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employment is either (1) "1 to 120 days (e.g., emergency or warranty work"; or (2) "more than 120 days to a maximum of 2 years (e.g., non-recurring project-based positions)." For high-skilled or high-wage employment, option 1 does not apply. As for option 2, while certain positions may be non-recurring or project-based, the vast majority are not.

The result seems to be a situation in which the employer may be able to obtain an LMIA for such a foreign worker once but, unable to fulfill this element of the transition plan, she could be barred from doing so in the future, regardless of the good-faith needs of her business.

Removal of exemption

Further evidence of this barrier-mentality can also be seen when one further considers these so-called exemptions. Before the latest version of the LMIA form was released, an additional basis for such an exemption existed in the form of "unique skills." At one time or another, the form counseled that this may include "nuclear physicist" or "Chief Executive Officer."

Without clearly enunciating what this phrase meant, just weeks later, Service Canada promptly removed it as an exemption altogether. So, the risk that one runs in not providing an adequate Transition Plan is to be informed by Service Canada that it was "...unable to process the... [LMIA] application you submitted because it is incomplete."

Any hope that Service Canada would retain the "incomplete" application and simply ask for additional information — or identify the deficiency with specificity so that it could be properly rectified — has been dashed by the indication that: "[y]our application has been securely destroyed... ." At least in such circumstances, one is able to rest assured that one's application will not fall into nefarious hands.

ENVIRONMENT

No fault liability a challenge of remediation

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Environmental regulators may order parties to remediate property even in the absence of clear evidence of direct fault.

Recent decisions from both the Nova Scotia Supreme Court and the Ontario Environmental Review Tribunal demonstrate the wide reach of environmental legislation to allocate liability to parties for remediation following contamination, even where a party was not the cause (or sole cause) of the contamination.

Nova Scotia IMP Group

In *IMP Group International Inc. v. Nova Scotia (Attorney General) ("IMP Group Case")*, IMP unsuccessfully appealed a Ministerial Order to remediate off-site groundwater contamination (the "order") issued under s. 125 of the Nova Scotia *Environment Act* (the "NSEA"). The NSEA seeks to support and promote the protection, enhancement and prudent use of the environment while maintaining (among other things) the principles of sustainable development.

Legislation

Section 125 of the NSEA grants the Minister broad powers to issue administrative orders where there are "reasonable and probable grounds that a person has contravened or will contravene" the NSEA. The Minister's discretion when issuing an order is not unlimited; s. 129 of the NSEA requires the Minister to consider several factors when determining whether to exercise the discretion to issue an order.

At issue in the *IMP Group Case* was whether the Minister properly considered the activity of previous owners and occupiers of the land when electing to name only IMP as a party to the order under s. 129(1)(b). Section 138 of the NSEA allows anyone who is aggrieved by an order to appeal to a judge of the Supreme Court of Nova Scotia; however, any decision by that court is final and binding on the appellant and on the Minister.

Facts

Property contaminated by industrial chemicals had changed hands among three industrial companies. The property was originally owned by Digital Components Limited ("DCL"). In 1976, the property was foreclosed and Industrial Estates Limited ("IEL") acquired it by Sheriff's deed. In 1978, IMP purchased the land from IEL. Each of DCL, IEL and IMP had used the land for various industrial activities.

In 2001, IMP discovered perchloroethylene in the property's groundwater and reported the contamination to the Nova Scotia Department of Environment (the "NS DOE"). IMP conducted extensive on-site remediation through a groundwater monitoring and soil removal and treatment program.

On the basis of consultants' advice, IMP concluded that,

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> . . . the plume of contaminant to off-site residential areas could not reasonably be eliminated and determined that no benefit would accrue from groundwater remediation off-site.

In the result, IMP limited off-site activity to sampling using pre-existing domestic wells on homeowners' properties.

NS DOE order

The NS DOE was not satisfied with IMP's off-site sampling program and issued an order requiring IMP to undertake four stages of activity as follows:

(1) enlisting an independent geoscientist or engineer to prepare a groundwater characterization report for the Minister;
(2) preparing a final report after consultation with the Minister;
(3) preparing a groundwater remedial action plan; and
(4) implementing the plan.

In effect, the order required IMP to perform the same remediation off-site as it was performing on-site.

Nova Scotia Supreme Court

On appeal, IMP challenged the reasonableness of the order's terms and the Minister's failure to name DCL and IEL as parties to the order. In determining whether the Minister's decision was reasonable, the court reviewed the record before the Minister at the time the order was made (the "Record").

Memorandum

The Record included testimony from IMP's consultants and from DOE experts. The court took note of a memorandum by a DOE expert which highlighted the dangers of off-site contamination:

> Unless more complete remedial action is undertaken in a timely manner the groundwater resource will likely continue to deteriorate in this area, due to tetrachloroethylene [*sic*, tetrachloroethylene] and related contamination, with less and less chance of recovery.

The court held that there was sufficiently compelling evidence that the order was within a "range of possible outcomes which are defensible in respect of the facts and the law."

Order naming IMP

The Minister must consider the factors in s. 129 of the NSEA, including activity involving previous owners and occupiers, when determining against whom an Order should issue. The evidence before the court included a Ministerial Order Checklist provided to the Minister by his staff prior to his decision being made (the "Checklist").

