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A New Twist on Director's Liability for Unpaid Wages in a Unionized Environment

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Across Canada, employment standards acts ("ESAs") impose certain personal liabilities on directors or officers in respect of unpaid wages of a company. The potential amounts and the circumstances in which such personal liability may arise, vary from one jurisdiction to another. In British Columbia, the ESA imposes liability on directors or officers for up to two months of unpaid wages for each affected employee. However, a recent B.C. Employment Standards Tribunal decision indicates that officers and directors of *unionized* employers may have a sound defence against liability for awards issued against their corporation.

In [Writers Guild of Canada and The Director of Employment Standards](#) (PDF), BC EST #RD021/11 (the "Guild Decision"), a company director, Kirk Shaw, avoided ESA enforcement proceedings against him because the unpaid amounts arose out of an arbitration award against the company, in a unionized setting.

In the *Guild* Decision, the Tribunal had to consider a fairly common situation: Workers in the movie production industry were not paid certain amounts owed them by the production company. Their union, Writers Guild of Canada, filed a grievance on their behalf, claiming \$150,000. The claim was of course against the company that was bound to the union agreement. Ultimately, there was an uncontested arbitration award for that amount against the company.

The BC *Labour Relations Code* says how arbitration awards are enforced. As in other provinces, the award is to be filed with the supreme court of the province. It can then be enforced in the same way as a court order. As it is an order against the company, there is no individual director liability.

The union took these steps in the *Guild* case. But there was no money in the corporation, so the court order was not satisfied. The union then asked the arbitrator to refer the Award to the Director of Employment Standards (the "Director") for enforcement under the ESA. It seems clear the union had their sights set on the possible "deep pockets" of the director, Mr. Shaw.

The BC ESA provides, in Section 3(8) that, "... if an arbitration board makes a decision ...in respect of wages, the arbitration board may refer the decision to the Director [of Employment Standards] for the purpose of collecting the wages...". Subsection 3(7) of the ESA permits referral to the Director if the arbitration award deals with certain specific sections of the ESA, most notably the group termination and minimum wage sections.

Upon the request of the union and without any specific analysis, the arbitrator referred the award to the Director. The Director then issued a determination that Mr. Shaw, as an officer and director, should personally pay the approximate \$150,000 amount owing.

Mr. Shaw took two separate appeals to the Tribunal. He won both, overturning the Director's determination. As a result, he avoided personal liability.

While the two Tribunal decisions took some different approaches to the many issues, there are some key points which are of general interest. The first is that it is the arbitrator and not the Director who must determine whether the ESA's preconditions are met, to allow the arbitrator to refer the award to the Director. In the *Guild* Decision, it was clear the arbitrator made no such substantive determination. He simply complied with the request of the union. More importantly, the decision highlights the limited statutory authority of an arbitrator under the ESA. The arbitrator can only refer his or her award to the Director for possible enforcement against a director or officer under the very narrow reasons set out in sections 3(7) and (8) of the ESA. Otherwise, enforcement is only against the corporation flowing out of the filed Court order. This may significantly reduce the potential exposure of a corporate director in a unionized setting, for unpaid wages, in Canadian jurisdictions with this kind of legal regime.

For anyone acting as a director or officer of a unionised company, the *Guild* Decision offers some comfort concerning personal liability. In what is surely a rare situation, employees in a unionized setting with a legal regime such as that under the BC ESA, appear to have fewer effective options available to them to collect unpaid wages than do non-union employees.

When faced with wage claims against them personally, corporate officers, directors and their advisors should carefully examine both the applicable ESA and labour statute to determine whether the employment standards authorities have jurisdiction to proceed against them. As indicated by the *Guild* Decision, there may be more protection for directors and officers of unionized companies than many previously thought.

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