

## ***Alizadeh v Ontario: Directors Face Uphill Battle to Rebut a Presumption of Management and Control***

By [Donna Shier](#), Partner and Certified Environmental Law Specialist by the Law Society of Ontario, with the assistance of Lauren Wortsman, Student-at-Law.

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Corporate directors and officers are presumed to have management and control of a corporation.<sup>1</sup> As such, directors and officers may be named in Orders issued by the Ministry of Environment, Conservation and Parks (“MECP”) to address environmental contamination. The *Environmental Protection Act*,<sup>2</sup> s. 18 provides the MECP with authority to issue an Order to any person who “owns or owned or who has or had management or control of an undertaking or property”.<sup>3</sup>

The Environmental Review Tribunal (“ERT”) recently affirmed that the evidentiary burden on a corporate director to rebut a presumption of management and control of a corporation is extremely high. In *Alizadeh v Ontario (Ministry of Environment, Conservation and Parks)*,<sup>4</sup> the ERT held a former director personally liable for an Order after the director led insufficient evidence to rebut the presumption. Further, the director’s financial inability to comply with the Order did not warrant removal of the director’s name from the Order.

### **Facts**

In *Alizadeh*, the company purchased a wood waste landfill site. In 2013, the MECP issued an Order requiring the company to conduct work on the landfill and leachate collection system. The company did not comply with the Order, and the company and its former director were prosecuted. The company was convicted and fined. The charges against the former director were withdrawn.

After the company was convicted, leachate from the landfill continued to discharge to a creek off site.

In March 2018, the MECP issued another Order against the company. This Order also named the former director personally. The Order required the company and the former

<sup>1</sup> *Caltex Petroleum Inc v Ontario (Ministry of Environment and Energy)*, 1995 OEAB No 75 at 7–8, aff’d 1998 OJ No 825 (Div Ct).

<sup>2</sup> RSO 1990, c E 19 [EPA].

<sup>3</sup> *Ibid*, s 18(1).

<sup>4</sup> [2019] OERTD No 32 [*Alizadeh*].

director to conduct work on the leachate collection system to inhibit the migration of leachate off site.

The former director argued that the Order improperly named him for two reasons:

- 1 he was never a person in “management or control” of the company, and
- 2 he had no financial ability to comply with the Order.

### **Presumption of Management and Control**

The ERT confirmed that corporate officers and directors are presumed to have management and control of the company.

The ERT affirmed holdings from previous decisions:

- ♦ In *Rocha v Ontario (Environment and Climate Change)*, the ERT held that “control” includes both the power to make things happen and the power to prevent them from happening<sup>5</sup>
- ♦ In *Currie v Ontario (Ministry of the Environment)*, the ERT held that a director who acts as a “point person” with respect to the MECP and has knowledge of the environmental issues at a site has management and control<sup>6</sup>
- ♦ In *Caltex Petroleum Inc v Ontario (Ministry of Environment and Energy)*, the ERT held that the onus is on the officer or director to present convincing evidence to rebut the presumption of management and control.<sup>7</sup>

In *Alizadeh*, the ERT stated that management and control is not limited to formal legal control by officers and directors.<sup>8</sup> It also includes “*de facto* control”.<sup>9</sup> However, the ERT does not define “*de facto* control”.

The ERT said “Where those with formal legal control of a corporation deny their involvement, the Tribunal puts the onus on them to make a ‘convincing case’.”<sup>10</sup>

<sup>5</sup> *Ibid* at para 27 citing *Rocha v Ontario (Environment and Climate Change)*, 2015 CanLII 43581 (ON ERT) at para 22.

<sup>6</sup> *Ibid* at para 33, citing *Currie v Ontario (Ministry of the Environment)*, [2011] OERTD No 26.

<sup>7</sup> *Ibid* at para 29, citing *Caltex Petroleum Inc v Ontario (Ministry of Environment and Energy)*, 1995 OEAB No 75 at 7–8, aff’d 1998 OJ No 825 (Div Ct).

<sup>8</sup> *Ibid* at para 28.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid*.

The ERT concluded the former director had not led sufficient evidence to rebut the presumption of control. This was despite the fact that the former director:

- ♦ was not a director at the time of the Order,
- ♦ had no access to any corporate documents that might prove his position,
- ♦ had no access to the site to comply with the Order, and
- ♦ was prohibited by court-ordered bail conditions in an unrelated matter from contacting the other director to obtain access to the site.

The ERT cited the following factors to conclude that the former director did have management and control:

- ♦ publically-available corporate filings indicate that the former director was the only director for much of the relevant time period,
- ♦ the former director negotiated and signed the Agreement of Purchase and Sale for the property on behalf of the company,
- ♦ the former director signed contracts on behalf of the company for work to be done on the leachate treatment system,
- ♦ for five years, the former director held himself out to the MECP as the only person making decisions about leachate management on behalf of the company,
- ♦ the former director made commitments to the MECP that the company would comply with the Order, and
- ♦ the company's environmental consultant took instructions from the former director.

The ERT concluded the former director had management and control.

*Alizadeh* affirms that the evidentiary burden to rebut the presumption of management and control is extremely high.

### **Financial Hardship**

The ERT affirmed that financial hardship is not a reason to remove a director's name from an Order. Three notices of assessment from the Canada Revenue Agency showing that the former director had limited income were insufficient to warrant removing the director from the Order.

The ERT rejected the director's argument that the MECP should use financial assurance provided by the company to pay for the completion of the leachate treatment system. The ERT held that using the financial assurance for this purpose would mean there would be insufficient funds available to maintain the system in the future.

The ERT also noted that when the company had purchased the property, the vendor advanced funds to the company to be used to construct a leachate treatment system. Under the former director's oversight, those funds were not used for this purpose.

### **Order Requirements**

The ERT concluded that it is insufficient for a director to provide reasons for removal of their name from the Order without also addressing how the environmental objectives of the EPA will be met if the Order is revoked.<sup>11</sup>

[Donna Shier](#) is a partner at Willms & Shier Environmental Lawyers LLP in Toronto and certified as a Specialist in Environmental Law by the Law Society of Ontario. Donna may be reached at 416-862-4822 or by e-mail at [dshier@willmsshier.com](mailto:dshier@willmsshier.com).

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<sup>11</sup> *Ibid* at para 37, citing *Kawartha Lakes (City) v Ontario (Director, Ministry of Environment)*, [2010] OERTD No 32 at para 38.