Environmental obligations: directors and officers, you may have more responsibilities than you think

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Author

Valérie Belle-Isle

Partner, Lawyer

In general, the directors and officers of a legal person have obligations and responsibilities relating to the legal person's activities. Each director must act with prudence, diligence, honesty, loyalty and in the legal person's interest.[1] Each officer is responsible for representing the legal person and directing its activities.[2]

That said, directors and officers must keep in mind that they have greater duties and responsibilities and a heavier burden to meet when it comes to ensuring compliance with certain environmental laws.

Since it came into force on May 12, 2022, the *Act respecting certain measures enabling the enforcement of environmental and dam safety legislation* (the "**Act**") has ensured the enforcement of various environmental laws.[3]

The Act essentially provides for two types of consequences arising from the actions of directors, officers and, in some instances, other representatives of a legal person. The first involves a particular burden as regards compliance with environmental laws, and the second, consequences relating to the administration of the environmental authorization scheme.

The duty of directors and officers to ensure compliance with environmental laws

The Act's criminal provisions provide for stiffer penalties for directors who commit an offence under an environmental law. Section 47 of the Act provides that where an offence is committed by a director or officer of a legal person, the minimum and maximum fines that would apply in the case of a natural person for such offence are doubled.

Also, where a legal person commits an offence under an environmental law, its director or officer is presumed to have committed the offence, unless it is established that they exercised due diligence

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and took all necessary precautions to prevent the offence.[4]

The Act additionally provides that anyone who, by an act or omission, helps a person to commit an offence or induces a person, by encouragement, advice, consent, authorization or order to commit such an offence commits that offence and is liable to the same penalty as that prescribed for the offence they helped or induced the person to commit.[5] Naturally, this rule applies to the directors and officers of a legal person, but is not limited to them. For example, it would also apply to an engineer or legal advisor who provides a legal person with advice causing it to commit an offence under an environmental law.

Lastly, where a legal person has defaulted on payment of an amount owed,[6] the directors and officers are solidarily liable, with the legal person, for payment of such amount. However, they may be exempted from this obligation if they are able to establish that they exercised due care and diligence to prevent the failure which led to the claim.[7] This rule could apply, for instance, where a legal person is insolvent, which underscores the need to anticipate and effectively manage the environmental issues that a legal person is likely to face.

Conduct of directors, officers and shareholders and the environmental authorization scheme

The *Environment Quality Act* (EQA) establishes a ministerial authorization scheme for certain activities considered likely to have an impact on the quality of the environment.[8] This authorization scheme is discretionary. Any activity covered by such scheme cannot be legally carried out unless the required authorization has first been issued. Holding and keeping such authorization is therefore fundamental for the company in question to continue to pursue its activities.

Under the Act, the Minister of the Environment[9] may refuse to issue, amend or renew a ministerial authorization, or decide to amend, revoke or cancel such an authorization, or oppose its transfer in certain situations relating to the conduct of the **directors, officers and shareholders**[10] of the legal person holding the authorization.[11]

Situations in which the Minister may intervene in this way are, for example, those where one of a legal person's directors, officers or shareholders has:

> filed a false declaration or document, or false information, or has distorted or omitted to report a material fact to have the authorization issued, maintained, amended, renewed or transferred
> failed to comply with an injunction made under any act that is administered by the Minister of the Environment
> defaulted on payment of an amount owed under any act administered by the Minister of the Environment (including monetary administrative penalties or any other fees that must be paid under such acts)
> been found guilty of an offence under an act administered by the Minister of the Environment or any regulations made under those acts
> been found guilty of an offence under a fiscal law or an criminal offence connected with activities covered by the authorization[12]

Thus, the conduct of directors, officers or shareholders can have repercussions on a legal person's rights and obligations in carrying out activities authorized by the Minister. In addition, their conduct could hinder or even prevent the transfer of an authorization as part of an asset sale.

Directors and officers have a vested interest in ensuring that the legal person they represent complies with environmental laws. Evidently, compliance is not only in the interest of the legal person itself, but also that of its directors and officers, whose personal liability and assets could be at stake should the legal person fail to comply.

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1. Articles 321 and 322 of the *Civil Code of Québec* (C.C.Q.)
2. Article 312 of the C.C.Q.
3. These environmental laws are the *Environment Quality Act,* the *Act to increase the number of zero-emission motor*

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vehicles in Québec in order to reduce greenhouse gas and other pollutant emissions, the *Natural Heritage Conservation Act*, the *Act respecting threatened or vulnerable species*, the *Pesticides Act* and the *Dam Safety Act* (section 1 of the Act).

4. Section 51 of the Act.
5. Section 49 of the Act.
6. The amount owing may be a monetary administrative penalty, a fine or financial compensation required under a notice of execution, among other things.
7. Section 66 of the Act; In addition, under section 67 of the Act, the reimbursement of an amount owing is secured by a legal hypothec on the movable and immovable property of the debtor, in this case the director and officer of the legal person.
8. Section 22 of the EQA. The EQA also provides that certain activities listed in the *Regulation respecting the regulatory scheme applying to activities on the basis of their environmental impact* may benefit from the more flexible declaration of compliance framework, or even an exemption. There is no need to describe these in detail for the purposes of this article.
9. In accordance with section 2 of the *Terms and conditions for the signing of certain documents of the Ministère du Développement durable, de l'Environnement et des Parcs* (M-30.001, r. 1), assistant deputy ministers, directors general, the secretary general, directors, regional directors and assistant directors are authorized to sign any document relating to such decisions.
10. For the purposes of these provisions of the Act, a shareholder means a natural person holding, directly or indirectly, shares that carry 20% or more of the voting rights in a legal person that is not a reporting issuer under the *Securities Act* (section 2 of the Act).
11. Except in a situation where urgent action is required, the Minister must give prior notice of such a decision to the person concerned, so that they may submit their observations (section 39 of the Act). The Minister's decision is then notified to the person concerned (section 40 of the Act), who may contest it before the Administrative Tribunal of Québec (sections 40 and 41 of the Act).
12. See sections 32 to 36 of the Act.

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