GOWLINGS

A STUDY OF THE LIABILITIES FACING DIRECTORS and OFFICERS of NONPROFIT CORPORATIONS in CANADA

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Prepared by:

GOWLING LAFLEUR HENDERSON LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3
Telephone: (613) 233-1781
Facsimile: (613) 563-9869

1. Executive Summary

Industry Canada has primary responsibility for nonprofit corporations incorporated through Part II of the *Canada Corporations Act*. In that capacity, Industry Canada is considering options to address concerns relating to the liabilities faced by the directors and officers of federally-incorporated nonprofit corporations as a part of a broad initiative relating to the development of improved government-voluntary sector collaboration. Therefore, Industry Canada requires a list and comparative review of the statutes imposing liability on such directors and officers.

This study comprises a review of legislation in Canada imposing liability on directors and officers of nonprofit organizations. The review has demonstrated that hundreds of federal, provincial and territorial statutory sections impose liability on directors and officers. A combination of the language of these sections and the common law establishes various categories of statutory liability. The three basic categories of liability are *mens rea* liability, strict liability and absolute liability. *Mens rea* in its simplest form requires that the Crown prove as the wrongful act and the accused's intention to commit the act for a conviction to be achieved. Strict liability in its simplest form requires that the Crown prove the wrongful act but not the accused's intention to commit the act for a conviction to be achieved. The accused has available the defence of the exercise of due diligence to avoid the conviction. Absolute liability in its simplest form requires that the Crown prove the wrongful act but not the accused's intention to commit the act for a conviction to be achieved. The accused does not have available a defence of due diligence. Further categories, or perhaps sub-categories, of liability may be emerging through the case law. One is a category of objective *mens rea* where the Crown must prove the intention to commit the wrongful act on an objective basis. Another is a category of strict liability created by a reverse onus on the accused to prove due diligence.

This review has found that statutory offences impose liability equally without consideration of a nonprofit corporation's size or charitable or voluntary nature. Liability is imposed in the same manner in which liabilities are imposed on the directors and officers of business corporations.

This review has also found that the penalties than can be imposed on the directors and officers of nonprofit corporations include fines that are unlimited by any defined maximum amount, imprisonment of several years, or civil liability to repay the losses of another person, or a combination of any of these three punishments.

Further this review has found that the combined effect of the common law with the language imposing offences creates complexity such that statutory offences in Canada are not easily comprehensible and, therefore, accessible by laypersons outside the legal profession to whom they may be applicable.

As a result, further review and initiatives with respect to statutory offences within the regulatory framework in which voluntary nonprofit corporations operate in Canada is well warranted.

2. Introduction

In February 1999, the Panel on Accountability and Governance in the Voluntary Sector released its report entitled *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector*. This report indicates that the liability of directors of voluntary sector organizations is frequently raised as an issue both of uncertainty and concern to directors and to potential directors of nonprofit organizations. As a result, it is difficult for nonprofit organizations to recruit qualified directors.

In August 1999, a further report entitled *Working Together* was released by the Privy Council Office of the federal government. This report identified as an objective the development of improved government – voluntary sector collaboration as one way to improve the quality of life for Canadians. *Working Together* recommended joint action by the government and the voluntary sector to build the government – voluntary sector relationship, to strengthen the capacity of the sector and to improve its regulatory framework.

Industry Canada has primary responsibility for nonprofit corporations that have been federally incorporated. The *Canada Corporations Act,*[1] Part II, hereinafter "*CCA-II*", governs nonprofit organizations that have incorporated federally. Before Industry Canada is able to develop options to address concerns raised with respect to the liabilities that directors of federally-incorporated nonprofit organizations face, those liabilities must be collected in a consolidated form and analysed as to what the liabilities are to which a director is actually answerable.

The purpose of this study is to provide Industry Canada with a list and a comparative review of all federal, provincial and territorial statutes in force as of December 31, 2000, which impose liability on directors or officers of nonprofit organizations, together with a discussion of the types of liability imposed.

The report will serve as the basis of further discussion and initiatives regarding directors' and officers' liability in the nonprofit sector. These discussions and initiatives will possibly lead to reforms in the federal law governing nonprofit corporations.

3. Part A: Review of Legislation

Part A comprises a review of federal, provincial and territorial legislation imposing liability on directors and officers of nonprofit corporations. This review, desegregated by jurisdiction, includes the following elements:

(a) the name of the Act;

(b) the section number and complete wording of the relevant provisions;

(c) an explanation as to what triggers the liability (e.g., breach of the law or right of action);

(d) the type of offence (*e.g.* absolute or strict liability);

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[1] *Canada Corporations Act*, R.S.C. 1970, c. C-32. This Act will not be further footnoted herein where it is mentioned generally.

(e) the liability to which directors and officers are exposed (e.g. jointly and severally liable to pay fines, imprisonment for criminal liability, penalties/redress for civil liability);

(f) the statutory defences available to directors and officers;

(g) differences in liability for the different types of nonprofits (e.g., charities, public benefit, mutual benefit organizations); and

(h) differences in size and type of liability imposed based on the size of the organization.

This review has been prepared as a searchable database incorporated into the compact computer disc which accompanies this study and which is found at Tab A. The Part A review has also been prepared in a hard-copy format which has been collated in the accompanying bound volume marked as Volume A.

4. Part B: Summary Matrix

Part B comprises a summary matrix through which the information collected and analysed in Part A may be compared. The summary matrix is incorporated into the compact computer disc accompanying this study. The matrix is also provided in hard-copy format which may be found at Volume B.

5. Part C: Liabilities of Directors and Officers of *CCA-II* Corporations Operating in Ontario

The directors and officers of nonprofit corporations incorporated under the *CCA-II* and operating within one of the provinces are amenable to both federal and provincial legislation, as follows:

(a) the *CCA-II*;

(b) where the corporation comes under federal constitutional authority, all federal statutes relating to the corporation's particular enterprise and relating to the corporation's employees; or

(c) where the corporation comes under provincial constitutional jurisdiction, all of the respective province's statutes relating to the corporation's particular enterprise and relating to employees within that provincial jurisdiction;

(d) all federal statutes of general application; and

(e) all provincial statutes of general application within the respective province.

In order to obtain an understanding of the full statutory framework applicable to a director or an officer of a federally-incorporated nonprofit organization, this section of the study presents a discussion of the liabilities potentially faced by the director or officer of the federally incorporated nonprofit corporation operating in the Province of Ontario.

(a) Nonprofit Organizations

The expression "nonprofit organization" refers to an organization that has been created for a reason other than the making of a profit. Any profit that it makes is not distributed to the organization's members but is to be used instead to benefit the organization. The expression "nonprofit organization" has broad scope, encompassing both charitable nonprofit organizations, such as hospitals, social service associations, and schools, and non-charitable nonprofit organizations, such as political organizations, golf clubs, sports organizations and the like.

The distinction between nonprofit and charitable organizations is beyond the scope of this study. Nevertheless, the distinction is important because a charitable organization is generally subject to

tighter provincial regulation, such as Ontario's *Charities Accounting Act,*[2] *Charitable Gifts Act*[3] and *Charitable Institutions Act,*[4] whereas most nonprofit organizations are not subject to specific regulation outside the general requirements of the federal *Income Tax Act*[5] and the income tax legislation of the respective province and, where the organization has incorporated through the general federal incorporating statute or a general provincial incorporating statute, to that respective federal or provincial corporations statute. Further, and also beyond the scope of this study, the standard of care and fiduciary obligation under the common law is significantly different for the director or officer of the charitable organization and the director or officer of the non-charitable nonprofit organization.

The federal *Income Tax Act*[6] defines a "nonprofit organization" as follows:

> a club, society or association that, in the opinion of the Minister ... [of National Revenue] ... , was not a charity within the meaning assigned by subsection 149.1(1) and was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada.

Nonprofit organizations may structure themselves in a number of different legal forms, including unincorporated association, establishing as a trust, incorporating under specific incorporating

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[2] *Charities Accounting Act*, R.S.O. 1990, c. C.10.

[3] *Charitable Gifts Act*, R.S.O. 1990, c. C.8.

[4] *Charitable Institutions Act*, R.S.O. 1990, c. C.9.

[5] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. l, as am..

[6] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 149(1)(l).

legislation, either public, such as the Ontario *Condominium Act,*[7] or private, as for example the Association of Canadian Clubs' incorporation through *An Act to incorporate The Association of Canadian Clubs*,[8] or by incorporating pursuant to the federal *CCA-II* or pursuant to a provincial corporation statute, such as Ontario's *Corporations Act*.[9]

This review of the statutory liabilities of a corporation's directors and officers considers the nonprofit corporation incorporated under the *CCA-II*[10] and operating in Ontario.

(b) Directors and Officers Distinguished

Under the *CCA-II*, the business and affairs of a nonprofit corporation are managed by a board of directors appointed in accordance with the by-laws of the corporation. The board of directors is the directing mind of the body corporate. The by-laws may provide for the appointment of officers although there is no obligation under the *CCA-II* that officers be appointed, nor a definition as to the meaning of the term "officer." The *Canadian Oxford Dictionary,*[11] however, defines "officer", among other definitions, as "a holder of a post in a society or organization, e.g. the president or secretary." Further, the *Ontario Business Corporations Act*,[12] defines "officer" as including "the chair of the board of directors, a vice-chair of the board of directors, the president, a vice-president, the secretary, an assistant secretary, the treasurer, an assistant treasurer and the general manager of a corporation, and any other individual designated an officer of a corporation by by-law or by

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[7] *Condominium Act*, R.S.O. 1990, c. C.26.

[8] *An Act to incorporate the Association of Canadian Clubs*, 3 George VI, c. 61.

[9] *Corporations Act*, R.S.O. 1990, c. C.38.

[10] *Canada Corporations Act*, R.S.C. 1970, c. C-32, s. 155(2)(d).

[11] Toronto: Oxford University Press, 1998.

[12] *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 1 as am..

resolution of the directors or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any such office."

Typically, a nonprofit corporation creates at least positions of president, vice-president, secretary and treasurer. Members of the board of directors may be appointed to those specific positions. When these appointments are filled by a member of the board of directors, that person is both a director and an officer. When a non-director is appointed, that person is simply an officer. The distinction is significant because statutory liabilities may be defined against directors solely, or against officers solely, or against both. Under the *CCA-II*, there is no restriction with respect to remuneration of directors or officers.

(c) Statutory Offences

Statutory offences, also called regulatory offences, are offences relating to non-criminal matters. Some statutory offences concern the public welfare, such as traffic infractions, sales of impure foods, violation of liquor laws, and the like. These are "in substance of a civil nature and might be regarded as a branch of administrative law"[13] as they involve a "shift of emphasis from the protection of individual interests to the protection of public and social interests".[14] Other statutory offences relate to the aim of ensuring the proper management of corporations which a government has permitted to come into existence, such as requiring that pertinent corporate information be filed with the regulating government annually. Others relate to the regulation of the employer-employee relationship, for example the requirement that employers pay debts for wages owed to employees. In *R. v. Wholesale Travel Group Inc.*, Cory J. stated[15] that "regulatory measures are the primary mechanisms employed by governments in Canada to implement public policy objectives. He also stated:

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[13] *R. v. City of Sault Ste. Marie* (1978), 85 D.L.R. (3d) 161 at 165 (S.C.C.).

[14] *Ibid.* at 172.

[15] (1991), 67 C.C.C. (3d) 193 at 239 (S.C.C.).

> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.[16]

Statutory liabilities applicable to directors and officers may range from civil liability requiring the director or officer pay for losses sustained by a governmental authority or by a person as a result of a statutory contravention, to punishments of a criminal or quasi-criminal nature with a potential of a fine or imprisonment or both a fine and imprisonment. Liability may arise either directly for the director's or officer's own violation of a statutory duty or prohibition or indirectly where a director or officer is held liable for the corporation's contravention of a statutory duty or prohibition. On this basis, for example, a director or officer can be prosecuted for the statutory offence committed by the nonprofit corporation in failing to remit amounts owed with respect to source deductions of income tax and pension payments and upon conviction be liable to pay a fine and to pay personally the income tax and pension remittances amounts owing.

In Canada, there are three basic categories of liability with respect to statutory offences, pursuant to the Supreme Court of Canada's decision in *R. v. City of Sault Ste. Marie.*[17] Conviction for some statutory violations demands a finding of *mens rea* (meaning "guilty mind"), requiring that the Crown provide proof beyond a reasonable doubt that the accused committed the wrongful act (also called the "*actus reus*" or "guilty act")and subjectively intended to do so, before culpability will be found against the accused; these are referred to as "*mens rea* offences". Some violations will find culpability where the Crown proves that the wrongful act was committed by the accused, without

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[16] *Ibid.* at 238.

[17] *Supra*, note 13.

any proof being required of the Crown as to mental intention, unless the accused can prove that he or she exercised due diligence in attempting to meet the statutory requirements; these are referred to as "strict liability offences". Some violations will find culpability automatically, despite evidence of the accused's due diligence in attempting to prevent the contravention from occurring, unless it is proven that the event or loss against which liability is alleged did not occur at all; these are referred to as "absolute liability offences".

Until *Sault Ste. Marie*, there was no generally-accepted middle position between the *mens rea* offence requiring proof of a guilty mind to the same degree as required for a finding of criminal culpability and the absolute liability offence requiring no guilty mind whatsoever. The problem presented by the situation was twofold. On one hand, the Crown when faced with a *mens rea* offence in a regulatory context had excessive difficulty in proving a culpable state of mind to the criminal standard. On the other hand, the accused when faced with an absolute liability offence could not avoid conviction even where there was no blameworthiness at all on his or her part and despite any positive steps that the accused had taken to avoid the occurrence of the offence. By creating a strict liability "halfway house",[18] the Crown would not need to prove a guilty mind with respect to statutory offences unless the statutory language clearly indicated that requirement but nor would the accused be liable where there was absolutely no blameworthiness, again unless the statutory language clearly indicated that intention. The Supreme Court of Canada clearly indicated in *Sault Ste. Marie* that public welfare offences would, *prima facie*, come within the strict liability category of statutory offence.[19] The stigma attaching to an offence or lack thereof will be a consideration in making a determination of the applicable category of liability as will the length of any potential term of imprisonment or the amount of any potential fine.

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[18] *Ibid.* at 172.

[19] *Ibid.* at 182.

In *Sault Ste. Marie*, the violation related to charges of water pollution under the *Ontario Water Resources Act*.[20] The court considered whether the offence related to the public welfare in the following manner:

> Turning to the subject-matter of s. 32(1) – the prevention of pollution of lakes, rivers and streams – it is patent that this is of great public concern. Pollution has always been unlawful and, in itself, a nuisance: ... . A riparian owner has an inherent right to have a stream of water "come to him in its natural state, in flow, quantity and quality"; ... . Natural streams which formerly afforded "pure and healthy" water for drinking or swimming purposes become little more than cesspools when riparian factory owners and municipal corporations discharge into them filth of all descriptions. Pollution offences are undoubtedly public welfare offences enacted in the interest of public health.[21]

Finding that the offence related to public welfare, the court found further that there could therefore be no presumption that the Crown had to prove *mens rea* to a level of criminal intent.[22]

The court then considered the statutory language creating the offence and noted that it used the words "cause" and "permit". The court found that these words import some mental element into the offence which negates the offence being one of absolute liability but not enough of a mental element to create a criminal level of *mens rea* as would the words "wilfully" or "knowingly".[23] The offence was, therefore, a strict liability offence. Being such, the Crown would only have to prove that the offence occurred and would not have to prove that the accused intended the violation. However, the accused would nevertheless be able to raise in his or her defence after the Crown had presented its case that the accused had exercised due diligence to try to prevent the violation from occurring. The

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[20] *Ontario Water Resources Act*, R.S.O. 1970, c. 332, s. 32(1).

[21] *Sault Ste. Marie*, *supra*, note 13.

[22] *Ibid.*

[23] *Ibid.* at 183.

accused must prove due diligence to the civil standard of "proof on the balance of probabilities" and not to the criminal standard of "proof beyond a reasonable doubt". If the accused cannot prove that he or she exercised due diligence, the offence is proven and the accused is guilty.

In practice, *mens rea*, strict and absolute liability offences are not always easily distinguished and as the case law had developed over the past near-quarter century since the *Sault Ste. Marie* decision was rendered, variations on the general theme of three categories of statutory liability have begun to emerge.

(i) ***Mens Rea* Offences by Directors and Officers**

"*Mens rea* offences" require proof beyond a reasonable doubt both that the director or officer did in fact commit the alleged act or omission in violation of a statute and that he or she intended to commit the act. The statutory language of *mens rea* offences typically includes words such as "with intent", "knowingly", or "wilfully". Further, the phrase "directed, authorized, assented to, acquiesced in, or participated in" indicates that the guilty mind must be proven by the Crown along with the wrongful conduct. This latter language was held by the Ontario Provincial Court to require proof of the mental element in *R. v. Rogo Forming Ltd.*[24] which has subsequently been followed in other courts.[25]

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[24](1980), 56 C.C.C. (2d) 31 at 42 (Ont. Prov. Ct.); McCarthy Tétrault, *Directors' and Officers' Duties and Liabilities in Canada* at 4 (Toronto: Butterworths, 1997).

