

DIRECTORS' AND OFFICERS' LIABILITY



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YOUR FUTURE IS OUR BUSINESS

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1.0 INTRODUCTION

1.1 This Memorandum provides a general overview of the duties, obligations and potential sources of liabilities of directors and officers working for a corporation incorporated under the British Columbia *Business Corporations Act*¹ or under the *Canada Business Corporations Act*². It is meant to be a general source and is not to be relied upon as providing an acceptable standard of conduct for directors and officers in any or all circumstances. If you require more information, please contact a legal advisor.

2.0 TWO STANDARDS: FIDUCIARY AND THE DUTY OF CARE

2.1 The standard of care imposed upon directors and officers of a corporation has been codified in most corporate legislation in Canada. The *CBCA* establishes two distinct duties to be discharged by directors and officers:

Duty of care of directors and officers

122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

2.2 A similar standard is codified in the *BCBCA*:

Duties of directors and officers

142 (1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must

- (a) act honestly and in good faith with a view to the best interests of the company,

¹ S.B.C. 2002, c. 57 [*BCBCA*].

² R.S.C. 1985, c. C-44 [*CBCA*].

(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,

(c) act in accordance with this Act and the regulations, and

(d) subject to paragraphs (a) to (c), act in accordance with the memorandum and articles of the company.

(2) This section is in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors and officers of a company.

(3) No provision in a contract, the memorandum or the articles relieves a director or officer from

(a) the duty to act in accordance with this Act and the regulations, or

(b) liability that by virtue of any enactment or rule of law or equity would otherwise attach to that director or officer in respect of any negligence, default, breach of duty or breach of trust of which the director or officer may be guilty in relation to the company.

2.3 The first duty, according to both the *CBCA* and the *BCBCA*, is to “act honestly and in good faith with a view to the best interests of the corporation”. This imports a fiduciary duty on directors and officers. Directors and officers, as fiduciaries of the corporation, owe it a duty of loyalty and good faith; their obligations to the corporation are greater than those of an agent but less onerous than those of a trustee.

2.4 Furthermore, directors and officers must respect the trust and confidence instilled on them by the corporation. Directors and officers must avoid conflicts of interest with the corporation, must avoid abusing their position to gain personal benefit and must maintain the confidentiality of information they acquire by virtue of their position. “Directors and officers must serve the corporation selflessly, honestly and loyally”.³

2.5 The *Peoples* decision of the Supreme Court of Canada affirmed that it may be appropriate although not mandatory, given the circumstances, to consider the broader interests of the corporation’s shareholders, employees, creditors, suppliers, consumers, governments and the environment as well. In coming to this decision, the Court cited the ruling of Berger J. in *Teck Corp. v. Millar*:

³ *Peoples Department Stores Ltd. (1992) Inc. Re.*, 2004 SCC 68, [2004] 3 S.C.R. 461 at para. 35 [*Peoples*].

I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company's shareholders in order to confer a benefit on its employees...But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.⁴

2.6 The scope of the fiduciary duty does not change when a corporation is within the "vicinity of insolvency" which means its financial stability has significantly deteriorated. Given the competing interests at stake when a corporation is within the "vicinity of insolvency", any honest and good faith attempt of a director or officer to redress the corporation's financial problems, to retain value for shareholders and improve the position of creditors, will not qualify as a breach of the statutory fiduciary duty if unsuccessful.

2.7 The second duty is to "exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances" and is referred to as the statutory "duty of care". This standard imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs. One of the leading cases is *City Equitable Fire Insurance Co., Re.*⁵ which outlined the following standards that must be met by all directors:

- (i) A director must act honestly.
- (ii) A director must exercise such degree of skill and diligence as would be reasonable for an ordinary man to take, in the circumstances, with respect to his own affairs.
- (iii) A director need not exhibit, in the performance of his duties, a greater degree of skill than may reasonably be expected of a person of his knowledge and experience. A director is not therefore liable for mere errors in judgment.
- (iv) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature and may be performed at board meetings. He is not bound to attend all meetings but should attend when reasonably able to do so.
- (v) A director is justified, in the absence of suspicion, in delegating certain tasks to an officer of the company. However, the director must be aware of both the

⁴ (1972), 33 D.L.R. (3d) 288 at p. 314 (B.C.S.C.).

⁵ [1925] 1 Ch. 407 (C.A.).

nature of the company's business and its articles, to ensure the task is one capable of being delegated.

2.8 The Supreme Court of Canada in *Peoples* held that the duty of care standard is objective and not subjective to the director or officer in question; the standard requires "more of directors and officers than the traditional common law duty of care outlined in, for example, *City Equitable Fire Insurance Co., Re.*"⁶ Consequently, directors and officers are expected to exercise the care, diligence and skill of a reasonable director or officer in comparable circumstances.

2.9 While the courts are expected to analyze whether a director or officer has acted honestly and in good faith with a view to the best interests of the corporation and has exercised the care, diligence and skill that a reasonably prudent person would exercise, there is a long-standing view that the judiciary should not interfere with informed business decisions. This is known as the "business judgment rule".

2.10 If directors and officers act honestly, with due care, on an informed basis and on reasonable grounds, then the courts have determined that the business judgment rule applies and directors and officers are shielded from personal liability. Courts defer to business decision makers as judges are not appointed based on their business experience and the cost of business would escalate if every decision was dissected.

2.11 In order for the business judgment rule to apply, directors and officers should ensure they are obtaining reliable, professional and independent legal advice. They should attend as many meetings as possible and be duly diligent and should be prepared to challenge propositions they do not agree with or do not understand.

2.12 The business judgment rule is not a defense for non-compliance with legislative requirements.⁷ While the rule supports business efficacy by allowing business people to take reasonable risks based on their relative expertise, it is not a reasonable business risk to be in non-compliance with the law. For instance, a corporation cannot elect to not comply with the specific disclosure requirements of applicable securities legislation.

⁶ *Peoples*, *supra* note 3 at para. 62.

⁷ *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331.

2.13 Both the *CBCA* and the *BCBCA* impose additional liability in a number of specific areas. The following are some examples of the specific statutory obligations and liabilities imposed upon directors and, in some cases, officers of a *CBCA* corporation:⁸

- (i) Section 32(4) imposes personal liability on a director who knowingly authorizes, permits or acquiesces in the wrongful transfer of shares by a corporation.
- (ii) Section 118 imposes personal liability on a director who votes for or consents to a resolution authorizing the issue of a share under section 25 of the *CBCA* for consideration other than money.
- (iii) Section 118(2) imposes personal liability on a director who votes for or consents to a resolution purchasing shares, paying a commission, paying a dividend, granting financial assistance, providing an indemnity or making certain payments to a shareholder if those actions are taken contrary to the authorizing provisions set out in the *CBCA*.
- (iv) Section 119 imposes personal liability on a director for corporate employees' debts for services performed for the corporation for up to six months' wages.
- (v) Section 122(2) requires that every director and officer of a corporation comply with the *CBCA* and any regulations, articles, by-laws and unanimous shareholders agreements.
- (vi) Sections 149(4) and 150(4) impose personal liability on a director or officer of a corporation who knowingly authorized, permitted or acquiesced in the corporation's failure to give notice of a meeting of shareholders and send a form of proxy to each shareholder entitled to receive notice of the meeting or in the corporation's failure to adhere to the proper protocols for soliciting and preparing proxies.
- (vii) Section 170 requires directors and officers to furnish information and access to records that are requested by the auditor.
- (viii) Section 250(1) imposes liability on any person who makes or assists in making a report, return, notice or other document required by the *CBCA* that contains untrue statements or omits material facts.
- (ix) Section 251 imposes personal liability on every person who, without reasonable cause, contravenes a provision of the *CBCA* or the regulations.

2.14 Similar examples are found in the *BCBCA*:⁹

⁸ Please reference the *CBCA* for a more complete list of statutory liabilities.

