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Environmental Commissioner of Ontario

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Dear Environmental Review Tribunal,

**Baker v. Director, Amended Notice of Appeal, 12-128**

Further to Mr. Guy's letter of November 30, 2012, Neil W. Baker wishes to amend his Notice of Appeal. Mr. Baker seeks the revocation of the entire Director's Order No. 5866-8WKU92 issued November 14, 2012 ("the Order") on all the grounds relied upon by the Director, to the extent, if any, this was not explicit in Mr. Guy's letter. This appeal is without prejudice to Mr. Baker's position that the appropriate venue for review of the Order is the Superior Court (Commercial List).

In particular, Mr. Baker appeals the Order on all of the following grounds of appeal:

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## SUMMARY OF APPEAL

1. The Order is unconstitutional, invalid, and issued without jurisdiction. It is also unfair and contrary to public policy.
2. The *Environmental Protection Act* (EPA) does not make corporate directors vicariously or collectively liable for the environmental debts of their corporations, or of the subsidiaries of their corporations. Personal liability can only be imposed on Mr. Baker for his own conduct.
3. Mr. Baker has done nothing wrong. He never had personal ownership, charge, management or control of any real or personal property or undertakings at 695 Bishop Street North, Cambridge, (“the Site”). Mr. Baker did not cause or permit the discharge of any contaminant into the natural environment at the Site. He was not involved with either corporation when the contamination occurred. Mr. Baker acted throughout as a reasonable, responsible director of Northstar Aerospace, Inc. (“Northstar Inc.”) given its many competing obligations. An Order against him is, therefore, outside the MOE’s jurisdiction under sections 17, 18 or 93 of the EPA.
4. According to the Order, Mr. Baker is personally liable because he failed to somehow compel Northstar Inc. to “secure” funding for future cleanup work, so as to prevent the distribution of these funds to secured creditors in accordance with federal insolvency laws and the orders of the Superior Court of Justice:

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....

2.20 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. ...

5. This is not a valid basis for imposing personal liability on directors. It would have been illegal for Mr. Baker to favour the MOE's claims over the claims of other stakeholders to the assets of Northstar Inc. Mr. Baker could not have flouted the duties and obligations imposed on him under corporate, securities and insolvency law.

6. The duties and obligations imposed on directors under the EPA must be interpreted in a manner that is consistent with directors' duties and obligations under other applicable laws, and with the orders of the Superior Court (Commercial List). The MOE Order directly conflicts with paramount federal laws, and is therefore inoperative.
7. This Order is a collateral attack on the orders of the Superior Court, which is the appropriate forum to determine the conflict between provincial environmental regulators and federal insolvency laws.

## **ORDER NOT WITHIN DIRECTOR'S JURISDICTION**

### **LIABILITY IS PERSONAL NOT VICARIOUS**

8. Corporate officers and directors do not have vicarious liability for everything done by their corporations. The EPA creates vicarious liability for corporations, in s. 192, but conspicuously lacks a vicarious liability provision for individuals, comparable to those in other provinces. Personal liability can only be imposed on an individual if there is specific statutory authority to do so.
9. Orders can only be issued to a person as an individual, not merely because he allegedly belongs to a group whose other members might be liable to an order. The Director must show that the EPA authorizes the Order against Mr. Baker, personally.
10. Other than responsibility for their own personal actions, the environmental duties of officers and directors are expressly set out in, and limited to, s. 194 of the EPA. S. 194 is a complete code of the personal obligations of directors, *qua* directors, for the environmental liabilities of their companies. The Order does not allege any breach of s. 194 by Mr. Baker.
11. Instead, the MOE cites three other statutory provisions as its authority for the Order: sections 17, 18 and 93 of the EPA. Given the facts, none can justify the Order against Mr. Baker.

