



FILLMORE RILEY REPORT

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A Director's Liability Tips and Traps



◆ Paul Grower

A number of provisions in the relevant tax legislation provide for the imposition of personal liability on directors of corporations as a result of certain corporate tax liabilities.

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The *Income Tax Act* (the “ITA”) imposes personal liability on a director where a corporation has failed to deduct, withhold or remit certain amounts as required by the ITA.

In addition, the *Excise Tax Act* (the “ETA”) imposes personal liability on directors for a corporation’s GST liability.

Furthermore, the *Canada Pension Plan* and the *Employment Insurance Act* both state that directors are liable for CPP and EI premiums that are not remitted.

Thankfully, all of the Acts noted above provide for a time limit on the liability of a director. This “limitation of liability” states that Canada Revenue Agency (which is in charge of collecting the taxes owed under these Acts) is prohibited from collecting any amount owed by a director, pursuant to these Acts, “more than two years after the director last ceased to be a director of that corporation.” In other words, any assessment or proceeding against a director may only be made, or commenced, within two years after the person last ceased to be a director of the corporation.

The ITA, ETA, *Canada Pension Plan* and the *Employment Insurance Act* are all silent as to when a person ceases to be a director. In the recent decision of *Moll, R.F. v. The Queen*, Justice Miller cited with approval the following passage from the Federal Court of Appeal decision in *The Queen v. Kalef*:

The *Income Tax Act* neither defines the term director, nor establishes any criteria for when a person ceases to hold such a position. Given the silence of the *Income Tax Act*, it only makes sense to look to the company’s incorporating legislation for guidance. ...

In this regard, section 103(1) of *The Corporations Act*, (Manitoba) provides that a director of a corporation ceases to hold office when

he dies or resigns, is removed from office in accordance with section 104 of the Act, or becomes disqualified under subsection 100(1) of the Act. The legislation goes on to state a director’s resignation becomes effective at the time a written resignation is sent to the corporation,

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or at the time specified in the written resignation, whichever is later. Identical provisions are found in the Saskatchewan *Business Corporations Act*, the Alberta *Business Corporations Act* and the *Canada Business Corporations Act*.

One would then be forgiven, therefore, for thinking that a director is “safe” after the two year period from resignation has passed, as long as the resignation was made in writing and sent to the corporation itself. *The Corporations Act* of Manitoba goes further however, by requiring a corporation, within 15 days after a change is made among its directors, to send to the Director of the Manitoba Companies Office a notice in the required form setting out the change. Again, the corresponding provisions of the federal, Saskatchewan and Alberta corporations legislation are essentially identical.

The question thus becomes whether the director or the corporation is responsible for filing this notice with the Companies Office. Furthermore, what effect does it have if the notice is not filed? The prevailing view seems to be that the obligation is that of the corporation. For example, in the Federal Tax Court decision of *Parisien v. Canada*, the court stated that:

...Under [the equivalent section of the *Canada Business Corporations Act*], the Corporation and not the director is required to send all changes in the composition of the Board of Directors to the director named under the [Act]. In addition, although it would be wise for a director to ensure that his resignation has been made public by an amending declaration, the absence of such a declaration does not invalidate the resignation of a director if the latter can provide evidence thereof.

However, in a recent Federal Tax Court decision out of Quebec, *Hattem v. R.*, the court held that a director’s resignation is not effective until the resignation is communicated to the Quebec Companies Office. Interestingly, the court expressed the view that this principle applied to all provincial and federal companies law.

While the above decision is based on the law of Quebec and its applicability open to debate due to the different provisions of the Quebec Act, it nevertheless highlights the wisdom of ensuring that a notice of a director’s resignation is filed with the appropriate Companies Office.

In addition, the filing of such a notice ensures that a record of a director’s resignation is kept in government files, instead of the corporation’s records, which may deteriorate, or may be lost, by the time CRA comes “calling”, often years later, in an effort to impose personal liability on the individual for the corporation’s failure to remit.

Prudence, therefore, would dictate that any director who resigns, through the proper written notice to the corporation, should also ensure that the requisite notice is provided to the applicable Companies Office.

