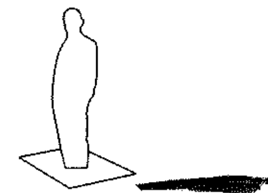
Legal Responsibilities of Directors and Officers in Canadian Co-operatives



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University of Saskatchewan

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Legal Responsibilities of Directors and Officers in Canadian Co-operatives

by

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and

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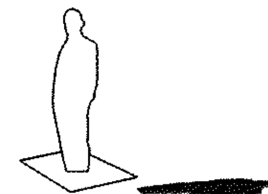

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Table of Abbreviations

ACA	*Co-operative Associations Act*, R.S.A. 1980, c. C-24.
ACA Reg.	*Standard Bylaws*, Alta. Reg. 439/83.
BCCA	*Co-operative Association Act*, R.S.B.C. 1979, c.66.
CA(BC)	*Company Act*, R.S.B.C. 1979, c.59 (s.137, 138, 142-147, 152 & 166 apply by virtue of BCCA, s.30.1; s.219 applies by virtue of BCCA, ss.39(1), (2); 235 & 239 apply by virtue of BCCA, s.48.6;
CCA	*Canada Co-operative Associations Act*, S.C. 1970-71-72, c.6.
MCA	*The Co-operatives Act*, R.S.M. 1987, c. C-223.
NBCA	*Co-operative Associations Act*, S.N.B. 1978, c. C-22.
NBCA Reg	*Co-operative Associations Regulation - Co-operative Associations Act*, N.B. Reg. 82-58.
NCA	*The Co-operative Societies Act*, R.S.N. 1970, c.65.
NCA Reg	*Co-operative Societies Rules*, 1978, Nfld. Reg. 297/78.
NSCA	*Co-operative Associations Act*, S.N.S. 1977, c.7.
NSCA Reg	N.S. Reg. 155/78.
OCA	*Co-operative Corporations Act*, R.S.O. 1980, c.91.
PEICA	*Co-operative Associations Act*, S.P.E.I. 1976, C.7.
PEICA Reg	*Co-operative Associations Act Regulations* (EC883/76).
QCA	*Co-operatives Act*, S.Q. 1982, c.26.
SCA	*The Co-operatives Act*, 1989, R.S.S. c. C-37.2.
SCA Reg.	*The Co-operatives Regulations*, R.S.S. c. C-37.1, Reg 1.

Preface

The legal responsibilities of directors and officers in corporations is one of the most important areas of traditional corporation law. The same holds true for co-operative corporations which are regulated by separate legislation. In addition to specific provisions in co-operative legislation which address directors' and officers' duties, the application of the provisions and the common law by the courts requires acceptance of the difference between co-operative corporations and ordinary business corporations. The differences between the two types of corporations does not allow a wholesale transfer of ordinary corporate law principles to co-operatives. This paper addresses directly and particularly the responsibilities imposed by law on directors and officers in Canadian co-operative corporations.

The law of all Canadian jurisdictions, with the exception of our two territories, is reviewed in this paper. An original draft was prepared by me, then Kathleen Ring dedicated an extensive amount of time, energy and talent to include references to co-operative law from all the provinces and from the Federal *Act*. Kathleen's task was enormous. She not only revised and added to the original text but she made exhaustive references in the endnotes to specific provisions in the eleven co-operative *Acts* and in other legislation. The ultimate result was in excess of 800 endnote references. Kathleen's contributions also included insightful comments and additions of major new material. Her contributions were invaluable and most assuredly deserve joint author status.

The intent is that the paper will become a valuable resource tool for co-operative board and management members and for the legal community as well. While the extensive endnotes and textual detail may sometimes detract from the readability of the paper, it will ensure that the original sources of the law can be located by the reader.

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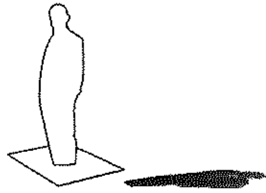
Daniel Ish
December 1995



Chapter 1

Distribution of Control Between Members and Directors

Introduction

As an introduction to the general topic of the legal responsibility of directors and officers of Canadian co-operatives, an appropriate starting point is a discussion of the division of power between the elected board of directors and the membership of co-operatives. The law concerning this division is less certain than one might surmise, as are many aspects of co-operative law, and to a large extent is fundamental to the nature of co-operatives—does the ultimate control of a co-operative lie with the membership? This introduction will discuss the statutes and case law surrounding this important issue.The various co-operative statutes grant the board of directors management power over the affairs of the co-operative. This part will discuss the division of power between the board of directors and the membership.

The functioning of boards of directors in co-operatives is worthy of close study. Although there are many similarities between co-operative boards and ordinary business corporation boards, there are significant differences which may result in differing roles of the respective boards. Co-operative directors usually devote their time for no remuneration; where they are remunerated, the remuneration tends to be of a token nature. Co-operatives often, although not always, have goals beyond that of maximizing profit. This should result in directors being selected on the basis of skills and talents which will contribute to these broader goals. Directors in co-operatives must be members and are selected by members on a one member, one vote basis. This often results in directors having less business expertise and financial expertise than the typical business corporate director. This lack of expertise may have important implications concerning control of the organization as between the directors and the co-operative officers. The officers, who have the financial expertise and who largely control the information flow to the board, can exercise a disproportionate amount of control over the affairs of the co-operative. This is also a problem in ordinary business corporations but it is suggested that it is exacerbated in the co-operative context.

The question that arises is whether directors actually manage the affairs of a co-operative and, if they do manage, to what degree they do. The size of a co-operative, like that of any other organization, has a dramatic effect on control of the organization. There is a view, supported by studies and actual events, that boards of directors in large corporations composed of

internal and external directors exercise very little management discretion. A co-operative board is in effect composed of virtually all outside directors in that the directors are not the professional managers of the organization, thus some of the knowledge gained with regard to the functioning of outside directors in ordinary business corporations may be applicable to co-operatives.

One writer has stated that: [1]

> It may still be true that the directors of a close corporation actually manage the corporation's affairs, but there is considerable evidence to show that it no longer applies to the large publicly-held corporation which has a mixed board of internal and outside directors. There is serious doubt whether such a board even exercises effective supervisory powers. According to one recent American study, these boards fulfill largely an advisory role and only exceptionally, in the case of a crisis, are they likely to intervene actively in the management of the corporation.[2]

It may be that a study of boards of directors of the larger Canadian co-operatives would lead to similar conclusions. Such results, however, should not be surprising given the complexity and diversity of both large modern co-operative corporations and of ordinary business corporations.

The Allocation of Powers

The prevalent statutory technique in co-operative statutes is to vest the power of management with the directors in the first instance[3] and then to set out various statutory mechanisms whereby the members can intervene in corporate decision-making.[4] A common method of curtailing directorial powers of management, found in the Saskatchewan,[5] Quebec,[6] British Columbia[7] and Maritime Acts,[8] is to stipulate that such powers are subject to the provisions of the association's internal rules, variously called articles, bylaws, regulations or rules. Members are thereby empowered to change the allocation of powers between the directors and themselves through the corporate constitution.

Section 72 of the Saskatchewan Act is illustrative of this approach:

> 72(1) Subject to this Act, the regulations, the articles and the bylaws, and unless the articles or bylaws provide otherwise, the board of directors, however designated, shall:
>
> (a) exercise the powers of the co-operative directly or indirectly through the employees and agents of the co-operative; and
>
> (b) direct the management of the business and affairs of the co-operative.

This provision is similar to those that appeared prior to the 1970s in most corporate legislation in letters patent jurisdictions, in that the word "shall" is used and, in itself, connotes the imperative nature of the provision.[9] However, it is dissimilar to provisions in letters patent jurisdictions in that the directors' powers are subject to the articles and bylaws. The vesting of management powers is not mandatorily in the board but the members are given considerable freedom of choice regarding the distribution of authority in their particular co-operative. In this latter respect the Saskatchewan Act is more similar to the typical memorandum jurisdiction, in that the power ultimately rests with the membership. In the typical memorandum jurisdiction the memorandum of association and the articles of association must delineate the division of authority between members and the board; failure to do so will result in the shareholders having the power to manage. Section 72(1) reverses the paramountcy over the power to manage, in that the board possesses the power unless otherwise provided in the Act, the regulations, the articles or the bylaws.

With regard to ordinary business corporations in memorandum jurisdictions, Slutsky summarizes the law as follows: [10]

> Where an article vests certain power in the board and provides no special machinery for shareholder control, the members in general meeting must pass a special resolution altering the article before they can interfere with the directors in their exercise of that authority. The shareholders by ordinary resolution are unable to derogate from this contractually delegated responsibility. Providing the directors are acting within the ambit of the authority conferred upon them by the articles, in respect of such powers, the majority of the members cannot instruct the board regarding any future course of action nor can they overrule any decision made by the directors.

The situation under the Saskatchewan Act would appear to be different.[11] While the division of control between the members and the directors may be specified in the articles[12] and such articles may only be amended by special resolution,[13] the matter may also be dealt with in the bylaws.[14] Unless the Act or the bylaws provide otherwise, bylaws can be passed or altered by a simple majority of members where ten days' notice of motion has been given.[15]

The Maritime Acts contain some additional provisions which further define the initial division of control between members and directors prior to any changes being effected by the members. Section 12 of the Nova Scotia Regulations states:

> The control of the association shall be vested in the members and effected through their membership meetings.[16]

Section 30 of the Prince Edward Island Regulations provides:

> 30. The directors shall administer all business carried on by or on account of the association. The directors shall in all their actions be under control and direction of any annual or special meetings of the members.

The New Brunswick Regulations contain the following additional provision:

> 33. The board of directors shall manage the affairs of the association and implement policies as directed at meetings of the members and in accordance with the Act, this Regulation and the bylaws of the association. [17]

The Quebec Act, in addition to a provision authorizing the members to alter the division of control in the co-operative through the internal rules, also contains a unique provision whereby the members of a small co-operative can assert complete control over the management of their association. Section 61 provides that a co-operative that has fewer than 25 members may, with the approval of at least 90% of the members, enter into a written agreement not to elect directors for one year. The members shall then administer the business of the co-operative and have the rights and obligations of the directors. [18]

The provisions in Manitoba, Ontario, Canada and Alberta which vest the power of management with the board of directors differ from the above-noted jurisdictions in that they do not allow directors powers to be made subject to the articles or the bylaws.[19] If one looks at these provisions in isolation they seem to vest absolute power with the directors, thus giving no room for membership control. With regard to a similar provision in the Ontario Business Corporations Act,[20] it has been observed that:[21]

> These statutory provisions are imperative, and it would seem to follow that any attempt, in either the articles of incorporation or bylaws, to divest the board of any or all of the management powers and place them in the hands of the shareholders would be invalid as being contrary to the command of the Acts that the directors shall manage the affairs of the corporation.

Because the provisions are imperative and do not allow a diminution of the directors' managerial power using the articles or the bylaws, one must look to other provisions in the legislation to determine whether the "power to manage" is absolutely vested with the directors.

In Manitoba, three subsections are relevant in determining the power of the members to encroach on the board's management power. The first two state:

> 64. (1)The members of a co-operative may, subject to this Act and the articles of the co-operative, at any annual meeting or any special meeting called for the purpose, enact bylaws not contrary to law and amend, repeal or replace any of them.
>
> (2)Without limiting the generality of subsection (1), the members of a co-operative may enact, amend, repeal or replace charter bylaws to provide for
>
> (a) the matters enumerated in subsection 6(4); and

> (b) any other matters in respect of which the enactment of charter bylaws is authorized or required by any provision of this Act.

Also, ss.6(4) provides that upon incorporation the articles of incorporation shall be accompanied by charter bylaws which may provide for, *inter alia*, "[t]he election, term of office, removal of and filling of vacancies among directors, committee members and officers, and their *powers*, duties and remuneration...[22](Emphasis added).

The effect of these provisions seems to be that the members can enact charter bylaws which would reduce the directors' power over management. Subsection 64(1) may not have this effect because of the words "subject to this Act," which can be interpreted to prevent member action with regard to power to manage. However, ss.64(2) specifically mentions ss.6(4), which allows for control over powers of the board. Thus, arguably, the specific references in ss.64(2) and ss.6(4) would take priority over the vesting provision in ss.63(1). Such a conclusion is, of course, consistent with the broader philosophical underpinning of co-operatives that members should have ultimate control over the organization. Nevertheless, the Manitoba Act could be more explicit in this regard. It is not at all clear from ss.6(4) that the members can allocate powers to themselves. The section mentions the allocation of power to directors; however, if the directors are denied power in the charter bylaws, that power would presumably accrue to the members.

Unlike the Manitoba Act, there is no provision in the Ontario Act for the members to remove managerial power from the directors and allocate it to themselves. The only way in which members may encroach on the directors' power to manage is through the procedure for requisitioning meetings. Ten percent of the members may requisition the directors to pass a bylaw or resolution requested by the members.[23] If the directors fail to pass the bylaw or resolution proposed by the requisitioning members within 21 days, the members may call a general meeting for the purpose of passing such bylaw or resolution and it is as effective as if passed at a directors' meeting.[24] The provisions in the Ontario Act are virtually identical to similar provisions in the Ontario Business Corporations Act. With regard to the latter, the following comment has been made:[25]

> Because the directors' power to manage the business and affairs of the corporation is expressed in the Business Corporations Act as an imperative duty, it would seem that shareholders under the Act do not have the power to reserve to themselves in the articles or bylaws the right to exercise a managerial power. Since the power to manage is expressly conferred on the directors by the Act, it can be interfered with only through the requisition procedure also provided for in the Act. No article or bylaw which is contrary to the Act can be effective.[26]

Under the Canada Act, like the Ontario Act, the only possible interference that the membership may have on the directors' managerial power is through their ability to pass bylaws at the general meeting,[27] as well as through their power to requisition a general meeting.[28] However, it is not clear whether the membership can interfere with management power by virtue of its bylaw enacting power. Subsection 64(1), which sets out the power to enact bylaws, makes the power "subject to this Act". Thus, ss.69(1) which vests managerial power with the board, arguably takes priority over ss.60(1), so that managerial decisions of the board cannot be interfered with by the membership. However, discerning the difference between a bylaw that interferes with "the power to manage" and one that does not may be a very difficult task in certain situations. Unlike the Ontario Act in this respect, the provision allowing the requisitioning of a meeting by the members does not specifically refer to "passing any bylaw or resolution".[29]

In Alberta, several provisions are relevant in determining the power of the membership to encroach on the directors' management powers. Section 27(1) of the Alberta Act states:

> 27(1) The directors *have* the general direction and supervision of the affairs and business of the association. (Emphasis added)

By using the word "have" rather than "shall", the provision suggests that the directors are vested with certain powers but it is not imperative that they exercise them. However, section 9(1) of the Standard Bylaws states:

> 9(1) The Board of Directors *shall* direct and supervise the business of the Association, and may exercise all the powers of the Association that are not required to be exercised by the Association in general meeting. (Emphasis added)

This section contemplates limitations on directorial power[30] but it is unclear whether the source of such limitations derives from the Act, the articles, the standard bylaws or the supplemental bylaws. Additionally,

ss.3(4) of the Act provides:

> 3(4) The memorandum of association shall be accompanied by a copy of the supplemental bylaws under which, together with the standard bylaws, the affairs of the association are to be regulated, governed and managed.

This provision seemingly permits the inclusion of managerial provisions in the corporate documents. However, it does not state clearly that members may thereby allocate managerial powers to themselves.

Unlike any of the Acts discussed up to this point, the Newfoundland Act has no provision stating that the business of the co-operative shall be managed by the directors. The determination of how management powers are to be allocated is, apart from specific powers delegated by the Act, left to the members who draft or amend the constitution.[31] If the members do not enact their own constitution but opt instead to adopt the form constitution in the regulations, they vest general management powers in the directors.[32]

The directors' powers to manage is further limited by statutory provisions which expressly reserve certain powers to be exercised by the members. By way of illustration, the Saskatchewan Act empowers the members[33] to make any decision to alter the co-operative's articles,[34] or bylaws,[35] to subdivide shares,[36] to increase capital,[37] to change its name,[38] to appoint[39] or remove[40] an auditor, to remove a director,[41] to sell, lease or exchange all or substantially all of the property of a co-operative, other that in the ordinary course of business of the co-operative,[42] to amalgamate,[43] to continue in another jurisdiction[44] or to dissolve an association.[45]

Finally, s.104 of the Saskatchewan Act establishes a procedure whereby members can requisition a special meeting at which they may exercise such powers as are reserved to them or their residual authority to allocate management powers.[46]

The Duty to Manage the Co-operative

All co-operative legislation requires directors to assume a managerial role in the co-operative unless the membership has encroached on their managerial powers. However, the precise nature of directors' managerial functions vary considerably between jurisdictions. The duty imposed by ss.72(1)(b) of the Saskatchewan Act is to "direct the management of the business and affairs of the co-operative" as opposed to "direct the business" or "manage the business".[47] This recognizes that boards should play a supervisory and advisory role rather than a direct management role. Nevertheless, the imperative nature of the duty makes clear that the board must retain ultimate control over all management decisions.

The Ontario Act provides that the "directors shall manage or supervise the management of the affairs and business of the co-operative".[48] The use of the disjunctive indicates that the directors need not make the managerial decisions themselves, but can comply with their statutory duty by "supervising" managerial decisions.[49]

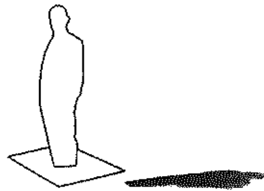
The directive in ss.27(1) of the Alberta Act does not mention managing the co-operative but says that "the directors have the general direction and supervision of the affairs and business of the association".[50] The word "direction" may suggest something different from the actual managing of the business but the precise difference is unclear. Moreover, it states that the "affairs and business" must be directed as opposed to "management" being directed; this suggests a direct connection of a management nature between the board and the business. The section does not use the disjunctive between "direction" and "supervision" as do some other similar statutes.[51] Thus, a mere supervising of the business would not meet the obligation of the section.

The remaining jurisdictions impose a duty to manage and do not allow for anything less, such as a supervisory function. Section 69(1) of the Canada Act is a typical provision. It states:

> 69. (1) The affairs of an association shall be managed by a board of directors however designated.[52]
>
> Such a provision is too narrow in imposing the duty to manage. It fails to recognize the more likely, and proper, role of boards of directors which is to set policy, to direct and supervise management, and to act in an advisory role. To speak only in terms of "managing" may include all of these, but it further suggests a closer and more direct link between the board and the day to day business of an association than is desirable.

Although the board of directors is vested with management powers, it will often delegate some of its powers to certain individuals. Section 73 of the Saskatchewan Act states that the directors may appoint a committee from their number and, by resolution, delegate powers to the committee.[53]

There are, however, certain restrictions on the powers that may be exercised by such committee.[54] As well, the directors may, unless the articles or bylaws otherwise provide, delegate powers to the officers to manage the business and affairs of the co-operative.[55]



Chapter 2

Number, Qualification, Appointment and Removal of Directors

Introduction

Canadian co-operative statutes generally contain a minimum of regulatory provisions of an imperative nature. The statutory provisions are frequently made subject to the bylaws of the co-operative or alternatively are contained in the model bylaws,[56] rules[57] or constitution[58] and therefore subject to modification by the co-operative. The members are therefore in a position to ultimately exercise control of the directorial regime through the bylaws. Given the goal of member participation and control in co-operatives, such residual control in the membership is highly desirable.

Several co-operative statutes expressly require the co-operative to set out the details of the directorial regime in its bylaws. The Saskatchewan Act, for example, states that the bylaws shall provide for "the election, term of office and removal of directors and members of committees of directors."[59] If the bylaws do not contain provisions governing these matters, the alternative rules in the legislation apply. It is that default scheme of regulation that will be examined in the ensuing discussion.

Number

No Canadian co-operative legislation has adopted the concept of the one person corporation which has been adopted by ordinary business corporation legislation. It is inconceivable that a true co-operative could operate with only one member, since it is inherent in the concept of co-operation that there be a plurality of members. The Saskatchewan Act, for example, requires a co-operative to have a minimum of five directors.[60] However, in specified circumstances, the Registrar may permit a lesser number.[61] There is no maximum number of directors set out in the Act; thus a co-operative's board of directors is limited only by the number of members, since a director must be a member.[62] The articles must contain the number of directors or the minimum and maximum number.[63] Subject to the prescribed minimums, the members may amend the articles to increase or decrease the number of directors.[64] However, a decrease in the required number shall not have the effect of truncating the term of an incumbent director.[65]

In contrast with Saskatchewan, which requires five directors, British Columbia,[66] Nova Scotia,[67] Prince Edward Island,[68] New Brunswick,[69] Canada[70] and Manitoba[71] only require a minimum of three directors. Under the Quebec and Newfoundland legislation, the minimum required number of directors varies with the type of co-operative. The Quebec Act requires that worker co-operatives have no fewer than three directors[72] and that all other co-operatives have at least five directors.[73] In Newfoundland, a credit society must elect not fewer than three directors at its first annual meeting,[74] a consumer society must elect at least nine directors,[75] and a producer society must elect at least five directors.[76]

Several jurisdictions specify a maximum number of directors. The British Columbia Act stipulates a maximum of seven directors.[77] The Nova Scotia,[78] Prince Edward Island[79] and New Brunswick[80] Acts specify a maximum of seven provisional directors but impose no such limitations on the number of regular directors. In Quebec, the board of directors shall consist of not more than fifteen directors.[81]

In most jurisdictions, the minimum and/or maximum number of directors are specified in the Act and are not subject to amendment by the co-operative. However, as noted earlier, in Alberta and Newfoundland the minimum numerical requirements are found in the model bylaws or constitution and in British Columbia the maximum numerical requirement is found in the model rules. Therefore, subject to approval by the Director (or the superintendent or Registrar, as the case may be), such numerical requirements could be amended by the co-operative.[82]

Alberta requires an odd number of directors.[83] The Ontario,[84] Canada[85] and Manitoba[86] Acts require a fixed number of directors. In Ontario, the articles of incorporation must set out the number of directors required on the board.[87] Although the Canada Act requires the charter bylaws to provide for virtually all aspects of the election of directors, it makes no specific mention of the number of directors being provided for in the charter bylaws.[88] Thus, the number of directors can presumably be fixed by ordinary bylaw.[89] The significance of this is that whereas charter bylaws require the approval of the Minister, ordinary bylaws require no such approval.[90] New Brunswick,[91] Nova Scotia[92] and Quebec[93] all require the co-operative to state the number of directors in its bylaws.

Once the number of directors has been fixed, the jurisdictions provide different procedures for altering the number of directors required by the co-operative. In Manitoba, the charter bylaws, by definition, require the approval of the Registrar, and any increase or decrease in the number of directors can be effected by amending the charter bylaws.[94] In Ontario, increases or decreases in the number of directors required as set out in the articles may also be effected by amending the bylaws but there is no requirement of approval by any official.[95] New Brunswick, Nova Scotia, Quebec and Canada do not have express statutory provisions for the increase or decrease in the number of directors. Presumably, however, increases and decreases in the number of directors can be made in accord with the provisions of the legislation relating to enactment of bylaws.[96] In British Columbia, the number of directors may be increased or reduced by general meeting.[97]

Alberta, Prince Edward Island and Newfoundland also do not have any express provisions for increasing or decreasing the required number of directors. However, they do not require a fixed number of directors in the first instance. If the number of directors is fixed, the co-operative could presumably alter such number by way of bylaw duly approved by the Director,[98] the Inspector[99] or the Registrar,[100] as the case may be.

Qualification

Age and Competence

There is considerable variation between jurisdictions regarding the qualification of directors. In Saskatchewan, for example, a director must be at least 18 years of age.[101] In Prince Edward Island[102] and New Brunswick,[103] a person must only be 16 years of age to hold office in a co-operative. Unless the rules otherwise provide, a director of a co-operative in British Columbia must be 19 years of age.[104] Newfoundland requires a director of a credit society, a consumer society or a producer society to be 21 years of age.[105]

The Saskatchewan Act further provides that a director must be an individual, as opposed to a corporate body or other legal entity.[106] As well, a person is disqualified from being a director if she has the status of a bankrupt[107] or is of unsound mind and has been so found by a court in Saskatchewan or elsewhere. [108] In addition, a member of a prescribed class of persons is not eligible to be a director.[109] The "prescribed class" currently consists of any person who is the auditor or a trustee of the co-operative.[110] Where membership in a co-operative is held jointly, only one joint member may be a director at any one time unless the other joint member also holds a membership in her or his own name or the bylaws otherwise provide.[111] A co-operative can also pass a resolution to require all directors and officers to sign a declaration relating to faithful performance of duties, secrecy of transactions with members and faithful and loyal support of the association.[112] The bylaws of the co-operative may provide for additional requirements to qualify for a directorship.[113]

Other jurisdictions specify further grounds on which a person may be disqualified from serving as a director. The Company Act of British Columbia provides that a person who has been convicted of an offense in connection with the promotion, formation or management of a corporation or involving fraud is not qualified to act as a director unless a prescribed period of time has elapsed, a pardon has been granted or a court has exempted the person from this disability.[114] In Nova Scotia, a person who engages in a competing business with the co-operative cannot hold office as a director unless approved by the Inspector.[115] In Newfoundland, a member of a credit society[116] or a consumers society[117] is prohibited from

holding office if he has failed to repay a loan, is in arrears in the payment of any loan, or has not paid up the value of one share. Under the Quebec Act, a co-operative may by bylaw provide that a member is ineligible as a director if he has not paid the installments due on his shares or any other amount due.[118] The Quebec Act further provides that auxiliary members are also ineligible for office.[119]

If the proposed directors of a co-operative in Saskatchewan fail to meet the required statutory qualifications, the registrar cannot approve an application for incorporation.[120] Moreover, an existing director ceases to hold office when she no longer satisfies these requirements.[121] The Company Act of British Columbia further provides that a person who acts as a director although he is disqualified pursuant to the Act is guilty of an offense.[122] Such a person would also be liable under the general offense provisions contained in most co-operative legislation.[123] In the Maritime jurisdictions, however, a director is granted a two-month grace period following her election in which to qualify herself as a director.[124]

Although a director may be penalized for continuing to act while disqualified, any act he performs as a director is valid, despite a defect in his qualification.[125]

Membership in the Co-operative and the Business Qualification

Although ordinary business corporate legislation has abandoned the requirement that directors must be shareholders,[126] no co-operative legislation has dispensed with the membership requirement as a prerequisite to being a director. The Saskatchewan Act contains a typical provision:[127]

> 75(1) A person is not eligible to be a director where the person:
>
> (d) is not a member of the co-operative or a duly appointed representative of a member that is a partnership, association, firm, body corporate or public body.

The Alberta Act and the Quebec Act do, however, modify the membership requirement to some extent. Under the Alberta Act, a person may be elected as a director at the first general meeting without being a member of the co-operative, provided he becomes a member within two months of the date of the election.[128] As well, the co-operative may enact bylaws whereby one or more directors may be appointed by a public body, commission or official and it is not necessary for such a director to be or become a member of the association.[129] However, directors so appointed

cannot exceed one-third of the entire number of directors.[130] In Quebec, the representative of a credit union or of a federation of credit unions and the representative of the federation to which the co-operative is affiliated may be a director even though such credit union or federation is not a member of the co-operative.[131] It is consistent with co-operative philosophy that the leaders of the enterprise also be member-patrons. However, a "token" membership is all that is required under the Saskatchewan Act. Therefore, where it is desired, a professional manager can easily qualify to hold a directorship. To prevent "token" memberships some statutes allow the co-operative to require a director to conduct a minimum amount of business with the co-operative in order to qualify for office.[132] The British Columbia Act contains a mandatory provision whereby a member of a co-operative dealing in agricultural products is ineligible to become a director unless she has sold her main crop or produce of the year through the association, has given a written undertaking to do so in the following year or has received the consent of the directors to otherwise dispose of his crop or produce.[133]

Residency and Citizenship

The Saskatchewan Act, like several ordinary business corporation statutes,[134] requires that a majority of the directors be ordinarily resident in Canada.[135] The Ontario Act imposes a citizenship requirement as well as a residency requirement. It provides that a majority of directors must be resident Canadians and defines a "resident Canadian" as "as Canadian citizen or person lawfully admitted to Canada for permanent residence, who is ordinarily resident in Canada".[136]

It can be argued that the inclusion of a residency requirement in a corporation statute is misplaced.[137] Furthermore, in a co-operative corporate statute it amounts to overkill since, as a practical matter, few non-residents seek positions on the boards of directors of co-operatives. The members of a co-operative seek positions on the boards of directors of co-operatives. The members of a co-operative are its patrons who, obviously, tend to be resident in the locale of the operations of the co-operative, and to be a director a person must be a member.

Employee Directors

Co-operative legislation in several jurisdictions requires some, if not all, directors not to be employees of the co-operative. This requirement is designed to provide an independent check or objective perspective on

management.[138] In Saskatchewan, the ability of employees to participate on their co-operative's board of directors varies with the type of co-operative. An employee of a consumer co-operative is not eligible to be a director unless the bylaws so provide, in which case no more than one-third of the directors may be employees.[139] In the case of an employment co-operative, a majority of its directors may also be its employees.[140] No more than one-third of the directors of a community clinic may be duly qualified medical practitioners, dentists or other qualified persons with whom a community clinic has entered into subsisting agreements.[141] With respect to all other co-operatives, not more than one-third of the directors can be employees of the co-operative unless the bylaws otherwise provide.[142]

Several other jurisdictions also impose restrictions on employees becoming directors of the co-operative. The Prince Edward Island Act prohibits any employee to hold office as a director in the co-operative and requires any director or officer to vacate his office if he holds any other office or place of profit under the co-operative.[143] In Nova Scotia, a person is ineligible to hold office as a director if he is an employee of the co-operative for more than thirty days in the calendar year unless approved by the Inspector.[144] In Newfoundland, only one employee of a consumer society[145] or a producer society[146] is eligible as a director. In Quebec, the office of general manager or manager is incompatible with the position of director.[147] The Quebec Act also provides that a director cannot be appointed auditor of the co-operative.[148]

It has been argued vigorously that worker directors should be present on boards of all corporations to ensure that employees have a say in the management of their corporations and that their interests are adequately considered.[149] The conflicting views of employee participation on a board of directors are set out in one work as follows: [150]

> According to John Elliot, the concept of employee directors is "radical" and "highly contentious... first because they involve employee representatives moving into the top policy-making levels of a company's hierarchy and decision-making areas and second because they are regarded as implicitly involving a change in the role of the [employees and their]... trade unions". Indeed, while allowing employee directors might necessitate a reassessment and reformulation of the traditional roles of employee and employer, the presence of such directors might also "bring a measure of consent to top management decisions which would percolate down to the

shop floor and so ease management's job and boost industrial efficiency. (original footnotes omitted)

Consent to Appointment or Election

In Saskatchewan, a director named in the articles of incorporation must consent to act as a provisional director.[151] In Ontario and Manitoba, consent of a first director is only required if that person is not also an incorporator.[152] The Ontario Act also requires all other directors, not just first directors, to expressly or implicitly consent to act as director.[153] Directors may consent tacitly by being present at the meeting which elects or appoints them and by not refusing at the meeting to act as director.[154] Where the person is not present at the election or appointment, he must consent in writing to act as director either before the election or appointment or within ten days thereafter.[155] Failure to comply with the consent requirements results in the triggering of a provision which deems the person not to have been elected or appointed as director.[156]

Appointment

First Directors

Most jurisdictions require the incorporation documents to name "first directors" to cover the period between the date of incorporation and the first meeting of members. Under the Saskatchewan Act, for example, first directors are appointed in the articles of incorporation and hold office until the first general meeting.[157] The first general meeting is to be held within four months of the date of incorporation[158] and the business at such meeting must include the election of directors in accordance with the Act, the regulations, the articles and the bylaws.[159]

The Ontario Act[160] and the Canada Act[161] also provide for the appointment of first directors in the articles but such directors continue in office until replaced by others appointed or elected in their stead. There are no provisions in either Act requiring an election of directors to take place at the first annual meeting; the replacing of the first directors shall be in accord with general election and appointment procedures set out in the articles or bylaws or alternatively provided for in the legislation.