- (i) Section 148(1) imposes personal liability on a director or senior officer for any profit that accrues to the director or senior officer as a result of a transaction where the director or senior officer holds a disclosable interest.
- (ii) Section 154 imposes personal liability on directors who vote for or consent to a resolution that authorizes the company to do an act contrary to section 33(1), to pay a commission or allow a discount contrary to section 67, to pay a dividend contrary to section 70(2), to purchase, redeem or otherwise acquire shares contrary to section 78 or 79 or to make a payment or give an indemnity contrary to section 163.
- (iii) Section 427(2) imposes personal liability on a director or officer of the corporation who knowingly authorized, permitted or acquiesced in the making of a statement that is false, misleading or omits any material fact.

3.0 LIABILITIES AS AN AGENT

3.1 In certain instances, an officer or director who signs an agreement on behalf of a corporation may incur liability for the obligations of the corporation pursuant to that agreement. It is incumbent upon an officer or director of a corporation, when he is personally dealing with another entity in arranging for the financial obligations of the corporation, to ensure that he is duly authorized to act and to take adequate steps to put the other party on clear notice that it is dealing with the corporation and not him personally.

3.2 The general rule in Canada is that if a person signs an agreement in a representative capacity, makes that capacity known and acts in that representative capacity, then he will not be liable for the debts of the corporation on whose behalf he has signed. There are two exceptions to this rule.

3.3 The first exception is where it is not clear on the face of the document that the person signed in a representative capacity, then both the person and the corporation may be jointly liable on the debt. In *Wood v. Grand Valley Railway*¹⁰, the president of the corporation signed a contract in an ambiguous fashion. This was interpreted by the Supreme Court of Canada to be signed in both a personal and a representative capacity. Consequently, both the signatory and the corporation were liable under the contract.

⁹ Please reference the *BCBCA* for a more complete list of statutory liabilities.

¹⁰ (1915), 51 S.C.R. 283.

3.4 This first exception requires that all documents signed by a director or officer on behalf of a corporation clearly state that the director or officer is acting on behalf of that corporation. Documents should be signed as follows:

XYZ Co.

By: Mr. Smith
President

3.5 Most preprinted cheques and business forms do not adequately describe that a signatory is signing on behalf of a corporation and not in a personal capacity. These documents should either be reprinted or manually amended to ensure that the capacity of the signatory is clear.

3.6 The second exception occurs if a director or officer commits a corporation to a contract when he does not have authority from the corporation to do so. In such cases, the director or officer, who acted as an agent in entering the contract, will be personally liable. The basis for this proposition in Canada is the decision of *Picard v. Revelstoke Sawmill Co.*¹¹ In *Picard*, the managing director sold the corporation's assets and agreed to pay a commission to the agent retained for the sale. The managing director had in fact no authority to sell the corporation's assets. The contract was unenforceable but the managing director was personally liable for the payment of the commission to the agent.

3.7 In situations where a director or officer is specifically authorized, through express or implied consent, to undertake certain actions on behalf of a corporation, it is clear that no personal liability will accrue. The more difficult situations are where a director or officer purports to act on behalf of a corporation in certain situations where that director or officer may not have been given specific authority to act. This is known as the doctrine of ostensible authority.

¹¹ (1913), 4 W.W.R. 1278 (B.C.C.A.) [*Picard*].

3.8 Ostensible authority was discussed in the decision of the English Court of Appeal in *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*¹² In this case, Diplock, L.J. held that:

[a]n ‘apparent’ or ‘ostensible’ authority . . . is a legal relationship between the principal and contractor created by a representation . . . that the agent has authority to enter on behalf of the principal into a contract of the kind within the scope of the ‘apparent’ authority, so as to render the principal liable to perform any obligations imposed upon him by such contract.

3.9 Lord Diplock set out four conditions that attach to the doctrine of ostensible authority.

- (i) a representation was made to the third party that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced;
- (ii) such representation was made by a person or persons who had ‘actual’ authority to manage the business of the company either generally, or in respect of those matters to which the contract relates;
- (iii) the third party was induced by such representation to enter into the contract, that is, he relied upon it; and
- (iv) under its memorandum of articles of association, the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

3.10 Once these four conditions are satisfied, the third party can enforce a contract with the corporation. Consequently, the agent will not be personally liable. Thus, if ostensible authority can be shown, a director or officer may escape personal liability.

3.11 Once ostensible authority has been established, a director or officer who has acted as an agent for a corporation will generally not be held personally liable for performance of the contract which he entered into, purportedly on behalf of the corporation. The corporation may,

¹² [1964] 2 Q.B. 480.

however, have a right of action against the director or officer for acting outside of his actual authority.

4.0 **BREACH OF TRUST**

4.1 In certain circumstances, money which is held by a corporation may be designated as trust funds. In such an event, an officer or director who deals with the funds becomes impressed with the trust imposed in respect of those funds.

4.2 An example of designated trust funds is found in the British Columbia *Builders' Lien Act*¹³. If a corporation holds funds in trust pursuant to section 10 of the *Builders' Lien Act*, then a director or officer who deals with those funds in a manner inconsistent with the trust breaches the trust. Section 11 of the *Builders' Lien Act* imposes personal liability on any person who appropriates or converts any part of the funds held in trust. Whether the action is intentional or innocent, a director or officer will become personally liable to the beneficiaries of the trust.

4.3 Furthermore, directors and officers can be found personally liable for breach of trust if they “knowingly assist” or “knowingly receive” funds in breach of the trust. In *Air Canada v. M & L Travel Ltd.*¹⁴ two directors of a travel agency were held to be personally liable for the breach of trust through “knowing assistance”. To be liable for “knowing assistance” the director or officer must:

- (i) have actual knowledge, be reckless towards, or be willfully blind to the breach of trust and,
- (ii) must take a risk to the prejudice of the beneficiaries' rights, knowing that they have no right to take the risk.

4.4 The *M&L Travel* decision also made it clear that directors and officers could be held personally liable if they are in “knowing receipt” of the funds in breach of the trust. Knowing receipt is satisfied when a stranger to the trust such as a director or officer, receives or applies

¹³ S.B.C. 1997, c. 45.

¹⁴ [1993] 3 S.C.R. 787 [*M&L Travel*].

trust property for his or her own benefit while having knowledge of facts which would put an honest and reasonable man on inquiry but does not make reasonable inquiries as to the source of the funds.

4.5 In *Citadel General Assurance Co. v. Lloyds Bank Canada*¹⁵, the Supreme Court of Canada found that it makes sense to give “knowing assistance” a higher threshold of knowledge than “knowing receipt”:

In "knowing assistance" cases, which are concerned with the furtherance of fraud, there is a higher threshold of knowledge required of the stranger to the trust. Constructive knowledge is excluded as the basis for liability in "knowing assistance" cases...However, in "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability.¹⁶

4.6 Ultimately, a director's or officer's knowledge of the unlawful action or omission must be proven, in fact or by implication. If the director can show, to the Court's satisfaction, that he had no knowledge whatsoever of the corporation's operation, he cannot be found liable as a trustee. Liability for breach of trust is not vicarious but personal in nature.¹⁷

5.0 CONFLICT OF INTEREST

5.1 Pursuant to the *CBCA* and the *BCBCA*, directors and officers act in a fiduciary relationship towards their corporations. Thus, directors and officers cannot conduct themselves in such a way as to create a conflict of interest. In general, a director whose primary objective is to derive an improper personal advantage cannot extricate himself by demonstrating that his activities have resulted in a benefit to the corporation.¹⁸

¹⁵ [1997] 3 S.C.R. 805.

¹⁶ *Ibid.* at para. 48.

¹⁷ *M & L Travel*, *supra* note 14.

¹⁸ *B.C. Timber Industries Journal Ltd. v. Black*, [1934] 2 W.W.R. 161 (B.C.C.A.).

