



Business and Liability

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No business is immune to the possibility that something might go wrong. You may face financial difficulties or your actions may have harmful consequences for others. In our legal system, legal liability is designed to shift losses from one party to another. There are many situations for which you may be liable including financial losses, bodily injury and property damage. The following is an overview of some of the main types of liability that you may face as a business owner.

Personal Liability

Depending on the way you carry on a small business in Canada, you may be financially liable for your company's debts and obligations. This financial responsibility is also called personal liability.

As a sole proprietor, your personal liability is unlimited. In other words, there is no limit on the amount for which you may be obligated. Therefore, your business obligations can be satisfied by recourse to your personal assets. The risk associated with unlimited liability is the biggest deterrent to carrying on business as a sole proprietor. To avoid that risk (and personal bankruptcy) you must either incorporate your company or procure adequate insurance against any possible mishaps.

As with a sole proprietorship, your personal liability as a partner is unlimited. Your personal assets, such as your car, your house or your furniture, can be seized by the courts to repay any debts of the partnership. Because any partner can legally bind the other partners, the risk of unlimited liability can present a major barrier to choosing to do business as a partnership. To overcome that barrier, you should, at a minimum, ensure that the partnership is adequately insured. A limited partnership can also offer some protection to anyone preferring a less direct involvement. In a limited partnership, the general partner(s) does not have limited liability but is the only one legally allowed to conduct business of the limited partnership or to contribute services. As limited partners, certain of the partners' personal liability is limited to the extent of their contribution to the partnership.

As a shareholder of a corporation, your liability is limited to the value of the cash and property you contributed to the company (usually in exchange for your shares). At the same time, the shareholders, through the exercise of their voting power, direct the affairs of the corporations and ultimately determine how it carries on business. Therefore, the corporate business form represents the best way for a small-business owner to maximize participation in his/her business while limiting personal liability.

Product Liability

If you are a manufacturer, you should be aware that the law imposes you to:

- Take reasonable care in the design and manufacture of your goods: You must ensure that your business designs or manufactures do not create an unreasonable risk of harm for anyone who uses them, but also that they do not

present a risk to consumers who put those goods to an unintended yet reasonably foreseeable use. For example, if to gain a competitive edge you design a lighter hair-dryer made of plastic that when heated can produce toxic fumes, you create an unreasonable risk of harm. If you design a hair-dryer that causes fires if used to dry clothes, you are potentially liable for injuries caused through this reasonably foreseeable use.

- To warn consumers about any reasonably foreseeable dangers associated with the use of your goods: A failure to do so create a basis for liability. The duty to warn also applies to intended and reasonably foreseeable unintended uses of your goods. However there is no duty to warn of obvious danger (i.e. a knife can cut the person handling it). To ensure that you meet your duty to warn, you should always place your warnings in a visible place on both the goods themselves and their packaging. The warning should be clear and easy to understand.

In Canada, anyone who suffers personal injury as a result of a design or manufacturing flaw in a product can sue its manufacturer for negligence. To successfully defend yourself against such a claim, you will have to prove that you took all reasonable care in the design and manufacture of your products to ensure that they did not pose a risk of injury to consumers. Successful plaintiffs are usually awarded compensation for their injuries including loss of income and any costs of future care.

However, product liability does not only affect manufacturers of goods. A person who sells, prescribes, installs or repairs a product that was negligently designed or manufactured must warn customers or clients about any known risks or dangers of using it. Failure to do so can make them liable along with the manufacturer.

Product liability insurance can cover you if your products or services cause harm or loss to anyone purchasing them. This type of insurance is particularly relevant to small manufacturing businesses.

Director's Liability

A key benefit of incorporating a company is that of limiting personal liability. The business stands alone and has its own assets and liabilities. Though it is owned by the shareholders, the assets of the company do not belong to them, likewise the assets of the shareholders do not belong to the company. Shareholders do not run the company. They elect a board of directors. This board is responsible for the day-to-day affairs of the business. The directors decide what direction the company will take, they make financial decisions, and they appoint officers. Like shareholders, directors are not personally liable for the debts of the business. There are a few exceptions to this rule.

A director may be personally liable if the third party is being misled, if the director doesn't act in good faith and with due diligence or if a specific statute has been broken.

Misleading a Third Party

When entering into a contract, a director may be liable if the other party doesn't realize they are dealing with a corporation. You can protect yourself by always using the full corporate name on all letterhead, invoices, contracts, etc. (i.e.) ABC Company Ltd. Also, when signing a contract make sure not to sign personally. Always sign on behalf of the corporation (i.e.) Company name, per: your signature, and then your position. This is important as well when signing company cheques. Always sign on behalf of the company.

Not acting in Good Faith

As director, you are liable if you order that a wrong action be done or if you know that wrong conduct is going on. You must always act in the best interest of your company and exercise the care and due diligence any reasonable person would exercise. Directors may not be found personally liable if they relied on professional counsel from a lawyer, an accountant etc (see Professional and Occupational Liability).

Broken Statutes

All corporations must comply with laws surrounding business practices. For example, there are regulations in the Business Corporations Act, Criminal Code and Environmental Protection Act (see Environmental Liability) that must be met. A director may be found personally liable for up to six months of employee wages, any taxes or source deductions not paid by the corporation and if laws on human rights or harassment are ignored.

To further avoid liability a director may have a Notice of Dissent recorded into the minute book, make sure due diligence is taken, have insurance for damages and insolvency or he or she can resign as a director. However, resignation only protects the director from future liabilities, not one that occurs before the resignation.

The great number of statutes in Canada that holds directors and officers personally liable for the actions of their companies has resulted, in recent years, in the introduction of insurance policies designed to protect against losses associated with such liability. Directors and officers liability insurance is often a condition of their service in those positions.

