



BARBEAU & COMPANY

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INTRODUCTION

In this issue of the Barbeau & Company newsletter, we shall examine two unrelated yet topical areas of the law relating to liability. Those being the law relating to the division of “family assets” under the *Family Relations Act* (British Columbia) and the liability of volunteer directors of a society.

FAMILY ASSETS AND THE FAMILY RELATIONS ACT

As many of our readers already appreciate, the *Family Relations Act* provides for the division of family assets upon a divorce, annulment or declaration by a court that there is no reasonable prospect of reconciliation between the parties. In this regard, family assets are defined as any assets that are owned by either spouse and are ordinarily used for a family purpose (such as the family home, family car, recreational property, etc.). Family assets also include RRSPs and pension plans.

The division of property under the *Family Relations Act* is an equal division. However, the court has the power¹ to change the presumption of an equal division of property having regard to certain specific factors.

¹ Section 65 of the *Family Relations Act*.

Some factors which the court can consider in ordering an unequal division of property include whether the marriage was of a short duration, whether property was acquired before the marriage or through inheritance or gift, whether one spouse has a need for a larger share of property in order to become or remain financially independent, and whether one spouse has the responsibility to provide a home for the children of the marriage.

The resulting division of property can take place by way of the sale of the property and division of the proceeds, or by the court ordering one spouse to retain property upon paying compensation to the other spouse.

In the case of an RRSP, an equal division of this asset will result from the application of the *Family Relations Act*, however the *Income Tax Act* (Canada) provides for a “rollover” permitting RRSPs to be transferred from one spouse to the other without any income tax becoming payable².

Moreover, the business assets of one spouse may be considered family assets if the other spouse has made a direct or **indirect** contribution to that asset.

² However, a court order or written separation agreement is required by the Canada Customs and Revenue Agency (N.B. Formerly Revenue Canada).

An indirect contribution may take the form of effective household management and child-rearing responsibilities and has been interpreted by the courts in rather broad terms. It would seem that even a very modest contribution by the “home-maker” may still amount to an indirect contribution sufficient to entitle him or her to a share in a business owned by the other spouse.

If property is not a family asset³, or an excluded business asset⁴, then it is an “other asset” and usually remains the property of the owning spouse. If a spouse claims that such an asset is an “other asset”, that spouse must prove that the asset was not used for a family purpose⁵.

The above noted general survey of the law regarding claims arising upon marriage breakdown sets out the general legislative environment applicable to the division of family assets. Clearly, the *Family Relations Act* provides a very comprehensive system for the redistribution of assets on marriage breakdown and should prompt the reader to consider these issues in relation to his or her own wealth preservation objectives.

³ As defined by Section 58 of the *Family Relations Act*.

⁴ As defined by Section 59 of the *Family Relations Act*.

⁵ As defined by Section 60 of the *Family Relations Act*.

DIRECTOR LIABILITY AND NON-PROFIT SOCIETIES

Non-profit organizations in British Columbia may be incorporated under the *Society Act* (“BCSA”). The BCSA provides that societies may be incorporated for any lawful purpose or purposes¹.

The BCSA defines the term *director* to include a trustee, officer, member of an executive committee and a person occupying any such position by whatever name². The members may nominate, elect, or appoint directors in accordance with the society’s bylaws³. The act does not, however, define the term *officer*.

Society directors have a statutory duty to supervise the management and affairs of the society in accordance with its constitution and bylaws. Limitations or restrictions on the powers or functions of the directors, such as a provision in the constitution or bylaws, are not effective against third parties who have no knowledge of such limitation or restriction.

Directors should also note that charitable societies are obligated to invest the funds of the society only in securities in which trustees are authorized by law to invest.

¹ Under the BCSA a lawful purpose includes national, patriotic, religious, philanthropic, charitable, provident, scientific, fraternal, benevolent, artistic, educational, social, professional, agricultural, sporting or other useful purpose.

² BCSA, s. 1 (definition of director).

³ BCSA, s. 24(1).

The BCSA further obligates directors, in the performance of their responsibilities as directors of a society, to:

- act honestly;
- act in good faith and in the best interests of the society; and
- exercise the care, diligence, and skill of a reasonably prudent person.

In addition, directors may not contract out of the duties imposed nor may the society’s constitution or bylaws relieve a director from these statutory duties or from any liability by virtue of a rule of law respecting negligence, default, breach of duty, or breach of trust.

As noted above, the British Columbia legislation modifies the common law by requiring directors to exercise the care, diligence, and skill of a reasonably prudent person. By setting the standard of care according to that expected of a reasonable person, the BCSA adopts an objective standard of care. In effect, this means that a director must exercise the care, diligence, and skill of a reasonable person in the same circumstances and informed of all the facts.

In addition to the liability arising from the BCSA, the *Employment Standards Act* imposes personal liability on directors and officers of a corporation for up to two months of unpaid employee wages for each employee. However, this act does not impose that liability on directors or officers of a society incorporated under BCSA where such directors are volunteer directors or officers of

a charity, within the meaning of the federal *Income Tax Act*.

Nevertheless, if a society fails to pay its employees, the unpaid wages still constitute a lien, charge and secured debt in favour of the Director of Employment Standards against all of the society’s real estate and personal property, including accounts receivable. Such a lien has priority except with respect to a duly registered mortgage or debenture charging land.

A director who has a direct or indirect interest in a proposed contract or transaction with the society may be liable to account to the society for any profit made as a consequence of the society entering into such contract or transaction.

Finally, a society in British Columbia must have at least three directors, and where a society has less than the requisite number for a period of more than six months, each director is personally liable for the payment of every debt of the society incurred after the expiration of the six month period. Such personal liability continues as long as the number of directors continues below the required number.

In conclusion, individuals who wish to or are currently directors of a British Columbia society, should ensure that they faithfully discharge their duties, consistent with the obligations of the BCSA.

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