### **NO PERSONAL CONTROL**

12. Mr. Baker never, personally, owned or had management or control of the Site or anything on it.

#### **• TWO SEPARATE COMPANIES**

13. An individual, non-executive director does not have personal ownership, management or control of the assets of the corporation, much less of the assets of its subsidiaries.
14. Northstar Aerospace (Canada) Inc. ("Northstar Canada") is the owner of the property referred to in the Order, 695 Bishop Street North, Cambridge. At all material times, the Site, and all assets at the Site, were owned by Northstar Canada or its predecessors in title, or third parties. Mr. Baker was never a director, officer or employee of Northstar Canada.
15. Mr. Baker is one of eight former directors of the publicly traded parent company, Northstar Inc.. He held that office for 33 months between September 2009 and June 2012. He was never an officer or employee of Northstar Inc.

16. Northstar Canada and Northstar Inc. were, in all material respects, separate companies, with separate boards of directors, separate assets, separate bank accounts and separate tax returns.
17. Northstar Inc. never owned or had charge, management or control of the Site. Northstar Inc. never owned, managed, or controlled the TCE or hexavalent chromium used at the Site by Northstar Canada. Northstar Inc. never discharged any contaminants into the natural environment.

## **NO PERSONAL FAULT**

### **• NO PERSONAL INVOLVEMENT OR BENEFIT**

18. Mr. Baker is not personally at fault for the contamination, and did not cause or permit the discharge of any contaminant into the soil and groundwater.
19. None of the contamination addressed by the Order was discharged into the natural environment while Mr. Baker was a director of Northstar Inc.
20. Mr. Baker obtained no personal benefit from the activities that gave rise to the contamination, or from his involvement in Northstar Inc.. As a result of the insolvency, which was caused in part by the costs of the cleanup, Mr. Baker lost his entire investment in Northstar Inc., in excess of \$5,500,000.

### **• SOURCE AND TIMING OF THE CONTAMINATION**

#### **TCE Contamination**

21. In 2004 and 2005, Northstar Canada discovered and promptly reported to the MOE the presence of Trichloroethylene ("TCE")<sup>1</sup> in soil and groundwater on and off the Site. Virtually all the requirements of the Order relate to this TCE.
22. The TCE plume is a historic relic of different times and different practices. The Director has provided no evidence that any of the TCE was discharged into the soil or groundwater after November 29, 1985 when Part X of the EPA, dealing with spills, came into effect or at any time that it was illegal to do so. The portion of the TCE plume that originates at the Site may all have been discharged into the soil and groundwater in the 1960s and 1970s, when it was believed to evaporate and disappear. Until 1976, TCE was widely used for medical, obstetrical and food processing purposes. The MOE did not establish any limit for TCE in soil or groundwater until 1994.
23. The 1995 spill of cyanide destruct process water, prominently referred to in the Director's Order, did not contain TCE.
24. Northstar Canada ceased all use, storage and handling of TCE at the Site in 2005, four years before Mr. Baker became a director of Northstar Inc. Since that time, there has been no source of TCE outside the natural environment on the Site, other than TCE-contaminated groundwater already collected in the remediation system. On the date of the Order, there was no risk of any discharge of TCE into the soil or groundwater at the Site.

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<sup>1</sup> Including its chemical decomposition products.

25. The remaining TCE contamination referred to in the Director's Order originated at 610 Bishop Street North, Cambridge, a property now owned by General Electric (the "GE contamination"). None of the Former D & O Group named in the Order ever had ownership, charge, management, or control of 610 Bishop St. N., or caused the TCE contamination discharged into the natural environment at that location.

### **Chromium Contamination**

26. Less than 5% of the work demanded by the Director's Order addresses chromium contamination. Chromium is not volatile, and is therefore no threat to indoor air quality. Dr. Nolan's affidavit refers exclusively to TCE contamination. MOE criteria for chromium are met in almost all soil and groundwater samples taken outside the Site.
27. The remaining chromium did not first enter the soil or groundwater during or after the 1995 spill of cyanide destruct process water. Northstar Canada cleaned up this spill, and restored the natural environment, under the MOE's supervision and to its satisfaction.
28. Northstar Canada ceased to use chromium at the Site before Mr. Baker became a director of Northstar Inc. On the date of the Order, there was no risk of any further discharge of chromium into soil or groundwater at the Site.

