



FILLMORE RILEY REPORT

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Employers' Vicarious Liability

◆ Kerri K. Tymchuk

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For many employers, the concept of vicarious liability may appear an unreasonable one that effectively imposes on them obligations similar to those of an involuntary insurer.

Recently, the Supreme Court of Canada has focused the concept of vicarious liability, thereby providing a better understanding of employers' responsibilities.

In determining whether an employer is vicariously liable for an employee's unauthorized act, the fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify such a finding. Vicarious liability generally is appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that occurs as a result, even if unrelated to the employer's desires. In those circumstances, vicarious liability will serve the broader policy goals of deterrence and the availability of an adequate and just remedy. Incidental connections to the employment enterprise, like time and place, will not suffice.

To determine whether there is a sufficient connection between the employer's creation or enhancement of the risk and the wrongful act in question, a number of factors need to be considered. These may include the following:

- the opportunity that the employment afforded the employee to abuse his or her power;

- the extent to which the wrongful act may have furthered the employer's aim (making it more likely for the employee to have committed the act);
- the extent to which the wrongful act was related to or inherent in the employment;
- the extent of the power conferred on the employee in relation to the victim; and
- the vulnerability of potential victims to the wrongful exercise of the employee's power.

The Supreme Court of Canada considered some of these factors in the recent decision of *E.D.G. v. Hammer*. The issue before the court was whether a school board should be held vicariously liable for an employee's sexual assault of a young student. The case involved a Grade three student at a public school in North Vancouver. Students were expected to help out with classroom chores, and the student was assigned the task of cleaning blackboard brushes. This involved taking the brushes down to the boiler room where the brush cleaner was kept. The boiler room was the domain of the day and night janitors employed by the school, who had their own table across from the brush cleaner. The main function of the janitors was to

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maintain the school building and to repair school equipment. They had no direct duties relating to the care or instruction of students, nor did they have direct authority over the students.

The night janitor began to sexually assault the student when she came down to the boiler room to clean the brushes. This occurred on at least twenty occasions over a two year period until the janitor was transferred to another school. For a variety of reasons, the student did not tell anyone about the assaults.

The trial judge found that “no person employed by the board had any reason to suspect [the janitor] was engaged or might be likely to engage in any inappropriate behaviour with the children.” The school did have a mechanism in place whereby teachers and other members of the staff could report negative performances by janitorial staff to the principal, who in turn would inform

the custodial operations manager. Since no one suspected that anything was amiss, this mechanism was never used. Although the student once asked her teacher to be taken off brush duty and assigned some other task, she did not explain why or pursue the matter further when the request was denied. The teacher, not suspecting that anything serious lay behind the request, did not follow up with further enquiries.

The Supreme Court of Canada held that the school board was not vicariously liable for its employee’s actions as the janitor’s activities were not sufficiently connected to his employment to suggest that the board created the risk of the assaults. While the board had provided the janitor with the opportunity to commit the assaults, it did not entrust him with the type of authority or the sort of tasks that would significantly increase the risk of abuse.

This decision makes it clear that not every instance of employee wrongdoing will result in a finding of vicarious liability. It also provides further guidance as to how the courts are likely to apply the various principles reviewed above when determining whether an employer will be held legally responsible for an employee’s wrongful activities.

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Announcing

The Province of Manitoba recently enacted legislation enabling law firms to register as Limited Liability Partnerships.

Our firm has been registered under the LLP legislation effective January 1, 2004 and from and after that date we will now be known as Fillmore Riley LLP (the “firm”)

This registration as an LLP does not create a new firm and will not affect our services to or relationship with our clients, and will not result in changes in our business, partners, employees or operations. The firm will continue to be responsible for the negligence of its partners, associates and employees and we will continue to maintain professional liability insurance in excess of the requirements of the Law Society of Manitoba.

Under the new legislation, a partner of the firm will not be individually liable for debts,

obligations or liabilities arising from the negligence, wrongful act or omission, malpractice or misconduct of other partners of the firm or associates or employees of the firm unless the partner knew of such actions or omissions at the time they were committed and failed to take steps to prevent them, or if the partner was directly responsible for that person in a supervisory role. All partners will continue to be liable for their own negligence or wrongful conduct.

If you have any questions or require any additional information in respect to our registration as a limited liability partnership, please do not hesitate to contact us.

Congratulations

*The partners of Fillmore Riley LLP are pleased to announce the admission of their colleague **Don G. Bowes** into the partnership effective January 1, 2004.*



Don received his Bachelor of Science (with Distinction) from the University of Manitoba in 1996, and a Bachelor of Laws (Gold Medal) from the University of Manitoba in 1999. He was admitted to the Manitoba Bar in 2000. Don practices mainly in the areas of taxation, corporate and commercial law and especially in acquisition and sales of businesses and corporations and in corporate reorganizations and restructuring.

