: Whether the Director should be required to provide particulars.

Requested Relief

[19] Mr. Baker's motion requests:

- An Order that the Director serve and file, within 20 days of the release of the Tribunal's decision, a document that specifies the Director's theory of legal liability and all material factual allegations on which the Director relies to justify the Director's Order against Mr. Baker, in sufficient detail to allow Mr. Baker to identify each transaction referred to, and how each relates to s. 17, 18 or 93 of the *EPA*.

- An Order requiring the Director to disclose the evidence the Director relies upon to establish any such alleged material facts.

[20] The motion by the 11 Appellants, although worded slightly differently, substantively requests the same relief.

[21] Mr. Baker and the 11 Appellants also each request that the Director be required to answer a series of questions.

[22] Mr. Baker's questions are:

- What is the Director's specific basis for naming Mr. Baker in the Director's Order?
- Whether Mr. Baker is alleged to have done anything wrong, and if so what it is?
- How s. 93 of the *EPA* and the 1995 spill are relevant to Mr. Baker's liability?
- What is the discharge?
- How and when did Mr. Baker permit it?
- What did Mr. Baker manage or control?

- How did that lead to the Director's Order?

- What are the preventive measures?
- What could Mr. Baker, personally, have done to avoid personal liability for the cleanup?

[23] The questions by the 11 Appellants are as follows :

- Does the Director rely on any material facts, other than those referred to in the Director's Order, to justify the Director's Order against the Former D&O Group?
- What is the exact nature of the discharge the Former D&O Group are alleged to have caused or permitted?
- Is the alleged liability of the Former D&O Group fault-based or rooted in any action on the part of the Former D&O Group (either collectively or individually)?
- If so, what are the impugned actions and when did the impugned actions take place? Is the impugned action a collective action (e.g., the board of directors and management collectively did something wrong and the liability of each member of the Former D&O Group is based on membership in that group) or is the Director alleging that each member of the Former D&O Group individually did something wrong?
- If the alleged liability is not fault-based, is the liability of the Former D&O Group rooted entirely in the combined facts that (1) there is contamination at the Site; and (2) the members of the Former D&O Group were officers and/or directors of Northstar Inc and/or Northstar Canada at some point between 2005 and 2012? If not, what additional facts ground the alleged liability?

Submissions

[24] The Tribunal notes that the parties provided extensive written and oral submissions which the Tribunal has considered in detail. However, in light of its findings, the Tribunal does not find it necessary to summarize all of these submissions in detail in this Order.

Mr. Baker's Submissions

[25] Mr. Baker challenges the Director's Order in its entirety, on constitutional, jurisdictional and fairness grounds. Mr. Baker asserts that he cannot have a fair hearing, if he does not know what it is he is alleged to have done wrong, and the basis on which he, individually, has been named in the Director's Order. He submits that he requires further particulars in order to know the case against him and to make full answer and defence to the Director's Order.

[26] Mr. Baker submits that he requires further clarification of the material facts on which the Director intends to rely, as well as the Director's legal theory of liability. Mr. Baker maintains that this information is necessary in order to determine, for the purpose of disclosure, which documents are relevant. He further maintains that this information is necessary to adequately consult and retain experts to assess the facts relied upon by the Director, and to address the issues, where necessary, with his own detailed evidence. 1

[27] Mr. Baker asserts that the Director's Order does not provide enough detail to permit Mr. Baker to know the case he must meet in this proceeding, nor does it provide a specific basis for naming Mr. Baker. He maintains that the Director's theory of liability is impossible to understand without particulars. In this regard, Mr. Baker maintains that counsel to the Director in these proceedings and counsel to the MOE in the Bankruptcy Proceeding have offered contradictory explanations of the grounds supporting the Director's Order against Mr. Baker. Mr. Baker also provides a legal analysis of the grounds set out in the Director's Order for issuing this Order against him. Based on this analysis, Mr. Baker argues that the Director's Order discloses no apparent basis for naming Mr. Baker in the Director's Order, under the applicable provisions of the *EPA*, or on grounds of fairness.

[28] Mr. Baker refers to a decision of this Tribunal in *Preserve Mapleton Inc. v. Ontario (Director, Ministry of the Environment)* (2012), 67 C.E.L.R. (3d) 246 ("*Preserve Mapleton")*, in which the Tribunal, at paragraph 11, stated that particulars address "the need to inform the other parties of the case they have to meet, to limit and decide the issues to be heard, to limit the generality of the claim, to make clear what is unclear, and to determine whether the appeal discloses a legally valid case."

[29] Mr. Baker also submits that, in *Preserve Mapleton*, the Tribunal found: (i) that the principles underlying the need for particulars in the context of civil litigation were also relevant in the administrative context; and (ii) that the purpose of ordering particulars is to ensure clarification of the case that must be prepared for by the responding parties.

[30] Mr. Baker also cites case law from civil and criminal courts in support of the principle that particulars are necessary where the responding party cannot determine what, exactly, the other party is alleging, and that, this is especially true where the matter is complex, covers a long period of time, and includes a range of possible acts, omissions and failed legal duties.