[25]See, for example, *R. v. Swendson* (1987), 87 D.T.C. 5335 (Alta. Q.B.).

(ii) Strict Liability Offences by Directors and Officers

"Strict liability offences" require proof beyond a reasonable doubt that the act or omission in violation of a statute in fact occurred. No proof is required with respect to the accused's state of mind with respect to the commission of the offence. However, the language of the statutory section imposing liability must indicate that there is some degree of a mental element in the offence in order to keep the offence out of the absolute liability category. Once the commission of the offence has been proven, the director or officer must present proof of the directors' or officers' due diligence as a defence if, in fact, due diligence has been exercised or attempted, in order to escape liability. Where a director or officer accused of a statutory offence can demonstrate on a balance of probabilities that the director or officer took all reasonable care to avoid the act or omission by which the violation occurred and thereby exercised due diligence in meeting the statutory requirements, the director or officer will not be liable for the offence.

A defence is also available where the director or officer reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent.[26]

The Supreme Court of Canada decided in *R. v. Wholesale Travel Group Inc.*[27] that a reverse onus on an accused to establish due diligence as a defence to a regulatory offence is not unconstitutional and that an objective fault standard may result in imprisonment.

Strict liability offences do not include language such as "knowingly" or "wilfully" which rather indicate a clear fully guilty mind requirement. They will, however, indicate that some mental element is involved in the offence in order to keep the offence out of the absolute liability category.

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[26] *R. v. City of Sault Ste. Marie*, *supra,* note 13 at 181-182.

[27] *R. v. Wholesale Travel Group Inc., supra*, note 15.

(iii) Absolute Liability Offences by Directors and Officers

"Absolute liability offences" by directors or officers require proof beyond a reasonable doubt that the act or omission in violation of a statute in fact occurred. Once that fact has been proven, there is no defence of due diligence available whatsoever. *Sault Ste. Marie* states:

> Offences of absolute liability would be those in respect of which the Legislature has made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence is ... [an absolute liability offence].[28]

In *Reference re s. 94(2) of Motor Vehicle Act,*[29] the Supreme Court of Canada held that a combination of absolute liability with the potential penalty of imprisonment is a violation of section 7 of the *Canadian Charter of Rights and Freedoms*.[30] Therefore, absolute liability cannot be imposed where prison is a possible penalty for a statutory offence. On that basis, where the statutory language appears to impose absolute liability but then makes a prison term a possible penalty for the statutory violation, the offence as a result becomes a strict liability offence allowing a defence of due diligence.[31] Further, general defences such as necessity, duress and coercion are available,[32] as is the defence of officially-induced error of law.[33]

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[28] *Sault Ste. Marie*, *supra*, note 13 at 182.

[29] [1985] 2 S.C.R. 486.

[30] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[31] *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295 at 300 (Ont. C.A.).

[32] *Ibid.* at 301.

[33] *Ibid.* at 304.

The case of *Dreaver v. Saskatchewan Treaty Indian Women's Council Inc.*,[34] which dealt with a violation of *The Labour Standards Act*[35] of Saskatchewan, presents an example of an absolute liability situation where the directors of a nonprofit corporation were personally and successfully sued, together with the corporation, by two employees for wages and other amounts owed. The statute stated " ... the directors of a corporation are jointly and severally liable to an employee of a corporation for all debts, not exceeding six months' wages, due for services performed by the corporation." This language clearly establishes absolute liability as there is no indication whatsoever of any mental element being included in the offence. The court reviewed the specific case of one director who had exercised due diligence with respect to the financial affairs of the corporation but who nevertheless was obligated to pay the same amount of damages as the other directors and stated:

> I have already commented on the unfortunate position of Linda Bigknife-Watson but I can see no basis on which I can relieve her of liability despite her persistently worth effort. Her effort is a commendable reflection of the proper attitude to be taken by a director of a corporation but the result is a reminder that directors must be cognizant of their responsibilities and the potential risks of directorship.[36]

Therefore, when the liability is absolute, the proof that due diligence was exercised will not in any way reduce the liability.

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[34]*Dreaver v. Saskatchewan Treaty Indian Women's Council Inc.,* [1994] S.J. No. 383 (Q.B.).

[35]*The Labour Standards Act*, R.S.S. 1978, c. L-1, as am. S.S. 1979-80, c. 92.

[36]*Dreaver*, *supra*, note 34 at para. 48.

(iv) Objective *Mens Rea* Offences by Directors and Officers

In a decision of the Ontario Provincial Court in *R. v. Commander Business Furniture Inc.,*[37] a further category of liability offence, somewhere between full *mens rea* liability and strict liability, has been recognized. To date, the *Commander Business Furniture* decision has not been overturned and has been followed in the Ontario Court (General Division) on this point in *R. v. Blair.*[38]

Commander Business Furniture involved a situation where a director of a corporation was charged under section 147a of Ontario's *Environmental Protection Act*[39] with failing to carry out his duty as a director of a corporation to take all reasonable care to prevent the corporation from causing or permitting an unlawful discharge of contaminants into the natural environment. The discharge here related to an odour. Section 147a(1) states:

> Every director or officer of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge.

Section 147a(2) states:

> Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.

The potential penalty for the director in this matter was $600,000.00 approximately. In making the determination as to what category of statutory liability section 147a fits, Madam Justice Hackett first,

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[37](1992), 9 C.E.L.R. (N.S.) 185 (Ont. Prov. Ct.).

[38](1995), 129 D.L.R. (4th) 367 (Ont. Ct. Gen. Div.).

[39]*Environmental Protection Act*, R.S.O. 1980, c. 141, s. 147a, as am. now *Environmental Protection Act*, R.S.O. 1990, C. E.19, s. 194.

following the approach outlined is *Sault Ste. Marie*, noted that regulatory offences are *prima facie* strict liability offences. She then reviewed the statutory language for indications that the offence comprises some mental element. Hackett J. noted that, though the section 147a language does not include any reference to imprisonment which would indicate unquestionably that some degree of *mens rea* is required, the section nevertheless calls for very significant penalties which would be consistent with some finding of fault being required. She then considered the degree of stigma attaching to the offence and found that, though the stigma in relation to environmental offences is increasing in Canada, it is not such here as to shift the offence to the *mens rea* standard. However, Hackett J. then, reviewing again the language of section 147a, found that the Crown had to prove "not only that the director is engaged in an activity that may result in the discharge of a contaminant but it must also prove that he or she failed to take all reasonable care to prevent it".[40] Madame Justice Hackett considered previous case law and found as follows:

> [It] ... clearly places the onus on the Crown to prove fault or conduct that is a departure from a reasonable standard of care. This is equivalent to negligence ... [and] ... is an objective mental element, or mens rea, which is distinct from, though often derived from or inferred from, the actus reus. If the action or the failure to do something is something a reasonable person would not have done, then the necessary fault, blameworthiness, negligence or objective mens rea may be established by inference unless evidence is called by the accused which raises a reasonable doubt that such an inference is proper in all the circumstances. ... [T]his analysis clarifies or expands the ... [*mens rea*] ... category of regulatory offences set out in *Sault Ste. Marie*. ...The ... [*mens rea*] ... category, in my view should be read to include negligence ... .[41]

Madam Justice Hackett then stated:

> To prove a failure to take all reasonable care ... means that the Crown must prove an act or failure to act which amounts to negligent

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[40] *Supra*, note 37, at 250.

[41] *Ibid.* at 248-249.

> conduct or an objective intention beyond a reasonable doubt. The words in s. 147a(2) indicate ... that the legislature intended that the fault for this offence must be proved by the Crown rather than, as it is the case in most strict liability offences, disproved by the defence on a balance of probabilities ... . The defence, at the close of a prima facie case called by the Crown, may call evidence which in all the circumstances raises a reasonable doubt about the mental element or degree of fault.[42]

Madam Justice Hackett went on to comment that, though she was constrained to follow the clear language in section 147a(2), the result was not one that she found satisfactory:

> It is frankly of concern to me that as part of a regulatory scheme, directors, who clearly undertake to work in a regulated field and have the duty set out in s. 147a(1), can sit mute and require the Crown to prove that they did not comply with this duty. Clearly, placing such an onus on the Crown will be more costly to society as a whole ... .[43]

Hackett J. blamed poor legislative drafting for the confusion that would be the result of her ruling.[44]

The *Commander Business Furniture* decision was affirmed by the Ontario Court (General Division)[45] and was subsequently followed in the Ontario Court (General Division) in *Blair*.[46] This case concerned an offence under Ontario's *Pension Benefits Act*.[47] The court held that where a statute sets an obligation for a specific standard of care, the Crown is required to prove beyond a

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[42]*Ibid.* at 251.

[43]*Ibid.*

[44]*Ibid.* at 252.

[45]*R. v. Commander Business Furniture Inc.* (February 18, 1994), Toronto Doc. 179/93 (Ont. Ct. Gen. Div.).

[46]*Supra*, note 38.

[47]*Pension Benefits Act*, S.O. 1987, c. 35, s. 1.

reasonable doubt that the standard has not been met. This case actually goes further than the *Commander Business Furniture* decision by stating that the notion of due diligence does not actually arise because once the Crown has established a *prima facie* case of objective *mens rea* there is no possibility of the accused establishing due diligence on a balance of probabilities.[48]

Thus, we are left with a possible further category of statutory liability offence, that being a *mens rea* offence where the Crown must prove on an objective basis that "it was objectively foreseeable to the director that the action or failure to take action would cause the unlawful ... [result]."[49] The objective *mens rea* element may be proven by implication through the occurrence of the violation itself and may require the exercise of due diligence to have been demonstrated by the accused in order to avoid a conviction in any event. Therefore, objective *mens rea* liability straddles the categories of *mens rea* liability and strict liability though Madam Justice Hackett has placed it in the *mens rea* category[50] on the basis that it is for the Crown to prove the absence of all reasonable care having been taken. For that reason, this study's Part A review of legislation and Part B summary matrix indicate this liability within the strict category rather than in the *mens rea* category in order not to lead a user of the database to understand that the Crown is obliged to prove full *mens rea* on a subjective standard and that the accused is not obliged to demonstrate any due diligence whatsoever in order for the statutory liability to be triggered.

The *Commander Business Furniture* and *Blair* decisions are in conflict with the decision in *R. v. Bata Industries Ltd. (No. 2)*[51] which had been rendered a few months earlier than *Commander Business Furniture* by the Ontario Provincial Court. In the *Bata* decision, three directors of a

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[48]*Blair*, *supra*, note 38 at 426-427.

[49]*Commander Business Furniture*, *supra*, note 37 at 251.

[50]*Ibid.* at 248.

[51](1992), 70 C.C.C. (3rd) 394 (Ont. Prov. Ct.).

corporation were charged under section 147a of the Ontario *Environmental Protection Act,*[52] the same section that the court considered in *Commander Business Furniture.* The charges related to the contamination of soil and groundwater from leaking chemical waste storage tanks. Here Mr. Justice Ormston found liability to be on a strict standard and once the offence was proven by the Crown he established a high level of due diligence that required that each director prove he had taken *all* reasonable steps within his knowledge and control in order to avoid liability.

In considering the implications of a statutory duty of reasonable care, Mr. Justice Ormston stated, as follows:

> The defendants argue that notwithstanding the recent decision of *R. v. Wholesale Travel Group Inc.*, ... the *actus reus* of these offences is "the failure to take all reasonable care". They argue that the legislators, by lifting these words right out of the case of *R. v. Sault Ste. Marie (City)*, have deliberately imposed upon the Crown the onus of disproving due diligence. The *actus reus* of the offence, they state, is the failure to be duly diligent. They argue that the legislators have imposed this higher burden upon the Crown in recognition of the serious personal implications that the legislation addresses. The penalties can be enormous and the loss of reputation considerable. They submit that, in the interests of fairness, the legislators imposed the higher burden on the Crown. The court was reminded of Mr. Justice Cory's comments in *R. v. Wholesale Travel Group Inc.*, ... that the Crown still must prove the *actus reus* beyond a reasonable doubt.
>
> In my opinion, to grant such an interpretation to these two sections in the absence of additional evidence of legislative intent, one would have to ignore the clear direction of the Supreme Court of Canada on the issue of regulatory offences and the defence of due diligence.
>
> In *R. v. Sault Ste. Marie (City)*, Justice Dickson (as he then was) addressed the issue:
>
> > It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it

[52] *Environmental Protection Act*, R.S.O. 1980, c. 141 as am..

> should be recalled that the concept of absolute liability and the creation of a jural category of public welfare offences are both the product of the judiciary and not of the Legislature. The development to date of this defence ... has also been the work of Judges. The present case offers the opportunity of consolidating and clarifying the doctrine.
>
> The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea* ... and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged ... that pollution was caused by the activities of a large and complex corporation.

Justice Cory, in *Wholesale Travel Group*, ... , stated:

> Regulated actors are taken to understand that, should they be unable to discharge this burden, an inference of negligence will be drawn from the fact that the *proscribed result* has occurred.
>
> . . . . .
>
> The Crown must still prove the *actus reus* of regulatory offences beyond a reasonable doubt. Thus, the Crown must prove that the accused polluted the river, sold adulterated food or published a false advertisement. However, once having established this beyond a reasonable doubt, the Crown is *presumptively relieved* of having to prove anything further. Fault is presumed from the bringing about of the *proscribed result*, and the onus shifts to the defendant to establish reasonable care on a balance of probabilities.

(Emphasis added.)

In my opinion, the *actus reus* of these sections is " ... engaging in an activity that may or does discharge ... ". This would be consistent with the analysis of Mr. Justice Cory and thereby leave the burden of proof of due diligence in the traditional way upon the defendants. This would also be consistent with the legislative attempt to provide

> for the defence of due diligence in terms suggested by Justice Dickson in *R. v. Sault Ste. Marie* (*City*).[53]

The finding of a strict liability offence requiring a high level of due diligence to be proven by the accused directors in *Bata* and the finding of an objective *mens rea* offence not requiring any defence on the part of the accused director in *Commander Business Furniture*, both which considered the same statutory language, creates a significant gap and uncertainty in the law in this area.

Whether on the *mens rea*, strict or absolute standard, the penalties and civil liabilities to which a director or officer of a business corporation is subject are generally of equal application to the directors and officers of nonprofit corporations. The directors and officers of nonprofit corporations are also subject to the liabilities imposed by the incorporating statute under which the respective corporation is constituted, that being the *CCA-II* in the present case.

The following sections present a survey of several of the statutory liabilities which most *CCA-II* corporations operating in Ontario would face depending on the particular enterprise. This survey is included in order to obtain a better understanding of the difficulties faced in attempting to slot the particular offences into the three traditional *Sault Ste. Marie* categories of statutory liability and to demonstrate the variations and uncertainty in the statutory language through which liability is imposed.

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[53] *Bata*, *supra*, note 51 at 426-427.

(d) Liability under *Canada Corporations Act*, Part II

The *CCA-II* governing the incorporation of federal nonprofit corporations imposes a number of liabilities upon directors and officers. As these liabilities are actually located in Part I of the *Canada Corporations Act* which formerly governed federally-incorporated business corporations, the statutory language uses the business-related terms of "company" and "shareholder". However, section 157(3) of the *CCA-II*, an interpretation section, indicates that, for the purposes of the *CCA-II*, "company" means a corporation incorporated pursuant to the *CCA-II* and "shareholder means a member of such corporation".

(i) Liability for Debts to Employees

The major liability that the directors, though not the officers, of *CCA-II* corporations face is with respect to "all debts", not exceeding six months' wages, owed to employees of the corporation for services provided for the corporation.[54] Though section 99(1), which imposes this liability, does not specifically include liability for vacation pay, the Court of Appeal for Ontario, when considering similar language in section 119 of the Ontario *Corporations Act*[55] in *Mills-Hughes v. Raynor*[56] held that the words "all debts" includes guaranteed bonuses and vacation pay. The court, however, held that "all debts" does not cover severance pay as severance pay is not compensation for past services. The court noted that the Québec Court of Appeal decision in *Swartz v. Scott*[57] had found that the directors of a bankrupt federally-incorporated company were liable under section 99 for severance pay but distinguished the *Swartz* decision on the basis that the severance pay liability in that case was pursuant to a collective agreement which created "a debt". According to *Swartz*, directors may be

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[54]*Canada Corporations Act*, R.S.C. 1970, c. C-32, s. 99(1).

