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Director Liability for Unpaid Employee Wages

By Jessica Barrow

It is an essential legal principle that a corporation possesses an independent legal personality and constitutes a separate legal entity. Ordinarily, courts are reluctant to pierce the corporate veil and find directors personally liable for the debts of the corporation. However, there are various statutory exceptions to this general principle, one of which is a director's liability for unpaid employee wages.

The justification for this exception to the ordinary rule is two-fold. Firstly, employees are a group of particularly dependent and vulnerable creditors that provide services to the corporation. The idea is that "directors who authorize or acquiesce in the continued employment of workers when the corporation is not in a position to pay them should not be able to shift the loss onto the shoulders of the employees"¹.

Secondly, as explained by the Supreme Court in *Barrette v. Crabtree Estate*, the purpose of holding directors liable for unpaid employee wages is to minimize the information asymmetry that exists between the two parties. Unlike employees, directors have or ought to have full knowledge of the financial health of the corporation and where the employees have continued providing services in good faith, relying solely on the guidance of the company's directors, the employees ought not to be penalized².

Director liability for unpaid employee wages is legislated in the *Canada Labour Code*, the *Canada Business Corporations Act*, the *Ontario Business Corporations Act*, and the *Ontario Employment Standards Act* ("ESA"). Pursuant to s. 81 of the ESA, 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. Section 81 further notes that a director will be personally liable if:

- a) the employer is insolvent and a claim for unpaid wages has not been paid;
- b) an employment standards officer has made an order that the employer is liable for wages;
- c) an employment standards officer has made an order that a director is liable for wages; or
- d) the Board has issued, amended or affirmed an order that requires an employer or the directors to pay wages.³

Courts have recently made it glaringly apparent that a director's obligation to employees is a significant one, and that a failure to fulfill these obligations will be taken very

¹ *Barrette v. Crabtree Estate*, (1993) 1 SCR 1027 at para. 30

² *Ibid* at para. 28.

³ *Employment Standards Act*, 2000, S.O. 2000, Ch. 41 at s. 81(1)



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seriously. In the recent Ontario case of *R v. Blondin*⁴, an Ontario Justice of the Peace fined a director, along with the six employer corporations, \$280,000 and sentenced the director to three months incarceration for failure to comply with 112 Orders to Pay unpaid wages of 61 employees issued pursuant to the ESA.

Failing to comply with the Orders to Pay constituted an offence under the ESA. In determining the appropriate sentence, the Court explained that the nonpayment of wages had caused hardship to a number of employees and that Blondin's complete failure to meaningfully attempt restitution warranted a sentence that would represent a punishment for the harm done to the public, and would satisfy the principle of deterrence. Accordingly, the Justice of the Peace imposed a \$40,000 fine against Blondin personally, a \$240,000 fine against the corporations, and sentenced Blondin to three months incarceration.

While the *Blondin* case is certainly an extreme example, the message is clear: a director's failure to acknowledge their obligation to step in when a corporation is unable to pay employee wages could have serious consequences.

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⁴ *R v. Blondin*, 2012 ONCH 826