[31] More specifically, Mr. Baker refers to *International Nickel Co. of Canada v. Travelers Indemnity Co*., [1962] O.J. No. 56 (Ont. S.C.) ("*International Nickel*"), cited in *Sleep Clinic London Inc. v. March*, 2012 CarswellOnt 6817, at para. 32, which states:

> I agree with the Defendant's statement of the law with respect to the purpose of particulars as set out by our Court of Appeal in International Nickel Co. v. Travelers Indemnity Co., [1962] O.J. No. 56 (Ont. C.A.) where that court reiterated that **the function of particulars is to limit the generality of pleadings and thus to define the issues which must be tried and as to which discovery must be given**. **It reminds us that discovery is not a substitute for particulars** and that an Examination for Discovery cannot be read in against a corporation. Of course, the Defendant here is not a corporation. That case was rendered in the time when there was an extreme technical reliance on the rules and they were not given the liberal interpretation they are now meant to be given. [emphasis added]

[32] Mr. Baker also refers to a decision of this Tribunal in *Monture v. Ontario (Director, Ministry of the Environment)*, 2012 CarswellOnt 10897 ("*Monture*"), at paras. 49-52, noting that the Tribunal, in that case, found that particulars should be ordered where a responding party is unaware of the case to be met or another party has not been clear regarding the evidence it intends to call.

Submissions by the 11 Appellants

[33] The 11 Appellants endorse and rely on the submissions made by Mr. Baker.

[34] Mr. Guy emphasizes the significance of this proceeding for the 11 Appellants, noting that the issue in this case is whether a $15 million liability can be imposed on them personally. The 11 Appellants argue that, as the stakes are very high, it is vital that they know the case that is being made against them so that they can present a full answer and defence. They assert that a lack of clarity of the Director's case will result in the parties not being able to define the issues between them, which, among other

things, has serious repercussions on documentary disclosure. In this regard, they maintain that it is impossible to determine relevance where the case is not defined. They further assert that such lack of clarity will inevitably result in unnecessary and extensive documentary production which will be expensive to produce. They maintain that time and resources will be wasted, both for the parties and for the Tribunal, if the parties are forced to present evidence on issues that are irrelevant or undisputed.

[35] The 11 Appellants maintain that the lack of clarity in the Director's case is rooted in three issues:

- the Director's Order does not go far enough in explaining the facts that the Director is relying on;
- the Director's Order makes irrelevant allegations; and
- the MOE has taken inconsistent positions in the Bankruptcy proceeding and this Tribunal proceeding.

[36] Therefore, they maintain that that the Director should be required to provide full particulars of the facts which the Director alleges give rise to liability of the Former D&O Group under the Director's Order.

[37] Mr. Guy responded to the Director's submission that the apparent purpose of their request for particulars is to restrict, at this stage in the proceeding, the grounds on which the Director can rely at the main hearing. He observed that both the 11Appellants and Mr. Baker disagree with this submission, stating that there are provisions in the Tribunal's Rules which allow the Director to amend the Director's case as time goes on.

Director's submissions

[38] The Director asserts that the Appellants do not need particulars, maintaining that the Director's Order already outlines the bases for this Order. The Director observes that the Appellants have filed lengthy notices of appeal with detailed grounds for appeal, despite their claims that the Director's Order does not provide enough detail to permit them to know the case they must meet.

[39] The Director submits that the Appellants are disregarding many years of Tribunal jurisprudence which presumes that an officer or director of a corporation had "management or control" of a corporation's undertaking or property for purposes of an order issued under s. 18 of the *EPA* unless the officer or director demonstrates otherwise. The Director states that, in a letter to counsel for the Appellants dated April 24, 2013 (the "Clarification Letter), Ms. Harris provided further details regarding the Director's jurisdiction to issue the Director's Order under s. 17 and 18 of the *EPA*. Regarding s. 18, she confirmed that the Director relies on corporate registration records as the basis for the Director's conclusion that the Appellants had management or control of Northstar Inc. and/or Northstar Canada and the Site. This letter also confirms the Director's position that the onus is on the Appellants to advance a very convincing case to rebut this presumption. (Specific cases referenced by the Director in this regard are discussed in the Tribunal's findings below.)

[40] The Director argues that Appellants are incorrectly characterizing the information they have requested as particulars. The Director maintains that they, instead, are requesting the evidence upon which the Director's Order is based. The Director maintains that, as such, an order for particulars is not required, as such evidence will be disclosed in accordance with the disclosure requirements under the Tribunal's Rules.

[41] The Director asserts that the MOE has not taken inconsistent positions in the Bankruptcy and Tribunal proceedings.

[42] The Director maintains that an order for particulars is rarely made by the Tribunal. In this regard, the Director observes that Tribunal jurisprudence indicates: (i) that cases in which particulars have been ordered are rare; and (ii) that the Tribunal has never ordered the Director to provide particulars of a Director's Order.

[43] The Director submits that a demand for particulars should not be used as an attempt to pre-empt the normal disclosure process required in Tribunal proceedings which includes the disclosure of all relevant documents as required under Rule 164 and the exchange of witness statements as required under Rule 170. The Director further submits that there is no basis for the Appellants' assertion that a failure to require the delivery of particulars will have serious repercussions on documentary disclosure, in that it would result in unnecessary and expensive documentary disclosure.

[44] The Director submits that the Appellants' attempts to draw a parallel between the Tribunal proceedings and either civil actions or criminal proceedings, misconstrues the nature of the Tribunal's hearing. In this regard, the Director observes that this appeal has been initiated by the Appellants, not the Director, who is the responding party in this proceeding. The Director further points out that the Director's Order is not an information under criminal law that charges the Appellants with a criminal or quasi-criminal offence. The Director also emphasizes that the hearing before the Tribunal is not limited to a review of the Director's decision nor is it limited to the evidence that was before the Director at the time the Director's Order was issued. In this regard, the Director emphasizes the Tribunal's jurisdiction as set out in s.145.2(1) of the *EPA*.

