

Rocha v Ontario, Environment and Climate Change

By [Donna S. K. Shier](#), Partner and Certified Environmental Law Specialist, with the assistance of Anand Srivastava, Student-at-Law.
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A financial advisor and lender has been personally ordered by the Ministry of the Environment and Climate Change (MOECC) to clean up a contaminated property that he does not own, contaminated by a business he also does not own.

On July 17, 2015, the Environmental Review Tribunal (“ERT”) upheld two Provincial Officer’s Orders against Alberto Rocha.¹ Mr. Rocha is a financial advisor, representative and lender to two corporations and their shared principal who own and operate a business at a contaminated property.

The ERT heard Mr. Rocha’s appeal of the Orders between August, 2014 and October, 2014 and rendered its decision nine months later. Since a stay of the Orders was refused, the Orders have operated against Mr. Rocha since August, 2014.

Issues

Whether Mr. Rocha, in his capacity as financial advisor, representative and lender, exercised management and control of the property, was the primary issue in the proceeding.²

The secondary issue in the proceeding was whether Mr. Rocha’s actions should be protected from a finding that he has management and control of the property because he is a “secured creditor” under the *Environmental Protection Act* (“EPA”).³

Decision

The ERT found that Mr. Rocha had authority to manage environmental issues at the property, and did so.⁴ In addition, the ERT found that Mr. Rocha’s position as a lender strongly influenced his management decisions and the decisions of the corporations and their principal regarding undertaking environmental work.⁵

¹ *Rocha v Ontario (Environment and Climate Change)* (17 July 2015), 14-043, online: ERT <<http://elto.gov.on.ca/ert>>.

² *Ibid* at para 23.

³ *Ibid* at para 24.

⁴ *Ibid* at para 131.

⁵ *Ibid* at para 141.

The key pieces of evidence supporting the ERT’s finding on the issue of Mr. Rocha’s management and control were:

- ♦ Mr. Rocha had authority to deal with the Ministry of the Environment and Climate Change (“MOECC”)⁶
- ♦ Mr. Rocha responded to and negotiated with the MOECC and neighbouring property owners on behalf of the corporations,⁷ and
- ♦ Mr. Rocha’s financial interest in the property was a primary motivator in management decisions not to spend funds on measures to deal with the contamination.⁸

The ERT also found that Mr. Rocha was not entitled to the secured creditor protections under the EPA.⁹

The key pieces of evidence supporting the ERT’s refusal to apply the secured creditor protections were:

- ♦ the mortgage on the property was not directly held by Mr. Rocha, and
- ♦ there was no evidence that the mortgagee was aware of the proceeding and no evidence that Mr. Rocha was acting as its representative.

The ERT held that even if Mr. Rocha could be considered a secured creditor, the protecting provisions of the EPA would not apply to Mr. Rocha due to the fact that Mr. Rocha’s personal financial interests strongly influenced his decisions regarding the environmental issues at the property.

Mr. Rocha argued that the EPA should not be interpreted to apply to him as doing so would create a “chilling effect” on brownfield site remediation. The ERT disregarded this argument, stating that there was a unique confluence of management and financial control on Mr. Rocha’s part and upheld the Orders.¹⁰

[Donna Shier](#), is a partner at *Willms & Shier Environmental Lawyers LLP* in Toronto and is certified as a Specialist in Environmental Law by The Law Society of Upper Canada. She can be reached at 416-862-4822 or by e-mail at dshier@willmsshier.com.

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⁶ *Ibid* at para 130.

⁷ *Ibid* at para 131.

⁸ *Ibid* at para 138.

⁹ *Ibid* at para 155.

¹⁰ *Ibid* at para 156.