

# Risk, Liability and Fairness: Directors

NEERLS

June 21, 2013

Dianne Saxe, Ph.D. in Law  
Saxe Law Office



# Why did you go to law school?

- Yes to make a living
- Yes to protect environment
- Was that all?



# Is it too hokey?

- Justice
- Fairness
  
- *Kafka*



# So what's just and fair

- Who should pay for historic contamination?
- Legal when it occurred
- Polluter pays
- Who's the polluter?

# Corporations can do harm

- Giant Mine, need I say more?
  - bad regulation, weak science, short-term thinking, profits now...
- So can governments, individuals, wars...
- Is limited liability part of why?
  - Shareholders v directors...

# Corporate veil eroding

- Personal liability for officers / directors for what they could have prevented
- NWT EPA 14.1. (1) Where a corporation commits an offence under this Act or the regulations, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and is guilty of the offence

# But

- Is unlimited personal, retroactive, no-fault liability just and fair?
- If so, for who?
  - shareholders?
  - employees?
  - lawyers /engineers?
  - directors?

# Ontario likes it

- Escheats
- Prosecutions
- 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

# Prosecutions

- Outside s. 194 (reasonable care)
- Respondeat superior?
- Vicarious liability?
- Who's a “director” or “officer”?

# Orders

- Infinite, permanent, personal, retroactive, no fault liability?
- Baker v Director
  - Director of US based parent
  - Only during \$20 M cleanup
  - Historic TCE

## Baker cont.

- Govt changed standards
- Issued \$10 M FA order
- Northstar to CCAA
- 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
- No stay pending appeal
- \$150K/ month

# Consequences?

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

# Questions?

## Saxe Law Office

720 Bathurst Street, Suite 204

Toronto, Ontario M5S 2R4

Tel: 416 962 5009 / 416 962 5882

Fax: 416 962 8817

[admin@envirolaw.com](mailto:admin@envirolaw.com)

**[envirolaw.com](http://envirolaw.com)**