

# Exceptions To The Historic Compromise? Director Liability Under Provincial Workers' Compensation Regimes Labour, Employment and Human Rights Bulletin



In Canada, workers have given up their right to sue their employer or fellow workers for workplace injuries, and employers agreed to fund a no-fault workers' compensation insurance system, in what has been termed the historic compromise. However, the scope, coverage and protection from liability under such schemes varies from province to province. In some circumstances, directors may be personally liable for claims, offences or assessment under provincial workers' compensation and occupational health and safety regimes. Recently, the Alberta Court of Appeal affirmed that directors in Alberta could, in some circumstances, be personally liable for injuries that occurred in the workplace.

The Alberta *Workers' Compensation Act* provides that directors are not workers under the Alberta statutory scheme except when they apply for and receive coverage. Where directors are without coverage in Alberta, they may not be entitled to protection from private causes of action for workplace personal injuries.

In *Hall v Stewart*, 2019 ABCA 98, the defendant, a director of a construction company, was sued for negligence after workers were injured following the collapse of a staircase built by the director's company. While the company was deemed an employer under Alberta's workers' compensation legislation, and thus protected from claims for personal injury, the director had not applied for coverage and was not covered under the Alberta regime.

While acknowledging that directors are generally shielded from liability, the court noted that there are some situations where personal liability remains, notwithstanding the concept of a corporation as a separate legal entity and limited liability. Where both the company and the director owe a duty of care and where the company is immune from suit, the court concluded that the nature of the harm (a personal injury not an economic loss) required that the director not escape personal liability.

The court concluded that where the statutory scheme requires that directors register to receive compensation coverage, the directors must also register for coverage to receive the benefit of the limitation of liability provided by Alberta's statutory regime. Where the director had not registered for coverage, he could not escape

personal liability even though his involvement in the tortious act was a part of the business of the corporation.

Liability from suit for workplace injury is more limited under most other provincial statutory schemes. Directors in Ontario are generally shielded from causes of action, as Workplace Safety and Insurance Board Schedule 1 employers (the majority of employers' in the province) and their directors are protected from causes of action from injured workers. Similarly, in Manitoba there is no cause of action for a workplace injury against the employer or a director of an employer corporation covered under Manitoba's regime.

In British Columbia, directors of corporations who are actively involved in the company, where it is not a personal services corporation, are considered workers and are required to obtain coverage. This coverage, and the resulting protection from causes of action related to worker injury, requires that the directors' earnings be reported when employee payroll is. Similarly, in Saskatchewan the protection against claims extends to directors that are active in the business.

While directors in most jurisdictions who are active in a business may be protected from causes of action arising from the workplace injuries of workers, they may still attract liability for occupational health and safety violations or unpaid premiums under provincial workers' compensation regimes.

In British Columbia, a director's personal property, where it is used in the business, can have a lien placed against it if there are unpaid assessments owing under its workers' compensation regime. Similar requirements exist in Alberta and provide that a workers' compensation lien may be attached to property used by an employer in its business, including property owned by a director of the business.

Perhaps more significantly, directors in many jurisdictions may be found liable for health and safety violations under a province's occupational health and safety regime or under the criminal code. For example, Ontario's *Occupational Health and Safety Act* provides that an individual offence may attract liability including a fine of up to \$100,000 and an additional victim surcharge of 25%. While individual charges under the regime are rare, in October 2019 a director of a corporation pled guilty to violations resulting in critical injuries to a worker and was fined \$10,000 plus the 25% victim surcharge.

## **Takeaway for Employers**

Director liability under the provincial statutory schemes vary. Directors should review their insurance coverage related to workplace incidents and consider what liability they may attract under their province's statutory regime.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

by Richard Savage