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REMINING, REPROCESSING, AND THE DEMAND FOR CRITICAL MINERALS IN ONTARIO—LIABILITY CONCERNS FOR OLD AND NEW OWNERS

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§ 32B.01 Introduction*

Ontario has a long history of mining, beginning with the first gold mine in 1886 in the eastern parts of the province, in the aptly named Eldorado, Ontario. To the north, the Abitibi Gold Belt stretches from Wawa, Ontario, to Val-d'Or, Quebec, leading to over 130 years of exploration and producing over 100 mines. Today, Ontario's deposits of nickel, lithium, and platinum are recognized as strategically important raw materials in a safe and accessible geopolitical location.

Mining in Ontario has always generated waste. Interest in rehabilitating tailings—often still rich with deposits—has fluctuated with commodity prices and technological advancements in extraction. Currently, as part of its broader critical minerals strategy, Ontario seeks to accelerate tailings recovery, remining, and reprocessing by simplifying regulatory access and attracting investment.

Whether Ontario's environmental laws and the proposed "Recovery Permit" framework can coexist in support of this strategy remains uncertain. Recent jurisprudence confirms that environmental regulators pursue, and Ontario courts and tribunals hold accountable, corporate officers and directors. Those with legal or financial "management and control" of mining operations can be personally liable for environmental liabilities, particularly where project finances or compliance assurance are in doubt.

This chapter analyzes the tension between reducing regulatory burdens to stimulate mining and remining investment and the growing personal liability risks for directors and officers. It first reviews recent amendments to Ontario's *Mining Act*,[1] including streamlined requirements for Closure Plans (end of mine rehabilitation) and the introduction of Recovery Permits

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[1]RSO 1990, c M.14.

for mine wastes. These permits are intended to encourage reprocessing of mining wastes, including tailings and waste rock, while improving public health, safety, and environmental outcomes, without the lengthy and costly requirements to file a mine Closure Plan or to obtain a mining lease.[2] In short, Ontario seeks to encourage investment in reprocessing by simplifying the *Mining Act* requirements.

The discussion then turns to the *Mining Act* amendments alongside Ontario's key environmental statutes and regulations, with particular attention to the expanding scope of officer and director liability. Recent jurisprudence in the oil, gas, and mining sectors illustrate how environmental legal standards and terminology have been applied to and incorporated into resource extraction legislation and judicial interpretations, increasing the potential for personal liability and piercing of the corporate veil.

The authors anticipate that Ontario's trend toward expanding personal environmental liability (including officers and directors) will continue and will likely extend into the Recovery Permit framework. Regulators and courts are expected to continue to draw upon environmental legislation, language, and jurisprudence to expand liability under the *Mining Act* and Recovery Permit regulations. If Ontario intends to incentivize remining, the *Mining Act* and associated Recovery Permit regulations require clarifying language setting out how remining and reprocessing will impact the management and control of the mine and tailings, both present and former. Responsibility for environmental liabilities should not be left to costly and protracted litigation. In the absence of such clarity, industry participants will need to seek private protections through indemnities and insurance.

§ 32B.02 Ontario Tailings Recovery Laws and Policy

[1] *Mining Act*

The *Mining Act* is Ontario's primary mining and mineral extraction legislation, governing prospecting, mineral exploration, mine development, and rehabilitation in Ontario.[3] Over the last century, it has been updated to reflect modernization of the mining industry. According to the Province:

> The *Mining Act* encourages *prospecting*, *mining claim staking* and *exploration* for the development of mineral resources in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in Section 35

[2]https://ero.ontario.ca/notice/019-7724#original-proposal.

[3]Canada has overlapping federal and provincial jurisdiction over mining and the environment. This chapter does not address federal regulation of mining projects or environmental matters, which generally focuses on federal lands, water bodies, or transboundary issues. The discussion is limited to the Province of Ontario's authority to regulate mining projects and their environmental impacts.

> of the *Constitution Act* (1982), including the duty to consult, and to minimize the impact of these activities on human health and safety and the *environment*.[4]

For this discussion, a "mine" includes all aspects of open excavation or underground workings, as well as above ground works, mills, stockpile, *tailings*, and *waste rock*.[5]

Part VII of the *Mining Act* is titled "Rehabilitation and Remediation of Lands" and sets out the requirements for mine rehabilitation and remediation of lands affected by advanced exploration and mining. Requirements of Part VII include progressive rehabilitation, voluntary rehabilitation, Closure Plans for advanced exploration and mine production,[6] and provisions for financial assurance to the Ministry of Energy and Mines (MEM) in advance of advanced exploration or mineral production. Standards, procedures, and requirements for mine closure and rehabilitation are set out in the Mine Rehabilitation Code of Ontario, incorporated by reference into the *Mining Act*, and related regulations.[7] Although the restoration of the environment is incorporated into Closure Plans, the Ministry of the Environment, Conservation and Parks (MECP) shares jurisdiction for environmental compliance and enforcement in Ontario and is often involved in the regulation of mining and mine sites.

