

Directors' Duties in Canada



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3rd Edition

Barry Reiter

Corporate Governance Group
Bennett Jones LLP



An Ultimate Corporate Counsel Publication



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CCH Canadian Limited

300-90 Sheppard Avenue East

Toronto Ontario

M2N 6X1

1 800 268 4522

www.cch.ca

Published by CCH Canadian Limited

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Edited by:

Kathleen Jones-Lepidas, B.A.

Library and Archives Canada Cataloguing in Publication

Reiter, Barry J., 1948–
Directors' duties in Canada/Barry Reiter. — 3rd ed.

Previous ed. published as *Directors' duties in Canada: managing risk*/
Margo Priest, Hartley R. Nathan.

Includes bibliographical references and index.

ISBN 1-55367-693-9

1. Directors of corporations — Legal status, laws, etc. — Canada. I. Title.

KE1402.R45 2006 346.71'06642 C2006-905659-5 KF1423.R45 2006

ISBN 1-55367-693-9

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Typeset by CCH Canadian Limited.
Printed in the United States of America.

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Barry Reiter

Barry Reiter is a senior partner in the Toronto office of Bennett Jones LLP. Barry's practice focuses on corporate governance, development, and finance.

Barry regularly advises boards, directors, directors' committees, and management on corporate governance issues. He is an experienced director and has chaired boards and served as a director on, or the chair of, a variety of board committees.

As Chair of the Bennett Jones LLP New Economy Practice, Barry has extensive experience in all aspects of technology law, including the protection of intellectual property rights, representation of start-up, growth and mature companies and private equity sources, international distribution arrangements, strategic alliances, partnerships and joint ventures, licensing, private and public financings, stock exchange listings, and mergers and acquisitions.

Formerly a law professor at the Faculty of Law, University of Toronto (1974–1982), Barry has published numerous books on a variety of legal topics (joint ventures, contracts, the legal process, and real estate) and many articles on corporate governance, boards of directors, and advisory boards. As a recognized expert in the field, Barry writes a monthly column on corporate governance in *Lexpert Magazine* and is a member of the ICD Blue Ribbon Commission on Governance of Executive Compensation. Barry is recognized in many peer-rating listings, including the 2006 LEXPERT® *Guide to the 100 Most Creative Lawyers in Canada*.

The Bennett Jones LLP Corporate Governance Group includes many partners and associates, several of whom have been contributors to this book, as noted in the Acknowledgements. The diversity of their interests and expertise reflects the breadth of the issues that are part of, and can affect, “corporate governance”.

ACKNOWLEDGEMENTS

This book is the product of a real team effort. The individual chapters were written by the following members of the Corporate Governance Group at Bennett Jones LLP:

- Chapter 1: Barry Reiter
- Chapter 2: Art Peltomaa and Maria Sountas-Argiropoulos (articling student)
- Chapter 3: Bryan Haynes and David Spencer
- Chapter 4: Gary Solway and Khalil Haji (summer student)
- Chapter 5: John MacNeil, Shawn Lynn (articling student), Andrea MacDonald (articling student), Andrea Gede-Lange (articling student), and Khalil Haji (summer student)
- Chapter 6: Nick Fader and Steven Tanner (articling student)
- Chapter 7: Grant Haynen
- Chapter 8: Jeff Kerbel
- Chapter 9: Mary Beth Currie and Kristopher Hanc (articling student)
- Chapter 10: Deron Waldock
- Chapter 11: Heather Forester, Adrienne Moore (articling student), Aaron Hirschorn (summer student), Olivia Dixon (summer student), and David McKinnon (summer student)
- Chapter 12: Art Peltomaa, Duncan Card, Roch Beharry (articling student), William Vass, Leonard Griffiths, Hilary Stedwill (associate), Preet Gill (summer student), Adrienne Moore (articling student), Raj Sahni, and Lee Cassey (articling student)
- Chapter 13: Steve Sibold and J. Brindle (associate), John MacNeil, Rob Staley, Lee Cassey (articling student), and Nicholas Crosbie (articling student)

