

D&O Environmental Liabilities

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Overview

- Personal environmental liabilities
 - Prosecutions
 - Escheats
 - Orders
- Protecting D&O

Corporate Veil Eroding

- Personal liability for officers / directors
 - For what they could have prevented?
 - For everything the corp does?
 - For everything?

What's Fair?

- Is unlimited personal, retroactive, no-fault liability just and fair?
- If so, for whom?
 - Shareholders?
 - Employees?
 - Lawyers / engineers?
 - Directors?

Prosecutions

- S. 194 EPA
- Every director or officer of a corporation has a duty to take all reasonable care to prevent the corporation from:

S. 194: Did Corp?

- Discharge contaminant above limit
- Fail to report hazardous or hauled liquid waste
- Fail to clean spill
- Obstruct officer
- Breach approval
- Breach order

Prosecutions

- Outside s. 194 (reasonable care)
- Respondeat superior?
 - All corp offences?
- Who is a “director” or “officer”?
 - *R. v. Lacombe Waste*
- Vicarious liability?

Beyond Prosecution

- Contaminated sites:
 - Escheats
 - Orders



Escheats Proposal

- Any director in corp's last 2 years
- All legacy costs
- Can directors resign?
 - Race to resign?
 - New roles for the homeless

Orders

- Infinite, permanent, personal, retroactive, no fault liability?
- *Baker v Director*



Baker v. Director

- Director of US based parent
 - Only during \$20M cleanup
- Historic contamination (by others)
- On and off-site
- A second off-site source
- No D&O fault
 - No s. 194 breach alleged

Baker v. Director cont.

- Govt changed standards
- Issued \$10 MM FA order
- Both Northstar co to CCAA
 - Court approved sale
- MOE failed to get \$ from creditor

Baker order

- Est. \$15 million order to Baker etc.
- Shaw asst corp secretary
 - Did firm get fees?
- No fault
- No cap, no expiry
- Joint and several

Baker Appeal

- Order appealed: unconstitutional, no jurisdiction, unfair
- Basis of liability unclear
 - Particulars motion

EPA – Remedial Order

- 17. Where any person causes or permits the discharge of a contaminant ... the Director may order the person to,
 - (a) repair the injury or damage...

S. 17, per MOE

- “Permit” contamination if don’t pay for future cleanup
- Whether or not
 - Caused the cleanup
 - FA legally required
 - FA financially possible

EPA – Preventive Order

18. (1) The Director... may require a person who owns or owned or who has or had management or control of an undertaking or property to:

S. 18, per MOE

- (Almost) absolute liability
- Corp and D&O
 - Direct or indirect
- No time limit, no financial limit
 - Never expires
- No fault, no due diligence
- Cleanups, not just prevention

Baker Appeal

- Good cleanup
- Good legal defence
- Forced to settle by financial squeeze:
 - No stay pending appeal
 - \$150K / month
 - \$ gone even if you win

Liability Regardless of

- Own or occupy
- Past or present
- On site or off site
- Change in standards
- Other sources
- Insolvency

Rule of Law?

- Irrelevant:
 - Innocence
 - Fairness
 - Corporate law
- No effective appeal right
- MOE discretion

Consequences?

- Who wants to be a director?
 - Charities too
- Social, economic, environmental?
- Institute of Corporate Directors
- Just and fair?

Managing This Liability

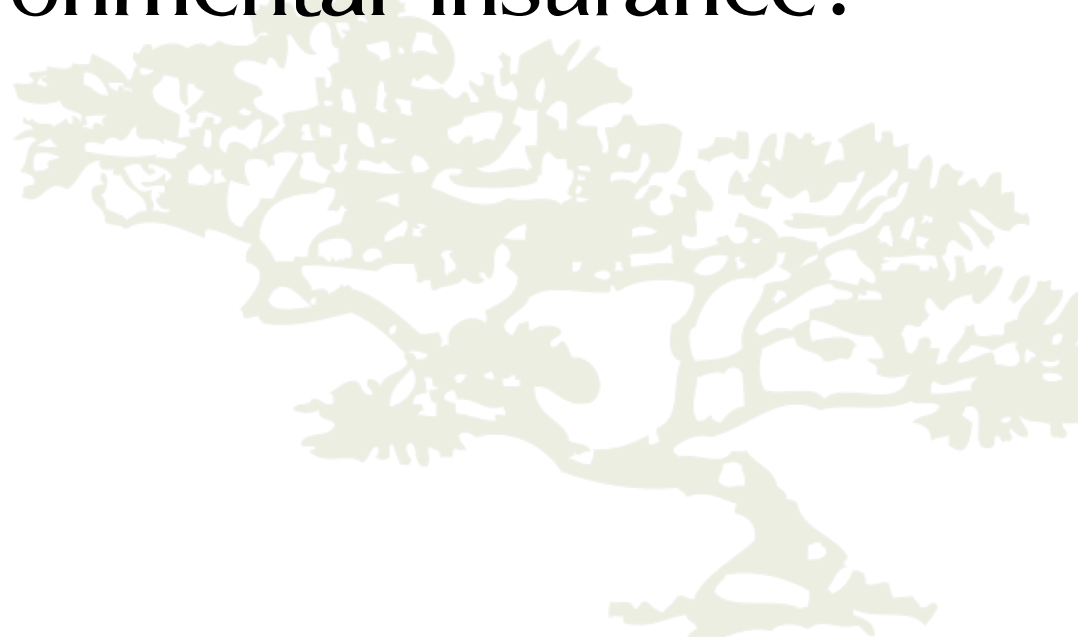
- Don't accept it: Lobby for policy change
 - Minister of Economic Development?
- Protect the company too
 - Financial assurance (??)
 - Record of Site Condition

Record of Site Condition

- Proves site suitable for land use
- Generic or risk assessed
- Only limit on MOE s. 18 power
- Reduces risk, doesn't eliminate it

Protect D&O

- Indemnification agreements (secured?)
 - (Insolvency: plan of arrangement?)
- D&O / environmental insurance?
 - Side A DIC



Conclusions

- D&O risk major environmental liability
 - Regardless of due diligence
- Some protection available:
 - RSC
 - Insurance
- Don't like it? Lobby!

Questions?

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