

TERMS OF REFERENCE BOARD OF DIRECTORS

Purpose

BC Hydro is a provincial crown Corporation established by the **Hydro and Power Authority Act** (the “**Hydro Act**”). The Directors and Chair are appointed by and accountable to Government. The Corporation also falls under the jurisdiction of the provincial Government through the **Utilities Commission Act**, **Financial Administration Act** and the **Financial Information Act**.

While the **Hydro Act** allocates the responsibility to “*manage the affairs of the Authority or supervise the management of those affairs*” to the Board, the Board delegates to the Chief Executive Officer the responsibility for the day-to-day leadership and management of the Corporation.

Directors are stewards of the Corporation. They have the responsibility to oversee the conduct of business, supervise management and endeavor to ensure that all major issues affecting the business and affairs of the Corporation are given proper consideration. In performing its functions, the Board also considers the legitimate interests in BC Hydro held by other stakeholders including employees, suppliers, customers and communities.

In supervising the conduct of business, the Board, through the Chief Executive Officer, sets the standards of conduct for BC Hydro and ensures the safety of its operations.

Procedures and Organization

The Board operates by delegating to management certain of its authorities, including spending authorizations, and by reserving certain powers to itself. Current approval authority levels are outlined at Tab 36.

The Board retains responsibility for managing its own affairs including the responsibility to:

- a) Annually review, in conjunction with the Chief Executive Officer, the skills and experience represented on the Board in light of the strategic direction of the Corporation, for the purpose of recommending the criteria Government should consider when appointing Directors.
- b) Make recommendations to the Chair and to Government regarding the criteria it should consider in making appointments to the Board.
- c) On the recommendation of the Chair, appoint, determine the composition of, and set the mandate for, Board Committees.
- d) Implement an appropriate process for assessing the effectiveness of Board governance, Committees and the contribution of Directors.
- e) Assume responsibility for the Corporation’s corporate governance practices and ensure they meet the needs of Government, the Corporation, and the public.

The Board of Directors has specific responsibility for environmental matters that have a bearing on the business of BC Hydro. On 23 May 2008, the Board adopted a standard that sets out these roles and responsibilities. In addition, certain environmental responsibilities were delegated by the Board of Directors to the Chief Executive Officer. Please refer to Tab 5.

Duties and Responsibilities

Commercial Interests and Public Policy

The shareholders of a commercial enterprise elect a Board of Directors to represent their ownership interests. In contrast, Government, as the representative of the public at large, is the sole shareholder of a crown corporation and Cabinet has responsibility for appointing suitable Directors to govern that Corporation. In its representative capacity, Cabinet must ensure that the business affairs of its crown corporations are conducted in the public interest.

The positioning of a crown corporation raises unique challenges for its governance. Commercial crown corporations such as BC Hydro, are governed not only by financial results but also by expectations of corporate behaviour consistent with standards that apply to the public sector.

BC Hydro applies sound business practices to manage its operations and develop corporate strategies that result in a profitable business enterprise. It is also committed to discharging the public policy responsibilities that are assigned to it by its shareholder, the Government, and agreed upon by the Corporation.

One of the major challenges of the Board and its management is to ensure the Corporation is operated in a commercial manner while fulfilling its public policy responsibilities.

Government's Mandate

Government's *Governance Framework for Crown Corporations* establishes guiding principles for the governance of its Crown agencies. The framework also identifies roles and responsibilities for the Shareholder and its Crown corporations and provides for a *Government's Letter of Expectations* (since renamed "*Mandate Letter*") to be jointly developed.

The *Mandate Letter* confirms the shared understanding of the Shareholder, represented by the Minister of Energy and Mines, and BC Hydro, on issues of corporate mandate, public policy, strategic priorities and performance expectations. The *Letter* also serves as the basis of agreement between the Shareholder and BC Hydro on those issues, priorities and expectations and will, as a result, be utilized in the development of BC Hydro's annual Service Plan.

