

# **Piercing the Corporate Veil: Directors' Liability for Unpaid Wages and Benefits**

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## **Introduction**

When the financial health of a corporation is in jeopardy it affects everyone from shareholders to suppliers. Inevitably caught in the middle of the instability are the employees of the corporation, many who continue to work for the faltering company and simply hope for the best. But when the time comes that the corporation is no longer able to pay the wages and benefits of its employees, who is responsible for the weeks, and sometimes months of wages and benefits that are owing to the employees for their services?

A corporation is thought to possess, in the eyes of the law, a personality (or perhaps a “personhood”) that is separate and distinct from the human beings who serve as the entity’s office holders, directors, employees or other agents.<sup>2</sup> Consequently the courts are reluctant to pierce the corporate veil and find directors personally liable for the debts of the corporation. However there are exceptions to this rule and thankfully for workers, liability for employee wages and benefits is one of them.

The following paper will discuss the scope and limitations of directors’ personal liability for unpaid wages under the ambit of the *Canada Labour Code*, the *Canada Business Corporations Act* and the *Ontario Employment Standards Act* and *Business Corporations Act*.<sup>3</sup> This paper will also address recent case law under the aforementioned statutes in which employees and Trustees of benefit trust funds have successfully obtained judgment against directors for unremitted health and welfare benefits, pension and vacation pay and how these decisions may have created new responsibilities for Trustees with regard to the collection of employer debt. Lastly, this paper will touch on other provincial statutes which create personal liability for directors and whether

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<sup>1</sup> Of Watson Jacobs McCreary LLP. Thank you to Danna Morrison, Student-at-Law for her assistance with this paper.

<sup>2</sup> Christopher C. Nicholls, “Corporate Law” (Toronto: Emond Montgomery Publications Limited, 2005) p. 2.

<sup>3</sup> While there are other statutes which find directors liable for amounts owed to workers, they are outside the scope of this paper.

the recent Ontario decisions will assist Trustees in those jurisdictions in securing remittances to Union Trust Funds.

### New Responsibilities for Trustees?

Trustees have a fiduciary duty to act in the best interests of the beneficiaries of the Trust Funds. Therefore, Trustees must take all steps reasonably necessary to recover unpaid health and welfare, pension, vacation and holiday pay and any other amounts owing to the Trust Funds. One such way to do this is to implement delinquency control programs wherein Trustees systematically monitor which employers in an employee benefit plan have failed to make proper remittances and contributions in violation of their respective collective agreements. However, even with such a program in place, it is often difficult to collect on Labour Board or arbitration orders that find a company liable to the Union or Trust Funds. This is especially true in the construction industry where a company's economic viability can change overnight, leaving a hard-fought order against a defunct company worthless.

However, all is not lost. Both provincial and federal law allow for directors to be found personally liable for the unpaid wages or debts of the corporation's employees. The following paper will discuss that legislation in some detail. The question is then, do these various avenues for debt collection and recent orders against directors whose corporations failed to make benefit plan remittances create additional responsibilities for Trustees? We suggest that they do and in order to meet their fiduciary duty, Trustees in jurisdictions with legislation that make directors liable for the debts of a corporation should be routinely availing themselves of the following processes in order to increase their chances of recovering outstanding wages and benefits on behalf of plan beneficiaries.

### **Canada Labour Code, R.S. 1985, c. L-2**

The *Canada Labour Code* (the "Code") affects employees, including unionized employees who are employed on or in connection with the operation of any federal work, such as work involving interprovincial and international transportation, radio and television broadcasting and banking, among others. It is estimated that only about ten percent of Canadian businesses are federally

regulated;<sup>4</sup> it is therefore vital to determine whether the employer in question is provincially or federally regulated in order to select the correct process.