### **• THE REMEDIATION WAS CONDUCTED REASONABLY**

29. From 2005 until its bankruptcy, Northstar Canada completed extensive investigation, remediation and monitoring activities at the Site and in the Bishop Street Community (as defined in the Director's Order), in conjunction with the MOE and local authorities, at a cost of nearly \$20 million.
30. Northstar Canada's remedial work was very effective in reducing the contamination, even after the Ministry moved the goal-posts mid-stream by changing the cleanup target. For example, there was a 95% drop in TCE concentrations in wells along the silt channel; the residential area containing TCE in the groundwater at concentrations greater than 1000 µg/L was reduced by 98%.
31. The MOE acknowledged that Northstar Canada "has been very proactive" in communicating with stakeholders and had "undertaken all needed investigation, mitigation and remediation programs on a voluntary basis".<sup>2</sup>

### **• IMPOSSIBLE TO PRE-FUND THE REMEDIATION**

32. Throughout the time that Mr. Baker was a director of Northstar Inc., Northstar Inc. and Northstar Canada were at risk of insolvency, and losing money every year. Neither company declared or paid dividends. The directors of both companies had very limited financial discretion, as all material payments were under the substantial control of the secured lender.

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<sup>2</sup> Provincial Officer's Report 6076-8RJRUP, 15 March 2012, at p. 6.

33. As required by corporate and securities law, Northstar Canada made proper provision in its financial statements for the estimated cost of cleanup. Northstar Inc. included this provision in its consolidated financial statements.
34. As disclosed in public filings and known to the Director, both companies were financially unable to raise or set aside any material amount of money to guarantee future cleanup costs. The companies owed more to their trade creditors than the funds available from its secured creditor.
35. At all material times, Mr. Baker did everything he reasonably could, for as long as he could, to have Northstar Inc. provide Northstar Canada with financial resources to comply with applicable laws.
36. In so doing, Mr. Baker and his fellow directors used reasonable care and fulfilled the proper duties of corporate directors, as required by corporate law. They acted honestly and in good faith with a view to the best interests of Northstar Inc. They exercised sound and reasonable business judgment, including a proper consideration of all environmental issues, particularly the proper balancing of the competing interests between the environmental concerns and the claims of Northstar Inc.'s and Northstar Canada's secured and unsecured creditors. They exercised the care, diligence and skill that a reasonably prudent person would exercise in supervising and managing Northstar Inc.'s affairs.
37. Northstar Canada continued to pay for the implementation of the Interim Remedial Action Plan ("IRAP") until the date of bankruptcy, although it could have refused to do so in accordance with the orders of the CCAA court.

### **NO JURISDICTION UNDER S. 17**

38. The Director lacked jurisdiction under s. 17 to issue the Order to Mr. Baker.
39. S. 17 only applies to a person who personally "causes or permits the discharge of a contaminant into the natural environment". Mr. Baker did not personally "cause or permit" the discharge of the contaminants referred to in the Order, all of which were discharged into the natural environment years before he became a director.

### **NO JURISDICTION UNDER S. 18**

40. The Director lacked jurisdiction under s. 18 to issue the Order to Mr. Baker.
41. S. 18 does not alter or expand the duties of corporate directors, *qua* directors, set out in s. 194 of the EPA. S. 194 would not have been necessary if s. 18 means what the MOE now claims it does.
42. S.18 only applies to a person who personally "owns or owned or ... has or had management or control of an undertaking or property". None of these is applicable to Mr. Baker:
  - On the date of the Order, there was no "undertaking" at the Site as- the manufacturing plant shut down years before; and