5.2 Directors and officers must not take opportunities for themselves that could benefit the corporation. Often these opportunities arise during the course of employment and because the directors and officers hold special positions within the corporation. In determining whether to hold directors and officers liable for taking the corporate opportunity, the Courts will consider whether it was fair for the director and officer to take the opportunity considering the requirements of loyalty, good faith and avoidance of conflicts as an employee of the corporation. Indicia that will assist in the Court in its determination include:¹⁹

- (i) Whether the opportunity arose during the course of work?
- (ii) Whether it is an opportunity the corporation would also have been interest in pursuing? Note that it is not important whether the corporation would have been successful in pursuing the opportunity; it is sufficient that they *could* be interested in it.
- (iii) Whether the opportunity was still “ripe”?
- (iv) How specific the opportunity was in relation to the director’s position to it?
- (v) And, if there was resignation by the director, how much time elapsed after which the director undertook the corporate opportunity. Note: A director who resigns from his position will still owe a fiduciary duty to the corporation and cannot resign to escape liability.

5.3 In *Canadian Aero*, the Supreme Court of Canada held that a resigning director who had undertaken a corporate opportunity was liable to his original corporation for its lost profits. The Court held that:

An examination of the case law . . . shows the pervasiveness of a strict ethic in this area of the law. In my opinion this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation whether the resignation may thoroughly be said to be prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative which led him to the opportunity which he later acquired.²⁰

¹⁹ *Canadian Aero v. O’Malley*, [1974] S.C.R. 592 [*Canadian Aero*].

²⁰ *Ibid.* at para. 25.

5.4 A more controversial and unsettled issue is whether or not liability will accrue when an opportunity is taken with the knowledge and the consent of the corporation. According to the Supreme Court of Canada's decision in *Peso Silver Mines v. Cropper*²¹, a director may take a corporate opportunity and may not face liability if:²²

- (i) the company, as a whole, *bona fide* rejects the opportunity;
- (ii) the director acts *bona fide* in rejecting the opportunity on behalf of the corporation;
- (iii) the director does not receive confidential information regarding the opportunity which is unavailable to the company; and
- (iv) the offer is made to the director not in his capacity as a director but as an ordinary member of the public.

5.5 The obligations imposed upon a director or an officer who receives a corporate opportunity while in a fiduciary relationship with a corporation has been codified in most corporate legislation. The *CBCA* outlines at section 120 the responsibilities and duties of a director and officer regarding disclosure of a conflict of interest with the corporation:

Disclosure of interest

120. (1) A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of any interest that he or she has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer

- (a) is a party to the contract or transaction;
- (b) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or
- (c) has a material interest in a party to the contract or transaction.

²¹ [1966] S.C.R. 673 [*Peso Silver*].

²² In *Canadian Metals Exploration Ltd. v. Wiese*, 2007 BCCA 318, 33 B.L.R. (4th) 50, the Court distinguished *Peso Silver*. In *obiter dicta*, the Court referenced academic commentary suggesting *Peso Silver* may not be good law. It also cited commentary suggesting that if *Peso Silver* is still good law, it must be applied in the following narrow circumstances: where the director demonstrates he did everything reasonably possible to get the corporation to take the opportunity, where the director opposed the corporation's refusal of the opportunity, the corporation refused the opportunity despite the director's advice and where the director was not in a position to control the outcome of the vote.

5.6 A similar duty is imposed upon directors and senior officers by the *BCBCA*. Section 148(1) states:

...a director or senior officer of a company is liable to account to the company for any profit that accrues to the director or senior officer under or as a result of a contract or transaction in which the director or senior officer holds a disclosable interest.

5.7 A “disclosable interest”, as defined in section 147(1) of the *BCBCA*, is when:

- (a) the contract or transaction is material to the company,
- (b) the company has entered, or proposes to enter, into the contract or transaction, and
- (c) either of the following applies to the director or senior officer:
 - (i) the director or senior officer has a material interest in the contract or transaction;
 - (ii) the director or senior officer is a director or senior officer of, or has a material interest in, a person who has a material interest in the contract or transaction.

5.8 It should be noted that Division 3 of the *BCBCA* also sets out various instances where a director or senior officer will not be held to have a disclosable interest. Nevertheless, a prudent director or senior officer must ensure that conflicts of interest, both existing and likely to occur, are laid out before the corporation, and that all information relevant to pending or particular business dealings of the corporation are revealed. Additionally, all information or business opportunities that have been gained through the directorship must be appropriated to the corporation’s use.

6.0 INDUCEMENT OF BREACH OF CONTRACT

6.1 Directors and officers of a corporation acting within the scope of their authority are not normally liable in tort for inducing or procuring a breach of a contract with the corporation. They may, however, be found personally liable if they do not act *bona fide* in the best interests of the corporation.

6.2 An example of this proposition is the Ontario High Court decision of *McFadden v. 481782 Ontario Ltd.*²³ The president of the corporation was found liable for “interference inducing a breach of contractual relations”. Essentially, the president induced the defendant to breach its contract of employment with an individual. The president was not acting in the corporation’s best interest in inducing this breach; he was acting to better position himself for negotiations with the corporation. He was found personally liable because he failed to act *bona fide* within the scope of his authority as the president of the corporation. The corporation was insulated from the legal consequences of the act because the president had acted outside the scope of his authority.

6.3 In *McFadden*, Callon J. summarized the conditions under which a director of a corporation would be found personally liable for inducing a breach of contract:

In short, if an officer or director of a corporation is to be relieved, as an agent, of the consequences of his otherwise tortious act of inducement, it is not because he is the company’s alter ego. Rather, it is because in so acting he acts under the compulsion of a duty to the corporation. His act is thus justified. But where he does not act under such a duty, as, for example, where he fails to act *bona fide* within the scope of his authority, his act is no longer justified, and he becomes liable.²⁴

7.0 DUTY TO SHAREHOLDERS

7.1 The position in Canada is that a director’s duty to account is primarily to the corporation for whom he is an agent and not to the shareholders. Therefore, the corporation must be a party to any action for a breach of fiduciary duty.²⁵

7.2 However, when directors discharge their primary duty and act in the best interests of the corporation, in most cases they are also acting in the best interests of the shareholders. Thus, it must be determined whether directors owe a separate and distinct fiduciary duty directly to the shareholders.

²³ (1984), 27 B.L.R. 173 [*McFadden*].

²⁴ *Ibid.* at para. 40.

²⁵ *Clarkson v. Davies*, [1922] 3 W.W.R. 913 (P.C.).

7.3 Directors and officers of a corporation owe their fiduciary duty to the corporation, always bearing in mind the interests of all stakeholders including the shareholders generally.²⁶

7.4 However, the Alberta Court of Queen's Bench in *Tongue v. Vencap Equities Alberta Ltd.*²⁷ decided that there are instances where directors may be liable directly to shareholders. In *Tongue*, the directors had purchased shares from the shareholders at sixty cents per share. After the purchase, the directors re-sold the shares to a third party for two dollars and sixteen cents per share. The Alberta Court of Queen's Bench ultimately decided in favour of the shareholders ruling that the directors were liable for both a breach of their fiduciary duty to the shareholders and for insider trading pursuant to section 131 of the *CBCA*.

7.5 Pursuant to *Tongue*, there are three instances where a director or officer may become a fiduciary outside of the corporate statutes altogether:

- (i) When a director acts outside his or her ordinary duties;
- (ii) When a director purchases shares from a shareholder;
- (iii) Or, when a Court deems it appropriate to find an existing fiduciary duty when the parties' relationship has developed as a matter of business exigency.