Of course, as that notice is, itself, signed on behalf of the corporation, the director should sign it on behalf of the corporation, noting his/her resignation that day, and then provide the corporation with his/her written resignation, made effective one minute after the execution of the notice to Companies Office.

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Announcement

The partners of Fillmore Riley LLP are pleased to announce the admission of their colleagues Paul K. Grower and Kelly C. Beattie into the partnership effective January 1, 2009.



Paul received his Bachelor of Arts, Honours (Gold Medalist) from the University of Winnipeg in 1998 and his Bachelor of Laws from the University of Manitoba in 2001. He was admitted to the Manitoba Bar in 2002. Paul practices in the areas of tax dispute and tax litigation, as well as commercial litigation. Paul can be reached at (204) 957-8369, by facsimile at (204) 954-0369 or by e-mail at pgrower@fillmoreriley.com



Kelly received her Bachelor of Arts from the University of Winnipeg in 1999 and her Bachelor of Laws from the University of Manitoba in 2002. She was admitted to the Manitoba Bar in 2003. Kelly practices in the areas of corporate and commercial law, banking and finance law, real estate law and taxation. Kelly can be reached at (204) 957-8342, by facsimile at (204) 954-0342 or by e-mail at kbeattie@fillmoreriley.com

Congratulations

The Perils Of Cyber-Squatting

A quick guide to solving the problem!



◆ Steven Z. Raber

A recent decision of the Alberta Court of Queen's Bench has underlined the ramifications of cyber-squatting for the cyber-squatter and, going even further, the ramifications for the cyber-squatter for diverting traffic to inappropriate websites.

The facts

In the case before the court, the plaintiff, Inform, had set up a high-end bicycle business in Canmore, Alberta. It registered its own domain name, InformCycle.ca.

A former InformCycle.ca employee became employed by a competitive bicycle business in Canmore called Rebound. The employee was well aware of the plaintiff and that the plaintiff used its website as an important way to reach its customers and to conduct its business. Despite that, the employee purchased the domain name InformCycle.com and registered it to his new employer, Rebound.

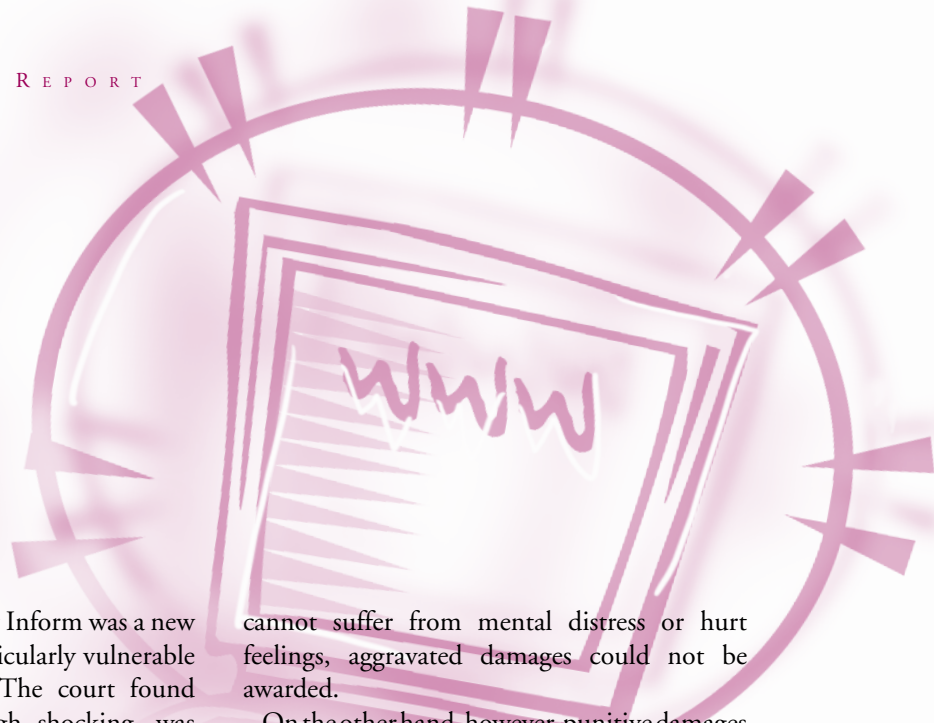
The employee caused hits on the InformCycle.com domain name to be automatically forwarded to Rebound's website, where Rebound promoted its own goods and services. After about a month, the employee changed the forwarding address for InformCycle.com from the Rebound website to a pornographic website. He did this apparently knowing that it would have an impact on Inform and its principals. Immediately after arranging the forwarding of InformCycle.com to the pornographic website, the employee left for a lengthy holiday. It took almost two weeks for one of the owners of Rebound to cancel the forwarding and about another week for the employee to verbally apologize to one of the principals of the plaintiff.