- Mr. Baker never personally owned the property (the Site), nor did he ever personally manage or control it.
43. Contrary to s.2.22 of the Order, the Order is not necessary or advisable so as to prevent or reduce the risk of the discharge of contaminants into the natural environment from the Site. S. 18 only authorizes preventive orders, not remedial orders. In this case, there is nothing to prevent as the discharges of contaminant all occurred many years ago. The migration of contaminants through the natural environment by natural forces is not a “discharge”.
  44. The Legislature has good reason to distinguish between preventative and remedial orders, a distinction that this Order utterly ignores. Remedial orders (under s. 17) are proper responses to those who are at fault in causing the contamination. S. 18 reasonably authorizes the MOE to require those with ownership, management or control of an undertaking or property, which poses a significant environmental risk, to take preventative measures to keep the environmental risk from occurring.
  45. Contrary to s.2.22 of the Order, the Order is not necessary or advisable so as to prevent, decrease or eliminate an adverse effect that may result from such a discharge; or from the presence or discharge of a contaminant in, on or under the Site. The preventative activities referred to in s. 18 must occur at the undertaking or property that the orderes own, manage or control. In this Order, over 75% of the work required by the Director’s Order is directed to take place on land in the Bishop Street Community, which was never owned, managed or controlled by Northstar Inc. or Northstar Canada; this cannot be authorized by s. 18.
  46. Some of this Order is directed at the GE contamination. Northstar could never have “prevented” contamination by GE. This portion of the Order cannot be authorized by s. 18.
  47. Paragraph 2.20 of the Order purports to hold Mr. Baker personally liable for the cost of cleanup because he held office while “the results of indoor air sampling were analyzed and [the] mitigation strategy was developed”. This is contrary to s. 168.26 of the EPA:

A person who conducts, completes or confirms an investigation in relation to property or a person who takes any action to reduce the concentration of contaminants on, in or under a property is not, for that reason alone... a person who has or had management or control of an undertaking or property for the purpose of subsection 18 (1).

48. No one can be liable to a s. 18 order merely because they took action to investigate or reduce the concentration of contaminants on, in, or under property.

### • **MIGRATION VS. DISCHARGE**

49. The Director wrongly conflates “discharge” with “migration” of contaminants. “Discharge”, as used in the EPA, refers to the first escape of the contaminant from human control into the natural environment, and not to subsequent movement of that contaminant through the environment by natural forces. Accordingly, the timing of contaminant migration is irrelevant to the Order. The only relevant date is that of the discharge.
50. In the alternative, none of the contamination addressed by the Order migrated off the Site while Mr. Baker was a director of Northstar Inc. As acknowledged by the Provincial Officer,



the pump and treat system (which operated continuously between September 2009 and June 2012) “prevented” the off-site migration of contaminants during that time.<sup>3</sup>

### **NO JURISDICTION TO RELY ON S. 93**

51. The Director lacked jurisdiction to rely on an alleged duty under s. 93 to issue the Order to Mr. Baker, because none of the work required by the Order is due to contaminants that were first discharged into soil or groundwater after November 29, 1985. Part X of the EPA, which includes s. 93, does not apply to spills prior to November 29, 1985.
52. The 1995 spill of cyanide destruct process water, prominently referred to in the Order, did not contain TCE, and is irrelevant to 95% of the Order.