Part VII is directed at "Proponents," which are defined in the *Mining Act* as "the holder of an unpatented mining claim or licence of occupation or an owner as defined in section 1."[8] A Proponent, therefore, will have the rights to extract minerals from tailings. That Proponent (or multiple proponents) will also bear the rehabilitation obligations for the mine under Part VII, even after the mine is closed, or the mine features are not obvious at the surface.[9] Proponents are required "to take steps, when required to do so, to protect the environment from the effect of those tailings."[10]

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[4]Ontario Ministry of N. Dev. & Mines, "A Class Environmental Assessment for Activities of the Ministry of Northern Development and Mines under the *Mining Act*," at 6 (approved Dec. 12, 2012; amended Feb. 28, 2018) (footnote omitted).

[5]For a more detailed explanation of the evolution of the ownership of tailings, as a form of chattel or part of the land, see Barry Barton, *Canadian Law of Mining* ch. 2 (2d ed. 2019).

[6]A comprehensive document detailing how a mine site and mining hazards will be rehabilitated, after mining operations cease. *See Mining Act* s 139(1).

[7]Rehabilitation of Lands, O Reg 35/24.

[8]*Mining Act* s 139(1).

[9]Moneta Porcupine Mines Inc. v. Dir. of Mine Rehab., File No. MA 00-02, 2010 (ON MLC); Conwest Expl. Co. v. Ontario (Ministry of N. Dev. & Mine Rehab.), [1996] O.J. No. 2020 (Ont. Div. Ct.).

[10]*Conwest Expl.*, [1996] O.J. No. 2020, para. 5; Mastermet Cobalt Mines Ltd. v. Canadaka Mines Ltd. (1978), 91 D.L.R (3d) 283 (ONCA), *aff'd*, [1980] 2 S.C.R 119.

The definition of Proponent, referred to as unduly complicated,[11] and its application have been subject to limited judicial review. To date, individuals have been held to be Proponents, under Part VII, where some form of land tenure is owned or held (either in the corporation or in a personal capacity), or on the basis of having carried out exploration work for the eventual mine.[12] In historical cases, a Proponent for the purpose of Closure Plan obligations included an individual who held a mining lease and had personally engaged in advanced exploration work.[13]

The *Mining Act* includes a provision for piercing the corporate veil, if appropriate, where directors and officers fail in their duty to manage the corporation. Liability exists for an officer, director, employee, or agent of the corporation who "directed, authorized, assented to, acquiesced in or participated in the commission of the offence."[14] These provisions do not require, however, that the individual officers and directors personally fund ongoing compliance in the place of the corporation.[15] As will be explained in greater detail, the ability to engage the personal liability of officers and directors, for the purposes of funding compliance (i.e., day to day control of mines and mining), is a new and more expansive liability.

[2] 2021 Introduction of Recovery Permits

In 2021, Ontario amended the *Mining Act* to introduce a new permitting system focused on easing restrictions for the reprocessing of mine hazards, including tailings and waste rock. The Ontario government's *Supporting People and Businesses Act, 2021*,[16] revised several sections of the *Mining Act*. The amendments updated Part VII and authorize the recovery of minerals or mineral-bearing substances from tailings or other waste materials resulting from mining.[17]

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[11] Barton, *supra* note 5, at 701.

[12] *Id.* at 703.

[13] MacGregor v. Dir. of Mine Rehab., File No. MA 033-93, Dec. 23, 1994 (ON MLC).

[14] *Mining Act* s 164(4). These are non-Criminal Code offences that involve breaches of provincial statutes, regulations, or municipal bylaws. In Ontario, regulatory offences can include breaches of highway traffic laws, environmental laws, and licensing requirements and permit approvals. Consequences involve fines, compliance orders, license revocation, and very rarely custodial sentences.

[15] For similar provisions in other jurisdictions, including British Columbia, see *R. v. Mossman*, 2024 BCSC 443, confirming that mine managers assume statutory obligations to ensure regulatory compliance by a corporation. The designated mine manager is a statutory requirement for all mines in British Columbia. *Mines Act*, RSBC 1996, c 293, s 21.

[16] SO 2021, c 34.

[17] *Mining Act* s 152.1(1) ("Any person may, subject to section 152.2, apply to the Minister for a permit authorizing the recovery of minerals or mineral bearing substances from tailings or other waste materials resulting from mining.).