[55]*Corporations Act*, R.S.O. 1990, c. C.38, s. 119.

[56]*Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.); see also *Volpni v. Groenewald* (1991), 84 D.L.R. (4th) 366 (Ont. Ct. Gen. Div.).

[57]*Swartz v. Scott* (1985), 32 B.L.R. 1 (Que. C.A.).

found liable for severance pay depending on the circumstances out of which the debt for severance pay arises. This possibility was also acknowledged by the Supreme Court of Canada in *Barrette v. Crabtree Estate.*[58] In *Barrette*, the court held that damages for wrongful dismissal are not debts for which directors of corporations are personally liable because such amounts relate to a failure to give sufficient notice and are not a debt for services performed for the corporation. However, the court distinguished *Swartz*, stating:

> Under the collective agreement in that case, the employees were entitled to such compensation not only in the event of dismissal but also in the event of voluntary resignation. These debts could therefore be regarded as "debts ... for services performed for the corporation," as the employees were entitled thereto simply because they had worked for a certain time.[59]

To face liability under section 99, the director must have been a director during the period in which the services were provided[60] and the director must be sued while a director or within a year of ceasing to be a director of the corporation.[61] Further, the corporation must have been sued first[62] and within six months of when the debt became due. On the basis of *Land v. Alberta Umpire under Employment Standards Code,*[63] the liability is determined on the basis of gross, not net, wages and it is not diminished by the amount of source deductions ordinarily made by the employer corporation. This statutory liability for wages is absolute and it cannot be avoided by providing evidence of the director's due diligence to monitor the payment of wages and vacation pay. Because the liability is "joint and several", each director is liable personally for the full amount owed though a director who makes a payment may seek contribution from any fellow director. Even where the director has taken

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[58]*Barrette v. Crabtree Estate* (1993), 101 D.L.R. (4th) 66 (S.C.C.).

[59]*Ibid.* at 82.

[60]*Canada Corporations Act*, R.S.C. 1970, c. C.32, s. 99(2)(b).

[61]*Canada Corporations Act*, R.S.C. 1970, c. C-32, s. 99(2).

[62]*Canada Corporations Act*, R.S.C. 1970, c. C.32, s. 99(2)(a).

[63](1992), 45 C.C.E.L. 25 (Alta Q.B.).

reasonable care to ascertain that employee wages and vacation pay have been appropriately paid, the director will be personally liable nevertheless if payment has not been made or if there is a shortfall in payment. In practical terms, however, this liability only arises when the corporation becomes insolvent. Section 99 of the *CCA-II* states:

Liability of Directors for wages unsatisfied – s. 99(1)

> **99.** (1) The directors of the company are jointly and severally liable to the clerks, labourers, servants and apprentices thereof, for all debts not exceeding six months wages due for services performed for the company while they are such directors respectively.

When not liable – s. 99(2)

> (2) A director is not liable under subsection (1) unless
>
> > (a) the company has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part, or
> >
> > (b) the company has within that period gone into liquidation or has been ordered to be wound up under the Winding-up Act, or has made an authorized assignment under the *Bankruptcy Act* or a receiving order under the *Bankruptcy Act* has been made against it and a claim for such debt has been duly filed and proved,
>
> nor unless he is sued for such debt while a director or within one year after he has ceased to be a director.

Amount recoverable – s. 99(3)

> (3) Where execution has so issued the amount recoverable against the director shall be the amount remaining unsatisfied on the execution.

Directors' preference – s. 99(4)

> (4) Where the claim for such debt has been proved in liquidation or winding-up proceedings or under the *Winding-up Act* or the *Bankruptcy Act* a director, upon payment of the debt, is entitled to any preference that the creditor paid would have been entitled to, and where a judgment has been recovered he is entitled to an assignment of the judgment.

(ii) Liability on Winding-up

The *CCA-II* also imposes liability upon directors, but not officers, where, upon the application of the Attorney-General of Canada to a court, a corporation is wound up and dissolved under the federal *Winding-up Act,*[64] now the *Winding-up and Restructuring Act.*[65] Winding-up may occur either pursuant to section 5.6(2) of the *CCA-II* because the corporation is not operating within the scope of its letters patent or pursuant to section 150(2) because the corporation has failed for two or more consecutive years to hold an annual general meeting or has failed to provide financial statements in accordance with the *CCA-II* or has failed to meet certain filing requirements. Under both statutory provisions, section 5.6(2) and section 150(2), a court is to determine whether the costs of winding-up are to be borne by any or all of the directors personally in the circumstances.

Section 5.6 regarding winding-up required as a result of a corporation operating outside its letters patent states:

> **5.6** (1) Where a company
>
> (a) carries on a business that is not within the scope of the objects set forth in its letters patent or supplementary letters patent,

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[64] *Winding-up Act*, R.S.C. 1985, c. W-11.

[65] Pursuant to S.C. 1996, c. 6, s. 167(2), "A reference to the "*Winding-up Act*" in any other Act ... shall ... be read as a reference to the "*Winding-up and Restructuring Act*".

> (b) exercises or professes to exercise any powers that are not truly ancillary or reasonably incidental to the objects set forth in its letters patent or supplementary letters patent,
>
> (c) exercises or professes to exercise any powers expressly excluded by its letters patent or supplementary letters patent,
>
> the company is liable to be wound up and dissolved under the *Winding-up Act* upon the application of the Attorney General of Canada to a court of competent jurisdiction for an order that the company be wound up under the Act, which application may be made upon receipt by the Attorney General of Canada of a certificate of the Minister setting forth his opinion that any of the circumstances described in paragraphs (a) to (c) apply to that company.

Costs of winding-up – s. 5.6(2)

> (2) In any application to the court under subsection (1) the court shall determine whether the costs of the winding-up shall be borne by the company or personally by any or all of the directors of the company who participated or acquiesced in the carrying on of any business or the exercise or the professing of the exercise of any powers as described in subsection (1).

Similarly, section 150 regarding winding-up required as a result of a failure to hold an annual general meeting or a failure to provide financial statements or to file required documentation states:

Grounds for winding up company – s. 150(1)

> **150.** (1) Notwithstanding any other provisions in this Act where a company
>
> > (a) fails for two or more consecutive years to hold an annual meeting of its shareholders,
> >
> > (b) fails to comply with the requirements of section 128, or
> >
> > (c) defaults in complying for six months or more with any requirement of section 133,

> the company is liable to be wound up and dissolved under the *Winding-up Act* upon the application of the Attorney General of Canada to a court of competent jurisdiction for an order that the company be wound up under that Act, which application may be made upon receipt by the Attorney General of Canada of a certificate of the Minister setting forth his opinion that any of the circumstances described in paragraphs (a) to (c) apply to that company.

Costs of winding-up – s. 150(2)

> (2) In any application to the court under subsection (1), the court shall determine whether the costs of the winding-up shall be borne by the company or personally by any or all of the directors of the company who were knowingly responsible for the company's failure or default as described in subsection (1).

The liability under section 150 is on a *mens rea* standard, as indicated by the word "knowingly" at section 150(2), requiring that the director must be found to have intended the corporation's non-compliance before there can be a finding of liability. Section 5.6, however, appears to create a strict liability offence because, though it acknowledges some necessary mental element through the language of "acquiesces", it does not include the clear language of "knowingly" that is used in section 150. Section 150 was already included in the Act when the Act was amended to include section 5.6 so the drafters had available the section 150 full *mens rea* language but chose not to use it. Further, the offence under section 5.6 relates to allowing the corporation to veer away from the objects that were established in the letters patent which is a matter for which the directors are fundamentally responsible whereas section 150 relates to administrative matters such as the sending out of financial notices and the filing of annual returns for which directors would probably not have direct operational responsibility.

(iii) Liability for Statutory Requirements and Prohibitions

The *CCA-II* also creates several specific regulatory offences and penalties that can affect directors and officers who fail to comply with their statutory obligations under the Act.

(1) Illegible Corporation Identification

Section 27 of the *CCA-II* makes every director or officer of the corporation using or authorizing the use of an illegible corporate seal or any official publication, including advertisement, cheque, promissory note, invoice, or similar documentation, without the corporation's name legibly indicated thereon liable to a penalty of $200.00 and personally liable for the amount owed to the holder of the cheque or promissory note or similar document unless the corporation pays the amount owing. This liability depends on whether the director or officer "used" or "authorized the use". The language of "uses" without any prison penalty indicates absolute liability. The language of "authorizes" indicates, according to the case law, that some mental element is required for conviction, especially as the potential for a significant civil liability is high, depending on the dollar amount of the financial instrument in question. The mental element, however, does not appear to go so far as to support a full *mens rea* offence as the language of "wilfully authorizing" indicated with other *CCA-II* offences indicates. Section 27 states:

Authorizing seal where name not engraven properly – s. 27

> **27.** Every director, manager or officer of a company, and every person on its behalf who
>
> > (a) uses or authorizes the use of any seal purporting to be a seal of the company, whereon its name is not engraven in legible characters,
> >
> > (b) issues or authorizes the issue of any notice, advertisement, or other official publication of such company,
> >
> > (c) signs or authorizes to be signed on behalf of the company, any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or
> >
> > (d) issues or authorizes to be issued any bill of parcels, invoice or receipt of the company,

> wherein its name is not mentioned in legible characters, is liable to a penalty of two hundred dollars, and is also personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

(2) Omission from Register of Mortgages

Section 71 of the *CCA-II* makes it an offence for a director or an officer wilfully to authorize or to permit an omission from the corporation's register of mortgages. Conviction for the offence is determined on the *mens rea* standard as required by the word "wilfully" and results in a fine of up to $200.00. Section 71 states:

Company's register of mortgages – s. 71(1)

> **71.** (1) Every company shall keep a register of mortgages and enter therein all mortgages and charges particulars of which are required to be delivered to the Minister and of all other mortgages and charges specifically affecting property of the company, not being mortgages or charges to which subsection 68(1) does not apply, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and, except in the case of securities to bearer, the names and addresses, if known, of the mortgagees or persons entitled thereto unless such names and addresses, if known, are entered in a register of holders of debentures kept by or on behalf of the company.

Omission of entries – s. 71(2)

> (2) Where any director, manager, or other officer of the company wilfully authorizes or permits the omission of any entry required to be made in pursuance of this section, he is liable on summary conviction to a fine not exceeding two hundred dollars.

(3) Refusal of Inspection – Mortgages

Section 72(2) of the *CCA-II* makes it an offence for an officer to refuse any creditor or a member of the corporation, or any other person who has paid the required fee, the right to inspect the corporation's register of mortgages. This offence incorporates *mens rea* through the use of the word "wrongfully".

Any director or officer authorizing or permitting the refusal is also liable to a fine. This offence requires also *mens rea* for conviction through the language of "wilfully". The fine payable is up to $20.00 with another $10.00 for every day that the refusal continues. Section 72 states:

Right to inspect copies of instruments -- s. 72(1)

> **72.** (1) The copies of instruments creating any mortgage or charge that, under this Act, are required to be delivered to the Minister and the register of mortgages kept in pursuance of section 71, shall be open at all reasonable times to the inspection of any creditor or shareholder of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding twenty-five cents for each inspection, as the company may prescribe.

Where inspection refused -- s. 72(2)

> **72.** (2) Where inspection of the said copies or register is refused, any officer of the company wrongfully refusing inspection, and every director or officer of the company wilfully authorizing or permitting such refusal, is liable on summary conviction to a fine not exceeding twenty dollars, and a further fine not exceeding ten dollars for every day during which the wrongful refusal continues.

(4) Refusal of Inspection – Debentures

Section 73 of the *CCA-II* makes it an offence for a corporation to refuse to allow authorized persons to inspect the register of holders of debentures. The fine is up to $20.00 with another fine of up to

$10.00 for each day that the refusal continues. Every director or secretary or other officer who wilfully authorizes or permits such refusal is equally liable. The language of "wilfully" requires that *mens rea* liability be established. Section 73 states:

Right of debenture holders to inspect register -- s. 73(1)

> **73.** (1) Every register of holders of debentures of a company shall, except when closed in accordance with the by-laws of the company or the provisions of the debentures or the covering deed, if any, during such period or periods, not exceeding in the whole thirty days in any year, as may be specified in the said by-laws or provisions, be open to the inspection of the registered holder of any such debentures, and of any shareholder, but subject to such reasonable restrictions as the company may impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of ten cents for every hundred words required to be copied.

Copy of trust deed to be forwarded -- s. 73(2)

> (2) A copy of any trust deed for securing payment of any issue of debentures shall be forwarded to every holder of any such debentures at his request, on payment in the case of a printed trust deed of the sum of twenty-five cents, or such less sum as may be prescribed by by-law of the company, or, where the trust deed has not been printed, on payment of ten cents for every hundred words required to be copied.

Where inspection refused -- s. 73(3)

> (3) Where inspection is wrongfully refused, or a copy is wrongfully refused or not forwarded, the company is liable on summary conviction to a fine not exceeding twenty dollars, and to a further fine not exceeding ten dollars for every day during which the refusal or neglect to forward a copy continues, and every director, manager, secretary, or other officer of the company who wilfully authorizes or permits such refusal shall incur the like penalty.

(5) Membership Information

Section 111.1 of the *CCA-II* allows authorized persons to obtain from the corporation a list of the corporation's members and their respective addresses. Section 111.1(3) makes it an offence to use such a list for any of the prohibited purposes listed under the section and any corporation doing so is guilty of an offence with a possible fine of up to $1,000.00 or to imprisonment for up to six months or both. Every director or officer of the corporation who knowingly authorized, permitted or acquiesced in the offence is equally guilty and liable to the same penalty. The liability of directors and officers requires a finding of *mens rea.*

Where the corporation fails to furnish a membership list properly requested, every director and officer involved in the offence is liable to a fine of up to $1,000.00 or prison of six months or both where *mens rea* is established, pursuant to section 111.1(4).

Further, where a corporation offers for sale, sells, purchases or otherwise traffics in a membership list, or a copy of such a list, of any or all members of the corporation, every director or officer, pursuant to section 111.1(5), is guilty of the offence where *mens rea* is established because the offence must be committed knowingly and is liable to a fine of up to one thousand dollars or to imprisonment of up to six months or to both.

Section 111.1 with respect to the misuse of membership lists states:

List of shareholders – s. 111.1(1)

> **111.1** (1) Any person, upon payment of the costs thereof and upon filing with the company or its transfer agent such declaration as may be prescribed by regulation is entitled to obtain from a company, other than a private company, or its transfer agent within ten days from the filing of such declaration a list setting out the names of all persons who are shareholders of the company, the number of shares owned by each such person and the address of each such person as

shown on the books of the company made up to a date not more than ten days prior to the date of filing the declaration.

Declaration of company – s. 111.1(2)

(2) Where the applicant is a corporation, the prescribed declaration shall be made by the president or other officer authorized by resolution of the board of directors thereof.

Offence and punishment – s. 111.1(3)

(3) Every person who, for the purpose of communicating to any shareholders any information relating to any goods, services, publications or securities except securities of the company, and except securities of any other company offered in exchange for the securities of the company pursuant to a take-over bid made pursuant to sections 135.1 to 135.93 or on an amalgamation pursuant to section 137, uses a list of shareholders obtained under this section is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both and where that person is a corporation, every director or officer of the corporation who knowingly authorized, permitted or acquiesced in the offence is also guilty of an offence and is liable on summary conviction to a like penalty.

Idem – s. 111.1(4)

(4) Every company or transfer agent that fails to furnish a list in accordance with subsection (1) when so required is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars and every director or officer of such company or transfer agent who knowingly authorized, permitted or acquiesced in the offence is also guilty of an offence and is liable on summary conviction to a like fine, or to imprisonment for a term not exceeding six months or to both.

Idem – s. 111.1(5)

(5) Every person who offers for sale, sells, purchases or otherwise traffics in a list or a copy of a list of all or any of the shareholders of a company is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for

> a term not exceeding six months or to both, and where that person is a corporation, every director or officer of the corporation who knowingly authorized, permitted or acquiesced in the offence is also guilty of an offence and is liable on summary conviction to a like penalty.

(6) Annual Returns

Where a corporation is in default with respect to filing the required corporate annual return summarizing the basic corporate information required by the *CCA-II*, every director or officer who knowingly authorized, permitted or acquiesced in the default is liable to a fine of up to one hundred dollars for each day during which the default continues. This is a *mens rea* offence as required by the language of "knowingly". Section 133 states:

Annual returns – s. 133(1)

> **133.** (1) Every company shall, on or before the 1st day of June in every year, make a summary as of the 31st day of March preceding, specifying the following particulars:
>
> (a) the corporate name of the company;
>
> (b) the manner in which the company is incorporated and the date of incorporation;
>
> (c) the complete postal address of the head office of the company;
>
> (d) the date upon which and the place where the last annual meeting of the shareholders of the company was held;
>
> (e) the names and complete postal addresses of the persons who at the date of the return are the directors of the company; and
>
> (f) the name and complete postal address of the auditor of the company.