Statute of Limitations May Apply to Tax Debt Collections Procedures

In the case of Markevich v. Canada, the Supreme Court of Canada held that statutes of limitation may apply to federal and provincial tax debts.

In that case, the taxpayer had received a notice of assessment for federal and British Columbia income taxes dated June 17, 1986 in the amount of \$234,136.04. The taxpayer did not challenge this assessment, but no action was taken by the government to collect the tax debt until January 15, 1998, when it sent a statement of account to the taxpayer, which, with accrued interest, amounted to \$770,583.42.

The taxpayer applied to the Federal Court for a declaration that the Crown was prohibited from collecting his tax debt by virtue of limitation periods prescribed by certain federal and provincial statutes of limitation. In response, the Crown argued that the federal *Income Tax Act* constituted a complete legislative code and, since it did not contain any specific time limitations affecting the Crown's collection powers with respect to taxes, there was no applicable limitation period such that the Crown was at liberty to commence collection proceedings.

The Supreme Court disagreed and held that the *Income Tax Act* was not a complete code and that, by not enacting a specific limitation period in respect of tax debt collection procedures, Parliament must have intended that other statutes of limitations of general application could be operative. The Supreme Court held that section 32 of the federal *Crown Liability and Proceedings Act*, which prescribes a six year limitation period after a cause of action arises in which proceedings by or against the Federal Crown may be taken, applied to the federal tax debt. Similarly, the British Columbia *Limitation Act* prescribed a six year limitation period for actions not otherwise specifically provided for, and the Court held that this limitation period applied to the provincial component of the tax debt.

Of interest, the Supreme Court of Canada determined that the commencement time for the limitation period was the date upon which the Crown became entitled to enforce the tax debt, that is, after the expiry of the 90 day appeal period in respect of the initial notice of assessment.

◆ Don G. Bowes

This case should be of keen interest to persons with long outstanding tax debts or professional advisors with clients in such circumstances. It may be possible to rely upon the *Markevich* case in applying for a declaration that aged tax debts may be unenforceable by the Crown because they are statute barred. However, due caution should be exercised in dealing with such circumstances so that the benefits of the applicable statute of limitation are not lost or compromised. For example, simply acknowledging the tax debt may arguably act to "restart" the limitation clock.

Would *Markevich* apply to Manitoba provincial income tax debts? As noted in *Markevich*, the British Columbia *Limitations Act* applies to the provincial Crown because section 14(1) of *The Interpretation Act* (British Columbia) states that, unless an enactment specifically provides otherwise, every legislative enactment is binding on the provincial Crown. However, in Manitoba, *The Interpretation Act*

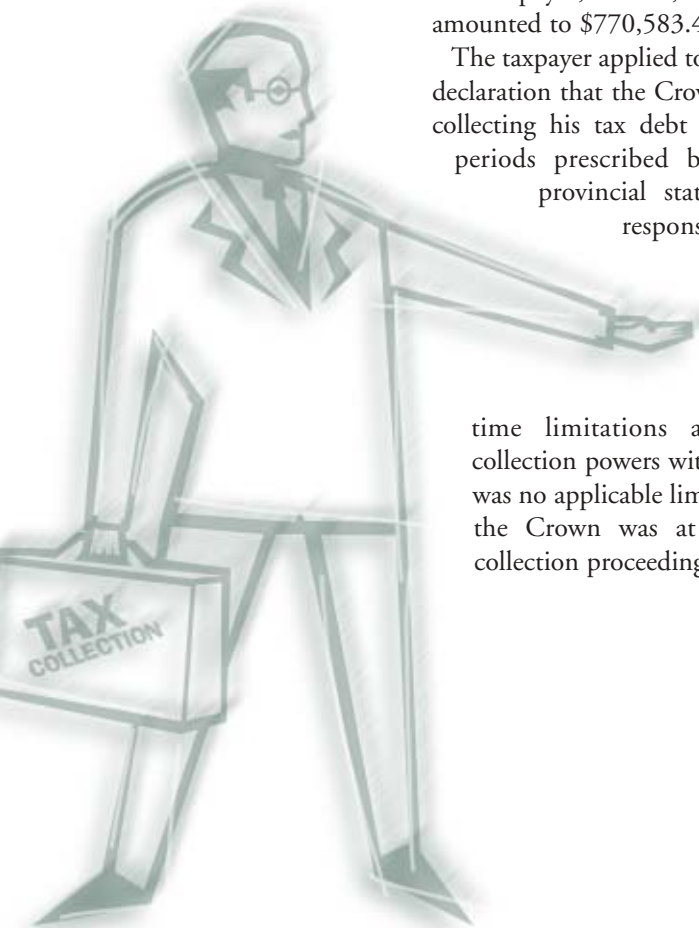
(Manitoba) contains a provision of opposite effect, in that an enactment is stated not to bind the provincial Crown unless it expressly states that Her Majesty the Queen is bound thereby. *The Limitations Act* (Manitoba) does not contain any express provision that it applies to the provincial Crown.

