

Non-Statutory Liability of Directors and Officers

Summary of Consultation Paper



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Ministry of
Attorney General

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This is a summary of the *Consultation Paper on Non-Statutory Liability of Directors and Officers* (“the consultation paper”) published by the British Columbia Law Institute (BCLI) in November 2025.

You can find and download the full consultation paper at: <https://www.bcli.org/director-liability/>.

BCLI is an independent not-for-profit law reform agency. BCLI’s recommendations for improving the law do not have official status, but they can influence legislation and policymaking. Courts refer to BCLI’s reports and other publications as well.

Before BCLI makes recommendations on a law reform issue, it usually puts them forward as tentative recommendations in a document like the consultation paper that explains the reasons behind them and invites feedback from stakeholders and the general public. Then BCLI considers the feedback in forming its final recommendations on the issue. BCLI puts its final recommendations in a report that it makes publicly available on its website.

BCLI has published the consultation paper to get feedback on some tentative recommendations about a problem with the present state of the law. BCLI is asking for feedback by December 31, 2025. See “How to Respond to the Consultation Paper” at the end of this summary.

The Problem

The consultation paper concerns personal liability of directors and officers under the law of torts. A tort is a civil wrong. Some typical torts are negligence, fraud, trespass, and nuisance. A person who commits a tort may be adjudged liable to pay damages (compensation in the form of money) to the person who has suffered harm. Tort law is based on case law instead of statutes (legislation). This is why the title refers to “*non-statutory*” liability.

The law of torts is part of the common law, which applies in all provinces and territories of Canada apart from Québec. Québec has a different system of law.

The case law on when directors and officers (senior executives) of a corporation may be personally liable if the corporation commits a tort is unclear and unsettled. As a result, directors and officers are frequently sued together with the corporation even when the grounds for holding them personally liable for the harm the corporation is alleged to have

caused are very weak or nonexistent. The reason why this is done is that even though few claims made against individual directors and officers actually succeed if they get to the trial stage, the risk exposure from being named as a co-defendant in the lawsuit can create pressure on the directors or officers to settle the lawsuit against the corporation and themselves.

Among the effects of the confused state of the law is to drive up the cost of directors' and officers' insurance. Another is to undermine the distinction in law between a corporation and the people associated with it. A third is the potential to create a "liability chill." If directors and officers think they need to continually look over their shoulders to avoid personal liability, they will not be able to make practical decisions or fulfil their roles effectively.

The problem primarily affects directors and officers of *business* corporations. While the legal duties and obligations of directors and officers of societies and other incorporated not-for-profit organizations are practically the same as those of directors and officers of a business corporation, and in theory the same principles of liability apply to them, not-for-profit directors and officers are very rarely sued personally because of something their organizations have done or not done.

Two Lines of Case Law Seeming to be in Conflict

There are two main lines of case law in Canada outside Québec on when directors and officers are personally liable to a third party (someone outside the corporation) because of a tort for which the corporation is also liable.

One line flows from a case called *ScotiaMcLeod*. It holds that as long as directors act honestly within their authority with a view to the best interests of the corporation, they are not personally liable for harm the corporation causes unless their own acts are "themselves tortious" or "exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own." In other words, no personal liability unless the director or officer personally commits a tort or acts outside that role to further an interest separate from the company's interests.

The second line of case law flows from a case called *ADGA Systems*. It holds that directors and officers of a corporation are personally liable for tortious (harm-causing) acts and decisions, even if they intended in good faith to act in the best interests of the corporation. The *ADGA Systems* line obviously allows for personal liability in a much greater range of circumstances.

Both lines of authority are followed by courts in the common law provinces and territories, resulting in much confusion and unpredictability.

Both *ScotiaMcLeod* and *ADGA Systems* Approaches Are Unsatisfactory

BCLI's Project Committee on Non-Statutory Liability of Directors and Officers rejects both the *ScotiaMcLeod* and *ADGA Systems* approaches as representing two extremes. The *ScotiaMcLeod* approach is not clear enough as to what conduct on the part of directors and officers might amount to "making the act or conduct complained of their own." It does not promote good corporate decision-making and governance because it does not discourage conduct that serves the narrow interests of the corporation but recklessly disregards the rights and interests of third parties.