Summary to be filed, signed and certified – s. 133(2)

(2) The summary mentioned in subsection (1) shall be completed and filed in duplicate in the Department on or before the 1st day of June aforesaid, and each of the duplicates shall be signed and certified by a director or an officer of the company.

Default – s. 133(3)

(3) A company that makes default in complying with any requirement of this section is guilty of an offence and is liable on summary conviction to a fine of not less than twenty dollars and not more than one hundred dollars for each day during which the default continues; and every director or officer who knowingly authorized, permitted or acquiesced in any such default is guilty of an offence and is liable on summary conviction to a like fine.

(7) General Offence Provision

In addition to the specific offences to which directors or officers are liable under the *CCA-II*, section 149 makes directors and officers liable for any act contrary to the provisions of the *CCA-II*, Part I, or for failing to comply with an applicable provision. Thus, under section 149, a director or officer found liable with respect to any provision applicable to *CCA-II* corporations for which no penalty is expressed may be, on summary conviction, fined up to one thousand dollars or imprisoned up to one year or both. The language of the section imposes absolute liability. However, the possible prison term requires that the liability standard be reduced to strict. There is a requirement indicating that the Minister must consent to any proceeding under this section which indicates that charges will not be laid lightly. Section 149 states:

Penalties not otherwise provided for – s. 149

149. Every one who, being a director, manager or officer of a company, or acting on its behalf, commits any act contrary to the provisions of this Part, or fails or neglects to comply with any such provision, is, if no penalty for such act, failure or neglect is expressly provided by this Part, liable, on summary conviction, to a fine or not more than one thousand dollars, or to imprisonment for not more than

one year, or to both, but no proceeding shall be taken under this section without the consent in writing of the Minister.

(8) Liability for Profit

The *CCA-II* also imposes potential civil liability on a director with respect to profits made by the director, either directly or indirectly, as a result of a contract with the corporation unless the director has declared his interest in the contract or proposed contract at a meeting of the directors of the corporation and has not voted, except in certain allowable circumstances in respect of the contract. This liability can be negated by a vote of the corporation's members at a special general meeting called for that purpose. Section 98 states:

Director interested in a contract with the company – s. 98(1)

98. (1) Subject to this section, it is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare his interest at a meeting of directors of the company.

At what meeting declaration to be made – s. 98(2)

(2) In the case of a proposed contract the declaration required by this section to be made by a director shall be made at the meeting of directors at which the question of entering into the contract is first taken into consideration, or, if the director is not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he becomes so interested, and, in a case where the director becomes interested in a contract after it is made, the declaration shall be made at the first meeting of directors held after the director becomes so interested.

What is deemed sufficient declaration – s. 98(3)

(3) For the purposes of this section, a general notice given to the directors of a company by a director to the effect that he is a shareholder of or otherwise interested in any other company or is a member of a specified firm and is to be regarded as interested in any

contract made with such other company or firm shall be deemed to be a sufficient declaration of interest in relation to any contract so made.

Director not to vote if interested – s. 98(4)

(4) No director shall vote in respect of any contract or proposed contract in which he is so interested as aforesaid and if he does so vote his vote shall not be counted, but this prohibition does not apply

(a) in the case of any contract by or on behalf of the company to give to the directors or any of them security for advances or by way of indemnity,

(b) in the case of a private company, where there is no quorum of directors in office who are not so interested, or

(c) in the case of any contract between the company and any other company where the interest of the director in the last-mentioned company consists solely in his being a director or officer of such last-mentioned company, and the holder of not more than the number of shares in such last-mentioned company requisite to qualify him as a director.

When director not accountable – s. 98(5)

(5) A director who has made a declaration of his interest in a contract or proposed contract in compliance with this section and has not voted in respect of such contract contrary to the prohibition contained in subsection (4), if such prohibition applies, is not accountable to the company or any of its shareholders or creditors by reason only of such director holding that office or of the fiduciary relationship thereby established for any profit realized by such contract.

"Contract" and "meeting of directors" – s. 98(6)

(6) For the purposes of this section "contract" includes "arrangement" and "meeting of directors" includes a meeting of an executive committee elected in accordance with section 96.

No liability when contract confirmed – s. 98(7)

> (7) Nothing in this section imposes any liability upon a director in respect of the profit realized by any contract that has been confirmed by the vote of shareholders of the company at a special general meeting called for that purpose.

(9) Interest in Security

The *CCA-II*, at section 157.1, makes certain sections of the *Canada Business Corporations Act*,[66] applicable to nonprofit corporations. Of the various *Canada Business Corporations Act* sections referenced in *CCA-II*, section 157.1, only one, that being section 235, imposes liability on directors and officers of nonprofit corporations. Section 235 provides that Industry Canada can, when it is satisfied that there is a reason to inquire as to the ownership or control of a security of a corporation, require a person (which may in law be a corporation) who has an interest in the security to provide certain information with respect to the security. The corporation which fails to provide the requested information is liable to a fine of up to five thousand dollars under section 235(4). Any director or officer of the corporation who knowingly authorized, permitted or acquiesced in the commission of the offence is liable to a fine of up to five thousand dollars or to imprisonment up to six months or both, whether or not the corporation has been prosecuted or convicted. This is a *mens rea* offence as indicated by the use of the word "knowingly". Section 235 states:

Information respecting ownership and control – s. 235(1)

> **235.** (1) If the Director is satisfied that, for the purposes of Part XI, XIII or XVII, or for the purposes of enforcing any regulation made under section 174, there is reason to inquire into the ownership or control of a security of a corporation or any of its affiliates, the Director may require any person that he reasonably believes has or has had an interest in the security or acts or has acted on behalf of a person with such an interest to report to him or to any person he designates

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[66] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

(a) information that such person has or can reasonably be expected to obtain as to present and past interests in the security; and

(b) the names and addresses of the persons so interested and of any person who acts or has acted in relation to the security on behalf of the persons so interested.

Constructive interest in securities – s. 235(2)

(2) For the purposes of subsection (1), a person is deemed to have an interest in a security if

(a) he has a right to vote or to acquire or dispose of the security or any interest therein;

(b) his consent is necessary for the exercise of the rights or privileges of any other person interested in the security; or

(c) any other person interested in the security can be required or is accustomed to exercise rights or privileges attached to the security in accordance with his instructions.

Publication – s. 235(3)

(3) The Director shall publish in the periodical referred to in section 129 the particulars of information obtained by him under this section, if the particulars

(a) are required to be disclosed by this Act or the regulations; and

(b) have not previously been so disclosed.

Offence – s. 235(4)

(4) A person who fails to comply with this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both.

Officers, etc., of bodies corporate – s. 235(5)

> (5) Where a body corporate commits an offence under subsection (4), any director or officer of the body corporate who knowingly authorized, permitted or acquiesced in the commission of the offence is a party to and guilty of the offence and is liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both, whether or not the body corporate has been prosecuted or convicted.

(e) Further Statutory Liability

Directors and officers of nonprofit corporations are subject to the same liabilities under both federal and provincial law as are the directors and officers of business corporations. Naturally, many of these liabilities will depend upon the nature of the nonprofit corporation's particular enterprise. The directors and officers of NAV CANADA, a *CCA-II* nonprofit corporation operating in Ontario and having responsibility for Canada's air navigation system, will face liability under a whole host of statutes relating to the federal government's jurisdiction over aeronautics and relating to employees working for an enterprise under the federal constitutional authority. The directors and officers of Service Coordination for Persons with Special Needs, a *CCA-II* nonprofit corporation operating in Ontario and providing social service coordination for persons with developmental disabilities and their families, will also face statutory liabilities but under a whole range of provincial statutes relating to group homes and disability benefits and the reporting of abuse against vulnerable persons. However, there are a number of statutory liabilities that the directors and officers of both NAV CANADA and Service Coordination must equally face. These relate to taxing statutes and employee matters.

(i) Taxing Statutes

Federal and Ontario income tax legislation and sales-type tax legislation, together with the *Canada Pension Plan,*[67] the *Employment Insurance Act*,[68] the *Excise Tax Act,*[69] and Ontario's *Employer Health Tax Act*[70] require that *CCA-II* corporations operating in Ontario withhold or collect and remit monies to the respective governmental authorities and hold directors and, on occasion, officers liable personally when the corporation does not meet its obligations.

(1) *Income Tax Act* (Canada)

Though nonprofit corporations are exempt from tax under the federal *Income Tax Act,*[71] they are not exempt from either the reporting requirements of the Act or the general rules contained in Parts XV through XVII with respect to administration and enforcement, tax avoidance and interpretation under the Act.

Pursuant to section 227.1 of the *Income Tax Act*, directors of nonprofit corporations, though not officers, may be held personally liable if the corporation fails to withhold or deduct and remit amounts as required by the Act or regulations passed pursuant to the Act. There must have been an attempt to collect from the corporation first. The liability is to pay the amount owing and any interest and penalties incurred in this regard. The *Income Tax Act* requires at section 153, for example, that source deductions with respect to income tax from remuneration, including salary and

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[67] *Canada Pension Plan*, R.S.C. 1985, c. C-8, as am..

[68] *Employment Insurance Act*, S.C. 1996, c. 23, as am..

[69] *Excise Tax Act*, R.S.C. 1985, c. E-15, as am..

[70] *Employer Health Tax Act*, R.S.O. 1990, c. E.11, as. am..

[71] *Income Tax Act*, R.S.C. 1985, (5th Supp.), c. 1, s. 149 (1)(l) as am..

wages, pension benefits, retiring allowances, death benefits and other similar payments to employees, be made and remitted. Section 215 requires that taxes on income to non-residents be withheld and remitted. However, the Act also contains a provision limiting the liability upon directors to the standard of strict, allowing as a defence that the director exercised the degree of care, diligence and skill of a reasonably prudent person. Further, the liability requires compliance with certain procedural steps and it is not forever ongoing as an action against a director must be commenced within two years of the director ceasing to hold that appointment. Section 227.1 states:

> **Liability of directors for failure to deduct – 227.1**
>
> (1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally liable, together with the corporation, to pay that amount and any interest or penalties relating thereto.
>
> (2) A director is not liable under subsection (1), unless
>
> (a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 223 and execution for that amount has been returned unsatisfied in whole or in part;
>
> (b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or
>
> (c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in that subsection has been

> proved within six months after the date of the assignment or receiving order.
>
> (3) A director is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.
>
> (4) No action or proceeding to recover any amount payable by a director of a corporation under subsection (1) shall be commenced more than two years after the director last ceased to be a director of that corporation.
>
> (5) Where execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.
>
> (6) Where a director pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings, the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to had that amount not been so paid and, where a certificate that relates to that amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment which assignment the Minister is hereby empowered to make.
>
> (7) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

The case law with respect to section 227.1 reveals that the courts have set a fairly high standard in the exercise of due diligence that is required before directors will be held not liable.[72] The case law further indicates that liability does not depend on whether the director is paid for being a director or whether the director is a volunteer in that position. In the 1999 decision of the Federal Court of

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[72]See, for example, *Soper v. R.,* [1997] 3 C.T.C. 242 at 262 (F.C.A.).

Appeal in *R. v. Wheeliker*,[73] a nonprofit corporation, the Louisburg Harbourfront Park Ltd. which had been incorporated by the Louisburg Harbourfront Society, had failed to remit required employee source deductions amounting to $17,886.91 under the *Income Tax Act*. The volunteer directors of the corporation were assessed for the unremitted source deductions after the corporation became bankrupt. On the standard of care and due diligence required under section 227.1, the court unanimously held that the standard does not vary on the basis that the corporation is a nonprofit corporation rather than a business corporation, but is one single standard, that being the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances. Mr. Justice Letourneau stated:

> As sad as it may be, especially with respect to the respondents who acted as benevolent directors and gave their time, it is simply not possible to find that they have exercised the degree of care and diligence expected to prevent a failure to withhold and remit when such known failure was allowed to repeat itself uninterruptedly for one year. This Court would be remiss of its duty to enforce the law if it were to condone acts or omissions performed by experienced, informed and warned directors which fall below the standard of care, diligence and skill expected from them pursuant to subsection 227.1(3) of the Act.[74]

The *Income Tax Act,*[75] at section 239(2.3), also imposes liability on officers, though not on directors, for knowingly using, communicating or allowing to be communicated a person's social insurance number or business identification number without that person's consent. This is a *mens rea* offence as indicated by the word "knowingly". It can result in a fine of up to $5,000.00 or imprisonment up to one year or both. Section 239(2.3) states:

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[73](1999), 172 D.L.R. (4th) 708 (F.C.A.).

[74]*Ibid.* at 728.

[75]*Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 as am..

> **239 (2.3)** Every person to whom the Social Insurance Number of an individual or to whom the business number of a taxpayer or partnership has been provided under this Act or a regulation, and every officer, employee and agent of such a person, who without written consent of the individual, taxpayer or partnership, as the case may be, knowingly uses, communicates or allows to be communicated the number (otherwise than as required or authorized by law, in the course of duties in connection with the administration or enforcement of this Act or for a purpose for which it was provided by the individual, taxpayer or partnership, as the case may be) is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months, or to both.

The *Income Tax Act*[76] also makes directors and officers liable as parties for any offence of the corporation under the Act on the *mens rea* standard. Section 242 states:

> **Officers, etc., of corporations – s. 242**
>
> Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

The language of "directed, authorized, assented to, acquiesced in or participated in" indicates that liability requires proof of full *mens rea* on the basis of the *Rogo Forming*[77] decision. Nevertheless, one court, the Saskatchewan Court of Queen's Bench, has held that strict liability is applicable to

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[76] *Income Tax Act,* R.S.C. 1985 (5th Supp.), c. 1 as am..

[77] *Rogo Forming*, *supra*, note 24.

similar language in the *Excise Tax Act*[78] in *R. v. Ethier*.[79] However, this decision appears to be based on a misreading of the decision of the Alberta Court of Queen's Bench in *R. v. Swendson*[80] which in actual fact had followed the *Rogo Forming* decision in finding that the phrase "directed, authorized, assented to, acquiesced in or participated in" calls for proof by the Crown beyond a reasonable doubt of all elements of the offence. The Alberta Court of Queen's Bench further stated in *Swendson* as follows:

> That ... [directors] ... should receive more protection than the corporation in the prosecution of certain offences is ... not surprising or illogical.[81]

(2) ***Income Tax Act* (Ontario)**

Ontario's *Income Tax Act,*[82] at section 38, makes directors personally liable, on a joint and several basis and together with the corporation, for two years after ceasing to be a director for a corporation's failure to withhold and remit source deductions in the same manner as does the federal *Income Tax Act*[83] and with a similar defence of due diligence allowed. Section 38 states:

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[78]*Excise Tax Act*, R.S.C. 1985, c. E-15, s. 330.

[79][1995] S.J. No. 645 (Q.B.).

[80]*Supra*, note 25.

[81]*Ibid*. at 5337.

[82]*Income Tax Act*, R.S.O. 1990, c. I.2.

[83]*Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, as am..

Directors' liability – s. 38(1)

> **38.** (1) Where a corporation has failed to deduct or withhold an amount as required by subsection 153(1) of the Federal Act, as it applies for the purposes of this Act, or has failed to remit such amount, the directors of the corporation at the time the corporation was required to deduct or withhold the amount, or remit the amount, are jointly and severally liable, together with the corporation, to pay any amount that the corporation is liable to pay under this Act in respect of that amount, including any interest or penalties related thereto.

Exception – s. 38(2)

> (2) A director shall not be liable under subsection (1) unless,
>
> > (a) a certificate for the amount of the corporation's liability referred to in subsection (1) has been registered in the Ontario Court (General Division) ... [Ontario Superior Court of Justice] ... under subsection 31(2) and execution for such amount has been returned unsatisfied in whole or in part;
> >
> > (b) the corporation has commenced a liquidation or dissolution proceeding or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceeding and the date of the dissolution; or
> >
> > (c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* (Canada) and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the date of the assignment or receiving order.

Standard of care – s. 38(3)

> (3) A director is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

Limitation period – s. 38(4)

> (4) No action or proceeding to recover any amount payable by a director under subsection (1) shall be commenced more than two years after the director last ceased to be a director of that corporation.

Amount of liability – s. 38(5)

> (5) Where the execution referred to in clause (2)(a) has been issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Crown preference – s. 38(6)

> (6) Where a director pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in a liquidation, dissolution or bankruptcy proceeding, the director is entitled to any preference that Her Majesty in right of Ontario would have been entitled to had such amount not been so paid and, where a certificate that relates to such amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment, which assignment the Provincial Minister is hereby authorized to make.

