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When directors go to jail

The duties and liability of directors of corporations have dramatically expanded over the past century. Recognizing that directors govern and oversee the activities of corporations, the law now imposes a broad range of duties and liabilities on directors.

Founded on the principles of good faith, stewardship, and accountability, these principles are established by case law and are prescribed under Canadian federal and provincial legislation.

Given that they exercise control and management over the corporation, directors bear significant personal responsibility for their conduct and decisions.

Directors are required to exercise their power with the level of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. They must also act honestly, in good faith, and in the best interests of the corporation.

Directors can be held responsible for: Employee income tax deductions which the corporation fails to remit for two years following ceasing to be a director, and any related interest or penalties, under the Income Tax Act; Insider trading; Securities Act offences; Contraventions of dangerous goods and transportation legislation; Violations of provincial Pesticide Acts and Water Resources Acts; Competition Act offences; Violations of the Bankruptcy and Insolvency Act; and Numerous provincial offences and violations of the Criminal Code.

If a director breaches his or her duty, the law provides for several remedies, including, but not limited to:

- Injunctions or declarations of rights;
- Damages or compensation;
- Accounting of profits;
- Restoration of the corporation's property;
- Rescission/setting aside of the pertinent contract, director or shareholder resolution, or other document;
- Removal/dismissal as a director;
- Penalties/fines/imprisonment.

It's time to wake up

A recent Ontario Provincial Court decision serves as a clear message to employers and corporate directors that the court will not only levy a heavy fine against the employer for Occupational Health & Safety Act violations but will also impose prison sentences on the corporation's directors.

The judge levied a \$250,000 fine against an importer and retailer of furniture and accessories, New Mex Canada Inc, and sentenced two of its directors, Baldev Purba and Rajinder Saini, to 25-day prison sentences, following the 2013 death of a forklift operator who

sustained a fatal trauma to the head when he fell from an order picker which was modified with an additional platform that did not have a safety guard rail.

A Ministry of Labour investigation found multiple violations of Ontario's Occupational Health & Safety Act at the Brampton workplace, including failure to provide health and safety training to workers, lack of fall-protection equipment and safety harnesses, and multiple other health and safety hazards.

The two corporate directors were charged with failing as directors to take reasonable care that the corporation complied with the Occupational Health & Safety Act and with Regulation 851 (Industrial Establishments). Both pleaded guilty. They each received a 25-day jail sentence and were ordered to attend a health and safety course within 60 days.

The employer was fined \$250,000, plus a 25 percent victim fine surcharge required by the Provincial Offences Act, which is credited to a special provincial government fund to assist victims of crime. It pleaded guilty to failing to provide training and supervision to a worker regarding fall-protection and/or working from a height, and failing to ensure the safety measures required by law were carried out.

Importance of the decision

In light of this decision, corporate directors should:

- Conduct themselves, and make considered decisions, in a careful, honest, prudent, independent, and diligent manner;
- Take all reasonable care to ensure that the corporation complies with the applicable statutory and regulatory requirements;
- Be proactive in managing and supervising the business and affairs of the corporation in order to satisfy the criteria for proper governance and oversight of the corporation;
- Be aware of the various contractual and statutory (and common law) limitations of liability/damages and defences that are available;
- Seek professional advice on the appropriateness and availability of director's and officer's errors and omissions insurance, and carefully review the exceptions, exclusions, and limitations of coverage; and
- Obtain indemnities, if possible, recognizing they may not be enforced by the Court in certain situations.

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