

Directors BEWARE – Potential Environmental Liability

When it comes to industrial clean-ups, the Ministry of the Environment is looking for help – and personal liability can lurk in the murky ponds and work sites of the companies you serve.

By John Buhlman and Derry Millar

A current case being heard by the Ontario Environmental Review Tribunal involving General Chemical Canada Ltd. is a powerful reminder of the potential liabilities faced by corporate directors for environmental clean-ups in the province.

General Chemical Canada closed its 86 year old Amherstburg, Ontario, plant in January 2005. The company left behind several environmental Orders issued by the Ministry of the Environment, with clean-up costs estimated as high as \$64 million. The main issue was the clean-up of a soda ash settling basin which received and treated liquid and solid waste by-products and covered 176 acres of the 450 acre site.

With the Canadian company soon to be insolvent, the Ministry of the Environment did not want taxpayers footing the bill for the clean-up. Therefore, in addition to issuing clean-up Orders to the Canadian company, the Ministry named the U.S. parent company on all three Orders – as well as a number of individual officers and directors who sat on the boards of one or both companies. Three of these individuals are lawyers at a major law firm.

THE MANAGEMENT OR CONTROL TEST

The Ontario *Environmental Protection Act* (“EPA”) permits a Ministry of the Environment Director to issue clean-up or preventative measures

Orders to persons who have or had “management or control” of an undertaking or property.

The Orders are being appealed by the parent company and the named officers and directors. The parent company claims that:

- Its sole interest in General Chemical Canada was as a shareholder.
- This shareholder interest, even when coupled with the financial, administrative, and director support that it provided to the subsidiary, does not constitute the type of operating management and control contemplated by the EPA.
- The business and manufacturing operations of General Chemical Canada were undertaken solely by employees of the Canadian company.

The individual officers and directors claim that they took the board positions solely to satisfy the requirements under Canadian corporate law for resident directors. While they had to execute corporate resolutions and provide outside legal advice from time to time, their role was nominal and they did not exercise any direct management or control over operations.

FEW PRECEDENTS FOR DIRECTOR LIABILITY

While similar Orders have been made by the Ministry of the Environment in the past, they

have rarely involved large and complex corporate structures, and those that did were resolved in some manner.

A very similar case occurred in the 1990's involving Uniroyal Chemical Ltd.*, which had operated a manufacturing plant in Elmira, Ontario since 1942.

The plant produced rubber chemicals, specialty chemicals and agricultural products, and in years past, wastes had been disposed of on the plant site. In-ground lagoons had been used for wastewater treatment. These historic practices of waste disposal and wastewater treatment had contributed to soil, surface water, and groundwater contamination.

A clean-up Order was issued by the Ministry of the Environment. Like General Chemical, Uniroyal was a Canadian subsidiary of a larger U.S. company, but there was no insolvency issue complicating matters. Still, the Ministry of the Environment named the U.S. parent companies as well as an individual officer and director in the clean-up Order.

The case was settled, with a cost-sharing arrangement between the Ministry and the company put in place. In the end, the Canadian company was able to pay its share of the clean-up costs, and the issue of individual officer and director liability became moot.

PROTECT YOUR INTERESTS

With the Uniroyal case resulting in a settlement, and the General Chemical Canada case yet to be heard, the extent to which company directors may be personally liable for environmental clean-up costs remains unclear.

But two facts remain certain:

1. The Ministry of the Environment has the power under the EPA and other statutes to name officers and directors personally on clean-up Orders.
2. The Ministry will not hesitate to use this power in situations where the public interest warrants it.

With this in mind, there are a couple of steps you can take to help ensure you are protected from potential personal liabilities under Ontario's EPA.

Be cautious in accepting nominal board appointments

Canadian corporate statutes require a percentage of directors to be Canadian residents. As a result, lawyers, executives and other professionals often agree to act as directors of Canadian subsidiaries of foreign-based companies to satisfy residency requirements, but never intend to play an active role in directing the business, or gain a full picture of the issues that may be involved.

While this can be a mutually beneficial arrangement for both parties, before


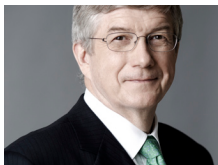
accepting such an appointment, it is critical that you undertake proper due diligence to ensure you have a clear understanding of any potential personal liability that could arise from your involvement with the company, both today and in the future.

Get protection in place

If you do accept a board appointment, make sure you have liability protection in place that will cover you in the event you are named in a clean-up Order. An Indemnity Agreement with the parent company is one form of protection, but you will want to ensure the financial health of the company is sound, as an insolvent parent may offer little protection. Insurance is another potential solution, but with many clean-up costs measured in the tens of millions, you will want to ensure that coverage limits are high enough to properly protect you.

If you have questions about issues raised in this newsletter, or any other environmental or litigation law concerns, please contact a member of the litigation group at WeirFoulds LLP.

** Derry Millar and John Buhlman represented Uniroyal Chemical Ltd. in the case referred to in this article.*

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