Professional or Occupational Liability

A person who practices a profession such as law, accounting, architecture, engineering or medicine claims to have special knowledge and skill just by setting up a practice. So does a person who carries on an occupation such as auto repair, bookkeeping, truck driving or construction, to name a few. Customers and clients are entitled to rely on the competence of people who claim to have special skills and knowledge. Based on Tort Law, professionals and people in skilled occupation -even those who are just beginners- have to be as competent at what they do than any reasonably competent, careful

professional or skilled worker in that particular field. Those who do not meet this standard of reasonable competence are committing the tort of professional negligence.

Moreover, anyone who claims to be a specialist in some particular area (for example a lawyer specialized in Environmental Law or an auto mechanic who specializes in brake repair) is held to a higher standard of competence than someone who does not claim to be a specialist.

Professional liability insurance can cover third-party loss and injury caused by you giving careless advice or doing careless work as a professional or a skilled worker.

Occupier's Liability

Occupier's liability is a particular area of negligence, of special importance to people who have business premises. According to the Law, every person who occupies premises has to take reasonable care to make sure that anybody coming onto the premises is reasonably safe i.e. the sidewalk in front of a store is kept free of ice, melted snow or spilled drinks are mopped up, escalators and elevators are in good condition. Anyone who is injured on someone else's premises that were not kept reasonably safe can sue the owner or a tenant.

It is not enough for a business to fix a dangerous condition that has been noticed, or to warn of a known dangerous condition. You have to inspect the premises on a regular basis and must fix any dangerous condition within a reasonable time, which, depending on the danger could mean immediately. People have to be protected from a dangerous condition as long as it remains unfixed. (For example, by being kept out of the area).

Environmental Liability

People who are involved in specific industries have a duty to protect the environment and to obey all environmental laws. People who are involved in activities that have a direct impact on the environment have a duty to know about and follow all environmental laws.

Canadian environmental laws are based on five basic principles:

1. Prevention of pollution is better than cure.
2. Pollution that has already occurred should not be allowed to spread.
3. Remedial action should take place sooner, rather than later.
4. Where pollution does occur, the polluter must pay to clean it up.
5. The original polluter can be pursued to pay for cleanups, even if it no longer owns the polluted land, and possibly even if it acted lawfully at the time the pollution occurred.

Who is "the polluter"?

The "polluter" is anyone whose negligence causes or contributes to pollution. This includes those who owned or were in charge of the source of pollution, if they failed to take reasonable steps to prevent the pollution. Official government policy is to look first to the persons who caused the contamination. However, the "polluter" is a surprisingly broad category, and may include persons who did not know the pollution was occurring.

There is no corporate veil. Individual officers, directors and employees can be held liable for corporate pollution. The "polluter" category includes individuals who were in charge, or who were otherwise responsible for the contamination. They may have personal liability for the cleanup. If the polluter is without funds, the government may attack the personal assets of its directors and officers.

The non-polluter also pays, especially when the polluter cannot be found or is insolvent. In theory, governments are committed to the "polluter pays" principle". However, where the original polluter no longer owns or occupies the contaminated site, liability can fall on current owners and occupiers, whether or not they caused the contamination, or even knew it was there.

The best way to manage environmental liabilities is to prevent environmental problems. Second best is to show due diligence. Due diligence is not a guarantee of protection from liability, but it can minimize your exposure. To use the due diligence defense, the company or individual must show that they established a proper system to prevent environmental harm, and that they took reasonable steps to ensure that the prevention system would work effectively. An environmental management system should identify, manage, and control the risk of harm to the environment, and should document the risks and actions taken.

If you need specific advice about defending an environmental charge, you should contact an environmental law lawyer. A lawyer can also advise you about how to ensure that you are complying with the law and how to minimize your exposure to environmental liability before problems arise.

Depending on your activities you may fall under provincial environmental regulations or federal environmental regulations:

- Provincial level: Alberta's Environmental Protection and Enhancement Act (EPEA) takes an integrated approach to the protection of air, land and water in our province. The Act establishes a regulatory framework that requires either approvals or code of practice registrations for industries that have the potential to impact the environment. Approvals and codes generally specify monitoring requirements. These monitoring requirements have the force of law. Enforcement actions are used to ensure that monitoring is conducted in accordance with approval or code requirements. It is illegal to violate these rules.

You can obtain more information about the regulations for specific substances and activities by contacting Alberta Environment (Information Centre: 780-944-0313 or website: www.gov.ab.ca/env).

- Federal level: Environment Canada administers the Canadian Environmental Protection Act 1999 (CEPA, 1999) and the pollution prevention provisions of the Fisheries Act (FA) on behalf of the federal government, but develops regulations and guidelines jointly with Health Canada. One of the purposes of the Fisheries Act is to protect fish and marine organisms from the discharge of harmful substances. The Canadian Environmental Protection Act (CEPA) is an Act respecting the protection of the environment, human life and health. Its seven parts include powers and provisions to:
 - a) undertake environmental research and develop guidelines and codes of practices for industry and business;
 - b) regulate toxic substances, wastes and fuels;
 - c) regulate nutrients;
 - d) regulate the environmental effects of federal operations;
 - e) regulate international air pollution and ocean dumping; and enforce regulations including agreements with provinces and territories.

For more information, contact the Environmental Protection Publications Centre, Environment Canada at (819) 997-2800 or 1-800-668-6767 or by facsimile (819) 953-2225.

Environmental liability insurance is designed to protect against damage or injury resulting from the accidental discharge of hazardous waste. It will not protect you if you deliberately discharge such materials, unless you were not aware of the danger at the time of the discharge. Be sure to discuss these details with your insurance provider if your business produces, stores or otherwise deals with hazardous wastes.

Disclaimer:

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