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Directors and Officers Insurance Demystified

G.B. Maughan

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Résumé de l'article

Nous remercions l'auteur ainsi que la Faculté de droit de l'Université McGill d'avoir bien voulu accepter d'offrir aux lecteurs de la revue le texte d'une conférence prononcée en mai dernier à l'occasion des lectures Meredith. Le sujet ne manque pas d'intérêt. Dans cette première partie, M^{e} Maughan dresse la panoplie des diverses obligations incombant aux administrateurs et aux dirigeants, qui découlent soit de la Common Law, soit du droit civil, soit du droit statutaire. Voici la première partie de l'étude. Les autres parties seront publiées dans le prochain numéro.

Directors and Officers Insurance Demystified

by

G.B. Maughan*

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Introduction

If there is one occupation which clearly can no longer be taken for granted, it is that of the corporate director. Two factors have contributed to make the position slightly more precarious: the nature of the modern economy coupled with the increasingly complex demands of corporate governance which this entails, and public policy. Not only has the business of administering corporations become more onerous and challenging, but the consequences of mismanagement increasingly involve repercussions on a wide cross section of society. One need, for

* Senior partner, Ogilvy Renault, Montréal. The author wishes to express his gratitude to his partner André Legrand and Leigh Crestohl, LL.B., B.C.L. for their contributions to this article, prepared for The Meredith Lectures presented by McGill University, Faculty of Law, on May 26, 1995.

example, only consider the liability questions which arise when a company releases pollutants into the environment, reaches insolvency without settling arrears in the wages of its employees, or raises capital on the market by public offer based on a prospectus containing material misrepresentations. Liability must attach somewhere and as between the corporation on the one hand, and its employees, investors or innocent third parties on the other, it is the former which is held accountable.

But is it enough to say that the corporation should bear responsibility? A corporation, although possessing a legal personality,[1] is not a natural person; it acts through its "controlling minds", its directors and officers. The ultimate policy objective is to discourage corporate wrongdoing amongst those who administer the company and to encourage them to supervise more diligently their subordinates to avoid damage to third parties. This deterrent effect could not effectively be achieved were it only the corporation which were held liable. Whether the strategy of achieving these goals through imposing personal liability on directors and officers effectively meets these policy objectives may be debatable,[2] but the fact remains that it represents the approach currently taken to policing corporate governance in Canada. This fact explains the abundance of federal and provincial statutes which impose liability on directors and officers.[3]

Experience demonstrates that where there is potential liability there is insurance[4] and, given the size of damage awards

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[1] Art. 298 *Civil Code*, the *Civil Code of Lower Canada* was replaced by the *Civil Code of Quebec* which entered into force on January 1, 1994. All references in this paper, unless the context indicates otherwise, are to the new Code [hereinafter *C.C.Q.*].

[2] Vanessa Finch, "Personal Accountability and Corporate Control: The Role of Directors' and Officers' Liability Insurance" (1994) 57 *Modern L.R.* 880 at 884-887.

[3] Although much criticism has been levelled at the growing number of statutory liabilities, the underlying philosophy has recently been reaffirmed by the TSE Committee on Corporate Governance in Canada. TSE Committee on Corporate Governance in Canada, "Where Were the Directors? Guidelines for Improved Corporate Governance in Canada", draft report, Peter Dey, Q.C. chairman, May 1994, [hereinafter "*Dey Report*"] at para. 5.54.

[4] One insurance scholar has recently estimated that Americans spend $75 billion annually on liability insurance, an amount equal to 2% of the GDP of the United States:

on both sides of the Canada-U.S. border, few would question the soundness of a corporation availing itself of the opportunity of insuring its directors and officers against losses flowing from their negligent acts. According to a Wyatt Company survey conducted at the start of the current decade this was indeed the habit of 90% of American corporations and 80% of the Canadian corporations surveyed.[5] Nevertheless, although most are aware of the existence of such insurance, few are familiar with how these policies operate, the extent of coverage and how claims are handled.