[45] The Director further submits that, as with any appeal hearing before the Tribunal, the position of the parties, including that of the Director, will be informed by information made available through the mandatory documentary disclosure process.

Findings on Issue 3

[46] Pursuant to Rule 163, the Tribunal may make an order for the production of particulars at any stage in the proceeding. Under Rule 3, particulars are defined as follows:

> "particulars" include clarification of the remedy, decision or order requested; clarification of the reasons given for requesting the remedy, decision or order; and a statement or clarification of the material facts upon which a Party relies in support of any allegation;

[47] The Director has observed that the Tribunal, in the past, has rarely ordered particulars. However, the Director cites no authority which limits the Tribunal's discretion, under Rule 163, to order production of particulars at any stage in the proceeding. Therefore, the Tribunal finds that it has the authority to order production of particulars prior to the disclosure of relevant documents required under Rule 166. However, the Tribunal also notes that Rule 166 does not indicate any presumption that the Tribunal should order particulars prior to such disclosure. Consequently, the germane question is whether the Tribunal should exercise its discretion to order production of particulars at this stage in the proceeding.

[48] The Tribunal accepts, as argued by the Appellants, that particulars play an important role in ensuring a fair, open, accessible and understandable process for the parties and other interested persons, and in assisting the Tribunal in fulfilling its statutory mandate. As this is not disputed by the Director, the Tribunal does not find it necessary to make specific reference to the civil and criminal law jurisprudence cited by the Appellants in support of this principle.

[49] As noted above in his submissions, Mr. Baker cites *International Nickel,* in which the Ontario Superior Court held that: (i) the function of particulars is to limit the generality of pleadings and thus to define the issues which must be tried and as to which discovery must be given; and (ii) that discovery is not a substitute for particulars. The Appellants assert that the same approach should apply to administrative proceedings before this Tribunal.

[50] As cited by the Appellants in *Preserve Mapleton*, the Tribunal stated at paragraph 63:

> This definition [of particulars] embraces a set of basic principles regarding the purpose of particulars, specifically, the need to inform the other parties of the case they have to meet, to limit and decide the issues to be heard, to limit the generality of the claim, to make clear what is unclear, and to determine whether the appeal discloses a legally valid case. **While the parties rely on cases decided in the context of civil litigation, similar concerns operate in the administrative context.** In short, both the Rule and the general principles that underlie the Rule make it clear that the purpose of ordering particulars would be to ensure clarification of the case that must be prepared for by the responding parties. (emphasis added)

[51] The Tribunal notes that the “similar concerns” to which the Tribunal referred, are the basic principles as cited in this paragraph. The Tribunal did not state that it adopted and applied the court’s rules of civil procedure as it relates to the production of particulars.

[52] The Tribunal accepts that the two principles set out in *International Nickel* should be considered when determining whether to exercise its discretion to order particulars. However, the timing of such an order must be considered in the context of the Tribunal’s practice and procedure as an administrative tribunal. In this regard, the Tribunal finds that the Tribunal’s process is not analogous to that of a proceeding before the civil or criminal courts.

[53] The Director is neither a plaintiff, as in a civil proceeding, nor an informant, as in a criminal proceeding. Instead, the Director performs a regulatory duty as authorized under the *EPA* or other applicable environmental legislation. Under s. 140 of the *EPA,* persons named in a director's order who wish to challenge the order, are required to file notice requiring a hearing. Under s. 142 of the *EPA*, this notice must state the portions of the Order for which a hearing is required, and "the grounds on which the applicant for the hearing intends to rely at the hearing." This section does not require that the notice must include a comprehensive statement of particulars, as defined in the Rule 3.

[54] Section 145.2(1) of the *EPA* also confirms that the hearing before the Tribunal is *de novo*, i.e. a new hearing. This section states:

> 145.2 (1) Subject to sections 145.3 and 145.4, a hearing by the Tribunal under this Part shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

[55] In contrast, the function of a civil court, when adjudicating a dispute between two parties, is to determine whether or not a plaintiff has established his/her case, and the function of criminal or quasi-criminal court is to determine whether the Crown has proved its case against the persons charged.

[56] The Tribunal's procedures prior to the main hearing must be understood in the context that this is a new hearing.

[57] The Tribunal also notes that, at the time a director's order is issued, a director may not have all the relevant information which is in the possession of the person named in the order and is relevant to the order. Similarly, a person named in the order may not have relevant information that is in the Director's possession, or in the possession of other individuals, such as persons who have also been named in the order. In this regard, under s. 140 of the *EPA*, a person who wants to require a hearing must do so within 15 days after being served with the order, which provides a relatively short amount of time to prepare, serve, and file the notice. The Tribunal's procedures prior to the main hearing must be understood in this context as well.

[58] Consequently, although the Tribunal accepts that discovery is not a substitute for provision of particulars, the Tribunal does not accept that it ought to apply any presumption, which may exist under the procedural rules and practice of the civil or

criminal courts, that particulars ought to be provided prior to the disclosure of relevant documents, as required under Rule 166.

