Book Reviews

Comptes rendus

Directors’ Liability in Canada

edited by Ron Davis
North Vancouver: STP Technical Publishers, looseleaf

and

Directors and Officers in Canada: Law and Practice,

edited by Carol Hansell
Toronto: Thompson-Carswell, looseleaf

Reviewed by David Fushtey*

In a world of legal texts, journals, newsletters, weblogs, weblinks, software-as-services, search engines and specialized research, why would you want to subscribe to a looseleaf publication?

For that matter, faced with an information glut, do we need two publications on directors’ liabilities in Canada? The recent appetite for information about responsibilities of corporate directors in Canada may have been fuelled by high-profile cases involving the likes of Bernie Ebbers and Conrad Black, but there are also more fundamental needs to help people understand decision-making duties and best-practice frameworks. Perhaps the question is not whether more than one publication is required, but whether they serve distinctive purposes in providing information about the important matters at stake.

Directors’ Liability In Canada, is currently edited by Ron Davis of the University of British Columbia and published by STP Technical Publishers of North Vancouver (Davis). It is a twelve-year-old service, born in the wake of the last wave of governance indiscretions in the early 1990s. As I have worked and taught in this field for several years, and this publication was not on my shelves, I was intrigued.

The comparative standard in Canada is Directors and Officers in Canada: Law and Practice, edited by Carol Hansell and published by Thompson-Carswell (Hansell). The editor is the doyenne of governance counsel in Canada, through her writing and work as partner of Osler, Hoskin & Harcourt, LLP in Toronto. These materials were first published in 1999, making this service the relative upstart.

* Governance Counsel, Vancouver
This review is based on the February 2006 update of the Davis service, and a 2005 update of Hansell. Davis is a one-volume service; Hansell is published in two volumes, and contains roughly twice the volume of material as well.

The threshold question in these halcyon days of information technology must be: Why a looseleaf service? The looseleaf approach once offered ease of updating for better informed professionals by providing more current information. It is difficult to compete with the brilliance of the web today on that front.

There are those of us in the legal profession, however, who embraced electronic information systems thirty years ago, and have watched as several modes of electronic memory have been rendered ephemeral. There is a certain archival reliability of the printed word which is appealing.

Perhaps more important is the quality of the journey to enlightenment. I have a personal attraction to the look and feel of texts and paper, and at certain points in my day when energies flag, there are real ergonomic benefits of changing work modes and information media. If there is reasonable economic value, and a reasonable substantive value in the currency and accuracy of information, I will continue to use loose-leaf services.

In this context, my criteria for assessing these two publications were (a) relevance of information; (b) currency of information; (c) accessibility, including the look and feel of the media as a qualitative experience; and (d) perceived value.

Relevant Information?

Taking the relevance aspect first, this raises the question: Relevant to what? Even leaving aside volume size, the two are quite different in scope and approach.

Davis introduces the subject with a general outline of corporate principles, then works through chapters on areas of substantive law (employment, tax and so on) and associated liability. The concluding chapters are distinguished by organizational character (non-profits, financial institutions, public boards).

Hansell introduces the subject with a general outline of roles and responsibilities (directors, officers and shareholders), then provides
seven chapters on corporate practices, and four on risk management (offences, insurance, indemnities), concluding with appendices of examples of bylaws, a corporate governance review, and insurance risk management.

For those who might serve as directors and officers in more than one type of organization, the Davis approach recognizes that board governance practices are increasingly harmonized across sectors (public, private and community), and that directors and officers who sit on different boards should be aware of the similarities and differences. In the context of much valuable information, including the approach itself, it’s the anomalies which tend to pop out. For example, the Davis service includes “public boards” in the category of “non-profit,” which is somewhat of an oversimplification, as many crown corporations and agencies have an increasingly complex and hybrid governance framework and expectations. The wordsmiths in the crowd might also question the use of the tag “non-profit,” when “not-for-profit,” “third sector,” or “volunteer sector and NGOs” perhaps more accurately describe modern multivalent organizations.

The Hansell approach on the other hand provides more in-depth comparison of corporate practices across Canada. There is a wealth of information here, thoughtfully presented. One place where the format could be better reconciled with the consideration of relevance, however, is the extensive use of primary source quotations from corporate legislation across Canada. Although handy for comparing views of similarities and differences among provincial and federal jurisdictions, I found the approach awkward when text from ten or eleven jurisdictions would be included with each subject under discussion. This really interrupts the flow of trying to understand the underlying principles or practices. Consolidating the legislative text and placing it in an appendix, including a table for quick reference, would be a better balance.

An unqualified asset of the Hansell approach was the separate chapter on “Delegation and Reliance,” increasingly an area in which directors require a better understanding.

Both services provide a reasonable breadth and depth of historical context for the legal principles, fact patterns, decisions and legislation bearing on directors’ duties and liabilities. The Hansell version is longer, with the advantage of reference to more primary sources; the Davis version, being shorter, relies more on edited summaries.
The Hansell version also purports to include “Practices,” and does so with much better detail and precedent information. The value of this and other references, however, is mitigated by the lack of effective service updates in the past. The Davis service, being half the length, is not as comprehensive on governance practices. It does include, however, a “practice-highlight” system of practice points in a line or two in separate boxes, which I found useful.

