

To Be or Not to Be a Director?: The Mind and Management of a British Columbia Corporation

By Scott T. Johnston

So, now that you have reserved that whimsical business name with the Registrar of Companies and incorporated a British Columbia corporation of your own: the real work begins. Who will be the mind and management of the enterprise? Who will be responsible for driving the bus that is your corporation?

A British Columbia corporation, also known as a company, is created by incorporating under the *Business Corporations Act* of British Columbia (the “Act”). It is a separate and distinct legal entity with the power and capacity of a natural person. However, the corporation is only able to function and act through its board of directors. It is a form of business organization that is ultimately owned by individuals (or corporations or other entities) known as shareholders who own shares of the corporation, who have, in turn, the power to elect and appoint individuals to act on their behalf as the directors of the corporation.

In most start-up corporations, all of the shareholders wish to be directors, as they all plan to be actively involved in the day to day management and control of the venture. The directors of the corporation are entrusted by the shareholders with the exclusive power to manage the corporation and its affairs. If the shareholders are dissatisfied with the performance of inept directors, they may remove them by voting them out at a general meeting of the corporation and replacing them with more competent individuals.

Every corporation must have at least one or more directors and the directors so appointed must manage or supervise the management of the business and affairs of the corporation. In order to be eligible to become or act as a director of a corporation, an individual must: (a) be over 18 years of age; (b) be capable of managing the individual’s own affairs (i.e. of sound mind and capacity); (c) not be an undischarged bankrupt; and (d) not have been convicted in or out of British Columbia of an offence in connection with the promotion, formation, or management of a corporation or incorporated business, or of an offence involving fraud within the last five years.

For example, Ricky and Julian incorporate a British Columbia corporation under the corporate name “420 Holdings Ltd.” for the purposes of carrying on a wholesale pre-owned discount barbeque sales and repair business. Unfortunately, Julian has recently been convicted in Nova Scotia of an offence in connection with an illegal Christmas light redistribution racket, so he is ineligible to act as a director of the corporation.

While shareholders often wish to also be directors of the corporation, it is important to understand that with power also comes responsibility. By acting as a director, and therefore, as the mind and management of a corporation, an individual is subject to potential liability both at common law and under various Provincial and Federal statutes for the misdeeds of the corporation. This statutory liability is of concern regardless of how one is elected or appointed as a director.

To illustrate, due to Julian’s disqualification, Ricky recruits Lucy to also act as a nominee director of the corporation, although she has no involvement in the day to day management of the barbeque operation and does not attend any meetings of the directors. As such, Ricky would be known as an “inside” director and Lucy as an “outside” director. Under most statutes, there is no difference between statutory liability of “inside” and “outside” directors for the wrongdoing of a corporation.

Ricky hires two employees, Cory and Trevor, as “barbeque relocation technicians” for the barbeque sales and repair corporation described above. Unfortunately, as a cost-cutting measure, Ricky decides that 420 Holdings Ltd. should pay Cory and Trevor with only pop and jalapeño chips for two

months of work rather than actual wages or salaries. Both of the understandably disgruntled Cory and Trevor file complaints under the *Employment Standards Act* of British Columbia for the unpaid wages owing to them. Under this particular statute, both Ricky and Lucy may be personally liable. A person who was a director of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

Accordingly, although Cory and Trevor were employed by the corporation, both Ricky and Lucy are personally liable for the unpaid wages, regardless of the fact that Lucy did not participate in the management of the business or handle any of the payments to the employees.

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