HOLDING DIRECTORS AND OFFICERS LIABLE FOR ENVIRONMENTAL PROBLEMS: SENTENCING AND REGULATORY ORDERS

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INTRODUCTION

I agree with Chief Justice Stuart. In the forty years of my legal practice, I too "have been abjectly frustrated and saddened by the failure of our legal system to effectively respond to environmental issues."

I could spend my allotted time scaring and depressing all of us over the climate crisis, endangered species, and the latest evidence that we are poisoning children with toxic chemicals. The seas are rising and dying; floods, droughts and fires are spreading; we are still the most wasteful people in the world. Meanwhile, our government slashes environmental research and monitoring, and our environmental laws. We have draconian potential fines, but little enforcement. And most of the environmental harm that is happening all around us is legal.

I could also spend my time bewailing the lack of scientific literacy and interest among judges. We have come a long way from the "frogs and logs brigade" comments I used to get, but most of the judges I appear before still did not like science in high school, and struggle with scientific evidence. It is not long ago that a Superior Court Judge refused to listen to evidence about the environmental dangers of gasoline because "I'm not a chemical engineer!" And only last year a judge accepted as "valid" a sample that fell below every provincial, national and international standard for reliable environmental data, and entered what I know to be a wrongful conviction.

Many days I feel there is no hope. But then, as Pete Seeger reminds us, I could be wrong.

For there to be hope, I agree that law, and sentencing, can and must:

1) Be an effective part of maintaining the difficult, but essential balance between economic development and environmental protection; and

2) Enable citizens to directly participate in our shared fiduciary duty to protect the interests of current and future generations.

So, what does all this mean about the directors and officers (D&O) who may come before your courts on environmental matters? Charges against D&O have become far more common in recent years and are now routine in Ontario, usually against the directors and officers of small corporations.

D&O may be convicted of an environmental offence like any other offender, i.e. as a conventional principal or party to the offence. But D&O may also end up before the court with much less moral justification, because of broadly written and broadly interpreted environmental statutes, coupled with aggressive use of prosecutorial discretion, and flexible or non-existent limitation periods. The challenge in sentencing such individuals is to integrate the complexity of the regulatory structure and the real difficulties of

compliance, into the usual sentencing matrix, and in earning social trust for the whole process consistent with fairness and the rule of law.

In part 1, this paper discusses the application of the sentencing principles developed by Chief Justice Stuart in *R. v. United Keno Hill Mines Ltd.*[1] to officers and directors.

In part 2, this paper discuses the recent Ontario case of *Baker v. Director, Ministry of Environment*[2] in which a completely innocent former director of a parent company was retroactively held personally liable for a multi-million dollar clean up related to historic contamination of a site owned by a subsidiary.

PART 1 – SENTENCING DIRECTORS AND OFFICERS

Environmental Sentencing Principles

As Chief Justice Stuart says in his paper, "We have come a long way since United Keno Hill". The fundamental considerations he laid down in that decision, however, are still the foundation for environmental sentencing for both corporations and their directors and officers:[3]

a. *The nature of the environment affected* – The more sensitive, special or unique the environment endangered, the greater should be the penalty.

b. *The extent of the damage afflicted* – The more severe the damage, the higher the penalty. In many environmental offences, environmental damage is not a necessary element of the offence. For such offences, absence of damage is not a mitigating factor, but the occurrence of damage is an aggravating factor.[4]

c. *The deliberateness of the offence* – The intent to commit an offence is not a necessary element of most environmental offences, but is a significant aggravating factor. Ignoring warning and attempts at concealment are also serious aggravating factors.[5]

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[1] 1980 CarswellYukon 9, 1 YR 299, 10 CELR 43 (YT Terr Ct) [*United Keno Hill*].

[2] See *Baker v Director, Ministry of the Environment*, ERT Case Nos: 12-158/12-159/12-160/12-161/12-162/12-163/12-164/12-165/12-166/12-167/12-168/12-169 (Env Rev Trib) [*Baker*], online: <http://www.ert.gov.on.ca/english/decisions/index.htm>.

[3] *United Keno Hill*, *supra* note 1 at 48-52; *R v Bata Industries Ltd*, 1992 CarswellOnt 211, 7 CELR (NS) 245, 9 OR (3d) 329, (sub nom *R v Bata Industries Ltd (No 2)*) 70 CCC (3d) 394 [*Bata*].

