

Income Tax

LMR. 24.0.1-1/R3 **Liability of directors**

Date of publication: **September 29, 2006**

Reference(s): *An Act respecting the Ministère du Revenu (R.S.Q., c. M-31), ss. 24.0.1 and 24.0.2*

This version of bulletin LMR. 24.0.1-1 supersedes the version of June 28, 1996.

The bulletin was revised to take into account the amendments made to section 24.0.1 of the Act respecting the Ministère du Revenu and developments in the case law.

In addition, some changes in respect of style and conformity were made to ensure technical accuracy.

This bulletin provides the interpretation of the Ministère du Revenu du Québec concerning the liability of a corporation's directors in respect of the amounts that the corporation is required to deduct, withhold or collect, and amounts that are not remitted to the Minister.

THE ACT

1. Under section 24.0.1 of the *Act respecting the Ministère du Revenu (AMR)*, the directors of a corporation are solidarily liable with the corporation for any amount deducted, withheld or collected under a fiscal law by the corporation and not remitted to the Minister, and for any amount that the corporation failed to deduct, withhold or collect under a fiscal law.

2. The same is true where a corporation failed to remit to the Minister an amount that it was required to pay as an employer under the *Act respecting the Québec Pension Plan (R.S.Q., c. R-9)*, the *Act respecting labour standards (R.S.Q., c. N-1.1)*, the *Act to foster the development of manpower training (R.S.Q., c. D-7.1)*, the *Act respecting the Régie de l'assurance maladie du Québec (R.S.Q., c. R-5)* and, since January 1, 2006, the *Act respecting parental insurance (R.S.Q., c. A-29.011)*.

APPLICATION OF THE ACT

CONDITIONS

3. Section 24.0.1 of the AMR applies in the following cases:

- where the writ of execution in respect of the corporation is returned unsatisfied in whole or in part following a judgment rendered in favour of the Deputy Minister under section 13 of the AMR;
- where the corporation is under a winding-up order or becomes a bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (R.S.C. 1985, c. B-3) and a claim is filed;
- where the corporation has commenced liquidation or dissolution proceedings or has been dissolved.

TYPES OF DIRECTORS

4. Said section 24.0.1 applies to directors in office on the date of the omission. Under the case law, there are two types of directors, that is, *de jure* directors and *de facto* directors. *De jure* directors are elected and appointed by the shareholders. Their names appear in the public records and the records of the corporation. Under the case law, *de facto* directors are individuals who, by their actions, influence the course of events and in fact direct the operation of the business. Also, any director who ceases to hold office but continues to act as a director of the corporation may be considered a *de facto* director.

EXCEPTIONS

5. Section 24.0.2 of the AMR provides for three exceptions to the application of said section 24.0.1:
- where the director exercised a reasonable degree of care, dispatch and skill under the circumstances (due diligence);
 - where, under the same circumstances, the director could not have been aware of the omission;
 - where two years have elapsed since the date on which the director last ceased to be a director of the corporation.

DUE DILIGENCE

6. Under the case law, the criteria for determining whether a director acted with due diligence are both objective and subjective. They are objective inasmuch as a standard is required by which a director may be judged, that is, the standard of a reasonable person. They are subjective inasmuch as the director must have done what a person having similar knowledge and a similar background would have done in the circumstances. Therefore, what constitutes due diligence will vary according to the circumstances of each case.

7. The standard of diligence is applied differently to internal and external directors, under the case law which established that internal directors are those who are involved in the day-to-day management of the corporation and who influence the conduct of its business affairs. In view of their influence, the case law is more strict towards internal directors.

TWO-YEAR TIME LIMIT

8. Section 24.0.2 of the AMR states that in no case may the Minister assess a director in respect of an amount referred to in section 24.0.1 of the AMR after the expiry of two years from the date on which that director last ceased to be a director of the corporation. To determine when a director ceased to act as such, reference should be made to the provisions in that regard in legislation applicable to corporations. For example, under the *Canada Business Corporations Act* (R.S.C. 1985, c. C-44), a director of a corporation ceases to hold office when the director dies or resigns. Therefore, under the case law, the resignation of a director, in accordance with the requirements of the applicable legislation, may constitute the point at which the two-year time limit begins to run.