In Newfoundland, it appears that a credit society is not required to have provisional directors but if they are elected prior to the registration of the society, they hold office and have all the powers of directors until the first regular board is elected at the first general meeting.[162] In the case of a consumer society or a producer society, if a provisional board is not elected, the first nine persons who sign the application to register shall be the Board until the first general meeting after registration.[163]

There are no provisions in the Quebec Act for the appointment of first directors upon incorporation. However, the founders of the co-operative must hold a general meeting within 60 days after incorporation[164] and must elect a board of directors at such meeting.[165]

Method of Election

The co-operative Acts contain few provisions regarding the procedure for election of directors. The onus is primarily on co-operatives to enact bylaws establishing their own electoral systems. The Saskatchewan Act provides that, subject to the regulations, articles or bylaws, the election shall be by secret ballot where the number of nominees exceeds the number of directors to be elected.[166] Any ballot which contains the names of more or less than the number of directors to be elected is deemed to be void unless the regulations, articles or bylaws otherwise provide.[167] Of course, in any election each member has only one vote.[168]

The Nova Scotia[169] and Quebec[170] Acts provide that the election of directors shall be included in the regular business of the annual meetings. In Manitoba, if the charter bylaws do not contain provisions governing the election of directors, the alternative statutory provisions state that the election shall be by ordinary resolution "at the first meeting of the members and at each succeeding annual meeting of the members at which an election of directors is required .[171]

Some of the statutes also contain nomination provisions. In Saskatchewan, a co-operative cannot, by bylaw, prohibit its members from nominating any member who is qualified to be a director and consents to the nomination.[172] In Alberta, the Standard Bylaws require candidates to be nominated openly at a general meeting.[173] The Manitoba Act permits nominations for election of directors to be included in a proposal signed by at least 5% of the members, but this does not preclude nominations being made at the meeting.[174]

Ontario is the only jurisdiction which has a statutory prohibition against cumulative voting. The Select Committee felt that cumulative

voting for election of directors should not be allowed because it permits "a member to cumulate his votes and cast them all for one member" thus, in effect, giving "that member more than one vote in breach of the co-operative principle of one member, one vote".[175] The committee went on to state that:[176]

> [It]is advised that a common practice among co-operatives in the election of directors is to require members to vote for a candidate for each vacancy on the board and that failure to vote for a complete slate invalidates the ballot. It seemed to the Committee that this practice is conducive to democratic control in a co-operative and should be embodied in the Act as a requirement for all co-operatives.

Section 91 of the Ontario Act thus provides:

> 91. Every member entitled to vote at an election of directors, if he votes, shall cast thereat a number of votes equal to the number of directors to be elected, and the member shall distribute the votes among the candidates in such manner as he sees fit, but no candidate shall receive more than one vote from each member.

In several jurisdictions, instead of having each member vote in an election of all directors, the association may pass bylaws providing for the division into districts of the territory in which it does business and for the election of directors from the districts, either directly or by district delegates.[177] A delegate system can be particularly useful where a co-operative has a large membership or spends over a large geographical area.[178]

As mentioned earlier,[179] a co-operative in Quebec may agree in writing not to elect directors for one year if it has fewer than 25 members and the agreement is approved by at least 90% of the members.[180]

Term of Office

The Saskatchewan Act requires an annual election of directors.[181] Several co-operative statutes provide that the election of directors shall take place yearly unless otherwise provided for in the articles[182] or the bylaws[183] or unless a director is elected for an expressly stated term.[184] The Ontario Act states that if the co-operative so provides in its articles, it can elect directors for a term of up to five years[185] while the Quebec[186] and Manitoba[187] Acts prescribe a directorial term of up to three years.

Under the Canada Act it is likely intended that a three-year maximum be imposed on directors' terms. The doubt arises because of the wording of the section which mentions a three-year limit. It reads:

> 68. Subject to the bylaws of the association, directors of an association shall be elected by the members in general meeting of the association assembled at some place in Canada, at such times, in such manner and for such term not exceeding three years as the bylaws of the association provide.

It does not make clear whether the three-year period is an absolute maximum or whether it is subject to the bylaws. The Nova Scotia Act does not specify the length of term for a director but requires it to be stated in the co-operative's bylaws.[188]

It should be noted that although most co-operative statutes specify the length of time that a director may serve on a board, they also provide that incumbent directors continue in office until their successors are elected.[189] The effect of this latter provision is to give directors an open-ended term where elections do not take place at the proper time.[190]

Several jurisdictions provide for staggered terms of office to ensure that there will always be some experienced directors sitting on the board. Alberta,[191] Prince Edward Island,[192] and New Brunswick[193] require the directors elected at the first general meeting to hold office for staggered terms. One-third of the board of directors shall hold office until the first annual meeting, one-third shall hold office until the second annual meeting and the remaining third shall hold office until the third annual meeting. The directors elected at any annual meeting hold office for three years.[194] The Manitoba and Ontario Acts expressly permit, but do not require, staggered terms of office.[195] In Ontario, a rotational system of election and retirement of directors may be provided for in the articles or bylaws but in such case at least two directors shall retire from office in each year.[196] The Quebec Act provides that where the term of office of the directors is two or three years, they shall be replaced each year according to the mode of rotation determined by bylaw.[197]

The Saskatchewan Act expressly provides that a retiring director is eligible for re-election with no restrictions on the maximum number of terms that he may serve.[198] In Prince Edward Island, directors may be re-elected but cannot serve more than two consecutive three-year terms without a lapse of at least one year.[199] In New Brunswick, a director of a co-operative with fifteen or more members may also be re-elected but shall

not serve more than three or, if the by-laws specify, two consecutive three-year terms without a lapse of at least one year.[200] The Nova Scotia legislation requires the co-operative to adopt bylaws which specify the maximum of consecutive terms directors may serve.[201] The remaining jurisdictions do not expressly provide for re-election but do not disqualify incumbent directors from being re-elected.

Various jurisdictions specify circumstances in which directors cease to hold office. Under the Saskatchewan Act, a director may cease to hold office by: (a) expiration of his term;[202] (b) death;[203] (c) resignation;[204] (d) failing to meet the statutory qualifications;[205] (e) dissolution;[206] (f) removal from office by court order[207] or by the members,[208] as later discussed.

Several other jurisdictions specify additional circumstances in which a director ceases to hold office. In Prince Edward Island, a director or officer shall vacate his office if he holds any other office or place of profit under the association.[209] The British Columbia Act contains a similar provision but allows a director to hold the office of manager, secretary or treasurer.[210] In British Columbia, subject to certain exceptions, the office of director shall also be vacated if the director is concerned or participates in the profits of a contract with the Association.[211]

Vacancies

The Saskatchewan Act sets out a regime for filling vacancies which is subject to any alternative provisions in the regulations, the articles and the bylaws. It states that vacancies on the board may be filled by the remaining directors provided that the vacancy does not create a quorum problem.[212] Where there is not a quorum of directors, a general meeting shall be called by the remaining directors to fill the vacancy.[213] Where there are no directors remaining, the lesser of ten members or 10% of the members may appoint temporary directors for the sole purpose of calling a general meeting at which new directors may be elected.[214]

The procedure for filling vacancies in other jurisdictions differs from the procedure under the Saskatchewan Act in several respects. Whereas ss.74(1)(e)(i) of the Saskatchewan Act implicitly allows the members to fill vacancies even though a quorum of directors exist,[215] the Ontario and Manitoba Acts expressly state that vacancies may only be filled by the members, notwithstanding that a quorum exists, where the articles[216] or charter bylaws[217] so provide or where the vacancies result from an increase

in the number of directors.[218] The Manitoba Act further provides that, despite the existence of a quorum or directors, a special general meeting of members shall be called to fill the vacancies resulting from a failure to elect the required or minimum number of directors.[219] Finally, the Ontario Act[220] and the Manitoba Act[221] allow one member to call a meeting to fill vacancies where there are no directors remaining whereas the Saskatchewan Act requires the lessoer of ten members or 10% of the members.[222]

The Quebec Act also differs from the Saskatchewan Act in respect of filling vacancies. Whereas the Saskatchewan Act requires the directors to call a general meeting if there is no quorum, the Quebec Act provides that a director or two members of the co-operative, or the board of directors of the federation of which it is a member may order the secretary to call a special meeting to fill the vacancies.[223] If the secretary fails to act, those who may order that the meeting be held may call it.[224]

In Alberta,[225] British Columbia,[226] the Maritime provinces[227] and Newfoundland (except for a credit society)[228] the legislation simply provides that if a vacancy occurs in the board, the remaining directors may appoint a director to hold office until the next general meeting. These Acts, as well as the Canada Act, do not establish a procedure for filling vacancies when no quorum of directors exist or there are no directors remaining.[229] However, since the provisions authorizing the directors to fill vacancies are permissive in nature rather than imperative, presumably bylaws could be enacted which establish a procedure for filling vacancies in such circumstances. In Newfoundland, the statutory form of constitution of a credit society does not contain any provisions for filling a permanent vacancy but states that if a director is temporarily absent from directors meetings, the board may appoint a temporary replacement.[230]

Where several directors are being replaced, a formal procedure should be followed whereby one director tenders his resignation to the board, that particular resignation is accepted by the board and a replacement is appointed, and then the process is repeated until all the vacancies are filled.[231] This change-over method preserves the quorum necessary for the board of directors to operate.[232] If this procedure is not followed and, instead, all the incumbent directors resign and then purport to appoint new directors, the new directors may be held to have improperly usurped the office of director.[233]

Remedial Provisions

Most jurisdictions have remedial provisions to address problems which may arise in the election procedure. The Saskatchewan Act provides that an act of a director is valid despite irregularities in his or her election or appointment or a defect in his or her qualification.[234] Further, if an election of directors does not take place as prescribed in the Act, the regulations or the bylaws, it will not render the directors then in office *functus officio*; instead, they will continue in office until their successors are elected.[235] Where a vacancy occurs on the board and there is a quorum of directors, the remaining directors may exercise all the powers of the board.[236]

Other jurisdictions have an additional provision which allows a board of directors to exercise all the powers of the board where a full slate of directors has not been elected by reason of the disqualification, incapacity, or death of any nominee provided at least a quorum has been elected.[237]

If an election is not held at the proper time, the Alberta Act specifies that it may be held on another day in such manner as may be provided for in the bylaws or at a general meeting called for that purpose.[238] The Canada Act states that the election may take place at any subsequent special general meeting.[239] In British Columbia, the meeting stands adjourned until the same day in the next week at the same time and place.[240]

Manitoba is the only jurisdiction which provides that a co-operative, a member or a director may apply to the court to review controverted elections or appointments of directors.[241] On such an application, the court has broad powers to make any order it thinks fit including: (a) an order restraining a director from acting pending resolution of the dispute; (b) an order declaring the result of the disputed election or appointment; (c) an order requiring a new election or appointment and giving directions for the management of the co-operative in the interim; (d) an order determining the voting rights of members and of members and of persons claiming entitlement to vote.[242]

Notice of Change of Directors

In Saskatchewan, a change of directors must be reported to the registrar within 30 days of the change.[243] In British Columbia, the association must, within 14 days, file a notice of appointment or election of a director.[244] In Manitoba[245] and Quebec,[246] a change of directors must be reported to the Registrar or the Minister, as the case may be, within 15 days of the change.

Appointment of Officers

The Saskatchewan Act requires a co-operative to have a president and a secretary.[247] A co-operative may also have such additional officers as are provided for in the bylaws or by resolution of the directors.[248] The election or appointment of the officers should be provided for in the articles or bylaws.[249] In the absence of such provisionsthe directors may designate the offices of the co-operative, appoint persons as officers, specify their duties and delegate powers to them.[250] The president and vice-president must be directors, unless the bylaws otherwise provide.[251] Other officers need not be directors and, indeed, there is no statutory requirement that they hold memberships in the association. The Ontario and Canada Acts provide that, if the articles and bylaws are silent on the issue, the directors shall elect from among themselves a president[252] and may, in their discretion, elect a vice-president.[253] The Ontario Act requires the appointment of a secretary.[254]

British Columbia,[255] Nova Scotia,[256] Prince Edward Island,[257] New Brunswick,[258] Newfoundland[259] and Quebec[260] require the board of directors to elect a president and vice-president from their number. The Alberta Act requires the appointment of a chairman of the board from their number.[261] In Prince Edward Island,[262] New Brunswick,[263] Newfoundland,[264] Alberta[265] and Quebec,[266] the board must also appoint a secretary or secretary treasurer but such officer need not be a director. British Columbia,[267] Alberta[268] and Nova Scotia[269] permit, but do not require the co-operative to create other offices in addition to the president and vice-president. All of these jurisdictions, except for British Columbia, expressly require an annual election of officers.[270] The forms of constitution for a consumer society and a producer society in Newfoundland expressly provide that retiring officers are eligible for re-election and that any vacancies may be filled by the board for the unexpired term.[271]

Removal

At common law, there is no inherent right to remove a director before his term of office has expired.[272] It follows that the right of removal must be expressly conferred by statute or by the constitutional documents. The Saskatchewan Act contains a provision setting out the procedure for removal of directors from office. Section 80 provides that a director may be removed by a resolution approved by two-thirds of the votes cast at a

general meeting. This provision is, however, subject to two qualifications. The bylaws may provide for a lessor vote[273] but may not require a greater vote.[274] Further, where the holders of any class or series of preferred shares of the co-operative have an exclusive right to elect a director, that director may only be removed by ordinary resolution of the preferred shareholders of that class or series.[275] Where a director is removed, the vacancy may be immediately filled at the same meeting or in the manner discussed earlier.[276]

Most other jurisdictions also expressly authorize the removal of a director by the members, but there is considerable variation in the removal procedure. The Ontario Act provides that a director may be removed from office by a majority vote at a general meeting duly called for that purpose, and the vacancy created can be filled for the remainder of the term by the members at the same meeting.[277] In Manitoba[278] and Quebec[279] a director may also be removed from office by a majority vote of the members but the vote must take place at a special meeting. *Quaere* why the removal of a director can only be at a special meeting.[280] There is no rationale for disallowing the power to be exercised as a matter of special business at a general meeting. Where a director is removed, the vacancy created can be immediately filled at the same meeting.[281] In Nova Scotia,[282] Prince Edward Island,[283] New Brunswick[284] and Newfoundland (excepting a credit society),[285] the members may remove a director from office at any annual meeting or at a special meeting called for the purpose by a vote of not less than two-thirds of the members who are present and entitled to vote. In Newfoundland, the vacancy so created may thereupon be filled by a majority vote of the members[286] and in the other Maritime provinces the vacancy shall be filled by the remaining directors until the next annual meeting or such other date as the bylaws provide. Prince Edward Island expressly requires the members to remove directors from office when they are derelict in their duties[287] and New Brunswick requires the members to remove a director from office for cause.[288] In British Columbia the members may, by resolution passed by a three-fourths majority, remove a director before the expiration of his term of office and appoint another person in his stead.[289] In Newfoundland, the Supervisory Committee of a credit society, consisting of at least two members, must by unanimous vote suspend a director if such action is necessary to the proper conduct of the society and they must then call the members together within seven days to act on the suspension.[290] Oddly enough, there are no corresponding

provisions empowering the members of a credit society to remove the directors from office.

There are no provisions in the Alberta Act or the Canada Act specifically authorizing the members to remove a director prior to the expiration of his term. However, the Canada Act states that the charter bylaws shall provide for "the procedure for removal" of directors.[291] In Alberta, the co-operative has quite broad bylaw-making powers[292] and presumably could, with the approval of the Director, enact a bylaw relating to removal of directors by the members. All co-operatives in these jurisdictions should make such provisions. Failure to do so will result in the members having no authority to terminate a director prior to the expiration of his term.[293] In this respect it would be highly desirable if the Canada Act and the Alberta Act contained a provision, similar to that which exists in most jurisdictions, specifically authorizing the removal of a director by a vote of the members.

In several jurisdictions, a director may be removed by the board of directors. Under the Alberta Act, the board may, by resolution, declare a director's office vacant if the director is proved to be guilty of disloyalty to the association without adequate cause being shown and the vacancy so created is to be filled by appointment by the remaining directors.[294] In British Columbia,[295] Alberta[296] and Newfoundland (in the case of a consumer society)[297] the board of directors may declare a director's office vacant if he fails to attend three consecutive meetings of the Board and may proceed to fill the vacancy. Nova Scotia,[298] Prince Edward Island[299] and New Brunswick[300] provide that the board of directors may declare a director's office vacant if the director fails to qualify himself for the office of director within two months after the date of his election or if he fails in the discharge of any of the duties of his office. The vacancy so created shall be filled by appointment by the remaining directors until the date of the next annual meeting or until such other date as may be fixed by the bylaws.[301]

In several jurisdictions, the governmental body responsible for co-operatives may appoint a person to assume control of the affairs of the co-operative where the financial position of the co-operative requires it. Upon such appointment, the powers of the directors may be curtailed, suspended or removed. In Alberta, following an investigation, the Minister may appoint the Director as the official director of the association.[302] The Director is thereupon empowered to take over the functions of the board

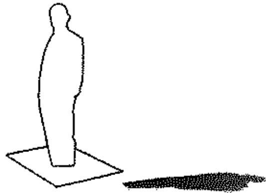
of directors and the directors are considered to be removed from office.[303] In New Brunswick[304] and Newfoundland,[305] the board of directors is not removed from office upon the appointment of an administrator but is prohibited from exercising any of its powers during the period of time that the administrator remains in control of the affairs of the association. Where an administrator is appointed under the Canada Act, the directors may continue to exercise such powers as accord with the orders or directions of the administrator.[306] In Manitoba, if a receiver-manager is appointed, the directors may not exercise any of their powers until the receiver-manager is discharged.[307]

In Saskatchewan[308] and Manitoba[309] a director may be removed by the court in the context of an oppression action. Additionally, a Manitoba court may, upon an application for reorganization, appoint directors in place of or in addition to all or any of the directors then in office.[310] A Manitoba court may also, in connection with an application for dissolution or dissolution and liquidation of a co-operative, make an order restraining the directors from (a) exercising any of their powers or (b) collecting or receiving any debt or other property of the co-operative, except as permitted by the court.[311]

The Saskatchewan Act contains a provision which allows a director to submit a written statement to the co-operative when she resigns, where there is a meeting of members or shareholders called to remove her or where there is a meeting of directors, members or shareholders at which another person is to be appointed or elected to fill the office of director in her stead.[312] The statement may give the reasons for her resignation or why she opposes the proposed action or resolution.[313] Once the statement has been received, the co-operative shall immediately send a copy of the statement to the registrar and make copies available to the members and shareholders.[314] The co-operative or anyone acting on its behalf incurs no liability by reason only of circulating a statement in compliance with the Act.[315] This immunity gives protection against a possible defamation action against the co-operative for publishing a statement that is defamatory. The reasoning behind the provision allowing a written statement to be circulated is explained in the proposals which preceded the Canada Business Corporations Act, where it is stated:[316]

> This procedure is important not only in the interests of the director himself, so that he may have an adequate opportunity to state his case, but also in the interests of the shareholders generally, since the removal power can obviously be used for both legitimate and illegitimate purposes.

Like the legislation in Saskatchewan[317] and Manitoba,[318] the Quebec Act entitles a director to make representations where his tenure as a director is being terminated.[319] However, the Quebec Act is more favourable to a director by giving him a choice of submitting a written statement or making oral representations at the meeting.[320] It also entitles a director to be informed of the reasons for the proposed dismissal.[321] In British Columbia, the co-operative must file a notice of cessation within 14 days after the resignation or removal of a director or the co-operative becoming aware of his not being qualified.[322]



Chapter 3

Duties of Directors and Officers

Introduction

The imposition of the power to manage or supervise management of a co-operative results in a corresponding imposition of certain responsibilities on directors and officers. The primary concern here is to focus on the duties of directors but, where appropriate, the duties of officers will be dealt with as well. Directors' duties will be classified into the traditional categories of care and skill, and of fiduciary duties. In addition, a third classification of specific duties, arising out of the various co-operative Acts and other statutes, will be surveyed.

Some of the co-operative statutes have attempted to codify, to a certain extent, the duties of directors and officers, while others have left the area to be controlled entirely by the common law. The statutory provisions tend not to totally usurp the area, as a true codification would, but to restate the common law and superimpose some additional requirements. Thus, the statutes must still be viewed against the backdrop of the common law to ascertain the complete regime of law that is applicable.

The common law has had some difficulty in defining the nature of the position of the corporate director. Traditionally, analogies to trustees and agents were drawn in an attempt to define the precise nature of the obligations that the law was to impose on directors.[323] But neither the trust relationship nor the agency relationship is directly analogous to the relationship that a corporate director has with her corporation. With regard to treating directors as trustees, Gower states:[324]

> The duty of the trustees of a will or settlement is to be cautious and to avoid risks to the trust fund. The managers of a business concern must, perforce, take risks; one of their primary duties is to carry on a more or less speculative business in an attempt to earn profits for the company and its members.

Although the final part of this quotation can perhaps be argued with when being applied to co-operatives, the problem is a comparable one. Gower then observes:[325]

> Hence the duties of directors can conveniently be discussed under two heads: (1) fiduciary duties of loyalty and good faith (analogous to the duties of trustees *stricto sensu*), and (2) duties of care and skill (differing fundamentally from the duties of normal trustees).

As previously discussed, the role of co-operative directors is very similar to the role of directors in ordinary business corporations, although it is arguable that the differing goals of the respective organizations in some instances should lead to differing duties being imposed. Also, there may be considerations taken into account in the selection of and qualifications of directors which have a practical effect on the role played by directors. Where these considerations apply, they will be focused upon in the following pages.

Duties of Skill and Care

The Common Law

The duties of care and skill include a duty of exercising a degree of diligence and prudence. Indeed, an analysis which asks and answers the two following questions will fairly represent the leaning of the common law in this area. The questions are:

> (1) What standard of skill in carrying out the business affairs of the co-operative will be imposed on directors? and
>
> (2) What degree of diligence will be required of directors in carrying out the business affairs of the corporation?

In answering these questions, the courts have encountered considerable difficulty. On the issue of diligence, the courts have asked whether it is proper and desirable to expect the same degree of diligence from a director as is expected of a trustee. Although it can be argued that the two positions should parallel each other, it has become expected in the corporate community that a director will be subject to a less strict regime than a trustee. As Gower states, "the law cannot be too far in advance of public opinion, and public opinion has come to recognize that some directorships are often little more than sinecures, requiring, at the most, attendance at occasional board meetings".[326] Clearly, co-operative directorships are not sinecures, but the balance of the quotation may apply to co-operative directorships. With regard to skill, the courts have had difficulty in determining what standard of care shall be applied to directors. Is it the standard of the reasonable person in the circumstances, or is it a more professional standard, that is, the standard of a reasonably competent person in that profession? With regard to the latter, Gower states:[327]

> Is a directorship a profession within the meaning of this distinction? In favour of this view it may be argued that a directorship is a recognized office of profit. But, once again, the courts have had to face the facts, and the facts are that until recently the possession of a title was often regarded as a greater qualification for office than any amount of business acumen and drive, and that the ordinary part-time director was only expected to display such skill (if any) as he happened to possess, and such attention to duty as he thought fit to offer.

Also, the courts have been reluctant to second guess the judgments of business people. This reluctance is exaggerated because the courts are

looking retrospectively at business judgments and not prospectively as were the directors at the time of the particular corporate action. This reluctance of the courts is displayed in the following words of Lord Macnaghten:[328]

> And I do not think it desirable for any tribunal to do that which Parliament has abstained from doingthat is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more.[329]

The case which has governed this area of the law to the present day is *Re City Equitable Fire Ins. Co. Ltd.*[330] In his judgment Romer J. set out principles which have become the touchstone of directors' responsibility for care, skill and diligence. The case involved a situation where a Mr. Bevan, a managing director of a corporation, had engaged in disastrous and improper investments which resulted in large losses for the corporation. Bevan was convicted of fraud. The court action was brought by the Official Receiver as liquidator to determine the liability of the other directors and the corporation's auditors for the losses occasioned by Bevan. Negligence of the directors was alleged, but their honesty was not questioned. Ultimately none of the directors was held liable because the articles of association of the corporation exonerated them from liability for all acts except acts of "willful neglect or default". However, some of the directors would have been held liable in the absence of the provision in the articles on the basis of a test set out in the judgment.

Romer J. first set out in general terms the duties imposed on directors in the following passage:[331]

> In order, therefore, to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the articles of association. In discharging the duties of his position thus ascertained a director must, of course, act honestly; but he must also exercise some degree of both skill and diligence. To the question of what is the particular degree of skill and diligence required of him, the authorities do not, I think, give any very clear answer.

Then, in an attempt to flesh out these very general statements, three propositions were set out based on the previous cases. They were:[332]

> (1) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience...
>
> (2) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so.
>
> (3) In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

As a general statement of the standard of care that a director shall be held to, proposition (1) has much to commend it. It dictates a partially subjective standard, taking into account the particular director's knowledge and experience, yet imposes an objective standard against which the actions will be measured. "It prescribes a test which is partly objective (the standard of the reasonable man), and partly subjective (the reasonable man is deemed to have the knowledge and experience of the particular individual)".[333] As will be seen, the result of this test is the imposition of a higher standard than is imposed by some statutory formulations of the standard of care. Any statutory standard of care in co-operative statutes should take cognizance of the fact that boards of directors are composed of people with varying business expertise and thus should be flexible enough to demand a reasonable level of competence from all directors without being unrealistic. Unless this is provided for in the legislation, the needs of co-operatives are as well served by continuing to apply the common law standard as set out in the *Re City Equitable case.*

The diligence requirement, as set out in Romer J.'s proposition (2), could also be applied to ensure a workable and reasonable level of attention

to a co-operative's business. However, the common law's demands of diligence have traditionally been minimal. In Re Denham & Co.[334] directors were not held liable for failing to attend meetings for over four years. In *Re Cardiff Savings Bank; Marquis of Bute's Case*[335] the Marquis was held not to have fallen below the common law standard even though he had attended only one board meeting in 38 years. Both of these cases preceded the Re City Equitable case, and the results would not necessarily have been the same if Romer J.'s test had been applied. It would be most unwise for co-operative directors to rely on these two cases as setting the appropriate diligence requirement today.

Even if it can be established that a director was in breach of duty by failing to attend meetings, the additional hurdle of establishing that his breach of duty has caused or contributed to a corporation's loss may be difficult to overcome. As Gower points out, "if a director is party to a decision to take a particular course of action it may be possible to show that this led directly to loss by the company, but it will be next to impossible to show that his laziness was the cause of the damage or that the action would have been different had he attended".[336] The statutory provisions which have been enacted do represent an improvement over the common law with respect to the diligency requirement.

One final point regarding diligence. Clearly, proposition (2) does not represent the law with regard to corporate officers and executive directors. Some co-operatives and credit unions have adopted the practice of having a full-time president of the board as distinct from a chief executive officer. The law would impose on such persons, as well as on officers, a much higher standard with regard to attention to the co-operative's business, including, of course, attendance at meetings. Additionally, greater skill would no doubt be required of such persons. Or, to put it another way, a more precise standard of professional competence would be imposed.

Proposition (3) reflects, as accurately today as it did at the time of its making, the practicalities of business. There is a responsibility not to be remiss in the selection of corporate officers. Generally, it is the board's responsibility to select at least the chief executive officer, and care must be taken to select someone who is able and qualified to do the job. Arguably, this is the most important task of a board of directors. Once this is done, however, the directors can rely on the expertise and advice of the employees and agents of the corporation. But, as Romer J. points out, such reliance must be "in the absence of grounds for suspicion". Certain actions on the part of employees may give rise to reasonable grounds for suspicion which will place a responsibility on the directors to obtain direct information more accurately, or at least to ask questions which will clarify any suspicious situation. Also, it is clear that directors will be liable where they knowingly allow an officer to exceed his authority with a resulting loss to the corporation.

It is in light of the common law that the provisions in the co-operative statutes will be viewed. If the common law were applied by the courts in a flexible manner and in recognition of modern business practice, in all likelihood the results would be quite satisfactory. Statutory intervention has not, and likely cannot, be a complete panacea in this area.

The above review of the common law has focused on cases which dealt with directors in ordinary business corporations. There are few Canadian cases dealing with directors' duties of care and skill in co-operatives. The underlying purpose and difference in structure of co-operatives very well may produce differing results from an application of the principles that were created to apply to ordinary business corporations.

The Statutory Standard

The Alberta, Quebec, Newfoundland and Canada Acts contain no provisions pertaining to the standard of care and skill required of directors. Therefore, unless the articles or bylaws make specific provision to the contrary, the required standard of care and skill of the common law, as set out above, applies to co-operatives incorporated in these jurisdictions. The other Canadian jurisdictions have provision aimed at the duty of care and skill.

Section 88(b) of the Saskatchewan Act provides:

> Every director and officer of a co-operative, in exercising the powers and discharging the duties of a director or officer, shall: ...
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The Manitoba[337] and Ontario[338] Acts contain virtually identical statutory formulations of the duty of care, diligence and skill. The duty of care imposed by the Maritime Acts[339] is similarly worded but applies only to directors and only in connection with their power to make decisions about the association's investments.[340] The British Columbia provision is likewise restricted to directors but, unlike the provisions in other jurisdic-

tions, it does not contain the phrase "in comparable circumstances".[341] Although it was intended that the statutory formulations would upgrade the common law standard of care, diligence and skill,[342] it is highly unlikely that they do, and it could be argued that they lower the standard in some respects.

The standard of measurement in the statutory test is the "reasonably prudent person" which, in effect, entrenches a non-professional standard for directors. A reference to the "reasonably prudent director", which was suggested in the Lawrence Report leading to a comparable provision in the Ontario Business Corporations Act, would establish a professional standard for directors and thus would raise the standard. However, it must be realized that even a reference to a reasonably prudent director would not provide complete clarity and the courts would still have to grapple with the individual facts of the cases as they do in all standard of care cases.

The common law test includes a subjective element by taking into account the director's knowledge and experience. The statutory provisions fail to do this and thus may, in effect, require a lower standard of conduct from a well qualified director than is demanded under the common law. Of course, the converse argument may also be made that the statutory provisions raise the common law standard for less skillful directors as they will no longer be able to rely upon their ignorance as a defense. However, the merits of such an argument are questionable. As one commentator observed:[343]

> [J]ust how high the standard is remains open to speculation. It is submitted that a reasonably prudent person might know absolutely nothing about the automobile business or genetic engineering or even sound business practice in general. Prudence goes not to the level of knowledge, but to the manner in which judgment is exercised. Though a prudent person may be expected to exercise sound judgment in practical matters, he cannot be expected to do so in more specialized matters, whether scientific, business or otherwise.[344]

The words "in comparable circumstances" in the Saskatchewan, Manitoba, Ontario and Maritime Acts introduce a needed flexibility to the test. They allow for a consideration of such factors as size, type, organizational structure and power structure of the co-operative. On the face of the words, it is arguable that they do not solve the problem of the different qualifications of directors since "in comparable circumstances" may refer

to situational factors and not to personal qualification factors of individual directors. Several writers take the position that "the level of skill possessed by the particular manager in question is part of the circumstances".[345] It has been suggested[346] that the courts will probably give consideration to the following factors in determining whether a director has acted as a "reasonably prudent person" would in "comparable circumstances":

(a) the qualifications of the director,
(b) the significance of the action,
(c) the information available to the director,
(d) the time available for making the decision,
(e) the alternatives open to the director,
(f) whether the director is a representative of a special interest group (creditors, employees), and
(g) whether the director is an advisor to the corporation (lawyer, accountant, engineer).

As noted earlier, the statutory standard of care required of a director in British Columbia differs from the statutory formulations in other jurisdictions in that it is not dependent on the particular circumstances of the director's co-operative. By imposing a single, objective standard on all directors, the British Columbia provision is considerably more onerous than either the common law or the corresponding provisions in other legislation.[347]

The statutory provisions are a substantial improvement over the common law with respect to the requirement of attentiveness to corporate business. "[T]he insertion of the word 'diligence' indicates a rejection of the defense of the absent director who claims that he is not responsible because he did not attend the relevant meeting".[348] In addition, the Saskatchewan Act,[349] as well as the Manitoba[350] and Ontario[351] Acts, contain provisions which deem a director to have consented to resolutions at meetings where he was absent. The deeming provisions do not apply in Saskatchewan if the director, within fourteen days after he becomes aware of the resolution, delivers or sends by registered mail his dissent to the co-operative. In Manitoba and Ontario, a director must cause his dissent to be filed in the minutes of the meetings, or delivered or sent by registered mail to the co-operative within seven days to avoid the deeming provisions. The Ontario Act further requires that a copy of the dissent be sent by registered mail to the Minister. The Manitoba deeming provision applies

to all resolutions whereas the Saskatchewan and Ontario provisions apply only to specific types of resolutions.