With the insurance crisis in the United States of the mid-eighties and the S&L debacle the whole subject of D&O insurance fell under extensive scholarly and judicial scrutiny.[6] The range of possible related topics of discussion is accordingly vast, particularly as new areas of liability such as environmental claims continue to emerge. The focus of this presentation, then, will be less on the liability of corporate directors and officers as such, and address more directly the practical consequences of this liability and how to protect against them. It will, to the extent possible, given the constraints imposed by a forum of this kind, review the parties to a D&O liability policy, coverage and exclusions, and claims. We will conclude with a discussion of a few areas which should be of particular concern to practitioners relative to defence and settlement considerations.

PART I: OVERVIEW OF LIABILITIES

The range of potential liabilities facing corporate directors is considerable, encompassing common law liability in tort and contract as well as liability under a plethora of federal and

Kent D. Syverund, "On the Demand for Liability Insurance" (1994) 72 *Texas L.R.* 1629 at 1629-30.

[5]Speech by Joseph Tontini, "Directors' and Officers' Liability, Risk Management and Insurance", Wyatt Company, September 23, 1991.

[6]On the impact of the S&L failures on D&O insurance see: M.M. Anbari, "Banking on a Bailout: Directors' and Officers' Liability Insurance Policy Exclusions in the Context of the Savings and Loan Crisis" (1992) 141 *Univ. of Penn. L.R.* 547, Thomas W. Mallin, et al., "Insurance Coverage Litigation: Recent Developments" (1991-92) 27 *Tort & Insur. L.J.* 286, and John A. Cottingham, "The D&O Insurance Crisis: Darkness at the End of the Tunnel" (1988) 39 S.C.L.R. 653.

provincial statutes.[7] In Quebec the *Civil Code* imposes similar liability on a director personally where he departs from the standard of the reasonable person.

a) The Common Law

The *locus classicus* of the standard of care owed by corporate directors may be traced to the English Court of Appeal in *Re City Equitable Fire Insurance Co.*[8] The pith and substance of the standard and duty of care contained in that decision have found statutory expression in most Canadian corporate law statutes[9] with which we are all familiar to some extent or another. Referring to this decision in detail is, therefore, an unnecessary exercise, apart from, for the sake of completeness, emphasizing two essential features. The first is that the standard imposed is a subjective one. It speaks of a degree of skill "that may reasonably be expected from a person of his knowledge and experience". The English courts, which have historically been followed more consistently in Canadian jurisprudence in corporate law matters than U.S. jurisprudence, displayed a great deal of reluctance in imposing common law liability on directors, a good many of whom, in the epoch from which many of these precedents date, accepted directorships for the prestige of the position without having too much to do with the affairs of the corporation. The second feature, therefore, is that these early English decisions refrained from imposing a duty to give any

[7] One need only consider the *Competition Act* or various Securities Acts as two considerable sources of statutory liability. These statutes continue to multiply. A recent study concluded that there were 106 federal and Ontario statues which impose liability on directors and officers for statutory offences. Ronald J. Daniels and Susan M. Hutton, "The Capricious Cushion: the Implications of the Directors' and Officers' Insurance Liability Crisis on Canadian Corporate Governance." (1993) 22 *Can. Bus. L.J.* 182 at 220.

[8] [1925] Ch. 407 (C.A.). See also the earlier case of *Re Brazilian Rubber Plantations and Estates Ltd.*, [1911] 1 Ch. 425 (C.A.).

[9] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, [hereinafter *C.B.C.A.*], s.122; *Ontario Business Corporations Act*, R.S.O. 1990, c. B-16, [hereinafter *O.B.C.A.*], s.134.

continuous attention to the affairs of the company[10] and, moreover, allowed a defence of good faith reliance on the company's management and professional advisors. Although modern courts do not take quite so lenient a view, they do often show a good deal of deference for corporate decision-making. A similar attitude in the United States has led to the formulation of the "business judgment rule". While Courts here have been reluctant to embrace the American business judgment rule, the substantive result is the same: Courts tend to show a certain degree of deference to directors who make decisions, wrong as they may turn out to be, in good faith with a view to the best interests of the company.