All Directors are required to sign the *Mandate Letter*. The current *Letter*, which is issued annually and amended as required, is located at Tab 33.

The following subsections describe various areas of the Board's responsibilities, and specify the role of the Board, to be exercised either directly or through its Committees, in respect of those responsibilities:

Selection of Management

The Board has the responsibility to:

- a) Appoint and replace the Chief Executive Officer and monitor and evaluate the Chief Executive Officer's performance.
- b) Approve the Chief Executive Officer's compensation.
- c) Provide advice and counsel to the Chief Executive Officer in the execution of the Chief Executive Officer's duties.
- d) Ensure plans are made for management succession and development.

Strategy Determination

The Board has the responsibility to:

- a) Annually review with management, and approve the Corporation's strategic business plan, taking into consideration the public policy responsibilities of the Corporation.
- b) Safeguard the Corporation's resources by approving annual operating and capital budgets, and major new project proposals.

Monitoring and Acting

The Board has the responsibility to:

- a) Monitor BC Hydro's progress towards the objectives set in the corporate strategic business plan, operating and capital plans, and to revise and alter its direction through management in light of changing circumstances.
- b) Direct management to ensure that systems are in place for maintaining the integrity of and implementing BC Hydro's internal financial control and management information systems.

Risk Oversight

The Board is responsible for risk oversight across the entire portfolio of activities and risks engaged in by the Corporation, including understanding the relationship between the principal risks. With input from management, the Board identifies principal risks to BC Hydro achieving its objectives, endorses management's recommendations around risk tolerance and ensures that systems are in place to manage and monitor those risks. Through its review of reports from the Chief Risk Officer and with input from the Board Committees, the Board of Directors will assess the appropriateness and consistent application of systems to manage principal risks within the Corporation and ensure that key matters of risk are brought forward for action by the Board and management.

The Chief Executive Officer of the Corporation, with advice from the Chief Risk Officer is responsible for establishing processes, procedures and mechanisms by which key matters of risk are identified, and ensuring that strategies are developed to manage such risks.

The Board will receive quarterly reports from the Chief Risk Officer, and from other areas of the Corporation as it considers appropriate or timely.

Policies and Procedures

The Board has the responsibility to:

- a) Approve and monitor, through management, compliance with all significant policies and procedures that govern BC Hydro's operations.
- b) Approve and act as the guardian of BC Hydro's corporate values.
- c) Direct management to implement systems designed to ensure that BC Hydro operates at all times within applicable laws and regulations, and to the highest ethical and moral standards.

Corporate Communications

The Board must pay particular attention to the fact that it operates within a highly public environment. The actions of the Corporation have a significant public impact and there is a need to ensure communications with the public and Government are effective and appropriate.

The Board has the responsibility to:

- a) Ensure the Corporation has in place a policy to enable management and the Board to communicate effectively with the Government, stakeholders and the public generally.

- b) Ensure the financial performance of BC Hydro is adequately and promptly reported to the Government, the public, security holders and regulators.
- c) Ensure financial results are reported fairly and in accordance with generally accepted accounting principles.
- d) Ensure timely reporting of any other developments that have a significant and material effect on the performance of BC Hydro.
- e) Report annually to the Government on the Board's stewardship for the preceding year through its Annual Report.

General Legal Obligations of the Board of Directors

The Board is responsible for directing management to ensure legal requirements have been met, and documents and records have been properly prepared, approved and maintained.

Legal duties are imposed on Directors. The basic legal duties are imposed at common law. Directors are under a fiduciary¹ duty to BC Hydro to carry out the duties of their office:

- Honestly and in good faith.
- In the best interests of BC Hydro.
- With the care, diligence, and skill of a reasonably prudent person.

Directors have specific statutory duties and obligations under employment, environmental and financial reporting law as well as under the withholding provisions of taxation law.

¹ without being legally precise, a fiduciary duty is duty to act for the benefit of another, like a trustee.

