

## **Witness Statement**

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## **Background**

1. I am the President and CEO of the Institute of Corporate Directors (“ICD”).
2. The ICD is a not-for-profit, member based association with more than 7,600 members and 11 chapters across Canada, including 3 in Ontario. Our vision is to be the pre-eminent organization in Canada for directors in the for-profit, not-for-profit and Crown sectors. Our mission is to foster excellence in directors to strengthen the governance and performance of Canadian corporations and organizations. This mission is achieved through education, certification and advocacy of best practices in governance. Sharing best practices in corporate governance from the perspective of directors is core to what the ICD does. By doing so, we believe we will have a positive impact on the economy and society.
3. I am also a lawyer, called to the bars of Alberta and Ontario and have practiced law since 1982, primarily as a former partner at Osler, Hoskin and Harcourt LLP where my practice focused on corporate governance, mergers and acquisitions and corporate finance. In that capacity I regularly advised directors on their fiduciary and related duties.
4. I am a graduate of the University of Ottawa (LLB), New York University School of Law (LLM) and ICD Directors Education Program (ICD.D).
5. I currently serve as a director of the ICD, Canadian Foundation for Governance Research and Weizmann Canada.
6. Neither I, nor the ICD, have been retained by anyone in this matter, nor do we have any direct financial interest in the outcome. The ICD sought presenter status and is filing this witness statement due to the profound implications this case and the Environmental Review Tribunal’s decision could have on corporate governance, the duties of directors and the economy of Ontario.

## **Opinion**

7. We have reviewed the report of Professor Poonam Puri dated September 25 which will be filed in connection with this matter (“Puri Report”) and agree with the contents thereof.
8. Corporate law provides that directors shall manage or supervise the management of the business and affairs of a corporation. Corporate governance best practice is for directors to oversee and monitor rather than actively manage the corporation’s business and affairs. The latter is the role of management.
9. Corporate law, consistent with good corporate governance, imposes fiduciary duties and a duty of care on directors.
10. The directors’ fiduciary duties require them to act honestly and in good faith and in the best interests of the corporation. The BCE decision of the Supreme Court of Canada makes it clear that this duty is owed to the corporation. Although directors are to have regard to the interests

of various stakeholders, at no time are they to have primary regard to any particular stakeholder group from a fiduciary duty perspective.

11. The directors' duty of care requires them to exercise the care, diligence and skill of a reasonably prudent person.
12. Core to director liability under corporate law and consistent with corporate governance best practice is the availability of a due diligence defence. A director will not be held liable if he or she exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances.
13. The policy rationale for a due diligence defence is clear. It incents directors to act responsibly and without it, directors would be reluctant to serve on boards.
14. Section 194 of the Environmental Protection Act ("EPA") adopts the concept of a due diligence defence by imposing liability where directors did not fulfill their duty to take all reasonable care to prevent the corporation from contaminating or otherwise contravening the EPA.
15. The ICD does not object to directors being held accountable where they are at fault and have not exercised reasonable diligence.
16. In this case, however, we understand that some or all of the named directors joined the board after the contamination occurred and due to the insolvency of Northstar Inc. could not have directed funds to the Ministry of Environment.
17. Imposing liability on these directors in these circumstances would be tantamount to penalizing them for matters that they did not cause and could not prevent.
18. This would be contrary to corporate governance best practices and would be extremely injurious to the health of Ontario's economy.
19. Imposing such liability in these circumstances would have a chilling effect on directors seeking to serve on boards of organizations with operations in Ontario that impact the environment and would result in organizations locating their operations outside Ontario.
20. Imposing liability on these directors, in these circumstances, would be of grave concern to our members, the directors of Ontario and Canada.

Institute of Corporate Directors

By  \_\_\_\_\_  
Stan Magidson  
President & CEO

## Acknowledgement of Expert's Duty

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Case Name     Baker v. Director,  
                  Ministry of the Environment

And No.:        12-128/12-158 to 12-169

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1. The Institute of Corporate Directors ("ICD") is located at 602-40 University Avenue, Toronto, Ontario M5J 1T1.
2. The ICD has not been engaged by anyone to provide evidence in relation to the above-noted proceeding.
3. The ICD acknowledges that it is our duty to provide evidence in relation to this proceeding as follows:
  - a) to provide opinion evidence that is fair, objective and non-partisan;
  - b) to provide opinion evidence that is related only to matters that are within our area of expertise;
  - c) to provide opinion evidence in accordance with the Environmental Review Tribunal's Practice Direction for Technical and Opinion Evidence; and
  - d) to provide such additional assistance as the tribunal may reasonably require, to determine a matter at issue.
4. We acknowledge that the duty referred to above prevails over any obligation which we may owe to any party by whom or on whose behalf we are engaged.

September 26, 2013

Institute of Corporate Directors

By \_\_\_\_\_

Stan Magidson  
President & CEO