[4] *R v Shamrock Chemicals Ltd* (1989), 7 WCB (2d) 417 (Ont Prov Ct), var'd 9 WCB (2d) 18 (Dist Ct).

[5] *R v Canadian Industries Ltd* (1977), 8 CELR 121 (YT Mag Ct); *R v Panarctic Oils Ltd*, 12 CELR 78, [1983] NWTR 143, 43 AR 199, 3 FPR 429 (Terr Ct) [additional reasons to (1982), 12 CELR 29, [1983] NWTR 47, 44 AR 385, 3 FPR 420 (Terr Ct)] at 87-88 [CELR].

d. *The attitude of the accused* – In *R. v. Bata Industries Ltd.*, Justice Ormston of the Ontario Court of Justice (Provincial Division) found that the attitude of the accused could be measured in part by three factors:[6]

   1. The speed and efficiency of corporate action to rectify the problem;

   2. Voluntary reporting;

   3. The personal appearance of corporate executives in court outlining the company's genuine regret and future plans for compliance.

e. *The size, wealth, nature of operations and power of the corporation* – In order to ensure that fines are "felt" and are not treated as mere license fees, the larger and wealthier the offender, the larger must be the fine.

f. *The extent of attempts to comply* – Any efforts made by the corporation to prevent the offence are mitigating factors, even if they were not adequate to show due diligence.

g. *Remorse* – Speedy and effective action to remedy the problem and to prevent its recurrence are important mitigating factors, although cleaning up spills is no more than the company's legal duty. Similarly, reporting a spill or discharge, while an independent legal duty, has some weight in mitigation. Personal appearance of senior corporate executives in court, compensation paid to those who suffered losses as a result of the offence, and similar means of making public amends are also important indications of remorse. In *Bata*, Justice Ormstrom noted "The issue of remorse is more significant in sentencing the individual than the corporation."[7]

h. *Profits realized by the offence* – If the defendant has profited through the commission of an offence, whether by benefiting from cheap waste disposal or by avoiding necessary repairs and equipment, no fine will be a deterrent if it is cheaper to pay the fine than to comply. The amount of the fine which would otherwise be imposed should be increased by the amount of the financial benefit.[8]

i. *Criminal record or other evidence of good character* – Repetitions of offences require a higher penalty, even if the current offence is not a "subsequent conviction" in the legal meaning of the phrase.

In my 40 years, I have seen an enormous range in the directors and officers who end up before the courts on environmental matters. How do these principles apply to different types of D&O?

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[6] *Bata*, *supra* note 3 at para 193.
[7] *Bata*, *ibid* at para 235.
[8] See e.g. *Environmental Protection Act*, RSO 1990, c O.40, s 188 [EPA].

The Crooks

Environmental sentencing principles have not, in my view, done enough to punish the relatively few crooks, who run amok through the rules and the environment for their own profit, sometimes causing immense harm. We do not punish such offenders enough, and we tend not to prevent them from doing it again. Wildlife offences, for example, are a $17 billion a year business, reputedly organized crimes' fourth top money maker, after narcotics, gambling and people smuggling. Yet they still attract embarrassingly light sentences.[9]

Similarly, consider the infamous Jim Sinclair.[10] He foolishly bought the grossly contaminated Bakelite site after Union Carbide and similar companies were done with it.

Sinclair was found guilty of 14 counts in five separate Informations of offences contrary to the *Ontario Water Resources Act*[11] arising out of his attempts to redevelop the property. His two companies, both "one-man operations", were convicted of an additional 23 counts. Completely disregarding both environmental laws and specific Orders from the Ministry of Environment (MOE), he bulldozed a drain through a contaminated wetland, releasing PCB contaminated sediment into the Bay of Quinte, thus contaminating an entire watershed with persistent toxic chemicals.