DUTIES AND OBLIGATIONS OF BC HYDRO DIRECTORS

Introduction

BC Hydro is a statutory corporation created pursuant to the *Hydro and Power Authority Act* (“*Hydro Act*”) and is an unusual Corporation in a number of respects. Unlike an ordinary commercial corporation, there is no person who owns shares in BC Hydro. Section 2 of the *Hydro Act* says merely that BC Hydro is a Corporation “consisting of persons who are appointed as Directors and who hold office” as provided in that Act. Under section 4(1) of the *Hydro Act*, the Directors of BC Hydro are appointed by the Lieutenant Governor in Council (Cabinet) and hold office during pleasure - which means that they can be dismissed by Cabinet at any time.

Many important aspects of BC Hydro’s business are highly regulated. Amongst other things, the Corporation is subject to the jurisdiction of the British Columbia Utilities Commission (BCUC) under the *Utilities Commission Act*, and to the jurisdiction of the provincial Government under the *Financial Administration Act* and the *Financial Information Act*. Moreover, Section 3(1) of the *Hydro Act* declares the Corporation to be “for all its purposes an agent of the government and its powers may be exercised only as an agent of the government”.

BC Hydro’s business and affairs touch in distinctive ways upon important facets of the public and economic policy of the Province and its Government. The Corporation is an influential economic institution. It has powers of expropriation, its activities raise environmental issues that have a high public profile, it is an important employer and it is a significant participant in the international money markets, although formally its borrowings are undertaken through and in the name of the Province.

Simply put, BC Hydro does not fit neatly into any category of corporation. It is a hybrid, partaking in some respects of the characteristics of ordinary commercial corporations, but in other respects differing significantly from them.

The following discussion is intended to provide a general description of the powers, duties and obligations for Directors of BC Hydro. This document forms part of BC Hydro's governance framework defining the roles and responsibilities of the Board and Management and the processes to be used for ensuring good governance at BC Hydro.

Duties of Directors

It is not surprising that, with few exceptions, the provisions of the British Columbia *Business Corporations Act* (the successor to the *Company Act*) which allocate rights and responsibilities among Directors and shareholders of ordinary commercial corporations and define the duties of Directors, do not apply to BC Hydro.

Unlike most British Columbia corporations, BC Hydro was not created or registered under the *Business Corporations Act*. Also, by virtue of Section 32 of the *Hydro Act*, most of the *Business Corporations Act*, and most other Provincial legislation, is not applicable to the Corporation.

The body of law that has grown up around Directors of ordinary commercial corporations is however useful in providing initial guidance on the powers, duties and obligations of BC Hydro Directors. Section 5 of the *Hydro Act* (in which BC Hydro is referred to as “the authority”) provides that the Directors of BC Hydro:

“must manage the affairs of the authority or supervise the management of those affairs, and may

- a) exercise the powers conferred upon them under this Act;
- b) exercise the powers of the authority on behalf of the authority; and
- c) delegate the exercise or performance of a power or duty conferred or imposed on them to anyone employed by the authority.”

This provision is central. The Directors have a statutory duty either to manage BC Hydro’s affairs themselves, or to supervise management by others. This duty cannot be avoided and, to put it in perspective, is consistent with the standard requirement that Directors be able to demonstrate “due diligence” if prosecuted for statutory offences, such as those under various environmental laws.

The nature, size and diversity of BC Hydro combine to make it practically impossible for the Directors to directly manage the affairs of the Corporation. It is both unavoidable and necessary for them to delegate significant management responsibilities to others. Section 10 of the *Hydro Act* permits the Corporation to appoint a secretary, executive officers, and other employees and consultants, to define their duties, and to “provide a system of organization to establish responsibility and promote efficiency”.

The general duty to supervise management means that each Director has an obligation to be satisfied that:

- a) in all circumstances, the arrangements made for the actual management of BC Hydro’s affairs are reasonable;
- b) those arrangements are consistent with the *Hydro Act* and any other applicable legal requirement;
- c) actual management and operational responsibility is entrusted to persons who are competent and trustworthy;
- d) the Directors are kept adequately and regularly informed concerning performance of management functions; and
- e) when significant legal non-compliance matters come to their attention, the Directors follow up to ensure corrective action is taken.

