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## AVOID A \$15,000 FINE FOR A FIRST OFFENCE UNDER THE *ACT RESPECTING OCCUPATIONAL HEALTH AND SAFETY*. KNOW YOUR RIGHTS!

JOSIANE L'HEUREUX

jlheureux@lavery.ca

On March 31, 2004, the federal legislature amended the *Criminal Code* (R.S.C., 1985 c. C-46) to include a criminal negligence offence, the purpose of which is to ensure the protection of worker health and safety. In June 2009, the provincial legislature passed another bill also intended as an incentive for employers to take the requisite preventive measures to enhance the health and safety of workers in the workplace and, ipso facto, reduce the number of industrial accidents.

In fact, the legislature increased the fines applicable to the penal offences covered by the *Act respecting occupational health and safety* (R.S.Q., c. S-2.1) (hereinafter referred to as the "Health and Safety Act"). The amount of the fines doubled on July 1, 2010, and will triple on January 1, 2011. Effective January 1, 2012, these amounts will subsequently be revalorized each year. According to the Commission de la santé et de la sécurité du travail (CSST) (Occupational Health and Safety Commission) (hereinafter referred to as the "Commission"), as a result of these increases, fines will reach the level they would have reached had they been indexed annually since 1979 in accordance with the Consumer Price Index (CPI).

Not only did the legislator increase the fines applicable to penal offences but it also introduced the concept of third and subsequent offence.

The most common offence reports stem from Section 236 of the Health and Safety Act: "Every person who contravenes this act or a regulation or refuses to conform to a decision or order rendered under this Act or the regulations or incites a person to do so [...]" and/or from Section 237 of the Health and Safety Act: "Every person who,

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by action or omission, does anything that will directly and seriously compromise the health, safety or physical well-being of a worker [...]".

For your information, the following table<sup>1</sup> shows the aforementioned amendments to the fines under the Health and Safety Act.

<sup>1</sup> The fines indicated in this table apply to a legal person.

OFFENCE DATE	SECTION 236 HEALTH AND SAFETY ACT		SECTION 237 HEALTH AND SAFETY ACT	
	Minimum	Maximum	Minimum	Maximum
<b>Situation prior to July 2010</b>				
First offence	\$ 500	\$ 1,000	\$ 5,000	\$ 20,000
Subsequent offence(s)	\$ 1,000	\$ 2,000	\$ 10,000	\$ 50,000
<b>From July 1, 2010, to December 31, 2010</b>				
First offence	\$ 1,000	\$ 2,000	\$ 10,000	\$ 40,000
Subsequent offence	\$ 2,000	\$ 4,000	\$ 20,000	\$ 100,000
Third or subsequent offence	\$ 4,000	\$ 8,000	\$ 40,000	\$ 200,000
<b>Effective January 1, 2011</b>				
First offence	\$ 1,500	\$ 3,000	\$ 15,000	\$ 60,000
Subsequent offence	\$ 3,000	\$ 6,000	\$ 30,000	\$ 150,000
Third or subsequent offence	\$ 6,000	\$ 12,000	\$ 60,000	\$ 300,000
<b>Effective January, 2012</b>				

The amount of the fines will be revalorized each year using the methods described in Sections 119 to 123 of the *Act respecting industrial accidents and occupational diseases* (R.S.Q., c. A-3.001)

It is up to the Commission to institute or pursue penal proceedings. The Commission's publication *Cadre d'émission des constats d'infraction* [Guidelines for issuing statements of offence], found on its Website,<sup>2</sup> sets out some of the elements which the Commission should analyze before deciding whether to lay or prosecute a charge: [translation] "the extent of the offence's severity, an employer's accident record and its prior intervention files, the defendant's prior occupational health and safety record, additional post-offence measures taken by the defendant to reach the objectives of the Act and to nullify the need for recourse to penal proceedings [...]".

Notwithstanding the discretion which the Commission should exercise in laying or prosecuting a charge, we have every reason to believe that by January 1, 2012 and thereafter, the Commission's inspection

visits and investigations will increase as will the charges laid under Sections 236 and 237 of the Health and Safety Act.

So, first of all, we encourage employers to take the requisite steps to protect the health and safety of workers by adopting one or more prevention plans.

Secondly, we also urge employers to learn about and know their rights regarding the Commission's inspections and investigations.

In this respect, we are submitting a few basic recommendations so that you can properly deal with the Commission's monitoring visits:

- ▶ set up a procedure to follow during the Commission's inspections and investigations;
- ▶ appoint one or more persons in positions of authority to deal with the Commission's inspectors;

▶ during the Commission's monitoring visit, have the inspector confirm the framework in which he or she is acting, *i.e.*, is he or she there in connection with an inspection or an investigation?;

▶ make sure that the Commission's inspector is at all times accompanied by the person in authority;

▶ make sure you get and keep a copy of any sample, photograph and document collected by the Commission's inspector.