One might well ask, in view of the nature of modern corporations and the important roles played by directors and officers in their administration, where deference must end and liability begin. The legislator has facilitated this determination by codifying a standard of care and creating a number of statutory liabilities which have raised the standard well beyond the early common law position. We will explore these statutory liabilities in greater detail below.

b) Civil Law

The liability of the corporate officer or director in civil law is triggered by the ordinary rules of civil liability set out in the *Civil Code*. The standard is expressed in article 1457 [11]:

> **1457** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person

[10] The English Court of Appeal in *Re Brazilian Rubber Plantations and Estates Ltd.*, *supra* n. 8 at 437 went so far as to hold that a director could be entirely ignorant of everything having to do with the business of the company.

[11] Formerly art. 1053 of the *Civil Code of Lower Canada*.

and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury to another by the act or fault of another person or by the act of things in his custody.

The obligations of corporate directors are also specifically addressed in articles 321-330 of the *Civil Code*. The appropriate standard of care is expressed in art. 322:

322. A director shall act with prudence and diligence.

He shall also act with honesty and loyalty in the best interest of the legal person.

It should also be noted that the *Civil Code* imposes vicarious liability on the corporation for the negligence of its agents. This, however, is not to suggest that they may not, under appropriate circumstances, be held personally liable. Directors are considered by the *Civil Code* to be mandataries of the corporation.[12] A mandatory can only bind his mandator within the terms authorized by the mandate. Thus, where, for example, a director acts contrary to the articles of incorporation he is deemed to be acting outside the scope of his mandate and is **personally** liable for any damage resulting as a consequence.[13] The same result is obtained at common law based on the law of agency and there has been a growing trend in common law provinces for directors to be held personally liable in tort[14] and contract.

c) Statutory Liabilities

The catalogue of statutory liabilities which may attach to corporate directors and officers has continued to expand at a tremendous rate over the past fifteen years. The web of liability has become so extensive that the *Dey Report* expressed concern

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[12] Art. 321 *C.C.Q.*

[13] Arts. 321 and 2158 *C.C.Q.*

[14] *Lawson Graphics Specific Ltd.* v. *Simpson* (1987), 36 B.L.R. 223 (B.C.S.C.).

about the manner in which the statutory liability of directors has developed and suggested a jurisdiction-wide review of existing liabilities.[15] Nevertheless, it is likely that some time will pass before this trend abates.

For the purpose of analysis, these liabilities may be grouped into categories. The first group is composed of various federal and provincial corporate statutes[16] to which may be added the full range of liabilities under various securities acts where applicable to the corporation. Yet another group consists of fiscal and employment standards legislation encompassing liability for employee source deductions, G.S.T. and T.V.Q. remittance.[17] The final category of statutes includes sector-specific liabilities which vary from corporation to corporation depending on the nature of its activities. Foremost amongst these are liabilities imposed under federal and provincial environmental protection statutes.

As a general rule, these statutes allow that a director may be exonerated by making out a defence of good faith reliance. The most serious, notable exception, is the liability imposed under the *Q.C.A.* for six months' arrears in wages.[18] We will consider these provisions in greater detail below.

I) Corporate Statutes

Central to D&O liability insurance are two provisions found in most corporate statutes: the duty of care, and the power of the corporation to indemnify its directors and officers. A typical duty of care provision is that embodied in section 122 of the *C.B.C.A.*:

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[15] *Dey Report*, *supra* n. 3 at para. 5.55, 5.61.

[16] References in this paper will be confined to: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, [hereinafter *C.B.C.A.*]; *Ontario Business Corporations Act*, R.S.O. 1990, c. B-16, [hereinafter *O.B.C.A.*]; and the Quebec *Companies Act*, R.S.Q. 1977, c.C-38 [hereinafter *Q.C.A.*].

[17] See for example *Excise Tax Act*, R.S.C. 1985, c. E-15, s. 323, and *Ministère du Revenu Act*, R.S.Q. 1977, c. M-31, s. 24, 24.0.1.

