

Protection of Officers in the Performance of Their Duties

(APEC Policy Dialogue
on Deposit Insurance)

Michael J. MacNaughton
(February 2004)



**BORDEN
LADNER
GERVAIS**

Lawyers

Patent and Trade-mark Agents



BORDEN
LADNER
GERVAIS

1. Overview

1. State immunity originally the norm.
2. State immunity did not extend to protect state servants or agents.
3. Law of negligence developed and can now be applied to the state subject to limits.
4. The activities of the state have increased, including through systems of deposit insurance.
5. Deposit insurers have been the subject of claims.



BORDEN
LADNER
GERVAIS

Overview (cont.)

6. There has been recognition that, without appropriate limits, these kinds of claims may have a chilling effect on the proper functioning of regulatory systems including deposit insurance regimes.
7. Judicial and legislative protections are not designed to completely insulate the state or its servants or agents from the consequences of actions not taken in good faith (e.g. the tort of misfeasance in office).
8. Legislative protection of directors, officers and others is an appropriate safeguard for the proper operation of public systems, like deposit insurance regimes.

2. Tort Law

Anns – the expansion of the law of negligence into the public sphere

Yeun Kun Yeu v. Attorney-General of Hong Kong – a reaction in the deposit insurance context

“A sound judgment would be less likely to be exercised if the commissioner were to be constantly looking over his shoulder at the prospect of claims against him, and his activities would be likely to be conducted in a detrimentally defensive frame of mind. In the result, the effectiveness of his functions would be at risk of diminution. Consciousness of potential liability could lead to distortions of judgment. ... If such liability were to be desirable upon any policy grounds, it would be much better that the liability were to be introduced by the legislature, which better suited than the judiciary to weigh the competing policy considerations.”



BORDEN
LADNER
GERVAIS

3. The Policy – Operations Distinction

It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. ...The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons – more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters.



BORDEN
LADNER
GERVAIS

4. The Policy Issues at Play in the Regulatory Context

Cooper v. Hobart – A court’s express recognition of the policy issues at play in the regulatory area

The regulatory scheme ... provides a general framework to ensure the efficient operation of the ... marketplace. The Registrar must balance a myriad of competing interests, ensuring that the public has access to capital through ... financing while at the same time instilling public confidence in the system by determining who is “suitable” and whose proposed registration ... is “not objectionable”. All of the powers or tools conferred by the Act on the Registrar are necessary to undertake this delicate balancing.



BORDEN
LADNER
GERVAIS

The Policy Issues at Play in the Regulatory Context (cont.)

- The decision of whether to suspend ... involves both policy and quasi-judicial elements. The decision requires the Registrar to balance the public and private interests. The Registrar is not simply carrying out a predetermined government policy, but deciding, as an agent of the executive branch of government, what that policy should be.
- the Registrar must make difficult discretionary decisions in the are of public policy, decisions which command deference.
- the spectre of indeterminate liability would loom large if a duty of care was recognized as between the Registrar and investors...
- . To impose a duty of care ... would be to effectively create an insurance scheme for investors at great cost to the taxpaying public

5. Statutory Protections

Neither the [Financial Services] Authority nor any person who is, or is acting as, an officer or servant of the Authority shall be liable in damages for anything done or omitted in the discharge or purported discharge of the functions of the Authority under this Act unless it is shown that the act or omission was in bad faith.

(UK Banking Act 1987, as amended)

The Corporation, its directors, officers and employees and any persons acting on behalf of the Corporation are not liable to any member institution, depositor with, or creditor or shareholder of, any member institution, or to any other person, for any damages, payment compensation or indemnity that any such member institution, depositor, creditor, shareholder other person may suffer or claim by reason of anything done or omitted to be done, in good faith, in the exercise, execution or performance of any powers, duties and functions that by this Act are intended to be exercised, executed or performed. (underlining added)

(Canada Deposit Insurance Corporation Act)



BORDEN
LADNER
GERVAIS

6. The Tort of Misfeasance in Public Office

In the absence of good faith, liability may still exist.