At trial, the Justice of the Peace found that Sinclair's aim was to "complete as much work on the property that he could as quickly as possible and hope that he could create such a mess that the Ministries involved would have no opportunity to stop him and would have no choice but to agree to let him do what he wanted with the property."[12] His attitude was described as "obnoxious, despicable, arrogant, deplorable, insulting, demeaning, confrontational, totally incorrigible and completely uncooperative."[13]

At trial, Sinclair was personally fined $71,000 and sentenced to four months in jail; the two corporations were fined a total of $588,000.[14] On appeal, the corporate sentences were reduced by $140,000,[15] but the personal sentence against Sinclair was upheld. As Rommel G. Masse J. of the Ontario Court of Justice wrote:[16]

> [T]he moral culpability of Mr. Sinclair is quite significant. He knew that the site was contaminated with PCBs. He intentionally dug up trenches to drain the wetlands and marshes knowing that by so doing, PCB contaminated sediments would be transported into the Bay of Quinte. His motivation for doing so was to increase profits or to decrease costs. He ignored warnings of the Ministry. He

[9] *R v Deslisle*, [2003] BCJ No 662 (CA).
[10] *R v Sinclair*, 2009 CarswellOnt 4894, 45 CELR (3d) 222 [*Sinclair*].
[11] RSO 1990, c O.40 [OWRA].
[12] *Sinclair*, *supra* note 10 at para 20.
[13] *Ibid* at para 110.
[14] *Ibid* at para 4.
[15] *Ibid* at para 127.
[16] *Ibid* at para 134.

> totally disregarded lawful Orders of the Provincial Officers, the Director and even the Court. He devastated the wetlands on the property without regard to the effect of doing so on the environment. There was actual damage to the Bay of Quinte and that damage, in view of the toxicity of PCBs, was significant. He denied the toxicity of PCBs, even though such is well known. His actions were deliberate, flagrant and calculated and continued over a lengthy period of time. He showed no remorse. His attitude towards Ministry personnel was deplorable and extremely insulting. He was totally un-cooperative. His actions were taken with callous disregard for the environment or for the law.

My question: why was this penalty so light? Other crimes attract much longer jail sentences, with much less harm to the public interest than Sinclair had caused.

The Well Intentioned

Mr. Sinclair is, fortunately, fairly unusual. Much more common are offenders who act like those in *United Keno Hill*: well meaning, but not effective enough. For the most part, they are not "bad guys"; they are simply men and women doing their best with too many demands and limited resources, and who are deeply remorseful when things go wrong.

The *United Keno Hill* principles work well for the well intentioned but ineffective D&O, whether running small family businesses, or waste disposal sites, to sophisticated factories with multiples sites and hundreds or thousands of staff. If they have not done as much as they should, and environmental harm results, it is fair to hold them to account for the consequences.

But we have to avoid 20/20 hindsight.

These people now have statutory duties to take reasonable care to have their companies comply with a dizzying array of environmental laws, as well as health and safety laws and many others. These duties appear in sections such as section 280.1 of the *Canadian Environmental Protection Act, 1999*:[17]

> 280.1(1) Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with
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> (a) this Act and the regulations, other than Division 3 of Part 7[18] and regulations made under that Division; and
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> (b) orders and directions of, and prohibitions and requirements imposed by, the Minister, enforcement officers and review officers, other than those issued or imposed in connection with obligations or prohibitions under that Division or regulations made under that Division.
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> …

[17] Which is based on s 194 of the EPA, *supra* note 8.

[18] Disposal at sea.

> Liability of directors and officers — Division 3 of Part 7
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> (3) If a corporation commits an offence arising out of a contravention of Division 3 of Part 7, a regulation made under that Division or an order or direction of, or prohibition or requirement imposed by, the Minister, an enforcement officer or a review officer in connection with an obligation or prohibition under that Division or a regulation made under that Division, every director and officer of the corporation who directed or influenced the corporation's policies or activities in respect of conduct that is the subject matter of the offence is a party to and guilty of the offence, and is liable to the penalty provided by this Act for an individual in respect of the offence committed by the corporation, whether or not the corporation has been prosecuted or convicted.

Once a bad thing happens, it is obvious that it can and will happen. But until then, this particular bad thing is just one of thousands or tens of thousands that can go wrong, not all of which can be prevented. A reasonable process of identifying and addressing hazards ought to offer a defence; since it has not been accepted as a defence to liability,[19] it must be an important factor in sentencing.

Many environmental offences happen with very little blameworthiness. For example, one highly motivated officer we know was called to one of the many manufacturing sites he is responsible for, late on a busy workday during a storm. He discovers that a sump pump in the basement has failed and the building has flooded. Contaminated wastewater is escaping the building, but he thinks it is contained on site. It is only hours later that he is told the liquid has escaped off site, and is flowing towards a nearby creek. The drains that should control the liquid on site turn out to have frozen in the severe weather. He works feverishly to get the flooding under control and calls repeatedly for a vacuum truck. Suppliers keep promising to get back to him, but they are very busy with the storm, and do not actually show up until the next morning. Most of his own company's staff has gone home and he is left with a very small team to address the problem. By the time he calls the Spill Action Centre (SAC) Hotline, the spill is several hours old. He is charged with failing to report the discharge.

