

Brief Your CEO: Officers & Directors Can Be Personally Required to Remediate Contamination



A company operated a resin production facility on property in Ontario until an explosion and fire permanently closed the facility. The resin company then leased the property to another company. MOE inspectors found numerous drums of resin, cylinders of boron trifluoride and bags of asbestos on the property as well as signs of spills from tanks. Other inspections raised issues regarding discharges into a creek, and groundwater and soil contamination. The Director of the MOE issued a remediation order to the resin company and three of its directors, who challenged the order on the grounds that they didn't have management and control of the property. The Environmental Review Tribunal disagreed, ruling that they had sufficient management and control to be personally subject to a remediation order [*Currie v. Director, Ministry of the Environment*].

THE PROBLEM

The environmental laws give the government many tools to protect the environment, such as the power to prosecute violators and require companies to clean up any pollution they cause. The government typically issues so-called "remediation orders" to the companies responsible for the contamination. But the laws also often authorize it to issue such orders to individuals who have management or control of a facility or property—such as a company's officers and directors. Thus, as the *Currie* case illustrates, officers and directors can be *personally* responsible for remediating contamination.

THE EXPLANATION

If you look at the issuance of remediation orders, it's fair to say that the agencies responsible for enforcing the environmental laws typically target

companies and not individuals. But these laws generally give the government the power to go after individuals in certain circumstances. For example, Ontario's *Environmental Protection Act* authorizes the Director to require a person who had "management or control of an undertaking or property" to take certain measures to fix or prevent environmental harm. Other jurisdictions' environmental laws have similar provisions.

So when are a company's officers and directors considered to have management and control of their company's operations and property? The court in *Currie* explained that management and control are overlapping concepts and encompass not only the formal legal control officers and directors have but also the *de facto* control of people in a position to significantly influence the company's management.

In *Currie*, the three directors had management and control under the EPA by virtue of being directors of the company that owned the property. But they also had management and control for EPA purposes because of their direct involvement in running the company and specifically in the environmental issues on the property:

- One of the directors was the company's "point person" for dealing with the MOE. He was in direct communication with MOE officials, regularly visited the MOE offices and generally dealt with the environmental issues;
- A second director worked with the first on the environmental problems on the property. He also was often at the site discussing the issues with MOE officials; and
- The third director wasn't as directly involved in the environmental issues as the other two but was kept informed of the ongoing problems.

The directors in *Currie* tried to argue that including them in the remediation order was essentially unfair. The court explained that several factors had to be considered when determining whether to impose cleanup liability on certain parties. But the focus had to be on furthering the EPA's purpose—that is, protecting the environment. The court also noted that letting the directors off the hook would undermine the "polluter pay's principle," which holds polluters responsible for remedying the contamination they're responsible for and imposes on them the costs of that pollution. *Bottom line*: "Those who manage or control undertakings must be responsible for the costs of pollution," ruled the court.

THE LESSON

You and your fellow officers and directors *can* be held personally liable for remediating any pollution caused by the company. What distinguishes *Currie* from other cases is the nature of the directors' involvement in the pollution at issue. These directors weren't holed up in corporate headquarters, completely removed from the property and unaware of any environmental issues. They *knew* there were environmental problems at the site. And at least two of them were directly involved in trying to address these problems with the MOE on the company's behalf. Thus, the more involved you are in the company's environmental compliance activities, the more likely it is that the government will go after you personally if remediation is required.

SHOW YOUR LAWYER

Currie v. Director, Ministry of the Environment, ON Environmental Review

Tribunal, Case Nos. 10-050/10-051/10-052, June 7, 2011