- Chapter 14: Jim Patterson, Lincoln Caylor, Linda Visser (articling student), Adrienne Moore (articling student), and Nathaniel Brand (summer student)
- Chapter 15: Marty Kay, Khalil Haji (summer student), and Lee Cassey (articling student)
- Chapter 16: Rose M. Carter, Carole L. Hunt, Stephanie A. Wanke, Laura Inglis-Chubb (summer student), Lisa Millman (articling student), Lee Cassey (articling student), Nathaniel Brand (summer student), Khalil Haji (summer student), and Mike Kershaw (summer student)
- Chapter 17: Barry Reiter and Lee Cassey (articling student)
- Chapter 18: Barry Reiter, Lee Cassey (articling student), and Andrea Gede-Lange (articling student)

Two Bennett Jones LLP summer students, Melissa Robins and Melanie Baird, cheerfully and enthusiastically spent most of the summer of 2006 supporting the lead authors with research, editing, and supplemental writing. Two articling students, Adrienne Moore and Lee Cassey, also picked up this role and the role of indexing when Melissa and Melanie had to return to their final year of law school.

Heather Forester acted as editor of the book, attempting to ensure consistency in style, presentation, and references.

Debra Forman, Director of Professional Development at Bennett Jones LLP, played a hugely important role in assembling and organizing the large team and in managing administrative arrangements with CCH.

My assistant, Karen Harvey, was, as always, most helpful both in producing my material and in internal team administrative matters.

Hugh MacKinnon, National Managing Partner of Bennett Jones LLP, was immensely encouraging of this project, and both he and Jim Smeltzer, Managing Partner of the Calgary Office, assisted in identifying and supporting the team throughout.

I also acknowledge Margot Priest and Hartley R. Nathan, Q.C., co-authors of the second edition of this book. This third edition builds on the organizational and substantive foundations that they provided.

It was a pleasure to deal with Simon Bossick and his team at CCH.

To all of these people, I am most grateful. Thank you.

I N T R O D U C T I O N

Since the second edition of this book was published in 2002, there has been an enormous focus on corporate governance. The corporate failings and scandals that occurred in the United States and Canada produced a veritable landslide of views, writings, legislation, regulation, guidelines, measurement scorecards, and shareholder and media interest. The volume of this material has created great difficulty for those on the front lines. As a director or as someone who may be called upon to advise directors, it is difficult to keep up with so much new and relevant information. More importantly, it is becoming increasingly difficult to know and to advise upon what to do in particular situations.

This book attempts to respond to these challenges. It is a snapshot (as of the summer of 2006) of a great deal of the material that bears upon corporate governance today. In many cases, the actual material is presented in the book; in others, we offer specific references so that the material may be accessed conveniently. The book attempts to provide practical guidance about what to do in a variety of situations in which directors and their advisors may find themselves. The book includes actionable precedents with respect to many of the important current corporate governance topics.

The precedents and other actionable materials are drawn from products that we have created, or with which we have been involved. While we believe that these materials were useful and appropriate to the companies and boards that adopted them, they may not be appropriate in other circumstances. One of the themes of this book is that each board and each director must consider what is right for that board and that director in the context of particular and individual circumstances. Accordingly, none of the

materials should be regarded as suitable for adoption without further consideration.

While the authors believe that what we say is legally correct and that we are offering sound advice, the material does not constitute legal opinions and it is not intended to be a comprehensive treatise. We have provided supporting references where we feel that they will be helpful to the reader, and we have included a bibliography that can take the reader to more detailed sources as desired.

In order to make this a practical and advisory book, we have attempted to make our material accessible in two ways. The book may be read cover to cover to provide an overview of currently relevant corporate governance information. We have also attempted to make each chapter relatively self-contained so that the reader can go to a specific chapter to obtain information relevant to a particular matter of immediate interest. The result is that some topics are addressed in more than one place since they bear on a variety of issues.

We hope that you will find the book useful.

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September 2006

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There has never been a more exciting time to be a director of a corporation. There has never been a more challenging time to be a director of a corporation. Directors operate in a new and very changed environment. Expectations are high, and directors' actions (and inaction) are subject to observation and comment from a wide variety of interested constituencies.

This book attempts to provide guidance to directors, and to those who advise them, about the expectations that exist and the requirements and best practices that will help meet such expectations.

In general, the phrases "corporate governance" and "corporate accountability" refer to the broad functions of those who oversee a corpora-