7.6 We note that a fiduciary duty may not arise every time a share transaction occurs between a director and a shareholder.²⁸ Instead, the dynamics of the director-shareholder relationship should be examined to determine whether a fiduciary duty should be imposed. Liability may not flow if it can be shown that there was no trust placed on the directors by the shareholder, the transaction proceeded at arm's length, the shareholders did not rely on the directors for advice and had retained an accounting firm to assist them, and the shareholders were not peculiarly vulnerable but were sophisticated and experienced business people.²⁹

7.7 There are circumstances in which directors owe a direct fiduciary duty to a group of shareholders or a specific shareholder. Such duties will exist when directors have direct dealings with the particular shareholder or when the shareholders have been misled in some

²⁶ *Peoples*, *supra* note 3.

²⁷ (1994), 148 A.R. 321 (Q.B.), *aff'd* 184 A.R. 368 (C.A.) [*Tongue*].

²⁸ *Weiss v. Schad*, [1999] O.J. No. 4356 (S.C.).

²⁹ *Ibid.*

manner. For example, in the case of *Dusik v. Newton*³⁰ a director was held to be in breach of his fiduciary duty to a minority shareholder because he did not disclose, when negotiating with the shareholder, that the corporation had received an offer to purchase all of the outstanding stock at a substantially higher price.

7.8 As indicated by these cases, the duties of directors towards shareholders continue to be considered in the context of the primary fiduciary duties that are owed by directors to the corporation, and liabilities are assessed on the basis that a breach of the duty to the shareholders constitutes a breach of the directors' duty to the corporation.

7.9 Corporate legislation provides relief to shareholders in some circumstances as well. Where the breach of fiduciary duty to the corporation may constitute conduct oppressive to shareholders, shareholders are entitled to relief under the statutory oppression remedies. These remedies are found in section 227 of the *BCBCA* and sections 241 and 242 of the *CBCA*.

7.10 The oppression remedy is in place to protect the reasonable expectations of a shareholder.³¹ Reasonable expectations of a shareholder are determined by looking at:³²

- (i) the norms of business practices;
- (ii) the nature of the corporation;
- (iii) the relationship of the parties to one another;
- (iv) past practices by the corporation;
- (v) steps that the shareholder could have taken to protect himself;
- (vi) representations made to the shareholder by promotional corporate materials;
and
- (vii) the requirement of directors and officers to attempt to resolve conflicting interests fairly and equitably.

7.11 If a breach of a shareholder's reasonable expectations is established, the court will decide whether such breach was oppressive, unfairly prejudicial or unfairly disregarding of the

³⁰ (1985), 62 B.C.L.R. 1 (C.A.).

³¹ *Re BCE Inc.* 2008 SCC 69, [2008] 3 S.C.R. 560.

³² *Ibid.* at paras. 72-88.

shareholders interests. “Oppression carries the sense of conduct that is coercive, abusive and suggests bad faith. Unfair prejudice may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, unfair disregard of interests extends the remedy to ignoring an interest as being of no importance contrary to the stakeholders’ reasonable expectations.”³³

8.0 DUTY TO FELLOW DIRECTORS

8.1 In addition to their fiduciary duty to the corporation, directors may also owe a duty to their fellow directors. In *Beamish v. Solnick*³⁴, two individuals were the sole directors of a small corporation. They were also the sole shareholders, although one director did not hold his shares in a personal capacity. They agreed to sell their business, but one director, acting in his own best interests, delayed the completion of the sale by refusing to sign. A representative action by the corporation and a personal action for damages were brought against the defaulting director.

8.2 In finding that the defaulting director had violated the duties imposed by the *Ontario Business Corporations Act*, namely to act honestly and in good faith with a view to the best interests of the corporation, Mr. Justice Galligan of the Ontario High Court stated:

I am convinced that there can be a cause of action by one director against the other in certain circumstances. In my opinion, if a director of a corporation acts in contravention of his duties to the corporation under s. 144 of the *Business Corporations Act* [Ontario], and when doing so, he knows or ought to know that his conduct not only is against the best interests of the corporation, but will also subject another director to a risk of special harm or damage quite apart from the damage to be suffered by the corporation, then in my opinion, he owes a duty to that director as well as the corporation, not to subject him to a special harm or damage.³⁵

8.3 As indicated in this case, the duty of care that is owed by directors to their fellow directors is quite restrictive and is assessed in the context of the primary duty that directors owe to their corporation.

³³ *Ibid.* at para. 67.

³⁴ (1980), 10 B.L.R. 224 (Ont. H.C.).

³⁵ *Ibid.* at para. 26.

9.0 DUTY TO CREDITORS

9.1 With reference to the *Peoples* case, directors do not owe a fiduciary duty of care to creditors. Because of the *Peoples* case, directors do owe a statutory duty to creditors to exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances.³⁶

9.2 We note that the *Peoples* decision is relatively new and has already faced criticism. In 2006, the Ontario government assented to Bill 152³⁷ which amended the *Ontario Business Corporations Act*³⁸ to read:

Standards of care, etc., of directors, etc.

134(1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties *to the corporation* shall...

(emphasis added)

9.3 The addition of “to the corporation” suggests that, at least in Ontario, directors and officers owe a fiduciary and statutory duty of care only to the corporation, contrary to *Peoples*. British Columbia has not made such an amendment to date.

9.4 Thus, it is important to note that the scope of the statutory duty of care is constantly evolving. With time, it will become clearer whether directors and officers owe a statutory duty of care to creditors pursuant to *Peoples* or whether the statutory duty of care is to be afforded to the corporation only.

9.5 Nevertheless, directors of some corporations, namely corporate deposit institutions or corporations that routinely receive monies in trust, may owe a duty directly to the special class of creditors since the depositors and beneficiaries of the trust monies are considered creditors of the corporation. This duty, however, would not extend to ordinary creditors of the corporation.

³⁶ *CBCA*, *supra* note 2 at s. 122(1)(b); *Peoples*, *supra* note 3 at para. 57.

³⁷ *Ministry of Government Services Consumer Protection and Service Modernization Act*, S.O. 2006, c. 34.

³⁸ R.S.O. 1990, c. B-16.

9.6 In addition, directors' actions may be reviewed when a corporation becomes insolvent or makes an assignment into bankruptcy. The courts have held that a trustee may bring an action against corporate directors who have breached their fiduciary duty to the corporation.

9.7 In *Weber Feeds Ltd. (Trustee of) v. Weber*³⁹, the corporation sold property to a third party, but the director maintained an option to purchase the property from the third party. Some fifteen days after the sale, the corporation made an assignment into bankruptcy. The trustee sued for an accounting of the transaction and for profit made by the director. The Ontario Court of Appeal held the following:

If as a result of the disposal of an asset by the company on the eve of bankruptcy a right is acquired by a director, the director must account to the trustee in bankruptcy of the company for any profit from the disposal of that right.⁴⁰

9.8 In *Sigarson v. Langbridge*⁴¹ the directors of the corporation used corporate funds to purchase a building, but the beneficial ownership of the building was placed in the names of the directors. The trustee of the corporation brought an action for the declaration of a trust and the Alberta Court of Queen's Bench found that the directors were under fiduciary duty to account to the corporation for the property.

9.9 In addition to the common law remedy, creditors have recourse through the oppression action found in section 241 of the *CBCA*, and possibly through that found in section 227 of the *BCBCA*.⁴² Through the oppression action, a creditor may apply to the court and be granted an order rectifying the matters complained of if the court is satisfied that the powers of the directors of the corporation have been exercised in the manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any creditor.

³⁹ (1979), 24 O.R. (2d) 754 (C.A.).

⁴⁰ *Ibid.* at para. 8.

⁴¹ (1977), 9 A.R. 72 (Q.B.).

⁴² Section 227 grants the right to bring an action to shareholders which include "any other person whom the court considers to be an appropriate person to make an application under this section."