The 2021 *Mining Act* amendments and the proposed Recovery Permit did not directly address environmental liabilities from legacy mine hazards and mine wastes, or the required standards for rehabilitation. The original language of the terms and conditions for a Recovery Permit included:

> the permit holder shall ensure the remediation of the land on which the tailings or other waste materials are located, such that the condition of the land with respect to one or both of public health and safety or the environment is improved following the recovery and remediation, as determined by the Director.[18]

A Recovery Permit holder need not be the owner of the lands or mine, and therefore may not necessarily be the Proponent, under Part VII. While the new sections of the *Mining Act* refer specifically to a permit holder and not a Proponent, these enforcement sections also refer to "any owner of the land," which includes a Proponent.[19] In other words, a permit holder may be a Proponent (an owner), but it is not a prerequisite. A recovery and remediation plan is required for Recovery Permit holders, although the content and detail has not yet been determined.[20] The Minister (formerly the Director), MEM, may in a case of non-compliance with a Recovery Permit issue orders to the permit holder, including stop-work, remedial, or preventative orders at current operating, closed, or abandoned mine sites. The Minister has the authority, with

> reasonable grounds for believing that the activities being carried out under a recovery permit have injured, damaged or endangered public health and safety or the environment, or are likely to do so, the Minister may, by order, require the permit holder, any owner of the land, or all of them jointly to repair the injury or damage or prevent the injury, damage or danger.[21]

These powers are consistent with *Mining Act* compliance authority to ensure mine hazards and Closure Plans are addressed by Proponents. However, as we will see, the import of environmental terminology may expand regulatory compliance power—and the financial obligations associated with mine hazards and Closure Plans—beyond a corporate Proponent and into the C-suite.

[3] 2022 Critical Minerals Strategy

In 2022, the then Minister of Northern Development, Mines, Natural Resources and Forestry—now MEM—introduced a critical minerals

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[18] *Id.* s 152.1(2)(1.). SO 2021, c. 34, Sched 12, s 7.

[19] *See id.* s 152.6(1), (2) (a distinction is made between the permit holder and owner).

[20] *Id.* s 152.1(3)(a).

[21] *Id.* s 152.6(2). Amendments replaced reference to the "Director" with reference to the "Minister."

strategy for 2022–2027.[22] This five-year roadmap sets out the Ontario government's priorities for strengthening access to and investment in the province's mining and mineral processing sectors.

The strategy identifies the recovery of minerals from mining waste as one of its priorities. It commits Ontario to (1) "developing a regulatory framework for recovery of minerals from mine tailings and waste, following the amendment to the Mining Act"; (2) "supporting mineral recovery opportunities where possible"; (3) "exploring innovative solutions for rethinking mining wastes"; and (4) "coordinating the new framework with other federal and provincial regulatory requirements."[23]

[4] 2023 Updates to Accelerate Development

The *Building More Mines Act, 2023* (*BMMA*), provided further amendments to the *Mining Act*, including Part VII, to accelerate resource development, reduce regulatory burdens, streamline environmental approvals, and ease financial requirements for Closure Plans.[24] For example, the amendments allow Proponents to submit "phased financial assurance" for Closure Plans based on schedules tied to the construction of new mine features, rather than requiring the full estimated cost of rehabilitation measures upfront.

These amendments have drawn criticism for allegedly reducing environmental requirements and oversight by mining regulators.[25] Notably, the *BMMA* amended section 152.1(2) on recovery permits, replacing the requirement that "the environment is improved" with the standard that "the environment following the remediation *is comparable to or better than it was before the recovery*, as determined by the Minister."[26] This "comparable to or better than" standard is intended to increase certainty and decrease the regulatory burden for projects on lands already disturbed by other activities.

[5] Proposed 2025 Regulation for Recovery of Minerals

On January 7, 2025, in furtherance of the legislative amendments made to the *Mining Act*—including the 2021 Recovery Permit additions and the

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[22] "Ontario's Critical Minerals Strategy 2022-2027: Unlocking Potential to Drive Economic Recovery and Prosperity" (Mar. 2022).

[23] *Id.* at 50.

[24] SO 2023, c 6.

[25] *See supra* note 2.

[26] *Mining Act* s 152.1(2) (emphasis added).

2023 *BMMA* updates—Ontario finalized a regulation titled *Recovery of Minerals*.[27] This regulation came into force on July 1, 2025.

Although brief, the regulatory framework is supported by additional documentation and tools, including the following elements.[28]

- *Application*. A person applying for a renewal or amendment of a Recovery Permit must submit an application to the Minister in the approved form.[29]
- *Project Categorization*. Projects are categorized based on their scale and potential impacts on the environment or public health and safety, with categorization self-assessed by the applicant.
- *Term*. Recovery Permits are approved for a five- to seven-year term.
- *Remediation*. The applicant must remediate the site "to an extent consistent with the disturbance caused by its activities." The Recovery and Remediation Plan must describe how the disturbed area will be returned to a condition comparable to or better than it was prior to the activity.