[59] Because:

- the Tribunal's hearing is a new hearing, where the Tribunal may substitute its opinion for that of the Director;

- the Tribunal adjudicates in the public interest, and, therefore, requires complete evidence to assist the Tribunal in fulfilling its statutory mandate; and

- the parties may require disclosure to enable them to fully particularize the grounds and material facts on which they will rely at the main hearing;

the Tribunal finds that, in the normal course of events, all parties should first have the opportunity to obtain full disclosure of all relevant documents, before they are asked to state the particulars on which they will rely at the main hearing. The completion of this disclosure process and subsequent formulation of an issues list, often achieves the purposes of particulars, which, as stated in *Preserve Mapleton*, is to inform the other parties of the case they have to meet, determine the issues to be heard, limit the generality of the claim, make clear what is unclear, and allow the parties to determine whether an appeal discloses a legally valid case. Therefore, an order for provision of particulars would not be required. That this often occurs, is borne out by actual practice. As the Director has pointed out, there are very few Tribunal proceedings where an order for particulars has been required.

[60] The Appellants argue that provision of particulars can and should be ordered, prior to the disclosure of documents, because the Director is not restricted from amending the Director's case as the proceeding progresses. However, the Tribunal finds that this approach ought to be avoided. A party generally should not be required to provide particulars until that party is in a position to make an informed and final decision on what those particulars will be. Otherwise, multiple versions of the particulars may be produced. This approach would not promote the purposes stated in Rule 1, that the Tribunal's process be understandable for the parties, and that efficiency of the Tribunal's proceeding be assured.

[61] The Tribunal does accept, however, that a party may be required to provide particulars at this early stage of the proceeding, if particulars are necessary to ensure that the Tribunal's pre-hearing procedures can be completed. Each case must be determined on its own individual circumstances. In this regard, the Tribunal notes that expedited appeals of renewable energy approvals (REAs) present different circumstances by virtue of Rule 29, which requires that more information be included in a notice of appeal of a REA than in other types of appeals, and Rule 33, which requires that the Director provide prescribed applicable reports to an Appellant within 14 days of receiving a notice of appeal.

[62] This brings the Tribunal to the Appellants' observation that disclosure of relevant documents can be made only if relevance can be ascertained. In this regard, they assert that relevance must be determined in relation to the issues to be addressed in the main hearing. This is not disputed by the Director. However, the Appellants submit that particulars are required in this case because they argue that the Director's Order and the Clarification Letter do not set out sufficient information to identify what the issues in this case are going to be. They maintain that, until the Director provides the requested particulars, they are unable to ascertain which documents are relevant for purposes of complying with the disclosure requirement under Rule 166. The Director disagrees, for the reasons described above in the Director's submissions.

[63] In addressing the Appellants' submission, the Tribunal begins with two observations regarding Rule 166. First, the requirement to disclose documents is quite broad. The Rule requires each party provide a copy of every relevant document in the possession, control or power of a party, except for those documents that are privileged. The Tribunal notes that there is nothing in Rule 166 to suggest that relevance is to be narrowly construed. Secondly, it is the party producing the documents who makes the initial determination whether a document is relevant, and, therefore, should be produced. Where there is uncertainty regarding relevance, a party may first identify the nature of the documents and advise the other parties of such uncertainty. Similarly if other parties believe additional relevant documents are available, it is incumbent on them to identify the nature of the documents and request that they be produced. In either of these circumstances, the Tribunal expects the parties to work co-operatively to resolve such disclosure issues. The parties may also apply to the Tribunal for directions, if required. For purposes of this analysis, the main point to be drawn from this second observation, is that the Tribunal's disclosure process is flexible, allowing for on-going identification of relevant documents within the time period allowed for

completion of the disclosure process. (In this regard, the Tribunal notes that appeals of REAs may present less flexible circumstances, as Rule 32 prescribes abbreviated time lines for completion of the disclosure process.)

[64] Turning now to the specific submissions of the parties, the Tribunal finds that it is unnecessary to review the Appellants' arguments addressing the constitutional, jurisdictional, and fairness grounds, in support their position that the Director's Order should not have named the Appellants. These arguments will be addressed at the main hearing. The issue here is whether there are sufficient particulars in the Director's Order to enable the Appellants to ascertain the documents in their possession that are relevant to these grounds. In this regard, the Tribunal notes that Part 2 of the Director's Order sets out the basis for its issuance. An excerpt from Part 2 (Part 2.8 to 2.21) is attached as Appendix B to this Tribunal Order.

[65] The Tribunal notes that Part 2 contains a lengthy factual description of the circumstances leading to the issuance of the Director's Order. Based on the submissions of the parties in this motion, it appears that much of this factual information is not in dispute. To the extent that there are disputes regarding factual information, no one has suggested that the parties would be unable to ascertain the relevant documents pertaining to such disputes, for purposes of providing disclosure under Rule 166. For example, Mr. Baker refers to the statement in Part 2.2.10 that a 1995 cyanide effluent spill, reported by Northstar Canada, contained *chromic acid*. In his motion materials, Mr. Baker submitted a report dated April 11, 2013, by AMEC Environmental & Infrastructure ("AMEC"), which provides an opinion that there is no evidence that this 1995 spill released *TCE* to soil or groundwater. The Tribunal, again, notes that the import of this evidence must be determined at the main hearing. However, it is clear that the nature of the factual assertions made by each party is sufficiently detailed, to allow the parties to ascertain the documents in their possession that are relevant to this particular aspect of the matters to be addressed at the main hearing.