Canadian courts have interpreted the statutory provisions as embodying the third of Mr. Justice Romer's propositions regarding the responsibilities of directors in the selection of corporate officers and the delegation of duties to them.[352] In *Distribulite Ltd.* v. *Toronto Board of Education Staff Credit Union Ltd.* case Campbell J. defined the duties of the board of a credit union in this way:[353]

> It must be recognized that credit unions are run by ordinary members of the community who need not possess financial expertise or sophistication: *Grindrod & District Credit Union* v. *Cumis Ins. Society Inc.* (1983), 4 C.C.L.I. 47, [1984] I.L.R. 1-1782 (B.C.S.C.). They are entitled to retain servants who possess the necessary financial skill and to delegate the everyday running of the organization to them. The directors need not ordinarily intermeddle in the daily operations of the credit union or supervise or deal with staff below the level of the staff who report to the board. The board does have a duty to ensure that their senior staff are reasonably competent and to supervise them to the extent reasonably required under the circumstances.
>
> Their duty under s.46(1) of the Act is to manage or supervise the affairs and business of the credit union, and they are perfectly free to do this through delegation to their servants so long as they retain reasonable control and supervision over their senior employees and pay reasonable heed to any warning signs about the performance of those to whom they delegate the daily work. As Romer L.J. pointed out in *Re City Equitable Fire Ins. Co. Ltd.*, [1925] 1 Ch. 407, the distribution of work and function between the board and its servants is a business matter to be decided on business lines. The manner of distribution must be a reasonable one under the circumstances.
>
> The board of a credit union is not required to exercise superhuman skill or prescience or to require absolute perfection from its senior management. Minor departures from rules or policies are a fact of life in every busy organization. As McEachern C.J.S.C. said in *Revelstoke Credit Union* v. *Miller*, [1984] 2 W.W.R. 297 at p.306, 24 B.L.R. 271, 28 C.C.L.T. 17 (B.C.S.C.): "...a busy credit union can no more function strictly within pre-set policies, particularly in respect of minor matters, than a court can function without some discretion in procedural matters".

These comments are equally applicable to co-operatives other than credit unions.

The Manitoba Act provides relief from liability under the standard of care provision where the directors have relied upon expert advice. It specifically allows the directors to rely on financial statements or documents prepared by co-operative officers, auditors and other professionals.[354] Other professionals include lawyers, accountants, engineers, appraisers or other persons "whose profession lends credibility to a statement made by him". Such reliance is no doubt permissible under the common law,[355] but the express authorization of it in the Manitoba Act certainly does no harm and, on the positive side, it likely performs an educative function.

Several statutes specify that the liability imposed by statute is in addition to any duty or liability otherwise imposed. The Manitoba Act[356] and the Company Act of British Columbia[357] provide this with respect to directors' fiduciary duties and duties of care and skill respectively. The Ontario Act specifies this with respect to all liabilities imposed by the Act.[358]

Fiduciary Duties

Introduction

No attempt will be made here to deal exhaustively with the matter of directors' fiduciary duties, since this subject has in recent years received the most complete doctrinal treatment of any area of corporate law.[359] Rather a review and summary of the common law and the existing literature will be undertaken together with a more detailed analysis of the pertinent provisions in the co-operative statutes.

The traditional rationale for fiduciary responsibility is stated by one writer as follows:[360]

> People trust others to act on their behalf or to perform tasks for them. This normally involves the trusted party acquiring access to assets of the trusting party. The mischief that can occur in such circumstances is that the trusted party will divert value away from the trusting party. The trust placed in the trusted party, in other words, will be abused. Public

> morality is offended by this kind of conduct. The courts, openly asserting this public morality or policy, formulated a liability rule to deter the abuse.

Two central issues arise in the context of fiduciary duties: (a) what relationships or arrangements are properly characterized as fiduciary in nature? (b) what is the content of the fiduciary obligation? Turning to the first issue, the courts traditionally determined fiduciary status using a categorical or class-based approach (i.e. the courts determined that certain types of relationships were fiduciary in nature and everyone in the class became a fiduciary as a matter of status).[361] In recent years, however, the courts have departed from this categorical approach and have developed a list of criteria to identify a fiduciary status. In *International Corona Resources Ltd.* v. *LAC Minerals Ltd.*, Sopinka J. quoted with approval from Wilson J. in dissent in *Frame* v. *Smith*, [1987] 2 S.C.R. 99:[362]

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion of power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[363]

Mr. Justice Sopinka pointed out that it is possible for a fiduciary relationship to be found although not all these characteristics are present and conversely, the presence of these ingredients does not invariably identify the existence of a fiduciary relationship.[364]

The director/corporation relationship has traditionally been characterized as a fiduciary relationship.[365] Given the recent adoption by the courts of a factual approach to fiduciary status, it may now be possible for a court to find, on the facts of a given case, that a director also owes a fiduciary duty to other categories of persons such as the shareholders,[366] members, or other directors.[367]

The fiduciary relationship between an individual director and his co-operative, by definition,[368] gives rise to certain duties. Fiduciary duties have developed in the law of trusts and agency but have particular application to the corporate director. Also, fiduciary duties apply to

officers of the corporation from senior management to more junior employees[369] but, because there is more opportunity for breach of these duties at the senior level of management, they have more practical import there.

The general principle upon which fiduciary duties are based is simply that directors must "display the utmost good faith towards the company in their dealings with it or on its behalf".[370] The same principle applies when the corporation is a co-operative corporation as opposed to an ordinary business corporation although, given its sometimes different goals, the application of the principle to the co-operative may have a different result.

The general principle can be broken down into at least four sub-principles. Following Gower's analysis,[371] four facets of the general rule are: (a) that the directors must act honestly and in the best interests of the corporation; (b) that they must exercise their powers for the purpose for which the power was conferred and not for some extraneous purpose; (c) that they must not fetter their discretion to exercise their powers; and (d) that they must not place themselves in a position where there is a conflict between their duties and their personal interests.[372] Although there are statutory provisions affecting some aspects of directors' fiduciary duties, the area is still largely governed by the common law, which is relatively complex.

The Duty to Act Honestly, in Good Faith and in the Best Interests of the Co-operative

In addition to the not surprising general requirement that directors act honestly, the common law further requires that directors act in the best interests of the co-operative. If their acts are honest, yet in the interests of someone other than the co-operative, such as employees, consumers or the community, directors run the risk of being in breach of duty.

There is a problem, however, in defining what are the best interests of the co-operative. Clearly the interests of the membership can be taken into account; the legal separation of the corporate entity from its membership is not taken to its logical legal, but in this situation absurd, conclusion.[373] Therefore, a declaration of a dividend is a proper act of the directors, as opposed to re-investing profits into the corporation. "But it is apparently

only the interest of the members and, presumably, creditors, present and future, to which they are entitled to have regard; the interests of the consumers of the company's products, the nation as a whole, and even (at present) the employees are legally irrelevant."[374]

Although profit maximization is the main focus of the case law,[375] actions which will benefit persons or groups other than the members, such as employees or the community, will be proper if, in the broad sense, they are for the benefit of the corporation. As Gower states:[376]

> Fortunately, so long as the company remains a going concern the members' interests will normally be served by having regard to other interests; rebellious staff, hostile trade unions, dissatisfied customers and an aggrieved public or government are not conductive to the future prosperity of the company.[377]

There has been an indication in Canada that a relaxation of this rule is in order. In *Teck Corpn.* v. *Millar*,[378] Mr. Justice Berger of the British Columbia Supreme Court took the view that the interests of other parties could be considered, provided that such consideration was not exclusive of or in disregard of the shareholders.[379] However, the traditional approach still represents the law, unless varied by statute, notwithstanding an increasing awareness in the corporate business world that, to be a "good corporate citizen", interests other than those of the shareholders must be taken into account.

The allowance made by the common law concerning other interests does not apply when the company's business is about to cease, for then there is not even a broad commercial purpose in catering to constituents other than the corporate members.[380] The cases have taken a strict view of the best interest doctrine in this situation.[381]

Another problematic issue, apart from defining the best interests of the corporation, is determining whether the directors have abused their powers in a given case. How is the court to determine their purpose? In the Teck case, the court established a two-part test:[382]

> I think the Courts should apply the general rule in this way: The directors must act in good faith. Then there must be reasonable grounds for their belief. If they say that they believe there will be substantial damage to the company's interests, then there must be reasonable grounds for that belief. If there are not, that will justify a finding that the directors were actuated by an improper purpose.

A director who is elected by a special class of shareholders should be particularly cognizant of the best interests doctrine. Notwithstanding that she has been elected to represent and protect the unique interests of those shareholders who have elected her, she is under a fiduciary duty, like all other directors, to act in the best interests of the corporation rather than in the exclusive interests of those shareholders whom she represents.[383]

Although it is tempting to argue that the best interests doctrine may be applied differently to directors of co-operatives, this may not be the case. Although maximization of profits should not usually be the primary goal of a co-operative, minimization of costs is a primary goal.[384] Thus, an application of the duty to act in the best interests of the corporation to co-operative directors would ask whether members' costs were minimized, with results similar to those that would obtain by applying the profit-maximization test of the case law. This same test would apply whether one was concerned with the directors of direct charge co-operatives or patronage dividend co-operatives. In a particular case, of course, the best interests of the co-operative might be entirely coincidental with the interests of another group of persons. For instance, the minimizing of costs in a consumer co-operative benefits both consumers who use that co-operative and its members. However, the consumers and members are to a large extent the same persons. There are non-member consumers who may benefit from an action that decreased costs, but this benefit would legally be only coincidental with the primary purpose of the action.

The flexibility that the common law has shown toward allowing the interests of others to be considered, provided that there was a primary commercial purpose in the directors' actions, would perforce apply to co-operatives. However, when the co-operative has ceased or is about to cease business, the "best interests of the co-operative" means only the interests of the present members.[385]

Most Canadian jurisdictions have adopted statutory provisions regarding the duty of directors and officers to act honestly, in good faith and in the best interests of the co-operative.[386] Section 88(a) of the Saskatchewan Act is a typical provision:

> Every director and officer of a co-operative, in exercising the powers and discharging the duties of a director or officer,

> shall: (a) act honestly and in good faith with a view to the best interests of the co-operative.

The provision is intended to restate generally, with one exception,[387] the fiduciary duties of directors as set out in the common law:

> In so far as the general duty of loyalty and good faith is concerned, this section is simply an attempt to distill the effect of a mass of case law illustrating the fiduciary principles governing the position of directors. Those principles have long since been accepted by courts in Canada: see, for example, Sun Trust Co. v. Begin, [1937] S.C.R. 305; Peso Silver Mines Ltd. v. Copper (1966), 58 D.L.R. (2d) 1. [The section] does not purport to answer in advance the manifold problems involved in assessing the facts of particular cases. Its purpose is simply, and perhaps gratuitously, to give statutory support to principles that are as difficult to apply as they are well understood.[388]

The words "with a view to the best interests of the co-operative" in ss.88(a) of the Saskatchewan Act[389] perhaps introduce a flexibility into the law that is not provided for in the common law.[390] This flexibility does not exist in the Ontario Act[391] or the Company Act of British Columbia[392] because the words used in there are "and in the best interests of the co-operative".

The Alberta Act does not contain a statutory formulation of the fiduciary duties of loyalty and good faith. It does, however, require directors to be loyal to the co-operative. It states:[393]

> If a director is, to the satisfaction of the board, proved to be guilty of disloyalty to the association without adequate cause being shown to the satisfaction of the board, the board may by resolution declare his office vacant and the vacancy so created shall be filled by appointment by the remaining directors.

Such loyalty requirement surely must be interpreted to mean that the directors must act in the best interests of the association and honestly and in good faith. However, a more explicit statement to that effect would be desirable. The remedy provided in the section quoted above hopefully would not be exhaustive of the co-operative's rights, should a director be in breach of good faith. The common law, as it applies to ordinary business corporations, would be applicable here. If a director has taken advantage and profited from an opportunity which rightfully belonged to the

corporation, the corporation has a right to bring an action to force him to disgorge such profits.

Finally, the Saskatchewan Act contains a provision which expressly permits an association to pass a resolution requiring all directors and officers to sign a declaration relating to any one or all of the following: (a) faithful performance of duties; (b) secrecy of transactions with members; or (c) faithful and loyal support of the association.[394] Even without this express authority in the Act, an association could require such a declaration from directors and officers. Also, if the declaration is in the general form as set out in the Act it really adds nothing to the common law. The most beneficial effect of the section is that it may encourage co-operatives to require such a declaration which will have an educational effect on the directors and officers. To sign such a declaration reminds directors and officers of the nature of the position that they hold with the co-operative.

The Quebec, Newfoundland and Canada Acts do not have a general provision setting out a duty of loyalty and good faith or a requirement of loyalty. Thus, the common law as discussed above will determine the parameters of directors' duties in these jurisdictions.

The Proper Purposes Doctrine

The proper purposes doctrine states that directors must exercise their powers only for the purposes contemplated in the grant of power. If directors exercise their powers for an improper purpose, they are deemed to have exceeded their authority and may be held liable. The imposition of this duty is in addition to the duty to act bona fides and in the best interests of the corporation. Thus, even if "directors have acted honestly in what they believe to be the benefit of the company they may nevertheless be liable if they have exercised their powers for a purpose different from that for which the powers were conferred upon them".[395]

The doctrine arose out of a line of English cases involving takeover bids in which the board of directors issued shares to friendly parties in order to frustrate corporate raiders.[396] The English courts held that if directors issued shares to defeat an attempt to secure control of the company, that was an improper purpose, even if they considered that they were acting in the best interests of the corporation in doing so. The underlying assumption in these cases is that the only purpose for which directors were given the power to issue shares was to raise capital.[397]

It has been argued that the duty to exercise power for a proper purpose is not a fiduciary duty at all but a legal duty to act within the grant of a particular power. One writer, in line with this view, explains the principle involved as follows:[398]

> If a power is given to a director or an officer for a particular purpose it cannot be exercised for some other purpose. Any attempt to exercise the power for other than its authorized purpose will be legally ineffective. For example, consider a corporate by-law which authorizes the corporate secretary to obtain cash advances from the corporation's account for purposes of traveling on corporate business. It would be a breach of the by-law to take an advance for the purpose of financing a wild weekend in the fleshpots of London, Paris and Brantford. The power is limited in its scope and the corporate secretary could not defend his actions by claiming that the power was simply to take the money for any use which he saw fit.
>
> Thus viewed, the rule is elementary. It applies whether the limited scope of the power is stated expressly or by implication, or whether it is set out in the statute or in subordinate parts of the corporate constitution. When a limitation is expressly imposed on a particular power the analysis will be easy. But such situations will be rare. Management powers are more likely to be phrased in open ended fashion: "the directors may declare dividends"; "the corporate secretary may sign invoices".
>
> Where no particular purpose is stated, two possibilities are open. In some circumstances it may be possible to infer from the corporate constitution that the power has been given for some particular purpose, or at least for a type of purpose wholly unrelated to the purpose the corporate official had in mind. In other circumstances it may be impossible to infer a particular purpose by looking at the terms of the grant of power. It is the latter situation which has caused confusion in the past. The courts have, quite correctly, fallen back on the general equitable obligation to exercise all managerial powers in the best interests of the corporation.[399]

It is also argued that the proper purpose test is superfluous. In support of this argument, one work points out that various cases which support

validation of directors' actions by the shareholders rely on the basic test of whether the directors have abused their powers for their own self interest or whether they have acted in the best interests of the corporation.[400]

It concludes:[401]

> Since the central concern is the directors' motivation, it may be argued that the proper purpose test is superfluous. The directors' general fiduciary duty to act honestly and in the best interests of the company imposes essentially the same obligation.

The *Teck Corpn.* case[402] supports this thesis. In that case, which involved the issue of shares to thwart a takeover, Berger J. refused to follow the leading case on the proper purpose doctrine, namely *Hogg* v. *Crampton*.[403] He held that, so long as the directors' primary purpose was in the best interests of the corporation, and the directors reached their decision on reasonable grounds, it was irrelevant that the secondary intention was for an improper purpose such as maintaining control.[404] The net effect of such an approach is that the "best interests" doctrine subsumes the proper purposes doctrine.[405]

The *Teck* decision has been approved or referred to without disapproval in several subsequent cases.[406]

As seen earlier,[407] the statutory formulation of fiduciary duties makes no mention of the proper purpose doctrine. The intent of the drafters of the Federal Proposals was that its omission in the statutory formulation would eliminate the doctrine and that the emphasis in testing directors' conduct would be on the bona fides of the directors' actions.[408] It is doubtful that the proviso has the contemplated effect since "it is arguable that only an express exclusion would be effective to oust the proper purpose doctrine which is firmly entrenched in the common law".[409] This view is further supported by the provisions in the Manitoba Act and the Company Act of British Columbia that the duties are "in addition to and not in derogation of, any enactment or rule of law relating to the duty or liability of directors or officers of a co-operative".[410]

While the proper purpose doctrine has not been expressly excluded in the legislation, it is apparent from recent Canadian authorities already noted, beginning with the *Teck* decision, that the doctrine is no longer being applied by most Canadian courts.[411]

The Duty Not to Fetter Discretion

Gower succinctly summarizes this duty as follows:[412]

> Since the directors' powers are held by them in trust for the company they cannot, without the consent of the company, fetter their future discretion. Thus it seems clear as a general principle, despite the paucity of reported cases on the point, that directors cannot validly contract (either with one another or with third parties) as to how they shall vote at future board meetings. This is so even though there is no improper motive or purpose (thus infringing the previous rules) and no personal advantage reaped by the directors under the agreement (thus infringing the succeeding rule).
>
> This, however, does not mean that if, in the bona fide exercise of their discretion, the directors have entered into a contract on behalf of the company, they cannot in that contract validly agree to take such further action at board meetings as is necessary to carry out that contract.

Conflict of Duty and Interest

(i) Introduction

A director must not place himself in a position where there is a conflict between the interests of the corporation and his self-interest. This flows from his position as a fiduciary. As Gower points out:[413]

> Good faith must not only be done but must manifestly be seen to be done, and the law will not allow a fiduciary to place himself in a situation in which his judgment is likely to be biased and then to escape liability by denying that in fact it was biased.

The principle can manifest itself in the corporate setting in a number of situations which include: (a) directors entering into contracts with their corporation; (b) directors converting property of the corporation to their own use; (c) directors taking advantage of information or opportunities which have come to them as directors; or (d) directors competing with their corporation.

(ii) Interest in Contracts

(A) At Common Law

A majority of co-operative Acts are silent with regard to the enforceability of contracts made between directors and their co-operatives, leaving

the matter to be governed by the common law. The common law dictates that a contract between an interested director and a corporation of which she is a director is voidable at the instance of the corporation. Also, the director must account to the corporation for any profits made by her personally as a result of such contract. The fairness of the contract to the corporation is irrelevant. This principle was firmly established in *Aberdeen Ry. Co.* v. *Blaikie Bros.*, where Lord Cranworth observed:[414]

> A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the cestui que trust which it was impossible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.

Unless the corporate constitution creates alternative machinery to exonerate an interested director, the only course open to him is to make full disclosure to the members and to have the contract ratified by the general meeting. Disclosure only to the board of directors is ineffective, notwithstanding the fact that the interested director may refrain from voting.[415]

(B) Statutory Reforms

(i) Scope of Statutory Provisions

Five jurisdictions contain sections regarding director contracts.[416] Although none of these provisions contain an exclusivity clause, the Legislature intended these statutory provisions to supplant the common law.[417] There is considerable variation from one statute to another as to who must make disclosure and the types of transactions which must be

disclosed. Section 93 of the Saskatchewan Act applies to both directors and officers and, in general terms, requires disclosures of interest in either current or proposed contracts with a co-operative.[418] The statutory provisions in the Ontario and Canada Acts and the Company Act of British Columbia are both narrower and broader than the Saskatchewan Act. They are narrower than the Saskatchewan provision in that they apply only to directors.[419] However, the range of interests which must be disclosed in these jurisdictions appears to be somewhat broader than that required under the Saskatchewan Act. The Ontario Act[420], the Company Act of British Columbia[421] and the Canada Act[422] apply not only to contracts but also to "transactions" or "arrangements".[423] Moreover, a director in Ontario must declare her interest not only in contracts or transactions involving the co-operative but also those involving any subsidiary of the co-operative.[424] The provisions of the Company Act of British Columbia are more limited in scope than their counterparts in other jurisdictions because they apply only to a proposed contract or transaction whereas the other statutory regimes apply to current or proposed contracts or transactions.[425]

Subject to the requirement of materiality,[426] a director in Saskatchewan must make disclosure in two types of situations.[427] One situation is where the director or officer is involved as a party to the transaction. The other situation is where he is "a director, officer or associate of, or has a material interest in, a person who is a party to a material contract or proposed material contract with the co-operative". Given the broad definitions of "associate"[428] and "person"[429] in the Act, as well as the potential breadth of the phrase "material interest in any person",[430] the scope of the disclosure requirement is quite far-reaching indeed.[431] The provisions of the Ontario and Canada Acts and the Company Act of British Columbia may, in certain aspects, have even broader application. Whereas the Saskatchewan Act applies only when a director (or entity of which he is a director, officer or associate or in which he has a material interest) is a party to the contract, the legislation in Ontario, British Columbia and Canada imposes a duty of disclosure on any director who is in any way, whether "directly or indirectly", interested in a contract or proposed contract.[432] Hence, these latter provisions could, in some circumstances, apply to contracts which indirectly benefit a director even though neither he nor the other entity is an actual party to the contract.[433]

As noted earlier, the disclosure provisions will not always apply in the conflict of interest situations described above. The Saskatchewan, Manitoba and Ontario Acts only require disclosure if both the interest and the contract are "material".[434] Unfortunately, no guidelines are given to distinguish between material and non-material interests, contracts or proposed contracts.[435] Without a definition of "material", the provision may present problems in practice in determining when a director has acquired an interest which necessitates disclosure. While it may seem reasonable to assume that the test is one of materiality to the co-operative, as opposed to the director or officer, cautious directors or officers may be advised to disclose their interest even if the contract is material only to themselves.[436]

The Federal and British Columbia provisions are broader than their counterparts in Saskatchewan, Manitoba and Ontario in that they contain no requirement of materiality; therefore, any problems as to what contract must be disclosed are avoided. The value of the certainty involved in requiring disclosure of all contracts is, however, perhaps offset by the fact that even very minor interests must be declared, which may prove inexpedient in practice.

The Saskatchewan,[437] Ontario[438] and Canada[439] Acts further provide that the disclosure provisions do not apply to contracts which are available to the members generally. The Canada Act, which is perhaps most precise on this point, excludes marketing contracts, service contracts and contracts to purchase goods from the association that are "similar to contracts entered into by the association with members who are not directors thereof".[440] A major problem with the provisions in the Manitoba Act and the Company Act of British Columbia dealing with directors' contracts is that they fail to make provision for contracts that directors enter into in their capacity as members.[441] Not to provide for the exclusion of such contracts seems to be taking too cautious an approach. Directors, who must be members,[442] in the ordinary course conduct business with the co-operative; indeed, it is the *raison d'etre* of a co-operative that its members are its patrons. To require such contracts to be subject to the disclosure requirements is to impede the normal operation of a co-operative. Of course, to be subject to the disclosure requirements, a contract in Manitoba must be a "material" contract, but this alone will not exclude all such contracts.

Ontario and British Columbia exempt additional transactions from the disclosure requirements. The Ontario Act states that the requirement does not apply: (a) to a contract or transaction in which the director's interest is limited solely to his remuneration as a director, officer or employee;[443] and (b) unless the interest and the contract or transaction are both material.[444] In British Columbia, a director is deemed not to be, or ever have been interested in a proposed contract or transaction by reason only that (a) it relates to a loan to the co-operative which he has guaranteed; (b) it is a contract with an affiliated co-operative of which he is a director or officer; (c) it is a contract relating to indemnity, insurance or remuneration of directors.[445]As will be seen,[446] the Saskatchewan and Manitoba Acts are more onerous on a director because they require him to make disclosure in the aforementioned situations and merely exempt him from the usual prohibition against voting on a resolution to approve such contracts.

(ii) Disclosure and Validation Requirements

The statutory provisions allow directors to enter into contracts with the co-operative provided certain requirements are met. These requirements vary slightly from jurisdiction to jurisdiction, but generally one can summarize them as follows: (a) the conflict of interest must be disclosed; (b) the contract must be approved (c) the director must refrain from voting on any resolution to approve the contract; and (d) the contract must be fair and reasonable to the co-operative at the time it is approved.

Turning first to the disclosure requirement, the statutory regimes, except the Canada Act, require a director to disclose the "nature and extent" of his interest as opposed to merely disclosing that an interest exists.[447] This would normally require a director to disclose the exact extent of any profit realized on the contract.[448] The Ontario Act contains an additional disclosure requirement where the contract or transaction involves the purchase or sale of property by or to the co-operative or its subsidiary, and the property was acquired by the seller within five years before the date of such contract or transaction. In such cases, the director must disclose not only the nature and extent of the interest in the property but also the cost of the property to the purchaser and the cost thereof to the seller, to the extent that such information is within the director's knowledge or control.[449] As indicated, the Canada Act is the only statutory regime wherein the nature and extent of a director's interest need not be disclosed.

Section 77(1) of the Canada Act merely requires disclosure by a director that there is an interest in a contract. The requirement to disclose the nature and extent of the interest exists in s.76 of the Canada Act which pertains to disclosure of serious impairment of capital by directors. Clearly it is preferable to require the more complete disclosure rather than the mere fact of interest. It seems obvious that the draftsmen of the Act simply mechanically transcribed ss.77(1) from the Canada Corporations Act.[450]

All of the statutory regimes require directors to disclose their interest in a contract or transaction at a meeting of the directors.[451] Under the Canada Act, disclosure can also be made to a meeting of an executive committee of directors[452] The Saskatchewan Act[453] and the Manitoba Act[454] also prescribe how disclosure is to be made: by written notice to the co-operative or by entering it in the minutes of a directors meeting.[455] There is no requirement to give notice of the disclosure to the members generally, which arguably would be a better control device than only requiring disclosure to one's colleagues on the board.[456]

The statutes contain elaborate provisions as to when disclosure is to be made. Under all of the statutory regimes, disclosure may be made by filing a notice of continuing interest but the contents of the notice vary from one jurisdiction to another. The Saskatchewan Act contains a continuing disclosure provision which allows a director or officer to make one blanket declaration of interest to the effect that he is to be regarded as interested in any contract made with the person or organization that the co-operative is contracting with.[457] Such a declaration is a sufficient declaration for the purposes of the Act of an interest in relation to any contract so made. In Ontario, a director must declare that he is a director or officer of or has a material interest in a person that is a party to a contract or proposed contract with the co-operative.[458] The remaining jurisdictions require a two-part declaration. First, a director or officer must declare that he is a director, officer, member or shareholder of or otherwise interested in any other association or corporation or is a member or owner of, or partner in a specified firm.[459] Second, a director must declare that he is to be regarded as interested in any contract made with the other association, corporation or firm[460] or that he has an interest in a specified corporation or firm.[461]

If a director (or officer) fails to file a notice of continuing interest or a contract is made between the co-operative and a party who is not included in the notice, the legislation provides alternative methods of disclosure. In

Saskatchewan, if a material contract or proposed contract is one that would not require approval by the directors or shareholders in the ordinary course of the co-operative's business, the Act requires a director or officer to declare her interest after she becomes aware of the contract or proposed contract.[462] Ontario and Manitoba have similar provisions but they differ in that, whereas the Saskatchewan provision does not specify how quickly disclosure must be made once the director becomes aware of the contract or proposed contract, the Ontario provision requires disclosure at the first directors meeting after the director becomes aware of it[463] and the Manitoba provision requires immediate disclosure.[464]

With respect to when disclosure shall be made of other types of contracts, the Saskatchewan Act sets out a separate procedure for directors and officers. A director shall disclose an interest:[465]

(a) at the meeting at which a proposed contract is first considered;

(b) where the director is not then interested in the proposed contract, at the first meeting after the director acquires an interest;

(c) where the director becomes interested after a contract is made, at the first meeting after the director acquires an interest; or

(d) where the director has an interest in a contract before becoming a director, at the first meeting after he becomes a director.

Whereas an officer shall disclose an interest:[466]

(a) immediately after the officer becomes aware that the contract or proposed contract is to be considered or has been considered at a meeting of directors;

(b) where the officer acquires an interest after a contract is made, immediately after the officer acquires the interest; or

(c) where the officer has an interest in a contract before becoming an officer, immediately after becoming an officer.

The provisions of the Ontario[467] and Canada[468] Acts and the Company Act of British Columbia[469] prescribing when disclosures of interest shall be made by directors[470] are similar in many ways to those in the Saskatchewan Act but differ in certain respects. First, unlike the Saskatchewan Act, there are no express timing requirements for disclosure where a director has an interest in a contract before becoming a director.

As well, the British Columbia provision has no specific timing requirement for disclosure where a director becomes interested after a contract is made. It does however, contain a clause which permits a director to disclose an interest at the first meeting after the relevant facts come to his knowledge.[471] Such a clause affords some protection to a director who might not be aware until a later time that she is interested in a contract considered by the directors.

Once the disclosure requirements have been met, the next step in several jurisdictions is to obtain contract approval.[472] Section 93(10)(b)(i) of the Saskatchewan Act authorizes either the directors or the members to approve the contract.[473] The Company Act of British Columbia requires approval of the proposed contract or transaction by the directors.[474]

The third requirement is that, unless the contract falls into a category enumerated in the applicable statute, the director refrain from voting on any resolution to approve the contract. In Saskatchewan, a director may not take part in discussions considering or vote on a resolution approving a contract unless the contract is:[475]

(a) an arrangement by way of security for money lent by the director to the co-operative or obligations undertaken by the director for the benefit of the co-operative or subsidiary of the co-operative;

(b) a contract relating primarily to the director's remuneration as a director, officer, employee or agent of the co-operative or a subsidiary of the co-operative;

(c) a contract for indemnity or insurance pursuant to section 91;

(d) a contract with an affiliate.

This statutory prohibition against a director taking part in discussions considering the contract, which is unique in Canadian co-operative legislation, is desirable to the extent it avoids the possible influence a director could have in such discussions in obtaining approval to the contract. It is unclear from s.93 whether an interested director must be absent during a vote,[476] but it may be prudent for such director to do so.[477]

Where a director is not entitled to vote at a meeting at which a resolution to approve a contract is tabled, and the director's presence is required to constitute a quorum, a decision of the directors is not deemed invalid only by reason of the absence of the director.[478]

The Canada Act also contains a general prohibition against voting except in the following circumstances: (a) in the case of any contract by or on behalf of the association to give to the directors, or any of them, security for advances or by way of indemnity; (b) where the director is needed for quorum purposes; or (c) where the interest involved consists solely of the director being a director or officer of an association or corporation which is involved in a contract with the co-operative, provided he holds not more than qualifying shares in such association or corporation.[479] The exception concerning quorum is too lax. Rather than allowing a director to vote where he is required for quorum purposes, the Act could divorce the quorum requirement from the voting provision and allow him to be counted for quorum purposes but still prohibit his voting. This latter approach is taken in the Saskatchewan, Manitoba and Ontario Acts.

The Ontario Act[480] and the Company Act of British Columbia[481] contain a blanket prohibition against an interested director voting in respect of a contract or transaction in which she is interested. The Ontario Act further prohibits a director from being counted in the quorum with respect to the contract or transaction in which she is interested.[482] The British Columbia provision specifies that, unless the articles provide otherwise, a director shall not be counted in the quorum at any meeting of the directors at which the contract is approved.[483]

In addition to the above-noted requirements, the Saskatchewan Act also specifies that the contract must be "reasonable and fair to the co-operative at the time it was approved".[484] The authors of the Federal Proposals, with regard to similar requirement in their draft Act, stated:[485]

> Particularly noteworthy is the overriding criterion that the contract be "reasonable and fair to the corporation", which is necessary to preclude mutual "back-scratching" by directors who might otherwise tacitly agree to approve one another's contracts with the corporation.

