

Corporate dissolution will not protect former directors and officers from environmental liabilities

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On December 10, 2016, Ontario's *Forfeited Corporate Property Act, 2015* (the FCPA), comes into force,¹ along with related amendments to the *Ontario Business Corporations Act* (the OBCA).² Directors and officers may be aware of these changes in so far as they will set out a new corporate filing requirement to keep a register of property owned in Ontario. However, the FCPA and the amendments to the OBCA also set out a new regime governing forfeiture of corporate property, which will have significant impacts on corporate governance of environmental risks. In particular:

1. D&O liability: Directors and officers can be personally liable for the cost to remediate forfeited corporate property after the corporation has dissolved; and
2. Dissolution requires Crown consent: Corporate dissolution will no longer be automatic.

These changes build on years of proposals to increase corporate accountability for contaminated land, and are aligned with the recent trend to impose liability for environmental clean-up costs on directors and officers, regardless of fault.

Forfeiture transfers ownership from the corporation to the Province

When a person dies without preparing a will and without heirs, their property transfers to the Crown (i.e. the Province) through the common-law doctrine of "escheat."³ Similarly, when an Ontario corporation is dissolved, any assets it has not disposed of on the date of dissolution also forfeit to the Province. The Province then controls the forfeited property and has the power to sell it.⁴

A corporation can voluntarily dissolve under the OBCA by filing a certificate of dissolution.⁵ If a corporation owns land on dissolution, the Province becomes the owner of the lands and is then responsible for dealing with legacy environmental issues on the land, including the costs of any environmental remediation required on the land.

The "must-knows" of the FCPA

1. D&O can be personally liable for the clean-up costs of forfeited corporate property

Then: Under the old regime, governed by the Escheats Act, there was no way for the Province to hold dissolved corporations, or their directors and offices liable for the clean-up of forfeited property.

Now: The FCPA responds to concerns that corporations were voluntarily dissolving in order to avoid environmental cleanup costs.⁶ Sections 30 and 31 of the new FCPA create new D&O liabilities for costs incurred by the Province

in connection with the disposition of forfeited corporate property, such as environmental remediation that must be completed to make the property saleable. Through a court order, the Province can recover costs incurred in connection with the disposition of the property from any person who was an officer or director in the two years prior to the dissolution.

These provisions, in effect, create a regime of absolute liability. Under the statute, there is no “defence” that D&O did not cause the contamination and are without fault; whether the courts will read in any exception for “innocent” past owners remains to be seen.

2. Voluntary dissolution is no longer automatic

Then: Section 239(1) of the OBCA provided for automatic corporate dissolution when the corporation filed the proper paperwork.

Now: The Province has the discretion to refuse to dissolve the corporation if the corporation is a landowner.⁷ If the corporation was a registered owner of land in Ontario, the articles of dissolution must state that the corporation is no longer a registered owner of land in Ontario.⁸ This is intended to encourage corporations to dispose of their property before they are wound down.

Additionally, the minister responsible for the FCPA (currently the Minister of Economic Development, Employment and Infrastructure) or the Minister of Northern Development and Mines can inform the Director responsible for the OBCA that revoking a dissolution order would be in the “public interest”, following which the Director must revoke the dissolution.⁹ While the parameters of this requirement are unclear, this section appears to be another mechanism through which the Province can ensure it is not left responsible for the remediation cost of forfeited corporate property.

3. New record-keeping requirements for property

Then: The Province did not receive notice when it became the owner of a property. Corporations could silently dissolve and forfeit their land to the Province. In most cases, the Province only became aware of the forfeiture of contaminated property when the property was the subject of an environmental or other regulatory investigation.¹⁰

Now: To administer this new regime of corporate forfeiture, the OBCA requires that a corporation prepare and maintain a register of its “ownership interests” in lands in Ontario. The corporation must keep with the property register a copy of any deeds, transfers, or similar documents that evidence the ownership in land.¹¹ The phrase “ownership interests” is broad and may include both legal and beneficial ownership. This new filing requirement will allow the Province to keep track of property ownership by corporations and determine whether any property is forfeited to the Province when the corporation dissolves.

Important dates:

- Corporations incorporated after December 10, 2016, must keep this property register starting on the day that the corporation is incorporated.¹²
- Corporations incorporated prior to December 10, 2016 have until December 10, 2018 to create this property register.¹³

Responsible corporate governance and

environmental risk management

Corporate officers and directors should consider measures to proactively assess and manage environmental risks. These measures could include:

- **Investigating environmental risks:** A Phase I Environmental Site Assessment is a non-intrusive investigation to identify potential environmental issues at a site and determine whether further intrusive investigation is warranted. This information can assist D&O in assessing the degree of environmental risk associated with the corporation's property holdings.
- **Managing environmental risk:** Where environmental risks have been identified, D&O can work with technical staff and legal counsel to develop a strategy to reduce the risk of environmental liability through, for example, remediation, risk management measures, or obtaining a Record of Site Condition, which provides the most complete protection from environmental orders issued by the Ministry of the Environment and Climate Change (the Ministry).
- **Setting aside funds to complete remediation in the event of insolvency:** Under section 17 of the *Environmental Protection Act*,¹⁴ the Ministry has the authority to issue environmental cleanup orders against those who cause or permit the discharge of a contaminant. In at least one case, the Ministry has taken the position that officers and directors who are aware of the need for long-term remediation efforts, and fail to set aside and secure the funds necessary to complete the remediation following the corporation's insolvency, are "permitting" a discharge.
- **Consider additional insurance:** Insurers may be able to provide additional environmental or D&O liability coverage, depending on the circumstances, which could protect against a claim under the FCPA.

The cost of environmental remediation can be significant and potentially far higher than the value of the land itself. Provincial governments across Canada are increasingly seeking to hold prior owners accountable for the cost of cleanup, regardless of fault, either through environmental orders or the creation of new statutory powers, such as those created by the FCPA. Directors and officers should be aware of the risk of personal liability and the need to responsibly manage environmental risk.

For more information, please contact a member of Dentons' Environment and Natural Resources team.

This article was authored by Meredith James and Aoife Quinn of Dentons' Toronto office.

References

¹ SO 2015 C.38, Sched 7 (FCPA).

² RSO 1990, c B.16 (OBCA).

³ RSO 1990, c E.20.

⁴ *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 244(1).

⁵ OBCA, s 239.

⁶ See for example, Dianne Saxe, "Escheat is very popular," (October 18, 2011).

⁸ OBCA, s 239(1.1).

⁹ OBCA, s 241(5)(b).

¹⁰ Ministry of Infrastructure, "Revitalizing Forfeited Corporate Property," (October 2012)

¹¹ OBCA, s 140.1.

¹² OBCA, s 140(4).

¹³ OBCA, s 140(5).

¹⁴ RSO 1990, c E.19.

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