### The Process

The Code gives inspectors who work for Human Resources and Skills Development Canada (Labour Program) fairly wide jurisdiction to investigate employee complaints that they have not been properly paid by their employers. A complaint may be filed by either a unionized or a non-unionized employee, however issues surrounding rates of pay, length of leave or the qualifying period for benefits are governed exclusively by any applicable collective agreement and will not be reviewed by an inspector.<sup>5</sup>

Pursuant to section 151 of the Code, where an inspector finds that an employer has not paid an employee wages or other amounts to which the employee is entitled, the inspector may issue an enforceable written payment order to a director of a corporation ordering the director to pay the amount in question. This broad power is restricted somewhat by section 251.18 which provides certain parameters on directors' liability for unpaid wages:

251.18 Directors of a corporation are jointly and severally liable for wages and other amounts to which an employee is entitled under this Part, to a maximum amount equivalent to six months' wages, to the extent that

- (a) the entitlement arose during the particular director's incumbency; and
- (b) recovery of the amount from the corporation is impossible or unlikely.

Therefore, a director can only be found to be personally liable under the Code to the extent of the equivalent of six months' wages per worker and if the debt was incurred during the period when the individual was acting as director of the corporation. This means that a director cannot be found personally liable for any unpaid wages that became owing after his or her term as director. Furthermore, there must be evidence that it is unlikely that the corporation will be unable to satisfy the debt as set out in the payment order. A payment order sent to the company that is not

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<sup>4</sup> Human Resources and Skills Development Canada, "Employment Standards" (2009), online: [http://www.rhdcc-hrsdc.gc.ca/eng/labour/employment\\_standards/index.shtml](http://www.rhdcc-hrsdc.gc.ca/eng/labour/employment_standards/index.shtml) (last modified April 24, 2009).

<sup>5</sup> *Canada Labour Code*, R.S. 1985, c. L-2, s. 168(1.1).

paid or appealed can be evidence that recovery from the corporation is impossible or unlikely, as would be the commencement of bankruptcy proceedings on behalf of the company.

### Wages and Other Amounts

The next significant question is what constitutes “wages and other amounts” under the Code. In other words, what amounts can a director be held personally liable for pursuant to section 251? Wages are defined in section 166 of the Code as including “every form of remuneration for work performed but does not include tips and other gratuities.”<sup>6</sup> This consists of regular wages, overtime pay, vacation pay and unlike under the other statutes discussed in this paper, it also includes notice and severance pay. It has not been decided by the courts whether the term “wages” includes the hourly amounts for benefits and pension as provided for in many collective agreements. Traditionally “wages” do not include benefit plan remittances, however filing a complaint under the Code is still an option for the collection of unpaid wages as it has been traditionally defined.

### ***The Ontario Employment Standards Act, 2000, S.O. 2000, c. 41***

Although there are some exceptions, the Ontario *Employment Standards Act* (the “ESA”) generally applies to all employees who work in Ontario and who do not fall under federal jurisdiction.<sup>7</sup>

### The Process

The Ontario Ministry of Labour through its Employment Standards Program enforces the ESA and its regulations. A program similar to the one found in the Code allows non-unionized employees to contact the Ministry of Labour and lodge a complaint about an employer’s failure to pay proper wages. This program allows wronged employees to seek legal recourse from their employers without the financial burden and other hassles associated with court-based civil litigation.

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<sup>6</sup> *Canada Labour Code*, R.S. 1985, c. L-2, s. 166 “wages”.

<sup>7</sup> For a full list of exceptions see section 3 of the *Employment Standards Act, 2000, S.O. 2000, c. 41*.

However, as confirmed by Arbitrator McKee in *Alcor Investment Group Inc.*,<sup>8</sup> this program is not available to unionized employees. While the terms of the ESA are incorporated into every collective agreement, enforcement of those terms is by way of arbitration<sup>9</sup> and not through the Employment Standards Program. Subsection 99(3) further dictates that a unionized employee is bound to any decisions of its union with respect to the enforcement of the ESA under the collective agreement, including a decision not to seek that enforcement.<sup>10</sup>

### Extent of Liability

Section 81 of the ESA sets out how directors (which includes a director of a corporation or a shareholder who is a party to a unanimous shareholder agreement) are jointly and severally liable for unpaid wages. Of note, a director is personally liable if:

- (a) the employer is insolvent, the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;
- (b) an employment standards officer has made an order that the employer is liable for wages, unless the amount set out in the order has been paid or the employer has applied to have it reviewed;
- (c) an employment standards officer has made an order that a director is liable for wages, unless the amount set out in the order has been paid or the employer or the director has applied to have it reviewed; or
- (d) the Board has issued, amended or affirmed an order under section 119, and the order, as issued, amended or affirmed, requires the employer or the directors to pay wages and the amount set out in the order has not been paid.<sup>11</sup>

The extent of directors' liability is set out at subsection 81(7) of the ESA, which finds that directors are jointly and severally liable to employees of a corporation for all debts not exceeding six months' wages that become payable while they are directors, for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months. Although an employment standards officer cannot make orders for more than \$10,000

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<sup>8</sup> *Alcor Investment Group Inc. (c.o.b. Alcor Interiors)*, [2002] O.L.R.D. No. 3158.

<sup>9</sup> *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA"), s. 99(2). Also see *Labour Relations Act, 1995*, S.O. 1995, c. 1 Schedule A, s. 48(12(j) and 133.

<sup>10</sup> *Ibid*, ESA, s. 99(3).

<sup>11</sup> *Ibid*, ESA, s. 81.

with respect to any one employee,<sup>12</sup> arbitrators enforcing the terms of the ESA under a collective agreement are not restricted by this monetary limitation and can make orders against employers and directors in excess of \$10,000.<sup>13</sup>

In *Robert Hume Construction Ltd.*<sup>14</sup> the Board found that “the purpose of section 81(7) is to place limits on the liability of directors. Under this section a number of limitations are established and these together with any other applicable limitation, must be satisfied before a director is liable. For example, liability is limited to that period of time during which the individual is a director of the company. The type of payment (e.g. wages) is also limited...As befits an employment statute, under section 81 of the ESA a director is only liable where the outstanding wages arose from an employment relationship between the company and the individual.”<sup>15</sup>

### Wages and Other Amounts

As expressed in *Robert Hume*, the type of payment (e.g. wages) for which a director is liable is limited. Wages in the ESA are defined more narrowly than under the Code. Its definition includes “monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied” but does not include “tips and other gratuities, expenses and travelling allowances or subject to certain sections of the ESA, employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan.”<sup>16</sup>

The meaning of “wages” was discussed by Vice Chair McKee in *Alcor Investment Group Inc.* In that case the Union asked Vice Chair McKee to make an order for director’s liability for amounts owing to the trust funds under the collective agreement, including payments for vacation and holiday pay, health and welfare funds and pension funds. After examining the ESA and the *Ontario Business Corporations Act*, Vice Chair McKee found that to the extent that he could rely

<sup>12</sup> *Ibid*, ESA s. 103(4).

<sup>13</sup> *Ibid*, ESA, s. 100(4).

<sup>14</sup> *Robert Hume Construction Ltd.*, [2005] O.L.R.D. No. 893.

<sup>15</sup> In that case, the Board found that once a receiver had been appointed by the court, the members of the union ceased to be employees of the company and were no longer performing services for the company as required by subsection 81(7). Accordingly, even though the director remained a director of the company, he was not liable under section 81 of the Act for any wages earned or vacation pay which accrued to the members of the union after the receiver was appointed.

<sup>16</sup> *Supra*, note 9, s. 1.

on the ESA to give him jurisdiction to order the director to pay unpaid wages, those wages were defined by the ESA and not by the collective agreement.<sup>17</sup> To that end Vice Chair McKee found that he had the jurisdiction to order the director to pay amounts representing unpaid vacation and holiday pay, as they fell under the definition of wages but not the other employee benefits sought by the Union. McKee also found that unlike under the Code, termination and severance pay are not included in the definition of wages.<sup>18</sup> The *Alcor* decision is now routinely used to stand for the proposition that directors may be found personally liable for unpaid vacation and holiday pay accrued over a 12-month period.

