

## Environmental Law

January 15, 2016

### Creditors Lose Protection from Environmental Liability when Exerting Managerial Influence

Providing financing to an owner of an environmentally contaminated site can be a risky endeavour. In recognition of these risks, and to ensure that individuals and businesses facing environmental issues have access to financing to address contaminations, the *Environmental Protection Act (EPA)* includes certain protections for secured creditors.

A recent decision of the Ontario Environmental Review Tribunal clarifies the limits to that protection. In *Rocha v. Ontario (Director, Ministry of the Environment and Climate Change)*<sup>1</sup>, the Tribunal held that a secured lender to a chrome plating business, Mr. Rocha, was liable for two *EPA* orders made against him.

While at first blush the decision in *Rocha* may seem to weaken the protection afforded to secured creditors under the *EPA*, the decision turned on unique facts. In addition to acting as a lender, Mr. Rocha served as a business advisor to the owner and as the key decision-maker regarding environmental issues. As a result of Mr. Rocha's extensive involvement in managing the environmental work, and his failure to address the contamination, the Tribunal held that he was not shielded from liability as a secured creditor.

#### Management and Control

The environmental issues giving rise to the *EPA* orders involved contaminated groundwater on the site of a chrome plating business in Oakville known as Autochrome. Mr. Rocha initially provided accounting services to Autochrome. As Autochrome's owner was

not proficient in English, Mr. Rocha soon also began acting as a translator and advisor on business matters. Over time, Mr. Rocha's role continued to expand to include matters typical of someone acting in a managerial capacity, such as negotiating and signing agreements of purchase and sale, leases and settlement agreements. In addition, Mr. Rocha provided financing in the form of a mortgage, which was held by a trust company on behalf of Mr. Rocha and his wife.

Mr. Rocha's activities with Autochrome included managing the contamination on the property. He was the main contact for the Ministry of the Environment and Climate Change in its efforts to identify and contain the contamination and for the environmental consultants hired to undertake technical analyses. Under Mr. Rocha's stewardship, Autochrome failed to act upon the Ministry's recommendations and orders.

In these circumstances, the Tribunal held that Mr. Rocha exercised both management and control of the undertaking, and thus was among the persons who could be subject to an *EPA* order.

The Tribunal also relied on Mr. Rocha's influence as a lender in reaching this conclusion. He would not permit Autochrome to obtain additional financing to fund the required environmental work if doing so would result in losing his first-ranking priority as creditor. The Tribunal found that this degree of financial control gave him a strong influence on decision-making, which he exercised to effectively prevent Autochrome from obtaining the required financing. Such indirect control of Autochrome's "pursestrings" reinforced the conclusion that Mr. Rocha exercised sufficient management and control to make him subject to the *EPA* orders.

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<sup>1</sup> 2015 CarswellOnt 1189 (E.R.T.)

# Goodmans<sup>LLP</sup> Update

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## Secured Creditor Protections

Section 168.17 of the *EPA* provides that a secured creditor and its representatives do not have management or control of an undertaking only because certain prescribed actions are taken. These actions include conducting investigations, preserving or protecting the secured property by paying taxes or collecting rents, and responding to health and safety risks.

Although Mr. Rocha acted as a lender to Autochrome, the Tribunal held that these provisions did not protect him for two main reasons.

First, Mr. Rocha was not a “secured creditor”, as that term is defined in the *EPA*, since he did not hold the mortgage himself. A trust company held the mortgage; Mr. Rocha was merely a beneficiary. The Tribunal also held that Mr. Rocha was not acting as the trust company’s representative.

Second, the Tribunal made clear that even if Mr. Rocha were a secured creditor, s. 168.17 would not protect him in light of the degree of his involvement with

Autochrome. The protected actions in s. 168.17 are narrow, and Mr. Rocha went well beyond their prescribed bounds. Furthermore, the Tribunal emphasized that s. 168.17 is intended to protect secured creditors who take positive action to address environmental issues; it does not apply where no action is taken to address a contamination.

## Conclusion

The decision in Rocha serves as a useful reminder for secured creditors to pay careful attention to the *EPA* when providing financing to borrowers with environmental exposure. The protections afforded to secured creditors in s. 168.17 are narrow. Stepping beyond those statutory boundaries can subject secured creditors to orders under the *EPA*, especially when the creditor exerts influence over the borrower’s decision-making on environmental issues.

For further information about the *EPA*’s secured creditor protections, please contact any member of our Environmental Law Group.