Passing off

The court defined passing off as a misrepresentation that creates a public belief that the parties are associated, with resulting damage occurring to the complaining party. The court found that Inform was a fledgling business and that, for a period of 21 days, anyone who typed in InformCycle.com instead of InformCycle.ca would have been redirected to Rebound's website, which offered some of the same goods and services for sale. Although there was no evidence as to how many people were so directed and no evidence as to whether Inform actually lost sales, the court determined that it would be difficult to see how Inform could have produced such information. In the absence of evidence as to actual damages, and having regard to the presumption of damages flowing from passing off activities, general damages of \$5,000 were assessed.

Defamation

The defamation found by the court in this case consisted of the employee deliberately and maliciously forwarding the .com website to an explicit pornographic website for a period of 16 days. Although no evidence of actual special damages suffered by Inform was provided, the court noted that in defamation, general damages are presumed.



Again, the court noted that Inform was a new company and would be particularly vulnerable to defamatory comments. The court found that the defamation, though shocking, was not as serious as would have been a direct comment that Inform was a front for an illegal or immoral activity.

The court found that, although the publication was for only 16 days, it on was the world-wide web and, therefore, published to the world at large. Nevertheless, because the defamation was a referral to a porn site, it was not something that could be replicated almost endlessly over the internet, as might have been the case with an actual defamatory statement.

The court took note of the employee’s motive, finding that the reason for his actions was to embarrass and harm Inform and its principals.

The court then applied the following analysis on the issue of general damages for corporations:

1. general damages are intended to provide solace for personal distress and to vindicate one’s reputation, including business reputation
2. corporations are incapable of suffering personal distress and thus cannot receive general damages for that, only for loss of their business reputation; and
3. generally, corporations should not receive large awards for loss of their reputation, absent proof of actual economic loss.

As a result, taking into account the foregoing factors, general damages were awarded to Inform for defamation in the amount of \$5,000.

Aggravated and punitive damages

The court noted that aggravated damages are intended to compensate a person for mental distress and hurt feelings. Since a corporation

cannot suffer from mental distress or hurt feelings, aggravated damages could not be awarded.

On the other hand, however, punitive damages are available to a corporate plaintiff where the defendant’s misconduct is so malicious, oppressive and high-handed that it offends the court’s sense of decency. The court found that the malicious actions of the employee were sufficiently egregious to require that punitive damages be awarded to achieve the goal of punishment and deterrence. Accordingly, the court awarded punitive damages in the sum of \$5,000.

Conclusion

Based on the foregoing, it is plain that parties must be most careful in misdirecting traffic from a legitimate website to either their own or a competitive website, or even to a website with nothing at all to do with the business of either party. In this case, a “misdirection” to a pornographic website constituted defamation and was found to be conduct sufficiently egregious to warrant an award of punitive damages.

Although the amount of damages awarded in this case was relatively small, one can conceive of a case where special damages for passing off and even for defamation may be proved. In such cases, the damages ultimately awarded may be enormous. In addition, the damages may be awarded not only against a corporation involved in such conduct, but the individual responsible. Cyber-squatting, therefore, may prove to be most expensive.

