

# DEVELOPMENTS IN PERSONAL LIABILITY OF DIRECTORS FOR UNPAID WAGES

01 April 2015

---

At law, corporations are treated as separate legal entities. This means that individuals acting on behalf of a corporation, such as directors, are generally protected from personal liability for wrongful acts committed by the corporation. Nonetheless, there are certain scenarios that "pierce" this "corporate veil" and can expose a director to personal liability. One of the most significant and frequently discussed aspects of personal liability of directors is the liability for unpaid employee wages. Corporate and employment legislation in Canada specifically provides that directors can be held personally liable for up to six months of unpaid wages.

However, the basis for finding a director personally liable has recently been extended by the Ontario Superior Court in *El Ashiri v Pembroke Residence Ltd.* ("El Ashiri") where the judge used the oppression remedy under corporate legislation to hold a director (and his estate) liable for unpaid wages and other employment amounts, instead of relying on the standard provisions in the corporate and employment legislation that specifically attribute liability for unpaid wages to directors.

## Applicable Corporate and Employment Legislation

The Canada Business Corporations Act (CBCA), the Ontario Business Corporations Act (OBCA), and the Ontario Employment Standards Act, 2000 (ESA), specifically provide that directors can be held liable for up to six months' unpaid wages if certain pre-conditions are met. Under the OBCA, a director can only be held liable if:

- the corporation is sued for the unpaid wages but is not able to pay them; or
- before the corporation and director are sued, the corporation goes into liquidation, is ordered to be wound up, or goes bankrupt.

Similar pre-conditions exist under the CBCA, except that under the CBCA an employee must first seek recourse against the corporation before looking to the directors, and the suit must be commenced within six months of the wages being due.

The ESA is similar, however, like the OBCA, proceedings under the ESA against an employer do not have to be exhausted before an employee can proceed against his or her employer's directors for unpaid wages.

These legislative provisions provide that a director can be held liable for "all debts". The courts have interpreted "all debts" to mean amounts that constitute debt for services that the employees have performed for the corporation and include unpaid wages, vacation pay, reasonable travel and out-of-pocket expenses, and employment benefits. A director's liability under these provisions has not to date, however, been extended to include termination and severance payments that may be owing by the corporation.

## **Use of the Oppression Remedy in El Ashiri**

The oppression remedy under corporate legislation is a specific equitable remedy available to "stakeholders", including shareholders, creditors, directors and officers, whose legitimate expectations have been infringed upon by a corporation's actions. This remedy is applied to discourage corporations from acting in a way that is oppressive or unfairly prejudicial to, or disregards the interests of, a stakeholder. It is most commonly used by minority shareholders.

In the case of El Ashiri, the judge used the oppression remedy to find a director personally liable for unpaid wages, in addition to other employment related debts. The two plaintiffs in this case worked as managers at hotels owned by two separate corporations with a common sole director and officer. The plaintiffs did not receive their wages for extended periods of time, and thus sued their respective corporate employers and the sole director and officer personally. He died before the matter was resolved, but the plaintiffs each obtained an order to continue their actions against his estate.

The Court found that the estate was liable for the unpaid wages, thereby attributing personal liability to the deceased director. The Court relied on the oppression remedy provision of the OBCA, which provides as follows:

1. A complainant and, in the case of an offering corporation, the [Ontario Securities] Commission may apply to the court for an order under this section.
2. Where, upon an application under subsection (1), the court is satisfied that in respect

of a corporation or any of its affiliates,

- a. any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
  - b. the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
  - c. the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
- that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

In *El Ashiri*, the judge was satisfied that employees with unpaid wages fit within the category of "creditors" to provide them with compensation. In arriving at this conclusion, the judge found that the director's payment to his companies' preferred creditors, but never paying the plaintiffs' wages, was oppressive. As such, the director (and his estate) was found to be personally liable not only for each of the plaintiffs' wages (including overtime where claimed), statutory holiday pay and vacation pay, but also notably for termination pay (which would not have otherwise been awarded if the standard provisions of the OBCA had been invoked).

## Commentary

It is not clear why the judge found the director liable under the oppression remedy. There is no guidance in the decision, nor is there any indication that the Court considered the possibility of relying on the standard provisions of the OBCA or the ESA. However, some possible reasons may be:

- it allowed the plaintiffs to be awarded compensation in excess of six months' wages;
- it allowed compensation for termination pay; and
- it allowed the judge to find liability against the estate, therefore avoiding the limitations that would have been otherwise imposed.

It is likely due to policy reasons that the standard provisions in the CBCA, OBCA and ESA limit a director's personal liability to six months' unpaid wages, and this policy was ignored by the judge in *El Ashiri*. In fact, other courts have held that the oppression remedy is generally not an appropriate remedy for employment related issues such as wrongful dismissal. Nonetheless, the judge applied this remedy in the employment context without providing any justification for his decision. It will be interesting to see how the courts

interpret El Ashiri and if the decision will be appealed.

## In Closing

The decision in El Ashiri, which is surprising to say the least, has the potential to change the landscape of directors' personal liability. Time will tell if this decision is upheld and how it will be interpreted. In the meantime, it reinforces the notion that the courts are not reluctant to pierce the corporate veil in order to protect the often powerless employee. Unpaid wages pose a substantial personal liability risk to directors that should never be taken lightly.

If you have any additional questions about El Ashiri or directors' personal liability risks and how to mitigate them, contact Kathleen Ritchie at [kathleen.ritchie@gowlings.com](mailto:kathleen.ritchie@gowlings.com).

A version of this article was originally published in the [Gowlings Employment & Labour Law newsletter](#).

---

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowing WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

---

**Related** [Capital Markets, Employment, Labour & Equalities, Mergers & Acquisitions](#)