[18] s. 96 *Q.C.A.* See also s. 131 *O.B.C.A.*. The federal provision is in s. 119, *C.B.C.A.* where a due diligence defence is available under s. 123(4).

122(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

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(2) Every director and officer of a corporation shall comply with this Act, the regulation, articles, by-laws and any unanimous shareholder agreement.

(3) Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves him from liability for a breach thereof.

The *O.B.C.A.* is in substantially the same terms,[19] as is the rule in Quebec, having been codified in art. 322 *C.C.Q.* cited above. It should be noted that while the common law standard was essentially a subjective one, the corporate statutes impose a hybrid standard blending both subjective and objective elements.

This statutory standard of care represents the threshold beyond which public policy precludes recovery through indemnification or insurance. The same is true of breaches of the obligation of loyalty flowing from the nature of the fiduciary relationship between the director and the corporation.[20] This is not the appropriate place to embark upon a commentary on the extent of the fiduciary duty that corporate directors owe to their company. For the present purposes, it is sufficient to observe that

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[19] s. 134.

[20] *Canadian Aerospace Ltd.* v. *O'Malley*, [1974] S.C.R. 592, 40 D.L.R. (3d) 371: Such senior officers stand in a fiduciary relationship to the corporation, which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest", at 606, per Laskin, J.

these too are fundamental obligations the breach of which cannot be covered by a D&O policy.

Apart from imposing a particular standard and duty of care, corporate statutes generally provide for the liability of directors in a number of situations. Most of these liabilities are in the context of insolvency.[21] Thus, where a corporation is insolvent the directors may have to answer for any dividend declared[22] or loan made to a shareholder.[23] Another fertile area for liability arises in change of control situations where the statutes impose a series of reporting requirements to authorities and the communication of various circulars to shareholders in a take-over bid. Change of control situations present the greatest potential hazards to the directors and officers of a corporation, particularly as a result of the availability of the oppression remedy[24] and the derivative action.[25] In 1990, a Wyatt Company survey concluded that shareholder suits represent 25% of the claims made in Canada under D&O liability policies.[26] A director may, therefore, suddenly have to respond to lawsuits brought by a large collection of individuals: other directors, the corporation, minority shareholders, employees and receivers.

Indemnification is the trade-off which is meant to counter-balance saddling directors with personal liability. These provisions allow the director to be indemnified by the corporation where he has suffered an adverse judgment for conduct undertaken in good faith and in the best interests of the company. The corporation, moreover, is permitted to take out insurance in the fulfillment of this obligation of indemnification.

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[21] s. 118, *C.B.C.A.*; s.130, *O.B.C.A.*

[22] s. 118(2)(c), *C.B.C.A.*; s. 130(2)(d) *O.B.C.A.*; s. 123.71, *Q.C.A.*

[23] s. 118(2)(d), *C.B.C.A.*; s. 130(2)(a); s. 95, *Q.C.A.* for Part I companies only and s. 123.66, *Q.C.A.* for Part IA companies.

[24] s. 241, *C.B.C.A.*; s. 247, *O.B.C.A.* There is no Quebec equivalent of the oppression remedy.

[25] s. 239, *C.B.C.A.*; s. 245 *O.B.C.A.*

[26] Tontini, *supra* n. 5.

124 (1) Except in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, a corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director of officer of a body corporate of which the corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of such corporation or body corporate, if

(a) he acted honestly and in good faith with a view to the best interest of the corporation; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable ground for believing that his conduct was lawful.

[...]

(3) Notwithstanding anything in this section, a person referred to in subsection (1) is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by him in connection with the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if the person seeking indemnity

(a) was substantially successful on the merits in his defence of the action or proceeding, and

(b) fulfills the conditions set out in paragraphs (1)(a) and (b).

(4) A corporation may purchase and maintain insurance for the benefit of a person referred to in subsection (1) against any liability incurred by him

(a) in his capacity as a director or officer of the corporation, except where the liability relates to his failure to act honestly and in good faith with a view to the best interest of the corporation; or

(b) in his capacity as a director or officer of another body corporate where he acts or acted in that capacity at the corporation's request, except where the liability relates to his failure to act honestly and in good faith with a view to the best interests of the body corporate.[27]

[...]