The Checklist stated that it was "difficult" to prove which party had caused the contamination because both DCL and IMP used PCE in their on-site operations. The Checklist also noted that DCL is now defunct and that the "most reliable and documented use of tetrachloroethylene on site is from the period of IMP's operation." The Court held that, in the circumstances, it was not unreasonable for the Minister to name only IMP in the Order.

Ontario *Rocha* decision

In *Rocha v. Director, Ministry of the Environment,* ("*Rocha Case*), the Environmental Review Tribunal (the "ERT") refused to stay an administrative order (the "Director's Order") pending an appeal. The Order had been issued under the Ontario *Environmental Protection Act* (the "EPA"). It required the appellant, Alberto Rocha ("Rocha"), to personally conduct remediation work at a cost of $80,000 to $150,000 prior to his appeal of the director's order.

Rocha was not the owner of the property, which was located at 520 Speers Road in Oakville, Ontario (the "Property"); instead, he was an advisor to the property owner and a mortgagee without possession. The property was owned by Autochrome Limited ("Autochrome"), a company run by an individual named Manuel Machado ("Machado"), the company's sole director and shareholder.

The EPA

The EPA regulates the discharge of contaminants into the environment. The amount of contaminant allowed into the environment depends on the use of the land and its proximity to environmentally sensitive areas.

The statute grants the Ministry of Environment (the "MOE") broad powers to issue director's orders to deal with the discharge of contaminants i.e., orders to: control the rate of discharge into the environment; stop the discharge of contaminants; clean up a contaminant; and take preventative actions.

Stay of order

Section 143.2(a) of the EPA empowers the ERT to stay the operation of any decision or order, except for an order to monitor, record and report to the Minister. Section 157.1 of the EPA permits a Provincial Officer to issue an order to any person who

> owns or who has management or control of an undertaking or property if the Provincial Officer reasonably believes that the requirements specified in the order are necessary to achieve the *EPA*'s objectives.

Rule 110 of the Practice of the ERT requires the party seeking a stay of an order to meet the three-part common law test for a stay as set out in *RJR-MacDonald Ltd. v. Canada (Attorney General)*.

Facts

On February 28, 2014, a provincial officer issued an order requiring that Rocha personally conduct off-site air

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sampling and delineation of trichloroethylene ("TCE") on the property (which was owned by Autochrome). Rocha requested a review of the provincial order (note, as distinct from the Director's Order).

The director's order confirmed the provincial order, requiring Rocha to conduct off-site indoor air sampling and delineation of a plume of contamination coming from the property. The director's order included the following reasons with respect to naming Rocha in the order,

> I believe that you are not only a lender, but are the person making decisions and exercising charge, management or control of the Property either as an advisor to Mr. Machado and Autochrome or as a person who has a financial interest in [the Property].

Ontario ERT

In accordance with section 143.2(a) of the EPA, the ERT held that it had no jurisdiction to stay the director's order against Rocha requiring the delineation of TCE because it was a requirement to "monitor, record and report" findings to the Ministry. Further, the ERT would not have granted a stay of the director's order against Rocha even if its jurisdiction was not circumscribed by s. 143.2(a).

The three-part common law test established in *RJR-MacDonald Ltd. v. Canada (Attorney General)* requires the moving party to establish that: there is a serious issue to be tried; irreparable harm will result if the stay is denied; and the balance of convenience, including the effects on the public interest, favours the granting of a stay.

Rocha established the first part of the *RJR-MacDonald* test: his appeal raised a serious issue of whether he was in "management or control" of the property under s.157 of the EPA. However, the ERT ruled that Rocha would not suffer irreparable harm in paying for the immediate remediation of the property because he had not proved that his costs were unrecoverable from Autochrome and Machado.

Perhaps most importantly, the ERT held that where groundwater contamination is established and threatens neighbouring properties, the balance of convenience favours holding a party responsible for the cost of remediation prior to any appeal of the director's order requiring remediation.

Significance

The decisions in the *IMP Group Case* and the *Rocha Case* demonstrate how environmental regulators can order parties to remediate property even in the absence of clear evidence of direct fault. In both cases, a decision-maker accepted the environmental regulator's finding of liability against a readily available (although arguably not directly, or solely, liable) party.

It is not entirely clear as to why the MOE issued the director's order against Rocha if the actual owner, Machado, was able to pay for remediation. By holding non-owners and, potentially, non-contaminators, liable for remediation costs, environmental regulators are aggressively following the mandate of their governing legislation to redress environmental damage.

However, there is a fine balance between the importance of remediating contaminated land and a strong legal basis for finding a party liable for the costs of remediation. The "pay-now, verify-later" approach is not without its own environmental risks: industrial businesses operating on historical factory sites may be unduly and disproportionately penalized, and corporations may be dissuaded from investing in the redevelopment of contaminated sites.

REFERENCES: *IMP Group International Inc. v. Nova Scotia (Attorney General),* 2014 NSSC 191, 2014 CarswellNS 385 (N.S. S.C.); *Nova Scotia Environment Act*, S.N.S. 1994-1995, c.1; *Rocha v. Director, Ministry of the Environment*, 2014 CarswellOnt 13113 (Ontario Environmental Review Tribunal); *Environmental Protection Act,* R.S.O. 1990, c. E. 19; *RJR-MacDonald Ltd. v. Canada (Attorney General)* [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120 (S.C.C.).

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