Involvement of Directors in day-to-day affairs

To properly discharge the obligations noted above with respect to the duty to supervise management, a Director must be fully informed of the full scope of the activities of the Corporation, including details of its financial affairs and the way in which it interacts with relevant departments of Government and regulatory bodies. While it is reasonable for Directors to assume that appropriate arrangements exist for the conduct of BC Hydro’s affairs by competent and trustworthy officers and employees, these arrangements, together with the Board governance framework, should be continuously reviewed.

A Director of BC Hydro is not bound to give continuous attention to BC Hydro’s affairs. The duties of a Director are of an intermittent nature. They are to be performed at periodic meetings of the Board and of any Board Committees to which the Director may be appointed. The functions of Directors are to be exercised at meetings of Directors, or in such other forums as the Board determines to be appropriate. Individual Directors have neither the responsibility nor the authority to give detailed instructions to officers or employees of the Corporation on how they perform their job functions or how they are to act in a particular circumstance.

Reliance on Management

A Director is entitled to trust senior management, and to rely upon them, unless there are grounds for not doing so. Reliance upon information, opinions, and reports prepared or presented by others is entirely appropriate, unless there are reasonable grounds for believing that such reliance is misplaced. There may also be occasions on which it is prudent for the Board or a Board Committee to retain competent outside advisors.

The same principles apply to Directors in their capacity as Committee members. A Director who knows, or has reason to suspect that some person, information, or opinion should not be relied upon, has an obligation to bring that knowledge or suspicion to the attention of the other Board or Committee members.

Committees of the Board of Directors

A Director who is a member of a Committee should approach the work of the Committee in exactly the same fashion as the work of the Board is approached. Committees of the Board, and individual Directors who are delegated specific responsibility or oversight by the Board for some area of BC Hydro's business or operations, should recognize that the Board is placing particular reliance on them with respect to that area and, as a result, the members of such Committees and such individual Directors have additional responsibility to be diligent.

If there are reasonable grounds to believe that the sources of the Committee's or individual Director's information are competent and reliable, and the procedures by which that information was obtained are thorough and reasonable, such information may be relied upon.

A Director who has special competence in a particular aspect of the operations of BC Hydro has an obligation to take a special interest in those operations and to assist the other Directors to evaluate the conduct of them. Directors with special knowledge or insight are bound to use that knowledge to the advantage of the Board as a whole and, in this way, in the best interests of the Corporation. (See *Director's Duty of Care*)

Obligations of Directors

Directors of BC Hydro have a duty to exercise the care, diligence and skill of a reasonably prudent person. The duty of care, diligence and skill is an individual obligation and must be discharged by each Director.

In general, the powers of the Directors are exercised as a Board at meetings by means of resolutions. They are not exercised individually and separately. Individual Directors and sub-groups of the Directors cannot exercise the powers of the Board unless specifically authorized or constituted as a Committee by Board resolution. It is considered that the best interests of a corporation are more likely to be promoted by collective deliberation and an exchange of views at a meeting, than if meetings are not held.

Individual Directors do not have a legal duty to attend every Board or Committee meeting in the sense that failure to attend a particular meeting would be a breach of duty. Directors do, however, have a general obligation to attend meetings with sufficient regularity to ensure that they are able to discharge their obligation, as part of the collective, to supervise management.

Directors as Fiduciaries

The Directors of BC Hydro, no less than the Directors of any other corporation, occupy a “fiduciary” position. Perhaps the best known example of a fiduciary position is that of the trustee of a trust. The exercise of the powers of fiduciaries, including Directors, is subject to certain limitations. These are conveniently summarized in a provision of *the Business Corporations Act* which provides that Directors must exercise their powers and perform their functions “honestly and in good faith with a view to the best interests of the company”. These principles also apply to Directors of BC Hydro.

