

# **Rationalizing Non-Statutory Liability of Directors and Officers Project**

## **Background**

BCLI is carrying out a project to rationalize and clarify the law surrounding the legal responsibility of directors and officers of companies under the common law of torts.

### **Overview of the Project**

#### **Project Scope**

This project concerns liabilities of directors and officers towards third parties that may arise concurrently with the liability of their companies when the company has committed a tort. Torts are non-contractual civil wrongs. They include negligence, nuisance, trespass, defamation (libel and slander), and interference with contractual relations, to name a few categories of torts under common law.

Common law is non-statutory, meaning that statutes (legislation) are not its source. The sources of common law are judicial decisions. The project does not concern liabilities under policy-based statutory provisions like the ones that impose personal liability on directors and officers for unmet corporate obligations, such as unpaid wages, failure to remit tax deductions, or environmental reclamation. Likewise, the project does not concern the now largely statutory duty of care, diligence and skill owed by directors and officers towards their own companies.

#### **What is the nature of the problem?**

The law regarding when corporate directors and officers may become personally liable to third parties for tortious acts or omissions of their companies is unsettled in Canada because of conflicting lines of judicial decisions on that subject. Lack of clarity in the law creates room for individual directors and officers to be sued as co-defendants of the corporation on tenuous grounds. Directors and officers of companies are very often sued personally when tort claims are made against the company. The practice of routinely suing directors and officers as individuals along with the company for corporate wrongs is criticized, but it is very prevalent even though

relatively few claims against directors and officers actually result in a judgment finding them personally liable.

Why then are directors and officers sued personally on a routine basis in corporate litigation? Adding claims against individual insiders of a company allows plaintiffs to exert greater settlement pressure because the assets of the individuals are placed in jeopardy along with corporate assets. As a defendant must overcome a fairly high procedural bar in order to get a civil claim struck out at the pre-trial stage, uncertainty about the legal principles that apply to the liability of directors and officers provides an incentive to sue them along with the company for tactical reasons even when the grounds for personal liability are tenuous or non-existent.

The Supreme Court of Canada has declined repeatedly to hear appeals that provided the opportunity to resolve the conflicting case law in this area. In 2024 an Alberta court summed up the situation by stating “The Canadian law concerning the liability of corporate agents in tort has been a mess for at least a quarter century.”<sup>1</sup>

### **Why is this bad?**

The unsatisfactory state of the law leads to routine naming of individual directors and officers as defendants for tactical reasons. This in turn exposes individuals to expense and reputational damage without legal justification. It undermines the concept of the modern corporation as a legal entity with limited liability that is separate from the individual people who manage and work within it. Weakening the principles of separate legal personality and limited liability tends towards making directors and senior corporate officers *de facto* guarantors of the corporation’s obligations to third parties.

Divergent lines of case law lead to inconsistent outcomes in litigation. The unsettled state of the law means that providers of liability insurance for directors and officers, known as “D&O coverage,” are at a disadvantage in assessing the level of risk exposure for corporate insiders. This will naturally have a tendency to raise D&O coverage premiums. Companies must purchase this insurance as a practical reality to get people with business acumen to serve on corporate boards. The increased cost will ultimately be passed on to end users of the company’s product or services.

Increasing the number of parties unnecessarily adds to the cost and complexity of civil litigation and takes up a larger amount of court time than a case otherwise would, because the court must deal with the allegations against each defendant.

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<sup>1</sup> *Axiom Foreign Exchange international v. Rudiger Marketing Ltd.*, 2024 ABKB 224 at para. 67.

## Goals of the Project

The goal of the project is to overcome the conflicts and uncertainty in the existing case law by developing recommendations for just, balanced, practical, and coherent principles regarding the liability of directors and officers.

The intention is for recommendations to take a form that could be implemented either by legislation or by the process of the common law, namely by courts adopting and applying them in new cases as they arise.

## Project Committee

BCLI is conducting this project with the assistance of a committee whose members have volunteered their time and expertise. The members of the Project Committee are:

John Smith - Chair  
*Barrister and Solicitor*  
*Lawson Lundell LLP*

Joost Blom, K.C.  
*Professor Emeritus*  
*Peter A. Allard Faculty of Law,*  
*University of British Columbia*

Ryan Darby  
*Barrister and Solicitor*  
*Whitelaw Twining*

Brian Hiebert  
*Barrister and Solicitor*  
*DLA Piper (Canada) LLP*

Julia Lawn\* (*until March 2025*)  
*(Formerly) Barrister and Solicitor*  
*Nathanson Schachter & Thompson LLP*

Glynnis Morgan  
*Barrister and Solicitor*  
*McCarthy Tetrault LLP*

Carey Veinotte  
*Barrister and Solicitor*  
*Cassels Brock & Blackwell LLP*

\* Ms. Lawn was appointed to the British Columbia Supreme Court in March 2025.

## Our Supporter

This project is made possible with the financial support of the Ministry of Attorney General for British Columbia.

## **Project Timeline**

This project commenced in mid-2024 and will conclude with the issuance of a law reform report in early 2026. One or more consultative documents may be issued in the interim.

## **About the British Columbia Law Institute**

The British Columbia Law Institute has been undertaking independent law reform projects in British Columbia to develop just and innovative solutions and increase access to justice since 1997. We work to promote the clarification and simplification of the law and its adaptation to modern social needs, promote improvement of the administration of justice and respect for the rule of law, and promote and carry out scholarly legal research.

## **Contact**

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