Despite this guidance, the *Mining Act*, its regulations, and related guidance tools lack clarity on how remedial and environmental obligations under an outstanding Closure Plan—or under environmental orders and permits—will interact with the new framework. For example, who has priority for remediating or rehabilitating mine hazards—the Recovery Permit holder or the Closure Plan Proponent? Can work under a Recovery Permit supersede the Proponent's management obligations under a Closure Plan? The *Mining Act* and regulations are silent on how former Proponents (including those who hold or held some form of land tenure) or those with "management and control" of a mine hazard prior to issuance of a Recovery Permit will remain liable for legacy environmental and closure obligations. Equally uncertain is how newer permit holders could become liable for preexisting disturbances and mine hazards, given the ambiguity of the "comparable to or better" remediation standard.

§ 32B.03 Liability and Enforcement

In Ontario, the primary environmental legislation is the *Environmental Protection Act* (*EPA*).[30] While the *EPA* and its associated regulations do not directly govern mines and mining exploration, the *EPA* sets out

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[27] O Reg 463/24; *see supra* note 2.

[28] *See* Appendix A – Proposed Regulatory Approach to Recovery of Minerals, Posted to the Environmental Registry of Ontario (Jan. 7, 2025).

[29] O Reg 463/24, s 3.

[30] RSO 1990, c E.19.

environmental stewardship obligations and responsibilities that apply to mining participants, including employees, agents, and, more recently, directors and officers.

Recent decisions on the scope of the *EPA*'s remedial powers have encouraged piercing of the corporate veil for day-to-day environmental compliance, putting the personal assets of officers and directors at risk to fund remedial environmental obligations. The principles underlying the interpretation of the *EPA* and the liability of officers and directors have also been extended to non-environmental legislation, such as the *Oil, Gas and Salt Resources Act (OGSR Act)*.[31]

In mining, MEM (mining) and MECP (environment) have overlapping jurisdiction. It is anticipated that mining and environmental regulators may draw on environmental legislation, language, and case law to inform assessments of liability under the *Mining Act* and Recovery Permit regulations. If relied on in the context of tailings recovery, these decisions could introduce significant and retrospective liability for participants, including officers and directors.

[1] *Environmental Protection Act* (*EPA*)

Similar to s. 164(4) of the *Mining Act*, the *EPA* imposes a positive duty on corporate officers and directors to manage corporations within the boundaries of the law. *EPA* s. 194(1) requires that "[e]very director or officer of a corporation has a duty to take all reasonable care to prevent the corporation from . . . discharging or causing or permitting the discharge of a contaminant, . . . failing to notify the Ministry of a discharge of a contaminant," or contravening several other sections of the *EPA*.[32]

Where the *EPA* has expanded dramatically is the ability to engage officers and directors for the day-to-day management of environmental risk, including cost. This expansive personal liability has been established for environmental compliance (1) despite the corporate veil and without finding of fraud or improper conduct; (2) despite a finding of no-fault to the entity for the environmental harm; or (3) where the party is not a formal officer or director, or resigned a decade earlier.

Under the *EPA* the MECP can establish responsibility for environmental matters by demonstrating that a party *has or had* ownership or management or control of a property, undertaking, or pollutant.[33] A mine and the

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[31] RSO 1990, c P.12. The *OGSR Act* regulates the drilling, operation, abandonment, and related activities for oil, gas, and salt infrastructure in Ontario.

[32] *EPA* s 194(1).

[33] *Id.* s 18.

related surface and subsurface workings (including tailings management areas) will be captured by broad interpretation of the terms "undertaking or property." Therefore, former owners, or those who formerly had management or control of mines and mine elements, will remain responsible for ongoing "adverse effects," including impairment of the quality of the natural environment or harm or material discomfort to any person.[34] The proposed Recovery Permit regime may trigger the *EPA* language of "management or control of a property," opening the door to environmental liability for the entire mine site by those who seek only to rehabilitate tailings.

For example, Part X of the *EPA* specifically deals with spills and the obligations of responsible parties in a spill scenario. Section 99(2) provides a mechanism for compensation for those who suffer a loss as a result of a spill of a pollutant from the owner of the pollutant and the person having control of the pollutant.[35] Ontario's courts have supported the expansive interpretation of who may be obligated to remediate based on the "Polluter Pays" principle, which is enshrined in Canadian environmental law.[36]

The following is a brief review of several key decisions that solidify the environmental obligations of those with ownership, management, and control to investigate and remediate, as well as the expansion and evolution of piercing the corporate veil in support of that remedial legislation.

[a] *Caltex Petroleum Inc.* (1995)

In *Caltex Petroleum Inc. v. Ontario (Ministry of Environment & Energy)*,[37] the then-Ontario Environmental Appeal Board (now the Ontario Land Tribunal (OLT)) found that, in proceedings under the *EPA*, a director with formal legal control of a corporation may be ordered to remediate contamination. In that case, the lease registered on title to the contaminated property included the signature of the director of the corporate owner and the separate corporate operator. The director was personally named in the MECP order for investigation and remediation, despite the tribunal's acceptance that the named director did not participate in the day-to-day operations.[38] On the issue of whether the director should be personally named in the environmental order, the Environmental Appeal Board stated: "The Board has consistently held that indicia of legal liability by way of registered documents create presumptions that the reality is in

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[34] *Id.* s 1(1)(a)–(h) (definition of "adverse effect").