[66] In summary, the lack of particularity asserted by the Appellants relates to the statutory grounds cited by the Director as authority for issuing the Director's Order, namely, s. 17, 18, and 93 of the *EPA*. Underlying this assertion is the undisputed fact that none of the Appellants were officers and/or directors of either corporation at the time the contaminants were initially discharged into the environment, nor did any of them personally own the Site or the contaminants. It is also not disputed that the Director relies on corporate registration records as the basis for the Director's

conclusion that the Appellants had management or control of Northstar Inc. and/or Northstar Canada and the Site.

[67] Section 17 provides that the Director may make a remedial order where a person causes or permits the discharge of a contaminant into the natural environment, resulting in, or is likely to result in, an injury or endangerment as described in this section. The Appellants assert that the Director's Order does not provide sufficient particulars to answer the question: What is it that the Appellants have 'caused or permitted'?

[68] The Tribunal has also already found that all parties should first have the opportunity to obtain full disclosure of all relevant documents, in order to prepare their statements of the particulars on which they will rely at the main hearing. Hence, in this case, the Tribunal accepts that the Director should be entitled to the disclosure required under Rule 166, in order for the Director to answer this question.

[69] The Tribunal, again, emphasizes that the germane issue is whether there are sufficient particulars to enable the Appellants to determine relevance for the purpose of the broad disclosure requirements under Rule 166, where relevance is not to be narrowly construed. In this context, the Tribunal finds that the common definitions of the terms "cause" and "permits", are sufficiently clear on their face, to allow the Appellants to determine relevancy. The Tribunal also notes that the Director has provided further clarification of the basis for the Director's Order in the Clarification Letter which states:

> The Director is not alleging that your clients actively caused the contamination. Instead, the Director is of the view that your clients, during their tenure as corporate directors and officers, permitted the discharge by failing to take appropriate steps to prevent the discharge of the contaminant in the long-term. For example, as corporate directors and officers of Northstar or Northstar Canada prior to their bankruptcy, your clients failed to plan for the resources and funds necessary for the company's long-term obligations to prevent or repair the injury or damage to the Bishop Street Community and the environment.

[70] Also, as noted by the Tribunal earlier in these reasons, any uncertainties regarding relevancy that may arise can be addressed through discussions of the parties, or where required, upon further direction of the Tribunal.

[71] Turning to s. 18, a similar analysis applies. Section 18 provides that the Director may make an order regarding preventive measures as against a person who owns or owned or who has or had management or control of an undertaking or property. The Appellants submit that the Director's Order does not specify the bases supporting the Director's assertion that the Appellants are persons who had management or control of

the Site or any undertaking in relation to remediation work referenced in the Director's Order.

[72] In response, the Director relies upon *Currie v. Ontario (Ministry of the Environment)* (2011), 60 C.E.L.R. (3d) 91 ("*Currie* ") and cases cited therein to support the Director's assertion that there is well established Tribunal jurisprudence which presumes that an officer or director of a corporation had management or control of a corporation's undertaking or property for purposes of an order issued under s. 18 of the *EPA,* unless the officer or director demonstrates otherwise. The Tribunal notes that the determination of this issue is a matter for the main hearing. At that time, the Tribunal will consider how the findings in *Currie* and the cases cited therein, should be applied in this case. However, for purposes of identifying documents to be disclosed under Rule 166, the Tribunal accepts that *Currie* does describe established jurisprudence regarding the interpretation of the terms "management" and "control". As such, this jurisprudence should guide the parties' decisions regarding which documents are relevant for purposes of disclosure.

[73] In this regard, paragraphs 75 to 78 in *Currie* are relevant:

> Section 18 of the *EPA* states that the Director may require a person "who owns or owned or who has or had management and control of an undertaking or property to do any one or more ..." of a number of measures to prevent environmental harm. Before an Order can be issued, the Director must be of the opinion that, based on reasonable and probable grounds, the requirements outlined in the Order are necessary or advisable to prevent or reduce the risk of a contaminant discharge from the property or prevent or decrease an adverse effect from the presence or discharge of a contaminant.
>
> In *P&L Tire Recycling Inc. v. Director (Ministry of the Environment),* [1992] O.E.A.B. No. 21, the Ontario Environmental Appeal Board reviewed section 18 of the *EPA* and noted at page 14:
>
> > Management and control are overlapping concepts. It is impossible to state precisely where one leaves off and the other begins. The Oxford Encyclopedic English Dictionary defines, "manage" as "organize; regulate; be in charge of (a business, etc.)". "Management" has a corresponding definition as "the process or an instance of managing." "Control" as a noun is defined as "the power of directing, command", or alternatively as "the power of restraining". Thus, control includes both the power to make things happen and to prevent them. As a verb, "control" means "have the control or command of; dominate; exert control over; regulate; hold an check; restrain". Black's Law Dictionary (5th Edition) defines "control" as "the power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee."