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Departing Employees and the duty of good faith



◆ Dean Giles

Historically, the nature and scope of the duties owed by employees to their employer has been the subject of much discussion and uncertainty.

This issue was recently revisited by the Supreme Court of Canada in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.* The decision is significant for defining the obligations owed by departing employees, particularly key personnel, to their employer.

The case involved a branch manager at RBC's Cranbrook office who resigned his position and persuaded almost all the investment advisers and support staff in the office to move with him to Merrill Lynch. The result was a significant loss of RBC's client base, to the point where the Cranbrook office essentially collapsed, as most clients chose to leave with their investment advisors. None of the departing employees had non-competition or non-solicitation covenants in their employment agreements. They also did not provide RBC with any notice of their resignation. During the period immediately preceding the departures, some of the employees copied client records which were taken to Merrill Lynch. These records were then used to solicit RBC's clients.

In its reasons for decision, the Supreme Court of Canada affirmed that the departing branch manager had breached an implied contractual duty to perform his employment obligations faithfully to RBC. The various breaches identified by the court included orchestrating the departure of the other employees, failing to make efforts to retain employees under his supervision and participating in the conversion of confidential client information. Damages in the approximate amount of \$1.5 million, representing RBC's loss of profits over a five month period, were awarded against the branch manager.

As for the other investment advisors, the court held that they did not owe a duty to RBC to refrain from competing during the notice period. In the absence of a restrictive covenant in the employment agreement or a finding

that the employee was a fiduciary, the obligation of an employee not to compete does not survive the termination of the employment relationship. The court further stated that, having made a global damages award for loss of profits against the former branch manager, it would be inappropriate to make an additional award under this head of damages on account of the misuse of confidential information by the other employees.

At the same time, however, the court found that the non-management employees were under a duty to perform the functions of their job in good faith and to provide reasonable notice of resignation. Their failure to do so resulted in a damages award of \$40,000.00, representing the losses suffered by RBC during the appropriate notice of period of 2.5 weeks.

This decision of the Supreme Court of Canada reaffirms that all employees owe their employer a duty of good faith in the performance of their duties. This is true whether or not the employee is characterized as a fiduciary. In the case of management employees, the duty encompasses an obligation to retain clients and not to organize or promote the departure of other employees.

In the absence of a specific contractual term or a finding that the employee was subject to the elevated duties of a fiduciary, however, there is nothing to prevent employees from competing against the former employer.

Accordingly, employers wishing to limit the ability of an employee to compete or solicit clients following resignation may want to consider negotiating and including reasonably restrictive covenants in a signed contract of employment.

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New Rules For Client Identification



◆ W. Parker Fillmore

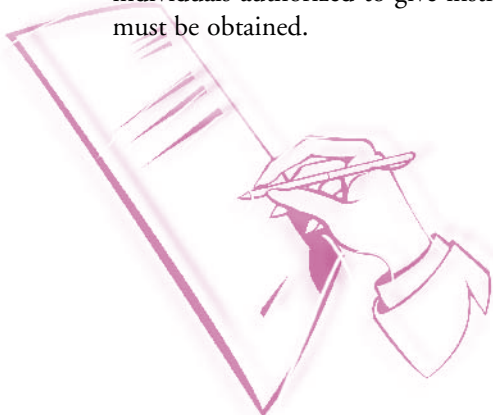
To comply with federal laws aimed at combatting money laundering and terrorist financing, Canadian law societies have adopted new rules on Client Identification and Verification.

The rules are mandatory and apply to all lawyers in Canada. The new rules (also known as Know Your Client rules) came into effect on December 31, 2008. All lawyers in Canada will have to abide by the Client Identification Rules when they are retained by a new client or an existing client on a new matter. They must also verify the client's identity when they receive, pay or transfer funds on behalf of a client or give instructions for such activities on behalf of a client.

Client identification

When a lawyer is contacted by a new client or an existing client in a new matter, the lawyer must obtain the following information from the client:

- If the client is an individual, the full name, business address, business telephone, home address, home telephone and occupation.
- If the client is an organization (such as a corporation, partnership, trust, co-operative or unincorporated association), the full name, business address, business telephone, incorporation or business identification number and place of issue, and a general description of the organization's business or activities; in addition, the name, position and contact information for the individuals authorized to give instructions on the matter must be obtained.