[35] *Id.* s 99(2).

[36] Midwest Props. Ltd. v. Thordarson, 2015 ONCA 819, at paras. 64, 68–69.

[37] 1995 O.E.A.B. No. 75, affirmed on the issue of onus at 1998 O.J. No. 825 (Gen Div).

[38] *Id.* para 57.

conformity with the legal descriptions that the parties have chosen in organizing their affairs . . . ."[39]

Directors and officers of smaller corporations bear the onus of presenting a "very convincing case" as to why they should not be personally subject to an environmental order for remediation, where documents registered on title identify their ownership and control of the business activities.

[b] *Currie* (2011)

In *Currie v. Ontario (Ministry of the Environment)*,[40] the OLT's predecessor tribunal heard an appeal from three individuals named personally in a Director's Order, requiring them to undertake remediation work at a property previously used for the production of resins. The individuals had management and control of the subject corporation (i.e., undertaking) that created the risk of discharge of contaminants from 1989 through 2005.[41] Only one named individual remained as a current director at the time of the Director's Order.

The OLT found that the environmental issues at the site prior to 1998 contributed to the ongoing issues in 2010.[42] The OLT found that acting as the former "point person" with the MECP (i.e., directing communications and meetings in 1998) established former management and control, giving rise to an order in 2010.[43] Even a minor influence on operations and environmental issues engaged liability, including one director who took the position that he was a "passive investor."[44]

Following *Caltex*,[45] the tribunal accepted that the overlapping concepts of "management and control" included formal legal control of officers and directors, as well as de facto control by others with management of the undertaking and business.[46] Former directors and officers were therefore properly named in a regulatory order for their past management and control of the property/undertaking at the time of contamination, even if the site had since been sold to another corporate entity.

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[39] *Id.* paras 62–63.

[40] 2011 CarswellOnt 5580 (ERT).

[41] *Id.* para 92.

[42] *Id.* paras 94, 102.

[43] *Id.* para 80.

[44] *Id.* paras 69, 83.

[45] *See* § 32B.03[1][a], *supra*; *see also* Ontario (Ministry of the Env't & Energy) v. 724597 Ontario Inc., [1995] O.J. No. 3713 (Ont. Div. Ct.).

[46] *Currie*, 2011 CarswellOnt 5580, paras 75–78.

[c] *Baker* (2013)

In 2004, Northstar Aerospace (Canada) Inc. (Northstar Canada) discovered contamination at its manufacturing property. Between 2005 and 2012, Northstar Canada voluntarily engaged in investigation, remediation, and monitoring activities at the property. The debtor company, under financial strain, was granted protection under the *Companies' Creditors Arrangement Act*,[47] and the directors resigned. Eventually, Northstar was declared bankrupt, and the trustee in bankruptcy sold most of Northstar's assets, not including the contaminated lands, at which time remediation ceased.[48]

In 2012, the MECP issued a Director's Order requiring financial assurances to be placed in trust to ensure that ordered remediation activities at the contaminated site would continue despite Northstar's bankruptcy. The MECP issued another Director's Order against the former directors and officers in their personal capacity (Former Directors) to cover the costs of the ongoing remediation activities.[49] Much of the contamination occurred at the Northstar site prior to the directorships of the Former Directors. However, the MECP took the position that the remediation began, and was halted, under the Former Directors' tenure. The Former Directors appealed the order, challenging (among other things) the jurisdiction of the MECP to order the Former Directors, some of whom were not Canadian residents.

The Former Directors sought a stay of the order and the costly remediation of the Northstar site, pending appeal of the order (the hearing being many months later). The tribunal dismissed the stay (affirmed by an appellate court) and the Former Directors were required to comply with the order, even as the tribunal hearing continued, or face prosecution for breach of an order.[50] Despite the ongoing recognition of the Polluter Pays principle, fault for the original contamination was treated as irrelevant by the environmental regulator and tribunal.[51] Anecdotally, after ongoing negotiations, the Former Directors reached a settlement with the MECP requiring a payment of over C$4 million for the remediation of the site.

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[47] RSC 1985, c C-36.

[48] Northstar Aerospace, Inc. (Re), 2013 ONSC 2719 (a decision from related bankruptcy proceedings in the superior court).

[49] Baker v. Ontario, [2013] O.E.R.T.D. No. 21 (dismissing the stay motion).

[50] *Id.* (breaching an order is an offence under *EPA* s 186 (2), and liable to prosecution.).

