

Loss Control

Bulletin

Directors and Officers

Liability Insurance

Director's Personal Liability for Employee Severance Pay

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On March 25, 1993, the Supreme Court of Canada confirmed the decision of Quebec's Court of Appeal in the case of *Barrette v. Crabtree*, ruling that directors are not liable under the *Canada Business Corporations Act* (CBCA) for severance pay in lieu of notice of dismissal.

According to the Supreme Court, the statutory language imposing liability on directors is ambiguous. The Court therefore considered the purpose of the statutory liability.

The following points were made at p. 16 of the judgment:

"In terms of the general principles governing company law, the provision is exceptional in at least three respects. First, the rule departs from the fundamental principle that a corporation's legal personality remains distinct from that of its members. In so doing, s. 114(1) CBCA [now s. 119(1)] creates an exception to the more general principle that no one is responsible for the debts of another. Further, unlike other statutory rules which may impose personal liability on directors, s. 114(1) CBCA does not contain an exculpatory clause as such."

In addition, Madam Justice L'Heureux-Dubé noted that the provision is unusual in that it imposes a positive duty on company directors, rather than merely prohibiting something.

This was certainly good news for directors of CBCA companies, but claims continue to be made. Although not all of the plaintiffs' arguments distinguishing *Crabtree* have yet emerged, the following positions have been taken:

1. Provincial Labour Standards legislation imposes a greater duty on directors.
2. Provincial incorporating statutes are worded differently or were enacted with different policies in mind.
3. Particular clauses in collective agreements or contracts provide a factual distinction.
4. Claims are forwarded as being something slightly different than "severance."

Regarding the last two positions taken by claimants, the Quebec Court of Appeal in *Wright v. Syndicat des techniciennes et techniciens du cinéma et de la vidéo du Québec*, [2004] R.J.Q. 7, concluded that the amounts claimed by employees pursuant to the collective agreement fell within the scope of section 119 of the CBCA, and the administrators could therefore be held responsible.

Nonetheless, the CBCA was amended in 2001 such that administrators against whom former employees made claims for unpaid wages could make use of the defence of due diligence. Section 123(4) reads as follows:

“A director is not liable under section 118 or 119, and has complied with his or her duties under subsection 122(2), if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on:

- (a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or*
- (b) a report of a person whose profession lends credibility to a statement made by the professional person.”*

Given that this amendment is relatively recent, the courts have not yet had the opportunity to interpret or to identify situations in which the due diligence defence might be available. It may be presumed, however, that the due diligence defence would be similar to that already provided for in other legislation (i.e., subsection 227.1(3) of the *Income Tax Act*).

However, it should be noted that section 96 of the *Quebec Companies Act* has not been amended to include such a due diligence defence.