The statutory requirement of fairness also serves to protect the co-operative where the disinterested directors fail to carefully consider the contract for which approval is sought and appreciate the full implications of the contract.[486] A number of tests have been proposed to assess whether the contract is "reasonable and fair". One test of fairness is whether the transaction carries the earmarks of an arm's length bargain.[487] Others include:[488]

(1) the amount of the disclosure by the interested director;

(2) whether there is fraud, actual or constructive; and

(3) if the transaction involves the sale of corporate assets, the price as compared to their market value and whether the fiduciary unduly profited in the transaction.

To protect a transaction from later attack, it has been suggested that an independent appraiser be retained to make a written report on the reasonableness and fairness of the contract prior to approval.[489]

Although the "reasonable and fair" requirement should be included in these provisions (it has been argued that it is in itself a sufficient test),[490] as the Federal Proposals go on to recognize, directors who engage the corporation in contracts which are not reasonable and fair to the corporation would be in breach of their general fiduciary duty as provided in the legislation.[491]

In Saskatchewan, if a director or officer discloses his interest in a material contract in accord with the Act, and the contract is approved by the members or directors, and if it is reasonable and fair to the co-operative at the time it was approved, the contract is not void or voidable by reason only that the director or officer is interested in the contract or was present at or counted to determine the presence of a quorum at the meeting of directors or committee of directors that authorized the contract.[492] Therefore, an interested director may be counted in the quorum of the meeting even though she cannot vote on the contract.

The Saskatchewan and Manitoba Acts are silent as to whether an interested director who satisfies the above-noted requirements is subject to account for any gains arising out of the contract. The statutory regime may have been intended to protect interested directors from an accounting[493] but it is unclear whether this result has been achieved.[494]

This ambiguity does not arise in Ontario, British Columbia and Canada because the statutory provisions in these jurisdictions explicitly protect an interested director from an accounting when the statutory requirements have been met. The Federal Act provides that if the director has met the disclosure requirements and has not voted in respect of the contract or transaction, he will not be accountable for any profit or gain realized from the contract or transaction by reason only of his holding the office of director.[495] Ontario and British Columbia have similar provisions but Ontario has an additional requirement that the "director acted

honestly and in good faith"[496] and British Columbia also requires approval of the contract or transaction by the directors.[497] The Ontario Act further provides that if the contract or transaction was in the best interest of the co-operative, it is not voidable by reason only of the director's interest in it.[498] The Company Act of British Columbia states: the contract or transaction would presumably be valid since non-compliance does not, in itself, make it void.[499] No mention is made in the Canada Act as to whether the contract is void or voidable. The common law likely applies, and such a contract may be voidable at the instance of the co-operative.

(iii) The Effect of Non-Disclosure

The Saskatchewan Act provides that where a director fails to make proper disclosure, the contract remains valid unless the co-operative, or a member, applies to the court to set the contract aside.[500] The effect of this provision "is to furnish a very strong incentive to a director to disclose his interest in a contract with the corporation of which he is a director before the contract is entered into".[501] Also, as was observed with regard to a similar provision in the Canada Business Corporations Act, "[p]resumably neither the corporation nor a shareholder would apply to the court if the contract were fair and reasonable, and no court would set the contract aside if it were fair and reasonable at the time it was approved".[502] Uncertainty remains whether directors who have failed to comply with the disclosure requirements are accountable to the co-operative since the Act is silent on the issue.[503]

Curiously, the Saskatchewan Act does not indicate what will be the result if a director engages in discussions or votes on a resolution approving a contract in contravention of the prohibition from such actions.[504] The Manitoba Act, on the other hand, contains a provision which is triggered where a director votes on resolution to approve a contract.[505] Where a director does so vote, "the resolution is not valid unless it is approved by not less than two-thirds of the votes of all the members of the co-operative to whom notice of the nature and extent of the director's interest in the contract or transaction are declared and disclosed in reasonable detail".[506] Thus, directors can be counted for quorum purposes but cannot vote on the resolution; if they do vote, the resolution is invalid unless ratified by a two-thirds vote of the membership. Aside from this provision allowing for member ratification, there is no provision in the Manitoba Act for member ratification of a contract where a director has failed to meet the disclosure requirements.

Consequences of the failure to comply with the statutory requirements are not spelled out in the Ontario Act or the Canada Act, as they are in the Saskatchewan and Manitoba Acts. In Ontario, "by implication it appears that failure to comply will render the interested director liable to account for his profits, and the contract voidable".[507] In Canada, since the contract is likely voidable even if disclosure is made, non-compliance with the disclosure requirements would merely render the director liable to account for profits.

Unlike the Ontario and Canada Acts, the Company Act of British Columbia clearly specifies the consequences of non-compliance with the statutory provisions. It states that a director who fails to comply with the disclosure requirements shall account to the co-operative for any profits made.[508] As in Saskatchewan and Manitoba, the contract itself remains valid notwithstanding that the disclosure requirements were not met unless the co- operative or any interested person applies to the court to enjoin the co-operative from entering into the proposed contract or transaction, or set it aside.[509]

The British Columbia Act imposes an additional sanction on a director who becomes involved in a contract with the co-operative. Rule 42(c) of Schedule B of the Act provides that a director who "is concerned or participates in the profits of a contract with the Association" shall vacate his office unless he discloses to the other directors that he is a member of a company which has entered into contracts with or done any work for the co-operative and he does not vote in respect of that contract or work. The sanction does not, however, restrict his right to sell or consign his agricultural or manufactured products to the association.[510]

The consequences of non-compliance can be avoided in Ontario, British Columbia and the Federal jurisdiction through special curative provisions which involve member ratification of the contract. The Canada Act provides that if the contract is confirmed by a simple majority of members at a special general meeting called for that purpose, mere non-compliance with the disclosure provisions will not impose any liability on the director in respect of any profit realized from the contract.[511] However, the saving provision has no effect on the validity of the contract. The saving provision in the Ontario Act is more onerous. The director is absolved from liability to account for profits and the contract or transaction is validated only if: (a) the director acted honestly and in good faith; (b) the

contract was in the best interests of the co-operative; (c) a two-thirds majority of members at a general meeting duly called for that purpose ratify the contract or transaction; and (d) the nature and extent of the director's interests are disclosed in reasonable detail in the notice calling the meeting.[512] In British Columbia, a director is not liable to account for profits if the contract or transaction is reasonable and fair and it is approved by a three-fourths majority of members after the director has made full disclosure of the nature and extent of his interest.[513] The provision regarding confirmation by members is an illustration of the members being permitted to exercise managerial power normally reserved to the directors.[514] It can be particularly useful where most or all of the directors are interested and consequently no independent quorum remains.[515]

(iv) Use of Corporate Property, Information or Opportunity

It is an elementary principle that when a director, as a fiduciary, converts corporate property to his own use, the property is held as trustee for the corporation and the director must account for any profit which accrues to him.[516] As explained in one work:[517]

> A prerequisite to the creation of such a trust relationship is that the corporation have a pre-existing proprietary interest, for there can be no trust unless there is trust property, that is, property owned legally by one party (the fiduciary), yet equitably by another (the corporation).

The duty not to use corporate property creates few problems in its application since "even the most unsophisticated director is likely to realize that he must not use the company's property as if it was his own".[518]

The misuse of corporate information and corporate opportunity has posed formidable problems for the courts. The general rule is that a director or officer must account for use of information or opportunity obtained while a director or officer. Although theoretically quite clear, the specific application of the rule has caused difficulties.

Laskin J. in *Can. Aero Service* v. *O'Malley* elaborates on the general principle in the following terms:[519]

> An examination of the case law in this Court and the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the persuasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior official from usurping for himself or diverting to another person or company with whom or with which he is actively associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been 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 that led him to the opportunity which he later acquired.

However, Laskin J. favoured a more flexible standard than the common law previously provided. As Beck points out:[520]

> The problem with respect to the corporate opportunity doctrine is to define the limits of the corporation's interest in such a way that directors and officers are given viable guidelines for their conduct. But clear definition is simply not possible, or desirable, when one is dealing with the interaction of human conduct and an infinite variety of commercial problems.

Arriving at this same conclusion, Laskin J. stated:[521]

> The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

Since the *Can. Aero Service* case, several aspects of the corporate opportunity doctrine have received further judicial consideration. The courts have held that it is no defense to an action for breach of fiduciary duties that the party offering the opportunity refuses to deal with the company.[522] The policy reasons for rejecting such a defense are set out by Prentice as follows:[523]

> Any other conclusion would tempt the directors "to refrain from exerting their strongest efforts on behalf of the corpora-

> tion" by affording them an "opportunity to profit" at what might be the company's expense. As Roskill J. pointed out [in the Cooley case] it would have been the defendant's duty to have tried to persuade the Eastern Gas Board "to change their mind" about dealing with the plaintiffs and that it would have been a "curious position" if "he whose duty it would have been to seek them to change their mind should now say that the plaintiffs suffered no loss because he would never have succeeded in persuading them to change their mind.

Prentice went on to state that similar reasoning would require the rejection of other possible defenses such as "commercial liability on the part of the company to exploit the opportunity or the fact that the opportunity was *ultra vires* the company".[524] Indeed, Canadian courts have held that the fact that the company cannot afford to take up the opportunity does not change the liability of the defendants.[525]

On the other hand, the courts have held that if there is a bona fide rejection of the opportunity by the corporation and the information concerning the opportunity was of a non-confidential nature (i.e. the information was common knowledge and not acquired by the directors only by reason of their office), there is no breach of the fiduciary relationship.[526] Ellis also suggests that the law will countenance a director's gain through conflict of interest where the director [527]

> (1) fully discloses the conflict;
>
> (2) abstains from involvement in any permissive mechanism whereby the corporation allows the director to take advantage of the conflict–for example, abstaining from voting in that regard; and
>
> (3) ensures appropriate corporate approval, usually through unanimous shareholder approval.

An issue which has not yet been resolved by Canadian courts is whether a director has a duty to offer to the company all corporate opportunities which come to her attention even in a private capacity.[528] There are no jurisdictions which expressly impose such a positive obligation upon a co-operative director and it is doubtful whether the general statutory formulation of directors' duties can be interpreted as imposing a positive duty on a director to offer all opportunities that come in a private capacity.[529] However, several commentators agree that if a director is appointed for the very purpose of acquiring for the company the type of opportunity which the director has taken herself, there may be a duty to bring such opportunity to the attention of the company, even if the opportunity did not come in her capacity as a director.[530]

None of the co-operative statutes in Canada imposes a specific obligation on directors or officers to refrain from using their fiduciary positions for their own advantage. Given the multitude of factors that must be taken into account to have a fair and workable rule, it is likely not desirable to attempt too much precision in a statute. British Columbia and Quebec do, however, regulate conflicts of interest in a general way. The Company Act of British Columbia provides that where a director or officer holds any office or possesses any property whereby, directly or indirectly, a duty or interest might be created in conflict with the duty or interest as a director of the company, the director must disclose the fact and the nature, character and extent of the conflict.[531] The Quebec Act provides that any director who has an interest in an undertaking which causes his personal interest to be in conflict with that of the co-operative must, under pain of forfeiture of office, disclose his interest and abstain from voting on any measure regarding the undertaking in which he has an interest.[532] While these are useful provisions, they arguably do not go far enough because they do not prohibit conflicts of interest. They merely require disclosure of potential conflicts.[533]

Attempts have been made in non-Canadian jurisdictions to codify in a more specific manner the conflict of interest rule. In England a 1978 Companies Bill contained the following:[534]

> (3) Without prejudice to subsections (1) and (2) above, a director of a company or a person who has been a director of a company shall not, for the purpose of gaining, whether directly or indirectly, an advantage for himself –
>
> (a) make use of any money or other property of the company; or
>
> (b) make use of any relevant information or of a relevant opportunity –
>
> (i) if he does so while a director of the company in circumstances which give rise or might reasonably be expected to give rise to such a conflict; or
>
> (ii) if while a director of the company he had that use in contemplation in circumstances which gave rise or might reasonably have been expected to give rise to such a conflict.
>
> (4) In this section –

"relevant information", in relation to a director of a company, means any information which he obtained while a director or other officer of the company and which it was reasonable to expect him to disclose to the company or not to disclose to persons unconnected with the company;

"relevant opportunity", in relation to a director of a company, means an opportunity which he had while a director or other office of the company and which he had

(a) by virtue of his position as a director or other officer of the company; or

(b) in circumstances in which it was reasonable to expect him to disclose the fact that he had that opportunity to the company.

Also the Draft Ghana Companies Act, prepared by Professor Gower, contains a statutory codification of the duty of loyalty. It is reviewed in the following terms:[535]

> For a model of a provision in a corporations statute requiring that directors observe the equitable duty of loyalty, one must look outside Canada to the Draft Ghana Companies Code prepared by Gower. Section 205 of the Draft Code prohibits a director from placing himself in a position in which his duty to the company conflicts or may conflict with his personal interests or his duties to other persons, unless he has the consent of the company. In particular, the Draft Code provides that without such consent, a director shall not:
>
> (a) use for his own advantage any money or property of the company or any confidential information or special knowledge obtained by him in his capacity director;
>
> (b) be interested directly or indirectly (otherwise than merely as a shareholder or debenture holder in a public company) in any business which competes with that of the company; or
>
> (c) be personally interested, directly or indirectly, in any contract or other transaction entered into by the company except as provided [in the Draft Code].
>
> Section 206 future provides that, in order to comply with the consent requirement, the director concerned must first disclose all material facts, including the nature and extent of his interest, and the transaction must be approved by all the shareholders, or approved at a general meeting by vote of the disinterested shareholders only.

It is concluded that a specific provision is more desirable than a general provision:[536]

> Though this kind of general statement of the directors' and officers' duty of loyalty is likely to have a salutary effect of emphasizing to directors and officers the significance of their position as fiduciaries, and though, in the light of the comments of Alaskan, J., noted above, it may be the only approach to codification which is possible at present, it may not be sufficient in itself. Beck emphasizes that it is essential that "the law - the legislatures, the agencies and the courts, take as realistic a look at the problem as is possible". He asserts that "Canada's highest court and its most important Corporations Act have both fallen short of giving the leadership that is required to make the practice in the boardroom conform to the law in books". To achieve this purpose, it may be necessary to develop detailed rules governing appropriation of corporate opportunities, abuse of confidential information and competition, similar to those which regulate insider trading or conflicts of interest in corporate transactions.

The duty not to take advantage of one's position as a director or officer applies equally to co-operative positions as to positions in ordinary business corporations. Also, there are no characteristics of a co-operative corporation that should result in different applications of the rule.

(v) Competition

Logically, the duty of a director to avoid conflicts between personal interest and duties to the co-operative would be breached where the director is in business in competition with the corporation or is associated with a business that is competing with the corporation. Surprisingly, however, this has been held not to be the case. There is authority to the effect that it is permissible to be a director of two competing corporations simultaneously, and that it is permissible to compete directly with the corporation of which one is a director.[537] However, these early cases have come under increasing criticism in recent years by the courts and academics alike.[538] Of the traditional lenient position, Gower poignantly states the problem it presents in the following terms:[539]

> This view is becoming increasingly impossible to support. It has been held that the duty of fidelity flowing from the relationship of master and servant may preclude the servant from engaging, even in his spare time, in work for a competitor, and that the servant's duty of fidelity imposes lesser

> obligations than the full duty of good faith owed by a director or other fiduciary agent. How then, can it be that a director can compete whereas a subordinate employee cannot? Moreover, it has been recognized that one who is a director of two rival concerns is walking a tight-rope and at risk if he fails to deal fairly with both.

Recent authority suggests that the engaging in competition while still in office may be a breach of duty, and that, at the least, it will almost always lead to other breaches of duty.[540] Moreover, recent jurisprudence indicates that a director's fiduciary obligations may continue after ceasing to hold any office with the corporation and prevent engagement in certain competitive action for a reasonable period of time. Two lines of authority have emerged since the *Can. Aero Service* decision[541] regarding the obligations of a departing fiduciary to the former employer.[542] The first line of authority, beginning with *Alberts* v. *Mountjoy*[543] holds that any direct solicitation of former customers constitutes a breach of fiduciary obligations. In *W.J. Christie & Co. Ltd.*, Huband J.A. applied the *Alberts* case and then proceeded to define the duties of a director/officer/key management person who occupies a fiduciary position in this way:[544]

> Upon his resignation and departure, that person is entitled to accept business from former clients, but direct solicitation of that business is not permissible. Having accepted a position of trust, the individual is not entitled to allow his own self-interest to collide and conflict with fiduciary responsibilities. The direct solicitation of former clients traverses the boundary of acceptable conduct.

The second line of authority has applied *Can. Aero Service* in a more restrictive fashion. Instead of extending the scope of the obligation to blanket solicitation of customers after departure, these authorities define the extent of the obligation by examining the nature, specificity and ripeness of the customer base, the knowledge held by the departing employee, and the type of solicitation.[545]

The dichotomy in the case law is perhaps understandable given that there are two conflicting policy goals in this area of the law. On the one hand, there is a concern for protecting the integrity of the business enterprise and on the other hand, there is a recognition of a person's right to earn a living and compete.[546] The length of time for which a fiduciary's obligations to his former employer will extend after termination or resignation will, of course, depend upon the facts of each particular case.

However, a review of the case law suggests that one year is the average period.[547]

Co-operative Acts in the Maritime provinces contain express anti-competition provisions. Section 32 of the New Brunswick Regulations, for instance, provide that:[548]

> No director shall engage in business that competes with the business of the association.

Section 27(c) of the Nova Scotia Regulations is similarly worded but it permits competition if approved by the Inspector. It will be noted that these provisions only prohibit competition by directors while they are directors of the co-operative. They do not deal with directors' obligations once they have ceased to hold any office with the co-operative. Hence, the common law would likely govern in that situation. The remaining jurisdictions are silent on the issue of competition and the common law would again apply.

(vi) Insider Trading

(A) At Common Law

Transactions involving corporate securities by persons who have access to inside information have become commonly known as "insider trading". As we have seen, if directors or officers use information acquired while a director or officer for their own purposes,[549] they will be in breach of duty. If the information is "price-sensitive information" in regard to corporate securities, the same result obtains and the corporation can recover any profit made as a result, even though it has experienced no loss.[550]

Individual aggrieved shareholders, on the other hand, traditionally had no legal recourse against directors engaged in insider trading. The rule at common law was that the directors owed a fiduciary duty to the corporation but not to the individual shareholders.[551] This principle is regarded as being established by the House of Lords decision in *Percival* v. *Wright*,[552] where the directors purchased shares from the shareholders without disclosing that negotiations were underway to sell the company at a favourable price. The court upheld the transfer and rejected any argument that the directors stood in a fiduciary position towards the shareholders at the time of the sale. However, the courts have gradually restricted the scope of the *Percival* decision and will now find a fiduciary duty owed by the directors to the shareholders in certain circumstances. In *Allen* v. *Hyatt*,[553] the court decided that the directors owed a fiduciary duty

to account to the shareholders for their secret profits because they had held themselves out to the individual shareholders as acting for them in an agency capacity for the purpose of finding buyers for their shares. In *Coleman* v. *Myers*,[554] the New Zealand Court of Appeal limited the *Percival* decision to its facts and held that a fiduciary obligation had been created in the circumstances. Woodhouse J. stated at pp. 324-325:

> In my opinion it is not the law that anybody holding the office of director of a limited liability company is for that reason alone to be released from what otherwise would be regarded as a fiduciary responsibility owed to those in the position of shareholders of the same company.
>
> ...On the other hand, the mere status of company director should not produce that sort of responsibility to a shareholder and in my opinion it does not do so. The existence of such a relationship must depend, in my opinion, upon all the facts of the particular case.
>
> As I have indicated it is my opinion that the standard of conduct required from a director in relation to dealings with a shareholder will differ depending upon all the surrounding circumstances and the nature of the responsibility which in a real and practical sense the director has assumed towards the shareholder.

This factual approach in determining whether or not a director engaged in insider trading owes a fiduciary duty to an individual shareholder has since been adopted by several Canadian courts.[555] The same duties will be owed by directors to members of co-operatives where shareholding is not a requirement of membership.

(B) Under Legislation

Subject to the general rules of use of corporate information and opportunity, insider trading has received elaborate treatment in ordinary business corporation statutes, largely because of the potential for insiders to profit; the great temptation that exists to engage in insider trading; and the fact that insiders can include persons who are not subject to fiduciary duties.

Co-operative statutes have traditionally not contained provisions controlling insider trading. However, there now exist insider trading provisions in several co-operative statutes. Because of the differences inherent in co-operative shares, these provisions control insider trading in a less elaborate fashion than do ordinary business corporation statutes and

securities statutes. Under Section 89 of the Saskatchewan Act, for example, there is no need to file insider reports. The rationale for this approach is explained in the Ontario Report on co-operatives which resulted in a similar regime being established in the Ontario Act. The report states:[556]

> There are in the opinion of the Committee, several reasons why the requirement to file insider reports should not extend to the insiders of a co-operative.
>
> A member of a co-operative has only one vote regardless of the number of shares he owns so that the holder of 10% of the voting shares in a co-operative is no more able to influence the conduct of the affairs of the co-operative by his voting powers than a member with only one share.
>
> Shares in a co-operative do not fluctuate greatly in value, are subject to a dividend limit... per annum, may be repurchased or redeemed by a co-operative... at a maximum of par value, and transfers of shares require the approval of the board of directors. All these factors contribute to the absence of any significant market in the shares of a co-operative.

This rationale applies to traditional co-operatives; however, the recent restructuring of co-operatives to allow shares to be publicly traded will demand closer security and regulation of insider trading since the potential abuses by insiders will be the same as in ordinary business corporations. Even in traditional co-operatives, there is potential for abuse of insider information. The Ontario report concludes:[557]

> There would, nevertheless, appear to be certain opportunities for abuse of confidential information by insiders of a co-operative for their personal gain. In particular, the judicious exercise of the discretion to approve transfers of shares and the selective use of the power of a co-operative to purchase its shares might enable the directors to dispose of their shares in favourable circumstances or, as appears to have occurred in one case, to reduce the number of members and thereby acquire effective control of a co-operative with valuable capital assets in order to wind up the co-operative and divide the assets. For this reason, the Committee, while recommending the elimination of a requirement that insiders of a co-operative with share capital file insider reports, recommends that insiders of all co-operative, defined as directors and officers, their associates and affiliates, be liable to compensate any person for any direct loss resulting from the use of any specific confidential information in connection with a

transaction relating to the securities of the co-operative for any direct benefit or advantage resulting therefrom.

Unlike the insider trading provisions in other co-operative statutes, s.89 of the Saskatchewan Act does not refer to "insider" or "insider trading". Instead, it contains a civil liability section which imposes double liability on "a director or officer, or an associate of a director or officer, who, in connection with a transaction relating to shares of a co-operative or a debt obligation of a co-operative, makes use of confidential information for the benefit or advantage of the director, officer or associate that, if generally known, might reasonably be expected to affect materially the value of the share or the debt obligation".[558] If such person is in breach of the provision, she is liable to compensate "any person for a direct loss suffered by the person as a result of the transaction".[559] However, if "the information was known or reasonably should have been known to the person at the time of the transaction", no liability will result.[560] The director is also accountable to the co-operative for any direct benefit or advantage received.[561]

The Manitoba and Ontario Acts generally take the same approach to insider trading as the Saskatchewan Act. There are no reporting requirements but the misuse of confidential information in connection with a transaction in a security[562] may result in dual liability to an "insider", and in Ontario, to an "associate or affiliate of an insider" as well.[563] These provisions are both broader and narrower, in terms of the class of persons covered, than the equivalent provision in the Saskatchewan Act. The Manitoba provision is broader than the Saskatchewan or Ontario equivalents in that it extends to employees or persons retained by the co-operative[564] and to anyone who receives confidential information from a director, officer or employee of the co-operative.[565] The Saskatchewan and Ontario provisions are broader than the Manitoba provision in that they impose liability on an associate who advantageously uses confidential information. The term "associate", where used to indicate a relationship with any person, means any corporation of which such person owns more than 10% of the equity shares, any partner of that person acting on behalf of the partnership of which they are both partners, any trust or estate in which the person has a substantial beneficial interest or as to which that person serves as trustee or in a similar capacity, any spouse or child of that person and any relative or relative of his spouse who has the same home as such person.[566] The Manitoba Act also applies to a director or officer of a subsidiary of a co-operative[567] and the Ontario Act applies to an affiliate of an insider.[568] The Ontario Act is narrower than either the Saskatchewan or Manitoba Acts in that it only applies to senior officers as opposed to all officers. "Senior officer" is defined in the general definition section as:[569]

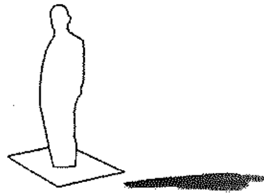
> i. The chairman or any vice-chairman of the board of directors, the president, any vice-president, the secretary, the treasurer or the general manager of a co-operative or any other individual who performs functions for the co-operative similar to those normally performed by an individual occupying any such office, and
>
> ii. each of the five highest paid employees of a co-operative, including any individual referred to in subparagraph i.

The Manitoba[570] and Ontario[571] Acts provide for a two-year limitation period after the date of completion of the transaction within which an action to enforce a right created by the civil liability section must be brought. The Ontario Act further provides that an owner of securities of a co-operative may apply to the court for an order that the Minister commence or continue an action in the name of and on behalf of the co-operative, if the co-operative has refused or failed to commence an action or has failed to prosecute such action diligently.[572] The applicant must show that he has reasonable grounds for believing that the co-operative has a cause of action under the insider trading provisions.[573]

The provisions in the Saskatchewan, Manitoba and Ontario Acts will likely be rarely used. Although, as recognized in the Ontario Report, there is some potential for insider trading, the potential is minimal in traditional co-operatives compared to ordinary business corporations. There are a number of interpretational and practical problems that arise from the insider trading provisions discussed above, but the reader is referred to other works for a review of these problems.[574] The Canada Act has adopted an approach that is substantially different from that adopted in the Saskatchewan, Manitoba and Ontario Acts with regard to insider trading. Section 79 requires directors and officers to file with the association's secretary, prior to each general meeting, a detailed statement of all transactions involving shares or other securities of the co-operative to which the director was a party for her personal account, either directly or indirectly. Such disclosures are then to be made available for inspection by the members.[575] Failure to comply with the disclosure section renders a director or officer liable to a maximum fine of $1,000 and/or six months imprisonment.[576]

Section 79 is a much less valiant attempt at regulating insider trading than appears in other co-operative statutes. There is no civil liability provision whatever, not to mention a dual liability provision. The disclosure requirement only applies to directors and officers and does not apply to other insiders. The rationale of the provision is that disclosure in itself will discourage directors and officers from using their position and insider knowledge for gains in transactions involving co-operative securities. "Securities" is defined as shares of a corporation or any debentures or other obligations of a corporation whether secured or unsecured".[577]

There are no statutory provisions governing insider trading in the remaining jurisdictions, so the common law applies.



Chapter 4

Other Statutory Duties

Co-operative Statutes

There are a number of specific duties and liabilities imposed on directors in addition to those dealt with in the previous sections. The provisions in the various co-operative Acts which impose the duty to manage or supervise management impose, in effect, on directors, many ancillary duties, in the sense that they may ultimately be responsible for many of the statutory directives which are aimed at the co-operative. However, additionally, there are specific provisions aimed at the directors in co-operative legislation.

Duty To Call Meetings And Maintain Records

The Saskatchewan Act does not specify that directors are responsible for calling annual meetings of members.[578] However, the Act does provide that directors shall call a special meeting of members within 20 days of the receipt of a written request from the lessor of 5% of the membership or 300 members (but in no case fewer than 100 members), if the co-operative has 1,000 or more members. In the case of a co-operative with fewer than 1,000 members 10% of the membership is required with no minimum number.[579]

Although the Saskatchewan and Maritime Acts do not contain any specific remedial provisions if the directors fail to call and hold a meeting of members upon requisition, most co-operative statutes expressly provide that any of the requisitionists (or a specified percentage thereof) may call the meeting if the directors fail to do so within the prescribed time period.[580] Several Acts further provide that the co-operative shall reimburse the requisitioners for any reasonable expenses incurred by them in requisitioning, calling and holding the meeting, unless the majority of members otherwise resolve,[581] and the co-operative shall retain an amount, equal to the amount the requisitioners were reimbursed, out of any monies due to the defaulting directors.[582] Subject to several qualifications, where a member of a Saskatchewan co-operative has submitted a proposal to the co-operative, the directors shall circulate the proposal or make it available to the membership.[583] The Saskatchewan Act does not impose a positive duty on directors to hold directors meetings at specified times[584] but directors are responsible for maintaining proper minutes of directors meetings[585] and true accounts.[586] In British Columbia, the directors are also responsible for keeping proper registers of members and directors at the registered office,[587] and in Newfoundland and British Columbia the

directors must ensure safe custody of the seal of the co-operative.[588]

Financial Reporting

In Saskatchewan, directors are responsible for placing before each annual meeting of members an approved[589] annual financial statement and the report of the auditor to the members.[590] As well, directors must notify the audit committee and the auditor of any errors in the financial statement.[591] If the auditor is of the opinion that the error is material, the directors shall prepare and issue revised financial statements or otherwise inform the shareholders and registrar of the error.[592] In Ontario and British Columbia, where facts come to the attention of the officers or directors which could reasonably have been determined prior to the last annual meeting and, if then known, would have required a material adjustment to the financial statement, the officers or directors shall communicate such facts to the auditor and promptly amend the financial statement and send it to the auditor.[593] Upon receipt of such facts, the auditor shall, if in his opinion it is necessary, amend his report and the directors shall mail such amended report to the members.[594] In Quebec, the board of directors is under a further obligation to send a copy of the annual report to the Minister within 30 days after the annual meeting.[595] The Canada Act imposes a duty on every association to send a copy of its financial statement and auditor's report to its members and to file a copy of it with the Minister within 14 days prior to its annual meeting.[596] Every director or officer of the association who knowingly authorizes, permits or acquiesces in the failure to file such documents in accordance with the Act is also guilty of an offense and liable to be fined.[597] In Saskatchewan and Manitoba, the minister may, at any time, require a co-operative or a director or officer to make a special return.[598] The Manitoba Act further provides that any person who fails to respond to a request by the Minister for a special return is guilty of an offense punishable by a $2,000 fine and/ or imprisonment for one year.[599]

Protection of the Corporate Fund

The Saskatchewan Act provides that directors are jointly and severally liable to make good any loss or damage suffered by the co-operative if they vote for, consent to a resolution authorizing, or otherwise approve of:

(a) the co-operative acquiring its own shares in contravention of the statutory requirements.[600]

(b) the payment of a dividend, a patronage dividend or

interest on shares when the co-operative is insolvent or when such dividend or interest payment would render the co-operative insolvent.[601]

(c) a loan or guarantee or the giving of financial assistance, except in specified circumstances, where there are reasonable grounds for believing that the co-operative is insolvent or would thereafter be insolvent.[602]

(d) the improper payment of an indemnity to a director or an officer.[603]

(e) any act not consistent with the purpose of the co-operative as set out in its articles and with respect to which the co-operative has paid compensation to a person.[604]

Since no other co-operative statutes contain a catch-all clause similar to (e) above, directors of Saskatchewan co-operatives arguably must meet higher standards than directors of co-operatives in other jurisdictions in terms of protecting the corporate fund.[605]

In Manitoba and Canada, directors are also potentially jointly and severally liable where they vote for or consent to the issue of shares for other than money and the consideration is less than the fair equivalent of the money that would have been required if money had been received for the shares.[606] Similar liability likely exists in other jurisdictions even though there is no specific provisions directed at the particular facts.