### Corporation's Ability to Pay

Another significant finding in *Alcor* is that an arbitrator should not order a director to be personally liable for any debts of the corporation unless it can be shown that the corporation itself cannot satisfy the debt. Although this finding has been followed consistently in many arbitration decisions,<sup>19</sup> a review of the case law shows that the corporation's ability to pay is not addressed by the Board in every single instance. The reason for this is unknown although it is surmised that in those instances the issue was likely addressed at the hearing and simply not included in the Board decision.

### **Ontario Business Corporations Act, R.S.O. 1990, c. B.16**

The *Ontario Business Corporation Act* (the "OBCA") applies to most corporate bodies with share capital<sup>20</sup> incorporated provincially in Ontario. Section 131 of the OBCA provides:

131 (1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more

<sup>17</sup> *Supra*, note 8, at para. 27.

<sup>18</sup> See also *Jonah v. Quinte Transport (1986) Ltd.*, [1994] O.J. No. 1507 (Gen. Div.).

<sup>19</sup> See *1258170 Ontario Inc. (c.o.b. Rubican Construction)*, [2002] O.L.R.D. No. 3157; *B&B Millwork Inc.*, [2009] O.L.R.D. No. 358; *Konkrit Group Inc.*, [2008] O.L.R.D. No. 408 and *City Acoustics Ltd.*, [2002] O.L.R.D. No. 3878.

<sup>20</sup> For exceptions see section s. 2 of the *Business Corporations Act*, R.S.O. 1990, c. B.16.

than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation.

131(2) A director is liable under subsection (1) only if,

(a) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part; or

(b) before or after the action is commenced, the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy and Insolvency Act* (Canada), or a receiving order under that Act is made against it, and, in any such case, the claim for the debt has been proved.<sup>21</sup>

### What Constitutes a Debt

While the OBCA, like the ESA, limits directors' liability to debts not exceeding six months' wages or vacation pay accrued during a 12-month time period, the term "debt" has been given a much broader meaning than "wages" as defined under the ESA. The Ontario Court of Appeal contemplated the meaning of "debt" in *Proulx v. Sahelian Goldfields Inc.*<sup>22</sup> wherein it found that a debt under section 131 of the OBCA is not limited to unpaid wages but includes any amount owing to an employee for services which they performed for the corporation. In the *Proulx* case this included reasonable travel and out-of-pocket expenses the employees incurred while performing their jobs.

In the *Alcor* decision, Arbitrator McKee relied on the reasoning in *Proulx* when he found that the term "debt" under section 131 encompassed the total employee compensation package set out under the collective agreement, including payments for vacation pay, health and welfare funds, pension funds, supplementary unemployment insurance benefits, employer association funds, union administration funds, supplementary union dues, apprenticeship training funds and promotional funds. Nevertheless, he also determined that he did not have jurisdiction to find the director, a stranger to the collective agreement, liable for these amounts because the OBCA did not grant arbitrators jurisdiction to enforce it, whereas the ESA specifically did. Consequently, McKee found that a claim made pursuant to the OBCA must proceed through the court system and not through labour arbitration.

<sup>21</sup> *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 131.

<sup>22</sup> *Proulx v. Sahelian Goldfields Inc.*, [2001] O.J. No. 3728 (Ont. CA).

### Directors' Liability for Employee Benefits

Probably the most significant gain for Union Trust Funds came in 2008 when the Trustees of the Drywall Acoustic Lathing and Insulation Local 675 were able to obtain an order finding the director of Drywall Plus Ltd. personally liable for amounts the corporation owed to various union trust funds, including those set out in the *Alcor* decision above.<sup>23</sup> In that case, the Union had proceeded to arbitration against Drywall Plus on various grounds, including the employer's failure to make proper contributions and deductions to the trust funds on behalf of its union employees.

While successful at arbitration, the Union's victory seemed like a hollow one when Drywall Plus filed an assignment in bankruptcy with no assets to satisfy the debt to the Union. However, in what appears to be an unprecedented move in Ontario, the Trustees quickly made a claim against the director of Drywall Plus in civil court, asserting that he should be personally liable for the debts of the corporation<sup>24</sup> pursuant to section 131 of the OBCA. The court agreed and found the director personally liable to the Trustees for outstanding employee benefits. In so doing the court relied on the rationale in *Alcor* and *Proulx* that the total wage package set out in the collective agreement (including vacation pay, health and welfare, pension, etc.) was a debt incurred by employees while performing services for the corporation and therefore constituted a debt for the purposes of s. 131.

