

I Direct – A Bit About Director's Liability

When setting up a company, everyone wants to be named as a director. For the most part, it makes sense because directors have the power to make all decisions related to the operation of the company. With having control however, comes significant responsibility that not all people raising their hands for directorship may be aware. And when it comes to running a family business, it may be better to name only one spouse or member of the family as a director to safeguard personal assets. This is especially the case when the other family members are not actively involved in managing the company's affairs.

Directors assume personal liability for their decisions and actions in managing the company under the *Business Corporations Act*. That personal liability comes with financial consequences owed to the company, where the directors authorize the company to acquire shares or payout any commission, dividend or shareholder that results in the company's insolvency or inability to pay its liabilities. Directors may not authorize the indemnification of costs incurred by a director for any claim, if the director did not act honestly and in good faith for the best interests of the company. In each instance, the directors are jointly and severally liable for the amounts improperly paid out by the company.

There are several mechanisms in place for the protection of company employees. The *Business Corporations Act* makes directors jointly and severally liable for up to six (6) months of employee wages, including vacation pay, where the corporation is sued and has not paid the debt or has become insolvent. Under the federal and provincial *Income Tax Acts*, directors are liable for employee source deductions of income tax, employment insurance and Canada Pension Plan premiums withheld from employees and not remitted to the Canada Revenue Agency. Director's liability extends to any interest and penalties imposed by CRA.

The Ministry of Labour has increasingly imposed fines against and imprisonment of directors for wanton disregard of employment standards and workplace safety legislation. Regardless of whether the company has been charged in connection with an offence under the legislation, the Ministry may charge any director who knowingly authorized, permitted or acquiesced to the company's commission of the offence. The same liability is imposed under environmental legislation arising from the failure to implement proper pollution control measures. In managing the operations of the company, the directors are held responsible for those decisions that ignore the company's duty to be compliant with protective laws.

Directors can also find themselves personally responsible for unpaid corporate taxes and unremitted GST, including any penalties and interest imposed by CRA. Liability extends to the period during which the director held the position and taxes were not paid by the company. The only defence available is if the director can establish she made a *bona fide* effort to ensure the company complied with its obligations. CRA will otherwise seek recovery of taxes from all directors named on the public corporate registry, regardless of how actively involved they may have been in the operation of the business.

Reading between the lines, a directorship position means the person assumes significant personal liability if the company fails to comply with its legal obligations. For smaller family businesses, the owners should seriously consider having only one person named as a director to limit the personal liability of the family. While being named as director of a company may be important and required in certain instances, caution should be exercised by those scrambling for the position. It is always best to consult with a lawyer when setting up and restructuring any company to understand the benefits and consequences of being a director. For these and other company related issues, contact your Chief Loophole Advisor at moira@wallacelaw.ca.