

BAKER V. DIRECTOR (MINISTRY OF THE ENVIRONMENT)

Do directors now have unlimited, permanent, personal, no fault liability for contamination, with no due diligence defence?

BACKGROUND

- Legal chlorinated solvent and chrome use, starting in 1960s
- Caused soil and groundwater contamination on and near Cambridge property
- Land bought by Northstar Canada in 1985, without knowledge of contamination
- No proof of contamination during Northstar ownership
 - Nearby overlapping source of TCE
- Northstar Canada discovered contamination and health/ environmental risk 2004/2005
- Excellent voluntary remediation until order/ bankruptcy in 2012
 - No legal requirement for financial assurance
- In Sept 2009, Neil Baker joined parent company board, Northstar Aerospace Inc.
 - By then, Cambridge plant was shut down. *No pollution on his watch*
- No breach of s. 194, *Environmental Protection Act*
- Northstar companies entered CCAA June 14, 2012
- No one would buy Cambridge property
- Cleanup needed for many more years
- Ministry of the Environment took over remediation
- MOE claimed priority over companies' secured creditors, but lost

MOE GOES AFTER FORMER D&O

- November 2012, MOE issued cleanup Order to 13 former directors and officers
 - of subsidiary and parent companies
- MOE main argument:
 - D&O have absolute liability, per s. 18 *Environmental Protection Act*, unless can prove lack of control
- Also s. 17 sideshow
 - MOE eventually admitted: D&O not at fault, did not cause contamination
- D&O appealed the Order to Environmental Review Tribunal
- Strong legal case BUT
- *Monthly* compliance costs >\$100K plus legal/ expert costs
 - Huge area, mostly offsite, contaminated from at least two sources
- No stay pending appeal
 - And no way to get the money back, even if they won
- Case could take years
- D&O settled, paid \$4.75 M plus the \$800,000 already spent to comply pending appeal
- If this board couldn't fight, who can?

S. 18 ONTARIO ENVIRONMENTAL PROTECTION ACT

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:

1. To have available at all times, or during such periods of time as are specified in the order, the equipment, material and personnel specified in the order at the locations specified in the order.
2. To obtain, construct and install or modify the devices, equipment and facilities specified in the order at the locations and in the manner specified in the order.
3. To implement procedures specified in the order.
4. To take all steps necessary so that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property.
5. **To monitor and record the presence or discharge of a contaminant** specified in the order and to report thereon to the Director.
6. **To study and to report** to the Director on,
 - i. the presence or discharge of a contaminant specified in the order,
 - ii. the effects of the presence or discharge of a contaminant specified in the order,
 - iii. measures to control the presence or discharge of a contaminant specified in the order,
 - iv. the natural environment into which a contaminant specified in the order may be discharged.
7. **To develop and implement plans** to,
 - i. reduce the amount of a contaminant that is discharged into the natural environment,
 - ii. prevent or reduce the risk of a spill of a pollutant within the meaning of Part X, or
 - iii. prevent, decrease or eliminate any adverse effects that result or may result from a spill of a pollutant within the meaning of Part X or from any other discharge of a contaminant into the natural environment, including,
 - A. plans to notify the Ministry, other public authorities and members of the public who may be affected by a discharge, and
 - B. plans to ensure that appropriate equipment, material and personnel are available to respond to a discharge.
8. To amend a plan developed under paragraph 7 or [section 91.1](#) in the manner specified in the order. [R.S.O. 1990, c. E.19, s. 18 \(1\)](#); 2005, c. 12, s. 1 (8, 9).

Grounds for order

(2) The Director may make an order under this section if the Director is of the opinion, on reasonable and probable grounds, that the requirements specified in the order are necessary or advisable so as,

- (a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or
- (b) to prevent, decrease or eliminate an adverse effect that may result from,
 - (i) the discharge of a contaminant from the undertaking, or
 - (ii) the presence or discharge of a contaminant in, on or under the property. 2005, c. 12, s. 1 (10)