> In *Ontario (Ministry of the Environment and Energy, Southern Region) v. 724597 Ontario Inc. (c.o.b. Appletex)*, [1995] O.J. No. 3713, the Divisional Court confirmed the Ontario Environmental Appeal Board's interpretation of "management and control" that is germane to the present case. The Court stated at para. 13:
>
> > The Board found that Bell and Harris retained ultimate control over all significant expenditures by Appletex through their authority to sign cheques. They had a veto over such expenditures. The Board's reasoning respecting control is found in the following statement in its reasons at p. 19:
> >
> > > "Control" does not only encompass the formal legal control available to officers and directors, but also de facto control by others in a position to significantly influence the management of the undertaking. It can incorporate control of the purse-strings through means other than direct or daily participation in the corporation or its business. Similarly, "management" of the undertaking is not restricted to management of the operations creating the risk of pollution. Indeed, as will be seen below, in the view that we will take on this matter, the real issue in this case in regard to Messr. Bell and Harris is not how the business was conducted as an operating entity, but how the property was decommissioned when the business was abandoned. The aspects of management and control that are most important to our decision are not those that relate to operating decisions but those relating to the decision to abandon the business and the premises.
>
> In *Caltex Petroleum Inc. v. Ontario (Ministry of Environment and Energy),* [1995] O.E.A.B. No. 75, the Ontario Environmental Appeal Board ruled that the onus is on directors to present evidence of their lack of involvement if they the wish to avoid being subject to an order. The Board also stated that "indicia of legal liability by way of registered documents create presumptions that the reality is in conformity with the legal descriptions that the parties have chosen in organizing their case." Further the Board stated that the presumption can only be rebutted by a "very convincing case."

[74] The Tribunal finds that the analysis in *Currie* and cases cited therein provides considerable guidance respecting the meaning and scope of the terms “management and “control” as used in s. 18 of the *EPA*. As such, the Tribunal finds that the Director’s Order, when read in conjunction with this jurisprudence, provides sufficient clarity to allow the Appellants to determine relevancy for purposes of providing disclosure under Rule 166. In this regard, the Tribunal notes that the Director’s Order does not rely on the status of the Appellants as directors and officers of the corporations, as the sole basis for asserting that they had management or control. Part 2.3 of the Director’s Order also states:

> Northstar's publicly released Annual Reports for 2008, 2009 and 2010 estimated that the future cost of the remediation of pollution related to the Site amounted to several million dollars. Nevertheless, the funding of such future work was not secured by Northstar or Northstar Canada through a trust account or other means.

[75] In further support of this conclusion, the Tribunal notes that the discussion of the terms "management" and "control" in *Currie* and the cases cited therein, underscores that these are fairly general terms that can have application in varied circumstances. This reinforces the Tribunal's conclusion that it is reasonable to expect that, in this case, the parties will require the broad disclosure required under Rule 166, in order to make informed decisions respecting the particulars on which they will rely at the hearing.

[76] The Tribunal now turns to s. 93 of the *EPA* which 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 forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment. It has not been suggested that any of the Appellants personally owned the pollutants.

[77] The Appellants submit that the Director's Order does not specify the bases supporting the Director's assertion that the Appellants are persons who had control of the pollutant. The Tribunal finds that the common definition of this term is sufficiently clear on its face, to allow the Appellants to determine relevancy. Furthermore, the Tribunal also notes the term "control" is used in both s.18 and 93 of the *EPA*. Whether this term should be interpreted synonymously in both sections, is a question to be decided at the main hearing. Certainly, it is arguable that it could be so interpreted. Consequently, the Tribunal finds that the findings in *Currie* and the cases cited therein respecting the term "control" should guide the parties' decisions regarding which documents are relevant for purposes of disclosure, as it relates to the particulars on which they will rely at the main hearing in respect of s. 93 of the *EPA*. For these reasons, the Tribunal finds that its analysis and conclusion in respect of s.18, also apply to s. 93.

[78] The Tribunal now turns to the Appellants' submission that if particulars are not provided at this stage in the proceeding, it will result in unnecessary and extensive documentary production which will be expensive to produce. They maintain that time and resources will be wasted, both for the parties and for the Tribunal, if the parties are forced to present evidence on issues that are irrelevant or undisputed. For the following reasons, the Tribunal does not accept this submission.

[79] The Tribunal recognizes that not every document that is disclosed will be adduced as evidence at the main hearing. Indeed, this is contemplated by Rules 166 and 167. Under Rule 166, relevant documents are exchanged only between the parties. Under Rule 167, documents that will be relied upon at the main hearing are provided to both the parties *and* the Tribunal. However, as noted above, the Tribunal's hearing is a new hearing that is not restricted to the evidence that was before the Director at the time the Director's Order was issued, nor is it restricted to determining only disputes among the parties. The Tribunal adjudicates in accordance with the purpose and provisions of the relevant legislation and in the public interest. In this context, it is important that all parties have an opportunity to review all relevant documents so they can determine the issues and evidence they each will present at the main hearing. This function is essential in assisting the Tribunal to fulfill its statutory mandate. The Tribunal further notes that the exchange of relevant disclosure can also serve to narrow or resolve the issues. While such disclosure would ultimately become unnecessary for purposes of the main hearing, this process, nonetheless, serves to assure efficiency of the Tribunal's proceeding.

[80] In addition, the Tribunal has already found that a requirement for particulars asserted by the Appellants relates to the requirements of s. 17, 18, and 93 of the *EPA*, which the Tribunal has further found are adequately described in order to allow the parties to determine relevancy for purposes of disclosure. Therefore, the Tribunal does not accept the assertion that the parties will be required to produce irrelevant documents.

[81] The Tribunal recognizes that, in some cases, the number of relevant documents to be produced may be voluminous. However, this is determined by the nature of the issues raised in the proceeding. In order to manage this situation, the Tribunal expects the parties to identify whether large volumes of documents may be relevant, and to confer with one another to determine whether selective disclosure of a subset of these documents may be sufficient.

Summary

[82] In summary, the Tribunal denies the Appellants' request for provision of particulars at this time.