The Canada Act provides that if the directors become aware of a serious impairment of capital of the co operative which, in their opinion, renders the co-operative insolvent, they have a duty to immediately call a special general meeting to disclose the nature and extent of the impairment to the members.[607]

Allocation of Surplus Revenues

The Saskatchewan Act sets out specific guidelines to be followed by directors as to apportionment of surplus revenues.[608] In Manitoba, the directors are required to compute the amount of business done by a member with the co-operative, using the prescribed criteria, to determine the allocation of surplus among the members.[609] The Quebec Act specifies that every person who makes an unlawful apportionment of sums belonging to a co-operative is guilty of an offense.[610] In Newfoundland, it is the duty of the directors of a credit society to recommend at annual meetings the manner in which surplus may be distributed and the rate of interest for all loans, and to determine the maximum loan which may be made to

members by the Society subject to the Rules and the Constitution.[611] The directors of a consumer or producer society shall recommend at annual meetings the interest on shares and patronage refunds to be paid.[612] In British Columbia, the directors shall report on the state of the co-operative's affairs at the meeting of members and make recommendations on the amounts to be paid by way of dividend and as bonuses.[613]

Membership

In several jurisdictions, positive duties are imposed on directors regarding membership in the co-operative. In Newfoundland, the board must consider and deal with an application for membership not later than its next meeting.[614] The Prince Edward Island Act provides that the board shall review and evaluate applications for membership on a regular basis, provide reasons if it rejects an application and record such reasons in the minutes.[615] The same duties apply if the legal heirs of deceased members apply for membership.[616] In Newfoundland, the forms of constitution state that the board is responsible for handling the withdrawal and expulsion of members.[617] The Alberta Act provides that when a member withdraws from membership, other than an association incorporated to supply electric power or natural gas to its members, the directors shall provide him with his equity, other than shares in the assets of the association.[618] Before ordering an expulsion, the directors must invite the member to attend a Board meeting and discuss the reasons for the expulsion with the member.[619] If an expulsion is ordered, the directors shall give prompt notice of the expulsion order to the affected member.[620] In the Maritime jurisdictions, the directors must give notice to a member before he is excluded from membership and the member may request that the matter be placed on the agenda of the next meeting of members.[621] In Alberta and Newfoundland, directors are to follow specific guidelines as to the disposal of shares of a member on his decease.[622]

Investigation

The Saskatchewan Act confers upon the court the power to order an investigation of a co-operative and to require any person to produce documents or records or to attend a hearing and give evidence on oath.[623] The Newfoundland Act requires officers (defined to include directors) to produce documents and furnish information where the Registrar holds an inquiry[624] or audits the accounts of the registered society.[625] The Registrar may apportion the costs of such inquiry between the co-operative, the members or creditor demanding the inquiry and the officers of the co-operative.[626] In several other jurisdictions, where the court or the Minister has ordered an investigation or the Inspector has initiated an investigation of the co-operative, it is a specific offence for a director to refuse to produce any account or record or, if examined under oath, to refuse to answer any question related to the affairs and management of the co-operative.[627] The Company Act of British Columbia also makes it an offence for any person to destroy or alter any document[628] or to fail to give information in the course of an investigation or knowingly or recklessly make a statement which is false in a material particular.[629]

Under the Canada Act, if an administrator is appointed following the investigation, it is an offence for any person to obstruct or hinder the administrator in the execution of her duties or make a false or misleading statement to her.[630]

Directors' Liability to Employees

In Manitoba, Ontario and Canada, the directors of a co-operative are jointly and severally liable to the employees for all debts that become due for services performed for the co-operative, not exceeding six months' wages in respect of a period while they are directors.[631] There are no limitations on the number of employees that can make the claim or the maximum total liability.[632] The provision does not limit liability to "wages" but rather extends it to all "debts" due for services performed for the co-operative. The reference to "wages" only limits the amount of liability to each employee.[633]

Duty to Comply with the Act

The Saskatchewan Act provides that any person who contravenes a provision of the Act or the regulations for which no other penalty is provided[634] or who fails to give any notice or send any return or document that is required by the Act[635] is guilty of an offence and is liable on summary conviction to a fine not exceeding $5,000.[636] Further, the Act provides that if a director does not comply with any provisions of the Act, the regulations, the articles or the bylaws, any complainant or creditor of the co-operative may apply to the court for an order requiring compliance with or restraining contravention of the provision.[637]

Several Maritime Acts also provide that directors and officers are guilty of an offence if, having knowledge of the facts, they support a motion,

resolution or proposal which, if carried out, would constitute an offence against the Act.[638] The Manitoba Act not only establishes an offence for non-compliance but also imposes a positive duty on directors to act in accordance with the Act, the regulations, the articles and the charter bylaws of the co-operative.[639]

Additionally, the Prince Edward Island and New Brunswick Acts impose a positive duty on directors to ensure that the association complies with the provisions of the Act, the regulations and its bylaws.[640] The British Columbia and Ontario Acts do not impose a positive duty on directors to ensure that the co-operative complies with the Act, but instead provide that where a co-operative is guilty of an offence, every director who authorizes, permits or acquiesces in an offence also commits an offence.[641] In Alberta, a director's derivative liability is of a secondary nature. The Alberta Act provides that an offence by the association shall be deemed to have been committed by each officer bound by the bylaws to fulfill the duties whereof the offence is a breach.[642] If there is no such officer, then each of the directors is liable.[643] However, no office or director is liable if it is proved that he attempted to prevent the commission of the offence.[644]

Under the Quebec Act, it is an offence for any person to hinder or attempt to hinder any person who performs an act which the Act obliges or authorizes her to do.[645] The Act further provides that every person who knowingly, by an act or omission, attempts to aid a person to commit an offence or advises a person to commit an offence, encourages or incites the person thereto, is herself a party to the offence and liable to the same penalty as that provided for the person who committed it, whether or not such person has been prosecuted or convicted.[646]

Other Duties

The various co-operative statutes also impose numerous miscellaneous duties on directors. In Saskatchewan, it is an offence for *any* person to make untrue statements of material facts or omits material facts in a report, return, notice or other document required by the Act or the regulations to be sent to the registrar or any other person.[647] Where such person is a body corporate, any director or officer of the body corporate who knowingly authorizes, permits or acquiesces in the offence is also guilty of an offence.[648] Under the Saskatchewan Act, it is also an offence for any person to contravene Part XIX (security issues), fail to comply with an order, direction or other requirement made pursuant to Part XIX or make a false or misleading statement of a material fact in any document, evidence or information submitted, given or required pursuant to Part XIX.[649] An individual committing such an offence is liable on summary conviction to a fine of not more than $5,000.[650] Directors of a consumers' co-operative are responsible to see that employees in appropriate positions are covered by proper security.[651]

Further, directors of a Saskatchewan co-operative shall, subject to several qualifications, promptly fill a vacancy in the office of auditor.[652] The Canada Act provides that every director who authorizes a seal or specified documents wherein or whereon the co-operative's name is not properly engraved or mentioned is guilty of an offence and liable on summary conviction to a fine up to $200 and is also personally liable to the holder of the bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the amount is duly paid by the association.[653] As well, every director who refuses or fails to permit the exercise of the right to inspect the books and make extracts is guilty of an offence.[654] Moreover, any person who willfully fails to give notice of an appointment of a receiver, or receiver and manager (by instrument or court order) to the Minister punishable on summary conviction by a fine up to $200 for each day the default continues.[655]

The Canada Act further provides that the directors shall appoint the auditor, if the members fail to do so,[656] and fix the auditors remuneration.[657]

Under the Canada Act, a director is exposed to far broader derivative liability than under any other Canadian co-operative legislation. The Act provides that every director commits an offence who knowingly and willfully authorizes or permits:

(a) a co-operative not to keep its name painted or affixed in the manner required by the Act;[658]

(b) a co-operative not to provide the prescribed particulars regarding mortgages and charges to the Minister;[659]

(c) the omission of any entry required to be made in the register of mortgages;[660]

(d) an officer to refuse an inspection of the register of mortgages or for copies of instruments to be made;[661]

(e) a refusal to inspect the register of debenture holders or provide a copy of the register or a trust deed in accordance with the Act is guilty of an offence;[662]

(f) the co-operative not to prepare and file an annual return in accordance with the Act.[663]

In British Columbia, a person who withholds, destroys or conceals a record after it has been required by the Superintendent or other person making an examination of the affairs of the association commits an offence and is liable to a $2,000 fine and/or imprisonment for up to one year.[664] As well, it is an offence for a person who has knowledge of a marketing contract between a producer and an association to acquire, or receive for sale or other disposal, any product or to persuade the producer to sell or deliver the product contrary to the contract.[665] As well, the model rules provide that the directors shall not invest any part of the funds of the co-operative exceeding $1,000 on any one occasion without the sanction of an extraordinary resolution or unless the monies are invested in accordance with the *Trustee Act*.[666]

In Alberta, the directors must annually allot shares to the members after the amount available for shares is ascertained and shall give written notice of the allotment to each member.[667] Every director who had knowledge of the pledging of credit in a manner not permitted by the Act, and acquiesced in or authorized the pledging of such credit is guilty of an offence and liable to a fine of between $50 and $500 or, if not immediately paid, to between 30 and 60 days imprisonment.[668]

The Quebec Act specifies that if a fishermen's co-operative receives advances from a federation on produce or merchandise in stock, any director, executive officer or employee who delivers such produce or merchandise to a party other than the federation is personally liable for the damage caused to the federation and is also liable to forfeiture of office.[669] Every person who falsely holds out that it is a co-operative, a federation or a confederation is also guilty of an offence.[670] The directors shall insure the co-operative against specified risks,[671] designate the persons authorized to sign contracts or other documents on behalf of the co-operative,[672] facilitate the work of the auditor,[673] encourage co-operative education,[674] promote co-operation[675] and furnish the Minister, when requested, with a copy of the bylaws and any other information he may require.[676] Moreover, the directors cannot pledge, hypothecate or otherwise give property as security unless authorized by bylaw passed by a two-thirds majority.[677]

In Prince Edward Island and New Brunswick, the directors shall acquire the facilities necessary to carry on the association's business,[678] ensure that the business is conducted in accordance with law and that justice is given to members and employees,[679] control all investments,[680] secure economical working of the co-operative's business,[681] take all reasonable steps necessary to ensure the existence of a system or control over the assets of the association,[682] provide the best possible conditions of labour in the association's service and demand and secure equivalent results in efficiency, faithfulness and diligence,[683] set policy for control of the sources of supply of the association's goods and maintain a direct and vital connection with other co-operatives.[684] The Prince Edward Island Act further provides that the directors shall foster a spirit of enthusiasm for co-operative effort.[685]

In Newfoundland, the directors shall (a) have charge of investments and designate the bank(s) in which the funds of the Society shall be deposited;[686] (b) be responsible for the proper care of all the assets of the Society and make all contracts entered into by or on behalf of the Society;[687] (c) authorize the charge-off of uncollectible loans and see to the collection of overdue loans;[688] and (d) in conjunction with the manager, formulate the general trading policy of the Society.[689]

In all jurisdictions, further duties and responsibilities may be set out in the bylaws of the co-operative.[690]

Other Statutes

Introduction

In addition to the above, there exist a multitude of statutory provisions in other legislation which impose personal liability on directors and officers.[691] It is beyond the scope of this book to embark upon a detailed review of all such legislation.[692] The following discussion will, instead, highlight some of the more notable areas of concern to directors and officers of co-operatives.

Liability To Employees

As noted earlier,[693] several co-operative statutes have express provisions governing directors' liability to employees. In the absence of such provisions, directors may still be responsible for certain types of employee claims under various Canadian employment legislation. Section 63(1) of the Saskatchewan Labour Standards Act is a typical provision:[694]

> 63(1) Notwithstanding any other provision in this Act or any provision in any other Act, the directors of a corporation are jointly and severally liable to an employee of the corporation for all debts, not exceeding six months' wages, due for services performed for the corporation while they are directors.

There are conflicting authorities as to the scope of directors' personal liability for wages under such provisions. Saskatchewan courts have held that directors may be personally liable not only for traditional wage claims but also termination pay and damages for wrongful dismissal.[695] Ontario courts, on the other hand, have ruled that subject to certain exceptions, directors are not liable for termination pay or awards for wrongful dismissal.[696] Directors' liability for employee claims under ordinary employment legislation is certainly broader than under the corresponding provisions in co-operative legislation. Section 63(1), for example, imposes absolute liability on directors, whereas the equivalent provisions in co-operative statutes create liability which is contingent on the co-operative's insolvency.[697] As well, s.63 has a simplified collection procedure whereby the Director of the Labour Standards Branch may file a certificate of unpaid wages with the court and have it entered as a judgment of the court. The more stringent liability of the legislation of general application would precede the less stringent requirements in the co-operative legislation.

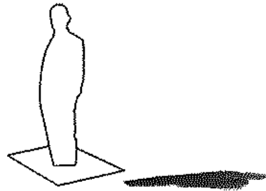
Tax Liability

The federal Income Tax Act contains several provisions which impose personal liability on directors.[698] The statutory provision that will most often impact on directors is ss.227.1 of the Act.[699] It provides that if a corporation fails to deduct, withhold or remit a requisite tax, the directors of the corporation at the time it failed to deduct, withhold or remit the tax are jointly and severally liable, together with the corporation, to pay that amount and any interest or penalties relating thereto. However, a director is not liable to pay until the Crown has (i) attempted to collect from the corporation and has failed or (ii) proved a claim in the corporation's liquidation or bankruptcy within six months of the commencement of such proceedings.[700] As well, proceedings against a director must be commenced within two years after the director ceased to be a director of the offending corporation.[701] A director may avoid liability by showing that he exercised "the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances".[702]

Environmental Offences

With the increasing concern for the environment has come an increasing array of environmental offences for which directors may be held personally liable. There are several ways in which a director's liability for environmental offences may arise. A director may be liable as a principal if he personally commits a forbidden act,[703] is in a position of influence and control over a activity and fails to take reasonable steps to prevent the occurrence of the offence[704] or is in breach of an order directed to the corporation (i.e. contempt of court).[705] A director may also be liable as a party to an environmental offence committed by the corporation or another person, under the general provisions for accomplice liability,[706] if he assisted or encouraged the corporation to commit the offence or counselled its commission.[707] As well, numerous special statutory provisions expressly impose personal liability on directors of offending corporations.[708] Finally, a director may be liable for conspiracy with the corporation or others to commit an environmental offence.[709]

Directors of co-operatives should be particularly cognizant of environmental offences because the fines available for them have increased substantially in recent years.[710] In order to escape liability, directors will have to play a more active role to ensure compliance with environmental protection laws. One recommendation is that directors establish "pollution prevention systems".[711]



Chapter 5

Statutory Relief, Waiver, Indemnification and Liability Insurance

Introduction

Although duties on directors and officers may be quite strict, the effectiveness of those duties can be greatly reduced if the directors and officers can be relieved from liability by the co-operative. One writer summarizes the problem in this area in the following words:[712]

> If the corporation is completely free to absolve its officers and directors from the consequences of their wrongful actions, or to indemnify them if successful actions are brought against them by others, the common law and statutory duties of care and rectitude will be nullified and the new derivative action will lose much of its value. Equally obviously a company should not be unbending. Everyone makes mistakes and a corporation must be allowed some latitude in dealing with management's lapses.

The following pages will review the various co-operative statutes to determine the extent to which officers and directors can be relieved from liability. In addition to waiver of liability, indemnification and liability insurance, the statutes contain provisions which grant relief from liability in specific situations. These provisions will also be reviewed.[713]

Statutory Relief And Waiver

Statutory Relief from Liability

As discussed earlier, the Saskatchewan Act contains provisions intended to protect the financial integrity of the co-operative.[714] A director may avoid personal liability under these provisions by seeking a court declaration as to whether the co-operative is insolvent or whether the payment of a dividend or interest on shares or patronage dividend or the lending of money would make the co-operative insolvent.[715]

Further, a director will not be held liable under these provisions if she has not voted in favour of the resolution complained of and enters a dissent in the minutes of the meeting or submits her written dissent before or immediately after the meeting is adjourned.[716] If the director is not present at the meeting at which the action is authorized, she is deemed to have consented to it unless a written dissent is submitted within 14 days after becoming aware of the proceedings.[717] The Manitoba Act contains a similar dissent procedure but with broader application. Whereas a director of a co-operative in Saskatchewan or Ontario may only invoke the dissent procedure in connection with a resolution relating to certain financial transactions, a director of a co-operative in Manitoba may record a dissent to any resolution passed or action taken at a directors' meeting.[718]

In Saskatchewan, a director may also be relieved from liability under the financial integrity provisions if it is proved that he did not know or could not reasonably have known that the act authorized by the resolution was contrary to the Act.[719] A director may also escape such liability by establishing that he relied and acted in good faith on statements of fact represented to him by an officer of the co-operative to be correct, or statements contained in a written report or opinion of the auditor or a professional person retained by the co-operative.[720] The reliance defense is also available under the Manitoba Act but again on a broader basis. It may be asserted that a director is entitled to rely in good faith upon a professional person, not only in cases where such professional person has been engaged by the co-operative.[721] Moreover, it applies not only to financial integrity claims but also to claims concerning employees' wages or arising under the directors' statutory duty of care.[722]

The Ontario Act specifies that a director is not liable for an improper share acquisition, loan repayment or dividend if the director discharged the general standard of care, diligence and skill required by the Act.[723] This provision may essentially achieve the same result as the statutory relief provisions in the Saskatchewan Act, in that the standard codified in the Ontario Act would arguably be met by establishing a defence of reasonable reliance or lack of knowledge under ss.90(10) of the Saskatchewan Act.[724]

Liability under the financial integrity provisions of the Saskatchewan Act is further limited by the requirement that action to enforce a liability must be commenced within two years from the date on which the vote, resolution, or approval was taken or given.[725] The Saskatchewan Act also contains provisions whereby a director who is sued for contravention of the financial integrity provisions may shift the financial burden to additional parties. The co-operative or the director may apply to the court to join as a defendant any person who received a benefit as a result of the resolution complained of and make such person jointly and severally liable with the directors to the extent of the amount paid to that person.[726] A director who is found liable may also apply to the court for an order compelling a member, shareholder or other recipient to return any money or property paid to him on the basis of the unlawful resolution.[727] In Manitoba, a director who satisfies a judgment is entitled to contribution from the other directors who voted for or consented to the unlawful act upon which the judgment is founded.[728] In Saskatchewan, any person may avoid liability for making false or misleading statements by proving that the untrue statement or omission was unknown and could not have been known in the exercise of reasonable diligence.[729] The Ontario Act contains an additional fetter in that no prosecution may be commenced for making a false or misleading statement except with the consent or direction of the Minister.[730]

Section 196(a) of the Saskatchewan Act, which is the general offence provision, exonerates a person from liability if "reasonable cause" can be established[731] and s.199 imposes a two-year time limit for commencement of prosecution proceedings.[732] In the federal jurisdiction, the written consent of the Minister is a prerequisite to proceedings for failure to comply with the Act.[733] Ministerial consent is required under the Ontario Act before a person may be prosecuted for failure to file documents with the Minister.[734] In Alberta, a director or officer is not liable for an offence by the association if it is proved that she attempted to prevent the commission of the offence.[735]

The Manitoba and Canada Acts, as seen earlier, impose liability on directors where shares have been issued for consideration less than the fair

equivalent of cash that the co-operative ought to have received for the shares.[736] However, a director may avoid liability under both Acts if it can be proved that he did not know and could not reasonably have known that the consideration was inadequate.[737] The Canada Act further provides that the written consent of the Minister must be obtained before a suit can be commenced against a director and the action must be commenced within three years from the date of the allotment of shares to which the suit relates.[738]

The liability imposed on directors for unpaid wages under the Manitoba, Ontario and Canada Acts is restricted in that the directors are only required to pay when collection proceedings against the co-operative have been unsuccessful or the co-operative has gone into liquidation, dissolution or bankruptcy and the director is sued while she is a director or within two years after she ceases to be a director.[739] The Manitoba Act further provides that where execution has issued, the amount recoverable from a director is limited to the amount remaining unsatisfied after execution.[740] A director who satisfies a claim under the Manitoba Act is also entitled to contribution from the other directors who were liable for the claim.[741] Where the debt is proved in liquidation and dissolution or bankruptcy proceedings, a Manitoba director is also entitled to any preference that the employee would have been entitled to, and where a judgment is obtained, she is entitled to an assignment of the judgment.[742] There is no statutory defence of reasonable reliance contained in the employee wage protection provisions in Ontario and Canada[743] and "directors are liable even though they have relied on financial statements and advice which indicate that the corporation will be able to meet its obligations to the employees".[744] However, a possible action for negligent misrepresentation may exist against advisors upon whose advice the directors relied.[745]

Where an action is brought by a member of a co-operative in British Columbia for relief from oppression, the court may relieve a director or officer from any liability potentially incurred for negligence, default, breach of duty or breach of trust if it appears that the person acted honestly and reasonably and ought fairly to be excused.[746] The Manitoba Act also confers power on the court to grant relief from liability where a person has failed to file a special return in accordance with the Act.[747]

Waiver

The Saskatchewan Act provides that a director cannot be relieved, by the provisions of a contract, the articles, the bylaws or the circumstances of appointment, from a duty to act in accordance with the Act and regulations or from a liability that by virtue or any rule of law would be imposed for negligence, default, breach of duty or breach of trust.[748] The Company Act of British Columbia contains a parallel provision but mentions nothing about the rules of the association.[749] Presumably the members may, with the approval of the superintendent,[750] include exculpatory clauses in the rules. The equivalent provision in the Manitoba Act is at once broader and narrower than its Saskatchewan and British Columbia counterparts. It is broader in that it also prohibits exculpation by resolution and applies to officers as well as directors.[751] It is narrower in that there is no prohibition against reducing liability based on the circumstances of the director's appointment.[752] As well, the Manitoba Act does not prevent waiver of common law duties which are not codified in the Act. The remaining jurisdictions have no statutory provisions preventing a co-operative from relieving, either in the bylaws or by an enforceable contract, directors and officers from the duties imposed on them by statute and common law. However, duties and responsibilities specifically imposed by the Act would arguably take priority over any bylaws or agreement that attempted to alter them.[753] Since the Alberta, Quebec,[754] Newfoundland and Canada Acts contain no provisions imposing standards of care and skill or fiduciary duties, and the provisions in the Maritime Acts have only limited application,[755] it cannot be argued that the statutory duties prevail over any contract or agreement to the contrary. Thus, these duties could be waived by the co-operative.

Indemnification

At Common Law

At common law, the right of a director or officer to be indemnified from the company is based on principles of agency.[756] An agent is, at common law, entitled to indemnification from the principal against all losses and liabilities, and to be reimbursed for all expenses incurred in the execution of the agent's authority.[757] Where the acts done by the agent are wrongful or outside the scope of the agent's authority, the agent has no right to indemnity or reimbursement.[758] There may, however, be a right

to indemnity where unauthorized acts are subsequently ratified.[759]

Co-operative Statutes

Most jurisdictions have adopted statutory provisions regarding the indemnification of directors.[760] The rationale behind such provisions is that directors or officers should not have to fund the defence of their business judgment exercised on behalf of the co-operative.[761]

The category of persons who may be indemnified under the statutory provisions vary between jurisdictions. In Saskatchewan, the indemnification provisions apply to past and present directors and officers and persons who, at the request of the co-operative, have acted as directors or officers of a body corporate of which the co-operative is or was a member or a creditor.[762] In Ontario and Quebec, the indemnification provisions are narrower in scope in that they only apply to current directors and officers[763] In New Brunswick and Canada, the provisions are circumscribed even further and embrace only current directors.[764] However, the statutory provisions in Manitoba, Ontario, British Columbia and Canada are broader in scope than their Saskatchewan counterpart in that they also extend to directors' heirs and legal representatives.[765]

In most jurisdictions, the indemnification provisions are not limited to claims made against directors or officers under co-operative legislation but also apply to claims under other statutory enactments and at common law.[766] In New Brunswick, however, indemnification is limited to claims brought by or against them in the exercise of the powers or duties conferred on them by the provisions of the Act, the regulations or the bylaws.[767]

A director is eligible for indemnification under the statutory provisions only if certain requirements are met. In Saskatchewan, for example, three conditions precedent apply before indemnification can be made. First, the director must be made a party to a civil, criminal or administrative action or proceeding by reason of being or having been a director or officer of the co-operative or body corporate[768]

Second, the director or officer must, in all cases, have acted honestly and in good faith with a view to the best interests of the co-operative.[769] Thus, a director or officer cannot be indemnified in respect of an action which involved a breach of fiduciary duty, but can be indemnified in respect of the breach of other duties, including the duty of care and skill. This is to be contrasted with the New Brunswick provision which requires

that the director "was acting in good faith *and with a reasonable degree of care* in the exercise of his powers and duties". (Emphasis added.)[770] One problematic area in which it may be difficult for a court to determine whether a director or officer "acted" with a view to the best interests of the co-operative is where the director or officer was not involved in the decision leading up to the corporate act giving rise to the suit.[771] For example, how could a Saskatchewan court determine whether a director was acting with a view to the best interests of the co-operative where his consent was deemed to have been given (pursuant to s.90) to any action approved of by the board, whether he was present at the meeting or not, unless he validly dissented?[772]

Third, in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the director or officer must have had reasonable grounds for believing that the conduct was lawful.[773] The Manitoba Act[774] and the Company Act of British Columbia[775] contain a similar requirement but use the words "his conduct" as opposed to "the conduct". The words "the conduct" suggest that indemnification may be permitted where the forbidden act was a corporate act in which the director had no involvement. In British Columbia, this third precondition to indemnity is perhaps broader because it does not require the action or proceeding to be "enforced by a monetary penalty".[776] To establish "reasonable grounds" for believing that the offending conduct was lawful, a director or officer may be required to seek legal advice where there is any risk of the offending conduct being found unlawful.[777]

In addition to the above three conditions, the Company Act of British Columbia also requires court approval for all indemnity payments.[778]

The Ontario, Canada and Quebec Acts impose somewhat different restrictions on the right of a co-operative to provide indemnification. The important qualifier in the Ontario Act pertains to liabilities incurred in a proceeding as a result of breaching any duty or responsibility imposed under the Act or under any other statute.[779] In such a case, indemnification can be made only if the director or officer has achieved complete or substantial success as a defendant. The ambiguity involved in the phrase "substantial success" may prove to be problematic in practice. Also, it must be noted that the restriction against indemnification only applies to breaches of statutory duties and responsibilities and not to breaches of common law or equity duties. As has recently been observed in the context of the Ontario Business Corporations Act, it "may have been assumed that

the general duty to act honestly, in good faith and in the best interests of the corporation, and to exercise powers with care, diligence and skill, encompassed all duties imposed at common law and equity";[780] however, duties such as the duty to avoid appropriation of corporate opportunity may not be included in the general statutory duty set out in s.108, and thus are excluded from the indemnity proscription of ss.110(2). Also, the prohibition would not appear to cover out-of-court settlements[781] since it applies only where a director of officer has been "adjudged to be in breach of any duty".

The indemnification provision in the Canada Act is very broad. It clearly allows for an out-of-court settlement. Also, there is no requirement of success being attained in the proceeding. The only qualification in the provision is that indemnification of a director is prohibited if the costs, charges and expenses "are occasioned by his own willful neglect or default". However, these words seem to apply only to ss.73(1)(b) which refers to all costs, charges and expenses other than those arising out of an action, suit or proceeding. Thus, even if liability arose because of "willful neglect or default", a director could be indemnified under ss.73(1)(a) provided the costs, charges and expenses arose in connection with an action, suit or proceeding.

In Quebec, the limitations on the right of indemnification vary according to the nature of the proceeding. In a penal or criminal proceeding, the co-operative must only assume the payment of the expenses of its director or other mandatory if she had reasonable grounds to believe that her conduct was in conformity with the law or she has been freed or acquitted.[782] In all other cases, the co-operative shall provide indemnification unless she has committed a grievous offence or a personal offence separable from the exercise of her duties.[783]

If a director or officer in Saskatchewan, Manitoba, British Columbia or Quebec meets the requirements noted above, he may be indemnified against costs, charges and expenses reasonably incurred by him, including an amount paid to settle an action or satisfy a judgment.[784] The words "action *or proceeding*" suggest that legal expenses for threatened litigation or for investigations should be covered as well (Emphasis added).[785] No guidelines are given to ascertain what constitutes "reasonable" expenses. The Ontario, New Brunswick and Canada Acts indemnify a director against all "costs, charges and expenses" he sustains.[786] By not including

the words "including an amount paid to settle an action or satisfy a judgment", it is arguable that the indemnity cannot include such amounts.[787]

Several co-operative statutes contain express provisions governing indemnification where an action is brought by or on behalf of a co-operative.[788] These provisions impose restrictions in addition to those set out above before indemnification can be made. The Saskatchewan Act provides, for example, that court approval of the indemnification is required.[789] Curiously, no such court approval is required under the Quebec Act. The second limitation with respect to a derivative action under the Saskatchewan Act is that the indemnity cannot include amounts paid in settlement but only costs, charges and expenses reasonably incurred in connection with the action.[790] Section 152 of the Company Act of British Columbia differs from the Saskatchewan provision by permitting indemnification in respect of "all costs, charges and expenses, *including amounts paid to settle an action or satisfy a judgment*" (Emphasis added). The New Brunswick, Canada and Ontario Acts do not contain express provisions dealing with derivative actions. By the same token, the general indemnification provisions do not exclude derivative actions and therefore they would apply.

In New Brunswick[791] and Quebec,[792] the indemnification provisions are completely mandatory in nature. By contrast, there are no circumstances in which a director (or officer) is entitled as of right to indemnification under the Company Act of British Columbia or the Ontario or Canada Acts. The Saskatchewan and Manitoba Acts take an intermediate approach. They provide that a co-operative *may* indemnify its directors and officers in the circumstances under discussion up to this point (i.e. the circumstances described in ss.91(1) to (3) of the Saskatchewan Act). They further provide that a director or officer *must* be indemnified for costs, charges and expenses where he has been substantially successful in the defence of any civil, criminal, or administrative action or proceeding in his capacity as director or officer.[793] It is obvious that the reference to "substantial success" may cause problems in application. It is intended "to cover the situation where a director or officer has essentially been vindicated despite a technical breach of duty."[794]

As noted above, court approval of an indemnification is required where an action has been brought by, or on behalf of, a co-operative. Subsection

91(5) of the Saskatchewan Act expressly authorizes a co-operative, director, officer or other person mentioned in ss.91(1) to apply for court approval of an indemnity. Upon application for court approval, the court may also order that notice be given to any interested person, and that person is entitled to appear and be heard in person or by counsel.[795] The Manitoba Act[796] and the Company Act of British Columbia[797] also specify that a co-operative or director or officer may seek court approval of an indemnity, but they differ from the Saskatchewan provision in several respects. Firstly, the Saskatchewan provision does not expressly require that the approval relate to an indemnity "under this section". Therefore, it may give jurisdiction to the court to approve an indemnity other than permitted by s.91. In other respects, the scope of the former provisions may be broader than the Saskatchewan provision since they authorize the court to approve an indemnity and also "make any further offer it thinks fit".[798] Moreover, the Manitoba Act requires the applicant to give notice of the application to the Registrar, who is entitled to appear and be heard.[799] In British Columbia, the court may order notice to be given to any interested person, but there is no express provision authorizing such person to appear and be heard.[800]

Subsection 91(5) of the Saskatchewan Act, and its counterparts in Manitoba and British Columbia, may be useful in several other circumstances such as where a co-operative is unsure whether indemnification is proper under ss.91(1) or required under ss.91(4).[801] As well, it may be useful where a receiver of a co-operative wants the directors to continue to participate in the co-operative's affairs but is concerned about legal exposure if the indemnities are paid.[802]

The primary problem with the indemnification provisions in Saskatchewan and Manitoba, from the perspective of a director, is that they do not require that a co-operative provide indemnification except in the limited circumstances set out in legislation. This problem is exacerbated in British Columbia, Ontario and the federal jurisdiction since the indemnification provisions in these jurisdictions are entirely discretionary in nature. To protect himself to the greatest extent possible, a director in the above jurisdictions should, as a first step, ensure that the co-operative has enacted an indemnification bylaw which provides for mandatory indemnification where legally permissible.[803] However, inclusion of indemnification provisions in the corporate bylaws does not afford complete protection to directors or officers since the bylaws of a corporation have

been held not to constitute a contract between the corporation and its directors.[804] An indemnification agreement is another device by which a director can convert the permitted indemnification under these statutes into mandatory indemnification. It is recommended that a director should require as a condition of becoming a director that the co-operative enter into a contract of indemnity whereby it agrees to protect the director to the full extent permitted by the applicable statute.[805] Directors should ensure that the indemnification agreement survives a director's cessation from office.[806]

One final point to note with respect to the statutory indemnification provisions generally is that, while they permit or require a co-operative to indemnify its directors in the circumstances described, they do not specifically prohibit any other kind of indemnity from the co-operative (other than the prohibition in OCA, ss.110(2) and the limited prohibition in SCA, ss.91(1) & (3) with respect to derivative actions). The absence of a specific prohibition leaves open the argument that a co-operative could still indemnify a director, either voluntarily or pursuant to an agreement, in circumstances beyond the scope contemplated by the legislation, provided that the indemnity is not contrary to public policy (e.g. public policy considerations would prohibit indemnification where a director has breached his fiduciary duties).[807]

The remaining jurisdictions have no statutory provisions for indemnification of directors and officers against liability. Where there is no specific statutory duty imposed, a co-operative clearly could agree to indemnify a director or officer against any liabilities arising from breach of the common law duties. Whether indemnification can be provided for in respect of statutory duties is a more difficult question. Logically, relief should not be allowed through indemnification where it could not be given through a waiver clause in the bylaws or in a contract.[808] In the absence of an indemnification agreement, the common law would apply.