Directors' recovery – s. 38(7)

> (7) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

In *Grigg v. R.*,[84] the bank of a corporation that was struggling with financial difficulties dictated which creditors were to be paid. The company did not make employee payroll remittances from December of 1992 until November of 1993. The director only discovered in March of 1993 that the remittances were not being made and at that point he contacted Revenue Canada. When the bank would not release funds to Revenue Canada, the director was assessed for the unpaid remittances

[84] *Grigg v. R.*, [1998] 4 C.T.C. 2758 (T.C.C.).

under section 38 of the Ontario *Income Tax Act,*[85] together with various federal taxing statutes, on the basis that he did nothing to prevent the corporation's failure to remit. He appealed the assessment. The court found the director liable for the failure to remit up to March of 1993 because he had not ensured that there was a system in place by which remittances could be made in a timely manner. The director was not liable, however, for the amounts not remitted between March and November of 1993 because as of March he had made an attempt to exercise due diligence, skill and care but the bank would not release the money to Revenue Canada.

The Ontario *Income Tax Act* also makes directors and officers liable as a party for any offence of the corporation under the Act on a *mens rea* liability basis through the language of "directed, authorized, assented to, acquiesced in or participated in". Section 46 states:

Liability of corporation officers – s. 46

> **46.** When a corporation is guilty of an offence under this Act, an officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is a party to and guilty of the offence and on conviction is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

Although the language of "directed, authorized, assented to, acquiesced in or participated in" has been held to create[86] a full *mens rea* offence, the same language has also been found to establish a strict liability standard under similar wording in the federal *Excise Tax Act*.[87]

Section 48(3) of the Act establishes a limitation period of eight years for breach of the Act. Section 48(3) states:

Limitation – s. 48(3)

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[85] *Income Tax Act*, R.S.O. 1990, c. I.2.

[86] *Rogo Forming*, *supra*, note 24.

[87] *Ethier*, *supra*, note 79.

> (3) An information or complaint under the *Provincial Offences Act* in respect of an offence under this Act may be laid or made on or before the day that is eight years after the day on which the subject-matter of the information or complaint arose

(3) ***Canada Pension Plan***

The *Canada Pension Plan*[88] requires that employers are to deduct and remit Canada Pension Plan contributions at source. Section 21(6) provides that interest will run against every employer who fails to remit *Canada Pension Plan* contributions. Section 21(7) provides that employers are also liable to a penalty of 10% of the amount to be remitted or 20% where the failure was made knowingly or with gross negligence. Section 21.1 makes directors, but not officers, at the time of the failure to remit the contributions jointly and severally liable, together with the corporation, to pay the amount owed as contributions and any interest or penalties. Section 21.1(2), however, allows a defence of due diligence incorporating by reference section 227.1(2) to (7) of the federal *Income Tax Act*[89] as presented above. The *Canada Pension Plan,* at section 21.1 with respect to the liability of directors, states:

Liability of directors – s. 21.1(1)

> **21.1** (1) Where an employer who fails to deduct or remit an amount as and when required under subsection 21(1) is a corporation, the persons who were the directors of the corporation at the time when the failure occurred are jointly and severally liable, together with the corporation, to pay to Her Majesty that amount and any interest or penalties relating thereto.

Application of *Income Tax Act* provisions – s. 21.1(2)

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[88] *Canada Pension Plan*, R.S.C. 1985, c. C-8 (as am. R.S.C. 1985 (1st Supp.), c. 6, s. 22).

[89] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, as am..

> (2) Subsections 227.1(2) to (7) of the *Income Tax Act* apply, with such modifications as the circumstances require, in respect of a director of a corporation referred to in subsection (1).

Assessment provisions applicable to directors – s. 21.1(3)

> (3) The provisions of this Act respecting the assessment of an employer for an amount payable by the employer under this Act and respecting the rights and obligations of an employer so assessed apply in respect of a director of a corporation in respect of an amount payable by the director under subsection (1) in the same manner and to the same extent as if the director were the employer referred to in those provisions.

The Tax Court of Canada considered section 21.1 in *Worrell v. The Queen*[90] and held that there could be no personal liability against the directors of a corporation in a situation where they did not have *de jure* control of the corporation. In this case the corporation was under the control of a bank. The court decided that the directors had no freedom of choice with respect to its operation and therefore could not be held liable personally on a strict liability basis where they were not in any position to exercise due diligence.

The *Canada Pension Plan*[91] also creates, where a corporation commits an offence under the Act, a *mens rea* offence against the directors and officers who "directed, authorized, assented to acquiesced in or participated in" the commission of the offence. Directors and officers are liable to the same penalty as the corporation. A prosecution must be started within five years after the offence occurred. Section 103 states:

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[90](1998), 98 D.T.C. 1783 (T.C.C.).

[91]*Canada Pension Plan*, R.S.C. 1985, c. C-8 (as am. R.S.C. 1985 (1st Supp.), c. 6, s. 22).

Limitation period – s. 103(1)

> **103.** (1) A prosecution for an offence under this Act may be commenced at any time within, but not later than, five years after the time when the subject-matter of the prosecution arose.

Officers, etc., of corporations – s. 103(2)

> (2) Where a corporation commits an offence under this Act, every officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted. ...

This language of "directed, authorized, assented to, acquiesced in or participated in" establishes a full *mens rea* offence[92] but the same language has also been found under the federal *Excise Tax Act*[93] to create a strict liability offence.[94]

(4) ***Employment Insurance Act*** **(Canada)**

Similarly, and in essentially the same language, the *Employment Insurance Act*[95] makes directors, though not officers, jointly and severally liable, together with the corporation, for the corporation's failure to remit employee contributions in respect of employment insurance. Section 82 of the Act makes the corporate employer liable for all employment insurance premiums not deducted from employee remuneration and remitted, together with interest and penalties. Section 83(1) makes the directors of the corporation jointly and severally liable, together with the corporation, for those

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[92] *Rogo Forming, supra*, note 24.

[93] *Excise Tax Act*, R.S.C. 1985, c. E-15.

[94] *Ethier, supra*, note 79.

[95] *Employment Insurance Act*, S.C. 1996, c. 23, as am..

amounts. However, section 83(2) makes section 227.1(2) to (7) of the federal *Income Tax Act*[96] applicable, allowing a defence of due diligence in the same language as that used in section 21.1(2) of the *Canada Pension Plan*.[97] Section 83 states:

> **Liability of directors – s. 83(1)**
>
> 83. (1) If an employer who fails to deduct or remit an amount as and when required under subsection 82(1) is a corporation, the persons who were the directors of the corporation at the time when the failure occurred are jointly and severally liable, together with the corporation, to pay Her Majesty that amount and any related interest or penalties.
>
> **Application of *Income Tax Act* provisions – s. 83(2)**
>
> (2) Subsections 227.1(2) to (7) of the *Income Tax Act* apply, with such modifications as the circumstances require, to a director of the corporation.
>
> **Assessment provisions applicable to directors – s. 83(3)**
>
> (3) The provisions of this Part respecting the assessment of an employer for an amount payable under this Act and respecting the rights and obligations of an employer so assessed apply to a director of the corporation in respect of an amount payable by the director under subsection (1) in the same manner and to the same extent as if the director were the employer mentioned in those provisions.

The *Employment Insurance Act* also establishes a penalty for employers making or allowing to be made false or misleading representations in matters relating to the Act. Where a director or officer is proven to have "directed, authorized, assented to, acquiesced in or participated in" the misrepresentation, the director or officer can have a penalty imposed by the Canada Employment Insurance Commission. Section 39 states:

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[96] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, as am..

[97] *Canada Pension Plan*, R.S.C. 1985, c. C-8 (as am. R.S.C. 1985 (1st Supp.), c.6).

Penalty for employers, etc. -- s. 39(1)

39. (1) The Commission may impose on an employer, or any other person acting for an employer or pretending to be or act for an employer, a penalty for each of the following acts if the Commission becomes aware of facts that in its opinion establish that the employer or other person has

(a) made, in relation to any matter arising under this Act, a representation that the employer or other person knew was false or misleading;

(b) being required under this Act or the regulations to provide information, provided information or made a representation that the employer or other person knew was false or misleading;

(c) in relation to any matter arising under this Act, made a declaration that the employer or other person knew was false or misleading because of the non-disclosure of facts;

(d) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or

(e) participated in, assented to or acquiesced in an act mentioned in paragraphs (a) to (d).

Maximum penalty -- s. 39(2)

(2) The Commission may set the amount of the penalty for each act at not more than nine times the maximum rate of weekly benefits in effect when the penalty is imposed.

Officers, etc., of corporations -- s. 39(3)

(3) If the Commission becomes aware of facts that in its opinion establish that a corporation has committed an act described in subsection (1) and that any officer, director or agent of the corporation has directed, authorized, assented to, acquiesced in or participated in the act, the Commission may impose a penalty on the

> officer, director or agent, whether or not a penalty has been imposed on the corporation.

Contravention of information requirements -- s. 39(4)

> (4) Notwithstanding subsection (2), if the act involves the provision of information about any matter on which the fulfilment of conditions for the qualification and entitlement for receiving or continuing to receive benefits depends, the Commission may set the amount of the penalty at not more than the greater of
>
> (a) $12,000, and
>
> (b) the amount of the penalty imposed under section 38 on any person who made a claim for benefits based on the information provided.

Major contraventions -- s. 39(5)

> (5) Notwithstanding subsection (2), the Commission may set the amount of the penalty at an amount required or authorized by the regulations if the act is a major contravention, as defined under the regulations.

Where the corporation as employer has had a penalty imposed on it under section 38 of the Act with respect to an employment insurance claimant's misrepresentation or under section 39 for the employer's own misrepresentation, discussed above, the directors but not the officers of the corporation are jointly and severally liable to pay the penalty. The Canada Employment Insurance Commission must try to collect the penalty from the corporation first. A defence of due diligence in the same language as section 227.1 of the *Income Tax Act* [98] is allowed and no action can be taken against a director more than six years after the corporation's act or omission leading to the penalty. Section 46.1 states:

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[98] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1, as am..

Liability of directors to pay penalties -- s. 46.1(1)

46.1 (1) If a penalty is imposed on a corporation under section 38 or 39 for an act or omission, the directors of the corporation at the time of the act or omission are, subject to subsections (2) to (7), jointly and severally liable, together with the corporation, to pay the amount of the penalty.

Limitations on liability -- s. 46.1(3)

(2) A director is not liable unless

(a) a certificate for the amount of the corporation's liability for the penalty has been registered in the Federal Court under section 126 and execution for that amount has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of its liability has been proved within six months after the date of commencement of the proceedings or the date of the dissolution, whichever is earlier; or

(c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of its liability has been proved within six months after the date of the assignment or receiving order.

Defence of due diligence -- s. 46.1(3)

(3) A director is not liable if the director exercised the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances to prevent the act or omission for which the penalty is imposed.

Limitation period -- s. 46.1(4)

(4) No action or proceedings to recover any amount payable by a director shall be commenced more than six years after the occurrence of the act or omission for which the penalty is imposed.

Amount recoverable -- s. 46.(5)

> (5) If execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Preference -- s. 46.1(6)

> (6) If a director pays an amount in respect of a corporation's liability that is proved in liquidation, dissolution, or bankruptcy proceedings,
>
> > (a) the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to if that amount had not been paid; and
> >
> > (b) if a certificate that relates to that amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment and the Commission shall make the assignment.

Contribution from other directors -- s. 46.1(7)

> (7) A director who has satisfied a claim under this section is entitled to contribution from the other directors who are liable for the claim.

(5) *Excise Tax Act* (Canada)

The *Excise Tax Act*[99] by which the federal government collects Goods and Services Tax ("GST") also provides that directors, but not officers, of a corporation are jointly and severally liable, together with the corporation, for any amount of GST required to be remitted by the corporation, together with interest and penalties incurred as a result of the corporation's failure to remit appropriately. Section 323 contains a strict liability provision analogous to section 227.1 of the *Income Tax Act*[100] allowing a defence of due diligence. The director is protected from liability after two years from ceasing to be a director. Section 323 of the *Excise Tax Act* states:

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[99] *Excise Tax Act*, R.S.C. 1985, c. E-15, as am..

[100] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, as am..

Liability of directors – s. 323(1)

323.(1) Where a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3), the directors of the corporation at the time the corporation was required to remit the amount are jointly and severally liable, together with the corporation, to pay that amount and any interest thereon or penalties relating thereto.

Limitations – s. 323(2)

(2) A director of a corporation is not liable under subsection (1) unless

(a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or receiving order.

Diligence – s. 323(3)

(3) A director of a corporation is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

Assessment – s. 323(4)

> (4) The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, sections 296 to 311 apply, with such modifications as the circumstances require.

Time limit – s. 323(5)

> (5) An assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

Amount recoverable – s. 323(6)

> (6) Where execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Preference – s. 323(7)

> (7) Where a director of a corporation pays an amount in respect of a corporation's liability referred to in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings, the director is entitled to any preference that Her Majesty in right of Canada would have been entitled to had the amount not been so paid and, where a certificate that relates to the amount has been registered, the director is entitled to an assignment of the certificate to the extent of the director's payment, which assignment the Minister is empowered to make.

Contribution – s. 323(8)

> (8) A director who satisfies a claim under this section is entitled to contribution from the other directors who were liable for the claim.

The recent decision of the Tax Court of Canada in *Bains v. R.*[101] demonstrates the high degree of due diligence required by section 323. In this case, the director had been informed by the corporation's

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[101] *Bains v. R.* (1999), 49 B.L.R. (2d) 128 (T.C.C.).

manager that monies were required to meet GST remittance obligations for the period ending February 1995. The director provided monies to the manager and was therefore not liable for that period. However, the court held that the director, being required by the Act to exercise due diligence and having been alerted to the existence of a GST payment problem, should have taken positive steps to ensure that an appropriate system was put in place regarding remittances and the other financial obligations of the corporation. As the director did not take positive steps demonstrating due diligence and skill to ensure a proper reporting system, the director was held liable for the GST not remitted for the eighteen months between March 1, 1995, and August 31, 1996, together with penalties and interest.

The *Excise Tax Act*[102] also includes section 96 by which directors or officers of a corporation who have "directed, authorized, assented to, acquiesced in, or participated in" offence committed by the corporation under the Act can be held liable as a party to the offence. Although *Rogo Forming*[103] indicates this language as requiring full *mens rea* culpability, one court has held the liability to be on the strict standard.[104] The maximum fine allowable is equal to the amount of the tax or the stamps which comprise the subject-matter of the offence plus $1,000.00. Section 96 states:

> **96.** (1) Every person who, being required, by or pursuant to this Act, to pay or collect taxes or other sums, or to affix or cancel stamps, fails to do so as required is guilty of an offence and, in addition to any other punishment or liability imposed by law for that failure, is liable on summary conviction to a fine of
>
> > (a) not less than the aggregate of twenty-five dollars and an amount equal to the tax or other sum that he should have paid or collected or the amount of stamps that he should have affixed or cancelled, as the case may be, and

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[102] *Excise Tax Act*, R.S.C. 1985, C. E-15, as am..

[103] *Supra*, note 24.

[104] *Ethier*, *supra*, note 79.

> (b) not more than the aggregate of one thousand dollars and an amount equal to the tax or other sum or amount of stamps, as the case may be,
>
> and in default of payment of the fine to imprisonment for a term of not less than thirty days and not more than twelve months.

Punishment for contravention -- s. 96(2)

> (2) Every person who contravenes any of the provisions of this Act or of a regulation made by the Minister under this Act for which no other punishment is provided is liable on summary conviction to a fine of not less than fifty dollars and not more than one thousand dollars.

Officers, etc. of corporations -- s. 96(3)

> (3) Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence is a party to and guilty of the offence and is liable on summary conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

In addition, the *Excise Tax Act*[105] includes a further section imposing liability on a *mens rea* basis against directors and officers who have "directed, authorized, assented to, acquiesced in or participated in" the commission of an offence by a corporation under Part IX of the Act with respect to GST. Section 330 states:

Officers of corporations, etc. -- s. 330

> **330.** Where a person other than an individual is guilty of an offence under this Part, every officer, director or agent of the person who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and liable on conviction to the punishment provided for the offence, whether the person has been prosecuted or convicted.

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[105] *Excise Tax Act*, R.S.C. 1985, c. E-15, as am..

This language has been held to create a full *mens rea* liability.[106] It has also been held to create strict liability.[107]

(6) ***Retail Sales Tax Act (Ontario)***

Ontario's *Retail Sales Tax Act*[108] also makes directors personally liable, jointly and severally with the corporation, for two years following the date when they ceased to be a director for failure to collect or remit sales tax, subject to the defence of due diligence which is allowed by the Act. Section 43 of the Act states:

Directors – s. 43(1)

> **43.** (1) Where a corporation has failed to collect tax or has collected tax and failed to remit the tax or has failed to pay any interest or penalty relating thereto, the directors of the corporation at the time the corporation was required to collect or remit the taxes or to pay the interest or penalty relating thereto, are jointly and severally liable, together with the corporation to pay such amounts.