The powers of the Directors are conferred upon them to exercise on behalf and for the benefit of BC Hydro. The Directors are legally bound to serve the interests of the Corporation.

Conflict of Interest

a) *Hydro Act requirements*

Section 7 of the *Hydro Act* provides as follows:

“A director of the authority must not, directly or indirectly,

(a) [Repealed 2001, c. 31, s. 1]

(b) have an interest in any device, appliance, machine, article, patent or patented process that is used in the generation or supply of power, or

(c) have an interest in a contract for the construction of, or doing any work on, a power plant.”

The definition of “power” as used in Section 7(b) is very broad and includes energy, light, heat, electricity and natural, manufactured or liquefied gas. The definition of “supply” also used in Section 7(b) is similarly broad and includes transmission and distribution. The definition of “power plant” used in Section 7(c) includes land, water rights, buildings, machinery, devices, appliances, furniture and equipment, vehicles, and supplies constructed, acquired, used or adapted in connection with the generation or supply of power (as broadly defined). Thus, under Section 7 of the *Hydro Act*, a Director must not directly or indirectly (e.g. through interests held for the Director by others) have an interest in any device, machine or patent, or in any contract for construction of or doing work on any facilities or assets, in either case used in connection with generation, transmission or distribution of electricity, heat, light or gas. This prohibition is absolute and if a Director, or another person on the Director’s behalf, has any interest described above, it must be divested.

Note that the prohibitions in Sections 7(b) and 7(c) likely do not apply to interests held through investments in corporations, mutual funds or other managed investments. Former Section 7(a) of the *Hydro Act*, which was repealed in 2001, did prohibit BC Hydro directors from holding, acquiring or becoming interested in any share, stock, bond, debenture or other security of a company that generates or supplies power. That provision had the effect of prohibiting directors from directly or indirectly owning shares or bonds of companies generating, transmitting or distributing light, heat, electricity or gas, arguably including ownership through mutual funds or similar managed investments. The repeal of Section 7(a) removed perhaps the most onerous statutory limitation on directors’ investments through share, bond or mutual fund ownership. However, Directors should note that the Code of Conduct continues to address investments in companies and mutual funds where a conflict of interest could arise.

b) Common law fiduciary duties

A basic legal rule applicable to all fiduciaries is that they may not enter into contracts or transactions in which they have a personal interest conflicting, or which possibly may conflict, with the interests of those with whom they are in a fiduciary relationship. This rule applies to Directors of BC Hydro in their relationship with the Corporation. All transactions with the Corporation should be avoided, whether they relate to the purchase or sale of land, the supply of professional or other services, or otherwise. Such transactions provide significant potential for embarrassment both for the Director and the Corporation, and for harm to both.

c) Code of Conduct

The *Code of Conduct* provides guidance to Directors on their expected conduct in relation to the Corporation. All Directors are required to sign an annual declaration stating that they have read the Code and agree to conduct themselves in accordance with its provisions.

In particular, the Code discusses common circumstances where Directors might find themselves in an actual or apparent conflict of interest. The Code states “Directors and Employees will perform their duties conscientiously and will not put themselves in a position in which their private interests and those of BC Hydro might be or perceived to be in conflict”.

Such conflicts may arise directly as a result of the Director’s interests or indirectly as a result of the interests of what the Code defines as “an associate” (Refer to the *Definitions* section of the *Code of Conduct*). Generally speaking, an associate includes a spouse, a close relative or a company in which the Director has an ownership interest beyond a threshold amount.

All Directors are obliged to avoid placing themselves in any situation where actual or apparent conflicts could occur. To assist Directors identify any potential conflicts of interest and discuss how to avoid them, Directors are required to meet with BC Hydro’s Code Advisor on their appointment to the Board, and at any time appropriate thereafter. In addition, Directors are required to meet with the Code Advisor annually, usually in April, to discuss the Director’s private interests and the potential for actual or apparent conflicts of interest.

