



ALEXANDER
HOLBURN BEAUDIN
& LANG LLP

Barristers & Solicitors • Trade-mark Agents



Prevention for Professionals

TOPICS FOR TODAY

1. Basic Legal Concepts
2. Due Diligence Entering into an Engagement:

Topics For Today

4. When Things Go Wrong During the Engagement
5. Errors Discovered After the Engagement

Why Worry?

- Personal Liability
- Limitation Periods
- Liability to Third Persons over whom you have no control

Individual C.A. Liability

- “Limited companies cannot exercise professional functions except through qualified individual employees.
- It is their skill and experience the **clients** are engaging and will rely upon.
- They therefore owe a concomitant duty of care to **those clients** and are potentially liable in tort if they fail to meet that duty.”
- *Strata Plan No. VR1720 v. Bart Developments*, [1999] B.C.J. No. 382

Personal Liability – *The Best Place on Earth* (B.C.)

- Section 14.3 of the *Accountants (Chartered) Act*
- Civil liability for professional negligence is not affected by the fact the C.A. acted through a Licensed Firm

Personal Liability in Other Province's LLP's

- Not liable for acts of other partners or employees unless:
 - Actual knowledge and failure to act; or
 - Wrongful act by an employee, agent or representative of the partnership (partner?) under your supervision; and
 - Failure to provide adequate supervision

Personal Liability in an e.g. Ontario LLP

Partner Liable For

Manager

Manager

Sup.

Sup.

Sup.

Sup.

C.A.

C.A.

C.A.

C.A.

C.A.

C.A.

C.A.

Personal Liability –In A BC LLP

- S.104(2) of B.C. Partnership Act :
- Partners own acts
- Acts of other partners or employees if the Partner actually:
 - **Knew** what they were doing; and
 - Didn't take reasonable steps to prevent
- No Liability for failure to Supervise!

Vicarious Liability

A professional firm can be vicariously liable for:

- Partners
- Employees
- Agents and Sub-consultants

Limitation Periods

- Two years for physical damage or injury to person;
- Six years for economic loss;
- Ten years for breach of trust in the mishandling of trust property; and
- Thirty-year ultimate rule.

Limitation Periods

- Section 6(3) postpones starting time of the limitation period until “*a reasonable man would have had within his possession sufficient facts that he should have recognized he had a right to sue with a reasonable prospect of success.*”

Limitation Periods

- No prohibition against any term in an engagement letter reducing the limitation period!

Limitation Periods

- 2007 – Tax Planning
- April 30, 2008 – Implementation of Tax Plan
- 2011 – CCRA Notice of Audit and Agreement to Extend Period for Reassessment

Limitation Periods

- 2012 – Reassessment
- Time to Sue Would Not Run Out Until:
 - **2014** in Alberta
 - **2018** in British Columbia

Negligence

- Two Primary bases for claim:
- Provision of accounting or related services to persons to whom a duty to do so is owed.
- Negligent misrepresentation.

Standard of Care in the Provision of Professional Services

Negligence: Failure to adhere to the standard of care expected of a reasonable and prudent Chartered Accountant in the provision of services to one to whom you owe a duty of care.

Hercules Management v. Ernst & Young Negligent Misrepresentation

- There must be a duty of care based on a “special relationship” between the representor and the representee.
- The representation must be untrue, inaccurate or misleading.

Negligent Misrepresentation

- The representor must have acted negligently in making the misrepresentation.
- The reliance must have been detrimental to the representee, i.e., damages resulted.

Negligent Misrepresentation

- The representee must have relied, in a reasonable manner, on the negligent misrepresentation.
- **The representation must have been made for the purpose that the representee would rely upon it in the way that he did.**

The Notice to Reader

Disclaimer of Liability

These financial statements were compiled solely for the use of CORP. We make no representations of any kind to any other person in respect of these financial statements and accept no responsibility for their use by any other person.

The Review

Disclaimer of Liability

These financial statements were reviewed and this Review Engagement Report issued solely for the use of [name of client]. We make no representations of any kind to any other person in respect of these financial statements and accept no responsibility for their use by any other person in the absence of our written consent and the acknowledgment of the limitations of our liability.