Exception – s. 43(2)

> (2) A director of a corporation is not liable under subsection (1) unless:
>
> > (a) a warrant of execution for the amount of the corporation's liability as described in subsection (1) has been issued under clause 37(1)(b) and directed to the sheriff of the county or district in which any property of the corporation is located or situate and the warrant has been returned by the sheriff unsatisfied in whole or in part;
> >
> > (b) the corporation becomes subject to a proceeding to which section 22 applies and a claim has been made under that

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[106] *Rogo Forming*, *supra*, note 24.

[107] *Ethier*, *supra*, note 74.

[108] *Retail Sales Tax Act*, R.S.O. 1990, c. R.31.

section at any time from the date that the Minister should have been advised of the commencement of those proceedings to the date that is six months after the remaining property of the vendor has been finally disposed of; or

(c) the corporation has become a bankrupt due to an assignment or receiving order or it has filed either a notice of intention to file or a proposal under the *Bankruptcy and Insolvency Act* (Canada), and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment, receiving order or filing of the proposal.

Prudent director – s. 43(3)

(3) A director of a corporation is not liable for a failure described under subsection (1) if the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

Assessment – s. 43(4)

(4) The Minister may assess any person for any amount payable by the person under this section and, where the Minister sends a notice of assessment, the sections of this Act respecting assessments, objections and appeals apply with such modifications as the circumstances require.

Time limit – s. 43(5)

(5) Any assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

Execution – s. 43(6)

(6) Where execution referred to in clause (2)(a) has been issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

Idem – s. 43(7)

> (7) Where a director of a corporation pays an amount in respect of a corporation's liability described in subsection (1) that is proved in liquidation, dissolution or bankruptcy proceedings or in respect of which a claim has been made in proceedings described in subsection 22(2), the director is entitled to any preference that Her Majesty in right of Ontario would have been entitled to had the amount not been so paid and, where a warrant of execution has been issued and directed to the sheriff for the area in which any property of the corporation is located or situate, the director is entitled to an assignment of the warrant of execution to the extent of the director's payment, and the Minister is empowered to make the assignment.

Allocation by Minister – s. 43(8)

> (8) For the purposes of this section, the Minister may apply any payment or payments made by or on behalf of the corporation under this Act to any of the liabilities described in subsection (1) including penalties and interest relating thereto and any liability for tax payable by the corporation under section 2 including any penalty and interest relating thereto.

Also under the Ontario *Retail Sales Tax Act*, any director or officer who directed, authorized, assented to, acquiesced in or participated in an offence of the Act is guilty of a *mens rea* offence pursuant to section 42. Section 42 states:

Officers, etc., of corporation – s. 42

> **42.** Any officer, director or agent of a corporation, or any other person, who directed, authorized, assented to, acquiesced in or participated in the commission of any act by the corporation which is an offence under this Act, or the omission of any act the omission of which is an offence under this Act, is guilty of an offence and on conviction is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted of any offence under this Act.

Once again, the language of "directed, authorized, assented to, acquiesced in or participated in" has been held to create a *mens rea* offence[109] but the same language has also been held to create a statutory liability offence.[110]

Section 44 states that any person who contravenes the Act or the related regulations is liable if no other penalty is provided to a fine of up to five thousand dollars. Pursuant to section 44(2), the fine for failure to collect the retail sales tax is the amount owed plus a further amount of up to two thousand dollars. Section 44 with respect to penalties states:

> **General penalty – s. 44(1)**
>
> > **44.** (1) Subject to subsection (2), any person who contravenes this Act or the regulations is guilty of an offence and, upon conviction, is liable, where no other penalty is provided for the offence, to a fine of not less than $50 and not more than $5,000.
>
> **Penalty for failure to collect tax – s. 44(2)**
>
> > (2) Every person who fails to collect the tax imposed by this Act is guilty of an offence and is liable on conviction to a fine equal to the amount of the tax that should have been collected as determined under subsection (3) and, in addition, an amount not less than $50 and not more than $2,000. ...

A limitation period of six years is applicable, pursuant to section 46.

(7) ***Employer Health Tax Act*** **(Ontario)**

Ontario's *Employer Health Tax Act*[111] establishes a health tax payable by employers, including *CCA-II* corporations under federal constitutional jurisdiction and *CCA-II* corporations under provincial

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[109] *Rogo Forming*, *supra*, note 24.

[110] *Ethier*, *supra*, note 79.

[111] *Employer Health Tax Act*, R.S.O. 1990, c. E.11, as. am..

jurisdiction within Ontario. Pursuant to section 36 of the Act, directors and officers of a corporation who directed, authorized, assented to, acquiesced in or participated in the commission of an offence by a corporation can be found liable on a *mens rea* standard of liability. Section 37 provides a six year limitation period for a prosecution to be commenced. Section 36 and section 37 state:

> **36.** Where a corporation is guilty of an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is guilty of the offence and on conviction is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.
>
> **37.** Proceedings for an offence under this Act or the regulations shall not be commenced after six years after the date on which the offence was, or is alleged to have been, committed.

The language of section 36 includes the "directed, authorized, assented to, acquiesced in or participated in" full *mens rea* language.[112] However, this language has also been held by the courts to create a strict liability offence.[113]

(8) Liability for Corporation Taxes On Winding-up

When the corporation is being wound-up or liquidated, directors and officers may be liable for the corporation's direct tax liabilities. The federal *Income Tax Act*,[114] at section 159(2) and (3), states that any person who acts as a "legal representative", which under the Act at section 248(1) means "a trustee in bankruptcy, an assignee, a liquidator, a curator, a receiver of any kind, a trustee, an heir, an administrator, an executor, a committee, or any other like person", in administering, winding up, controlling or otherwise dealing in a representative or fiduciary capacity with the property of the

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[112] *Rogo Forming*, *supra*, note 24.

[113] *Ethier*, *supra*, note 79.

[114] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 as am..

corporation, and who distributes the property of the corporation without obtaining a clearance certificate that indicates that all taxes have been paid or secured will be liable personally for any tax liability of the corporation. These provisions do not directly impose liability on directors and officers of corporations but the courts have indicated that in certain circumstances a director and officer can be an "other like person" in the winding up of the corporation.[115] This view is supported by the reference to "otherwise dealing in a ... fiduciary capacity" in the statutory language.

The *Canada Pension Plan*,[116] at section 23, the *Employment Insurance Act*,[117] at section 86, and the *Excise Tax Act*,[118] at section 270, contain similar provisions requiring the obtaining of clearance certificates on winding-up or liquidation.

The Ontario *Corporations Tax Act*,[119] at section 107, creates a similar possible liability for a director or officer who takes on the role of receiver in a corporation's winding up.

(ii) Liabilities with Respect to Employees

Directors and officers of *CCA-II* corporations operating in Ontario face several liabilities under both federal and Ontario legislation relating to employment standards, labour, pension benefits and occupational health and safety, beyond their wage-related obligations under section 99 of the *CCA-II* which were discussed above, together with the other liabilities of directors and officers under the *CCA-II*.

(1) *Canada Labour Code*

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[115] *Malka v.* The Queen (1978), 78 D.T.C. 6144 (F.C.T.D.); Pâquet *v. Canada (Minister of National Revenue)*, [1991] T.C.J. No. 1013 (T.C.C.).

[116] *Canada Pension Plan*, R.S.C. 1985, c. C-8.

[117] *Employment Insurance Act*, S.C. 1996, c. 23.

[118] *Excise Tax Act*, R.S.C. 1985, c. E-15.

[119] *Corporations Tax Act,* R.S.O. 1990, c. C.40, as am..

A *CCA-II* corporation operating in Ontario but subject to federal constitutional jurisdiction as a federal work, undertaking or business is amenable to the *Canada Labour Code*.[120] The *Canada Labour Code*, Part II, also governs occupational health and safety with respect to workers coming within the federal jurisdiction and Part III of the Code deals with standard hours, wages, vacations and holidays. Section 251.18 of the Code imposes absolute liability on the directors of a corporation with respect to monies to which the corporation's employees are entitled under Part III and which cannot be collected from the corporation. Section 251.18 states:

> **Civil liability of directors – s. 251.18**
>
> > **251.18** Directors of a corporation are jointly and severally liable for wages and other amounts to which an employee is entitled under this Part, to a maximum amount equivalent to six months' wages, to the extent that
> >
> > > (a) the entitlement arose during the particular director's incumbency; and
> > >
> > > (b) recovery of the amount from the corporation is impossible or unlikely.

The language of section 251.18 appears to be sufficiently open to make directors liable for the payment of severance and termination pay which is not available under section 99 of the *CCA-11* but still only to an amount that is equivalent to six months wages. Section 257 provides a three-year limitation period with respect to this liability and also provides that "no proceedings against a director ... shall be instituted except with the consent of the Minister".

Under the Code, at section 149(2), a director or officer who directs, authorizes, assents to, or acquiesces or participates in an offence by the corporation is guilty of the offence, whether or not the corporation is prosecuted or convicted. Section 149(2) states:

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[120] *Canada Labour Code*, R.S.C. 1985, c. L-2, as am. S.C. 1993 c. 42.

Officers and senior officials, etc. – s. 149(2)

> (2) If a corporation or a department or other portion of the public service of Canada to which this Part applies commits an offence under this Part, any of the following persons who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and liable on conviction to the punishment provided for the offence, whether or not the corporation, department or portion of the public service has been prosecuted or convicted:
>
> > (a) any officer, director, agent or mandatary of the corporation;
> >
> > (b) any senior official in the department or portion of the public service; or
> >
> > (c) any other person exercising managerial or supervisory functions in that corporation, department or portion of the public service.

Once again, the language of "directed, authorized, assented to, acquiesced in or participated in" has been held to create a full *mens rea* offence[121] and has also been held to create a strict liability offence.[122]

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[121] *Rogo Forming*, *supra*, note 24.

[122] *Ethier*, *supra*, note 79.

(2) *Employment Standards Act* (Ontario)

A *CCA-II* corporation operating in Ontario and not subject to federal jurisdiction is amenable to Ontario's *Employment Standards Act*.[123] Although Part XIV.II of the Act makes the directors of business corporations jointly and severally liable to employees for amounts owing up to the equivalent of six months' wages and up to twelve months of vacation pay, the directors of federally-incorporated nonprofit corporations are excluded from the operation of Part XIV.II, pursuant to section 58.19(5). As a result, any *CCA-II* director's liability will be determined in accordance with section 99 of the *CCA-II*.

The *Employment Standards Act*, however, includes section 79 holding directors and officers liable for the corporation's contravention of the Act or the related regulations on a strict liability basis and a *CCA-II* director would be liable for offences that are outside Part XIV.II. There is no language in the section to indicate that the offence is anything other than one of strict liability. However, in this case, the director or officer has the onus of proving that he or she did not authorize, permit or acquiesce in the offence. Although section 79(3) allows any amounts unpaid to an employee to be assessed against the director or officer personally, this section would not be applicable with respect to payment of wages, vacation pay, holiday pay or overtime wages in the case of an *CCA-11* corporation operating in Ontario as a result of the section 58.19(5) exclusion, with respect to nonprofit corporations incorporated outside Ontario. Section 79 states:

Officers, etc., liable -- s. 79(1)

> **79.** (1) Where a corporation contravenes any provision of this Act or the regulations, an officer, director or agent of the corporation or a person purporting to act in any such capacity who authorizes, permits or acquiesces in the contravention is a party to and guilty of the offence and is liable on conviction to the penalty provided for the offence whether or not the corporation has been prosecuted or convicted.

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[123] *Employment Standards Act*, R.S.O 1990, c. E.14, as am..

Onus of proof -- s. 79(2)

> (2) In determining whether for the purposes of subsection (1) an officer, director or agent of the corporation or a person purporting to act in any such capacity authorized, permitted or acquiesced in the contravention of any provision of this Act or the regulations, it shall be for the officer, director or agent or person purporting to act in any such capacity to prove that he or she did not authorize, permit or acquiesce in the contravention.

Additional Penalty -- s. 79(3)

> (3) Where an officer, director or agent of the corporation or a person purporting to act in any such capacity is convicted of an offence under subsection (1), the Ontario Court (Provincial Division) ... [Ontario Court of Justice] ... may, in addition to any other penalty, assess the amount unpaid by the corporation in respect of the employee and shall order the officer, director or agent to pay the amount so assessed to the Director who shall collect and distribute to the employee the amount ordered to be paid.

No prosecution without consent -- s. 79(4)

> (4) No prosecution under this section shall be instituted without the consent of the Director and the production of a consent purporting to be signed by the Director is admissible in evidence as proof, in the absence of evidence to the contrary, of the Director's consent.

In *R. v. Lark Manufacturing Inc.*,[124] the court, in considering section 79(2) held that the *Employment Standards Act* requires that directors of corporations are obliged to consider the interests of their employees and to take whatever steps they can to protect those interests. This section, the court further held, makes it an offence for a director of a corporation to fail to take reasonable precautions to ensure that the corporation complies with the Act and creates an offence of strict liability whereby the onus rests on the director to establish the defence of due diligence on the balance of probabilities. The strict liability offence requires the same onus in any event.

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[124] *R. v. Lark Manufacturing Inc.* (1992), 42 C.C.E.L. 300 (Ont. Prov. Ct.).

(3) *Occupational Health and Safety Act* (Ontario)

Ontario's *Occupational Health and Safety Act*[125] creates a positive obligation that directors and officers take all reasonable care to ensure that corporations coming within this Act's purview comply with the Act and its related regulations, together with the orders of the Minister, inspectors, and other officials. Section 32 states:

> **Duties of directors and officers of a corporation – s. 32**
>
> **32.** Every director and every officer of a corporation shall take all reasonable care to ensure that the corporation complies with,
>
> (a) this Act and the regulations;
>
> (b) orders and requirements of inspectors and Directors; and
>
> (c) orders of the Minister.

Breach of section 32 may be judged against either the "objective *mens rea"* standard, if *Commander Business Furniture*[126] is applied, or against the strict standard if the *Bata*[127] approach is applied.

Section 66 of the *Occupational Health and Safety Act* provides for a penalty where there is a contravention of or failure to comply with the Act through a fine of up to $25,000.00 for persons or a prison term of up to twelve months or both. Section 69 provides that no prosecution may be instituted more than one year after breach of the Act.

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[125] *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as am..

[126] *Supra*, note 37.

[127] *Supra*, note 51.

(4) *Pension Benefits Standards Act* (Canada)

The directors and officers of the *CCA-II* corporation operating in Ontario under federal constitutional authority also face liability under the *Pension Benefits Standards Act, 1985*.[128] Should the corporation fail to remit pension fund contributions as required, the corporation's directors and officers are liable to a fine of up to $500,000.00 plus civil liability for all amounts owed to the pension fund, together with interest where they "authorized, permitted, assented to, acquiesced in or participated in" the offence. This language has been held to create a *mens rea* offence.[129] It has also been held to create a strict liability offence.[130] The prosecution of the offence must begin within five years of its commission. Section 38 of the Act states:

> **Offences – s. 38(1)**
>
> **38.**(1) Every person who
>
> > (a) contravenes any provision of this Act or the regulations or a direction of the Superintendent given under the authority of this Act or the regulations,
> >
> > (b) to avoid compliance with this Act or the regulations,
> >
> > > (i) destroys, alters, mutilates, secretes or otherwise disposes of any record, writing or other document,
> > >
> > > (ii) makes a false or deceptive statement or a false or deceptive entry in any record, writing or other document, or
> > >
> > > (iii) omits to furnish any material particular in any statement or in any record, writing or other document,

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[128] *Pension Benefits Standards Act*, *1985*, R.S.C. 1985 (2nd Supp.), c. 32.

[129] *Rogo Forming*, *supra*, note 24.

[130] *Ethier*, *supra*, note 79.

(c) prevents or obstructs, or attempts to prevent or obstruct, another person doing anything that the other person is authorized by or pursuant to section 34 to do or, unless unable to do so, fails to do anything that is required to be done by or pursuant to that section, or

(d) being an employer, fails to remit to the pension fund all amounts that the employer is liable so to remit,

is guilty of an offence.

Punishment – s. 38(1.1)

(1.1) A person who commits an offence under subsection (1) is

(a) in the case of an individual, liable on summary conviction to a fine not exceeding one hundred thousand dollars or imprisonment for a term not exceeding twelve months, or to both; and

(b) in the case of a corporation or other body, liable on summary conviction to a fine not exceeding five hundred thousand dollars.

Remittance of amount owing – s. 38(2)

(2) If an employer is found guilty of not remitting all amounts to a pension fund, the court may, in addition to imposing a penalty under subsection (1), order the employer to remit to the pension fund all amounts owing with interest.

