

## COMPANY DIRECTORS AND OFFICERS CAN BE LIABLE

by Janice Mucalov, LL.B.

Directors and officers (e.g. the president, secretary or treasurer) of companies are exposed to the risk of personal liability – even if the company is small and board meetings are held around the kitchen table.

BC's *Business Corporations Act* says that directors and officers must act "honestly and in good faith with a view to the best interests of the company" and must "exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances." If you don't adhere to these standards, you could become liable for any resulting loss suffered by the company, and sometimes by its shareholders and creditors too.

The obligation to act in the best interests of the company carries with it the "fiduciary" duty to avoid conflicts of interest. For example, if you have a direct financial interest in a contract being considered by the company, the *Business Corporations Act* says you must disclose your interest to the rest of the Board of Directors and not vote on the decision whether to proceed. Otherwise, you could later be required to disgorge any profit you made.

A related fiduciary duty is to avoid making personal use of any business or investment opportunities that come to your notice as a director. Even if the company couldn't directly profit, it's risky for you to take advantage of these opportunities unless appropriate resolutions are obtained.

Directors may also be liable for breaches by the company of its statutory obligations. For example, under the provincial *Employment Standards Act*, directors and officers are personally liable for up to two months' of unpaid wages or overtime, vacation or severance pay owed to any employee. And if the company hasn't deducted and remitted income tax from employees' salaries, the federal *Income Tax Act* says that the directors and officers are on the hook for paying this, along with interest and penalties.

Directors and deemed directors are also liable under BC's *Social Service Tax Act*, *Hotel Room Tax Act*, *Motor Fuel Tax Act* and *Tobacco Tax Act* for a company's unpaid sales and other consumption tax debts. Note that it's not just directors, but also deemed directors, who can be liable here – a deemed director being anyone who performs the functions of a director, even though they haven't technically been appointed a director.

If a claim is made against you, you may be able to avoid liability if you took reasonable steps to cause the company to observe and perform its obligations. And you're typically not liable for any decision of the directors that you formally dissented to.

There are other things you can do to minimize your exposure. The company can buy directors' liability insurance – but this can be quite expensive and may have significant gaps in coverage. Also, if you end up paying a fine or settling a lawsuit against you, the *Business Corporations Act* allows the company to indemnify or reimburse you, but only if you were acting honestly, in good faith and in the reasonable belief that you were acting lawfully.

Given the personal exposure you face as a director or officer of a company, you should check out the company and its management carefully before agreeing to serve. If you decide to accept a directorship, don't rely exclusively on others to oversee the company's affairs. And if you perform some of the functions of a director (even though you aren't one), try to have the company's directors and officers' liability insurance policy endorsed to include "deemed directors."

***This column has been written with the assistance of MILNE SELKIRK. The column provides information only and must not be relied on for legal advice. Please contact James A. MacLean of MILNE SELKIRK for legal advice concerning your particular case.***

Lawyer Janice Mucalov has authored several popular law books and writes about legal affairs for a variety of publications. "You and the Law" is a registered trade-mark. Copyright by Janice Mucalov.



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