

# In the zone of insolvency:

1. Advising the Board
2. Dealing with customers and supplies

Ken Kraft  
30 November 2016

## Fiduciary duty of directors is to corporation as a whole

- Directors are fiduciaries of the corporation
- They have a duty to act honestly and in good faith with a view to the best interests of the corporation

## Potential personal liability for directors

- Source deductions
- HST / PST / GST
- Other taxes (e.g. Ont. – Employer's Health Tax)
- Wages (including accrued vacation pay) (6 mon / 12 mon)
- WEPP may apply **[up to \$3,900 per employee]**
- WEPP subrogated to employees
- Insurance?

## Environmental claims

- Upstream (Marathon Pulp)
- D&O (North Star)
- Insurance?

## Foreign subs?

- US – WARN Act
- UK – wrongful trading
- Continental Europe – Criminal exposure (e.g. Germany – 21 days once insolvent)

## Solvency test

- Cash Flow
- Balance Sheet
- Special CCAA test
- Are we dealing with a corporate group?
- Board may need independent counsel

## Supplier / Vendor considerations

- Pressure for payment
- Reviewable transactions
- Preferences
- Fraudulent conveyances
- Review periods

## QUESTIONS?

## Speaker bio



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A member of our [Banking and Finance](#) group, Kenneth Kraft focuses his practice on insolvency and finance, both secured and unsecured. Acting for lenders as well as borrowers, his expertise encompasses receiverships, informal work-outs and all manner of restructurings under the *Companies' Creditors Arrangement Act* and the *Bankruptcy and Insolvency Act*. He is recommended as a leading insolvency practitioner for Canada in the *Restructuring and Insolvency Handbook of the Global Counsel Handbook* series.

Ken has written numerous articles and case comments, and has spoken at various professional conferences both in Canada and abroad.

Outside of the office, he has served as a director of Credit Counselling Services of Toronto (now Credit Canada), a non-profit charity organization, former co-chair of the board of directors of the Toronto Heschel School, and former vice-president of the Canadian Friends of Haifa University. He is also a former chairman of the board of the Beth David B'nai Israel Beth Am synagogue.

- Ken is listed as a leading lawyer in restructuring and insolvency in editions of *Chambers Global: The World's Leading Lawyers for Business* since 2010. In 2009, he was one of just two Canadian lawyers nominated for the *BTI Client Service All-Star Team for Law Firms*, which honours superior client service delivered to corporate counsel at Fortune 1000 and other large companies. In 2011, Ken was recognized for his expertise in Insolvency & Restructuring Law in Corporate INTL Magazines' *50 Best Lawyers in Canada* and in 2013 in the *Canadian Legal Expert Directory*.
- Ken joined Dentons Canada LLP's Toronto office in 2014 from another major Canadian firm.

30 November 2016

9

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## Thank you

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