Evidence – s. 38(3)

(3) In any prosecution for an offence under this section, a certificate purporting to be signed by the Superintendent or by any person on the Superintendent's behalf certifying that a copy of a pension plan or of an amendment to any such plan was not filed with the Superintendent as required by this Act, or certifying as to the registration of a pension plan, is admissible in evidence and, in the absence of any evidence to the contrary, is proof of the matters so certified.

Limitation period – s. 38(4)

> (4) A prosecution for an offence under this section may be commenced at any time within, but not later than, five years after the time when the subject-matter of the offence arose.

Corporations and other bodies – s. 38(5)

> (5) Where a corporation or other body is guilty of an offence under this section, every officer, director, agent or member of the corporation or body who directed, authorized, assented to, acquiesced in or participated in the offence is a party to and guilty of the offence and is liable on summary conviction to the punishment provided for the offence, whether or not the corporation or body has been prosecuted or convicted.

Informations and complaints – s. 38(6)

> (6) An information or complaint under this section may be laid or made by any officer of the Office of the Superintendent of Financial Institutions, any member of the Royal Canadian Mounted Police or any person authorized in writing by the Minister.

(5) ***Pension Benefits Act*** **(Ontario)**

The directors and officers of the *CCA-II* corporation operating in Ontario under provincial jurisdiction face similar liability under Ontario's *Pension Benefits Act.*[131] Section 109 of the Act states that any contravention of the Act or the regulations or an order made under the Act is an offence. Section 110 imposes a fine of up to $100,000.00 for a first conviction and up to $200,000.00 for any subsequent conviction for directors or officers who either cause, authorize, permit, acquiesce or participate in the commission of an offence by the corporation pursuant to section 110(2)(a) or who fail to take reasonable care to prevent the commission of the offence pursuant to section 110(2)(b).

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[131] *Pension Benefits Act*, R.S.O. 1990, c. P.8.

The language of section 110(2)(a) appears to create a strict liability offence. The wording of this section does not include the clear *mens rea* indicators of "knowingly" or "wilfully" nor the full phrase of "directed, authorized, permitted, assented to, acquiesced in or participated in". Further, the language of the section also includes the verb "causes" which tends toward absolute liability rather than *mens rea* liability.

Section 110(2)(b) creates either an objective *mens rea* offence or a strict liability offence with respect to a failure to take all reasonable care depending on whether a court follows *Commander Business Furniture*[132] or *Bata.*[133]

There is a limited period of five years from the date of the offence during which a prosecution may be commenced. Section 110 states:

> **Penalty – s. 110(1)**
>
> > **110.** (1) Every person who is guilty of an offence under this Act is liable on conviction to a fine of not more than $100,000 for the first conviction and not more than $200,000 for each subsequent conviction.
>
> **Persons re corporation – s. 110(2)**
>
> > (2) Every director, officer, official or agent of a corporation and every person acting in a similar capacity or performing similar functions in an unincorporated association is guilty of an offence if the person,
> >
> > > (a) causes, authorizes, permits, acquiesces or participates in the commission of an offence referred to in section 109 by the corporation or unincorporated association; or
> > >
> > > (b) fails to take all reasonable care in the circumstances to prevent the corporation or unincorporated association from committing an offence referred to in section 109.

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[132] *Supra*, note 37.

[133] *Supra*, note 51.

Penalty – s. 110(3)

> (3) A person who is guilty of an offence described in subsection (2) is liable on a first conviction to a fine of not more than $100,000, and on each subsequent conviction to a fine of not more than $200,000, whether or not the corporation or unincorporated association has been prosecuted for or convicted of an offence arising from the same facts or circumstances.

Order for payment – s. 110(4)

> (4) Where a person is convicted of an offence related to the failure to submit or make payment to a pension fund or to an insurance company, the court that convicts the person may, in addition to any fine imposed, assess the amount not submitted or not paid and order the person to pay the amount to the pension fund or to the insurance company.

Enforcement – s. 110(5)

> (5) An order for payment under subsection (4), exclusive of the reasons therefor, may be filed in the Ontario Court (General Division) ... [Ontario Superior Court of Justice] ... and is thereupon enforceable as an order of that court.

Time limit – s. 110(6)

> (6) No prosecution for an offence under this Act shall be commenced after five years after the date when the offence occurred or is alleged to have occurred.

Where directors or officers act as administrators of a corporation's employee pension plan, they face the liabilities imposed upon administrators of employee pension plans, as do directors and officers of a corporation who sit on a pension committee appointed to administer the plan. This liability arises from the role as administrator and not director or officer *per se.* However, directors and officers of nonprofit corporations often find themselves appointed to a pension committee and so the liability is one of significance nonetheless.

Section 22 of the Ontario *Pension Benefits Act*,[134] requires that administrators exercise the care, diligence and skill that a prudent person would exercise in dealing with the property of others, and use all relevant knowledge and skill that they possess or, by reason of their profession, business, or calling, ought to possess. Further**,** under section 22(4), they can allow no conflict between their interest and that of the pension fund. Pursuant to section 22(7), the Act requires that an administrator who employs an agent to handle the administration of a pension fund will personally select and be satisfied of the agent's suitability and will carry out such supervision of the agent as is prudent and reasonable. Should these standards of care, loyalty and supervision not be met by an administrator who is also a director or officer, the director or officer may be prosecuted pursuant to section 110, presented above. Section 22 states:

> **Care, diligence and skill – s. 22(1)**
>
> > **22.** (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> **Special knowledge and skill – s. 22(2)**
>
> > (2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> **Member of pension committee, etc. – s. 22(3)**
>
> > (3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.
>
> **Conflict of interest – s. 22(4)**

[134] *Pension Benefits Act*, R.S.O. 1990, c. P.8.

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent – s. 22(5)

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund – s. 22(6)

(6) No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent – s. 22(7)

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent – s. 22(8)

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

Benefit by administrator – s. 22(9)

(9) The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits, a refund of contributions and fees and expenses related to the administration of the pension plan and permitted by the common law or provided for in the pension plan.

Member of pension committee, etc. – s. 22(10)

(10) Subsection (9) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Payment to agent – s. 22(11)

(11) An agent of the administrator of a pension plan is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan.

(6) ***Pay Equity Act* (Ontario)**

The *Pay Equity Act*[135] which provides for affirmative action to redress gender discrimination in job compensation in Ontario provides at section 26(2) that every officer of a corporation that intimidates in any way an employee with respect to the exercise of rights under this Act in contravention of section 9(2), or obstructs a review officer in contravention of section 35(5) or breaches an order of the tribunal will himself or herself be a party to the offence if they authorized or acquiesced in it on a strict standard and, if liable, to the same penalty which can be a fine of up to $50,000.00. There is no language in this section indicating a shift from the strict liability presumed applicable for a regulatory offence to the *mens rea* standard. At section 26(2.2), an officer of a corporation authorizing or acquiescing in the corporation's misuse of information obtained under Part III.2 of the Act is liable, again on the strict liability standard, to a fine of up to $50,000.00. Section 26 states:

Offences and penalties – s. 26(1)

26. (1) Every person who contravenes or fails to comply with subsection 9(2) or subsection 35(5) or an order of the Hearings Tribunal is guilty of an offence and on conviction is liable to a fine of not more than $5,000, in the case of an individual, and not more than $50,000, in any other case.

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[135] *Pay Equity Act*, R.S.O. 1990, c. P.7, as. am..

Parties – s. 26(2)

(2) If a corporation or bargaining agent contravenes or fails to comply with subsection 9(2) or subsection 35(5) or an order of the Hearings Tribunal, every officer, official or agent thereof who authorizes, permits or acquiesces in the contravention is a party to and guilty of the offence and, on conviction, is liable to the penalty provided for the offence whether or not the corporation or bargaining agent has been prosecuted or convicted.

Confidentiality – s. 26(2.1)

(2.1) Every person who uses information obtained under Part III.2 other than for the purposes of the Act is guilty of an offence and on conviction is liable to a fine of not more than $5,000 in the case of an individual, and not more than $50,000 in any other case.

Parties – s. 26(2.2)

(2.2) If a corporation or bargaining agent contravenes subsection (2.1), every officer, official or agent of the corporation or bargaining agent who authorizes, permits or acquiesces in the contravention is party to and guilty of the offence and, on conviction, is liable to the penalty provided for the offence whether or not the corporation or bargaining agent has been prosecuted or convicted.

Prosecution against bargaining agent – s. 26(3)

(3) A prosecution for an offence under this Act may be instituted against a bargaining agent in its own name.

Consent – s. 26(4)

(4) No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Hearings Tribunal.

(7) *Workplace Safety and Insurance Act, 1997* (Ontario)

The *Workplace Safety and Insurance Act, 1997*[136] contains an extensive list of offences applicable to employers including, at section 156, the contravention of or failure to comply with a regulation made under the Act. Section 157 of the Act creates *mens rea* liability for the directors and officers of nonprofit corporations who "knowingly" authorize, permit or acquiesce in the offence. The *mens rea* standard is established by the word "knowingly". Section 157 of the Act states:

> **Offence by director, officer – s. 157**
>
> **157.** If a corporation commits an offence under this Act, every director or officer of the corporation who knowingly authorized, permitted or acquiesced in the commission of the offence is guilty of an offence, whether or not the corporation has been prosecuted or convicted.

Pursuant to section 158, an individual convicted under the Act is liable to a fine of $25,000.00 or a jail term of up to six months or both penalties.

(iii) Environmental Statutes

Directors and officers of nonprofit corporations face liability with respect to environment-related legislation in the same manner as do business corporations. The applicability of this liability, of course, depends upon the enterprise in which the corporation is involved. In cases where a *CCA-II* arts-related corporation operates in rented space in a downtown office building, there may be little risk of environmental liability. However, where a *CCA-II* social service agency operates a group home with an oil furnace in the basement or a *CCA-II* youth organization operates a summer camp with waterfront, the potential for environmental liability can be significant. Because experience has demonstrated the weakness in environmental regulation aimed at corporations alone, environmental legislation frequently tries to encourage effective compliance by making corporations' directors and officers personally liable for environmental violations. Although many *CCA-II* corporations will not face environmental liability, a review of some of the major statutes imposing such liability is

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[136] *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A.

presented as the penalties can be so extensive that every nonprofit corporation director and officer should be aware of the risks faced in this regard in any event.

(1) ***Canadian Environmental Protection Act, 1999***

The *Canadian Environmental Protection Act, 1999*[137] imposes myriad obligations ranging from requirements with respect to fuels, international air and water pollution and the proper storage and disposal of toxic substances, to the filing of required information with the Minister of the Environment. Some fines for violations of the Act have a maximum amount of $1,000,000.00. In certain cases, a violation of the Act's obligations can result in fines for which the Act does not apply any maximum cap at all. The Act allows prison terms of up to five years and prosecution under the *Criminal Code of Canada* where the accused has shown a wanton or reckless disregard for the lives or safety of other persons and thereby causes death or harm.

The Act provides that directors and officers have a positive duty to ensure that the corporation complies with the Act and related regulations and the orders of the Minister of the Environment and ministry officials. The Act also makes directors and officers liable for any offence committed by the corporation. Section 280 of the Act states:

Liability of directors – s. 280(1)

> **280.** (1) Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.

Duties of directors – s. 280(2)

> (2) Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with

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[137] *Canadian Environmental Protection Act, 1999,* S.C. 1999, c. 33.

> (a) this Act and the regulations; and
>
> (b) orders and directions of, and prohibitions and requirements imposed by, the Minister end enforcement officers and review officers.

Section 280 creates liability for two offences. There is liability for the offence itself where the director or officer "directed, authorized, assented to, acquiesced in or participated in the commission of the offence" under section 280(1). This liability may be on the *mens rea* standard[138] or the strict standard[139] depending on the case precedent followed. There is also liability for breaching the positive duty created by section 280(2), which may be on either the objective *mens rea* standard[140]or the strict standard[141] if the director and officer failed to "take all reasonable care to ensure" corporate compliance with the Act, its regulations and any requirements imposed under the Act by the Minister, an enforcement officer or a review officer.

Pursuant to section 272, a director or officer convicted under section 280 is liable to a find of up to $1,000,000.00 or to a term of imprisonment of up to three years, or both, if the Crown proceeds by way of indictment. If the Crown proceeds by way of summary conviction, a person is liable to a fine of up to $300,000.00 or to a term of imprisonment of up to six months, or both. It should be noted that if an offence is committed for more than one day the person who committed the offence is liable to be convicted for a separate offence for each day on which it is committed or continued, according to section 276.

The Act also provides for the enhancement of a penalty if "as a result of the commission of the offence the offender acquired any property, benefit or advantage". In such a circumstance the

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[138] *Rogo Forming*, *supra*, note 24.

[139] *Ethier*, *supra*, note 79.

[140] *Commander Business Furniture*, *supra*, note 37.

[141] *Bata*, *supra*, note 51.

amount of the fine may be increased by an amount equal to the estimated value of the benefit, pursuant to section 290. If the offence resulted in the loss or damage to property of another, the court may also order compensation to the person injured under section 292.

Further, section 291 provides the court with a broad array of sentencing powers upon conviction under the Act. Accordingly, if an officer or director is convicted of an offence he or she would be liable to the imposition of a court order pursuant to this section. It should be noted that section 291 empowers the court to order environmental restoration and environmental effects monitoring, two potentially long-term and costly measures. As well, the court may direct the offender to implement an environmental management system as well as to conduct an environmental audit of the offender's organization and to remedy deficiencies identified by the audit.

In addition, section 40 establishes a civil cause of action arising from conduct that contravenes the Act or its regulations. Accordingly, an officer or director who has committed an offence may be held accountable in a civil action for any loss or damage as a result of his or her offending conduct.

The Act also establishes at section 22 a right of a person to commence an "Environmental Protection Action" against a person who has committed an offence under the Act, if the Minister failed to conduct an investigation and report concerning the alleged offence within a reasonable period of time, or if the Minister's response to the investigation of the offence was unreasonable. As well, conduct which contravenes the Act or its Regulations may be the foundation of an application for an injunction which may be issued against the alleged offender pursuant to section 39.

(2) ***Fisheries Act*** **(Canada)**

The federal *Fisheries Act*[142] contains significant penalties for the pollution of waters leading to a loss of income for commercial fishermen, along with penalties for a wide variety of other offences, including fines of up to $500,000.00, imprisonment up to two years, civil liability and the forfeiture

[142] *Fisheries Act,* R.S.C. 1985, c. F-14.

of equipment. The Act further indicates that where a violation of the Act continues for more than one day, each day of violation constitutes a separate offence which has the potential to lead to enormous fines being imposed. With respect to the liability of directors and officers, section 78.2 states:

> **Offences by corporate officers, etc. – s. 78.2**
>
> > **78.2** Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted.

The wording of section 78.2 creates a full *mens rea* standard of liability through the phrase "directed, authorized, assented to, acquiesced in or participated in". However, section 78.6 must be considered. Section 78.6 states:

> **Due diligence defence -- s. 78.6**
>
> > **78.6** No person shall be convicted of an offence under this Act if the person establishes that the person
> >
> > > (a) exercised all due diligence to prevent the commission of the offence; or
> >
> > > (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.

Section 78.6 may either raise the standard to strict by imposing a reverse onus on the director or officer to prove due diligence or may not be applicable to directors charged under section 78.2 at all, leaving the section 78.2 liability as *mens rea*.

The practical effect of section 78.6 is to create a two-step process for a conviction of a director or officer under section 78.2. First the offence of the corporation must be proven and this is so even

if the corporation has not been prosecuted. Then the director's or officer's liability would have to be proven. The liability of the corporation is on the strict standard in that the corporation could not itself be convicted of the offence if it has exercised all due diligence or if it, through its directing minds reasonably and honestly believed in the existence of facts that, if true, would render the corporation's conduct reasonable. If the corporation is not prosecuted or represented, the director or officer will be obliged to prove the corporation's due diligence. Where the director proves that the corporation has not committed an offence on the basis of due diligence or a reasonable and honest belief, which must be proven on the balance of probabilities, there is no offence to which the director or officer can be party. Therefore, the director or officer will not be liable. Where the director or officer cannot prove a defence of due diligence or reasonable and honest belief on the part of the corporation and the corporation is found to have committed the offence, the Crown would then be required to prove full *mens rea* on the part of the director or officer. However, section 78.2 may once again trigger a requirement that the director show due diligence or reasonable and honest belief on his or her own part. In any event, the director or officer will be obliged to present a defence of due diligence or reasonable and honest belief at some stage and cannot rely on the onus of proof as being fully on the Crown. The offence therefore appears to be a strict liability offence.