The Code Advisor is an external contractor appointed by the Board of Directors and retained by the Corporation to provide confidential, independent advice to Directors and Executive Officers.

In extraordinary circumstances, and where it is clearly in BC Hydro’s best interests, the Chair may exempt a Director from the requirements of the Code.

Directors who find themselves in a conflict of interest must disclose it and must not participate in discussions, attempt to influence the discussions or vote with regard to the activity or transaction that gives rise to the conflict. The Code sets out the specific steps a Director must take to declare a conflict and avoid participation in the discussions or votes with regard to the activity or transaction giving rise to the conflict.

Duty to act honestly, in good faith and with a view to the best interests of the Corporation

Directors must exercise their powers honestly, in good faith and with a view to the best interests of the Corporation. It is the Corporation that is the beneficiary, as it were, of the fiduciary duty of the Directors.

Directors are not the delegates of any particular constituency, whether from the business community, the environmental movement, the trade union movement, consumers, or any other group. It is improper, and a breach of duty, for a Director to act, as a Director, on the instructions or in accordance with the wishes of such a group or organization, unless the Director is satisfied that so to act is consistent with the best interests of BC Hydro.

Directors are expected to exercise their own independent judgment about matters that come before them as Directors, and to devote themselves without distraction to the best interests of BC Hydro. They hold their powers in trust, not for the constituents of a group or organization, but for the Corporation. They are entitled to take account of the views and interests of other constituencies, but are not entitled to prefer those interests or views over the interests of BC Hydro. To do so would be a breach of a Director's fiduciary duties.

Neither the fact that the Directors have been appointed by Government, or the fact that they are removable by the Government at its pleasure, makes any Director a delegate of the Government.

Directors are not bound as a matter of course to act on what they think would be the wishes of the Government any more than they would be bound to act on what they think might be the wishes of any other constituency, in disregard of what they consider to be BC Hydro's best interests.

As set out in the *Terms of Reference for the Board of Directors* (Board Governance Manual, Tab 3 - *Commercial Interest and Public Policy*), BC Hydro is committed to discharging the public policy responsibilities assigned to it by Government. This commitment could conflict with the duty of Directors, discussed below, to act with a view to the best interests of the Corporation.

If Government requests BC Hydro to act in a particular manner which is lawful, but about which the Directors consider that they have insufficient information to determine whether it is in the best interests of the Corporation, the Directors have a choice. They can insist that before acting the relevant instructions be given specifically, explicitly, and in writing, and that they be accompanied by an appropriately drafted indemnity from Government against any liability that may result from having acted in breach of duty. Alternatively, they can insist that Government makes its request legally binding upon the Corporation by legislation.

Indemnification and Insurance

In relation to the above, Section 32(7)(c) of the *Hydro Act* specifically makes Division 5 of Part 5 of the *Business Corporations Act* applicable to BC Hydro. This provision permits a company to indemnify an "eligible party" (including directors, officers, former directors and former officers) against all "eligible penalties" awarded or imposed in an "eligible proceeding", and to pay, subject to certain rules, the "expenses actually and reasonably incurred by an eligible party in respect of that (eligible) proceeding".

An "eligible proceeding" is one where the "eligible party" is or may be a party or is or may be liable for or in respect of a judgment, penalty or fine, or expenses related to the proceeding.

Indemnification is prohibited by the Act if it is determined that the Director did not act honestly and in good faith with a view to the best interests of BC Hydro, or, in the case of proceedings other than civil proceedings, if the Director did not have reasonable grounds for believing his or her conduct was lawful.

BC Hydro provides its Directors, the outside Directors of its Subsidiaries, and certain officers with an Indemnity Agreement that is intended to provide protection in the event claims are made against them by third parties (Board Governance Manual, Tab 17 – *Indemnification and Insurance Coverage*).