**Current Information?**

If both services provide a relevant body of information, is there a difference in the timeliness of amendments to warrant the increased costs of a looseleaf service? I am willing to pay more, if someone will provide a filter, for updated relevant information coming to me in a timely way.

If I am paying a premium for an “update” service, I would want to see the last date of general review and consolidation to be not more than two years in the past. Ideally, issues of note would be updated as part of the service to the current date, periodically and somewhat more frequently than a two-year general update and re-consolidation.

In this regard, the Hansell service needs work. When I subscribed to this service, it appeared to be five years out of date. I understand that there have been two additional service-pack updates in the past two years, only one of which I had received at the time of preparing this review. The base information is good, but I am paying a premium for a looseleaf product which has not made adequate provision for updating in the past. The benefits of including extensive legislative text are marginal if the statutory citations are five years out of date. Of interest is that, even after an update in 2005, the Hansell table of cases remained now six years out of date, which undermines the ease of research and information accessibility.

The Davis product, on the other hand, promises a couple of updates per year and was current when reviewed.

As a test for currency of information, I examined a now not-so-recent case from the Supreme Court of Canada, *Peoples Department Stores Inc. v. Wise.* The case is generally cited for *obiter* remarks about the scope of directors’ duties. The Hansell publication did not include the case in its outdated table of cases, but did include a summary of the trial court decision of 1998 in its chapter on directors’ duties. The Davis materials did not refer to the decision in its discussion on directors’

---

duties, but did include a passing reference to the Supreme Court of Canada decision of 2004 in a footnote on the business judgment rule. It may be that I missed other references to the case, but this in itself raises the question of how easy the information is to find.

**Accessible Information?**

Here we are talking not only about chapter organization, and indexes, but look and feel - information ergonomics.

Both services provide both a table of contents and indexes which are adequate to establish the structure and content of the works. The Hansell indexes, however, are much more detailed and comprehensive, which is helpful for the researcher seeking a finer grain of information and are especially important for a text which only purports to be updated every several years. Unfortunately, the table of cases in Hansell is oddly out-of-date for a looseleaf publication. On the other hand, the Davis product has no table of cases.

In rendering diverse information accessible, the advantage goes to Hansell. This is to be expected in a service of twice the length, but in addition to detail there is both thoughtful aggregation and indexing of information.

A test for me was the term “advisory boards.” I could find no references to this in the Davis binder, although it tends to be a point of interest with most boards. The Hansell product, however, included both an indexed reference to advisory boards in particular, and an entire chapter on “Delegation and Reliance,” which is a credit to the editor.

Another benefit, which I include under accessibility, is the physical impression of the volume. If you don’t like using something, the odds are you won’t be as inclined to do so. The binding and text of the Hansell product is of a high standard. The Davis binder has a lower quality appearance and texture, but would not be out of place in an office library.

An issue of formatting or style with the Davis product is the need to render information more visually accessible. For example, the practice-highlight feature, which I like, seems to be jammed in among the other text without thought to ease of reading.

The Hansell service is more formal in appearance, with perhaps a more professional feel to format and font, on warm-toned paper.
Combined with its more detailed information this service is well-suited for the lawyer’s own library.

Conclusions

Perhaps there is a need for two looseleaf update services. Both would let me extend the productive hours in my day, as a break from pulsing cursors and backlit pixels. Although I am seduced by the *vox machina* of electronic information searches and data manipulation (with due credits), there is both the touch of paper and the serendipity of manual searching which has a place in my work.

In terms of value, it seems that the competitive advantage for a looseleaf service over a moderated weblog is if the combination of look and feel, ease of use, and currency and calibre of information, render the service worthy of a price three times that of most texts.

Overall, I prefer the physical presentation and content of the Hansell service. It offers an impressive level of detail on the diverse scope of the law and practice pertaining to corporate directors in Canada. On the other hand, for one-tenth the price I could get Carol Hansell’s summary text, and look to free access to current legislation online. Without a disciplined update program, the Hansell product is not a “service” and it should be priced as such.

I also liked the diversified governance approach and practice highlight feature of the Davis service. At one-half the size of the Hansell product, the Davis work on directors’ liability also canvasses non-corporate organizations. I liked its approach to update services.

The combination of the scope, approach and physical presentation would determine the constituency to whom I would recommend each of these publications. The Davis service is half the volume, and projects a lighter tone due to the use of graphic etchings to begin each chapter. Combined with its practice-highlight feature, this service would be more easily used by a broader audience – from business consultants, to in-house counsel, to non-legal educators in business and other faculties.

Is the era of the looseleaf service over? Not for me. For reliability of media and ergonomics, the ring-bound update format has a place in my library – if it can provide current, and accurate information for basic background context. Come to think of it, what seems to be missing from both products is an electronic version for keyword searching, and possibly a web-based service for online access.
Setting aside the critical hat of a reviewer, however, I applaud both editors and publishers for bringing this information to the market. Will I use both works? Yes.