[83] However, the Tribunal has noted that Rule 166 provides that the Tribunal may make an order requiring the provision of particulars at any stage of the proceeding. In his submissions, Mr. Baker refers to the Tribunal's decision in *Monture*, noting that the

Tribunal, in that case, found that particulars should be ordered where a responding party is unaware of the case to be met or another party has not been clear regarding the evidence it intends to call.

[84] The Tribunal expects that, upon completion of disclosure under Rule 166, the parties will co-operate in providing any necessary statements or clarification of any of the matters falling within the definition of "particulars" under the Tribunal's Rules. However, any party should be able to make a future request for provision of particulars, if necessary. Consequently, the Tribunal's dismissal of the Appellants' motions requesting particulars, is made without prejudice to a future request for provision of particulars, once the disclosure required under Rule 166 has been completed.

ORDER

Pursuant to s. 142(3) of the *EPA*, the 11 Appellants are granted leave to file their amended notice requiring a hearing dated May 14, 2013, and Mr. Baker is granted leave to file his notice requiring a hearing dated April 19, 2013.

[85] The motions by the Appellants requesting that the Director be required to provide particulars are dismissed.

Motions to File Amended Notices Requiring a Hearing Granted
Motions for Particulars Dismissed

"Dirk VanderBent"

Dirk VanderBent, Vice-Chair

"John B. Lang"

John B. Lang, Member

Appendix A - Relevant Legislation and Rules

Appendix B – Excerpt from Part 2 of the Director's Order

Appendix A

Relevant Legislation and Rules

Environmental Protection Act, R.S.O. 1990, Chapter E.19

Remedial orders

17. Where any person causes or permits the discharge of a contaminant into the natural environment, so that land, water, property, animal life, plant life, or human health or safety is injured, damaged or endangered, or is likely to be injured, damaged or endangered, the Director may order the person to, . . .

Order by Director re preventive measures

18. (1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property to do any one or more of the following: . . .

Duty to mitigate and restore

93. (1) 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 forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.

When duty effective

(2) The duty imposed by subsection (1) comes into force in respect of each of the owner of the pollutant and the person having control of the pollutant immediately when the owner or person, as the case may be, knows or ought to know that the pollutant is spilled and is causing or is likely to cause an adverse effect.

Contents of notice requiring hearing

142. (1) An applicant for a hearing by the Tribunal shall state in the notice requiring the hearing,

(a) the portions of the order, certificate of property use, direction, term, condition, suspension, revocation or licence or other form of permission in respect of which the hearing is required; and

(b) the grounds on which the applicant for the hearing intends to rely at the hearing.

Effect of contents of notice

(2) Except with leave of the Tribunal, at a hearing by the Tribunal an applicant is not entitled to appeal a portion of the order, certificate of property use, direction, term, condition, suspension, revocation or

licence or other form of permission, or to rely on a ground, that is not stated in the applicant's notice requiring the hearing.

Leave by Tribunal

(3) The Tribunal may grant the leave referred to in subsection (2) where the Tribunal is of the opinion that to do so is proper in the circumstances, and the Tribunal may give such directions as the Tribunal considers proper consequent upon the granting of the leave.

Powers of Tribunal

145.2 (1) Subject to sections 145.3 and 145.4, a hearing by the Tribunal under this Part shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

Statutory Powers Procedure Act, R.S.O. 1990, Chapter S.22

Disclosure

5.4 (1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

(a) the exchange of documents;
(b) the oral or written examination of a party;
(c) the exchange of witness statements and reports of expert witnesses;
(d) the provision of particulars;
(e) any other form of disclosure.

Other Acts and regulations

(1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.

Exception, privileged information

(2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information.

Rules of Practice and Practice Directions of the Environmental Review Tribunal

Purposes of the Rules

1. The purposes of these Rules are: to provide a fair, open, accessible and understandable process for Parties and other interested persons; to facilitate and enhance access and public participation; to encourage co-operation among Parties; to assure the efficiency and timeliness of proceedings; and to assist the Tribunal in fulfilling its statutory mandate.

Definitions

3. “particulars” include clarification of the remedy, decision or order requested; clarification of the reasons given for requesting the remedy, decision or order; and a statement or clarification of the material facts upon which a Party relies in support of any allegation;

Disclosure Ordered by Tribunal

163. The Tribunal may, at any stage of the proceeding, make orders for:
(a) the exchange of documents;
(b) the oral and written examination of a Party;
(c) the exchange of witness statements and reports of expert witnesses;
(d) the provision of particulars;
(e) the provision of a common document book; and
(f) any other form of disclosure.

Disclosure of Documents

166. All Parties shall provide without charge to all other Parties within the time directed by the Tribunal, which is usually no later than 15 days before the commencement of the main Hearing, a copy of every relevant document in the possession, control or power of a Party, except for those documents that are privileged. Documents may be exchanged electronically if all Parties agree.

Appendix B

Excerpt from Part 2 of the Director's Order

2.8 Northstar Canada is a wholly owned subsidiary of Northstar. Until recently Northstar was publicly traded on the Toronto Stock Exchange.

2.9 Northstar Canada and its predecessor companies operated a manufacturing and processing facility at the Site from about 1981 to about 2010. The processing operations involved the machining and metal plating of aircraft parts, including a chromium plating line. These operations used Trichloroethylene ("TCE") as a degreaser. These operations also used Chromic Acid which contains Hexavalent Chromium. Both TCE and Hexavalent Chromium are known human carcinogens. TCE, Hexavalent Chromium and other heavy metal contaminants such as nickel and copper have contaminated the soil and groundwater on and under the Site as well as beyond the Site.