### **UNCONSTITUTIONAL ATTACK ON CCAA ORDERS**

53. The MOE Order is an attack on the Superior Court orders in the insolvency proceedings, and is an attempt to do indirectly what that court has already ruled the MOE cannot do directly.
54. Northstar Canada’s good faith attempts to pay the cost of cleanup were unsuccessful only because it ran out of money. The assets of both companies were then distributed to other creditors by the effect of federal insolvency laws and the orders of the Superior Court of Justice (Commercial List), which specifically rejected an attempt by the MOE to claim priority over other creditors.
55. Nothing in the EPA requires or permits a corporate officer or director to alter the distribution of the corporation’s assets in insolvency. Nor would any director’s attempt to keep funds from other creditors have been effective in the face of federal insolvency laws.
56. Federal law is paramount in any direct conflict with provincial law, and here there is a direct conflict. It would be impossible for a director to comply both with federal insolvency law and with the MOE’s demands that cleanup money be segregated and protected from the legitimate prior claims of secured creditors.. The MOE’s demand, that cleanup costs should receive priority over secured creditors, directly conflicts with and would frustrate the purposes of the CCAA which establishes a highly regulated regime for the distribution of assets in insolvency. When provincial laws conflict with a valid federal law, the provincial law is inoperative to the extent of the inconsistency. In this case, the EPA therefore cannot authorize an Order that conflicts with federal insolvency laws.
57. On March 15, 2012, the MOE issued Director’s Order 2066-8UQP82 pursuant to sections 17, 18 and 196 of the EPA (the “Remediation Order”) ordering Northstar Inc. and Northstar Canada to develop and implement a plan to clean-up contaminated groundwater. The Remediation Order was not issued on environmental grounds. It was explicitly issued because Northstar Inc. and Northstar Canada had publicly disclosed the worsening of their financial difficulties. The Remediation Order essentially required that Northstar Canada continue doing what it was already doing to remediate the Site. The Remediation Order was not made against Mr. Baker, and did not allege any improper behaviour by him.

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<sup>3</sup> Provincial Officer’s Report 6076-8RJRUP, 15 March 2012, at pp. 4-5.

58. A second Director's Order was issued on May 31, 2012 (the "Financial Assurance Order"). Again, that Order was made against Northstar Inc. and Northstar Canada, not against Mr. Baker, and did not allege any improper behaviour by him. The Financial Assurance Order required financial assurance in the amount of \$10,352,906 to be paid to the MOE by June 6, 2012 to ensure that the remediation activities at the Site would continue notwithstanding any financial difficulties experienced by Northstar Inc. or Northstar Canada. The deadline was later extended.
59. The MOE knew that it would be impossible for either company to comply with the Financial Assurance Order. In fact, neither Northstar Inc. or Northstar Canada had the necessary funds available, given their other legal obligations.
60. On June 14, 2012, before the revised deadline in the amended Financial Assurance Order, Northstar Inc. and Northstar Canada obtained protection from their creditors pursuant to the *Companies' Creditors Arrangement Act* ("CCAA").
61. The initial order by Morawetz J. of the Superior Court in the CCAA Proceedings on June 14, 2012 (the "Initial Order") granted a stay of proceedings against Northstar Inc. and Northstar Canada and the companies' former directors and officers until July 14, 2012. All members of Northstar Inc. and Northstar Canada's board of directors resigned effective upon the issuance of the Initial Order. The stay of proceedings in respect of the former directors and officers was extended on several occasions until it ultimately expired on October 31, 2012.
62. Simultaneously with the CCAA filing in Canada, Northstar Inc. also filed in the United States Bankruptcy Court for the District of Delaware. The CCAA proceedings and the US bankruptcy proceedings were conducted in parallel pursuant to a cross-border protocol approved by both courts.
63. The CCAA court and the US bankruptcy court approved a stalking horse sales process with respect to all of the assets of Northstar Inc. and its affiliate companies. That process culminated in a court-approved sale (approved by both the CCAA court and the US bankruptcy court) of the majority of Northstar Inc. and Northstar Canada's assets to Heligear Canada Acquisition Corporation and Heligear Acquisition Co. (collectively, "Heligear") effective August 24, 2012. The sale transaction did not include the Site.
64. An attempt to block the sale was brought by the MOE and denied by the CCAA court. The MOE's appeal from that decision to the Court of Appeal for Ontario is pending. The MOE also filed an unsecured claim in the CCAA proceedings.
65. Following the closing of the sale, the Canadian sale proceeds were distributed pursuant to a distribution order made by the CCAA court. The bulk of the proceeds were paid to the secured creditor group, which was still left with a significant shortfall after this payment was made. As a result of the sale, Northstar Inc. was effectively left with little or no assets. Like all other unsecured creditors, the MOE did not receive any payment on its claim.
66. Northstar Canada was adjudged bankrupt on August 24, 2012. The remediation activities conducted by Northstar Canada at the Site continued following the CCAA filing up until the closing of the sale to Heligear, at which point there were no funds to continue those efforts.