It is indemnification statutes, therefore, which supply the legitimacy for directors' and officers' liability insurance. Indemnification, however, has its limitations. These provisions, for instance, make it clear that a director may not be indemnified where the impugned conduct is in breach of the standard contained in s. 122.[28] Furthermore, the scope of the corporation's authority to procure liability insurance is tied to that of indemnity, so insurance for acts which are not done honestly, in good faith with a view to the best interests of the corporation is similarly precluded. Consequently, although indemnification and the availability of insurance taken together may provide a certain

[27] *C.B.C.A.*, *supra* n. 9, notice the exception made in the case of derivative actions at the outset of this provision. This is destined to prevent "friendly" claims to recover an indemnity and subsequent insurance.

[28] A director who, for example, incurs costs in defending the interests of the majority shareholder before a securities commission is not acting in the best interest of the corporation and is not entitled to an indemnity: *Balestreri* v. *Robert*, [1993] R.L. 4 (C.A.).

sense of security to the corporate director who might otherwise not be overly eager to walk into a potential lion's den, directors and officers must not allow themselves to be lulled into a false sense of security. There are potential pitfalls which may nevertheless await a director in this scheme. Indemnification, for instance, is only an effective means of protection where the corporation has the necessary financial resources at its disposal to make good on its obligation to indemnify. Because many liabilities only arise when the corporation is in the throes of financial adversity, the protection afforded by indemnification may prove illusory at best. Moreover, as we will see below, there are a number of exclusions in the standard D&O policy and, over recent years, insurers have successfully introduced a greater number of exclusions in reaction to the uncertainties presented by statutory liabilities of uncertain but ominous proportions, such as those presented by environmental protection legislation.

A person considering embarking as a corporate director should therefore conduct a careful assessment of the risks and take every available protection respecting both indemnification and liability insurance. Indemnification is not automatic, some preparation may be required. That this is so may be observed from the permissive "a corporation **may** indemnify a director...". The circumstances under which a corporation is **obliged** to indemnify its directors are narrowly circumscribed by the conditions set out in s. 124(3) and are limited to costs and expenses, not awards. A prudent director will, therefore, ensure that all appropriate corporate law formalities are observed in terms of authorizing and empowering the corporation to subscribe to a liability insurance policy: articles of incorporation, resolutions, etc. Moreover, since articles and resolutions are subject to amendment or repeal, directors and officers may enhance their protection by stipulating the maintenance of D&O insurance as a term of their contracts of employment with the company.[29] The permissive character of s.124(1) *C.B.C.A.* may be contrasted with articles 123.87 to 123.89 of the *Q.C.A.* which,

[29] R.W. McDowell and Mark C. Newton, "Directors' and Officers' Liability Insurance" (1989) 7 *Can. J. of Insur. Law* 35 at 39.

in the case of Part IA companies, provide a *prima facie* right to an indemnity in all civil suits except those occasioned by the director's *faute lourde.*[30]

A further limitation results from the scope of the indemnity provided. The statutory language speaks of costs "reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding". The reality, however, is that "actions" and "proceedings" are not exhaustive of the range of potential financial burdens which a corporate director may have to assume. An example is the costs of investigations and inquiries which precede an action or proceeding.[31]

Consequently, it is essential, from the perspective of the corporate director or officer, that indemnification be available through adequate insurance in cases where the corporation either refuses or is precluded from doing so. The enormous significance of art. 124(4) *C.B.C.A.* which allows the corporation to take out insurance on behalf of its directors and officers must be understood in that light.

ii) Securities Legislation

Publicly traded corporations raise a further specter for the unwary director, namely the additional risks posed by the various securities regulatory regimes in each of the jurisdictions where the corporation's securities are traded.[32] Liability in this connection can result from a host of infractions: defaulting on

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[30] *Faute lourde* is similar to the concept of gross negligence in the common law. It has traditionally been assimilated to intentional fault in both the doctrine and jurisprudence which explains why such conduct has been excluded. See J.-L. Baudouin, *Responsabilité civile et délictuelle*, 4th ed. (Cowansville, Que.: Éditions Yvon Blais, 1993), at. no. 127, and *Ceres Stevedoring Co.* v. *Eisen und Metall*, [1977] C.A. 56. Note also, *Potvin* v. *Stipetic*, [1989] R.J.Q. 777 (C.A.) where the court adopted a more expansive notion of *faute lourde*. Art. 1474 *C.C.Q.*, which has only been in force for a year, defines the term as "a fault which shows gross recklessness, gross carelessness or gross negligence".