2.10 In 1995 Northstar Canada notified the MOE Spills Action Centre that, at the Site, it had spilled about 34,000 litres of treated cyanide effluent that had caused the overflow of a pit that contained chromic acid. A mixture of the spilled effluent and chromic acid discharged from the building to the natural environment. At the same time Northstar Canada advised the MOE that it had cleaned up the affected area. This spill triggered the statutory obligation to clean up a spill imposed on Northstar Canada by section 93 of the EPA.

2.11 In October 2004 counsel for Northstar Canada notified the MOE that it had identified soil and groundwater contamination on the Site and that it could possibly be moving beyond the Site, Northstar Canada identified the primary contaminants as TCE and Hexavalent Chromium.

2.12 In or about 2005 Northstar Canada confirmed that the Contamination had migrated from the Site into the Bishop Street Community. In or about 2005 Northstar Canada commenced a remediation and mitigation plan such as: (1) the installation and operation of a groundwater pump and treat system on the Site as well as an injection well system that involves the injection of potassium permanganate into the contaminated groundwater in order to reduce the concentration of TCE; (2) measures to mitigate the intrusion of TCE vapour into hundreds of homes in the Bishop Street C01mnunity including sealing basements, sub slab depressurization systems, soil vapour extraction systems and heat recovery ventilation systems.

2.13 Northstar's publicly released Annual Reports for 2008, 2009 and 2010 estimated that the future cost of the remediation of pollution related to the Site amounted to

several million dollars. Nevertheless, the funding of such future work was not secured by Northstar or Northstar Canada through a trust account or other means.

2.14 In order to secure the continued performance of the work described above, the Remediation Order was issued on March 15, 2012 to Northstar and Northstar Canada for the reasons set out in that order (copy attached as Schedule "A").

2.15 On June 14, 2012 Northstar, Northstar Canada and two other related companies sought and obtained protection from their creditors under the CCAA. On July 24, 2012 the Ontario Superior Court of Justice (Commercial List) dismissed the MOE's motion for a declaration that the Remediation Order was not subject to the stay issued by the Court on June 14, 2012.

2.16 On July 24, 2012 the Ontario Superior Court of Justice (Commercial List) approved of the sale of substantially all of the operating assets of Northstar and N01ihstar Canada, other than the Site, leaving no personnel or resources to carry out the remediation strategy. Substantially all of the proceeds of sale were distributed to Northstar's secured lender.

2.17 Effective August 24, 2012 Northstar Canada was deemed bankrupt. BDO Canada Limited was appointed the Trustee in Bankruptcy for Northstar Canada. On August 24, 2012 the Trustee disclaimed its interest in the Site and, as a result, the Site is now abandoned as it is owned by Northstar Canada which has no officers, directors or employees. Northstar and Northstar Canada stopped doing the work required by the Remediation Order on or about August 23, 2012. A stay of proceedings under the CCAA was also in effect against the former officers and directors of Northstar and Northstar Canada.

2.18 Given the above circumstances, on August 15, 2012 the Minister of the Environment issued a direction under section 146(1) of the EPA that requires some of the work required by the Remediation Order to be done by the Ministry until such time as any other person assumes responsibility for the work required by the Remediation Order, and in particular:

> (a) operate and maintain the existing indoor air mitigation systems that have been installed in the Bishop Street Community;
>
> (b) operate, monitor and maintain the soil vapour extraction systems in accordance with Amended Environmental Compliance Approval No. 5018-8KSR9B dated January 5, 2012; and
>
> (c) operate, monitor and maintain the groundwater pump and treat system on and in the vicinity of the Site in accordance with Amended Permit to Take Water

No. 7007-87HLXW dated August 9, 2010 and Amended Certificate of Approval No. 2388-7KLJ35 dated November 5, 2009.

2.19 The stay of proceedings under the CCAA against the former officers and directors of Northstar and Northstar Canada expired on October 31, 2012. A motion brought by certain former officers and directors of Northstar and Northstar Canada on October 31, 2012 to enjoin the issuance of this Order was dismissed by the Ontario Superior Court of Justice (Commercial List) on November 9, 2012. Given that it is now permitted to do so, the Director is proceeding with the issuance of this Order and requires that the Parties undertake the work described below. The Ministry will no longer undertake the work required by the Direction issued by the Minister on August 15, 2012 given that this Order requires the Parties to do that work. The timelines for the completion of the work described in this Order provide for a reasonable transition period.

2.20 The Parties are former directors and/or officers of the companies named in the Remediation Order and as such had management and control of those companies. The Parties were directors or officers during the period from approximately 2005 to 2012 during which the results of indoor air sampling were analyzed and mitigation strategy was developed with respect to the Contamination.

2.21 As no provision has been made for the continuation of the investigations, monitoring, mitigation and remediation of the Contamination, the Parties have failed to carry out their duty and exercise their authority as a director/officer to make adequate provision to ensure implementation of the remediation strategy generally and in accordance with the obligations imposed by section 93 of the EPA as well as the Remediation Order. Further, the Parties have caused or permitted the discharge of Contaminants so that human health or safety is endangered or is likely to be endangered a result of the failure to make adequate provision to ensure implementation of the remediation strategy and compliance with the Remediation Order.