9.10 Directors or officers should be particularly cautious when dealing with creditors or prospective creditors of the corporation when, for example, arranging a bank line of credit. Creditors rely on corporate management to provide accurate information. Even though these dealings are not viewed in the context of a fiduciary duty owed directly to the creditors, corporate management can still be held personally accountable if their acts constitute breaches of warranty or misrepresentations that provide grounds for a lawsuit.⁴³

10.0 PUBLIC COMPANIES

10.1 Directors of a corporation listed on the Toronto Stock Exchange (“TSX”) and the Toronto Stock Venture Exchange (“TSXV”) and other reporting issuers (i.e., public companies) must be aware of additional obligations and duties. A TSX and TSXV listed corporations are regulated by the TSX and TSXV policies, respectively. Moreover, any reporting issuer or trading of securities which has a connection to British Columbia will also be regulated by the British Columbia Securities Commission (the “Commission”).

10.2 The TSX and TSXV impose similar obligations on each listed corporation to undertake certain actions. In the event that a corporation fails to comply with these obligations, the corporation may be required to suspend trading activity on the market. In most cases, a breach of the policies of the TSX or TSXV also constitutes a breach of the *Securities Act*⁴⁴. As a result, the TSX and TSXV may also approach the Commission to request that it take certain action against the directors and officers of that corporation.

10.3 Directors and officers of public companies may face civil or criminal liability. Criminal liability is rare unless there are egregious facts that warrant such prosecution. Civil liability flows from the *Securities Act* and directors and officers are prosecuted by the Commission. In order to find a director or officer liable, the Commission must demonstrate, on a balance of probabilities, that an offence was committed.

10.4 Offences that directors and officers may commit under the *Securities Act* include:

⁴³ *Supra* note 32.

⁴⁴ R.S.B.C. 1996, c. 418 [*Securities Act*].

- (i) misrepresentations in a prospectus;⁴⁵
- (ii) misrepresentations in a circular or notice;⁴⁶
- (iii) misrepresentations in a prescribed disclosure document such as a material change report;⁴⁷ or
- (iv) insider trading, tipping and recommending contrary to section 57.2.⁴⁸

10.5 The *Securities Act* also requires reporting issuers to provide timely continuous disclosure about its affairs and when there is a material change.⁴⁹ “Material change” refers to:⁵⁰

- (i) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of a security of the issuer; or
- (ii) a decision to implement such a change made by a director or senior management of the company.

10.6 In the event of a material change, the reporting issuer has an obligation to issue and file a press release as soon as practicable disclosing the nature and substance of the material change and to file a report with the Commission within ten days after the material change occurs. A non-exhaustive list of material change examples is included in Schedule “B” to this memorandum. Nevertheless, directors and officers should err on the side of disclosure when a change is arguable material.⁵¹

10.7 It is the responsibility of directors and officers to determine what changes are material; corporate policies regarding what constitutes a material change may be effective in providing greater consistency and in demonstrating that the directors and officers exercised the care, diligence and skill of a reasonably prudent person in comparable circumstances. Absent

⁴⁵ *Ibid.* at s. 131.

⁴⁶ *Ibid.* at s. 132.

⁴⁷ *Ibid.* at s. 132.1.

⁴⁸ *Ibid.* at s. 136.

⁴⁹ *Ibid.* at s. 85.

⁵⁰ *Ibid.* at s. 1(1).

⁵¹ *YBM Magnex International Inc., Re.* (2003), 26 O.S.C.B. 5285 at para. 518.

proper reporting procedures, directors and officers may face personal liability for misrepresenting the status of the corporation.⁵²

10.8 Upon a finding of liability, the Commission has sweeping powers to fine or otherwise discipline individuals involved in the offence. With respect to directors and officers, section 155 of the *Securities Act* states that an employee, officer, director or agent of a corporation who authorizes, permits or acquiesces in the corporation's offence also commits an offence and is liable to either a fine of not more than \$3,000,000 or to imprisonment for not more than three years or to both. The Commission also has the authority to impose the following:⁵³

- (i) a cease trade order against an individual;
- (ii) an order setting aside the securities transaction;
- (iii) an order imposing restitutionary or punitive payment;
- (iv) an order requiring a director or officer to resign and become prohibited from acting as a director or officer in the future;

10.9 Also, when a corporation files a document that purports to provide full, true and plain disclosure of all material facts with respect to that corporation, directors and all signatories may be liable to persons the document is sent to. These documents include prospectuses, take-over bid circulars, issuer bid circulars and offering memoranda.⁵⁴

10.10 In addition, reporting issuers are required pursuant to National Instrument 51-102-Continuous Disclosure Obligations to file certain continuous disclosure documents on the System for Electronic Document Analysis and Retrieval (SEDAR), which documents include the material change reports discussed in section 10.6, press releases, annual and interim financial statements, management discussions and analysis, management information circulars, annual information forms (for TSX listed corporations) and business acquisition reports.

⁵² *Supra* note 47.

⁵³ *Supra* note 44 at ss. 157, 161.

⁵⁴ *Supra* note 44 at s. 131-32.

10.11 Furthermore, TSX and TSXV standards require that a corporation listed on the TSX or the TSXV file reporting forms relating to activities of the corporation with the TSX or TSXV, respectively. These documents provide summary information on all material activities of the corporation.

10.12 Moreover, a director or officer must, within ten days of becoming an insider of a reporting issuer, file an insider report disclosing any direct or indirect beneficial ownership of shares of the corporation which he or she had on the date he or she became a director or officer. Where the insider has no direct or indirect beneficial ownership of shares, he or she is not required to file this report. A director or officer must, within ten days after he or she acquires or disposes of shares, file an insider report disclosing the change on the System for Electronic Disclosure by Insiders (SEDI).

10.13 Securities legislation places an additional disclosure requirement on any person who owns in excess of 10% of the issued and outstanding shares of a reporting issuer. In such cases, an additional report and a press release must be filed for every 2% increase in ownership of equity securities of the corporation within two days of such an acquisition.

11.0 OTHER STATUTES

11.1 There are several other statutes, both federal and provincial, of which directors and officers should be aware. These are listed in Schedule “A” to this memorandum. Of these statutes, the following, in particular, should be noted:⁵⁵

11.2 Income Tax Act

11.2.1 Several provisions of the federal *Income Tax Act*⁵⁶ require a person (which includes a corporation) to deduct and withhold a prescribed amount from payments it makes to another person on account of income taxes which may be payable by that other person. These deductions must be remitted to the Receiver General of Canada.

⁵⁵ Please reference the specific statutes for a complete list of relevant provisions. This section includes provisions dealing with personal liability for acquiescing in the offence of a corporation.

⁵⁶ R.S.C. 1985 (5th Supp.), c. 1 [ITA].

11.2.2 For example, section 153 requires a corporation to deduct a prescribed amount from salary, wages, commissions, pensions, death benefits, superannuations, retiring allowances, and similar payments payable to employees and remit it to the Receiver General. Similarly, Section 215 requires a corporation to deduct “withholding tax” from certain types of payments, including interest, dividends, rent, royalties, management fees and pension benefits, payable to persons who are not residents of Canada for purposes of the *ITA* and to remit such tax to the Receiver General.

11.2.3 Section 227.1 makes the directors of a corporation jointly and severally liable, together with the corporation, to pay any amount that the corporation has failed to deduct, withhold or remit as required by sections 153, 215, 135(3) or 135.1(7), or any tax the corporation has failed to pay. The liability extends to interest and penalties. The directors are not liable unless the corporation is insolvent, bankrupt or is being wound up, or if the federal government has tried but has not been able to recover the amounts from the corporation. The director is not liable:

- (i) if he was not a director at the time the company was required and failed to deduct, withhold or remit the required amount;
- (ii) if he exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances; or
- (iii) unless the proceedings are commenced within two years after he ceased to be a director.