Technically, yes, he probably could have called SAC more quickly. But his moral culpability is of an entirely different, and much lower, calibre than Mr. Sinclair. And he is already one of the most conscientious people we know.

This officer may choose to plead guilty without attempting a due diligence defence because he cannot afford to fight. Mounting a complete defence to an environmental prosecution is incredibly expensive. In addition to legal fees, it usually requires technical evidence prepared by experts. If his company will not pay the fees, he cannot.

[19] *R v Imperial Oil*, 2000 BCCA 553.

The Well Intentioned but Confused

The *United Keno Hill* principles must be applied with special care when the regulated community cannot reasonably determine what the applicable environmental law is, and how to comply with it. Unfortunately, we spend a lot of time on cases like this.

In applying factors (c) and (f), deliberateness of the offence and extent of attempts to comply, I would like to see judges pay more attention to the vagueness and inscrutability of many environmental requirements, and the often imperfect conduct of regulators and other government bodies. These issues will have to be part of sentencing, because the Supreme Court has blocked them from being part of a due diligence defence

For example, in *Castonguay Blasting Ltd. v. Ontario (Environment)*,[20] the defendant reported the flyrock exactly as required by the province's own contract, and to the satisfaction of the province's supervising contract administrator. The MOE never formally approached the blasting contractors and asked to be notified of flyrock; they simply began the "conversation" with a summons. This is a very poor approach to regulation.

In many another cases, the MOE has issued permits with conditions that they know cannot be met, such as requiring a composting facility to have "100% negative pressure", when the pressure will inevitably fluctuate when there is a gust of wind. In another case, the MOE claimed that a hauler of "solid waste" broke the law whenever it rained, because now there was some liquid in the load. The fact that the waste was on its way to be dumped in a landfill where it will also rain? Irrelevant, said the MOE.

Many environmental regulations and approvals are vague, leaving large grey areas where reasonable people may differ. We have long recommended that regulated entities write to regulators explaining their understanding, and requesting a response if the regulators disagree. The Supreme Court has now rejected this practical approach, while offering nothing in its stead.

In *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*,[21] the Supreme Court has made compliance with ambiguous regulations tougher than ever, by ruling that honest efforts to understand the law (however confusing) are not enough.

Sovereign General (SG) was an Alberta insurance company registered with the Quebec Autorité des marchés financiers (AMF) to sell insurance products. It was convicted of 56 counts of offering such products through an unregistered broker, each count with a minimum fine of $10,000.

[20] 2013 SCC 52.
[21] 2013 SCC 63 [*La Souveraigne*].

Before the charges were laid, SG had given AMF a written explanation of why SG believed the broker did not require registration. The AMF did not respond, leading SG to believe that its explanation had been accepted. Then the 56 charges arrived, bearing a minimum $560,000 fine. The AMF punished SG much more severely than the offending broker, a Quebec resident. The Supreme Court upheld all the convictions, despite some sympathy for SG's mistake.

The Court rejected SG's argument that it should recognize reasonable mistake of law in the vast mosaic of regulatory offences. "More specifically, [SG] asks that this defence be made available in cases in which reasonable ignorance of or honest confusion about the applicable law is closely tied to improper conduct on the part of a regulatory body."[22] It concluded on this point:[23]

> This Court has held many a time that the fact that a defendant has exercised due diligence to find out and verify the nature of the applicable law is not a defence.
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> …
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> It should nonetheless be noted that if the rule that *ignorantia juris non excusat* — ignorance of the law excuses no one — were absolute, this could seriously hinder the application of another cardinal rule of our criminal justice system: there can be no punishment without fault. The overlap between these rules is all the more significant given the current simultaneous proliferation of regulatory measures and penal statutes. Indeed, several authors have pointed out that it is now impossible for citizens to have comprehensive knowledge of every law …
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> … [C]onflicts … inevitably result from the constantly expanding presence of regulatory measures. Such measures play an essential role in the implementation of public policy. The rule that ignorance of the law is not a valid defence supports the state's duty in this regard. For this reason alone, it needs to be enforced.
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> At the same time, the rise in the number of statutes coupled with their growing complexity increases the risk that a citizen will be punished in circumstances in which ignorance of the law might nevertheless be understandable …
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> …
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> *The regulator at issue in the instant case, the AMF, is not required by law to reply to those to whom the law applies or to inform them about their rights and obligations.* As a result, it was not reasonable in this case for the appellant to view the AMF's silence as a confirmation of its interpretation of that law. *This being said, the AMF's attitude is of some concern. Nevertheless, although its attitude does not reflect the greater transparency a regulator is normally expected to show, and as unfortunate as that might be, that attitude cannot be equated with improper conduct or bad faith on its part.*