Liability Insurance

Subsection 86(3) of the Saskatchewan Act permits, but does not require, a co-operative to purchase and maintain insurance for the benefit of a director, member of a committee of directors, an officer or an employee against a liability, loss or damage incurred by that person while serving the co-operative or a subsidiary in that office. There are no restrictions imposed on the type of liability coverage which may be purchased.

Therefore, insurance may be purchased for breach of duties for which indemnification is prohibited under s.91.[809] The argument in favour of allowing insurance, where a waiver or indemnification would not be allowed, has been summarized by Ziegel as follows:[810]

> It remains to deal with the question, much discussed in the United States, whether a corporation should be permitted to take out liability insurance in favour of management even though it would not be entitled to indemnify the officer or director directly. A substantial number of American jurisdictions now permit it. On the face of it the distinction seems anomalous but there are several arguments in its favour. One is that employers frequently insure their employees against various types of liability and that good men might be reluctant to serve on the boards of larger corporations unless they were covered by liability insurance. A second reason is that apparently insurance companies refuse to issue separate liability policies, one in favour of the corporation and another in favour of management. Thirdly, the insurance premiums, though far from negligible, would cost the corporation much less than indemnifying the officer or director against an actual judgment. Finally, the existing policies contain a hefty "deductible" clause, the amount of which will have to be absorbed by the beneficiary himself if he is sued successfully.

The Ontario and Manitoba Acts and the Company Act of British Columbia also authorize a co-operative to purchase insurance for directors and officers, but the class of persons covered by the provisions differs from one jurisdiction to another. Whereas the Saskatchewan Act only allows insurance to be purchased for present directors and officers, the Manitoba Act and the Company Act of British Columbia also permit the purchase of insurance for the benefit of former directors and officers and the heirs and personal representatives of a director.[811] However, these statutes preclude the purchase of insurance for employees.[812] The provisions in the Ontario Act apply only to present directors and officers.[813]

British Columbia, like Saskatchewan, has no restrictions on the scope of coverage which may be obtained.[814] On the other hand, the Manitoba and Ontario Acts only permit insurance to be purchased against a limited range of liabilities. The Manitoba Act prohibits the purchase of insurance against liability relating to a failure to act honestly and in good faith with a view to the best interests of the co-operative.[815] However, directors' and officers' insurance may be purchased by the co-operative against liability incurred for failing to meet the standards of care, diligence and skill imposed by ss.83(1)(b) of the Act.[816]

The Ontario Act prohibits the purchase of insurance relating to any liability incurred as a result of a contravention of s.108.[817] This restriction is very broad since s.108 encompasses not only the conduct captured by the Manitoba Act but also the failure to meet the requisite standards of care, diligence and skill. Indeed, s.108 embodies most of the conduct in respect of which a director or officer could be sued. However, as pointed out above,[818] there may be certain fiduciary duties which may not be included in s.108; thus, insurance could be maintained for liability arising from breach of those duties.

The remaining jurisdictions are silent on the issue of liability insurance. The earlier discussion regarding the power of the co-operative to enter into indemnification agreements in such circumstances also applies to insurance.[819]

Directors' and officers' liability insurance can have several important benefits. It may provide a mode of protection for directors for those types of liabilities which are not covered by the statutory indemnification provisions in certain jurisdictions. It can also protect directors when the corporate documents prohibit or limit the availability of indemnification.[820] As well, it gives protection to directors where the co-operative has become insolvent and the indemnifications provided by the co-operative are reduced to unsecured claims against the co operative.[821] However, in recent years D & O liability insurance has become very expensive and may afford only limited protection in some circumstances.[822] One device which has evolved in the corporate world to protect directors and officers is to fund possible indemnification claims through a stand-by letter of credit arranged with the corporation's bank to back up indemnification agreements.[823] Another suggested mechanism whereby corporate directors may protect themselves is to have the corporation set aside and segregate funds in trust to cover potential director liabilities and indemnification claims.[824] If properly set up, the trust funds will not form part of the corporation's estate and therefore is not available to satisfy creditors' claims if the corporation fails.[825]

Conclusion

The foregoing pages address the issues surrounding the legal responsibilities of directors and officers in Canadian co-operatives. One of the problems in analyzing this area of the law is that the number of judicial decisions respecting co-operatives in Canada is relatively low whereas there have been a vast number of cases dealing with ordinary business corporations. There are at least two results of this.

First, the interpretation placed on co-operative legislation by the courts is often influenced significantly by the interpretation of ordinary corporate legislation by previous courts. It has resulted often in co-operative legislation being interpreted without due regard to the fundamental nature of co-operatives—most notably that they are democratically controlled organizations. This may be somewhat understandable since modern Canadian co-operative legislation displays amazing similarity with ordinary corporate legislation thus camouflaging the fact that co-operatives are distinct from ordinary business corporations which base control on investment and which possess hierarchical management structures.

A second result of the dearth of co-operative law cases is that in this paper we have had to extrapolate corporate law principles to co-operatives. Of course we have done this taking into account differences in legislation which govern the two types of corporations and taking into account theories of co-operation which underlie the co-operative organization. To some extent this has caused us to be somewhat tentative with respect to some of our conclusions but we believe that our statements are as accurate as they can be given the state of jurisprudence surrounding co-operative law issues.

Endnotes

1. J.S. Ziegel, "The New Look in Canadian Corporation Laws" in Ziegel, ed., *Studies in Canadian Company Law,* (Toronto: Butterworths, 1973), vol.2, 1 at 41.
2. In support of this quotation Ziegel cites Mace, *Director: Myth and Reality* (1971), and Proc. ABA Nat. Inst., "Officers' and Directors' Responsibilities and Liabilities" (1972), 27 Bus. Law (Special Issue) 23. Ziegel also states in a footnote:

   If further proof is needed of this thesis, it is to be found in the Staff Report of the Committee on Banking and Currency, House of Representatives, On The Penn Central Failure and the Role of Financial Institutions, Jan. 3, 1972, especially at p.170: "Instead of exercising their fiduciary responsibilities to the Railroad's stockholders, the Directors allowed themselves to become tools of management. Their primary function became that of a rubber stamp of approval for management's irresponsible actions. The major question that remains to be answered is whether the situation described above is unique to the Penn Central Board, or whether it is generally representative of corporate boards throughout the country? If the latter situation is the case, serious consideration must be given to changing the director system so that the interest of the stockholders and the public can be adequately protected."
3. Eg. SCA, ss.72(1). The exception is in Newfoundland where the vesting provisions are set out in the bylaws, rather than the statute, and the members may choose to adopt them or to enact their own internal constituions: see p. 8
4. Note the discussion in the text here is only concerned with membership intervention with directors' decisions properly taken, it does not discuss the avenues open to members when directors are acting improperly.
5. SCA, ss.72(1).
6. QCA, s.89.
7. BCCA, ss.30(4) & Sch.B, Rule 43; BCCA, Sch.C, s.5 which states that one of the matters to be provided for by the rules is "the appointment and removal of directors, managers or other officers, *and their respective powers*" (Emphasis added).
8. NSCA, ss.33(3) & NSCA Reg. s.23; PEICA, ss.31(3); NBCA, ss.31(3). The Maritime Acts further specify that the powers of directors shall be set out in the regulations and bylaws: NSCA, ss.33(4); PEICA, ss.31(4); NBCA, ss.31(4).
9. See Slutsky, "The Division of Power between the Board of Directors and the General Meeting" in Ziegel, ed., *Studies in Canadian Company Law,* (Toronto: Butterworths, 1973) vol.2, c.4, where the law relating to ordinary business corporations incorporated in memorandum jurisdictions and letters patent jurisdictions is discussed thoroughly. To a large extent this article is only of historical value, but often valuable insights as an aid to interpretation can be gained by looking at the old legislation.
10. *Ibid.* at 169.
11. However, it should be noted that several of the jurisdictions discussed up to this point still require a special resolution to alter the bylaws or rules: BCCA, s.17 & Sch.B, Rule 70; NSCA Reg. s.18; PEICA Reg. ss.38(2); NBCA Reg. ss.45(2).
12. SCA, ss.72(1)
13. SCA, ss.143(1)
14. SCA, ss.72(1)
15. SCA, ss.112(1)(a) & 105. QCA, s.122 & s.72 also provide for the adoption of bylaws by a majority vote.

16 See also PEICA Reg. s.22.
17 See also PEICA Reg. s.22.
18 QCA, s.62.
19 MCA, ss.63(1); OCA, ss.96(1); CCA, ss.69(1); ACA, ss.27(1).
20 R.S.O. 1970, c.53.
21 Slutsky, "The Division of Power Between the Board of Directors and the General Meeting" in Ziegel, ed., *supra*, note 9, 166 at 170-71.
22 Five percent of the members may requisition the directors to call a meeting, s.105.
23 OCA, ss.70(1).
24 OCA, ss.70(4),(6).
25 Iacobucci, Pilkington, and Prichard, *Canadian Business Corporations* (Agincourt, Ont.: Canada Law Book, 1977) at 232; see also Slutsky, "The Division of Power Between the Board of Directors and the General Meeting" in Ziegel, ed., *supra*, note 9, 166 at 171.
26 The requisition procedure in the *Ontario Business Corporations Act* has been criticised by several commentators. Slutsky, p.180, footnote 93, states: "Is it really necessary that bylaws can only be passed on the initiative of the directors? Is there any reason why shareholders too should not be able to initiate bylaw changes without having to go through the cumbersome procedure of s.101? The whole area is surely in need of thorough reexamination...". See also J.S. Ziegel, "The New Look in Canadian Corporation Laws" in Ziegel, ed., *supra*, note 1, 1 at 59 who states: "The cumbersome character of the procedure is obvious. Even more striking is the fact that s.101 allows the shareholders to intervene in the daily conduct of the corporation's business while denying them any voice in the major allocation of powers between shareholders and directors. To me this will seem like a wrong order of priorities".
27 CCA, s.64.
28 CCA, s.82.
29 OCA, ss.70(1); and see Slutsky, "The Division of Power Between the Board of Directors and the General Meeting" in Ziegel, ed., *supra*, note 9, 166 at 171, where emphasis is placed on the word "any" in the comparable provision in the Ontario Business Corporations Act.
30 For instance, the directors cannot exercise powers required to be exercised by the association in general meetings.
31 In this respect, the NCA most closely parallels the typical memorandum jurisdiction.
32 NCA Reg. Sch.B, Form 1, Part X, s.5; Form 2, Part VIII, s.10; Form 3, Part VII, s.10. It should be noted that in the case of housing societies, the form constitution does not contemplate the appointment of a board of directors. Rather, all managerial functions are vested in the membership: NCA Reg. Sch.B, Forms 4A & 4B.
33 The list in the text is not intended to be exhaustive.
34 SCA, ss.143-146.
35 SCA, s.112.
36 SCA, s.144.
37 SCA, s.144.
38 SCA, ss.143(1)(a).
39 SCA, s.131.
40 SCA, s.134.
41 SCA, s.80.
42 SCA, ss.76(2).
43 SCA, ss.152(1).
44 SCA, ss.156(6).

45 SCA, s.160.
46 See also OCA, ss.79(1),(3); MCA, ss.105(1),(3); QCA, s.77; ACA Reg. ss.4(2); CCA, ss.82(1); BCCA, ss.31(5); NSCA Reg. s.17; NBCA Reg. ss.28(1); PEICA Reg. s.26; NCA Reg. Sch. B, Form 2, Part VII, s.3 & Form 3, VI, s.3.
47 See also MCA, ss.63(1)(b).
48 OCA, ss.96(1).
49 See J.S. Ziegel, "The New Look in Canadian Corporation Laws" in Ziegel, ed., *supra*, note 1, 1 at 41, where he states in a footnote:
The words "or supervised" ...were added on the recommendation of the Lawrence Committee (s.7.1.1) because the committee felt that the old formulation showed signs of age and no longer corresponded to the realities of many boardrooms. The committee's report does not spell out the full implications of the change but presumably it means that the objections to long-term management contracts sustained in such American cases as *Sherman and Ellis Inc.* v. *Indiana Mutual Casualty Co.* (1930), 41 F. 2d 588, ... will no longer prevail in Ontario, assuming they ever did. The report offers no guidance as to the meaning of the disjunctive duty "to supervise". Does it relieve the directors from the obligation to make any managerial decisions?
50 See also ACA Reg. ss.9(1) which states that directors "shall direct and supervise the business of the association".
51 Eg. OCA, ss.96(1).
52 See also BCCA, ss.30(4) & Sch.B, Rule 43; QCA, s.89; NSCA, ss.33(3); PEICA, ss.31(3) & PEICA Reg. ss.28(1): NBCA, ss.31(3) & NBCA Reg. s.33; NCA Reg. Sch. B, Form 1, Part X, s.5; Form 2, Part VIII, s.10; Form 3, Part VII, s.10. Moreover, NCA, ss.2(1)(a) defines the board of directors as a body "to whom the management of its affairs is entrusted". But note also PEICA Reg. s.30 and NBCA Reg. s.35 which provide that the directors may arrange themselves into committees and each committee "shall *supervise* one or more of the different activities carried on by the association" (Emphasis added).
53 SCA, s.73(1); OCA, s.97; CCA, s.75; BCCA, Sch. B, Rule 45; NSCA Reg. s.22 permits the delegation of powers to committees comprised of members; NCA Reg. Sch. B, Form 2, Part VIII, s.9 & Form 3, Part VII, s.9 permits delegation of powers to a special committee of the board or of the board and other members; QCA, s.107-108, s.111-112; ACA Reg. ss.9(2); MCA, ss.76(1) also authorizes the appointment of a managing director.
54 SCA, ss.73(4),(5); MCA, ss.76(2); NSCA Reg. s.22. OCA, ss.97(1); CCA, s.75; BCCA, Sch.B, Rule 45 contemplates discretionary, as opposed to mandatory, restrictions.
55 SCA, ss.94(2)(a)(iv); see also ss.72(1)(a) quoted earlier in the text; MCA, ss.82(a) "except powers to do anything referred to in subsection 76(2)", ss.63(1)(b).
56 Eg. ACA Reg.
57 Eg. BCCA, Sch.B.
58 NCA Reg. Sch.B.
59 SCA, ss.8(1)(b); see also MCA, ss.6(4)(d); CCA, ss.13(i); BCCA, ss.30(1) & Sch.C, ss.5; NSCA Reg. ss.32(h)-(k); NBCA Reg. ss.44(i)-(1); PEICA Reg. ss.36(j)-(m); OCA, ss.21(c)-(e) but makes such bylaws permissive, not mandatory.
60 SCA, ss.7(3); see also ACA Reg. ss.8(1); OCA, ss.85(2).
61 SCA, ss.7(3).
62 SCA, ss.75(1)(d).

63 SCA, ss.7(2)(d).
64 SCA, s.82.
65 SCA, s.82; see also MCA, s.73.
66 BCA, ss.30(2).
67 NSCA, s.9, ss.33(1),(2).
68 PEICA, ss.31(1),(2).
69 NBCA, ss.31(1),(2).
70 CCA, ss.69(2).
71 MCA, ss.63(2).
72 QCA, s.223-2.
73 QCA, s.80.
74 NCA Reg. Sch. B, Form 1, Part X, s.2.
75 NCA Reg. Sch. B, Form 2, Part VIII, s.2.
76 NCA Reg. Sch.B, Form 3, Part VII, s.2. Note that none of the model constitutions impose minimum numerical requirements at subsequent annual meetings.
77 BCCA, Sch. B, Rule 36.
78 NSCA, ss.33(1).
79 PEICA, ss.31(1).
80 NBCA, ss.31(1).
81 QCA, s.80, s.223.2.
82 ACA, s.18; BCCA, s.17,s.18 & Sch.B, Rule 70; NCA, s.12 & NCA Reg. Sch. B, Form 1, Part XVII & Form 2, Part XVII & Form 3, Part XVI.
83 ACA Reg. ss.8(1).
84 OCA, ss.85(2).
85 CCA, ss.69(2).
86 MCA, ss.63(2).
87 OCA, ss.5(2)4.
88 CCA, s.13.
89 CCA, ss.64(2)(b)(i).
90 CCA, ss.3(1).
91 NBCA Reg. ss.30(2).
92 NSCA Reg. ss.32(j).
93 QCA, s.80.
94 MCA, s.73.
95 OCA, s.88.
96 NBCA Reg. s.45; NSCA Reg. ss.2(e); QCA, s.122; CCA, ss.64(3), ss.65(1). Note that the Inspector must approve bylaw amendments in Nova Scotia and New Brunswick.
97 BCCA, Sch. B, Rule 36.
98 ACA, s.18.
99 PEICA, ss.19(2),(3). 100 NCA, s.12.
100 NCA, s.12.
101 SCA, ss.75(1)(a); see also MCA, ss.66(1)(a), ss.90(4); CCA, ss.43(5); ACA, ss.21(7); OCA, ss.89(1), ss.5(6)(a) which requires verification by affidavit that each first director is at least 18 years of age.
102 PEICA Reg. s.4.
103 NBCA Reg. s.4.
104 BCCA, ss.24(2)(a).
105 NCA Reg. Sch.B, Form 1, Part III, s.3; Form 2, Part III, s.3; Form 3, Part III, s.3.
106 SCA, ss.75(1)(c); see also MCA, ss.66(1)(b). CA(BC), ss.138(1)(c) only disqualifies a

"corporation" from acting as a director, thereby leaving the door open for a partnership or association to hold the office of director.
107 SCA, ss.75(1)(e); see also MCA, ss.66(1)(c); CA(BC), ss.138(1)(d); OCA, ss.89(2).
108 SCA, ss.75(1)(b); see also CA(BC), ss.138(1)(b); OCA, ss.89(2).
109 SCA, ss.75(1)(f).
110 SCA Reg. s.8.
111 SCA, ss.51(1)(b) & (2); see also BCCA, ss.68(3) which provides that only one joint shareholder may be a director of a housing co-operative at one time.
112 SCA, s.96.
113 SCA, ss.75(2); see also MCA, ss.66(2); NSCA Reg. ss.32(h); PEICA Reg. ss.36(j); NBCA Reg. ss.44(i); CCA, ss.13(i), s.67; OCA, ss.21(d).
114 CA(BC), ss.138(1)(e).
115 NSCA Reg. ss.27(c).
116 NCA Reg. Sch. B, Form 1, Part X, s.3.
117 NCA Reg. Sch. B, Form 2, Part VIII, s.3.
118 QCA, ss.82(1).
119 QCA, s.52.
120 SCA, ss.9(2)(b).
121 SCA, ss.79(1)(c); see also note 204.
122 CA(BC), ss.138(3).
123 See "Duty to Comply With the Act", *infra.*
124 NSCA, ss.33(5); PEICA, ss.31(5); NBCA, ss.31(5).
125 See "Remedial Provisions", *infra.*
126 E.g., the *Ontario Business Corporations Act.*
127 SCA, ss.75(1)(d); see also MCA, ss.66(2); NSCA Reg. s.27; CCA, s.67; BCCA, ss.30(2) & BCCA, Sch.B, s.41; OCA, s.87; QCA, s.81.
128 ACA, ss.26(3).
129 ACA, ss.29(1).
130 ACA, ss.29(2).
131 QCA, s.81 & s.83, but the credit union or federation must be a "group" within the meaning of s.83.
132 ACA, ss.26(5); OCA, ss.21(d); QCA, ss.82(2).
133 BCCA, ss.27(10).
134 Eg. *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, ss.105(3).
135 SCA, ss.72(2). It is unusual for Canadian legislation to provide a statutory definition of residence, thus the common law tests of residency as developed by the courts is used.
136 OCA, ss.85(3),ss.1(1)21. See also OCA, ss.96(2) & ss.97(1) & (3) whereby a residency/citizenship requirement is also imposed in respect of the election of an executive committee and the conduct of directors meetings.
137 See Iacobucci et al., *supra,* note 25 at 246, for a commentary on similar residency requirements in ordinary business corporation legislation.
138 *Ibid.* at 250.
139 SCA, s.239.
140 SCA, s.261.
141 SCA, s.267.
142 SCA, ss.74(3).
143 PEICA Reg. s.29.
144 NSCA Reg. ss.27(b).
145 NCA Reg. Sch.B, Form 2, Part VIII, s.3.

146 NCA Reg. Sch.B, Form 3, Part VII, s.3.
147 QCA, s.117 & s.224; see also s.207 (workers co-operatives) which includes the office of treasurer as being incompatible with the position of director.
148 QCA, s.138. Most jurisdictions impose a requirement on the auditor to be independent from the directors rather than visa versa. See, for example, MCA, s.118.
149 C.S. Axworthy, "Corporation Law As If Some People Mattered" (1986), 36 University of Toronto L.J.392.
150 L.E. Apland, *Election of Directors in Saskatchewan Co-operatives: Processes and Results*, Occasional Paper 87-01, (Saskatoon: Centre For the Study of Co-operatives/ University of Saskatchewan, April 1987), at 17.
151 SCA, ss.71(1).
152 OCA, ss.5(5); MCA, ss.6(3).
153 OCA, s.89.
154 OCA, ss.89(3)(a).
155 OCA, ss.89(3)(b).
156 OCA, ss.89(4).
157 SCA, ss.71(1); see also BCCA, ss.6(a), ss.30(1) & Sch.B, Rule 37; NSCA, s.9, ss.33(1); PEICA, s.8, ss.31(1); NBCA, s.8, ss.31(1); MCA, ss.6(1)(e), s.67. The ACA does not expressly provide for appointment of first directors. However, ACA Reg. s.2 refers to provisional directors and the Form of Memorandum of Association contained in the *Forms Amendment Regulation*, Alta. Reg. 144/85 requires the subscribers to name the provisional directors.
158 SCA, ss.102(2), "unless an extension is granted by the Registrar". See also NSCA, ss.33(2); NBCA, ss.31(2) and PEICA, ss.31(2). Note there is some variation in the time limits for calling the first general meeting: ACA Reg. s.2, ss.8(4) (two months); BCCA, ss.31(1) (three months or such later period as is approved by the superintendent); MCA, ss.93(a) (18 months).
159 SCA, ss.71(2), ss.102(4)(b).
160 OCA, ss.5(2)4 & (5), ss.86(1).
161 CCA, ss.12(g), s.70, except where the association is created by a change in corporate status.
162 NCA Reg. Sch. B, Form 1, Part X, s.1, s.2. Section 1 states "The provisional board, *if any,...*". (Emphasis added)
163 NCA Reg. Sch. B, Form 2, Part VIII, s.1; Form 3, Part VII, s.1
164 QCA, s.21.
165 QCA, ss.24(2).
166 SCA, ss.74(1)(c); see also ACA, ss.26(1); OCA, ss.90(1); CCA, ss.72(b), unless the charter bylaws otherwise provide.
167 SCA, ss.74(1)(d).
168 SCA, ss.110(1).
169 NSCA Reg. ss.16(b).
170 QCA, ss.76(3).
171 MCA, ss.68(1).
172 Sask. Reg. s.7.
173 ACA Reg. ss.8(3).
174 MCA, ss.97(4).
175 *Report on Co-operatives by Select Committee on Company Law* (Ont. 1971), p.60 ("The Ontario Report").
176 *Ibid.*
177 ACA, ss.18(5)(a); BCCA, s.29; NSCA, ss.31(3); PEICA, ss.29(3); NBCA, ss.29(3); QCA, s.83; CCA, ss.13(h); OCA, s.24 authorizes the directors, rather than the association, to pass such bylaws. Note that SCA, s.108 & 109 and MCA, s.91 provide for district meetings and appointment of delegates but do not contemplate the election of directors from each district.

178 Apland, *supra*, note 149 at 12.
179 See p.15.
180 QCA, s.61.
181 SCA, ss.74(1)(a) unless the regulations, articles or bylaws provide otherwise; see also BCCA, Sch.B, Rule 38; and NCA Reg. Sch. B, Form 1, Part X, s.2 & Form 2, Part VIII, s.2 & Form 3, Part VII, s.2.
182 OCA, ss.90(2).
183 QCA, s.84; CCA, ss.72(a).
184 MCA, ss.68(3).
185 OCA, ss.90(2)
186 QCA, s.84 states that a term exceeding one year must be prescribed in the bylaws.
187 MCA, ss.68(1); as a result of reading ss.68(1) and (3) together, the three-year maximum appears to be an absolute one, although ss.68(1) in itself would seem to suggest that it could be provided otherwise in the articles or bylaws.
188 NSCA Reg. ss.32(j).
189 See "Remedial Provisions", *infra* p.26.
190 B.L. Welling, *Corporate Law in Canada: The Governing Principles* (Toronto: Butterworths, 1991) at 305.
191 ACA Reg. ss.8(4).
192 PEICA Reg. ss.28(1).
193 NBCA Reg. ss.30(3).
194 ACA Reg. ss.8(5); PEICA Reg. ss.28(1); NBCA Reg. ss.30(4).
195 MCA, ss.68(2); OCA, ss.90(5).
196 OCA, ss.90(4).
197 QCA, s.84.
198 SCA, ss.74(1)(b) "unless the regulations, articles or bylaws provide otherwise"; see also ACA Reg. ss.8(6); OCA, ss.90(2); NCA Reg. Sch. B, Form 2, Part VIII, s.2 &1 Form 3, Part VII, s.2; CCA, ss.72(a).
199 PEICA Reg. ss.28(1).
200 NBCA Reg. ss.30(5).
201 NSCA Reg. ss.32(j).
202 SCA, ss.74(1)(b), unless the regulations, articles or bylaws otherwise provide.
203 SCA, ss.79(1)(a); see also MCA, ss.69(1)(a); NSCA, ss.33(7); NBCA, ss.31(7); PEICA, ss.31(7).
204 SCA, ss.79(1)(a); see also MCA, ss.69(1)(a); NSCA, ss.33(7); NBCA, ss.31(7); PEICA, ss.31(7).
205 SCA, ss.79(1)(c); see also MCA, ss.69(1)(c). Co-operative legislation in some other jurisdictions provides that a director ceases to hold office if certain statutory qualifications are absent. BCCA, ss.30(3) & Sch.B, Rule 42(a) provides that the office of a director shall be vacated if the director ceases to be a member or hold one share. OCA, ss.89(2) states that if a director becomes a bankrupt or mentally incompetent person, he thereupon ceases to be a director. PEICA Reg. s.29 states that a director or officer shall vacate his office if he becomes bankrupt "or insolvent".
206 SCA, ss169(2); all other jurisdictions have similar provisions.
207 SCA, ss.189(3)(e).
208 SCA, ss.79(1)(b); see also MCA, ss.69(1)(b).

209 PEICA Reg. s.29.

210 BCCA, Sch.B, Rule 42(b).

211 BCCA, Sch.B, Rule 42(c) discussed in greater detail in "Interest in Contracts", *infra.*

212 SCA, ss.74(1)(e); see also CCA, ss.72(c).

213 SCA, ss.74(1)(e)(ii).

214 SCA, ss.74(1)(e)(iii).

215 It states "the remaining directors...*may* fill the vacancy until the next annual meeting". Also, the provision is made subject to alternative provisions in the articles and bylaws.

216 OCA, ss.92(1); MCA, ss.72(3).

217 MCA, ss.72(3).

218 OCA, ss.92(2); MCA, ss.72(1),(2).

219 MCA, ss.72(2).

220 OCA, ss.92(3) .

221 MCA, ss.72(2) .

222 SCA, ss.74(1)(e)(iii).

223 QCA, s.85.

224 *Ibid.*

225 ACA, ss.26(6).

226 BCCA, Sch.B. Rule 38.

227 NSCA, ss.33(7); PEICA, ss.31(7); NBCA, ss.31(7)"...or until such other date as may be fixed by the bylaws".

228 NCA Reg. Sch. B, Form 2, Part VIII, s.5; Form 3, Part VII, s.5.

229 If a quorum of the board of directors is not present, the board cannot fill vacancies unless expressly permitted by statute. This is because of the general rule that a board of directors, like any collective body, requires a quorum to operate: see Welling, *supra*, note 189 at 311.

230 NCA Reg. Sch. B, Form 1, Part X, s.7.

231 Welling, *supra*, note 189 at 310-311.

232 *Ibid.* at 309.

233 *Oliver* v. *Elliott* (1960), 23 D.L.R. (2d) 486 (Alta. S.C.).

234 SCA, s.85. See also MCA, s.77. OCA, s.109; CCA, ss.69(5) & BCCA, ss.30(6) which only cure subsequently discovered defects. ACA, ss.26(7); NSCA, ss.33(8); BCA, ss.30(6); NBCA, ss.31(8) and PEICA, ss.31(8) do not remedy irregularities in election. For a discussion of the interpretational and practical problems that arise from these curative provisions, see Welling, *supra*, note 189 at 308-309.

235 SCA, ss.74(2) unless the regulations, articles or bylaws provide otherwise; see also CCA, s.71, ss.81(4); OCA, ss.90(3); MCA, ss.68(4); QCA, s.86; ACA, ss.26(2). BCCA, Sch.B, Rule 39 provides that vacating directors are deemed to be elected again if their places are not filled.

236 SCA, ss.74(1)(e)(i)(A) unless the regulations, articles or bylaws otherwise provide; see also MCA, ss.75(2); CCA, ss.69(3); OCA, ss.96(3). QCA, s.87 simply states that the incumbent directors continue in office despite a decrease in their number.

237 CCA, ss.69(4); MCA, ss.68(5) & ss.75(2) which states that a majority of the required number of directors constitutes a quorum unless the co-operative's constitutional documents otherwise provide.

238 ACA, ss.26(2).

239 CCA, s.71.

240 BCCA, Sch.B, Rule 39.

241 MCA, s.107; see also Iacobucci et al., *supra*, note 25 at 261-262 for a discussion of other means of challenging an irregular election.

242 MCA, ss.107(2).

243 SCA, s.83, unless an annual return is sent to the registrar within that period.

244 CA(BC), ss.137(1).

245 MCA, ss.74(1).

246 QCA, B.88.

247 SCA, ss.94(1)(a); see also OCA, ss.105(1).

248 SCA, ss.94(1)(b); see also OCA, ss.105(1).

249 OCA, ss.21(e) expressly authorizes the co-operative to pass bylaws to regulate the appointment of officers.

250 SCA, ss.94(2); see also MCA, s.82.

251 SCA, ss.94(3). Contrast to MCA, s.82 which does not require any officers to be directors.

252 OCA, ss.105(2)(a); CCA, ss.72(d). Contrast to SCA, ss.94(2) & MCA, s.82 which are permissive in nature.

253 OCA, ss.105(2)(c); CCA, ss.72(d).

254 OCA, ss.105(2)(b)

255 BCCA, Sch.B, Rule 44.

256 NSCA Reg. s.21.

257 PEICA Reg. ss.28(2).

258 NBCA Reg. ss.31(1).

259 NCA Reg. Sch. B, Form 1, Part XIII, s.1; Form 2, Part IX, s.1; Form 3, Part VIII, s.1.

260 QCA, s.113, 114.

261 ACA Reg. ss.10(1).

262 PEICA Reg. ss.28(2).

263 NBCA Reg. ss.31(2).

264 NCA Reg. Sch. B, Form 1, Part XIII, s.1; Form 2, Part IX, s.1; Form 3, Part VIII, s.1.

265 CA Reg. ss.10(1).

266 QCA, s.116.

267 BCCA, Sch.B, Rule 44.

268 ACA Reg.ss.10(5), ss.14(4).

269 NSCA Reg. ss.24(2).

270 ACA Reg. ss.10(1); QCA, s.113; NSCA Reg. s.21; PEICA Reg. ss.28(2); NBCA Reg. ss.31(1); NCA Reg. Sch. B, Form 1, Part XIII, s.1; Form 2, Part IX, s.1; Form 3, Part VIII, s.1.