In convincing the presiding judge that he should issue the order for personal director's liability, the Trustees had to satisfy him that the amount they were asking the director be personally liable or did not exceed six months' wages or twelve months' of vacation pay for each individual employee who had benefits outstanding.<sup>25</sup>

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<sup>23</sup> *Drywall Acoustic Lathing and Insulation Local 675 Benefit Trust Funds (Trustees of) v. Hintze (Drywall Plus)*, [2008] O.J. No. 4102.

<sup>24</sup> The claim was only for amounts owed for unremitted contributions and deductions and not for damages for the use of non-union subcontractors/non-union employees, which do not fall under the ambit of s. 131.

<sup>25</sup> It should be noted that a claim against the director must be brought within the time period set out in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 4.

Similar success was obtained by the Trustees of the Bricklayers Union later in 2008 when they obtained a comparable order against the directors of Vinmod Construction Inc. after it filed an assignment in bankruptcy.<sup>26</sup>

In the two preceding examples, the corporations in question had declared bankruptcy thereby satisfying the requirements set out in s. 131(2)(b) of the OBCA. However if the corporation has not declared bankruptcy, the Trustees would be required to sue both the corporation and directors in court and provide the court with evidence that the order it made against the corporation has returned unsatisfied in whole or in part.<sup>27</sup> This is a lengthier and more involved process, however it follows the theory that the court will not find a director liable for the debts of a corporation unless the corporation cannot pay the debt itself.

**Canada Business Corporations Act, R.S., 1985, c. C-44**

The *Canada Business Corporation Act* (the “CBCA”) applies to most federally incorporated bodies.<sup>28</sup> Pursuant to section 119 of the CBCA, directors of corporations are jointly and severally, or solitarily liable to employees of the corporation for all debts not exceeding six months’ wages payable to each employee for services performed for the corporation while they are directors.<sup>29</sup> However, there are limitations on this liability. For instance, a director is not liable under section 119(1) unless:

- (a) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;
- (b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or
- (c) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the debt has

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<sup>26</sup> *International Union of Bricklayers and Allied Craftsmen, Local 2/Brick and Allied Craft Union of Canada, Local 2 Benefit Trust Funds (Trustees of) v. Fazzini* [2008] O.J. No. 4362.

<sup>27</sup> *Supra*, note 21, s. 132(2)(a).

<sup>28</sup> For exceptions section s. 3 of the *Canada Business Corporations Act*, R.S. 1985, c. C.44.

<sup>29</sup> *Canada Business Corporations Act*, R.S. 1985, c. C.44, s. 119.

been proved within six months after the date of the assignment or bankruptcy order.<sup>30</sup>

It is noteworthy that the CBCA, unlike the OBCA, dictates that the corporation must be sued for the debt within 6 months of the debt becoming due in order for a director to be personally liable for the debt.<sup>31</sup> Practically speaking this tight timeline requires Trustees who are operating within the federal jurisdiction to have a system in place which detects and prosecutes delinquent employers in a timely manner. The director also must be sued while he or she is a director or within two years after ceasing to be a director.<sup>32</sup>

### What Constitutes a Debt

Like under the OBCA, the term “debt” is giving a broader meaning than wages under the ESA and includes all debts payable to each employee for services performed for the corporation, including unpaid wages, vacation pay and unpaid expenses. While to the best of our knowledge, no case has been tried where a Union or its Trust Funds have sought to include employee benefits such as health and welfare and pension payments under the definition of “debt” under the CBCA, given the recent successes of the Trustees in the *Drywall Plus* and *Vinmod* decisions, it is expected that such a claim would be successful.