[51] Confirmation that orders by the MECP are not dependent on fault (i.e., "no-fault" Orders) was also confirmed in *The Corp. of the City of Kawartha Lakes v. Director, Ministry of the Environment*, 2012 ONSC 2708 (Div. Ct.) (affirming a decision of the lower tribunal restricting evidence of fault from the hearing).

[d] *Rocha* (2015)

In *Rocha v. Ontario (Environment and Climate Change)*,[52] the scope of the MECP's ability to establish personal liability expanded further. An individual need not be a corporate director or officer to be found personally responsible for environmental matters relating to business and business properties. The law by 2015 continued to advance to confirm that control or management of a property or contamination will suffice, even without indicia of "legal liability by way of registered documents" per *Caltex*, or de facto control by others within management of the undertaking and business per *Currie*.

Alberto Rocha did not own the contaminated property at issue and was not an owner, director, or officer of the corporations that owned the contaminated lands. Rocha began his relationship with the two companies by first working as their account manager.[53] Over time, Rocha took on more responsibilities for the companies, incentivised by his investment, including being the contact person with the MECP and dealing with environmental issues.[54] The MECP alleged that Rocha's actions took him "beyond those of a mere adviser, representative, interpreter, and lender/invester, and that his work for the companies and his involvement in decision-making, in combination with his financial role, demonstrate his management or control of an undertaking or property."[55]

The tribunal agreed and found that Rocha had authority to deal with the MECP for environmental issues, had sufficient financial control over the companies, and retained the power to influence the decisions of the companies.[56] Thus, personal environmental liability can arise not through formal corporate position or documents, but through conduct that places an individual in apparent management or control of environmental matters.

Since *Rocha*, Ontario's environmental tribunal and reviewing courts have continued to endorse this expanded view of personal liability, emphasizing the goal of ensuring that environmental impacts are addressed and funded by those with decision-making authority—regardless of fault or ability to pay.[57]

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[52] 2015 CarswellOnt 11189.

[53] *Id.* para 4.

[54] *Id.* para 4.

[55] *Id.* para 9.

[56] *Id.* paras 131, 138, 143.

[57] *See, e.g.*, Alizadeh v. Ontario (Env't, Conservation & Parks), 2019 CanLII 62106 (Ont. ERT); 1000251411 Ontario Inc. v. Ontario (Env't, Conservation & Parks), 2024 CarswellOnt 14688 (OLT).

[2] Adoption of *EPA* Terminology

Understanding the evolving expansion of the terms "control" and "management" in relation to the *EPA* is relevant for the purposes of the proposed amendments to the *Mining Act* and Recovery Permit framework. The expanding liability that current and former directors and officers may face dealing with environmental contamination has been imported into other resource industry and operational statutes that do not include the *EPA*'s language and are not necessarily interpreted using Polluter Pays or other environmental principles.

[a] *Bilodeau* (2022)

In *Bilodeau v. Her Majesty The Queen in the Right of Ontario*,[58] Peter Bilodeau appealed an order by the Ministry of Natural Resources (MNR) under the *OGSR Act*[59] requiring him, in his personal capacity, to "abandon"[60] (i.e., plug) gas wells belonging to a bankrupt corporation.

In 2004, MNR issued licences to drill the wells to Onco Petroleum Inc. (Onco), which at all material times held the licenses.[61] After the drilling was complete, Bilodeau became a shareholder of Onco and eventually a director. Onco suffered financial difficulties, entered receivership (2008–2010), and was declared bankrupt. In 2011, Bilodeau resigned as a director and his role with Onco ceased.

In 2009, and later in 2011, MNR ordered Onco to plug three wells. The MNR used financial assurance (funds held in trust), required by the *OGSR Act* and established by Onco at the time of drilling, to plug several wells, but the financial assurance was insufficient to complete all of the Onco wells.

In March 2011, a separate corporation called Energex purchased and acquired all of Onco's assets in bankruptcy. Bilodeau, then a director and CEO of Energex, sought to transfer Onco's licenses to the wells. MNR refused to transfer the licences, and the Onco well remained unplugged.[62] Eventually Energex also entered bankruptcy.

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[58] 2022 ONSC 1742 (Div. Ct.). **Editor's Note:** The author of this chapter was lead counsel in this matter.

[59] Under the *OGSR Act*, "abandoning" is the process of plugging and decommissioning the oil or gas extraction well to prevent escape of material.

[60] "Abandoning" a gas well involves permanently sealing and decommissioning the well to prevent environmental hazards.

[61] *Bilodeau*, 2022 ONSC 1742, para 4.

[62] *Id.* para 19.

In 2019, nearly 15 years since Onco drilled the wells and eight years after Bilodeau had any role with Onco, the Ministry issued a new plugging order naming Onco, Energex, and Bilodeau personally. A "plugging order" can be issued to an "operator" under section 7.0.1 of the *OGSR Act*. The key question, therefore, was whether Bilodeau could be considered an operator, at this point nine years post-bankruptcy, based on his actions as a director many years prior.