For example, simply acknowledging the tax debt may arguably act to "restart" the limitation clock.

On this basis, it may be that the analysis of *Markevich* may not be available to Manitoba Provincial income tax debts since it may be that no statute of general application prescribes limitation periods affecting the provincial Crown. However, *Markevich* may nevertheless be available to the

federal component of an aged tax debt of a Manitoba taxpayer.

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Directors' & Officers' Liability - Issues for Private Corporations

In response to the general lack of investor confidence resulting from the collapse of notable corporations such as Enron and MCI WorldCom, legislators in the United States have increased the liability of corporate wrongdoers.

◆ Edward M. Hermann

While these measures have focused primarily on the directors and officers of publicly traded companies, the relative immunity enjoyed by directors and officers of privately held companies may also fall prey to a call for greater accountability.

In Manitoba, the standard of care owed by directors and officers is codified in section 117(1) of *The Corporations Act* which states:

Every director and officer of a corporation, in exercising his powers and discharging his duties, shall:

- (a) act honestly and in good faith, with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Rather than treating directors and officers as a homogenous group of professionals whose conduct is governed by a single, unchanging standard, section 117(1) has traditionally embraced a subjective quality which takes into account the personal knowledge and background of the director or officer, as well as his or her corporate circumstances. As a result, more has been expected from a director or officer with superior qualifications and business experience. Conversely, a director or officer would not be liable for an honest mistake made in good faith.

These well established principles recently were examined in *Re: Walt Disney Company Derivative Litigation* (released May 28, 2003). In that case, the Delaware Court of Chancery considered whether Disney's shareholders should be allowed to proceed with a claim against Disney's directors for approving an employment agreement with Michael Ovitz that contained a no-fault termination clause that resulted in a significant payment to Ovitz (allegedly in excess of US \$140 million) after approximately one year of service. The shareholders alleged that the directors delegated their authority to negotiate and ratify the final agreement to Disney's CEO, Michael Eisner. In doing so, the shareholders also alleged that the directors failed to properly consider whether it was in the best interests of the corporation to enter into and execute the employment agreement on those terms and conditions. The defendants brought a motion to dismiss the claim, essentially on the grounds that the allegations leveled against the directors failed to raise a cause of action.

In dismissing the motion, the court found that the shareholders' allegation that Disney's directors abdicated all responsibility to appropriately consider an action of material importance to the corporation put directly into

question whether the directors' decision making process was carried out in the best interests of the corporation. As such, a cause of action did exist and the directors were required to respond to the claim on the basis of a complete factual record. This was the case notwithstanding that, as mentioned above, directors and officers historically have been able to rely on a lack of experience as a defence when making incorrect decisions as long as they were made in good faith.

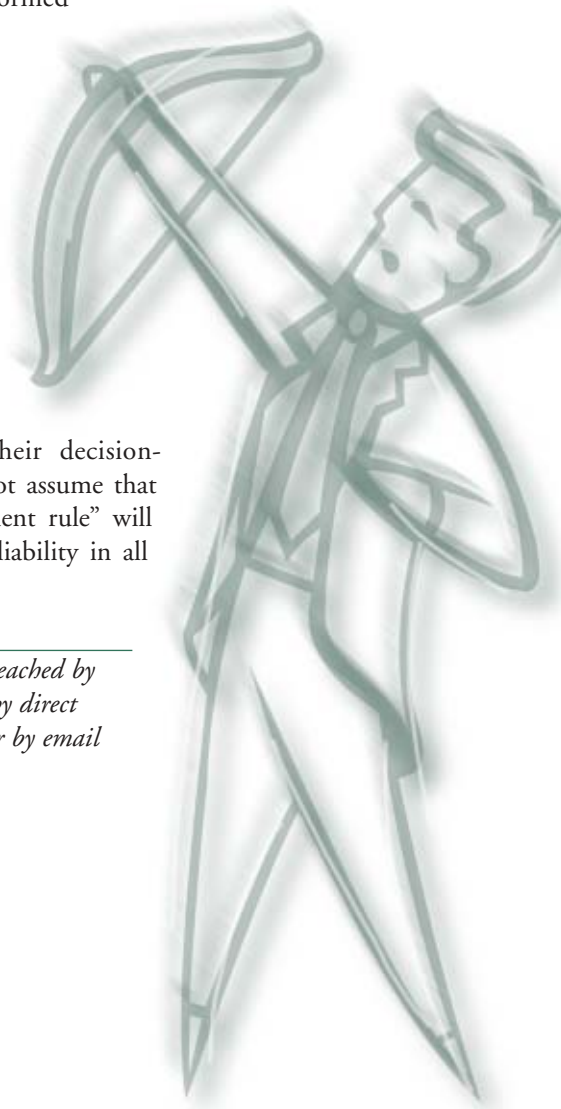
Whether this case, which involved several high-profile parties, ultimately will lead to an increase in the personal exposure of directors and officers remains to be seen, as does the reaction of Canadian courts. It does suggest, though, that prudent directors and officers should exercise vigilance when presented with substantial transactions such as acquisitions, dispositions, reorganizations and financings. Specific issues to be considered include the following:

- Have the interests of all of the stakeholders in the corporation (such as minority shareholders or creditors) been considered?
- Have the directors canvassed all of their sources in order to obtain all of the relevant information needed to make an informed decision?

- Have the directors retained the counsel of experts, advisers and consultants in order to make an informed business decision?
- Is the decision-making process independent and have the corporation's directors and officers disclosed any conflict of interest that may jeopardize this independence?

At a minimum, directors and officers of privately held companies should exercise vigilance when exercising their decision-making powers and should not assume that the so-called "business judgment rule" will operate to shield them from liability in all circumstances.

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NEWS

Stuart Blake has been appointed President of the Winnipeg Humane Society.

Shauna Braz has been elected as a board member of the North Point Douglas Women's Centre.

Don Bowes attended Part III of the Canadian Institute of Chartered Accountants In-Depth Tax Course. This course is designed for advanced practitioners and consists of group study along with "in residency" conferences.

In late November, **Doug Christie** attended a meeting of foreclosure practitioners chaired by the Real Property section of the Manitoba Bar Association. Land Titles is considering a review of all mortgage realization procedures and Doug has been asked to coordinate the input from the lawyers who practise in the foreclosure area. He also met in September with a group of lawyers who practice foreclosure law in B.C., Alberta, and Saskatchewan.

Derek Cumming, a board member of the Children's Hospital Foundation, has been appointed the chair of a sub-committee which represents the Foundation in the commercialization of promising child health research being conducted by its member researchers.

Paul Grower taught a session entitled "Small Claims Practice" as part of the Civil Procedure segment of the Law Society of Manitoba's Bar Admission Course. He also recently presented to the Crocus CEO Roundtable on "The Effect of the *Personal Information Protection and Electronic Documents Act* on Manitoba Business".

Edward Hermann attended a course entitled "Tax Law for Lawyers" in Niagara-on-the-Lake, Ontario. The course provides an in-depth look at commercial taxation issues. He also attended a seminar in Toronto, Ontario on Directors' and Officers' Liability.

Fillmore Riley LLP is a full service law firm. Its members practise in substantially all areas of the law including corporate and commercial law, finance, real estate, advising financial institutions, bankruptcy and insolvency, general and insurance litigation, environmental, administrative, securities, information technology, copyright, patent, trade-mark, trade secrets, domestic/family, wills and estates, labour, taxation, and transportation law. **Nous parlons français.**

Ade & Company, patent agents, are associated with Fillmore Riley.

David Kroft served as the course leader for the Civil Procedure and Administrative Law Advocacy segments of the Law Society of Manitoba's Bar Admission Course. **Anita Southall** participated as a seminar leader in the course.

Wayne Leslie was re-elected as a board member of the Canadian Association of Insolvency and Restructuring Professionals for a two year term at their annual meeting. CAIRP represents in excess of 913 general members acting as trustees in bankruptcy, receivers, agents and consultants in insolvency matters.

Sofia Mirza, one of our articling students, has been elected as the student bencher to the Law Society of Manitoba.

Steven Raber, together with Ade & Co.'s **Ryan Dupuis**, spoke to members of the Association of Professional Engineers and Geoscientists of Manitoba on the subject of intellectual property ownership rights.

Cary Reiss, **Peter Davey**, **Dan St. Jean** and **Shauna Braz** participated as instructors for the University of Manitoba Faculty of Law Solicitors' Transaction course.

Anita Southall has been appointed to the Reimbursement Claims Fund and Practice and Ethics Committees of the Law Society of Manitoba.

Mike Williams of Ade & Company is the instructor for Intellectual Property Management I and II, part of the Certificate in Intellectual Property and Technology Commercialization Management being offered by the University of Manitoba.

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The **Fillmore Riley Report** is not intended to present advice with respect to matters reviewed and commented upon. You are invited to contact the authors if you have specific comments or questions regarding articles, or you may contact any member of Fillmore Riley LLP to obtain specific legal advice.

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