



## ***Rubin v MOECC: Balancing Environmental Protection and Financial Hardship***

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When the Ontario Ministry of the Environment and Climate Change (MOECC) orders businesses or individuals to complete work required to protect the environment, the costs to comply can lead to financial hardship for those ordered. If those ordered cannot afford to complete the work, leaving a site partially remediated, the MOECC may be forced to complete the work itself at taxpayers' expense.

How should Ontario's Environmental Review Tribunal balance environmental protection and financial hardship?

The Tribunal had to strike this balance in *Rubin v Ontario (Environment and Climate Change)*.<sup>1</sup> The Tribunal found that ordering individuals to complete the work, where those individuals cannot afford to complete the work, does not benefit the environment. In these circumstances, the Tribunal can make recommendations to the MOECC Director to look to others, not included in the Director's Order, to protect the natural environment.<sup>2</sup>

### **Background**

From the late 1950s to the 1990s, Harry Rubin & Son Ltd. operated a metal recycling business in St. Catharines, Ontario. In the 1990s, under MOECC Director's Instructions, the company had PCB and other waste transported to and stored at its property in Thorold, Ontario (the "Property").

In 2012, the MOECC Director alleged that Allan, Howard and Ronald Rubin (the "Rubins") had management and control of the waste stored at the Property and ordered the Rubins to remove and dispose of waste stored at the Property, including PCB waste, and provide financial assurance. The MOECC Director relied on the fact that the Rubins were former directors and officers of the company in issuing the Director's Order. The MOECC Director also named the company, now owned by a Trust, and the Trustee of the Trust. The Rubins appealed the Director's Order to the Tribunal. The company and Trustee, who vacated her position, did not appeal.

The Rubins issued a Notice of Allegation concurrently with their appeal. The Tribunal's "Rules of Practice and Practice Directions" require Notices of Allegation where a party asks the Tribunal to provide relief in an appeal because of the acts or omissions of another party.<sup>3</sup> The Rubins

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<sup>1</sup> 2016 CanLII 24523 (ON ERT) [*Rubin*].

<sup>2</sup> *Ibid* at paras 45, 76.

<sup>3</sup> Environment and Land Tribunals Ontario, "Rules of Practice and Practice Directions of the Environmental Review Tribunal," September 12, 2016, Rule 84.

produced information about the origins of the waste and requested that Horizon Utilities Corporation and the City of St. Catharines be included in the Director's Order and that they undertake the waste removal work.

### **Implications for Future Cases**

The *Rubin* decision has implications for future Directors' Orders in three ways.

#### Use of Notices of Allegation

The Tribunal dismissed the Rubins' Notice of Allegation. However, the Tribunal did not close the door to the Rubins' request that the Tribunal consider the potential role of third parties:

“Arguably, from a relief sought perspective, the Tribunal is not really “dismissing” any part of the proceeding. It is simply providing direction to the parties as to what type of evidence is relevant to the issues the Tribunal needs to decide.”<sup>4</sup>

The Tribunal found the Rubins' Notice of Allegation was unnecessary because the Tribunal did not need to conduct a lengthy hearing into third party conduct in order to recommend that the Director look to other parties to address the environmental problem. The Tribunal held that it did not need to know specifics about third party conduct to make this recommendation.<sup>5</sup>

#### Tribunal's Powers in Relation to Third Parties.

The Tribunal provided guidance on the scope of the Tribunal's review powers. While the Tribunal can *recommend* that the MOECC Director consider including a third party in the Director's Order, the Tribunal will not step into the shoes of the MOECC to investigate other potential orderees and *order* them. The Tribunal found that “allocating liability of current and potential orderees is not something the Legislature has asked the Tribunal to focus on.”<sup>6</sup>

#### Fairness Re-imagined

Perhaps most noteworthy, the Tribunal suggested in *Rubin* that striking a balance between the financial hardship of orderees and environmental protection should be achieved, where possible.

The Tribunal cited *Kawartha Lakes (City) v Ontario (Director, Ministry of the Environment)*, in which the Ontario Court of Appeal held that an innocent landowner can be ordered to undertake environmental work even when others are at fault.<sup>7</sup> In *Rubin*, the Tribunal reaffirmed that the “key question” for the Tribunal was not about fairness or fault.<sup>8</sup> The Tribunal's focus is, instead, about whether the Order furthers environmental protection objectives.

In *Rubin*, the Tribunal viewed financial hardship of the Rubins (who could not afford to complete the entirety of the work ordered) not as an issue of fairness, but rather a practical issue of “completing the work.”<sup>9</sup> The Tribunal took a pragmatic perspective and held that the natural

<sup>4</sup> *Rubin, supra 1* at para 95.

<sup>5</sup> *Ibid* at para 45.

<sup>6</sup> *Ibid* at para 53.

<sup>7</sup> 2013 ONCA 310, 74 CELR (3d).

<sup>8</sup> *Rubin, supra* note 1 at para 91.

<sup>9</sup> *Ibid* at para 45, 50, 77, 84

environmental cannot be protected if the MOECC Director orders a party who does not have the financial capacity to complete the work.

The *Rubin* case was settled before proceeding to a full hearing. In the settlement, the Rubins were removed from the Order. The MOECC Director issued a new Order to the Rubins with a narrower scope that will not result in undue financial hardship to the Rubins.

The *Rubin* decision may open the door to appeals of orders based on undue financial hardship where there is an alternative solution that can achieve environmental protection.

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