Section 1(1) of the *OGSR Act* defines an operator as:

> (a) a person who has the right as lessee, sub-lessee, assignee, owner or holder of a licence or permit to operate the work,
>
> (b) a person who is authorized under subsection 10 (1.1) to operate the work without a licence,
>
> (c) a person who has the control or management of the operation of the work, or
>
> (d) if there is no person described in clause (a), (b) or (c), the owner of the land on which the work is situated; ("exploitant")

For the purpose of this chapter, only (a) and (c) above are relevant. There was no question that Onco met the definition under (a) as the owner/holder of the licence of the wells, but as a bankrupt corporation MNR would not recover any funds for plugging from Onco.

Part (c) of the definition includes a broad interpretation of an operator as "a person who *has* the *control or management* of the *operation of the work*."[63] Unlike the *EPA*, however, the *OGSR Act* does not have retrospective application and does not include the language of *has or had* control or management. Further, the *OGSR Act* includes the wording "operation of the work"—in this case, the operation of the gas well—which Bilodeau had never undertaken and could not have undertaken, as no leases existed for the gas well properties.

Bilodeau appealed the order on the basis, in part, that he lacked management or control of the wells and the further impossibility of carrying out the necessary work on gas wells situated on private property for which he had no right of entry.[64] Bilodeau argued that the *OGSR Act* did not provide for personal liability on the part of officers and directors and that without fraud or an improper purpose there was no other basis for piercing the corporate veil and holding him financially liable for the corporation's actions.

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[63] *OGSR Act* s 1(1) (emphasis added).

[64] *Bilodeau*, 2022 ONSC 1742, paras 25–36.

The court dismissed Bilodeau's appeal, finding that he held the requisite management and control to engage the title of operator. The court relied on well records that Bilodeau executed in his role as a corporate officer, as well as communications between Bilodeau and MNR about transferring well licences. The court cited environmental case law to support their piercing of the corporate veil, requiring him to personally fund the well plugging:

> Since there is no jurisprudence on what constitutes "control or management of the operation of the work" in the context of the [*OGSR Act*], the Designee looked to cases under the *EPA* for guidance. Adopting the rationale in *Bristol Metal Industries of Canada Ltd. v. Ontario (Director, Ministry of Environment)*, 1991 CarswellOnt 6022 (O.E.A.B.) at para. 78, the Designee recognized that like the *EPA*, the [*OGSR Act*] is remedial legislation and that "its objectives would be undermined if corporate directors, officers and shareholders could cloak themselves with the corporate veil in order to avoid compliance with" a plugging order.[65]

The court found that the corporate veil can be pierced without any finding of fraud or impropriety, so long as the legislation at issue included remedial measures.[66] The court went on to find that "control" meant not only having the power or ability to make something happen to property, but also the power and control to prevent something from happening to the property.[67] This expansion of the meaning of control applied to Bilodeau's historical position as a director or officer of the corporation, despite the clear language in the statute requiring that an operator, by definition, must have current management or control of the well operations.

[b] *Reicheld* (2024)

A few years after *Bilodeau*, the divisional court revisited the issue of liability for "operators" under the *OSGR Act*. The divisional court took this opportunity to clarify that the key finding when determining whether an individual maintained management or control was whether they "had the legal power to make decisions concerning the works in question or the ability to influence the decisions of the person who did have that legal power."[68]

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[65] *Id.* para 61.

[66] *Id.* para 64.

[67] *Id.* para. 62. One of the facts relied upon to establish "control" was that Bilodeau signed well reports in his capacity as an officer of the corporation. Recall that within the related *Mining Act* regulation for Rehabilitation of Lands, including Closure Plans, there are signing/certification requirements for a Proponent's "senior officer." These signing requirements will provide environmental regulators with sufficient evidence of management and control to establish personal liability for environmental hazards.

[68] Nathan Reicheld v. His Majesty the King in Right of Ontario as Represented by the Minister of Natural Resources and Forestry, 2024 ONSC 5016, at para 44.

The applicant, Nathan Reicheld, sought a review of a decision of MNR, which ordered Reicheld to repair and plug 62 hazardous petroleum wells owned by Glenfred Gas Wells (Glenfred). Glenfred declared bankruptcy in 2022. MNR argued that Reicheld was sufficiently associated with Glenfred and had decision-making authority over the wells and was therefore an "operator" of the wells. Among other facts, MNR found that Reicheld's dealings with multiple regulatory agencies and customers on substantive issues through a variety of communication methods over an extended time period (since 2014) constituted "substantial evidence" that he was an operator. He had keys to the well locks, coordinated sales of the wells, and received payments on behalf of the corporation. These factors supported a finding of personal liability for the environmental condition of the wells, based on the MNR's reliance on the MNR's previous findings in *Bilodeau* and the appellate court's supporting decision.

