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Contamination is Risky Business for Restructuring Companies and their Directors and Officers

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In October 2013, the Ontario Court of Appeal released its decisions in *Nortel Networks Corporation (Re)* and *Northstar Aerospace Inc. (Re)*. These decisions throw yet another wrench into the gears for owners and past owners of contaminated properties and the directors and officers of corporations owning such properties.

Background to Nortel

In *Nortel*, the insolvent corporation was undergoing restructuring under the *Companies' Creditors Arrangement Act (CCAA)*. Under the terms of the court order granting Nortel protection from its creditors, it was granted relief from remediation obligations imposed by the Minister of the Environment (MOE). The lower court found that the MOE order was tantamount to a financial obligation of *Nortel*, because to comply with the clean up order would have required the expenditure of money that would escape the reach of creditors. As a result, the claim was stayed during the insolvency just like any other creditor's claim. The MOE succeeded on appeal, as explained below.

When Clean-Up Orders Will Trump, and When They Won't

In coming to its decision, the Court of Appeal referred to the Supreme Court of Canada decision in *AbitibiBowater*, where remediation orders were found to be subject to the insolvency process, but the circumstances were unique - the court found that the province would perform the remediation work itself and only then seek reimbursement. The MOE became a creditor of the insolvent corporation so its claim was stayed.

In *Nortel*, the Court of Appeal distinguished *AbitibiBowater* because it was *not* clear enough that the MOE's sole option was to perform the remediation itself and then seek reimbursement. Accordingly, the MOE orders in *Nortel* were not found to constitute orders to pay and therefore

they should not be stayed by the insolvency proceeding. By virtue of the corporation having to comply with the orders during the restructuring process, the MOE was effectively granted priority over the claims of creditors.

At the same time, the Court of Appeal released its decision in *Northstar*. In that case, the *CCAA* court had initially reached the same conclusion: that the MOE's claim was a financial obligation claim just like all other monetary claims of creditors and should be stayed. Unlike in *Nortel*, the Court of Appeal upheld the decision staying the MOE's claim because the MOE had *already* begun remediation efforts following Northstar's bankruptcy. The central factor appeared to be the point in time when the clean-up order crystalizes into a financial obligation of either the corporation or the taxpayer.

Impact for Owners or Former Owners of Land and for Restructuring Corporations

Purchasers of potentially contaminated sites such as builders, developers and landlords will want to consider the impact of cases like *Nortel* and *Northstar*, particularly where property is purchased from a vendor undergoing insolvency proceedings. The impacts can be significant, so the ability to limit or reduce exposure to possible liability should be carefully considered. For struggling corporations who may be contemplating restructuring, the *Nortel* and *Northstar* decisions may have a significant impact on the conduct of insolvency proceedings. In some situations, there may be strategic reasons why a *CCAA* proceeding will no longer be the preferred approach. It is important therefore for the corporation to seek legal advice at an early stage to assess the various options.

Personal Liability of Directors and Officers

In another recent case in *Baker v. Director (MOE)*, directors and officers of a corporation, including some whose appointment post-dated the contamination and who appeared to have no specific role or responsibility in relation to environmental matters, were *personally* named in a $15 million MOE remediation order. These directors/officers appealed the orders to the Environmental Review Tribunal. Shortly before the appeal was scheduled to be heard, an out-of-court settlement was reached, which included payment by eight of the directors and officers of $4.75 million to the MOE. This was is in addition to payment of legal fees plus interim remediation costs, which they were compelled to pay even while the appeal was pending. It is important to underline that because of the settlement, no determination was made regarding the liability of these directors and officers. Accordingly, prospective and current directors and officers of corporations that own, owned or are considering the purchase of a contaminated site are encouraged to first seek legal advice to give careful consideration to any potential risks such as those raised by the *Baker* settlement.

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