



Fault's Got Nothing To Do With It!

Northstar Settlement Underscores Troubling Times for Directors and Officers Liability Exposures

By Donna S. K. Shier, Partner
Certified Environmental Law Specialist
Willms & Shier Environmental Lawyers LLP

November 13, 2013

Northstar Aerospace (Canada) Inc.'s former directors and officers denied liability for contamination at the site of the defunct company, yet remained on the hook for millions in clean-up costs. The settlement is indicative of the serious risks that directors and officers are exposed to from environmental enforcement. In particular, the settlement shows that the former D&Os of a bankrupt company can be held personally responsible for clean-up orders long after their company's assets have disappeared.

After a convoluted legal odyssey through Ontario's courts and tribunals, twelve former directors and officers (D&Os) of bankrupt aerospace firm Northstar Aerospace (Canada) Inc. (Northstar) have settled with the Ministry of the Environment and agreed to pay \$4.75M in clean-up costs. That's in addition to the \$800,000 they'd already spent and about one-third of the estimated \$15M it will take to address residual contamination beneath and around the company's former plant in Cambridge, Ontario. The Ministry will assume responsibility for managing the unfunded long-term expenses. Under the Agreement, the D&Os deny liability for the contamination.

What Northstar teaches us about D & O liability

While the debate continues over whether or not the former Northstar directors had sufficient "management and control" to confer liability, many D&Os certainly do. While a company is still operating and viable, it can indemnify or reimburse those D&Os if they are subject to Ministry sanctions. But what happens when the company is gone? D&Os must remember that

- ♦ they face significant personal expense when environmental orders are made against them
- ♦ they are exposed to environmental liability even when they are not involved in day-to-day operations
- ♦ they may be personally liable even after the companies they served are no longer extant
- ♦ environmental liability extends even where there is no fault
- ♦ D&O orders are not likely to be stayed while liability is adjudicated
- ♦ even if the appeal of a D&O order is ultimately successful, interim work may be costly and may not be reimbursed
- ♦ D&O insurance is not currently available to protect D&Os from MOE orders.

“This is the first time the Ministry has held corporate directors of a publicly traded company personally responsible for an environmental clean-up after a company has gone bankrupt,” according to a Ministry statement reported in *The Globe and Mail* newspaper. “All groundwater and air remediation work will continue uninterrupted and the ministry will make sure the community remains protected.”

Northstar target of first clean-up Orders

Northstar had operated a facility on the site for the manufacturing and processing of helicopter and aircraft parts from about 1981 to April 2010. In the early years of the plant’s operation, trichloroethylene (TCE) and hexavalent chromium, both carcinogenic chemicals, had contaminated the soil and groundwater, migrated from the site, and affected some 500 nearby homes. It is unlikely that any of contaminants were discharged during the tenure of any of the named D&Os.

Since the problem was first identified in 2004, Northstar had spent more than a reported \$15M on environmental testing and remediation at and around the site. While the company estimated its liability for future remediation at \$7.5M, it had not set aside these clean-up costs in a special trust account.

To ensure it continued the clean-up work outlined in its remediation plan, in March 2012 the Ministry issued a Director’s Order against the financially troubled company. A second Order, issued on May 31, 2012, required Northstar to provide financial assurance of over \$10M to the Ontario Ministry of Finance by June 20, 2012. This did not happen and the company filed for, and was awarded, protection from its creditors under the *Companies’ Creditors Arrangement Act* in June 2012.

With Northstar bankrupt, Ministry turned attention to D&Os

When Northstar was adjudged bankrupt in August 2012, following the sale of the bulk of its assets and properties (with the exception of the Cambridge site), the Ministry engaged a contractor to undertake the operation, monitoring and maintenance of the company’s remediation systems. Following the expiration of a “Stay Period” imposed by the Superior Court as part of the bankruptcy proceedings, the Ministry issued a new Director’s Order on November 14, 2012 against Northstar and 13 former D&Os of Northstar and its parent company under sections 17, 18 and 196(1) of the *Environmental Protection Act*.

“Management and Control” provisions form basis of new Order

In a witness statement filed with the Environmental Review Tribunal (ERT) on September 27, 2013, Jane Glassco, the Ministry Director who made the clean-up Order, said she had the authority to issue an Order to “anyone who is or was in management and control of an undertaking or property.” The Director deemed that the board of directors was overseeing the senior managers at both Northstar Inc. and Northstar between 2005 and 2012. “As such, the directors and officers had management and control of the undertaking at the site,” Glassco said.

To be clear, I am not alleging that the directors and officers in any way caused the discharge of the TCE and chromium. However, once the magnitude of the contamination and the need for a long-term remediation effort became known, the directors and officers ought to have set aside and secured the funds necessary to complete the remediation. They did not set aside any amount of funds. They thus failed to take the necessary steps

to prevent the discharge of contaminants in the long-term, which I understand falls under the definition of “permit”.

By failing to prevent, the Ministry alleged these directors “permitted” the discharge of contaminants. The Order required that the D&Os carry out the work that was originally set out in the company’s March 2012 Director’s Order, including indoor air monitoring and mitigation at the surrounding residential properties, soil vapour extraction and groundwater pumping operations, and other components of the remediation plan.

D&Os appealed Order to the ERT before signing settlement Agreement

Twelve of the 13 D&Os appealed the Order to the ERT, challenging both its reasonableness and the jurisdiction of the Director to issue it. In February 2013, the Tribunal dismissed a motion by the appellants requesting a stay of the Director’s Order. A judicial review of that Order was also dismissed by the Ontario Superior Court of Justice (Divisional Court). A full hearing on the appeal before the ERT was scheduled for the fall of 2013. In the interim, the directors continued to pay estimated remediation and monitoring costs of \$100,000 a month, in addition to their growing legal bills, with slim likelihood of recovery even if their appeal was successful.

At the first day of the scheduled ERT hearing on October 28, 2013, the parties advised the Tribunal that the appellants had entered into private mediation with the Director and that they had reached agreement to settle all of the issues raised in their appeals.

While the former D&Os continue to deny any liability, they will pay \$4.75M to the province for the performance of on-going environmental assessment and remediation associated with the site and impacted or potentially impacted off-site properties, and any existing or future orders or approvals issued to Northstar. In exchange, the Director’s Order is to be revoked against the appellants who are parties to the settlement. Once the final documents are signed, the ERT has said it will dismiss the appeal without costs.

Ministry assumes unfunded liability

While the \$4.75M will fund the remediation work in the short and intermediate term, the Ministry has confirmed that it will assume responsibility – and provide further funding as required – for managing the long-term mitigation, remediation and monitoring needs “until the contamination is adequately addressed or another person assumes responsibility for the site.”

(For additional background on the Northstar case, see “Directors and officers liable for contamination that occurred before their tenure,” in our June 2013 newsletter.