In conclusion, the increase in fines set out in the Health and Safety Act is a tool obviously intended to persuade employers to adopt preventive measures. However, in view of the increased fines, this same tool should also motivate employers to learn about their rights in the event of the Commission's inspections and investigations.

<sup>2</sup> [www.csst.qc.ca/amendes](http://www.csst.qc.ca/amendes).

## MANAGEMENT OF TAX-RELATED DOCUMENTS

LUC PARISEAU

lpariseau@lavery.ca

The complexity of the tax rules applicable to Canadian businesses has increased substantially during recent years. This inevitably results in a larger volume of documents relating to the tax affairs of businesses: accounting records, memoranda by tax experts, correspondence, internal working documents, etc. Appropriate management of such documentation can have considerable beneficial effects for a business and may make it easier to settle a dispute with the fiscal authorities or to avoid one.

Firstly, may we remind you that the tax laws generally require that Canadian taxpayers carrying on a business keep books and records that are adequate to determine the amounts payable under such laws. The books and records must be kept for a minimum period of six (6) years from the end of the fiscal year to which they relate. A failure to comply with these obligations may prevent the taxpayer at

fault from successfully contesting a notice of assessment, in addition to exposing him to certain penalties. The tax authorities and the courts have been more demanding in this regard in recent years. Despite these requirements, taxpayers are not required to keep all documents in any way relevant to their tax affairs. Generally, the pertinence of keeping a given document varies according to its utility for the purpose of determining the business's fiscal burden. To the extent that a document is not useful for this purpose, it is not required to be kept.

This being said, even if the law does not require that a document be kept, it would be prudent to also ask oneself to what extent the document in question could be favourable to one's position on a tax issue. In all cases, the process of managing the tax-related documents of a business must be well supervised and applied continuously. The destruction of documents in the context of a tax audit could result in criminal proceedings against the persons involved.

Beyond the issue of failure to retain certain documents relating to the tax affairs of one's business, one must be sure to properly keep and manage the documents

that are essential or useful with respect to one's tax affairs. Some of these documents may benefit from a privilege that prevents the tax authorities from requiring their production in certain circumstances, such as certain communications between a lawyer and his client. One should manage these documents in such a way as to not lose the privilege.

In fact, lawyer-client professional confidentiality is a rampart established by our country's constitution against incursions by governmental authorities, particularly the tax authorities, into the affairs of individuals and businesses. This confidentiality enables taxpayers to communicate freely with their lawyers so that they can obtain enlightened advice that takes into account all the facts, even those that could be damaging to the taxpayer's position.

When the lawyer-client privilege applies to documents, the tax authorities cannot obtain a copy or take cognizance of their contents in any manner whatsoever. However, the lawyer-client privilege does not apply to all documents. Generally, the lawyer-client privilege applies to a document that

satisfies the following three (3) conditions: it is a communication between a lawyer and his client; it comprises a consultation or advice on a legal matter; the parties (the lawyer and his client) consider it to be of a confidential nature. Many documents emanating from a lawyer meet these three (3) conditions and are therefore inaccessible to the tax authorities.

In the tax field, memoranda relating to a reorganization and legal advice on one or more tax issues are examples. There are, however, certain exceptions to the lawyer-client privilege. Advice from a lawyer that is not of a legal nature, communications that have been disclosed to other persons (and therefore are not confidential) and communications that aim to facilitate or recommend illegal behaviour are examples. The disclosure of a document to persons other than the client is one of the most frequent causes of loss of the lawyer-client privilege in the tax field.

As for the litigation privilege, it is a concept that is distinct from lawyer-client privilege. Generally, this concept means that any document prepared by a lawyer, as well as a communication from a third party to a lawyer, benefits from a confidentiality privilege if it relates to preparation for litigation. The lawyer-client privilege and the litigation privilege can prove to be very important and even decisive in the context of an audit by the tax authorities or litigation relating to a tax matter. Therefore, one should act in all circumstances so as to preserve these privileges, use the procedures generally provided for in the tax laws to invoke them, and make sure that the tax authorities respect them. This requires great care on the part of taxpayers and their advisors.

In conclusion, Canadian taxpayers operating a business should, in all cases, make sure to adopt a rigorous policy for managing tax-related documents and put in place systematic monitoring measures to ensure continuous implementation of the policy.

## DIRECTOR AND... LIABLE

PATRICE VAILLANCOURT

pvaillancourt@lavery.ca

Many entrepreneurs decide to carry on their business through a corporation, notably due to the principle that the shareholders' liability is limited: if the corporation experiences financial difficulties, or is even driven into bankruptcy, the liability of a shareholder is generally limited to his capital investment.