11.2.4 Section 242 provides that where a corporation commits an offence under the *ITA*, 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 guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

11.3 Bankruptcy and Insolvency Act

11.3.1 Section 204 of the federal *Bankruptcy and Insolvency Act*⁵⁷ provides that if a corporation commits an offence under the Act, any officer or director who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.

11.3.2 A director is guilty of an offence under the *BIA* if he causes or allows the corporation to make a false entry or material omission in a statement or accounting or if he causes or allows the corporation to fraudulently dispose of its property, or within 12 months before or after bankruptcy to:

- (i) conceal, destroy or falsify a book or document relating to its property or affairs, unless there was no intent of concealing the state of the company's affairs;
- (ii) obtain any credit or property by false representation;
- (iii) fraudulently conceal or remove property of a value of \$50 or more; or
- (iv) pawn, pledge or dispose of property obtained on credit and not paid for, unless in the ordinary way of trade.

11.3.3 Penalties for these offences range from a maximum fine of \$5,000 or one year in jail or both, to a maximum fine of \$10,000 or three years in jail or both.

11.4 Environmental Statutes

11.4.1 Officers and directors may be held personally liable under section 280 of the *Canadian Environmental Protection Act*⁵⁸. Punishment may include a fine of up to \$1,000,000 and imprisonment for three years. Liability may be found where a director is found to have directed, authorized, assented to, acquiesced in or participated in the commission of the offence.

⁵⁷ R.S.C. 1985, c. B-3 [*BIA*].

⁵⁸ R.S.C. 1999, c. 33.

11.4.2 In addition to the federal environmental statute, there are several provincial environmental statutes that expose directors and officers, who play an active role in the management of their corporation, to liability for environmental damage.

11.4.3 Officers and directors may be held personally liable under section 121 of the provincial *Environmental Management Act*⁵⁹.

11.4.4 Directors and officers have the responsibility of ensuring that the corporation does not unlawfully contaminate the environment, even if the contamination is unintentional. To avoid personal liability for environmental offences, directors and officers must prove that they took positive steps to avoid and minimize the effects of environmental contamination. Under the *Environmental Management Act*, the following are examples of what may also constitute an offence for directors and officers:

- (i) Neglect or refusal to supply an environmental impact assessment when required to do so;
- (ii) Supplying an environmental impact assessment that is known to be false or misleading or that contains false or misleading information;
- (iii) Neglecting or refusing to comply with an order made under the Act; or
- (iv) Obstructing or resisting an officer acting under the provisions of the Act.

11.4.5 A director or officer can be charged with a wide variety of offences under the *Environmental Management Act*. The penalties for offences include a fine of up to \$1 million, imprisonment of up to six months or both. The courts also have the power to order an injunction on certain activities of the corporation, prohibit future actions and order payment for the cost of clean-up. Directors and officers may also be liable for the costs of remediation of a contaminated site. Thus, personal liability may flow unless directors and officers are able to establish lack of knowledge or establish a defense of due diligence.

11.4.6 It should be noted that officers' and directors' liability in the area of environmental protection is constantly evolving, with a trend towards increasing liability.

⁵⁹ S.B.C. 2003, c. 53.

11.5 Employment Standards Act

11.5.1 Under section 96 of the British Columbia *Employment Standards Act*⁶⁰, a director or officer can be held to be personally liable to an employee for up to two months' wages when the corporation fails to pay them.

11.5.2 In contrast to the *Employment Standards Act*, section 119 of the *CBCA* provides for liability for up to six months' unpaid wages against directors of a corporation incorporated or continued under that Act.

11.6 Social Service Tax Act

11.6.1 Section 122 of the British Columbia *Social Service Tax Act*⁶¹ provides that where a corporation is guilty of an offence under the Act, every officer or director who directed, authorized, assented to, acquiesced or participated in the commission of the offence is a party to and guilty of the offence.

11.6.2 Penalties for these offences range from a maximum fine of \$2,000 to a maximum of \$10,000 or two years in jail or both, and an additional fine equal to the amount of tax not collected, remitted or paid, plus any penalties or interest.

11.7 Goods and Services Tax

11.7.1 Section 323 of the Goods and Services Tax, which is included in Part IX of the *Excise Tax Act*⁶², provides that where a corporation fails to remit tax as required under subsection 228(2), (2.3) or section 230.1, the directors of the corporation at the time the corporation was required to remit the tax are jointly and severally liable to pay it. The liability extends to interest and penalties.

11.7.2 The directors are only liable if the federal government has tried but has not been able to recover the amounts from the corporation, the corporation is insolvent, bankrupt or is being wound up. A director will not be liable for the corporation's failure where such director

⁶⁰ R.S.B.C. 1996, c. 113.

⁶¹ R.S.B.C. 1996, c. 431.

⁶² R.S.C. 1985, c. E-15.

exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances. Assessments of amounts owing by directors must be made within two years after the person last ceased to be a director of the corporation.

11.7.3 Sections 326, 327, 328 and 329 of the *Excise Tax Act* provide a list of other offences for which a director or officer may be liable. Examples of these offences are failing to file a return, making deceptive statements in a required document, or failing to pay tax owed. Penalties for these offences may be as high as 200% of the tax sought to be evaded or the rebate or refund sought to be gained, plus a possible 5 years in jail. Section 330 of the GST imposes personal liability on an officer or director who directed, authorized, assented to, acquiesced in or participated in the commission of an offence under the Act, whether or not the corporation has been prosecuted or convicted.

11.8 Corporation Capital Tax Act

11.8.1 Under section 47(5) of the British Columbia *Corporation Capital Tax Act*⁶³, an officer, director or agent of a corporation who directed, authorized, assented to or acquiesced or participated in the commission of an offence is a party to the offence. Offences include making omissions or false statements in submissions required by the act, altering or omitting information in the records of a financial corporation, willfully attempting to evade compliance with the Act, or conspiring with any person to commit an offence.

11.8.2 Penalties for offences under the Act range from a fine of \$25 to \$10,000, an additional penalty of up to double the amount of the tax that would otherwise be payable, or a prison term of up to two years or both.

11.9 Employment Insurance Act

11.9.1 Sections 39(3), 107 and 125(17) of the federal *Employment Insurance Act*⁶⁴ provide that where a corporation commits an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the

⁶³ R.S.B.C. 1996, c. 73.

⁶⁴ S.C. 1996, c. 23.

offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.

11.10 Competition Act

11.10.1 Section 65(4) of the federal *Competition Act*⁶⁵ provides that where a corporation commits an offence under that section, 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 guilty of the offence and is liable for the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

11.10.2 Penalties pursuant to section 65 include a fine with no set limit or imprisonment for a term of up to 10 years or both.

11.11 Excise Tax Act

11.11.1 Pursuant to section 96(3) of the federal *Excise Tax Act*⁶⁶, where a corporation commits an offence under the Act, 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 guilty of the offence and is liable on summary conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

11.12 Workers' Compensation Act

11.12.1 Pursuant to s. 213 of the British Columbia *Workers' Compensation Act*⁶⁷, a director, officer or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence, whether or not the corporation is prosecuted for the offence.

11.12.2 Penalties for a first offence under the Act are a fine up to \$589,010 plus a daily fine if the offence is a continuing one, or imprisonment for a term not exceeding six months, or both.

⁶⁵ R.S.C. 1985, c. C-34.

⁶⁶ R.S.C. 1985, c. E-15.

⁶⁷ R.S.B.C. 1996, c. 492.

11.13 Criminal Code

11.13.1 Directors and officers may be held criminally liable for any criminal offence they commit in the course of their duties. The *Criminal Code of Canada*⁶⁸ contains numerous provisions which impose liability upon directors and officers. Directors and Officers are criminally liable if they do or omit anything for the purpose of aiding or abetting any person to commit an offence.⁶⁹ Other offences include theft,⁷⁰ conspiracy,⁷¹ publishing defamatory libel,⁷² falsifying books and documents,⁷³ or acting unlawfully towards employees.⁷⁴

12.0 CONCLUSION

12.1 This Memorandum summarizes some of the more common issues with respect to the duties and obligations of directors and officers and their potential liability when acting in these capacities. This Memorandum should not be considered as a reference source on the subject but merely as an aide-memoir to assist individuals in finding general statements on these issues. If you require more information please contact a legal advisor.