271 NCA Reg. Sch. B, Form 2, Part IX, s.1; Form 3, Part VIII, s.1.

272 See *Imperial Hydropathic Hotel, Blackpool* v. *Hampson* (1882), 23 Ch. D. 1 (C.A.); see also *London Finance Corpn.* v. *Banking Service Corpn.*, [1925] 1 D.L.R. 319 (Ont. S.C.).

273 SCA, ss.80(1).

274 SCA, ss.8(3).

275 SCA, ss.80(2).

276 SCA, ss.80(3); see also "Vacancies", *supra.*

277 OCA, s.104.

278 MCA, ss.70(1).

279 QCA, s.99, unless the bylaws otherwise provide; s.72.

280 Dickerson, Howard and Getz, *Proposals for a New Business Corporations Law for Canada* (1971), vol. 1 ("the Federal Proposals"), para. 211 state that in practice, "it

will be possible to remove a director only at a special meeting, that is a meeting other than the annual meeting", but no reasons are given for this.

281 MCA, ss.70(2); QCA, s.100.

282 NSCA, ss.33(6).

283 PEICA, ss.31(6).

284 NBCA, ss.31(6).

285 NCA Reg. Sch. B, Form 2, Part VIII, s.4; Form 3, Part VII, s.4.

286 NCA Reg. Sch. B, Form 2, Part VIII, s.4; Form 3, Part VII, s.4.

287 PEICA Reg. ss.27(a).

288 NBCA Reg. ss.29(a).

289 BCCA, Sch.B, Rule 40.

290 NCA Reg. Sch. B, Form 1, Part XII, ss.4(c).

291 CCA, ss.13(i).

292 ACA, s.18.

293 See *Imperial Hydropathic Hotel, Blackpool* v. *Hampson, supra*, note 271; see also *London Finance Corpn.* v. *Banking Service Corpn., supra*, note 271.

294 ACA, s.28.

295 BCCA, Sch. B, Rule 42(d).

296 ACA Reg. ss.12(1),(2).

297 NCA Reg. Sch. B, Form 1, Part X, s.6; Form 2, Part VIII, s.4.

298 NSCA, ss.33(5).

299 PEICA, ss.31(5).

300 NBCA, ss.31(5).

301 NSCA, ss.33(5); PEICA, ss.31(5); NBCA, ss.31(5)

302 ACA, s.66.

303 ACA, ss.68(1).

304 NBCA ss.39(3).

305 NCA, ss.49(3) & (7).

306 CCA, ss.106(4).

307 *Corporations Act*, R.S.M.1987, C 225, s.91 which applies by virtue of MCA, s.154.

308 SCA, ss.189(3)(e).

309 MCA, ss.159(3).

310 MCA, ss.150(3)(b).

311 Corporations Act, R.S.M. 1987, C 225, ss.210(f) which applies by virtue of MCA, s.154.

312 SCA, ss.81(2); see also MCA, ss.71(2)-(4).

313 SCA, ss.81(2).

314 SCA, ss.81(3).

315 SCA, ss.81(4).

316 The Federal Proposals, para. 211; see also Iacobucci *et al., supra*, note 25 at 266-67.

317 SCA, ss.81(2-(4).

318 MCA, ss.71(2)-(4).

319 QCA, s.101

320 QCA, s.101

321 QCA, s.101

322 CA(BC), ss.156(1); see also "Notice of Change of Directors", *supra*, regarding notice provisions in other jurisdictions.

323 See L.C.B. Gower, *Principles of Modern Company Law*, 4th ed. (London: Stevens, 1979) at 571.

324 *Ibid.* at 572.

325 *Ibid.*

326 *Ibid.* at 602-603.

327 *Ibid.* at 603.

328 *Dovey* v. *Cory*, [1901] A.C. 477 at 488 (H.L.).

329 However, there are recent indications that American courts may be willing to play a more active role in reviewing the process by which a board of directors reached a business decision. In *Smith* v. *Van Gorkom* 488 A. 2d 858 (1985) (the "Trans Union case") the Delaware Supreme Court concluded that the directors had not made an informed business decision and found them personally liable for $23.5 million in damages. While there are no reported Canadian cases to date which have expressly followed the *Trans Union* approach, the corporate community should nevertheless be familiar with the case to minimize the possibility of history repeating itself in Canada. The Institute of Law Research and Reform (Alberta), *Corporate Directors' Liability*, Research Paper No. 17, February 1989, observed at 33: "To the extent that contemporary Canadian corporate law regimes owe a great deal to U.S. models, we can expect the same stirrings for reform, whether they be judicial or legislative in origin, eventually to have some impact on the interpretation of existing laws in this country".

330 [1925] 1 Ch. 407 (C.A.).

331 *Ibid.* at 427.

332 *Ibid.* at 428-29.

333 Gower, *supra*, note 322 at 604.

334 (1883), 25 Ch.D. 752 (Eng., Ch.).

335 [1892] 2 Ch. 100 (Eng., Ch.).

336 Gower, *supra*, note 322 at 605.

337 MCA, ss.83(1)

338 OCA, s.108.

339 NSCA, ss.16(n); PEICA, ss.15(1)(n); NBCA, ss.15(n).

340 Quaere why directors of a co-operative in the Maritime provinces would be held to a statutory standard in relation to their investment powers and to a common law standard in all other circumstances.

341 CA(BC), ss.142(b). The effect of this variance in wording is discussed at pp. 39-40

342 See the Federal Proposals, which preceded the enactment of the Canada Business Corporations Act, at para. 242, where it is stated:

> The formulation of the duty of care, diligence and skill owed by the directors represents an attempt to upgrade the standard presently required of them .... The duty of care imposed by [the proposed provision] is exactly the same as that which the common law imposes on every professional person.

See also the *Interim Report of the Select Committee on Company Law* (Ont. 1967) ("The Lawrence Report"), at p.53, which somewhat exaggerated the common law position by describing it as a "sea of murky jurisprudence"; but the recommendation used the "reasonably prudent director" in its proposal, which was ultimately changed to "reasonably prudent person" in the Ontario Business Corporations Act, s.144, and in the Ontario Co-operative Corporations Act.

343 R.A. Donaldson, "Update on the law of Directors' and Officers' Liability", paper presented at a seminar "Corporate Counsel-Liability of Corporate Officers and Directors Impact of the Insurance Crisis" by the Canadian Bar Association - Ontario, 1987 Annual Institute on Continuing Legal Education, February 5-7, 1987 at 19.

344 In the same vein, Welling, *supra*, note 189 at 333 states: "It would seem arguable, indeed intuitively obvious, that a reasonably prudent person might be utterly unskilled, particularly where matters of corporate management are concerned".

345 Welling, *supra*, note 189, at 333; see also F. Iacobucci, "The Business Corporations Act, 1970: Management and Control of a Corporation" (1971), 21 University of Toronto L. J. 543, at 552, where it is suggested that these words "indicate more clearly that, for example, 'outside' directors would be subject to a somewhat different standard from 'inside' directors".

346 J.M. Wainberg & M.J. Wainberg, *Duties and Responsibilities of Directors in Canada*, 6th ed., (Toronto: CCH, 1987) at 27.

347 CA(BC), ss.142(b). In *Grindrod & District Credit Union, et al.* v. *Cumis Insurance Society Inc.* (1984), C.C.L.I. 47, [1984] I.L.R. 1-1782 (B.C.S.C.), Dohm, J. considered a provision of the Credit Union Act (B.C.) which was identical to s.142 of the Company Act (B.C.). He found that, whereas the test laid down by Romer J. was both objective and subjective in nature, the test to be applied in the Credit Union Act is purely an objective one. Therefore, in determining the degree of skill to be required of a director under the Act, the court is to use the standard of a reasonable man without regard to the knowledge and experience of a particular director.

348 F. Iacobucci, The Business Corporations Act, 1970: Management and Control of a Corporation", *supra*, note 346 at 552; see also, pp. 35- herein.

349 SCA, ss.90(6).

350 MCA, ss.84(3).

351 OCA, ss.101(3).

352 *Grindrod & District Credit Union et al.* v. *Cumis Insurance Society, Inc., supra*, note 347; *Distribulite Ltd. et al.* v. *Toronto Board of Education Staff Credit Union Ltd. et al.*, (1984) 62 O.R. (2d) 225 (H.C.). Several cooperative statutes expressly permit the directors to delegate some of their powers to the officers of the co-operative: see pp. 17-18.

353 *Ibid.* at 286.

354 MCA, ss.84(4).

355 See, pp. 35-37.

356 MCA, ss.83(4).

357 CA(BC), ss.142(2).

358 OCA, ss.102(2).

359 For a thorough analysis of this area see Gower, *supra*, note 322, c.24; Beck, "Corporate Opportunity Revisited" in Ziegel, ed., *Studies in Canadian Company Law*, (1973) vol.3, p.193; Iacobucci et al., *supra*, note 25, c.7; Welling, *supra*, note 189 at 336-454; M.V. Ellis, *Fiduciary Duties in Canada* (Don Mills, Ont.: De Boo, 1988), c.15.

360 R. Flannigan, "Fiduciary Obligation in the Supreme Court" (1990), 54 Sask. L.R. 45 at 46.

361 *Ibid.* at 58.

362 [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 at 599 (S.C.R.).

363 This approach to the determination of fiduciary status has been criticized by some commentators as being too narrow in scope: See, for example, Flannigan, "Fiduciary Obligation in the Supreme Court", *supra*, note 360 at 58-70. He opts, instead, for a "mischief" approach as described at pp. 35-38 and also in his article, "The Fiduciary Obligation", *infra*, note 365.

364 *International Corona Resources Ltd.* v. *LAC Minerals Ltd., supra*, note 362 at 599.

365 R. Flannigan, "The Fiduciary Obligation" (1989) 9 Oxford J. Legal Stud. 285 at 291.

366 See *infra*, for a review of the cases where the court has found a fact-based fiduciary relationship between the directors and the shareholders.

367 *Beamish* v. *Solinick* (1980), 10 B.L.R. 224 (Ont. H.C.).

368 See L.S. Sealy, "Fiduciary Relationships", [1962] Cambridge L.J. 69.

369 *Can. Aero Service Ltd.* v. *O'Malley* (1973), 40 D.L.R. (3d).

370 Gower, *supra*, note 322 at 575.

371 *Ibid.* at 576..

372 Flannigan, "The Fiduciary Obligation", *supra*, note 365 at 320 suggests that perhaps the specific rules (eg. the duty not to misuse property or the duty to not make secret profits) are only illustrations of the ways in which fiduciaries may abuse the trust reposed in them and that other forms of conduct may also offend the fiduciary obligation. As he states at p.320: "There can be no *final* and *exhaustive* definition of the precise 'conduct' of any obligation at any time. Only a general test will be appropriate".

373 Gower, *supra*, note 322 at 577, citing *Greenhalgh* v. *Arderne Cinemas Ltd.*, [1950] 2 All E.R. 1120 (C.A.).

374 *Ibid.* at 578, citing *Walker* v. *Wimborne* (1976), 50 A.L.J.R. 446 (Aust. H.C.); *Parke* v. *Daily News*, [1962] 2 All E.R. 929; and *Hutton* v. *West Cork Ry.* (1883), 23 Ch.D. 654 (C.A.).

375 See Iacobucci *et al., supra*, note 25 at 295.

376 Gower, *supra*, note 322 at 578.

377 Perhaps an analogy can be drawn between the test used here and that used to determine the deductibility of business expenses for income tax purposes. In neither case need it be shown that there was a direct causal connection between the expenditure and the earning of income; however, in each case some broader "business purpose" must be shown.

378 (1972), 33 D.L.R. (3d) 288 (B.C.S.C.).

379 See Iacobucci et al., *supra*, note 25 at 296 and Iacobucci, "The Exercise of Directors' Powers: The Battle of Afton Mines" (1973), 11 Osgoode Hall L.J. 353 at 369.

380 Gower, *supra*, note 322 at 579.

381 See, e.g. *Parke* v. *Daily News*.

382 *Supra*, note 378 at 315-16.

383 Iacobucci *et al., supra*, note 25 at 295.

384 It is, of course, recognized that profits can be maximized by decreasing costs, but co-operatives should ideally not seek to acquire surpluses that are not passed on to patron members thus, in effect, reducing costs.

385 Re *Ridley Wilson et.al. and Cowichan Co-operative Services et al.* (1987), 34 D.L.R. (4th) 620 (B.C.C.A.).

386 SCA, ss.88(a). See also MCA, s.83(1)(a); NSCA, ss.16(n); PEICA, ss.15(1)(n); NBCA, ss.15(n) but note the Maritime provisions only apply to directors and only in connection with their power to make investment decisions. See also OCA, s.108 & CA(BC), ss.142(1)(a) but note variations in wording discussed at, p. 55.

387 The noted exception is the proper purposes doctrine. For further discussion, see, pp.46-49.

388 The Federal Proposals, para. 237, commenting on a provision virtually identical to ss.88(a) of the Saskatchewan Act which was contained in the draft Act accompanying the proposals and which subsequently became a provision in the *Canada Business Corporations Act*.

389 See also MCA, ss.83(1)(a); NSCA, ss.16(n); PEICA, ss.15(1)(n); NBCA, ss.15(n).

390 See, pp. 43-44.

391 OCA, s.108.

392 CA(BC), ss.142(1)(a). Note as well that it only applies to directors.

393 ACA, s.28.

394 SCA, s.96.

395 Gower, *supra*, note 322 at 581.

396 *Fraser* v. *Whalley* (1864), 2 Hem. & M. 10, 71 E.R. 361; *Punt* v. *Symons & Co.*, [1903] 2 Ch. 506; *Martin* v. *Gibson* (1908), 15 O.L.R. 623; *Piercy* v. *S. Mills & Company*, [1920] 1 Ch. 77; *Hogg* v. *Cramphorn*, [1967] Ch. 254.

397 Welling, *supra*, note 189 at 339.

398 *Ibid.* at 337-38.

399 In *Ridley Wilson et al.* v. *Cowichan Co-operative Services et al., supra*, note 385, the trial judge set aside the directors' resolution approving the compulsory redemption of shares of certain members of a co-operative. While the appellate court appears to have upheld the decision on the ground that the directors breached their duty to act in the best interests of the co-operative, it may also be said that the directors exceeded their authority under the rules of the co-operative. Madam Justice McLachlin stated at p.627: The main purpose of the provisions in the rules for compulsory share redemption, as noted above, was to encourage members to patronize the Co-operative. That purpose had ceased as of June, 1975.

400 Iacobucci *et al., supra*, note 25 at 298.

401 *Ibid.*

402 (1972), 33 D.L.R. (3d) 288 (B.C.S.C.).

403 See note 396.

404 Berger J. stated at 314:

> 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; *Parke* v. *Daily News Ltd.*, [1962] Ch. 927. 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.

405 See Iacobucci, "The Exercise of Directors' Powers: The Battle of Afton Mines", *supra*, note 379 at 366, where some of the problems of this approach are discussed:

> It is certainly difficult to interpret an agreement made by directors in terms of having to conclude what was the real or primary purpose of the arrangement especially when agreements and conduct leading thereto can be disguised to be something they really are not. However, judicial line-drawing is endemic in the examination of directors' conduct to see if fiduciary standards have been met. In most cases involving an issue of shares where a fight for control is in the background, the court will likely find that the main reason (or a main reason) for the issue was to maintain or obtain control. But on the facts of the *Teck* case, one could reasonably conclude that the control dispute was over who should get the ultimate deal to develop Afton's copper property and not over who should control Afton. Another question should be raised briefly at this point: whether an act of directors can pass the collateral purpose test so long as its *primary* purpose was proper, regardless of whether another *major* purpose was improper. Mr. Justice Berger indicated that the Canex agreement should be judged on the basis of its primary objective, which he found was *not* the dilution of Teck's position as controlling shareholder. But this test is perhaps not sufficiently stringent, since it is often easy for directors to concoct evidence sufficient to convince a court that one or another of their motives was the controlling one. It would seem that a more workable test, and one less open to abuse, would be to scrutinize an act to see whether *any major* purpose for it was improper. Even by this standard, however, the agreement in the *Teck* case would not be invalid since, as mentioned above, the share issuance under the agreement was ancillary to the normal ultimate deal.

406 *Shield Development Company Limited* v. *Snyder, et al*, [1976] 3 W.W.R. 44 (B.C.S.C.); *Re Royal Trustco* (No,3) (1981), 14 B.L.R. 307 (Ont.H.C.); *First City Financial Corp.* v. *Genstar Corp.* (1981), 33 O.R. (2d) 631, 125 D.L.R. (3d) 303 (H.C.). *Olson* v. *Phoenix Industrial Supply Ltd.*, [1984] 4 W.W.R. 498, 26 B.L.R. 183, 27 Man. R. (2d) 205, 9 D.L.R. (4th) 451 (C.A.), leave to appeal to S.C.C. refused (1984) 31 Man. R. (2d) 8n, 58 N.R. 78, listed the two requirements that the directors have (a) an honest belief that they were acting in the best interests of the corporation, and (b) reasonable grounds for their belief; *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.* (1986), 59 O.R. (2d) 254 (Div. Ct.), affirmed 59 O.R. (2d) 281. But see also *Exco Corp.* v. *Nova Scotia Savings & Loan C.* (1987), 78 N.S.R. (2d) 91, 35 B.L.R. 149, 193 A.P.R. 91 (S.C.) where the court concluded that the *Teck* approach was too stringent and stated the test this way:
"When exercising their power to issue shares from treasury the directors must be able to show that the consideration upon which the decision to issue was based are consistent only with the best interests of the company *and inconsistent with any other interests*". (Emphasis added).

407 See pp. 45-46.

408 The Federal Proposals, para.240.

409 Iacobucci *et al., supra*, note 25 at 300; it is interesting to note that the Lawrence committee, p.53, recommended a provision similarly worded but made no mention in the commentary that it was intended to eliminate the proper purpose doctrine.

410 MCA, ss.83(4); CA(BC), ss.142(2). In fairness, however, the drafters of the Federal Proposals did not propose a provision similar to these sections.

411 As indicated earlier at note 406, the exception to recent judicial trends is the *Exco* case.

412 Gower, *supra*, note 322 at 582.

413 Gower, *supra*, note 322 at 583.

414 [1843-60] All E.R. Rep. 249 at 252-53 (H.L.); see Gower, *ibid.* at 584.

415 *Imperial Mercantile Credit Assn.* v. *Coleman* (1871), 6 Ch. App. 558 at 567, affirmed L.R. 6 H.L. 189.

416 SCA, s.93; MCA, s.81; CA(BC), s.144-146 & BCA, Sch.B, Rule 42; OCA, s.98; CCA, s.77.

417 *Rhyolite Resources Inc. et al* v. *CanQuest Resource Corp.* (1990) 50 B.L.R. 275 (B.C.S.C.).

418 See also MCA, ss.81(1).

419 OCA, s.98; CCA, s.77; CA(BC), s.144.

420 OCA, ss.98(1).

421 CA(BC), s.144.

422 CCA, ss.77(7).

423 Under the CCA, ss.77(7), "contract" has an expanded meaning to include an "arrangement". "Arrangement" is not defined but presumably includes a transaction

falling short of a legal contract.

424 OCA, ss.98(1).

425 CA(BC), s.144.

426 See, p. 52.

427 SCA, ss.93(2). See also MCA, ss.81(1) but note it does not refer to "associate".

428 SCA, ss.2(1)(d), ss.93(3).

429 SCA, ss.2(1)(gg). See also MCA, ss.1(1).

430 Welling, *supra*, note 189 at 451-52 suggests that a director or officer may have a material interest in some other person in two possible ways: (a) financial involvement (eg. if he is a shareholder of another corporation, or partner of another person, which/who is doing business with the corporation of which he is a director or officer or (b) emotional involvement (eg. if the corporation is negotiating with a close relative or close personal friend of the director or officer). Quaere however, what fact situations would come within the phrase "a material interest in any person" in Saskatchewan given the broad definition of "associate". The situation may be different in Manitoba since it does not include the term "associate".

431 In fact, the SCA is the only co-operative statute which expressly extends to personal relationships such as spouses, common law partners and relatives.

432 OCA, ss.98(1); CCA, ss.77(1); CA(BC), ss.144(1).

433 R.W. Ewasiuk, "Certain Peculiar Aspects of Directors' Powers and Obligations Under the Business Corporations Act" (1984) 22 Alta. L. Rev. 541 at 542, footnote 4.

434 SCA, ss.93(2). See also MCA, ss.81(1); OCA, ss.98(2)(a).

435 Welling, *supra*, note 189 at 452-53 suggests, however, that "Any personal relationship or monetary interest he may have in the other side that might be thought to be an inhibiting factor is a material interest if disclosure of the relationship or interest might be relevant to the corporate decision whether to involve the particular manager in the negotiations.... On the other hand, relationships of a tenuous nature and financial involvements such as holding a pitifully small number of shares in a large corporation whose shares are widely distributed will not be "material" ...".

436 A.L. Sone, "Directors' and Officers' Conflicts of Interest" in Miner, ed., *Current Issues in Canadian Business Law* (Toronto: Carswell, 1986) 167 at 176.

437 SCA, ss.93(1); ss.125(1)(a) identifies the types of contracts which a co-operative may, subject to the articles, enter into with its members.

438 OCA, ss.98(2)(b).

439 CCA, ss.77(1).

440 *Ibid.*

441 The reason the CA(BC), s.144-146 do not exclude such contracts is of course that they were drafted with the intention of regulating ordinary business corporations, rather than co-operatives in particular.

442 See, "Membership in the Co-operative and the Business Qualification", p.17.

443 OCA, ss.98(1).

444 OCA, ss.98(2)(a).

445 CA(BC), ss.144(4).

446 See, *Disclosure and Validation Requirements*, p. 56.

447 SCA, ss.93(2). See also OCA, ss.98(1); MCA, ss.81(2); CA(BC), ss.144(1).

448 A.L.Sone, "Directors' and Officers' Conflicts of Interest" in Miner, ed., *supra*, note 436, 167 at 177.

449 OCA, ss.98(1).

450 The disclosure provisions in the Canada Act are patterned from similar provisions in the Canada Corporations Act, R.S.C. 1970, c. C-32, s.98.

451 SCA, s.93; MCA, 2. 81; OCA, ss. 98(1); CA(BC), ss.144(1); CCA, ss.77(1).

452 CCA, ss.77(7).

453 SCA, ss.93(2).

454 MCA, ss.81(1).

455 SCA, ss.93(2); MCA, ss.81(1).

456 See Iacobucci *et al., supra,* note 25 at 309.

457 SCA, ss.93(9).

458 OCA, ss.98(6).

459 MCA, ss.81(7); CCA, ss.77(3); CA(BC), ss.144(3) all have slight variations in wording.

460 MCA, ss.81(7); CCA, ss.77(3).

461 CA(BC), ss.144(3).

462 SCA, ss.93(6).

463 OCA, ss.98(3).

464 MCA, ss.81(8).

465 SCA, ss.93(4); see also MCA, ss.81(2).

466 SCA, ss.93(5); see also MCA, ss.81(2),(3).

467 OCA, ss.98(3).

468 CCA, ss.77(2).

469 CA(BC), ss.144(2).

470 As noted earlier, these provisions do not apply to officers.

471 CA(BC), ss.144(2)(c).

472 Note that what is being discussed here is contract approval as an additional requirement once disclosure has been made. The OCA, CA(BC) and CCA also contain provisions authorizing contract approval by the members when the disclosure requirements have not been met: see, pp. 60-61.

473 See also MCA, ss.81(8).

474 CA(BC), ss.145(1)(b).

475 SCA, ss.93(7). See also MCA, ss.81(5) but note that (a) it does not prohibit a director from taking part in discussions concerning the contract; (b) contracts with an affiliate are excluded; and (c) it is subject to ss.81(6) (see p. 60). Quaere whether these provisions only prohibit a director from voting at a director's meeting or also as a member at a members' meeting.

476 No such requirement is stated in ss.93(7) but may be inferred from ss.93(8).

477 A.L. Sone, "Directors' and Officers' Conflicts of Interest" in Miner, ed., *supra*, note 436, 167 at 183.

478 SCA, ss.93(8).

479 CCA, ss.77(4).

480 OCA, ss.98(1).

481 CA(BC), ss.145(1)(c).

482 OCA, ss.98(1).

483 CA(BC), ss.145(2).

484 SCA, ss.93(10)(b)(ii). See also MCA, ss.81(8). This requirement is also stated in CA(BC), ss.145(1)(d) but only with respect to contracts approved by the members: see, pp.60-61 for a more detailed discussion of the member ratification provisions. The "fair and reasonable" requirement is not contained in the OCA or the CCA.

485 The Federal Proposals, para.228.

486 A.L. Sone, "Directors' and Officers' Conflicts of Interest" in Miner, ed., *supra*, note 436, 167 at 181 citing Ziegel, *Making the Change: The New Ontario Business Corporations Act - A User's Guide to the New Provisions* (Toronto: Richard De Boo,

1983) at p.25.

487 Sone, *ibid.* at 182 citing De la Garza, "Conflict of Interest Transastions: Fiduciary Duties of Corporate Directors Who Are Also Controlling Shareholders," (1980), 57 Denver L.J. 609.

488 Sone, *ibid.* at 182.

489 *Ibid.* at 183.

490 Iacobucci *et al.*, *supra*, note 25 at 312.

491 SCA, s.88; see also MCA, ss.83(1).

492 SCA, ss.93(10). See also MCA, ss.81(8).

493 The drafters of the Canada Business Corporations Act stated that the purpose of the legislation was "First, to stipulate the conditions that must be fulfilled by a director having an interest in a contract with the corporation; and second, to declare that if a director does fulfill these conditions, the contract is not void *and he has no liability to account for any profit he may make under the contract*" (Emphasis added): The Federal Proposals, Vol.1 at 79.

494 See A.L. Sone, "Directors' and Officers' Conflicts of Interest" in Miner, ed., *supra*, note 436, 167 at 175-76. Welling, *supra*, note 189 at 443-44 & pp.453-54 takes the position that a director remains accountable for his profits unless the applicable statute changes the equitable rule. He notes however, that a director will likely retain the profits in most situations unless some attempt is made to recover it.

495 CCA, ss.77(5).

496 OCA, ss.98(4).

497 CA(BC), ss.145(1)(b).

498 OCA, ss.98(4).

499 CA(BC), s.146.

500 SCA, ss.93(11). See also MCA, ss.81(9). Welling, *supra*, note 189 at 449-50 points out that the provision applies only when a director has failed to disclose his interest in a contract (as opposed to situations where statutory approval has not been obtained or the contract is not "fair and reasonable") and discusses the problems thereby created.

501 The Federal Proposals, para. 233.

502 Iacobucci *et al.*, *supra*, note 25 at 312.

503 For further dicussion of this issue, see, p.58.

504 Welling, *supra*, note 189 at 446 states that the director would be violating a statutory prohibition and therefore be committing an offence. He further suggests that his voting might invalidate the board resolution, resulting in a voidable *transaction* not covered by the statute and therefore within the equitable rule.

505 MCA, ss.81(5).

506 MCA, ss.81(6).

507 Iacobucci *et al.*, *supra*, note 25 at p. 308 commenting on an identical provision in the Ontario Business Corporations Act.

508 CA(BC), ss.145(1).

509 CA(BC), s.146.

510 BCCA, Sch.B, Rule 42.

511 CCA, ss.77(6).

512 OCA, ss.98(5).

513 CA(BC), ss.145(d),(e).

514 A.L.Sone,"Directors' and Officers' Conflicts of Interest" in Miner, ed., *supra*, note 436, 167 at 178 citing Ziegel, *Making the Change: The New Ontario Business Corporations Act - A User's Guide to the New Provisions* (Toronto: Richard De Boo,

1983), at p.26.

515 Sone, *ibid.* at 178.

516 See Palmer, Prentice and Welling, *Canadian Company Law*, 2nd ed. (1970) at 6-28.

517 *Ibid.*

518 Gower, *supra*, note 322 at 592. However, one area of growing concern involves the unauthorized copying and use of computer programs. In *Lake Mechanical Systems Corporation* v. *Crandell Mechanical Svstems Inc. et al.* (1985), 31 B.L.R. 113 (B.C.S.C.) the court held that the defendant director was a fiduciary and, in copying and using computer programs of the plaintiff company, without its authorization, to regulate the financial affairs of his own company, he was in breach of his fiduciary obligations.

519 *Supra*, note 369 at 382.

520 S.M. Beck, "The Quickening of Fiduciary Obligation: *Canadian Aero Service* v. *O'Malley*" (1975), 53 Can. Bar Rev. 771 at 781.

521 *Can. Aero Service* v. *O'Malley*, *supra*, note 369 at 391.

522 *Industrial Development Consultants Ltd.* v. *Cooley*. [1972] 1 W.L.R. 443, [1972] 2 All E.R. 162 (Birmingham Assizes). This strict approach has also been taken in Canada: *Abbey Glen Property Corporation* v. *Sturborg et al.*, [1976] 2 W.W.R. 1, 65 D.L.R. (3d) 235 (Alta. S.C.T.D.), affirmed (1978), 9 A.R. 234, [1978] 4 W.W.R. 28, 85 D.L.R. (3d) 35, 4 B.L.R. 113 (Alta. S.C.A.D.); *Redekop* v. *Robco Construction Ltd.* (1978), 7 B.C.L.R. 268, 89 D.L.R. (3d) 507, 5 B.L.R. 58 (S.C.). Both Canadian cases quoted from Laskin J. in *Can. Aero Service*, *supra*, at p.609 (S.C.R.):

> The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction.

523 D.D. Prentice, "Director's Fiduciary Duties – The Corporate Opportunity Doctrine" (1972) 1 Can. Bar Rev. 623 at 630.

524 *Ibid.*

525 *Re Weber Feeds Ltd: Trustee* v. *Weber* (1979), 30 C.B.R. (N.S.) 97, 24 O.R. (2d) 754 (C.A.); *Roper* v. *Murdoch and Northstar Productions Inc.* (1987) 14 B.C.L.R. (2d) 385, 39 D.L.R. (4th) 684 (S.C.). In both these cases, the company became bankrupt prior to, or on the eve of, the directors/officers securing the opportunity for themselves.

526 *Martin et al.* v. *Columbia Metals Corporation Ltd.* (1980), 12 B.L.R. 72 (Ont. H.C.). But see Prentice, *supra*, note 523 at 631-32 where he submits that a defense based on bona fide rejection of an opportunity by the corporation should fail for the same reasons (set out in the text at note 523) that the courts have rejected a defense based on refusal to deal with the corporation.

527 Ellis, *supra*, note 359 at 15-22.

528 For a full discussion of this issue, see M. Turcotte, "Corporate Opportunity: Moonlighting or Stealing" (1987) 2 S.C.R.R. 73 at 75-78.

529 *Ibid.* at 75.

530 *Ibid.* at 75-78.

531 CA(BC), s.147.

532 QCA, s.106.

533 Iacobucci *et al.*, *supra*, note 25 at 316.

[534] Gower, *supra*, note 322 at 591-92; Companies Bill, cl. 44.

[535] Iacobucci *et al.*, *supra*, note 25 at 316-17.

[536] *Ibid.* at 317.