The Supreme Court of Canada in *Barrette v. Crabtree Estate*<sup>33</sup> confirmed that since severance and termination pay are not debts for services performed for the corporation they are excluded from the term “debt” under the CBCA and consequently a director cannot be found personally liable for same. However, if the collective agreement contains language which specifically affords union members severance or termination pay, as was the case in *Schwartz v. Scott*,<sup>34</sup> the court has reasoned that this could yield a different result.

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<sup>30</sup> *Supra*, note 29, s. 119(2).

<sup>31</sup> See *Western Express Air Lines Inc. (Re)*, [2006] B.C.J. No. 1906.

<sup>32</sup> *Supra*, note 29, s. 119(3).

<sup>33</sup> *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027. See also *Mesheau v. Campbell* (1982), 39 O.R. (2d) 702 (CA), *Mill-Hughes v. Raynor*, [1998] O.J. No. 38 (C.A.) and *Englefield v. Wolf* [2005] O.J. No. 4895 (Sup. Ct.).

<sup>34</sup> *Schwartz et. al.*, (1985), 32 B.L.R. 1 (C.A.).

### Indemnification of Directors/Reasonable Diligence of Directors

Although the ESA, OBCA and CBCA offer directors possible defences to personal liability through indemnity and reasonable diligence provisions,<sup>35</sup> a review of the case law indicates these provisions have never been successful used to avoid director's liability for unpaid wages under their respective statutes.

### Other Provincial Statutes

Although the *Vinmod* and *Drywall Plus* cases were decided under Ontario legislation and the bulk of this paper has therefore pertained to Ontario statutes and common law, other Canadian provinces and territories address the issue of directors' liability in their respective legislation.

Alberta, Manitoba, Nunavut, Quebec, Saskatchewan, the Northwest Territories and the Yukon<sup>36</sup> all have business corporation legislation which holds directors liable for "all debts" payable to employees, which is similar language to that of the CBCA and the OBCA. British Columbia, New Brunswick, Newfoundland and Labrador, Nova Scotia, and PEI on the other hand do not have business corporation legislation which hold directors personally liable for "all debts" payable to an employee.

Employment standards legislation in Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nunavut, Saskatchewan, the Northwest Territories and the Yukon<sup>37</sup> all impose some form of liability on directors for unpaid "wages", however Nova Scotia and P.E.I.'s legislation does not.

So what does this all mean? Generally the amounts for which directors are personally liable are broader under business corporation acts (which refer to "all debts") than under employment standards legislation (which refer to "wages"). As mentioned, prior attempts to obtain orders for directors' liability of benefit plan remittances under the Ontario ESA have failed. Ontario

<sup>35</sup> See ss. 82(2) of the ESA, s. 136 of the OBCA and ss. 123(4) of the CBCA for further details.

<sup>36</sup> Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 119, Manitoba *Corporations Act*, C.C.S.M. c. C225, s. 114, Northwest Territories *Business Corporations Act*, S.N.W.T. 1996, s. 19, s. 120, Nunavut *Business Corporations Act*, S.N.W. T. 1996, s. 19, s. 120 and Quebec *Companies Act*, R.S. Q., c. C-38, s. 96.

<sup>37</sup> Alberta *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 112, British Columbia *Employment Standards Act*, RSBC 1996 C. 113, s. 96, Manitoba *Employment Standards Code*, C.C.S.M. C. E110, s. 90, Newfoundland and Labrador *Labour Standards Act*, RSNL 1990 C. L-2, s. 37, Northwest Territories *Labour Standards Act*, R.S.N.W.T. 1988, C. L-1, s. 62, Nunavut *Labour Standards Act*, R.S.N.W.T. 1988, C. L-1, s. 62, Saskatchewan *Labour Standards Act*, R.S.S. 1978, c. L-1, s. 63 and Yukon *Employment Standards Act*, R.S. Y. 2002, c. 72, s. 86.

Trustees were only successful once they proceeded under the OBCA because the OBCA dictates that directors are liable for “all debts” and not simply “wages”.

As a result, it seems unlikely that provinces with legislation that does not create directors’ liability for “all debts” payable to employees<sup>38</sup> will be successful in obtaining orders for directors’ liability of benefit plan remittances. Again this is because of the difficulty in characterizing benefit plan remittances as “wages” in the respective employment standards legislation.

