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SASKATCHEWAN DIRECTORS AND OFFICERS RELIEVED FROM LIABILITY – WILL *CANADA CORPORATIONS ACT* REFORM PROVIDE SIMILAR PROTECTION?

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Saskatchewan's *Non-Profit Corporations Act*, 1995, was amended in June 2003 to provide some welcome relief to non-profit directors and officers in that province. The amendments are based on a 2001 report released by the Law Reform Commission of Saskatchewan which carried out extensive consultation with voluntary groups in the province.[1] In a nutshell, directors and officers of non-profit corporations in Saskatchewan are not personally liable (to third parties or to the corporation itself) in any civil action for acts or omissions in connection with their responsibilities to the corporation they serve, provided they acted in good faith. The general immunity does not extend to fraud or profit-taking at the expense of the corporation. Directors remain liable for certain statutory liabilities.

The Law Reform Commission emphasized the important contribution of charities to the social fabric in Saskatchewan, citing a statistic from the Canadian Centre for Philanthropy that "Saskatchewan has by far the highest number of charities for its population, 4.88 per1,000, twice the national rate of 2.42 per 1,000." The

[1] Consultation Paper: *Liability of Board Members of Not-For-Profit Organizations*, The Law Reform Commission of Saskatchewan, 2001

report expressed concern about the increasing potential for legal liability of board members in the voluntary sector:

> "Few Saskatchewan not-for-profit organizations have faced unmanageably large damage claims, and fewer claims still have been made against volunteer board members. But the risk of substantial liability for board members is real. Advisors to prospective directors recommend caution before accepting an invitation to sit on the board. Increasing public concern about accountability, the increasing litigiousness of our society, and the emergence of new liability issues such as sexual abuse and sexual harassment contribute to a growing concern. The frequency of lawsuits against directors and officers appears to be increasing in North America. We cannot expect Saskatchewan to be immune to this trend." [2]

The Law Reform Commission's report tried to balance two complementary though sometimes conflicting objectives; ensuring that the not-for-profit sector is accountable for its activities while at the same time affording volunteers and not-for-profit organizations some degree of protection against liability when they conscientiously carry out a community service. The report examined the law of directors' liability, drawing on the *American Model Non-Profit Corporation Act,* as well as recent decisions and commentaries. It expressed particular concern regarding the potential for board members' liability in cases involving third parties. The Commission outlined the liability exposure of not-for-profit corporations to third parties for the actions and omissions of their volunteers and employees under the doctrine of vicarious liability and concluded that the extension of this liability to board members may not be so far away or as rare as previously thought. As the report says, "…there are indications that the courts are willing to take a more sympathetic view of third party claims against both not-for-profit organizations and their board members."[3]

The report also surveyed the various protections available at common law and under statute but concluded that they were not adequate to encourage and protect directors. In attempting to balance the public's need for accountability against the protection of not-for-profit directors, the report examined various levels of immunity in tort that could be codified by statute. It cited the fact that most jurisdictions in the United States have rejected the general immunity approach, instead opting for limitation of personal liability of directors and officers. The report followed this approach, stating "In the Commission's opinion, board members in the not-

[2] Ibid., p. 3
[3] Ibid, p.14

for-profit sector should be substantially relieved of personal liability. Any other approach to the problem of director's and officer's liability would be piecemeal and unsatisfactory."[4]

The Commission's recommendations have been embodied in new Section 112.1 of Saskatchewan's *Not-For-Profit Corporations Act*. The general principles provided under the section can be summarized as follows:

a) Unless another Act expressly provides otherwise, directors and officers of not-for-profit corporations are not personally liable in any civil action, including both third party actions and actions brought against a director or officer on behalf of the corporation, that arise out of an act or omission connected with the responsibilities of a director or officer.

b) The immunity extends only to acts done in the course of carrying out duties as a member of the board or as an officer of the corporation in good faith, and does not extend to loss caused by fraud or criminal misconduct on the part of the director or officer.

c) The immunity does not affect statutory liabilities of directors and officers under Saskatchewan law. As a result, directors and officers remain liable for loss arising as a result of an act or omission by a director or officer which constitutes an offence under the *Not-For-Profit Corporations Act* or any other Act, including an Act of the Parliament of Canada.

d) The section applies to any claim for damages for loss that is filed on or after the coming into force of the section and the section should not be interpreted as affecting the liability of the corporation for loss to any person.

It is too early to say with any certainty which direction reform of the *Canada Corporations Act* will take in the area of directors and officers liability. However, if the two discussion papers[5] released by Industry Canada during its consultation process in 2002 are any indication, it appears that the federal government will follow a different route than the one taken by Saskatchewan in an attempt to reach a similar result. However, unlike Saskatchewan, it will be noted that federal reform in this area appears to be leaning in favour of reinforcing the accountability of directors and officers.

The framework proposal put forward by Industry Canada provided the following recommendations in relation to directors' and officers' liability in the proposed new legislation:

[4] Ibid, p.25

[5] *Reform of the Canada Corporations Act: Draft Framework for a New Not-For-Profit Corporations Act* and *Discussion Issues for a New Not-For-Profit Corporations Act*, March 2002, Industry Canada

a) The new Act would clearly define the fiduciary duties and standard of care to which directors and officers will be held.

b) Directors and officers would be afforded a due diligence defence that can be relied on by directors and officers if they are named in an action. Under the defence, the directors or officers would not be liable if they are able to demonstrate that they exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances.

c) The new Act would include a statutory right to dissent which would allow a director to avoid responsibility for actions or resolutions taken during a board meeting by having his or her dissent recorded.

d) The new Act would also contain new indemnification provisions that would broaden the scope of situations in which a director or officer would be indemnified for costs and awards arising out of legal actions.

It will be noted that these proposals are more onerous for directors and officers than the solution adopted by Saskatchewan, since they require active participation by directors and officers in the affairs of the Corporation in order to avoid liability, there being no statutory immunity included in the recommendations. Under Industry Canada's proposal, directors and officers would have the onus of establishing that they exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances. Further, any relief from liability afforded by the right to dissent would require directors to be either present at board meetings or at least to be aware of decisions made at board meetings in order to register a dissent (the proposal gives directors 7 days of becoming aware of a resolution to register his or her dissent).

A discussion paper provided during Industry Canada's consultation reviewed the rationale for not providing some degree of statutory immunity similar to that provided by the American statutes. It expressed concern that: "Limiting or extinguishing liability will not encourage directors and officers to exercise properly the care expected from a person in such a position….In addition, there is a risk, where liabilities have been limited or extinguished, that individuals who suffer harm as a result of the actions of a director or officer would end up bearing not only the effects of the harm, but also the costs associated with it."[6]

The due diligence defence and statutory right to dissent proposed by Industry Canada represent an attempt to arrive at a solution which emphasizes the need for accountability in the voluntary sector while at the same

[6] *Discussion Issues for a New Not-For-Profit Corporations Act*, Industry Canada, page 23

time providing directors and officers with "tools" for limiting their liability by following proper governance procedures. If the proposals become law, directors and officers of federally incorporated not-for-profit corporations would be well advised to obtain expert assistance in order to learn more about the procedural and other requirements necessary to exercise the right to dissent and to constitute a proper due diligence defence.

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