In many Quebec family businesses, the shareholders are also the directors. Unlike the shareholders, the directors are the persons who manage the business and affairs of the corporation and who may be held liable for certain actions taken in the course of doing so. However, these principles are not absolute and must be qualified.

Firstly, the liability of directors applies not only to those who are formally elected by the shareholders at annual meetings and are registered as such in the corporation's records. Indeed, any person who *acts* as a director, even if he has not been elected or appointed in accordance with the law, could be held liable as a *de facto* director if he does something that is normally reserved for the directors *in law*.

Secondly, a *unanimous* shareholder agreement allows the shareholders to withdraw some or all of the directors' powers and entrust them to the shareholders. In this context, the shareholders are liable for the actions they take as substitutes for the directors.

The causes of directors' liability are numerous and the purpose of this article is not to list them all. We will focus on those that are specifically provided for in certain statutes.

### STATUTORY LIABILITY

The cases of directors' liability that are often faced by Quebec SMEs arise out of corporate, tax, environmental and employment matters.

#### Corporate matters

A director of a corporation will be held liable, for instance, when the corporation carries out certain corporate operations at a time when it does not have the financial capacity to do so in compliance with the provisions of the applicable statute. The liability regimes under the *Companies Act* (Quebec) and the *Canada Business Corporations Act* are different.

#### Employment matters

Under the corporate statutes, directors are solidarily liable for employees' salaries for a period of up to six (6) months.

#### Tax matters

Directors' liability will be sought when deductions at source are not made and remitted, or payments are not made, to the applicable taxation or other governmental authorities, notably the CSST, the Régie des rentes and Employment Insurance Canada.

Directors' liability will also apply when they fail to collect and remit goods and services taxes (GST and QST).

#### Environmental matters

The environmental statutes are increasingly severe: directors will find themselves held liable, notably under the *Environment Quality Act* (Quebec) and the *Canadian Environmental Protection Act, 1999*, not only when they authorize and order an action that contravenes these statutes but also when they counsel or encourage such an action.

### HOW TO ADEQUATELY PROTECT ONESELF?

If a director is absent from a meeting of the board of directors at which a decision is made that leads to directors' liability, will he be solidarily liable with the other directors even if he did not vote on the issue?

The answer is negative if the corporation is incorporated under the laws of Quebec but is positive if it is federally incorporated! In the latter case, a written dissent will enable him to avoid such liability.

In addition, in the case of Quebec corporations, the statute provides for a mandatory protection regime for the directors because the corporation *must* assume the defence of a director who is sued by a third party for an action taken in the performance of his duties and it must pay, if need be, the damages resulting from such action, except if the director has been grossly negligent or committed a personal fault separable from the performance of his duties.

In the case of federal corporations, the regime is not as strict, because the statute only provides for an *optional* protection regime for directors: a federal corporation *may* indemnify its directors, among others, for all their costs and expenses resulting from the holding of an investigation or from lawsuits in which they are involved as directors.

The general by-laws of Quebec and federal corporations usually provide an indemnification mechanism for directors. If that is not the case, it may be useful to revise the corporation's by-laws. Don't hesitate to contact your legal advisor about this.

In addition, it may be useful to provide for a specific written indemnification undertaking signed by the corporation, its parent corporation or any solvent entity, in favour of the corporation's directors. The undertaking may, among other things, provide for a regime that is even more attractive to the directors, while still complying with the applicable legal provisions.

Lastly, when the nature of the business it carries on or its size justifies doing so, it may be prudent for a corporation to purchase an insurance policy that specifically covers its directors and officers (often called a *D&O policy*). Usually, external directors (who hold their positions at the request of the shareholders) will require that such a policy be purchased and maintained in force.

#### SMART PRACTICES

Satisfy yourself regularly with the assistance of your professional advisors that all deductions and payments relating to employment and tax matters are made in full and at the required times, in order to avoid the payment of penalties and interest, as well as directors' liability.

At the time of a corporate operation (for example, the declaration and payment of a dividend or a redemption of shares), make sure with your legal, tax and accounting advisors that the corporation can indeed proceed with the transaction without contravening the law.

When you cease being a director, make sure to tender your written resignation to the corporation: from the date on which you deliver it, you will not be responsible for *future* actions taken by the corporation and for which its directors can be liable. Your liability for past actions remains unaffected and you cannot avoid it. In addition, make sure that your resignation has been recorded in the enterprise register (CIDREQ) so that third parties can also note your departure.

In conclusion, when you act as a director, make sure to obtain all relevant information before making decisions and don't hesitate to consult your legal and business advisors to obtain, among other things, an exhaustive list of corporate actions that can lead to your becoming liable.

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## CONTACTS

MONTREAL - 1 Place Ville Marie  
514 871-1522

QUEBEC CITY - 925 Grande Allée Ouest  
418 688-5000

OTTAWA - 360 Albert Street  
613 594-4936

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