[22] *Ibid* at para 67.

[23] *Ibid* at paras 68, 73-75, 78-79.

> Furthermore, even if the AMF's conduct were so vexatious as to justify accepting a new exception to the rule with respect to ignorance of the law, which I cannot find to be the case here, I am of the opinion that the steps taken by the appellant to avoid breaking the law do not meet the requirements for the due diligence defence. The appellant relied solely on the legal advice of professionals acting for a third party, Flanders, in Manitoba. A reasonable person would at least have sought an independent opinion from a member of the Barreau du Québec, preferably one who specializes in insurance law. Thus, the appellant in this case has not shown that it took all reasonable steps to avoid breaking the law."

The Supreme Court has left the door open that perhaps, in future cases, a mistaken understanding of a complex regulatory system could be a defence. In the meantime, however, this issue can only be addressed in sentencing.

In SG's case, the judges were also concerned about AMF's heavy-handedness, in laying 56 charges, each with a minimum $10,000 fine, when one would surely have been sufficient, and a fairer response to SG's honest efforts to understand the law. Three of the judges would have collapsed the 56 counts into a single charge; the others decided not to intervene because the issue had not been fully argued in the courts below. The combination of high minimum fines and a vindictive prosecutor can impose a startling and unjustified burden. I hope that judges will use their sentencing discretion to avoid saddling companies like AMF with unreasonably high fines.

PART 2 – REGULATORY ORDERS: PUNISHING THE INNOCENT D&O

Environmental Orders are not supposed to be punitive. Their aim is to ensure protection of the environment. However, orders that impose huge cleanup costs on the innocent certainly feel like punishment to those affected, and they are so instinctively unfair that they can seriously erode the social contract. This is especially so in the many cases where an innocent party has no realistic prospect of compensation, precisely because the original polluter is dead or insolvent.

A recent example is the case of *Baker v. Director (Minister of the Environment).*[24] Beginning in the 1960s, chlorinated solvents and chromium were used at a manufacturing site in Cambridge, Ontario, leading to soil and groundwater contamination on and near the property. There was also an overlapping source of TCE nearby.

In 1985, Northstar Aerospace Inc. (Canada) (Northstar Canada) bought the site, without knowledge of the contamination. There is no proof of chlorinated solvent contamination during Northstar Canada's ownership of the site.

[24] *Baker*, *supra* note 2.

In 2004, Northstar Canada discovered the historic contamination, which posed risks to human health and the environment. The company began an extensive voluntary remediation. Unfortunately, the company experienced significant financial difficulties after 2008, and the Cambridge site was vacant by 2009. By August 2012, it was bankrupt, and its parent company (Northstar Inc.) was insolvent, in CCAA protection, and without assets. All the directors resigned.

The MOE took over the remediation. It tried to claim priority over both companies' secured creditors, but lost in the Court of Appeal.[25] It then looked to the former directors and officers of both companies, perhaps in the hope of seizing a $1.75M directors' charge set up under the CCAA.

In November 2012, the MOE issued a cleanup Order to 13 former directors and officers (former D&O group) of both Northstar Canada and its parent company. Our client, Mr. Baker had only sat on the board of the parent company, and had joined that board only after all manufacturing at the Cambridge site had stopped. It was absolutely clear that no contamination occurred on his watch. In fact, the only thing that happened "on his watch" was that the subsidiary spent a great deal of borrowed money doing a very effective remediation, until the very day of its bankruptcy.

I believe that the Order against Mr. Baker was in all respects illegal.