- (1) the defendant was a public entity exercising official or public authority;
- (2) the defendant had committed some unlawful act or omission in the course of exercising its powers;
- (3) the defendant (through its officials) had acted in bad faith (the act or omission occurred either intentionally (in the knowledge that the act or omission was unlawful and would probably cause loss) or as a consequence of recklessness (in the knowledge that the defendant was acting outside its powers and wilfully chose to disregard the risk of loss to the plaintiff); and
- (4) the relevant act or omission caused the plaintiffs' losses.



7. Draft Indemnity Provision

The Authority [or other appropriate person] shall indemnify a present or former director or officer of the Authority and the director's or officer's heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, that are reasonably incurred by the director or officer in respect of any civil, criminal or administrative action or proceeding to which the director or officer is a party by reason of being or having been such a director or officer, if the director or officer

- (1) acted honestly and in good faith with a view to the best interests of the Authority; and
- (2) in the case of any criminal or administrative action or proceeding that is enforced by a monetary penalty, believed on reasonable grounds that the director's or officer's conduct was lawful.

8. Defence Costs

Indemnification provision just discussed provides protection but does not deal with timing issues.

Defence of a proceeding can be exceedingly expensive.

Would it be fair, and consistent with the primary goal of the indemnification itself, that a person who is entitled to be protected from litigation costs and expenses should have to fund those costs out of their own resources and wait for reimbursement until the proceeding is concluded?

If defence costs are funded but at the end of the proceeding it is determined that the person was not entitled to be indemnified (e.g., failed to act in good faith) should those costs be recoverable by the Authority from the person?



9. Draft Defence Cost Provision

Where an existing or former Director or Officer claims indemnification pursuant to the [Indemnification Provision] against costs, charges and expenses incurred in respect of an action or proceeding to which he or she is a party and the same are not promptly paid on behalf of or reimbursed to the individual pursuant to the [Indemnification Provision] as and when incurred, the Authority, if so requested, shall make one or more advances to the individual or for his or her account in order to pay such costs, charges and expenses, provided that

- (a) the Authority is satisfied that there is no substantial reason to doubt that the individual is entitled to be indemnified pursuant to the [Indemnification Provision], and
- (b) the individual takes all steps reasonably available to effectively assign to the Authority, and agrees that the Authority shall be subrogated to, his or her right to be indemnified pursuant to the [Indemnity Provision] and otherwise to recover on account of the costs, charges and expenses in question from any other person.

Draft Defence Cost Provision (cont.)

(Recovery in the event that the Indemnity Provision does not apply (e.g., a conclusion at the end of a proceeding that the officer or director failed to act in good faith).)

Any such advances

- (a) shall bear interest calculated at a rate and payable at such times as the Authority considers reasonable,
- (b) shall be correspondingly repayable to the Authority forthwith as and when payments by way of indemnity are made pursuant to the [Indemnity Provision], and
- (c) in any event, shall be repayable to the Authority in full, together with all accrued but unpaid interest thereon, but no later than the third anniversary of the conclusion of the action or proceeding in question.

10. Guidelines and the importance of Trigger Mechanisms

Oath of Office

Conflict of Interest Guidelines

Trigger Mechanisms



BORDEN
LADNER
GERVAIS

11. Conflict of Interest Guidelines

1. Each director and employee must uphold the highest ethical standards, so that public confidence and trust in the integrity, objectivity and impartiality of the Authority are conserved and enhanced.
2. Each director and employee has an obligation to carry out his or her duties and exercise his or her powers as a director or employee, and to arrange his or her private affairs, in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged simply by acting within the law.
3. Each director and employee must arrange his or her private affairs in a manner designed to prevent real, potential or apparent conflicts of interest from arising, but if such a conflict does arise between the private interests of a director or employee and the responsibilities of that director or employee as such the conflict must be resolved in a manner satisfactory to the Authority.

Conflict of Interest Guidelines (cont.)

4. A director or employee must not step out of his or her role to assist private persons in their dealings with the Authority where that would result in preferential treatment to, or privileged access to the Authority by, any person.

5. A director or employee must not knowingly take advantage of, or benefit from, any information obtained by reason of his or her status as a director or employee and not generally available to the public.

6. A director or employee must not directly or indirectly use, or allow the use of, the property of the Authority for anything other than officially approved activities.



BORDEN
LADNER
GERVAIS

Conflict of Interest Guidelines (cont.)

7. A director or employee must not, after ceasing to have that status, act in such a manner as to take improper advantage of his or her former status as a director or employee.