67. On August 15, 2012, prior to the closing of the sale to Heligear, the Minister issued a direction under s. 146 of the EPA directing the MOE to perform the work required by the Remediation Order in the event that Northstar Canada's remediation efforts stopped, as they were expected to and in fact did on August 24, 2012. Pursuant to that direction, the MOE took over the remediation activities on the Site and the Bishop Street Community as of August 27, 2012.
68. On November 14, 2012, the MOE issued the Order that is the subject of this appeal. The Order essentially requires certain of Northstar Inc. and Northstar Canada's former directors and officers (the Former D&O Group, including Mr. Baker) to pay for all remediation activities at the Site and the Bishop Street Community, at an estimated cost of \$15 to \$20 million over the next ten years.
69. The Order is a collateral attack on the CCAA court and the various steps and decisions previously made and approved in the CCAA proceedings. The MOE admits that it issued the Order only because Justice Morawetz refused to give the MOE priority over Northstar Inc.'s and Northstar Canada's secured creditors. The MOE is attempting to use this Order to obtain the same result indirectly.
70. In the CCAA proceedings, the MOE has said that the Order was issued because of the activities of Northstar Inc. and Northstar Canada while those entities were under CCAA protection (e.g., the decision to put Northstar Canada into bankruptcy). All of those activities were (i) conducted after Mr. Baker had resigned; (ii) performed at the direction of court appointed officers, namely, the Monitor and the Chief Restructuring Officer (who the MOE has not ordered to do anything); and (iii) approved by the CCAA court.
71. The Order uses Mr. Baker to attack the policy choices of federal bankruptcy laws, which expressly give a provincial environmental regulator a super priority for cleanup costs, but only over the contaminated real estate and adjacent property.
72. On April 9, 2013, Justice Morawetz rejected a further attempt by the MOE to access certain funds of the insolvent companies, which had been held in reserve to satisfy certain post-filing claims against officers and directors. He ruled:

In the context of the MOE claims against the Applicants in these CCAA proceedings, it has already been determined, in *Northstar*, supra, that the MOE claims are unsecured and subordinate to the position of Fifth Third Bank. It would be a strange outcome, and invariably lead to inconsistent results, if the MOE could, in the CCAA Proceedings, improve its unsecured position against Fifth Third Bank by issuing a Director's Order after the commencement of CCAA Proceedings, based on an environmental condition which occurred long before the CCAA Proceedings. This would result in the MOE achieving indirectly in these CCAA Proceedings that which it could not achieve directly.
73. This Order is a similarly invalid attempt to achieve indirectly what the MOE cannot achieve directly.

## **ORDER IS EXCESSIVE AND UNREASONABLE**

74. The Director knew the facts set out in this letter at the time she issued the Order. The Director relied on improper considerations and failed to properly evaluate whether she had a basis for imposing personal liability on Mr. Baker, before issuing the Order.
75. In the alternative, the Order is excessive and unreasonable, to the extent that the MOE demands that the former directors and officers do more than the MOE itself did when it was in charge of the remediation.

## **PUBLIC POLICY AND FAIRNESS**

76. The Order is not fair to Mr. Baker, who had nothing to do with creating the contamination, and complied with s. 194 of the EPA and all corporate and common law duties as a director.
77. Directors and officers cannot be expected to absorb unlimited personal liability for historical corporate environmental issues. The Order will discourage any reasonable person from serving on the board of any Ontario corporation. This would be extremely harmful to the economy of Ontario as a whole.
78. Such further grounds as counsel advises and the Tribunal permits.

## **RELIEF REQUESTED**

Mr. Baker requests that the Order against him, dated November 14, 2012, be set aside.

Many thanks,

Yours very truly,

Dianne Saxe, Ph.D. in Law  
*Certified as a Specialist in Environmental Law  
by the Law Society of Upper Canada*

C.c. Barry Weintraub  
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client