



Rocha v Director, Ministry of the Environment—ERT Refuses Mortgagee’s Stay Pending Appeal

By [Donna S. K. Shier](#), Partner and Certified Environmental Law Specialist, with the assistance of Giselle Davidian, Student-at-Law.
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On September 23, 2014, the Ontario Environmental Review Tribunal (ERT) released its interlocutory decision in Rocha v Director, Ministry of the Environment. The ERT refused to issue a stay pending appeal of a Director’s Order issued to a mortgagee and advisor under section 157.3(5) of the Environmental Protection Act (EPA). The ERT found that it did not have jurisdiction to grant a stay of the work items set out in the Director’s Order.

The ERT decided that even if it had jurisdiction to stay any of the work items, it would not exercise its discretion to do so. Mr. Rocha failed to demonstrate that it would suffer irreparable harm. The ERT held that the balance of convenience did not warrant a stay.

Most interesting was the ERT’s finding that “where groundwater contamination is present and spreading”, the balance of convenience test directs a mortgagee with management or control to conduct work on the property before hearing an appeal.

Contamination at the Property

Mr. Rocha was a real estate advisor and mortgagee of a property in Oakville that was the site of trichloroethylene (TCE) contamination. A Director’s Order required Mr. Rocha to conduct off-site indoor air sampling and TCE plume delineation.

Mr. Rocha appealed the Director’s Order under section 140 of the EPA, asserting that the Order should not apply to him. Mr. Rocha denies exercising management or control either as advisor or by virtue of having a financial interest in the property. He submits that his interest in the property is as a lender and that he is not in control of the property. The Director of the Ministry of Environment and Climate Change (MOECC) disagrees:

The Provincial Officer’s Report and the information above provide significant details which lead me to believe that you are the person making decisions regarding the TCE contamination [at the property]. I believe you are not only a lender, but you are the person making decisions and exercising charge, management or control of the property either as an advisor to [the owner], or as a person who has a financial interest in [the property].ⁱ

The work required under the Order is expected to cost Mr. Rocha \$80,000 to \$150,000. Even if the Order is struck down on appeal, Mr. Rocha will not be able to recover the funds he spends to comply with the Order.

Mr. Rocha applied to the ERT for a stay pending the hearing of his appeal. The ERT considered whether it has jurisdiction to grant a stay and, if so, whether any of the work ordered should be stayed. On September 23, 2014, the ERT denied Mr. Rocha's application for a stay, pending appeal.

ERT Has No Jurisdiction To Grant Stay

The ERT found that, under section 143(2) of the EPA, it has no jurisdiction to stay an order to "monitor, record and report" findings to the MOECC. The ERT determined that each of the work items set out in the Order constituted "monitoring, recording or reporting" under the EPA or were ancillary to same.

Despite the ERT's determination that it lacked jurisdiction, the ERT considered the common law stay analysis set out in [RJR MacDonald Inc. v Canada \(Attorney General\)](#).ⁱⁱ The three-part test considers whether:

- ♦ there is a serious issue to be decided by the tribunal,
- ♦ irreparable harm will ensue if the relief is not granted, and
- ♦ the balance of convenience, including effects on the public interest, favours granting the relief requested.ⁱⁱⁱ

The ERT concluded that even if it had jurisdiction, it would not have allowed a stay of the Order. The reasons are summarized below.

Issue is Serious But Appellant Did Not Demonstrate Irreparable Harm

The ERT found that the issue of whether or not Mr. Rocha has or had "management or control" of the property is serious. Nevertheless, the ERT concluded that Mr. Rocha did not demonstrate that he would suffer irreparable harm. The ERT decided that in order to satisfy the irreparable harm requirement, Mr. Rocha must prove that he would be unable to recover the costs of satisfying the order from the property owner and its associated companies.

Balance of Convenience Does Not Warrant a Stay

The ERT found that, "where groundwater contamination is present and spreading", the balance of convenience test directs a mortgagee with management or control to conduct work on the property before the ERT hears an appeal. The ERT considered that the public interest of completing environmental work immediately often outweighs ordering a person with undecided management or control of the property to pay.

ERT May Expand "Management or Control"

In *Baker v Ministry of the Environment*,^{iv} the Ontario Divisional Court held that former directors and officers must remediate while an MOECC Director's Order against them is under appeal. In the *Baker* case, the directors and officers ultimately settled the Order against them by payment of settlement funds.^v

The ERT heard Mr. Rocha's appeal of the Order against him on August 6, 2014. The decision is awaited with interest and concern. A finding that Mr. Rocha as mortgagee had sufficient management or control of property will expand the scope of personal liability introduced by *Baker*. The ERT's decision will have many ramifications.

For further information about the impact of the ERT's decision in *Rocha* and on exposures to and protections against directors' and officers' environmental liability in general, please contact Donna Shier directly at dshier@willmsshier.com / 416-862-4822.

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. Donna may be reached at 416-862-4822 or dshier@willmsshier.com.

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ⁱ *Rocha v Director, Ministry of the Environment*, 2014 Carswell 13113 at para 5.

ⁱⁱ [1994] 1 SCR 311 (SCC) [*RJR*].

ⁱⁱⁱ Rule 110 of the *Rules of Practice and Practice Directions of The Environmental Review Tribunal* requires a party seeking a stay to pass the three-part test set out in *RJR*. Ontario, Environment and Land Tribunals, *Rules of Practice and Practice Directions of The Environmental Review Tribunal*, r 110.

^{iv} 2013 ONSC 4142.

^v For additional background on the *Baker* case, see Donna Shier's November 2013 article "[Fault's Got Nothing To Do With It](#)" and "[Directors and officers liable for contamination that occurred before their tenure](#)" on page 3 of Willms & Shier's June 2013 newsletter.