[537] See Gower, *supra*, note 322 at 599 citing *London & Mahonaland Exploration Co.* v. *New Mahonaland Exploration Co.* [1891] W.N. 165, and *Bell* v. *Lever Bros.*, [1932] A.C. 161 (H.L.). See also *Waite's Auto Transfer Ltd.* v. *Waite*, [1928] 3 W.W.R. 649 (Man. K.B.) which held *per* Donovan J. at p.655: "the defendant is entitled to compete and to canvass for business. I think that the onus is on the plaintiff to show that the defendant has in fact by the abuse of his position as director become liable to the plaintiff for the damage alleged".

[538] See *W.J. Christie & Co. Ltd.* v. *Greer & Susses Realty & Insurance Agency Ltd.* (1981), 121 D.L.R. (3d) 472, 9 Man. R. (2d) 269, [1981] 4 W.W.R. 34, 14 B.L.R. 146, 59 C.P.R. (2d) 127 (C.A.) where the Manitoba Court of Appeal refused to follow *Waite's Auto Transfer Ltd.* v. *Waite; Scottish Co-operative Wholesale Society Ltd.* v. *Meyer, infra*, note 547. See also *Abbey Glen Property* v. Stumborg, *supra*, note 522 (trial level) where McDonald J. stated in obiter at p.278 (D.L.R.):
"The sweeping proposition for which the *London & Mahonaland* case and Lord Blanesburgh's dicta are cited [i.e. that a person is free to act as director of rival companies] is not the law ... and a director [may] breach his fiduciary obligation to company A merely by acting as a director of company B. This will particularly be possible when the companies are in the same line of business and where acting as a director of a company B will harm company A. Beyond that I need go no further than to say that the question whether a breach of a director's duty to company A must be determined upon the basis of the factors enumerated in *Canadian Aero Service Ltd.* v. *O'Malley* and *Regal (Hastings) Ltd.* v. *Gulliver*, and a negative answer will not necessarily be produced by the mere fact that the director is also a director of company B and owes it a like fiduciary duty".
Beck, *supra*, note 520 at 787-92 also suggests that this line of authority should be reconsidered in light of the *Can. Aero Service* decision.

[539] Gower, *supra*, note 322 at 599-600.

[540] *Marshal (Thomas) (Exporters) Ltd.* v. *Guinle*, [1978] 3 All E.R. 193, [1978] 3 W.L.R. 116 (Ch. D.).

[541] Note 369.

[542] For a thorough discussion of the two divergent views, see P.C. Wardle, "Post-Employment Competition — Canaeor Revisited" (1990) 69 Can. Bar Rev. 233.

[543] (1977), 79 D.L.R. (3d) 108, 16 O.R. (2d) 682, 2 B.L.R. 178, 36 C.P.R. (3d) 97 (H.C.).

[544] *W.J. Christie & Co. Ltd.*. v. *Greer & Susses Realty & Insurance Agency Ltd.*, *supra*, note 538 at 477 (D.L.R.).

[545] Wardle, *supra*, note 542 at 251-54, 268-71.

[546] *Ibid.* at 235.

[547] *Ibid.* at 274. If a director serves on the boards of rival corporations, his conduct may also be construed as "oppressive" in certain circumstances. In *Scottish Co- operative Wholesale Society Ltd.* v. *Meyer.* [1959] A.C. 324, [1958] 3 All E.R. 66 (H.L.) Lord Denning stated at 71:

> Your Lordships were referred to *Bell*, v. *Lever Bros. Ltd.*, [1932] A.C. 161 at 195 (H.L.), where LORD BLANESBURGH said that a director of one company was at liberty to become a director also of a rival company. That may have been so at that time. But it is at the risk now of an application under s.210 [the oppression remedy] if he subordinates the interests of the one company to those of the other.

Appl'd in *Redekop* v. *Robco Construction Ltd.*, *supra*, note 522 at 278 (B.C.L.R.).

[548] PEICA Reg. s.29 contains identical wording.

[549] Text at footnote 517 *et seq.*

[550] Gower, *supra*, note 322 at 631.

[551] *Ibid.* at 573.

[552] (1902), 2 C.H. 421 (Eng., Ch.).

[553] (1914), 17 D.L.R. 7 (P.C.).

[554] [1977] 2 N.Z.L.R. 225.

[555] *Dusik* v. *Newton* (1985), 62 B.C.L.R. 1 (C.A.); *NIR Oil Ltd.* v. *Bodrug* (1985), 38 Alta. L.R. (2d) 321 (C.A.)(Obiter at pp. 328-330; insider trading by Chief Executive Officer); *Bell* v. *Source Data Control Ltd.* (1988), 66 O.R. (2d) 78 (C.A.) (dissent by Cory J.A.; insider trading by majority shareholder); *Hasse* v. *Vladi Private Islands Ltd.* (1990), 96 N.S.R. (2d) 323 (App. Div.).

[556] The Ontario Report, p. 62.

[557] *Ibid.*

[558] SCA, s.89. See also Welling, *supra*, note 189 at 369 & 376 where he suggests that the statutory insider trading provisions (such as SCA, ss.89(a)), viewed strictly, may not change the common law position because of the problems in proving loss or causation.

[559] SCA, ss.89(a).

[560] SCA, ss.89(a).

[561] SCA, ss.89(b).

[562] See MCA, ss.1(1); OCA, ss.1(1)22 for a definition of "security".

[563] MCA, s.161; OCA, s.111.

[564] MCA, ss.161(b).

[565] MCA, ss.161(1)(c).

[566] SCA, ss.2(1)(d); OCA, ss.111(3)(a).

[567] MCA, ss.161(1)(a).

[568] OCA, ss.111(1). "Affiliate" is not defined but ss.111(4) deems corporations which are in a parent-subsidiary relationship to be affiliated.

[569] OCA, ss.1(1)23.

[570] MCA, ss.161(3).

[571] MCA, ss.111(2).

[572] OCA, s.112.

[573] OCA, s.112.

[574] See Iacobucci *et al.*, *supra*, note 25 at 353-366. See also Wellings, *supra*, note 189 at 361-376.

[575] CCA, ss.79(1),(2).

[576] CCA, ss.79(3).

[577] CCA, ss.3(1).

[578] This duty is expressly imposed in several other jurisdictions. See MCA, 93; ACA Reg. s.2, s.3.

[579] SCA, ss.104(2),(4). See also (noting variations in the number of members which must sign the requisition) OCA, ss.79(1),(3); MCA, ss.105(1),(3); QCA, s.77; ACA Reg. ss.4(2); CCA, ss.82(1); BCCA, ss.31(5); NSCA Reg. s.17; NBCA Reg. ss.28(1); PEICA Reg. s.26; NCA Reg. Sch.B, Form 2, Part VII, s.3 & Form 3, VI, s.3.

[580] OCA, ss.79(4); MCA, ss.105(4); BCCA, ss.31(5) & Sch.B, Rule 22; NCA Reg. Sch.B, Form 2, Part VII, s.3 & Form 3, Part VI, s.3; QCA, s.78; ACA Reg. ss.4(3); CCA, ss.82(3).

581 MCA, ss.105(6); OCA, ss.79(6); CCA, ss.82(5) but note it does not have a qualification whereby the members can reject such reimbursement.

582 OCA, ss.79(6)(b); CCA, ss.82(5).

583 SCA, s.111; see also OCA, s.71 but note that it requires the written requisition by 5% of the membership.

584 Several jurisdictions do impose such a duty. See ACA, ss.27(3); NCA Reg. Sch.B, Form 1, Part X, s.4, Form 2, Part VIII, s.6 & Form 3, Part VII, s.6; QCA, s.92 requires directors to meet at the call of the president or two directors; PEICA Reg. s.30 & NBCA Reg. s.36 require directors to convene meetings of the association.

585 SCA, ss.78(1),(2); see also NSCA, ss.33(9); PEICA, ss.31(9); NBCA, ss.31(9); BCCA, s.40 & Sch.B, Rule 46.

586 SCA, ss.78(3); see also BCCA, s.41 & Sch.B, Rule 55.

587 BCCA, Sch.B, Rule 47.

588 BCCA, Sch.B, Rule 69; NCA Reg. Sch.B, Form 1, Part X, ss.5(b).

589 SCA, ss.128(1); see also MCA, s.117; OCA, ss.139(1); CCA, ss.110(1); ACA, ss.25.1(1); QCA, s.133.

590 SCA, s.127; see also MCA, s.114; OCA, s.128; CCA, s.109; ACA, s.25; CA(BC), s.169 (a report of the directors is also required); NSCA, ss.41(2); PEICA, ss.40(2); NBCA, ss.40(2); NCA Reg. Sch.B, Form 2, Part VIII, ss.10(d) & Form 3, Part VII, ss.10(d). QCA, s.90 requires the directors to submit its annual report, which includes the annual financial statement and auditor's report, and give an account of its management.

591 SCA, ss.140(7)-(9). See also MCA, ss.128(5)-(8) & ss.128(8) which makes it a specific offence to knowingly fail to comply with the provision.

592 *Ibid.*

593 OCA, ss.127(4); CA(BC), ss.219(1). In these provisions, the duty to amend the financial report is not contingent on the auditor's opinion.

594 OCA, s.s127(5); CA(BC), ss.219(2).

595 QCA, s.134.

596 CCA, ss.111(1).

597 CCA, s.114.

598 SCA, ss.142(3); MCA, s.88.

599 MCA, ss.89(1).

600 SCA, ss.90(1)(a); see also MCA, ss.79(2)(a) (also applies to repayment of patronage loans); OCA, ss.99(1) (also applies to repayment of its loans. BCCA, Sch.B, Rule 10.1 requires directors to suspend the redemption of shares, the refund of an amount paid up on shares or a prepayment of a loan if it would impair the financial position of the association.

601 SCA, ss.90(1)(b),(c); see also OCA, ss.100(a).

602 SCA, ss.90(1)(d); see also MCA, ss.79(b); OCA, s.17 prohibits loans and financial assistance in all cases, not only when insolvency tests are not satisfied; CCA, ss.29(2) contains a similar blanket prohibition "unless authorized by a charter bylaw of the association, and then only in accordance with the provisions of that bylaw".

603 SCA, ss.90(1)(e); see also MCA, ss.79(2).

604 SCA, ss.90(1)(f).

605 S. Bailey, "Power to the People, Right? A Comparison of the Co-operatives Act With the Business Corporations Act" (1985-86) 50 Sask. L. Rev. 225 at 232.

606 MCA, ss.79(1); CCA, s.80 (but note qualifications).

607 CCA, s.76.

608 SCA, ss.35(1); see also ss.240(1),(4) (consumers' co-operatives) and ss.252(1),(2) (housing co-operatives) which require the allocation of surplus monies into a reserve. Also BCCA, Sch.B, Rule 60; NBCA Reg. s.23.

609 MCA, 2.29, s.30.

610 QCA, ss.246(4).

611 NCA Reg. Sch.B, Form 1, Part X ss.5(c).

612 NCA Reg. Sch.B, Form 2, Part VIII, ss.10(g); Form 3, Part VII, ss10(g).

613 BCCA, Sch.B, Rule 59.

614 NCA Reg. Sch.B, Form 1, Part III, s.2; Form 2, Part III, s.2; Form 3, Part III, s.2.

615 PEICA Reg. s.5.

616 PEICA Reg. s.6.

617 NCA Reg. Sch., B, Form 1, Part X, ss.5(a); Form 2, Part VIII, ss.10(a); Form 3, Part VII, ss.10(a).

618 ACA, ss.39(2)(c).

619 ACA Reg. ss.26(2).

620 ACA Reg. ss.26(3).

621 NSCA, ss.29(2); NBCA, ss.27(2); PEICA ss.27(2).

622 ACA, s.20; NCA Reg. Sch.B, Form 2, Part III, s.7: Form 3, Part III, s.7.

623 SCA, ss.180(1), ss.181(e)(g).

624 NCA, ss.48(2).

625 NCA, ss.18(3).

626 NCA, s.51.

627 OCA, ss.146(6), ss.148(6); NSCA, ss.5(4); PEICA, ss4(4); NBCA, ss.4(4); CA(BC), s.235.

628 CA(BC), ss.235(c).

629 CA(BC), s.239.

630 CCA, s.107.

631 MCA, ss.80(1); CCA, ss.78(1). OCA, ss.103(1) also imposes liability for up to 12 months' accrued vacation pay.

632 J.A. Carfagnini, "Directors' Liabilities When a Company Fails" (1988) 5 Bus. & L. 37 at 37.

633 See N. Gibson, "Business Issues: Directors Liability" (1989) 53 Sask. L. Rev. 187 at 188-90 for a discussion of the scope of this liability provision in other legislation.

634 SCA, ss.196(a); see also MCA, s.167; OCA, ss.176(1); CCA, ss.144(1); ACA, ss.52(2); BCCA, ss.65(4); OCA, ss.246(5); NSCA, ss.62(2); PEICA, ss.61(2); NBCA, ss.60(2); NCA, ss.69(1)(a),(c).

635 SCA, ss.196(b); OCA, ss.174(1).

636 Note that the penalties vary in each jurisdiction.

637 SCA, s.192; see also (note slight differences in wording) MCA, s.164; OCA, s.178; BCCA, s.48.7.

638 NSCA, ss.62(3); PEICA, ss.61(3); NBCA, ss.60(3).

639 MCA, ss.83(2); see also SCA, ss.92(a) & CA(BC), s.143 from which the positive duty to comply may be inferred.

640 PEICA Reg. ss.30(j); NBCA Reg. ss.38(i).

641 BCCA, ss.65(6) but note saving provision in ss.65(7); OCA, ss.174(2), ss.176(2). Under the SCA, ss.195(3) a director's derivative liability is limited to cases where the co-operative has made false or misleading statements and the director knew or ought to have known that the statement was false or misleading.

642 ACA, ss.52(3)

643 *Ibid.*

644 *Ibid.*

645 QCA, ss.246(3).
646 QCA, s.247.
647 SCA, ss.195(1); see also MCA, ss.166(1); OCA, ss.173(1); BCA, ss.65(5)(a); NCA, ss.69(1)(b),(2); QCA, ss.246(2).
648 SCA, ss.195(2); see also MCA, ss.166(2); BCCA, ss.65(6).
649 SCA, ss.224(1).
650 *Ibid.*
651 SCA, ss.95(1); ss.95(2) provides that bonding is optional with respect to other co-operatives. See also the model constitutions enacted under the NCA which impose a duty on all directors to ensure that all officers handling money are bonded: NCA Reg. Sch.B, Form 1, Part X, ss.5(b); Form 2, Part VIII, ss.10(b); Form 3, Part VII, ss.10(b).
652 SCA, s.135; see also ACA, ss.25.41(1); NSCA ss.40(2); PEICA ss.39(2); NBCA, ss.38(2).
653 CCA, s.38.
654 CCA, ss.102(2).
655 CCA, ss.94(2).
656 CCA, ss.115(10,(2); see also NSCA, ss.40(2); PEICA, ss.39(2); NBCA, ss.38(2).
657 CCA, ss.115(1), (7).
658 CCA, ss.37(1).
659 CCA, ss.93(9).
660 CCA, ss.96(2).
661 CCA, ss.97(2).
662 CCA, ss.98(3).
663 CCA, s.120.
664 BC(CA), ss.65(5)(b).
665 BC(CA), ss.65(2).
666 BC(CA), Sch.B, Rule 53.
667 ACA Reg. ss.23(3),(4).
668 ACA, ss.37(b), ss.52(5).
669 QCA, s.215.
670 QCA, ss.246(1).
671 QCA, ss.90(2).
672 QCA, ss.90(3).
673 QCA, ss.90(5).
674 QCA, ss.90(6).
675 QCA, ss.90(7).
676 QCA, ss.90(8).
677 QCA, s.89.
678 PEICA Reg. ss.30(b); NBCA Reg. ss.38(b).
679 PEICA Reg. ss.30(c); NBCA Reg. ss.38(c) requires the business to be conducted "in accordance with co-operative principles and the law".
680 PEICA Reg. ss.30(d); NBCA Reg. ss.38(d).
681 PEICA Reg. ss.30(e); NBCA Reg. ss.38(e).
682 PEICA Reg. ss.30(f); NBCA Reg. ss.38(f).
683 PEICA Reg. ss.30(g); NBCA Reg. ss.38(g).
684 PEICA Reg. ss.30(h); NBCA Reg. ss.38(h).
685 PEICA Reg. ss.30(i).
686 NCA Reg. Sch.B, Form 1, Part X, ss.5(d)(e) (other than loans to members); Form 2, Part VIII, ss.10(f); Form 3, Part VII, ss.10(f).

687 NCA Reg. Sch.B, Form 2, Part VIII, ss.10(e); Form 3, Part VII, ss.10(e).
688 NCA Reg. Sch.B, Form 1, Part X, ss.5(f).
689 NCA Reg. Sch.B, Form 2, Part VIII, ss.10(e).
690 Several Acts specifically recognize this: NSCA Reg. ss.32(i); PEICA Reg. ss.36(k); NBCA Reg. ss.44(j).
691 It will be noted that over and above his myriad statutory liabilities, a director may also be held personally liable in contract or tort in certain circumstances: see J.A. Millard, *The Responsible Director* (Toronto: Carswell, 1989) at 34-36; see also Donaldson, *supra*, note 344 at 42-48.
692 For a comprehensive listing of directors' and officers' statutory liabilities, see Wainberg *et al.*, *supra*, note 346 at 29-39. For a more detailed discussion of selected directors' liabilities, see Gibson, *supra*, note 632 Carfagnini, *supra*, note 633.
693 See, p 83.
694 R.S.S. 1978, c. L-1.
695 *Meyers* v. *Walters Cycle Co. et al.*, [1990] 5 W.W.R. 455, 71 D.L.R. (4th) 190 (Sask.C.A.). For a critical discussion of this case, see also J. Fleisher, "Directors' Liabilities on the Increase in Saskatchewan" (1991) 8 Bus. & L. 17.
696 *Mill-Hughes et al.* v. *Reynor et al.* (1988), 63 O.R. (2d) 343, 47 D.L.R. (4th 381 (C.A.).
697 See, p 83.
698 For a thorough review of directors' liability under the Income Tax Act, see E.P. Moskowitz, "Directors' Liability Under Income Tax Legislation and Other Related Statutes" (1990) 38 Can. Tax J. 537.
699 *Income Tax Act*, R.S.C. 1952, c.148 as amended (the "ITA"), ss.227.1 [en. S.C. 1980-81-82-83, c.140, ss.124(1)].
700 ITA, ss.227.1(2).
701 ITA, ss.227.1(4).
702 ITA, ss.227.1(3). For a detailed analysis of the "due diligence" defence, see R.L. Campbell, "Directors' Diligence Under the Income Tax Act" (1990) 16 Can. Bus. LJ. 480.
703 Saxe, *Environmental Offences – Corporate Responsibility and Executive Liability* (Aurora: Canada Law Book Inc., 1990), p.103-112.
704 *Ibid.* at 112-123.
705 *Ibid.* at 123-126.
706 The Criminal Code, s.21.
707 Saxe, *supra*, note 703 at 126-131.
708 *Ibid.* at 131-140.
709 *Ibid.* at 141.
710 *Ibid.* at 55.
711 R.M. McLeod, "Environmental Protection Legislation: Personal Liability of Officers and Directors" (1988) 5 Bus., & L. 20 at 22 suggests:
Each director should have responsibility, at a minimum,
(a) to ensure that the board of directors instructs the officers to set up a system of ensuring compliance with environmental laws,
(b) to ensure that the officers report back periodically to the board of directors on the operation of this system, and
(c) to ensure that the offficers are instructed to report any substantial non-compliance to the board in a timely manner.
The directors collectively are responsible for carrying out diligent and thorough reviews of environmental compliance reports provided by the officers of the

corporation....
The Board should also substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies responsible for environmental protection.

712 J.S. Ziegel, "The New Look in Canadian Corporation Laws" in Ziegel, ed., *supra,* note 1 at 50.

713 As noted, the discussion in the text will focus on statutory mechanisms which may be utilized to minimize the exposure of a director. A director may also minimize his exposure through his conduct: see Wainberg *et al., supra,* note 346 at 66 for a list of defensive practices to be followed by a director.

714 See, "Protection of the Corporate Fund", *supra.*

715 SCA, ss.90(2).

716 SCA, ss.90(4), (5); see also OCA, ss.101(1), (2).

717 SCA, ss.90(6); see also OCA, ss.101(3) but note seven day time limit.

718 MCA, ss.84(1)-(3), noting again the seven day time limit.

719 SCA, ss.90(10)(a).

720 SCA, ss.90(10)(b).

721 MCA, ss.84(4).

722 *Ibid.*

723 OCA, ss.102(1).

724 Iacobucci *et al., supra,* note 25 at 330.

725 SCA, ss.90(8). See also MCA, ss.79(7).

726 SCA, ss.90(9).

727 SCA, ss.90(11); see also MCA, ss.79(4); OCA, ss.99(2), ss.100(b).

728 MCA, ss.79(3).

729 SCA, ss.195(3), ss.224(2) (relates to security issues); see also MCA, ss.166(3); OCA, ss.173(2); BCCA, ss.65(7).

730 OCA, s.175.

731 See also MCA, s.167.

732 See also MCA, ss.169(1); BCCA, ss.65(8); OCA, s.177 but note one-year time limitation.

733 CCA, ss.144(1).

734 OCA, s.175.

735 ACA, ss.52(3).

736 MCA, ss.79(1); CCA, s.80.

737 MCA, ss.79(6); CCA, ss.80(2).

738 CCA, ss.80(3), (5).

739 MCA, ss.80(2), (3); OCA, ss.103(2); CCA, ss.78(2) but note that it imposes a one-year limitation period. In practice however, these provisions may provide little comfort to a director since claims tend to be brought against directors only when the employer corporation is insolvent: S. Hebenton, "Limiting Directors' Liability" (1987) Bus. & L. 4 at 5.

740 MCA, ss.80(4).

741 MCA, ss.80(6).

742 MCA, ss.80(5).

743 As noted earlier, the "reliance" defence does apply to employee wage claims in Manitoba: see text at note 722, p.101.

744 Iacobucci *et al., supra,* note 25 at 331.

745 *Ibid.*; see *Haig* v. *Bamford* (1976), 72 D.L.R. (3rd) 68 (S.C.C.).

746 BCCA, ss.48.3(2) & CA(BC), s.226. For conflicting views as to the merits of such a provision, see Iacobucci *et al., supra,* note 25 at 332.

747 MCA, ss.89(2).

748 SCA, s.92.

749 CA(BC), s.143.

750 BCCA, ss.18(1) requires all amendments to the rules of the association to be approved by the superintendent.

751 MCA, ss.83(3). Bailey, *supra,* note 605 at 231 suggests that the SCA permits members of a co-operative reduce the liability of directors by way of resolution in order to get people who have business knowledge to serve on the board.

752 Bailey, *supra,* note 605 at 231 suggests that the legislative intent was perhaps to provide a way for outside directors to avoid liability for corporate mismanagement which was not apparent at the time they were appointed to the board.

753 Iacobucci *et al., supra,* note 25 at 333; see also J.S. Ziegel, "The New Look in Canadian Corporation Laws" in Ziegel, ed., *supra,* note 1 at 50.

754 Except for QCA, s.106.

755 See text at notes 338 and 386.

756 Newbury, "Defensive Practices", paper presented at a seminar "Directors' and Officers' Liability" by the Continuing Legal Education Society of British Columbia, April 24, 1990 at 6.1.01.

757 S.M. Brooks, "Directors' Liabilities: Insurance and Indemnification", in Miner, ed., *Current Issues in Canadian Business Law* (Toronto: Carswell, 1986), 185 at 189 citing *Re Famatina Dev. Corp. Ltd.,* [1914] 2 Ch. 271 (C.A.).

758 *Ibid.*

759 *Ibid.* at 289 citing Powell, R. *The Law of Agency* (London, Sir Isaac Pitman Ltd., 1952) at p. 267.

760 See SCA, s.91. See also MCA, s.85; CCA, s.73; OCA, s.110; QCA

761 S.M. Brooks, "Directors' Liabilities: Insurance and Indemnification" in Miner, ed., *supra,* note 757 at 193 discussing a similar provision in the Ontario Business Corporations Act, 1982.

762 SCA, ss.91(1).

763 OCA, s.110. QCA, s.103-105. In Quebec, the indemnification provisions also apply to any person who acted at the co-operative's request as a director of a corporation of which the co-operative is a shareholder or creditor: QCA, s.105.

764 CCA, s.73; NBCA, s.25. S.M. Brooks, "Directors' Liabilities: Insurance and Indemnification" in Miner, ed., *supra,* note 757 at 193 states that the inclusion of former directors and officers is necessary because allegations giving rise to a cause of action against a director or officer can arise long after that person has ceased to hold office. He submits that the inclusion of directors or officers of a body corporate of which the co-operative is or was a member or creditor is also required because the directors or officers of the co-operative may also sit on the board of such a body. It makes the economic resources of the co-operative available for the indemnification of such directors or officers and avoids controversy as to whether a decision was made on behalf of the co-operative or the body corporate.

765 MCA, ss.85(1); OCA, ss.110(1); CCA, ss.73(1); CA(BC), ss.152(1).

766 SCA, s.91. See also MCA, s.85; CCA, s.73; OCA, s.110; CA(BC), s.152; QCA, s.103-105.

767 NBCA, s.25.

768 SCA, ss.91(1). See also MCA, ss.85(1); CA(BC), ss.152(1). QCA, s.103 provides that "A co-operative shall assume the defence of its director or other mandatary prosecuted by a third person...". . In *Denton* v. *Equus Petroleum Corporation* (1986)

33 B.L.R. 314 (B.C.S.C.) it was held that investigations by the Superintendent of Brokers, the VSE and the Commercial Crime Division of the RCMP did not constitute "criminal or administrative actions or proceedings" under s.152 of the CA(BC).

769 SCA, ss.91(2)(a). See also MCA, ss.85(1)(a); CA(BC), ss.152(1)(a).

770 NBCA, s.25.

771 S.M. Brooks, "Directors' Liabilities: Insurance and Indemnification" in Miner, ed., *supra,* note 757 at 194.

772 *Ibid.* at 194. A comparison is made to similar American enactments which permit indemnification where a director or officer has acted in or *not opposed to* the best interests of the corportion.

773 SCA, ss.91(2)(b).

774 MCA, ss.85(1)(b).

775 CA(BC), ss.152(1)(b).

776 CA(BC), ss.152(1)(b).

777 S.M. Brooks, "Directors' Liabilities: Insurance and Indemnification" in Miner, ed., *supra,* note 757 at 194.

778 CA(BC), s.152. As later discussed in the text, court approval is only required in Saskatchewan with respect to derivative actions: p. 100.

779 OCA, ss.110(2).

780 Iacobucci *et al., supra,* note 25 at 335.

781 *Ibid.*

782 QCA, s.103.

783 QCA, s.103

784 SCA, ss.91(1); MCA, ss.85(1); CA(BC), ss.152(1). QCA, s.103 provides that "a co-operative shall *assume the defence of* its director or other mandatory prosecuted by a third person for an act done in the exercise of his duties, and *pay any damages* resulting from that act...."(Emphasis added). However, in the case of penal or criminal proceedings, the co-operative must only *pay the defence expenses* of its director or other mandatory and only in limited circumstances.

785 S.M. Brooks, "Directors' Liabilities: Insurance and Indemnification" in Miner, ed., *supra,* note 757 at 193; but see *Denton* v. *Equus Petroleum Corporation. supra,* note 768 where the court held that the words "all costs" in CA(BC), s.152 do not include amounts paid to defend criminal or administrative investigations.

786 OCA, s.110; NBCA, s.25; CCA, s.73.

787 See, note 790; however, it seems doubtful that the words "costs, charges and expenses" would be interpreted in such a restrictive fashion in the Ontario, New Brunswick or Canada provisions since they do not deal exclusively with derivative actions and therefore the same policy considerations would not apply. {my idea}

788 SCA, ss.91(3). See also MCA, ss.85(2); CA(BC), ss.152(1); QCA, s.104. Note that in Manitoba and British Columbia, the provision governing indemnification in derivative actions also applies to "an action by or on behalf of...[a] *body corporate*": MCA, ss.85(2); CA(BC), ss.152(1).

789 SCA, ss.91(3)(a). See also MCA, ss.85(2). As noted earlier, CA(BC), s.152 requires court approval for all indemnity payments.

790 SCA, ss.91(3). See also MCA, ss.85(2); QCA, s.104. This limitation results from SCA, ss.91(3) not including the words "including an amount paid to settle an action or satisfy a judgment". It could be argued however that "all costs, charges and expenses reasonably incurred" in connection with the action may include settlement amounts and that the mere exclusion of the relevant words in ss.91(3) is not

sufficient to illustrate a legislative intention to exclude settlement costs. However, it was the draftsmen's intent to exclude settlement costs from derivative actions; see the Federal Proposals, para. 247, where it is stated:

> The implied premise of this subsection is that if a derivative action in the name of the corporation has been brought against a director or officer, he has probably not been acting in the interests of the corporation and therefore his conduct should be more closely scrutinized. This is particularly true in respect of settlements or actions where directors, having in their own interests profited from dealings that were prejudicial to the corporation, then seek indemnity from the corporation because they are compelled to settle a derivative action alleging that misconduct, a practice that has been appropriately castigated as "double looting" in some U.S. jurisdictions.

791 NBCA, s.25.

792 QCA, s.103-105.

793 SCA, ss.91(4); MCA, ss.85(3).

794 Iacobucci *et al., supra,* note 25 at 337.

795 SCA, ss.91(6).

796 MCA, ss.85(5).

797 CA(BC), ss.152(2).

798 See S.M. Brooks, "Directors' Liabilities: Insurance and Indemnification" in Miner, ed., *supra,* note 757 at 197 for a discussion of alternative interpretations of this phrase.

799 MCA, ss.85(6).

800 CA(BC), ss.152(3).

801 S.M. Brooks, "Directors' Liabilities: Insurance and Indemnification" in Miner, ed., *supra,* note 757 at 196.

802 *Ibid.* at 196.

803 Carfagnini, *supra,* note 632 at 38.

804 S.M. Brooks, "Directors' Liabilities: Insurance and Indemnification" in Miner, ed., *supra,* note 757 at 197 citing *Re Famatina Dev. Corp. Ltd.,* [1914] 2 Ch. 271 (C.A.).

805 Brooks, *ibid.* at 199 also discusses the contents of an indemnification agreement; see also Carfagnini, *supra,* note 632 at 38.

806 Carfagnini, *ibid.* at 38.

807 R.B. Miner, "Specific Liabilities of Directors in Canada" in Sarna, ed., *Corporate Structure. Finance and Operations* (Toronto: Carswell, 1984), Vol. 3, 1 at 48. But see also S.M. Brooks, "Directors' Liabilities: Insurance and Indemnification" in Miner, ed., *supra,* note 757 at 193 where he submits that if a corporation is free to indemnify its directors and officers in situations not contemplated by the statute, it would limit the effect and purpose of the statutory provisions.

808 But see Iacobucci *et al., supra,* note 25 at 52 where he states that directors of a corporation could be indemnified for statutorily imposed duties.

809 For conflicting views whether the scope of the power to insure should be co-extensive with the scope of the power to indemnify, see: The Federal Proposals, par. 250; Iacobucci *et al., supra,* note 25 at 337-340; Newbury, *supra,* note 756 at 6.1.03-6.1.04.

810 J.S. Ziegel, "The New Look in Canadian Corporation Laws" in Ziegel, ed., *supra,* note 1 at 52.

811 CA(BC), ss.152(4); MCA, ss.85(4).

812 *Ibid.*

[813] OCA, ss.110(3).
[814] CA(BC), ss.152(4).
[815] MCA, ss.85(4).
[816] MCA, ss.85(4).
[817] OCA, ss.110(3).
[818] See, p. 63.
[819] See, *Indemnification*, p. 95.
[820] R.W. McDowell & M.C. Newton, "Directors' and Officers' Liability Insurance" (1987) 7 Can. J. Ins. L. 35 at 40.
[821] Millard, *supra*, note 691 at 12.
[822] For a comprehensive analysis of D & O policies, see H. Silber, "Directors' and Officers Liability Coverage: Directors' Liability and the Scope of Policy Exclusions in Canada" (1990) 8 Can. J. Ins. L. 95.
[823] Millard, *supra*, note 691 at 12-13.
[824] Carfagnini, *supra*, note 632 at 39.
[825] *Ibid.*