The Indemnity Agreement attempts to further protect these individuals by providing that the indemnity still applies if the actions of the Director or officer are contrary to the above, but are made pursuant to “Directions” (defined as directions or approvals from the provincial Cabinet or the Minister charged with the administration of the *Hydro Act*). Such a provision may not, if challenged, be upheld by a court so in these circumstances Directors should seek an indemnity from Government as noted above.

BC Hydro will indemnify Directors for expenses and liabilities arising in connection with their service as Directors, whether or not they arise at law (for example, under environmental statutes) or by reason of third party claims (for example, lawsuits for personal injury or breach of contract). The indemnity is only available if:

- a) the Director acted honestly and in good faith with a view to the best interests of BC Hydro,
- b) in the case of fines or penalties, the Director had reasonable grounds for believing that his/her conduct was lawful, and
- c) the indemnity is not otherwise legally prohibited.

Director’s Duty of Care

The *Hydro Act* is silent as to the standard of care applicable to BC Hydro Directors. Since the *Business Corporations Act* does not apply to BC Hydro (except Division 5 of Part 5 dealing with Indemnification), the common law standard of care is therefore applicable. At common law, directors will satisfy their duty “if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience”. However, “a director need not exhibit in the performance of his or her duties a greater degree of skill and care than may reasonably be expected from a person of his or her knowledge and experience”.

Thus, the standard of care that a Director must discharge is both objective and subjective. It is objective in the sense that the Director must perform his or her duties as would a reasonably prudent person. It is subjective in the sense that if the Director possesses specialized knowledge or skill, he or she must use such knowledge and skill when performing his or her duties in the manner that a reasonably prudent person with the same knowledge and skill would perform the same duties. So, for example, if a Director has special expertise (for example, dam safety), that Director may reasonably be expected to understand the issues and risks, and perhaps to ask more questions and to be more critical of management’s statements, than another. As a result, such a Director may find himself or herself exposed to greater scrutiny should something go wrong which should have been foreseen if the right questions were asked or considerations made. Directors with special expertise, because of their expertise, would be expected to question or follow up on matters that their expertise tells them should be questioned or followed up upon.

It would be prudent for Directors with special expertise to utilize that expertise in fulfilling their Board duties, but it is important for them for there to be appropriate indemnification and D&O Insurance in place. As noted above under *Indemnification and Insurance*. BC Hydro does provide

an Indemnity Agreement to individual Directors together with D&O Insurance coverage (Board Governance Manual, Tab 17 – *Indemnification and Insurance Coverage*).

It is important to note that Directors, with or without special expertise, are generally entitled to rely on technical reports of staff and management unless they know or ought to know better for some reason. In other words, Directors must act in matters on which they know otherwise, despite staff or management assurances.

Potential Directors' liability in respect of a matter such as dam safety is not unlike Directors' liabilities for their company's environmental performance. The established concepts and practices as to environmental due diligence are therefore relevant. Typically, it is prudent for the Board and for any Director or Committee delegated an oversight function, to have in place well designed systems that clearly establish:

- a) the oversight mandate and responsibility,
- b) staff and management responsibilities generally in respect of the subject matter, including requirements/criteria for reporting to an overseeing Director, Committee and/or full Board, monitoring known risks and checking for unknown risks, and follow-up respecting corrective action requirements, and
- c) the overseeing Director's or Committee's criteria and responsibilities for reporting to the Board itself as to incidents, risks, monitoring and corrective action. Such reporting may well be a regular standing item on the full Board's agenda.

Having a system in place, and following it, tends to meet modern requirements of due diligence, thus mitigating the exposure to liability of the Directors. It is important that such a system, if put in place, be followed.

It should be noted that BC Hydro's current dam safety management system is documented in the Dam Safety Management Manual. The manual includes sections on such matters as governance, process roles and responsibilities, quality assurance, and emergency preparedness.

Statutory Liabilities

Various statutes provide for personal liability of Directors of corporations in certain circumstances, whether or not the corporation is also charged or convicted. For example, Section 121(1) of the British Columbia *Environmental Management Act* provides that "if a corporation commits an offence under this Act, an employee, officer, director or agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence whether or not the corporation is convicted".