Client verification

When a lawyer is receiving, paying or transferring funds (including cash, currency, securities, negotiable instruments and other financial instruments) on behalf of a client or gives instructions for such activities on behalf of a client, the lawyer must obtain the following documentary information from the client:

- If the client is an individual, a piece of identification, such as a driver's license or passport.
- If the client is an organization (such as a corporation, partnership, trust, co-operative or an unincorporated association), the name and occupation of each director, the name, address and occupation of each person who owns 25% or more of the organization or of the shares of the organization, plus a document verifying the organization's existence, such as a certificate of corporate status, a partnership agreement, a trust indenture or a copy of an annual filing. The lawyer must also look at a piece of identification such as a driver's license or passport for each person authorized to give instructions on the payment or transfer of funds.
- The lawyer is also required to collect the same documentary information from a third party that the client represents.

Should you have any questions, with respect to these requirements, please do not hesitate to contact your lawyer at Fillmore Riley LLP.

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FILLMORE RILEY
NEWS

A number of lawyers at Fillmore Riley LLP were named in the 2009 Canadian Legal Lexpert® Directory. Those recognized were **Tim Dewart** in the specialties of Banking Law and Property Development Law; **Mike Dow** in the specialty of Insolvency Law; **Cy Fien** in the specialty of Corporate Tax Law; **Wayne Leslie** in the specialties of Insolvency Law and Corporate Commercial Litigation; **Robert McDonald** in the specialties of Commercial Insurance Litigation and Personal Injury Law; **Mickey Rosenberg** in the specialty of Property Development Law; **Charles Sherbo** in the specialties of Commercial Insurance Litigation and Professional Liability Law; and **Rob Simpson** in the specialty of Labour Management Law.

Steven Raber, a fellow of the Intellectual Property Institute of Canada, has joined the Institute's Alternative Dispute Resolution ("ADR") Committee. It is the intention of the Committee to create more awareness among intellectual property lawyers of the benefits of ADR, work with the Canadian Intellectual Property Office to encourage the use of mediation in such matters as trademark oppositions, provide intellectual property focused ADR training for mediators, arbitrators and counsel, establish panels of experienced intellectual property mediators and arbitrators, and to work with other ADR organizations and ADR service providers to share information and best practices.

Eleanor Wiebe was invited by the Royal Bank ("RBC") to sit on a panel of experts with an accountant and family facilitator. The event was hosted by RBC for over 150 of their customers and clients and the topic was Business Succession and Transitions. Eleanor also is serving as a sessional lecturer for the Wills and Succession course at the Faculty of Law, University of Manitoba.

Dean Giles and **Shayne Berthaudin** served as seminar leaders for the University of Manitoba's Faculty of Law Advocacy Course.

Mauri Rutherford was appointed to the Board of Oak Hammock Marsh Interpretive Centre and is presently Board Secretary of the National Board of Directors of Ducks Unlimited Canada.

Rob Simpson is currently sitting on the Board of Directors for the Heart & Stroke Foundation of Manitoba.

Dan Ryall presented on certain legal issues in Workplace Safety and Health for the Canadian Society of Safety Engineers Conference. Dan also was elected as the new Director of Communications for the Canadian Transport Lawyers Association.

Norm Yusim lectured on Interviewing Skills and acted as an examiner for the Law Society of Manitoba's Canadian Centre for Professional Legal Education for Articling Students.

Fillmore Riley LLP, together with several other donors, made a significant contribution to the Canadian Human Rights Museum resulting in an additional \$4.5 million dollars in funds raised for its construction. These donations pushed the private sector campaign to over \$100 million dollars, an unprecedented event in the Province of Manitoba. The Canadian Human Rights Museum will be located in Winnipeg and is the first new national museum created in 41 years. The goal of the Museum is to promote respect for all people and enhance people's understanding of human rights.

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