The MOE claimed authority for the order under section 18 of the *Environmental Protection Act*, which allows preventative Orders to be issued to "a person who owns or owned or who has or had management or control of an undertaking or property".[26] The MOE claimed that this authorized them to issue clean up orders to anyone who *ever* owned, managed or controlled an "undertaking or property", directly or indirectly, regardless of fault or when the contamination occurred.

The MOE claim stood on two main pillars.

First, the Ontario Court of Appeal recently ruled in *Kawartha Lakes (City) v. Ontario (Environment)*,[27] that section 18 Orders can require innocent owners to clean up contamination caused by others. In that case, the innocent owner was even forbidden to show who was at fault as it was "irrelevant" to the Order against the City. The City had a statutory right to add the cost of the cleanup to the taxes of the responsible home.

Second, in earlier cases the Environmental Review Tribunal (ERT) has upheld some section 18 orders against some directors who *were* at fault because they were the directing minds of private companies and had not been duly diligent when the environmental risk occurred. The ERT created a rebuttable presumption that such

[25] *Northstar Aerospace Inc (Re)*, 2013 ONCA 600.
[26] *Environmental Protection Act*, RSO 1990, c E.19, s 18 [emphasis added].
[27] 2013 ONCA 310 [*Kawartha Lakes*].

directors personally manage and control a corporation's assets. However legally suspect that presumption may be, the results did look a bit like "polluter pay".

The Northstar former D&O group appealed the Order to the ERT. Their request for a stay of the cleanup Order pending their appeal was refused so they were required to pay monthly compliance costs of approximately $100,000, in addition to the legal and expert costs required for the appeal. Further, even if they were successful in proving that they did not have "control" of the property or undertaking, and the Order was therefore issued without jurisdiction, there is no mechanism under the EPA through which they could recoup these costs. In other words, they could reasonably expect to spend $5 million in unrecoverable compliance costs during the appeal, none of which they could get back even if they won.

Baker and others reasonably expected that the courts would eventually strike down the illegal order against them. But given the financial squeeze deliberately created by the EPA and the ERT, there was little point in turning to the courts.

Ultimately, Mr. Baker and others chose to settle the matter before it proceeded to a hearing before the ERT at a cost $4.75 M plus the $800,000 already spent to comply pending appeal. The financial impact of this regulatory order is far greater than any environmental fine imposed on an individual yet it was imposed without any consideration of any of the factors generally applied in environmental sentencing.

The "justification" for such an unfair result is alleged to be the importance of environmental protection, as described by the Ontario Court of Appeal in *Kawartha Lakes*:[28]

> In this case, all agree that the appellant is innocent of any fault for the spill. I agree with the Tribunal and the Divisional Court that evidence that others were at fault for the spill is irrelevant to whether the order against the appellant should be revoked. That order is a no fault order. *It is not premised on a finding of fault on the part of the appellant but on the need to serve the environmental protection objective of the legislation.*
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> The tribunal had to determine whether revoking the Director's order would serve that objective. Deciding whether others are at fault for the spill is of no assistance in answering that question. Evidence of the fault of others says nothing about how the environment would be protected and the legislative objective served if the Director's order were revoked. Indeed, by inviting the Tribunal into a fault finding exercise, permitting the evidence might even impede answering the question in the timely way required by that legislative objective.

Imposing cleanup costs on the innocent are akin to an offence of absolute liability – the orderee may be "morally innocent in every sense" and yet subject to huge financial losses. As the Supreme Court famously articulated in *R. v. Sault Ste. Marie*, some claim that absolute liability is justified because it is "efficient" and perhaps will ensure "a high

[28] *Kawartha Lakes*, *supra* note 27 at paras 19-20 [emphasis added].

standard of care and attention on the part of those who follow certain pursuits". In fact, though, imposing absolute liability on the innocent is corrosive to our sense of justice, and unlikely to improve behaviour:[29]

> Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may downplay it, the opprobrium of conviction. It is not sufficient to say that the public interest is engaged and, therefore, liability may be imposed without fault ...

Chief Justice Stuart is right: we do need vigorous enforcement of environmental laws, and sentences that compel attention. But I also ask you to put yourself in the shoes of a D&O defendant before you pass sentence. Could and should that person reasonably have known what was expected of them before the bad thing happened? How much blame does that individual really deserve? Are the regulators or others partly at fault? Environmental protection is essential, but so is fairness and the rule of law. Somehow, we need them all.

[29] *R v Sault Ste Marie*, [1978] 2 SCR 1299 at 1311.