

Chartered Accountants in Private Industry

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SOMETHING DIFFERENT

- Responsibilities and liabilities of CA's in private industry
- Rules of Professional Conduct as they apply to CA's in private Industry
- Specific issues

RULES OF PROFESSIONAL CONDUCT

- It is essential to remember that a profession does not cease to be a profession because a proportion of its members enter private employment.
- These members continue to belong to the profession and to be subject to the Rules of Professional Conduct – *Forward to the Rules of Professional Conduct*

RULES OF PROFESSIONAL CONDUCT

- Members not in public practice are bound by the same Rules of Professional Conduct, unless the Rule is only applicable to public practice
- “Professional Services” is not just public practice – it is where anyone relies on the CA in expectation that as a CA, there will be due care, integrity and objectivity

RULES OF PROFESSIONAL CONDUCT

Rules 206.2 and 206.3

- All financial statements prepared by a CA should be presented fairly in accordance with GAAP
- Carry out Audit Committee or Directors responsibilities with the care and diligence of a competent CA

RULES OF PROFESSIONAL CONDUCT

- The Overriding Rule: 201 – Act at all times in a manner which will maintain the reputation of the profession and its ability to serve the public interest
- The Balance of the 200 Rules divide between:
 - Competency
 - Integrity
 - Independence

RULES: 202 Integrity

- “A member, student or licensed firm shall perform professional services with integrity and due care”
- An Overriding rule: A breach of many more specific rules

RULE 205

- A member cannot associate with any statement, oral or written, which the member knows, **or should know**, is false or misleading
- A breach of this rule is almost universally regarded as also a breach of Rules 201 and 202

RULE 208 : Confidentiality

- Two aspects of this Rule:
 - Inappropriate Disclosure to Third Persons
 - Inappropriate Use by the Member

LIABILITY OF CA'S IN PRIVATE INDUSTRY

- Two distinct situations in which a CA, acting as a controller or C.F.O., may find himself facing personal liability:
 - The liability of the CA individually to third persons with whom he deals on behalf of his employer; and
 - Liability to the employer.

LIABILITY TO THIRD PERSONS

Strata Plan No. VR1720 v. Bart Developments,
[1999] B.C.J. No. 382 (B.C.S.C.):

- “It cannot be plausibly argued that a limited company purporting to offer professional services as ‘consulting engineers’ and indicating that its employees have special skill and experience is not inducing its clients to rely on those individual’s expertise.

LIABILITY TO THIRD PERSONS

- Limited companies cannot exercise professional functions except through qualified individual employees. Those employees must realize 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.” (p. 3)

LIABILITY TO THIRD PERSONS

- What of the C.F.O. who prepares false financial statements on behalf of the company to present to the bank or a supplier?
- Isn't there a degree of reliance on the CA Brand?

LIABILITY TO THIRD PERSONS

- The CA, whether in public practice or private industry, is equally bound by the Rules of Professional Conduct.
- The traditional view: An employee who causes a breach of contract between his employer and a third person cannot be liable in tort at the suit of that third party

LIABILITY TO THIRD PERSONS

- Traditional view allows 6,000 CA's in B.C. to sleep at night
- This is good – because to date, no insurance is available to these CA's
- This is too bad, because someday, the nightmare will begin

LIABILITY TO THIRD PERSONS

London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), 73 B.C.L.R. (2d) 1 (S.C.C.):

- Everything that can possibly go wrong in litigation.

LIABILITY TO THIRD PERSONS

Imagine What It Cost for a \$32,000 Generator

- A trial.
- An appeal before five judges of the British Columbia Court of Appeal.
- A further appeal to the Supreme Court of Canada.

LIABILITY TO THIRD PERSONS

Mr. Justice Iacobucci held:

- “There is no general rule in Canada to the effect that an employee acting in the course of his or her employment in performing the ‘very essence’ of his or her employer’s contractual obligations with a customer, does not owe a duty of care, whether one labels it ‘independent’ or otherwise, to the employer’s customer.

LIABILITY TO THIRD PERSONS

- Our law of negligence has long since moved away from the category approach when dealing with duties of care.

LIABILITY TO THIRD PERSONS

- It is now well established that the question of whether a duty of care arises will depend on the circumstances of each particular case, not on predetermined categories and blanket rules as to who is, and who is not, under a duty to exercise reasonable care....”

LIABILITY TO THIRD PERSONS

- “The mere fact that an employee is performing the ‘very essence of a contract’ between the plaintiff and his or her employer does not, in itself, necessarily preclude a conclusion that a duty of care was present.”

LIABILITY TO THIRD PERSONS

- The way is open for banks and suppliers to pursue the C.F.O. of insolvent companies where the C.F.O. negligently misrepresents the affairs of the company to banks.

LIABILITY OF THE CA TO THE EMPLOYER

- Can an employee be personally liable to the employer for negligently carrying out his or her employment duties?

LIABILITY OF THE CA TO THE EMPLOYER

Montreal Trust Co. of Canada v. Scotia McLeod Inc. (1995), 129 D.L.R. (4th) 711 at 720, as approved in *ADGA Systems International Ltd. v. Valcom Ltd.* (1999)

- These two Ontario Cases held:

LIABILITY OF THE CA TO THE EMPLOYER

Absent fraud, deceit or want of authority, “...officers or employees of limited companies are protected from personal liability (to the employer) unless it can be shown that:

- Their actions are themselves tortious ; **or**
- They exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.”

LIABILITY OF THE CA TO THE EMPLOYER

- ***D.H. Overmyer Co. v. Wallace Transfer Ltd.*** (1976), 65 D.L.R. (3d) 717 (B.C.C.A.) held that the manager had breached his duty of care to his employer to exercise his managerial duties with reasonable care and skill.

LIABILITY OF THE CA TO THE EMPLOYER

- See *Dominion Manufacturers Ltd. v. O’Gorman* (1989), 24 C.C.E.L. 218 (Ontario District Court).
- The Ontario District Court held a former accountant and comptroller liable to his employer for failing to remit employee withholdings for income tax purposes or to remit provincial sales tax in a timely basis.

LIABILITY OF THE CA TO THE EMPLOYER

- A person who professes skill in a calling is bound by law to show a reasonable amount of such skill in the performance of their duty even where their duties are under a contract of employment.

LIABILITY OF THE CA TO THE EMPLOYER

Pelione v. Marmot Concrete Services Ltd., [1996] A.J. No. 104 (Alta. Q.B.).

\$45,000 in damages caused by an employee's breach of his implied obligation pursuant to his contract of employment to supervise the work to the degree, skill and care expected of a person of that experience holding that position.

WHEN IN DOUBT?

- Institute Practice Advisors
- Other senior members
- Lawyers