[31] Where a director incurs costs at the investigation stage, it has been held that an indemnity will not lie: *Denton* v. *Equus Petroleum Corp.* (1986), 33 B.L.R. 314 (B.S.S.C.).

[32] Due to the general harmony among provincial statutes we consider here only the Ontario *Securities Act*, R.S.O. 1990, c. S-5. [hereinafter *O.S.A.*] and the Quebec *Securities Act*, R.S.Q. 1977, c. V-1.1, [hereinafter *Q.S.A.*].

reporting obligations to regulatory authorities,[33] inadequate disclosure,[34] material misrepresentations in offering documents,[35] and insider trading,[36] to name but a few. Since regulatory offences are sanctioned by fines, recovery for these losses would be unavailable under a D&O policy as fines are expressly excepted from the definition given to "loss" in standard D&O policies.

More significantly, however, various statutes provide civil remedies against directors or officers of corporations where a
 shareholder has suffered damage due to a material misrepresentation. The recourse may usually take the form of recision of the contract or a claim for damages. By way of example, Part XXII of the Ontario *Securities Act*, entitled "Civil Liability" renders issuers, directors, and underwriters liable for various forms of misrepresentation.[37] The same recourse is extended to misrepresentations in take-over bid circulars.[38]

The threat posed by the existence of this remedy has not been as acutely felt in Canada as has proven to be the case in the United States. Market considerations explain this in part, given the comparatively concentrated character of share holding in Canada compared to its neighbour. Large institutional shareholders, who control the markets in Canada, may have less interest than private investors in availing themselves of these civil remedies for, as has recently been observed, institutional investors can more easily absorb losses, an alternative which may outweigh the adverse effects of suing important industry contacts or attracting publicity to a poor investment choice on their part.[39] The private investor, on the other hand, can not call on the same financial and legal resources as the large

[33] s. 122 *O.S.A.*; s. 196(3), *Q.S.A.*

[34] s. 75 and 122(1)(c), *O.S.A.*; s.195(3), *Q.S.A.*

[35] s. 122(1)(b), *O.S.A.*; s. 196(1), Q.S.A.

[36] s. 76 and 122(4)-(5), *O.S.A.*; s. 187, *Q.S.A.*

[37] s. 130, *O.S.A.*; see also s. 217, *Q.S.A.*

[38] s. 131, *O.S.A.*

[39] John J. Chapman, "Class Actions for Prospectus Misrepresentation", (1994) 73 *Can. Bar Rev.* 492 at 502 et seq.

institutional investor, a factor which renders the availability of the recourse under s. 130 illusory in a great majority of possible cases.

Nevertheless, there are two jurisdictions which are increasingly problematic because of the availability of class actions. Quebec added Book IX to the Code of Civil Procedure in 1978 and Ontario has recently replaced R. 12.01 of the Rules of Civil Procedure with the Class Proceedings Act, 1992.[40]

Chapman considered the potential effects of the new Ontario class action regime in connection with the civil remedy provision of the Securities Act,[41] and concluded that the new system will not, in all likelihood, open up the floodgates to securities related investor litigation. The same conclusion would probably result in Quebec given the problems which would likely be encountered in constituting a class having a uniform interest. Nevertheless, the existence of the remedy should still, if for no other reason than mere prudence alone, be regarded as a risk to be taken into account when assessing the director's overall risk exposure.

[40] S.O. 1992, c.6.

[41] Chapman, *supra* n. 39, at 509 et seq.