Environmental regulatory liability in the mining sector

By Richard Butler and Nicole Petersen

Mine operators across Canada let out a collective gasp on Aug. 4, 2014, after a breach of the tailings storage facility dyke at the Mount Polley mine. The next day, the B.C. Ministry of the Environment issued a Pollution Abatement Order to the Mount Polley Mine Corporation, ordering the corporation to undertake an environmental assessment and cleanup.

What will happen if a mine accident like Mount Polley occurs in Ontario? How will the Ministry of the Environment and Climate Change (MOECC) respond? It often comes as a surprise to corporate directors and officers (D&Os) that the Ontario government can and does issue orders pursuant to the Environmental Protection Act (EPA) against D&Os directly and personally for environmental investigation and remediation.

REGULATORY AUTHORITY

The MOECC regulates spills and discharges from mines pursuant to its powers under the EPA. Ontario's Mining Act forms the regulatory framework for mine operations, closure and rehabilitation, but the Act does not explicitly impose personal liability on D&Os. In contrast, the MOECC has the authority to target D&Os directly for environmental offences committed by the company.

That authority is not new. Numerous examples of D&O prosecutions and convictions exist in the mining, waste and industrial sectors.

What is new, however, is the MOECC's assertiveness in issuing remedial and preventive orders against D&Os. It can issue cleanup orders against any person who "has or had management or control of an undertaking or property." A "person" may include the corporation, the D&Os of that corporation, and managers and employees. The order can require costly environmental monitoring, reporting and remediation.

THE BAKER CASE

The MOECC's willingness to issue cleanup orders against D&O was recently highlighted in the case of *Baker v MOECC*. The end result: former D&Os of a bankrupt company paid $4.75 million of their own money to settle litigation.

In *Baker*, Northstar Aerospace (Canada) Inc., a Canadian subsidiary corporation, voluntarily remediated trichloroethylene (TCE) contamination at its Cambridge, Ontario property. Northstar encountered financial difficulty during the lengthy remediation. The MOECC issued orders requiring Northstar to continue remediation, and to post $10 million in financial assurance. Northstar later obtained creditor protection and eventually declared bankruptcy, at which time the MOECC took over the remediation due to neighbouring human health concerns.

In November 2012, the MOECC issued a new order against Northstar, its U.S. parent corporation, and 13 former D&Os (including D&Os from the U.S. parent). The order required the D&Os to continue costly groundwater monitoring and remediation. A number of the directors named were appointed after contamination took place, but MOECC took the position that Northstar's D&Os failed to set aside adequate remediation funds prior to bankruptcy.

The corporate directors appealed the order to Ontario's Environmental Review Tribunal (ERT). The ERT denied an interim stay and held that interrupting the remediation program posed serious ongoing risks to human health and the natural environment. The directors unsuccessfully appealed this decision to the Superior Court and mounting litigation and remediation costs forced Northstar's D&Os to pursue settlement.

In October 2013, 10 of Northstar's former D&Os resolved the matter by paying $4.75 million in exchange for a release from the MOECC's order.

IMPLICATIONS FOR DIRECTORS AND OFFICERS IN ONTARIO

Baker showed that MOECC's willingness to turn to D&Os for remediation funding may hinge on:

- the significance of the pollution event
- the degree of control of the D&Os

- the degree of control/involvement of the corporate parent
- the financial (in)stability of the responsible company
- the availability (or lack) of others to pay for remediation (e.g. insurance)

In the event of a tailings discharge in Ontario, the mine operator should expect to receive monitoring and remediation orders similar to those issued against Mount Polley Mining Corporation. Depending on the extent of its management and control, the corporate parent may be named in the order and, similar to the Mount Polley incident, D&Os may (initially) escape being named in a regulatory order.

For junior mining companies with a single operating property, an underfunded project or lacking appropriate environmental insurance, one substantial incident can throw the company into dire financial straits. In Ontario, failing to undertake remediation, or failing to set aside funds for remediation, incentivizes the MOECC to look to D&Os to make up the shortfall.

Imperial Metals recorded $67.4 million in costs, including $20.3 million incurred for response and recovery. Production at the income-generating mine has stalled. In contrast to *Baker*, however, Imperial Metals is weathering the storm. Imperial Metals continues to actively monitor and remediate. Importantly, the company has been able to allocate the remaining $47.1 million in future costs.

Even so, the Mount Polley story is not over: the B.C. government released its findings about the accident on Jan. 30, 2015. Further orders and prosecutions are pending.

PLANNING FOR LIABILITY EXPOSURES

The Mount Polley incident will spur heightened regulatory oversight of tailings storage facilities and mine operations in Canada. D&Os of mining companies active in Ontario, whether the D&Os reside in Ontario or not, need to plan for increased scrutiny of mine operations and environmental safety. D&Os would be wise to confirm whether their company offers D&O indemnification as well as a policy of D&O insurance with high coverage limits and no environmental exclusions. CIM

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