⁶⁸ R.S.C. 1985, c. C-46.

⁶⁹ *Ibid.* at s.21(1).

⁷⁰ *Ibid.* at s. 322(1).

⁷¹ *Ibid.* at s. 465.

⁷² *Ibid.* at s. 301.

⁷³ *Ibid.* at s. 397.

⁷⁴ *Ibid.* at s. 425.

13.0 SCHEDULE A: LIABILITY IMPOSED BY STATUES

13.1 The following is a list of federal and provincial statutes, current as of July 31, 2009, which impose personal liability on directors and officers when they acquiesce in the offences of the corporation.

13.2 Federal

1. *Advance Payments for Crops Act*, R.S.C. 1985, c. C-49, s. 13(4)
2. *Agricultural Marketing Programs Act*, S.C. 1997, c. 20, s. 38(2)
3. *Air Travelers Security Charge Act*, S.C. 2002, c. 9, s. 67.
4. *Antarctic Environmental Protection Act*, S.C. 2003, c. 20, s. 51(1).
5. *Bank Act*, S.C. 1991, c. 46, s. 986.
6. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 204.
7. *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.), s. 36.
8. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss. 32, 149(4), 150(4), 153(9), 235(5), 250(2).
9. *Canada Corporations Act*, R.S.C. 1970, c. C-32, ss. 100.3, 108.3(2), 108.4, 111.1, 129.1, 133(3), 135.93(4), .
10. *Canada Deposit Insurance Corporation Act*, R.S.C. 1985, c. C-3, s. 48.
11. *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18, s. 24.5.
12. *Canada National Parks Act*, S.C. 2000, c. 32, s. 27.5.
13. *Canada Not-For-Profit Corporations Act*, S.C. 2009, c. 23, s. 262(4).
14. *Canada Pension Plan Act*, R.S.C. 1985, c. C-8, ss. 21.1, 103(2).
15. *Canada Transportation Act*, S.C. 1996, c. 10, s. 53.6(4).
16. *Canadian Environmental Protection Act*, S.C. 1999, s. 33, s. 280(1).

17. *Canadian Ownership and Control Determination Act*, R.S.C. 1985, c. C-20, s. 25.
18. *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, s. 68(4).
19. *Citizenship Act*, R.S.C. 1985, c. C-29, s. 36(2).
20. *Competition Act*, R.S.C. 1985, c. C-34, s. 65(4).
21. *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 38.
22. *Cooperative Credit Associations Act*, S.C. 1991, c. 48, s. 467.
23. *Corporations Returns Act*, R.S.C. 1985, c. C-43, s. 9(2).
24. *Cultural Property Export & Import Act*, R.S.C. 1985, c. C-51, s. 46.
25. *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 158.
26. *Defence Production Act*, R.S.C. 1985, c. D-1, s. 46.
27. *Electricity & Gas Inspection Act*, R.S.C. 1985, c. E-4, s. 35(2).
28. *Employment Insurance Act*, S.C. 1996, c. 23, ss. 39(3), 46.1, 83, 107, 125(17).
29. *Energy Administration Act*, R.S.C. 1985, c. E-6, s. 31(2), 48(2).
30. *Energy Efficiency Act*, S.C. 1992, c. 36, s. 29.
31. *Energy Monitoring Act*, R.S.C. 1985, c. E-8, s. 40.
32. *Environmental Violations Administrative Monetary Penalties Act*, S.C. 2009, c. 14, s. 8(1).
33. *Excise Tax Act*, R.S.C. 1985, c. E-15, ss. 96(3), 323, 330.
34. *Excise Act*, S.C. 2002, c. 22, s. 226.
35. *Export and Import of Rough Diamonds Act*, S.C. 2002, c. 25, s. 42.
36. *Export & Import Permits Act*, R.S.C. 1985, c. E-19, s. 20.
37. *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9, ss. 183, 465.
38. *Fisheries Act*, R.S.C. 1985, c. F-14, s. 78.2.
39. *Fishing & Recreational Harbours Act*, R.S.C. 1985, c. F-24, s. 21.

40. *Foreign Publishes Advertising Services Act*, S.C. 1999, c. 23, s. 11.
41. *Hazardous Materials Information Review Act*, R.S.C. 1985, c. 24 (3rd Supp.), s. 49(2).
42. *Hazardous Products Act*, R.S.C. 1985, c. H-3, s. 28(2).
43. *Health of Animals Act*, S.C. 1990, c. 21, s. 71.
44. *Human Pathogens and Toxins Act*, S.C. 2009, c. 24, s. 63.
45. *Immigration Act*, R.S.C. 1985, c. I-2, s. 99.
46. *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, ss. 227.1, 242.
47. *Insurance Companies Act*, S.C. 1991, c. 47, s. 1028.
48. *International Boundary Waters Treaty Act*, R.S.C. 1985, c. I-17, s. 24.
49. *International Bridges and Tunnels Act*, S.C. 2007, c. 1, ss. 10(3), 22(3), 27(3), 42(3).
50. *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30, s. 11(5).
51. *Livestock Feed Assistance Act*, R.S.C. 1985, c. L-10, s. 20(2).
52. *Marine Transportation Security Act*, S.C. 1994, c. 40, ss. 28(4), 46(4).
53. *Meat Inspection Act*, R.S.C. 1985, c. 25 (1st Supp.), s. 24.
54. *Migratory Birds Convention Act*, S.C. 1994, c. 22, s. 13(1.2).
55. *Motor Vehicle Fuel Consumption Standards Act*, R.S.C. 1985, c. M-9, s. 32.
56. *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 121(2).
57. *Northern Pipeline Act*, R.S.C. 1985, c. N-26, s. 38.
58. *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.), s. 38(5).
59. *Pest Control Products Act*, S.C. 2002, c. 28, s. 70(1).
60. *Petroleum and Gas Revenue Tax Act*, R.S.C. 1985, c. P-12, s. 41.
61. *Plant Protection Act*, S.C. 1990, c. 22, s. 54.
62. *Proceeds of Crime (Money Laundering) Act*, S.C. 1991, c. 26, s. 7.

63. *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, s. 78.
64. *Quarantine Act*, S.C. 2005, c. 20, s. 73(1).
65. *Radiocommunications Act*, R.S.C. 1985, c. R-2, s. 11.
66. *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.), s. 43.
67. *Remote Sensing Space Systems Act*, S.C. 2005, c. 45, s. 40.
68. *Softwood Lumber Products Export Charge Act*, S.C. 2006, c. 13, s. 75.
69. *Species At Risk Act*, S.C. 2002, c. 29, s. 98.
70. *Tobacco Act*, S.C. 1997, c. 13, s. 50.
71. *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29, s. 59.
72. *Transportation of Dangerous Goods Act*, S.C. 1992, c. 34, s. 39.
73. *Trust and Loan Companies Act*, S.C. 1991, c. 45, s. 535.
74. *Weather Modification Information Act*, R.S.C. 1985, c. W-5, s. 7(2).
75. *Weights & Measures Act*, R.S.C. 1985, c. W-6, s. 35(3).
76. *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52, s. 24.

13.3 Provincial

1. *Agricultural Land Commission Act*, S.B.C. 2002, c. 36, s. 57(5).
2. *Agricultural Produce Grading Act*, R.S.B.C. 1996, c. 11, s. 11.
3. *Business Corporations Act*, S.B.C. 2002, c. 57, s. 427(2).
4. *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 164(5).
5. *Civil Rights Protection Act*, R.S.B.C. 1996, c. 49, ss. 2(2), 5(3).
6. *Commercial River Rafting Safety Act*, R.S.B.C. 1996, c. 56, s. 11(10).
7. *Cooperative Association Act*, R.S.B.C. 1996, c. 71, s. 200.