A Director's liability for the environmental and other offences of a corporation may not be absolute. Rather, it is often subject to the legal defence known as "due diligence". The due diligence defence entitles a Director to an acquittal if the Director can show that all reasonable steps had been taken to prevent the offence from occurring, or else had reasonably believed in a mistaken set of facts which, if true, would have rendered the act or omission innocent.

What constitutes due diligence depends on the regulatory statute, the company, and the situation, but some generalizations can be made. Due diligence generally involves

- a) putting in place a system for preventing non-compliance,
- b) training employees in applying the system,
- c) documenting training, standard operating procedures, policies and so on,
- d) monitoring and adjusting the system,

- e) ensuring that adequate authority is given to the appropriate employees, and planning remedial action in case the system fails at any point.

Confidentiality

Information supplied to Directors of BC Hydro about its business and affairs is supplied to them in their capacity as Directors, for the purposes of permitting them to exercise their powers and perform their duties. It is improper for a Director to use or disclose information received as such for any other purpose, whether for personal benefit, or that of others, unless the information has been generally disclosed to the public. It is also improper to disclose to third parties the content of Board discussions.

Post Term Activities

Public sector entities must make sure that the decisions they make reflect the priorities and values of the government and citizens of BC. Integrity is a core value of BC Hydro and maintenance of the priorities and values of BC Hydro and the government through accountability, impartiality, and integrity are vital to the continued operation of the organization.

In support of these values, Directors are required to maintain all confidences after their term of office as a BC Hydro Director to avoid placing themselves in a conflict of interest, harming BC Hydro or providing a future employer or other third party with an unfair advantage.

Some of Directors' fiduciary duties to BC Hydro, including the obligation to exercise powers honestly, in good faith and with a view to the best interests of the Corporation, do not necessarily continue beyond the Director's term. Activities that would pose a conflict of interest during a Director's term – including because of competing obligations of candour, confidentiality and acting in an entity's best interests – are unlikely to be precluded post-term. However, the obligation Directors have to keep confidential and not disclose non-public information about BC Hydro's business and affairs that was supplied to them in their capacity as Directors continues indefinitely.

Directors also may not make use of non-public information received in the course of their term as Director for personal or third party benefit after the end of their term. This obligation is consistent with BC Hydro's interest in maintaining its reputation and protecting the integrity of its public processes, including competitive procurement processes.

In addition, for 24 months after the end of a BC Hydro Director's term, the former Director must disclose to the Corporate Secretary all BC Hydro Business Relationships with an Outside Entity in which the former Director performs Work or in which the former Director has a significant financial or personal interest.

For the purpose of these provisions:

“BC Hydro Business Relationship” means any transaction with terms that are the subject of negotiation with BC Hydro or the performance of which involve the exercise of BC Hydro's discretion (including competitive tenders, Requests for Proposals, direct award contracts and so on).

“Outside Entity” means a person or entity other than a BC government public sector entity.

“Work” services provided to an Outside Entity as an employee, sole proprietor, partner, consultant, advisor, or board member.

The disclosure of an anticipated Business Relationship will not prevent the former Director from engaging in Work for an Outside Entity. The purpose of the disclosure is to enable BC Hydro to identify and take steps to prevent or address any unfair competitive advantage or reasonable perception of bias including those within the context of public procurement processes.

A Director may seek an exemption from the application of these provisions through the Board Chair, or in the case of the sitting Board Chair, through the Chair of the Governance and Human Resources Committee. In making a determination on the exemption request, the Board Chair or (Chair of the Governance and Human Resources Committee) will consider, among other things:

- a) the nature of BC Hydro’s negotiations, and decisions in respect of the BC Hydro Business Relationship, and
- b) the degree to which the former Director’s anticipated involvement with an Outside Entity may be perceived or expected to give that party an unfair commercial advantage.