On the other hand, Trustees in Alberta, Manitoba, Nunavut, Quebec, Saskatchewan, the Northwest Territories and the Yukon where directors are liable for all debts payable to an employee can apply the principals set out in the *Vinmod* and *Drywall Plus* decisions in order to obtain an order for director liability even though the legislation is not identical. Of course, the particular wording of the statute should be examined in order to determine the limits on the liability and the proper procedure to be followed.

## **Commentary**

### Why Workers?

Because corporations are separate legal entities from the individuals who control them and commonly no one is liable for the debts of another, directors are by and large shielded from corporate obligations. So why have legislatures pierced the corporate veil and made directors personally liable for certain corporate debts during times of financial hardship, and furthermore, why the debts of workers but not other creditors?

As pointed out by Marcia T. Moffat in her article “Director’s Dilemma – An Economic Evaluation of Director’s Liability for Environmental Damages and Unpaid Wages”, employees are not typical creditors. She submits,

Even after an employer has fallen behind in wage payments, workers may continue working to protect their firm-specific investment. Workers invest time and effort in finding employment and over the course of their employment may

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<sup>38</sup> British Columbia, New Brunswick and Newfoundland and Labrador, Nova Scotia, and PEI.

have developed firm-specific skills that would not be valued highly elsewhere. As a result, employees may be more vulnerable to holding out techniques, such as promises of future payment, than other creditors. This vulnerability is also linked to the fact that employees, unlike most other creditors, are dependent on a single debtor. Other creditors generally have many debtors with each representing only a portion of a creditor's income. This heavy reliance on a single debtor means that an employer's bankruptcy has a far greater impact on employees than on most other unsecured creditors.<sup>39</sup>

A similar sentiment was espoused by Justice L'Heureux-Dube in the *Barrette* case as she considers the underlying rationale for the exceptional remedy of directors' liability and cites from *Fee v. Turner*<sup>40</sup> which states

For lack of any other reason it occurs to me that what must have been had in view, was to protect to a limited extent those who were employed by such companies in positions which do not enable them to judge with any special intelligence what is the company's real financial position. The directors have personally this knowledge or should have it, and if, aware of the company's embarrassed affairs, and specially of the danger of a speedy collapse and insolvency, they continue to utilize the services of employees who have no means of securing this knowledge and who give their time and labour upon their sole reliance, often, on the good faith and respectability of the company's directors, it is not inequitable that such directors should be personally liable, within reasonable limits, for arrears of wages, thus given to their service.<sup>41</sup>

Of course, as pointed out by the Ontario Court of Appeal in *Canadian-Automatic Data Processing Services Ltd.*,<sup>42</sup> a director's liability to an employee for unpaid wages is secondary to that of his or her corporate employer; in other words, efforts must be made to collect a debt from the corporation or it must be shown that the corporation is unlikely to satisfy such debt. It is

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<sup>39</sup> Marcia T. Moffat, "Director's Dilemma – An Economic Evaluation of Director's Liability for Environmental Damages and Unpaid Wages" (1996) 54 U.T. Fac. L. Rev., 293 – 326.

<sup>40</sup> *Fee v. Turner* (1904), 13 Que. K.B. 435.

<sup>41</sup> *Barrette*, supra note 34, at para. 27.

<sup>42</sup> *Canadian-Automatic Data Processing Services Ltd. v. CEEI Safety & Security Inc.*, [2004] O.J. No. 4879 (Ont. CA).

apparent that this, along with the temporal and monetary limit put on the liability, is an attempt to compromise between leaving employee creditors without recourse and protecting the corporate doctrine of the corporation as a separate legal entity.

### **Conclusion**

When a company experiences financial hardship the effects are felt across the board. The financial consequences are especially significant for employees because of their economic dependence on their employers. However, when a corporation cannot make an employee financially whole, all is not lost. By utilizing the provisions of the aforementioned statutes, employees, unions and trust fund Trustees can get help putting hard-earned wages and benefits back into the hands of workers where they belong.