8. *Corporation Capital Tax Act*, R.S.B.C. 1996, c. 73, s. 47(5).
9. *Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82, s. 101.
10. *Cremation, Interment and Funeral Services Act*, S.B.C. 2004, c. 35, s. 58(2).
11. *Dike Maintenance Act*, R.S.B.C. 1996, c. 95, s. 6(3).
12. *Drinking Water Protection Act*, S.B.C. 2001, c. 9, s. 99.
13. *Employee Investment Act*, R.S.B.C. 1996, c. 112, s. 42(2).
14. *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 125(2).
15. *Energy Efficiency Act*, R.S.B.C. 1996, c. 114, s. 5(2).
16. *Environmental Management Act*, S.B.C. 2003, c. 53, ss. 25(3), 115(9), 121(1).
17. *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 127, s. 49(3).
18. *Financial Institutions Act*, R.S.B.C. 1996, c. 141, s. 253.1(5).
19. *Food Products Standards Act*, R.S.B.C. 1996, c. 153, s. 12.
20. *Forest Act*, R.S.B.C. 1996, c. 157, ss. 164.1(3), 166.
21. *Forest and Range Practices Act*, S.B.C. 2002, c. 69, ss. 71(4), 102.
22. *Heritage Conservation Act*, R.S.B.C. 1996, c. 187, s. 36(4).
23. *Homeowner Protection Act*, S.B.C. 1998, c. 31, ss. 28.3(9), 34(2).
24. *Hotel Room Tax Act*, R.S.B.C. 1996, c. 207, s. 35.
25. *Income Tax Act*, R.S.B.C. 1996, c. 215, s. 66
26. *Insurance (Captive Company) Act*, R.S.B.C. 1996, c. 227, s. 12(4).
27. *Insurance Premium Tax Act*, R.S.B.C. 1996, c. 232, s. 33.
28. *Integrated Pest Management Act*, S.B.C. 2003, c. 58, ss. 23(9), 27.
29. *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267, s. 77.
30. *Local Government Act*, R.S.B.C. 1996, c. 323, s. 981(3).

31. *Logging Tax Act*, R.S.B.C. 1996, c. 277, s. 37(5).
32. *Manufactured Home Park Tenancy Act*, S.B.C. 2002, c. 77, s. 86.1(8).
33. *Mineral Land Tax Act*, R.S.B.C. 1996, c. 290, s. 20(5).
34. *Mineral Tax Act*, R.S.B.C. 1996, c. 291, s. 41.
35. *Mines Act*, R.S.B.C. 1996, c. 293, s. 37(5).
36. *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313, s. 22(3).
37. *Motor Dealer Act*, R.S.B.C. 1996, c. 316, s. 35(1).
38. *Motor Fuel Tax Act*, R.S.B.C. 1996, c. 317, s. 68.
39. *Motor Vehicle (All Terrain) Act*, R.S.B.C. 1996, c. 319, s. 8(5).
40. *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 27.03(2).
41. *Partnership Act*, R.S.B.C. 1996, c. 348, s. 90.4(2).
42. *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352, s. 72(3).
43. *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361, s. 134(3).
44. *Pharmacy Operations and Drug Scheduling Act*, S.B.C. 2003, c. 77, s. 29(4).
45. *Private Investigators and Security Agents Act*, R.S.B.C. 1996, c. 374, s. 32(3).
46. *Private Managed Forest Land Act*, S.B.C. 2003, c. 80, ss.26(3), 35(4)
47. *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378, s. 34(3).
48. *Public Health Act*, S.B.C. 2008, c. 28, s. 96(5), 100(1).
49. *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, ss. 30(2), 39(3).
50. *Real Estate Services Act*, S.B.C. 2004, c. 42, s. 118(3).
51. *Residential Tenancy Act*, S.B.C. 2002, c. 78, s. 94.1(8).
52. *Safety Standards Act*, S.B.C. 2003, c. 39, s. 75(1).
53. *Securities Act*, R.S.B.C. 1996, c. 418, ss. 140.3(2)-(4).

54. *Security Services Act*, S.B.C. 2007, c. 30, s. 35(5).
55. *Small Business Venture Capital Act*, R.S.B.C. 1996, c. 429, s. 35(3).
56. *Social Service Tax Act*, R.S.B.C. 1996, c. 431, s. 122.
57. *Tobacco Control Act*, R.S.B.C. 1996, c. 451, s. 12(2).
58. *Tobacco Tax Act*, R.S.B.C. 1996, c. 452, s. 38.
59. *Transport of Dangerous Goods Act*, R.S.B.C. 1996, c. 458, s. 19.
60. *Vancouver Charter*, S.B.C. 1953, c. 55, s. 606(3).
61. *Veterinary Drugs Act*, R.S.B.C. 1996, c. 363, s. 78(4).
62. *Water Act*, R.S.B.C. 1996, c. 483, s. 97.
63. *Water Protection Act*, R.S.B.C. 1996, c. 484, s. 17(5).
64. *Wildfire Act*, S.B.C. 2004, c. 31, ss. 30(2), 44.
65. *Workers' Compensation Act*, R.S.B.C. 1996, c. 492, s. 213.

14.0 SCHEDULE B: LIST OF MATERIAL CHANGES

14.1 National Policy 51-201, Disclosure Standards (Canadian Securities Administrators) provides a non-exhaustive list of the types of events or information that may constitute “material changes” of a corporation:

- (i) changes in share ownership that may affect control of the corporation;
- (ii) major reorganizations, amalgamations, or mergers;
- (iii) take-over bids, issuer bids, or insider bids;
- (iv) the public or private sale of additional securities;
- (v) planned repurchases or redemptions of securities;
- (vi) planned splits of common shares or offerings of warrants or rights to buy shares;
- (vii) any share consolidation, share exchange, or stock dividend;

- (viii) changes in a corporation's dividend payments or policies;
- (ix) the possible initiation of a proxy fight;
- (x) material modifications to rights of security holders;
- (xi) a significant increase or decrease in near-term earnings prospects;
- (xii) unexpected changes in the financial results for any periods;
- (xiii) shifts in financial circumstances, such as cash flow reductions, major asset write-offs or write-downs;
- (xiv) changes in the value or composition of the corporation's assets;
- (xv) any material change in the corporation's accounting policy;
- (xvi) any development that affects the corporation's resources, technology, products or markets;
- (xvii) a significant change in capital investment plans or corporate objectives;
- (xviii) major labour disputes or disputes with major contractors or suppliers;
- (xix) significant new contracts, products, patents, or services or significant losses of contracts or business;
- (xx) significant discoveries by resource corporations;
- (xxi) changes to the board of directors or executive management, including the departure of the company's Chief Executive Officer, Chief Financial Officer, Chief Operating Officer or president (or persons in equivalent positions);
- (xxii) the commencement of, or developments in, material legal proceedings or regulatory matters;
- (xxiii) waivers of corporate ethics and conduct rules for officers, directors, and other key employees;
- (xxiv) any notice that reliance on a prior audit is no longer permissible;
- (xxv) de-listing of the corporation's securities or their movement from one quotation system or exchange to another;

- (xxvi) significant acquisitions or dispositions of assets, property or joint venture interests;
- (xxvii) acquisitions of other corporations, including a take-over bid for, or merger with, another corporation;
- (xxviii) the borrowing or lending of a significant amount of money;
- (xxix) any mortgaging or encumbering of the corporation's assets;
- (xxx) defaults under debt obligations, agreements to restructure debt, or planned enforcement procedures by a bank or any other creditors;
- (xxxi) changes in rating agency decisions; and
- (xxxii) significant new credit arrangements.



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