The decision in *R. v. Wentworth Valley Developments Ltd.*[143] dealt with a Crown appeal with respect to the acquittal of charges against a corporation operating a ski hill whose reconfiguration of the ski hill with bulldozers caused siltation problems affecting the fish habitat in a nearby river, together with charges against the directors of the corporation. The directors were charged pursuant to section 78.2. The entire tenor of the decision relates to the directors' exercise of due diligence and not the Crown's requirement to prove *mens rea.* This supports the evaluation that the liability under this section appears to have been established as on the standard of strict.

(3) ***Fishing and Recreational Harbours Act*** **(Canada)**

[143][1992] N.S.J. No. 386 (N.S.C.C.).

The federal *Fishing and Recreational Harbours Act,*[144] under which penalties can be imposed for the pollution of certain recreational harbours and for other related violations, provides for fines of up to $25,000.00 or imprisonment of up to six months or both. Directors and officers of a corporation which commits an offence are party to the offence and on conviction, which requires *mens rea* liability, are liable to the same punishment as the corporation. Section 21 states:

> **Officers, etc., of corporations – s. 21**
>
> **21.** Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

However, section 23 then states:

> **Offence by employee or agent – s. 23**
>
> **23.** In any prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of the accused and that the accused exercised all due diligence to prevent its commission.

This language either acts to raise the liability standard to strict from *mens rea* in that the director or officer party to the corporation's offence has to prove no knowledge or consent and that he or she exercised due diligence to prevent the commission of the offence despite the language of "directed, authorized, assented to, acquiesced in or participated in" which, according to *Rogo Forming,*[145] indicates a full *mens rea* offence requiring the Crown to provide proof beyond a reasonable doubt or is not applicable to directors or officers at all. The latter conclusion does not fit with the

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[144] *Fishing and Recreational Harbours Act*, R.S.C. 1985, c. F-24.

[145] *Supra*, note 24.

Wentworth Valley Development[146] decision discussed in the preceding section and finding strict liability applicable to much the same language in the *Fisheries Act*.[147]

(4) ***Environmental Protection Act*** **(Ontario)**

Ontario's *Environmental Protection Act*[148] provides penalties for a number of environmental violations relating to the discharge of contaminants into the natural environment likely to cause an adverse effect. "Contaminant" for the purposes of the Act means any "solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of them resulting directly or indirectly from human activities that may cause an adverse effect". Such adverse effects may be impairment of the natural environment, injury or damage to plant or animal life, harm or material discomfort to any persons, an adverse effect on the health of any person, impairment of the safety of any person, rendering any property or plant or animal life unfit for human use, loss of enjoyment of normal use of property, or interference with the normal conduct of business. Both the definition of "contaminant" and "adverse effect" leave little human activity outside the scope of the statutory language. Penalties for the failure to prevent an unlawful discharge may be as high as $50,000.00 for each day that the offence continues or to imprisonment for up to a year or to both. Prosecution must be commenced within two years of governmental authorities becoming aware of the violation.

Section 194 of the Act establishes a positive duty on directors and officers to take reasonable care to prevent the unlawful discharge of a contaminant into the environment by the corporation and also creates either an objective *mens rea* offence on the basis of *Commander Business Furniture*[149] or a

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[146] *Supra*, note 143.

[147] *Fisheries Act*, R.S.C. 1985, c. F-14, s. 78.2 and s. 78.6.

[148] *Environmental Protection Act*, R.S.O. 1990, c. E.19.

[149] *Supra*, note 37.

strict liability offence on the basis of *Bata.*[150] The Part A review of legislation and Part B summary matrix indicate the liability as strict. Section 194 states:

> **Duty of director or officer – s. 194(1)**
>
> **194.** (1) Every director or officer of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge.
>
> **Offence – s. 194(2)**
>
> (2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.
>
> **Liability to conviction – s. 194(3)**
>
> (3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.

[150] *Supra*, note 51.

(5) *Pesticides Act* (Ontario)

Ontario's *Pesticides Act*[151] makes directors and officers liable for the impairment of the quality of the environment for any use that can be made of it, for injury or damage to property or plant or animal life, for harm or material discomfort to any person, for an adverse effect on the health of any person, for an impairment of the safety of any person, or for directly or indirectly rendering any property or plant or animal life unfit for human use, from a pesticide or pesticide-related substance. The Act allows a fine of up to $200,000.00 for each day or part of a day that the offence occurs and imprisonment of up to two years less a day or both.

At section 49, the Act establishes a positive duty on a director or officer to take care to avoid any unlawful effects from pesticides and further establishes an offence for the breach of that duty. The section 49 wording again raises the conflict between *Commander Business Furniture*[152] objective *mens rea* and *Bata*[153] strict liability. The Part A review of legislation and Part B summary matrix indicate the liability as strict. Section 49 states:

> **Duty of director or officer – s. 49(1)**
>
> **49.** Every director or officer of a corporation that engages in an activity that may cause an effect mentioned in subsection (3) contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful effect.
>
> **Offence – s. 49(2)**
>
> (2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.

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[151] *Pesticides Act*, R.S.O. 1990, c. P.11.

[152] *Supra*, note 37.

[153] *Supra*, note 51.

Effects – s. 49(3)

(3) The effect referred to in subsection (1) is any one or more of,

(a) impairment of the quality of the environment for any use that can be made of it;

(b) injury or damage to property or plant or animal life;

(c) harm or material discomfort to any person;

(d) an adverse effect on the health of any person;

(e) impairment of the safety of any person; or

(f) directly or indirectly rendering any property or plant or animal life unfit for human use,

from a pesticide or any substance or thing containing a pesticide to a greater degree than would necessarily result from the proper use or storage of the pesticide.

Liability to conviction – s. 49(5)

(4) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.

(6) ***Ontario Water Resources Act***

The *Ontario Water Resources Act*[154] also establishes a positive duty on directors and officers to ensure that no discharge occurs that may impair water quality and creates a direct liability for directors and officers for breach of that duty. Section 116 states:

Duty of director or officer – s. 116(1)

[154] *Ontario Water Resources Act*, R.S.O. 1990, c. O.40.

> **116.** (1) Every director or officer of a corporation that engages in an activity that may result in the discharge of any material into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge.
>
> **Offence – s. 116(2)**
>
> (2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.
>
> **Liability to conviction – s. 116(3)**
>
> (3) A director or officer of a corporation is liable to conviction under this section whether or not the corporation has been prosecuted or convicted.

It was with respect to the predecessor of this section[155] that the Ontario Provincial Court considered the question of what constitutes reasonable care on the part of directors and officers to avoid adverse effects on the environment in *R. v. Bata Industries Ltd. (No. 2).*[156] In this case, three directors of a corporation were charged under the *Ontario Water Resources Act*[157] and the Ontario *Environmental Protection Act*[158] with respect to soil and groundwater contamination resulting from the leakage of chemical waste from storage drums at the corporation's plant. The court held that the liability was on the strict standard and that, in order to prove due diligence, the directors as a minimum must have established a proper system to prevent the commission of the offence and must have taken all reasonable steps to ensure the system's effective operation. Two of the directors were convicted as the evidence proved that they did not take all reasonable steps within their knowledge and control.

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[155]*Ontario Water Resources Act*, R.S.O. 1980, c. 361, s. 75, as am. S.O. 1986, c. 68, s. 42, as. am. 1988, c. 54, s. 87.

[156]*Supra,* note 49.

[157]*Ontario Water Resources Act*, R.S.O. 1980, c. 361, s. 75, as am. S.O. 1986, c. 68, s. 42, as am. 1988, c. 54, s. 87.

[158]*Environmental Protection Act*, R.S.O. c. 141, s. 147a.

These two directors were fined $12,000.00 each which amount was reduced on appeal to $6,000.00 each. The *Bata* decision clearly indicates that due diligence requires a high standard of positive action by a director or officer to take *all* reasonable steps.

Although this case involved environmental liability, there is nothing in the decision of the court to limit the scope of the discussion of due diligence to that context. This finding of strict liability in this case was later criticized in *Commander Business Furniture* [159] where the court found on similar language establishing a positive duty of reasonable care that the liability is in fact an objective *mens rea* liability. The Part A review of legislation and Part B summary matrix indicate the section 116 liability as strict as due diligence must be demonstrated by an accused in any event though under the objective *mens rea* standard the Crown must prove that there was not any due diligence whereas under the strict liability standard the accused must prove that due diligence was exercised.

(f) General Discussion of a *CCA-II* Directors' and Officers' Liabilities in Ontario

The federal and Ontario governments have enacted a large number of further statutes, together with those surveyed above, that impose personal liability on the directors of *CCA-II* corporations operating in Ontario both for their own conduct and for the conduct of the corporation for which they are the directing mind. The liabilities range from violations of Ontario's *Securities Act*[160] in the case of *CCA-II* corporations that comprise former governmental public enterprises that issue securities on privatization as a nonprofit corporation, such as NAV CANADA, to violations of the *Cemeteries Act (Revised)*[161] in the case of a nonprofit corporation that operates a cemetery in a local community. In considering the federal and Ontario statutes imposing liability on the directors and officers of

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[159] *Supra*, note 37.

[160] *Securities Act*, R.S.O. 1990, c. S.5.

[161] *Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4.

corporations, it became clear that there are few statutory liabilities that could never possibly affect a *CCA-II* corporation in any event.

As each federal and Ontario statute having director and officer liability provisions was reviewed, we contemplated whether the statute could be applicable in any way in a nonprofit context. The federal *Defence Production Act*[162], for example, would not *prima facie* appear to have nonprofit applicability until the possibility of a nonprofit defence production corporation is considered should Canada be faced with war in the future. Neither does the Ontario *Registered Insurance Brokers Act*[163] appear *prima facie* to be applicable in a nonprofit context until a nonprofit "protective society" for members of a health profession considers making group health insurance available to its members through an insurance carrier. Where it was considered there could be some possibility of applicability to a nonprofit corporation, the statute was included in the list. It is only where it was considered that there could be no possible applicability whatsoever to a nonprofit corporation that a statute was excluded. In preferring to err on the side of caution, we acknowledge the tremendous creativity and enterprise potential in the nonprofit sector. We provide a list of federal statutes imposing liability that could be applicable to a *CCA-II* enterprise operating in Ontario at Tab B. We provide a list of Ontario statutes imposing liability that could be applicable to a *CCA-II* corporation operating in Ontario at Tab C.

The liabilities to which *CCA-II* directors and officers are exposed are judged traditionally against the standards of *mens rea* liability, strict liability, or absolute liability depending upon the statutory language establishing the offence. In attempting to fit the statutory language into the three *Sault Ste. Marie* categories, Ontario courts have had to split hairs to hold, for example, that where an offence is "permitted" the liability is against the strict standard, where "permitted or acquiesced in" the liability remains strict, but where the offence is "directed, authorized, assented to, acquiesced in or participated in" the liability is against a *mens rea* standard.

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[162] *Defence Production Act*, R.S.C. 1985, c. D-1.

[163] *Registered Insurance Brokers Act*, R.S.O. 1990, c. R.19.

The basic standards of liability are a product of common law through *Sault Ste. Marie,*[164] rather than statute. The common law has been superimposed on statutes, some of which have been on the books for decades. Therefore, some statutory language, which incorporates many different verbs to indicate actions that are wrongful acts by which statutes may be contravened and many adverbs to describe mental intention, may not have been drafted with the basic standards of liability even available in law at the time of drafting.

In addition, further standards of liability may be developing, possibly as a product of poor legislative drafting, to quote from Madam Justice Hackett in the *Commander Business Furniture*[165] decision, but just as possibly with the intention of the legislators. The further standard that has emerged to date is that of objective *mens rea* which relates to an offence of failing to take reasonable care or to exercise due diligence where reasonable care or due diligence have been established as a positive duty. These offences are not uncommon with respect to legislation relating to environmental matters. Hackett J.'s review of the language of section 147a of Ontario's *Environmental Protection Act*[166] found that the liability in that section creating a positive duty of care was against an objective *mens rea* standard where the Crown was obliged to prove that the accused intended not to take reasonable care. As noted above, Madam Justice Hackett did not find this to be a satisfactory result or a result appropriate to the regulatory offence scheme. However, being limited by what she saw as clear statutory language creating a positive duty of reasonable care, Hackett J. found that she was obliged to interpret the language as she did. Numerous statutes, some drafted subsequent to the *Commander Business Furniture* decision, create a positive duty of reasonable care in the same language or in language importing the same result[167]. Without knowledge of the actual intention of the legislators through a detailed review of committee reports and minutes and Hansard, it is not

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[164]*Supra*, note 13.

[165]*Supra*, note 37.

[166]*Environmental Protection Act*, R.S.O. 1980, c. 141, s. 147a, as am.; now *Environmental Protection Act,* R.S.O. 1990, c. E.19, s. 194.

[167]*Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 280.

possible at this juncture to state unequivocally whether a new statutory liability category of objective *mens rea* has been established where a duty of reasonable care is created. Neither is it possible to clearly establish whether the objective *mens rea* offence is a subset of the full *mens rea* offence category or whether it is properly part of the strict liability offence category on the basis that due diligence in the form of reasonable care must have been demonstrated by an accused in order to avoid liability. Madam Justice Hackett indicated that the *Commander Business Furniture*[168] decision would create confusion and she has been proven correct in this regard.

While some statutory infractions, such as acquiescing to a corporation's failure to allow an authorized person to inspect the corporation's register of mortgages, are relatively minor in nature and result in a relatively minor penalty, some statutory infractions, such as failing to remit employee income tax, Canada Pension Plan, and employment insurance source deductions, are major and result in significant penalties. Further, some of the major liabilities are absolute and allow for no defence of due diligence, for example the liability under the *CCA-II* requiring directors to pay debts owed by the corporation to employees for an amount up to a total of six months' wages where the debts cannot be collected from the corporation. This is a liability which directors simply cannot avoid no matter what their best efforts are. Of interest is the fact that many of the more minor offences that do not attach a great deal of stigma or high fines or prison penalty are full *means rea* offences because of the language in which they were drafted while the more serious public welfare offences are strict liability offences. An example is the full *mens rea* liability applied to a *CCA-II* director or officer who permits or authorizes an omission from the corporation's register of mortgages, for which the fine is up to $200.00.[169] There is a certain incongruity between this being a full *mens rea* offence requiring the full resources of the state to prove both the wrongful act and the *mens rea* beyond a reasonable doubt, and the strict liability offences under the various taxing statutes requiring the state to prove only the wrongful act and requiring the accused to prove due diligence as a defence in order to avoid liability. It can reasonably be surmised that many of the minor statutory offences

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[168] *Supra*, note 37 at 252.

[169] *Canada Corporations Act*, R.S.C. 1970, c. C-32, s. 71.

were drafted as fully *mens rea* offences in order to differentiate them from absolute liability offences at a time when no strict liability offence category was available.

This review has revealed approximately two hundred statutory sections under federal and Ontario statutes imposing liability on the director or officer of a *CCA-II* corporation located in Ontario . The liabilities do not vary according to the size of the *CCA-II* corporation nor according to whether the corporation is of a charitable or non-charitable nature. Neither is there any differentiation according to whether the director or officer is a volunteer in that capacity or receives remuneration. The directors and officers of nonprofit corporations face the same liabilities as do the directors and officers of business corporations.

These offences to which directors and officers of nonprofit corporations are liable are established in volumes of statues that are publicly available. However, in a practical sense, knowledge and understanding of many of these liabilities are not easily accessible by directors and officers simply because the language in which they are drafted is not easily comprehensible by lay persons or, for that matter, by legal professionals and judges. There is very much a sense of guesswork in attempting to establish into which of the statutory liabilities categories an offence is properly situated. The only certainties are where the language of the offence calls for absolute liability but imposes a prison term making the liability strict or where the language of the offence indicates that the wrongful act was committed knowingly or wilfully, which clearly indicates a full *mens rea* offence.

The liability imposed under the statutes has been established for the important purpose of governing and encouraging positive corporate behaviour and conduct. It has also been imposed to allow a balancing of the interests of nonprofit corporations with the interests of their members, their employees, the Canadian public and Canada's natural environment, depending on the circumstances. When the director or officer of a *CCA-II* corporation accepts the position of director or officer, he or she automatically assumes all the legal responsibilities and duties that the law imposes on directors and officers. The imposition of liability for breach of a director's duties and liabilities

seeks to ensure that those duties and responsibilities will be appropriately met. It seems eminently fair, however, that directors and officers should be able to discern with some degree of accuracy the standard of liability by which a violation of a statutory provision will be judged. At this time, it is questionable, at least in Ontario,[170] whether such determinations can be made with any real degree of certainty.

This review of the hypothetical liabilities that directors and officers of a *CCA-II* corporation operating in Ontario could face indicates that further discussion and initiatives by Industry Canada, perhaps together with other federal government departments and the various provinces and territories, with respect to the basic regulatory offence scheme of liability applicable to the directors and officers of nonprofit corporations in Canada would well be warranted.

[170] This analysis has been limited to the CCA-II corporation operating in Ontario.