Protection: Due Diligence Before the Engagement

- Know Your Client - Each year before beginning the Engagement:
 - Update Officers and Directors – Copy of Last Annual Report
 - How does management think it did; problems now or ahead
 - Internal controls – what are they and are they adequate

Protection: Due Diligence Before the Engagement

- Review the responsibilities of Management with Management
- Ask yourself: Do I like this client?

Protection: Due Diligence Before the Engagement

- Purpose of the engagement:
 - Why and what does the client need
 - Who will be receiving the Financial Statements or work product
 - Is there any concern about fraud
 - Is an NTR or Review adequate

Horror Stories – Notice To Reader

- Used to impart credibility and authenticity
- Section 15(2)
- S. 163.2 problems are finally starting to become an issue

Protection: Due Diligence Before the Engagement

- Are there too many CA's?????
- Has the client followed your past advice with respect to internal controls
- Is this a last minute client who won't make the effort?
- **Fire High Risk or Uncooperative Clients**

Protection: Due Diligence Before the Engagement

- Set a fee appropriate to the Risk and the Aggravation level
- Get the #* @!! Engagement letter signed before you begin the work – no exceptions!
- Use multiple engagement letters for different functions or services
- Get a new engagement letter every year!

Engagement Letters

- Remember No Term is Iron Clad
- While Engagement Letters are Your Best DefenceThere is Sometimes A Way Around Anything

During the Engagement

- Can a CA do too much work in a Compilation or Review Engagement?
- When and why would you do more?
- You cannot be liable for doing more work than required, unless, you do it poorly, or ignore problems that should then be apparent

During the Engagement

- Make sure the potential for any loss of independence will not be your fault
 - What is your policy with respect to solicitation of employment of your senior CA's by clients?
 - Not only are there too few CA's in public practice, apparently there are too few CFO's

During the Engagement

- What happens when you can no longer rely upon the *Good Faith of Management*?
- Absent an “escape clause” in your engagement letter, what about your contractual responsibilities?
- Can only quit if contract is *frustrated*, i.e., no longer possible to perform for professional reasons

Loss of Presumption of Good Faith in Management

- Different issues for NTR, Review, Audit?
- Can you still continue an Assurance function if you qualify Report or Opinion?
- Can you resolve the concerns by doing more work and charging a much higher fee?

Loss of Presumption of Good Faith in Management

- Will your quitting the engagement cause a delisting on an exchange?
- Will your quitting cause the company to fail when the bank, already concerned, hears about it and responds by calling the loan?

Response to Good Faith Issues

1. Seek legal assistance
2. Seek the counsel and advice of a senior member of the Institute with a reputation in respect of assurance obligations
3. Set out in a letter to the client what has caused you to resign, i.e. the specific wrongful activity

Response to Good Faith Issues

4. Advise Client of obligations per Rule 302.3 to advise a successor CA that suspected fraud or illegal activity may have been a factor in the reason to resign
5. Advise Client that you will not disclose confidential information per Rule 208, but will refer successor to Client and this letter

Completing the Engagement

- Provide draft product
- Prepare and keep in Working Papers a detailed agenda for the meeting with Client
- Obtain, without fail, the representation letter as a condition to releasing work product
- Review key items on Balance Sheet, Income Statement, Changes – for a review, confirm each number is plausible

Completing the Engagement

- Review all of the Notes – are they up to date
- Document, document, document
- Don't stop until documenting complete
- Write a CYA letter on issues or concerns – too often ignored in Review and NTR engagements

Subsequent Error in Financial Statements

- Is the error material?
- Does the discovery prompt you to worry that the error is not isolated?
- Does the error cause you to lose that presumption of management good faith?
- Are you still providing assurance functions to the Client, or have you learned of error from a successor CA

Subsequent Error in Financial Statements

- Competing Professional Obligations:
 - Rule 205 vs. Rule 208
- Easier to resolve if you have the right per the engagement letters to contact recipients
- Regretfully, there is no one or right answer!