The *ADGA Systems* approach, on the other hand, allows for personal liability to go hand-in-hand with corporate liability in nearly all cases, regardless of whether directors and officers have acted in good faith in the best interests of the corporation.

What BCLI's Project Committee is Recommending

BCLI's Project Committee has come up with a set of 9 tentative recommendations outlining an approach the Project Committee believes courts should apply in deciding cases where directors and officers are sued along with the corporation for a tort the corporation is alleged to have committed. The Project Committee believes the tentative recommendations are in keeping with existing principles of tort and corporation law. As such, they would not require legislation to be put into effect and could simply be applied by courts.

The Project Committee thinks the tentative recommendations cut through the confusion that has built up in the case law and amount to a just balance between fairness to victims of corporate torts and the realities of responsible decision-making in corporations. The consultation paper explains the reasons behind all 9 tentative recommendations.

This is a paraphrased description of the effect the tentative recommendations would have:

The fact that directors and officers are in a position to control what the corporation does must not be treated as a reason in itself to hold them personally liable for harm done by the corporation.

At the same time, the mere fact that directors and officers fulfil their legal duty to act honestly in good faith with a view to the best interests of the corporation should not be a

complete defence that would prevent them from becoming personally liable to a third party outside the corporation who is harmed by the corporation.

Directors and officers should not be held personally liable only because they authorized or directed a lawful activity by the corporation, or what they reasonably believed to be a lawful activity, and the corporation committed a tort in carrying out the activity.

If acts or omissions of a director or officer would amount to a tort whether or not the corporation is also liable, or if the director or officer deliberately causes the corporation to commit a tort, then the director or officer should be found personally liable to a third party who is harmed as a result.

A director or officer should not be found liable for a tort unless the director's or officer's conduct met the ingredients (required elements) of that tort.

When a third party alleges negligence against a director or officer as well as against the corporation, a finding by the court that the corporation owed a duty of care to the third party (one of the prerequisites for liability in a negligence case) must *not* be taken to mean, without more, that the director or officer individually owed a duty of care to the third party. The court must make a separate determination whether the director or officer personally owed a duty of care towards the third party.

In making that separate determination, the court must take into account the existence of the corporation and its role in the circumstances leading to the lawsuit, and decide in light of those factors whether any relationship of proximity could have existed between the individual director or officer and the third party from which a duty of care could arise.

Even if a court determines that a director or officer could be found to have owed a duty of care towards the third party because the prerequisites for finding a duty of care (i.e., a proximate relationship between the parties and reasonable foreseeability of harm) were present, the court may still consider the economic and social importance of corporations as a "residual policy factor" and ask itself whether finding a personal duty of care was owed would have negative implications for the effectiveness and usefulness of corporations. If so, the court would then have to decide whether those negative implications are serious enough to warrant not making a finding that an individual duty of care was owed.

Another Issue: Special Protection Against Civil Liability for Directors and Officers in the Not-for-Profit Sector

The consultation paper discusses arguments for and against giving directors and officers of societies and other not-for-profit organizations special protection against personal liability. The consultation paper does not take a position on this issue because the Project Committee thinks the tentative recommendations would provide adequate and fair protection against legally weak and unfounded claims to directors and officers of both business and not-for-profit corporations. It is also very unusual for non-for-profit directors and officers to be sued personally by third parties. Nevertheless, the consultation paper invites readers to provide their views on this issue as well.

How to Respond to the Consultation Paper

BCLI and its Project Committee want to hear from you. You can respond to the consultation paper in one of two ways:

by email: consultations@bcli.org

by regular mail: British Columbia Law Institute
1822 East Mall, UBC
Vancouver, BC V6T 1Z1

If you wish your response to be considered by us as we prepare our report, we must receive it by **31 December 2025**.