Despite these operational elements, the same appellate court held that Reicheld *did not* have the requisite legal authority or power to influence the decisions of the corporation, Glenfred, and found that the order naming Reicheld as an operator was unreasonable. Importantly, the evidence indicated that Reicheld's father was the one who possessed the requisite *legal control* over Glenfred, and there was no evidence presented by MNR to suggest that Reicheld was able to influence his father.[69]

§ 32B.04 Mitigating Liability and Further Considerations

At first blush, the *Reicheld* decision appears to be incongruent with *Bilodeau*. Reicheld demonstrated significant operational control over the wells and business (not found to be an operator), compared to Bilodeau, who never set foot on well properties and the business no longer existed (found to be an operator).

However, if one looks to the evolution of "management and control" within environmental jurisprudence (from *Caltex* through to *Rocha*), the decision in *Reicheld* reflects a continuation of the expansion of environmental liability toward those who have legal and financial control, with the primary goal being to ensure that remediation can be funded. Concepts of fault or responsibility fall away, and even the Polluter Pays principle is eroded in favor of finding financing.

As the court stated in *Reicheld*:

> It would be unfair and unreasonable to interpret the [*OGSR Act*] to find that a low-level employee who carries out functions in relation to an enterprise could be held liable for the pollution caused by that enterprise unless it could be

[69] *Id.* para 52.

> established that that employee actually had decision making authority in relation to that enterprise.[70]

Like predecessor case law (i.e., *Baker*), both the *Bilodeau* and *Reicheld* situations involved companies in bankruptcy or facing financial difficulty. Ontario's courts and tribunals have become comfortable funding historical remediation by piercing the corporate veil and targeting those with legal and financing powers, including current or historical control.

Mining and resource industry participants should be aware of the importation of environmental principles into operational mining statutes, like the *OGSR Act*. Directors and officers in mining continue to have an ongoing duty to see that the corporations they oversee remain within the law. That duty is enshrined in statute, and a failure to diligently carry out that duty can engage consequences, including but not limited to prosecutions and fines. However, it is more recent and more troubling that the personal assets of those officers and directors can be engaged, by order, to fund remediation of a corporation's environmental footprint. In Ontario, the corporate veil can be pierced to support the goals of legislation that includes remedial obligations, even if those remedial provisions are tertiary to the industry that the legislation supports.

Moving forward, when considering whether an individual has "control" or "management" of the corporation, corporate property, or environmental matters, natural resource and mining regulators may continue to evaluate whether targeted individuals possess the legal authority or financial means to rectify the corporation's environmental liabilities. If so, there is a serious risk for personal liability in remining contexts for directors and officers of companies pursuing these remining projects. Fault is largely irrelevant and those with deeper pockets to fund remediation efforts will likely receive greater scrutiny. Anecdotally, there has been increased attention to officers' and directors' insurance policies that specifically include environmental coverage (where such matters were once excluded) and to securing environmental coverage for corporate real property assets that name officers and directors as insureds.

The *Mining Act* and associated Recovery Permit regulations leave open this possibility of personal liability, not just for new rehabilitation and reprocessing activities, but also for historical environmental obligations. Like *Currie* and *Bilodeau*, regulators can and will use present-day "management and control" to address legacy sites that pose a continued environmental hazard. In both of those cases, the regulatory order was issued to remedy historical environmental harms, targeting the individuals with

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[70] *Id.* para 45.

the most recent *corporate control* even if they were not the parties who caused the environmental harm.

Greater certainty is required to encourage investment in remining and reprocessing activities. To support new investment in old tailings, the *Mining Act* and associated Recovery Permit framework requires, at a minimum, language clarifying how historical liability can be apportioned. There must be recognition that potential impacts or benefits of remining do not automatically engage liability for historical mine hazards that are linked to ownership (as a Proponent), or former management and control of the mine or tailings. Such exemptions and exceptions exist in Canadian environmental law, including examples from "Brownfields" and the redevelopment of abandoned or underused lands, in part, because of concerns about contamination.[71] For example, limitations on statutory liability can be applied for certain activities (e.g., evaluation studies), which have been proven effective at incentivizing investment in remediation and land redevelopment.[72] Reaching milestones in the remediation process can be met with regulatory immunity from certain types of orders, acting as a quid pro quo for positive environmental impacts in redevelopment.[73] Some of these incentives could be applied to the remining and Recovery Permit framework to create a zone of investment, with reduced risk for officers and directors.

Without clarification—through improved certainty and clear delineation of responsibility—the Recovery Permit framework will be insufficient to incentivize remining and reprocessing projects.

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[71] *EPA* pt. XV.1 (Records of Site Condition).

[72] *Id.* s 168.17(1) (limitations on potential liability for secured creditors, who undertake certain prescribed activities at a contaminated site).

[73] *Id.* s 168.7(1).