

CRTC is statute-bound to consider the provision of telecommunications services such as wholesale HSA services under the *Telecommunications Act*.

The issue raised in the dissent may be an appropriate subject for the next phase of legislative reform of Canadian communications legislation,

should such a process be undertaken by the Canadian government.

REFERENCES: *Review of whole-sale services and associated policies*, Telecom Notice of Consultation CRTC 2013-551, 15 October 2013, as amended by Telecom Notice of

Consultation CRTC 2013-551-1, 8 November 2013; *Review of whole-sale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, July 22, 2015; *Broadcasting Act*, S.C. 1991, c.11; *Telecommunications Act*, S.C. 1993, c. 38.

ENVIRONMENT

Advisors and lenders may be liable for environmental orders

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In upholding environmental orders, the ERT will consider a party's actual activities concerning a site or undertaking.

The trend toward ever widening liability for environmental orders in Ontario continues with a recent Environmental Review Tribunal (the "ERT") decision ("*Rocha*"). In that case, Mr. Rocha acted as an advisor, representative, lender and translator for the owner of a contaminated site.

The ERT upheld environmental orders against him, finding that he had management and control of environmental work at the site. The ERT further found that although Mr. Rocha held a mortgage on the property (albeit indirectly), he was not shielded from the orders by the secured creditor protections under the *Environmental Protection Act* (the "*EPA*").

EPA orders

The Ministry of Environment and Climate Change has broad powers under the *EPA* to issue environmental orders. For example, under s. 18 of the *EPA*, preventative orders may be

issued against those who have *or had* ownership, management or control of a property or undertaking, where the order is necessary to prevent or reduce the risk of the discharge of a contaminant or the adverse effects that may result from such a discharge.

Such an order can impose a range of corrective action, from monitoring to remediation. Whether a party is actually responsible for the contamination is not relevant in determining whether that party can be subject to an environmental order. In *Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment)*, the Court of Appeal upheld an environmental clean-up order against the City of Kawartha Lakes.

The City was the innocent owner of land that had been contaminated by a neighbour following a furnace oil spill. In its decision, the ERT relied heavily on the need to uphold the environmental protection purposes of the *EPA*.

Secured creditor protections

Historically, lenders were reluctant to loan money for property that may have been contaminated. They were concerned that if they tried to collect on their security (for example, if they tried to collect rent) or to protect their investment (for example, if they installed locks or fencing), they

could expose themselves to the risk of an environmental order.

This concern was well founded. For example, in *Karge v. Ontario (Director, Ministry of Environment and Energy)*, the Ontario Environmental Appeals Board (a precursor to the ERT) found that Mr. Karge, a mortgagee, exercised control over the property in question. This was the case even though he was not in possession of the property; he authorized persons to occupy the property, accepted rent from them, attempted to evict them and restored the property to its previous condition, all to protect his investment in the property. The Board upheld an amended environmental order against Mr. Karge.

In 2001, s. 168.17 was added to the *EPA* to allow secured creditors to take certain actions without being targeted by the Director for that reason alone. This protection covers actions taken to investigate, preserve or protect the secured property, as well as actions taken for the purpose of responding to a danger to human health or the environment resulting from the presence or discharge of a contaminant at the property.

In a sense, this amendment codified the agreements that lenders had previously negotiated with the Ministry to limit their liability.

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The Rocha case

Mr. Rocha was named in two environmental orders requiring preventative measures to address contaminated groundwater at the site of a chrome plating business. The orders included monitoring, recording and reporting on the contamination to delineate the plume and to contain it on site, but not remediation.

He argued that the orders were outside the Ministry's jurisdiction because he was only acting as an advisor and representative of the owner. The Ministry, he said, had not shown that he had the power to make decisions or the ability to control actions regarding the property.

The ERT disagreed, finding that Mr. Rocha's role at the site — which it determined included management of the environmental issues, management of the property, being a lender to the owner and being a beneficiary of a mortgage on the property — constituted management or control. The ERT upheld the orders against him.

The ERT concluded that Mr. Rocha,

[H]ad a strong influence over decisions concerning the contamination on, in, or under the Property and the plume that created the risk of discharge of a contaminant into the environment. His management decisions led to inaction in addressing the contamination, which is not consistent with the EPA's objective of protecting the environment. As a result, the Tribunal finds that there is jurisdiction under the EPA for the orders under appeal.

The ERT found that because Mr. Rocha was a beneficiary of the mortgage held on the property through a trust company, and not the holder of the mortgage himself, he was not a "secured creditor" under the EPA, and was therefore not protected by s. 168.17. Even if he were a secured creditor, the ERT found that he had not satisfied the requirements of the provision.

The ERT concluded that the actions Mr. Rocha took were not of the type listed in the provision and were not undertaken for one of the purposes referred to in the provision. The ERT emphasized that s. 168.17 is directed at protecting secured creditors who take positive action at contaminated sites, rather than those who, like Mr. Rocha, fail to take any positive action on environmental issues.

Significance

The Rocha case demonstrates that the Ministry and the ERT will look past a party's position, role or title. The ERT is prepared to consider a party's actual activities concerning a site or undertaking to assess the degree of management or control.

Environmental consultants, lenders and other advisors should carefully document their lack of decision-making power regarding the site and not hold themselves out as having such authority in dealings with other entities or the Ministry. A secured creditor who exerts control over a site must act in accordance with s. 168.17 of the EPA to receive its protection.

Rocha serves as a reminder that although s. 168.17 has been added to the EPA, the ERT's powers are no less broad. The ERT remains equally prepared to undertake a detailed review of a party's reliance on s. 168.17 to uphold the environmental protection objective of the EPA.

REFERENCES: *Environmental Protection Act*, RSO 1990, c E.19; *Rocha v. Ontario (Director, Ministry of the Environment and Climate Change)*, 2015 CarswellOnt 11189 (Ont. Environmental Review Trib.); *Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment)*, 2013 ONCA 310, 2013 CarswellOnt 5503 (Ont. C.A.); *Karge v. Ontario (Director, Ministry of Environment and Energy)*, 1997 CarswellOnt 6486 (Ont. Environmental App. Bd.).

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