



New To The Board? Think About Your Statutory Liability Exposure

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In the second post in our series on Canadian directors and officers, we consider the importance of understanding potential D&O liabilities originating in a range of federal and provincial statutes.

- In the second in our series for new board members, we look at statutory liability of directors and, in particular, two common forms of statutory liability: occupational health and safety and environmental.
- Additional information can be found in Section 3 of our new publication, [Directors & Officers in Canada](#).
- The following discussion is focused on Ontario, but similar principles apply in most other Canadian jurisdictions.

Where Do Directors' Duties Come From?

Literally hundreds of potential statutory liabilities could – in principle, at least – apply to directors of Canadian companies. While the majority of these apply only in unusual circumstances, in certain provinces or within certain industries, as a new board member it is important to develop a working understanding of the types of liability that typically arise in your industry and within your company's jurisdictions of operation.^[1]

Three fundamental questions

Asking a few fundamental questions about the corporation should help to frame your particular D&O liability issues:

- What is the corporation's **jurisdiction of incorporation**?
- In which **jurisdiction or jurisdictions** is the corporation active?
- In which **industry or industries** is the corporation active?

Each of these is a factor in determining which statutes apply to your business and create duties and liabilities for you.

- The first factor, jurisdiction of incorporation, tells you which statute you have to look at to understand your duties and liabilities under corporate law (as discussed in our [previous post](#)).

- Suppose that you live in Toronto and are a director of a company with manufacturing facilities in Ontario and Quebec. If your company was incorporated federally under the *Canada Business Corporations Act* (CBCA), the corporate law duties that apply to you as a director – e.g., fiduciary duty, duty of care, etc. – will be the ones in the CBCA. Even though there is also an Ontario *Business Corporations Act* (OBCA), it will have no application to your situation even though you live in Ontario. Nor would the Quebec *Business Corporations Act* (QBCA), even though you have a plant there. In short, no matter where your company operates, the duties of its directors under corporate law are determined by its statute of incorporation.
- The second factor – the jurisdiction of the business – tells you what jurisdiction-specific duties may apply to you. In many key areas of law, such as employment and environmental law, your obligations as a director can depend on where you and your business are situated. Thus, if your company operates in several Canadian provinces, it may not be enough to understand your potential liabilities under your own province’s statutes.
 - Suppose, for example, that you live in Ontario and your company operates facilities in Toronto, Montreal and Calgary. In that situation, you will need to be mindful of your potential liabilities under the environmental and employment laws (among others) of Alberta and Quebec, in addition to those of Ontario. As we note in *Directors & Officers in Canada*, those liabilities can vary significantly from one province to another.
 - It should also be noted that federal laws may apply in place of provincial laws with respect to business activities taking place on federal lands, such as national parks.
- The third factor, industry, may be significant in either of the following two respects, depending on the nature of your business:
 - Certain industries are regulated by specific statutes that create unique D&O liabilities. To take a randomly-chosen example, if your company is involved in the wholesale distribution of magazines to Ontario retailers, you as a director could face liability under certain provisions of Ontario’s *Paperback and Periodical Distributors Act*. Or if you are on the board of a company that manufactures containers for Alberta’s transportation industry, there are potential liabilities that you should aware of under that province’s *Dangerous Goods Transportation and Handling Act*. Specific liabilities of this kind exist in most industry sectors.
 - Your company may be in a federally-regulated industry, such as broadcasting, telecommunications, rail transport or shipping (among others). If so, your potential liabilities under employment and privacy legislation (for example) may be determined under federal law, rather than by the corresponding provincial legislation.

How greatly do provincial laws vary with respect to D&O liabilities?

The foregoing discussion raises the question of the variability of board liabilities among Canada’s provinces (and between provincial and federal legislation). The answer is that D&O liability in corporate law statutes is generally similar across the country, partly because most of the provincial statutes (such as the OBCA, QBCA, etc.) are modelled on the CBCA. Nevertheless, there are many differences of detail – see *Directors & Officers in Canada* for more.

Other laws, including those relating to employer responsibilities and the environment, can differ significantly from one province to another, both in terms of specific requirements and in terms of the extensiveness of potential liabilities. Environmental regulation, discussed in greater detail below, is the subject of frequent changes that often focus on industries and risks that are important to the economy of

a particular province. Thus, in many industries, it will be essential for the board to keep up with changes from across the country in order to ensure ongoing compliance.

Examples to Think About

The following examples – the first more general and the second more specific – help to illustrate some of the points made in this article and the importance of understanding the statutory liabilities that apply to you as a director of a company.

Environmental law

Directors of corporations that violate environmental laws can be held personally liable under a variety of environmental statutes, including (in Ontario) not only the [Environmental Protection Act](#) but also a number of other statutes concerning specific environmental issues, such as drinking water contamination and the use of pesticides. Additional detail on the scope of environmental legislation and liabilities can be found in [Directors & Officers in Canada](#).

Notably, in Ontario, directors have a positive duty to take all reasonable care to prevent an unlawful discharge by the company. Clean-up orders can also be made against persons who have had “management or control” of a property or undertaking, which can include directors in certain cases. Ontario’s environmental laws provide for extremely high maximum fines (in the millions of dollars per day, in some cases) and terms of imprisonment, although the application of such extreme penalties to board members is unlikely outside of truly exceptional situations.

Fortunately, due diligence defences may be available, making it important for you, as a director, to press management to ensure that the company fulfills its environmental obligations by establishing the following (among other things):

- Fully compliant environmental policies in keeping with industry standards;
- Regular reports to the board on environmental matters; and
- Processes that ensure prompt attention to environmental concerns.

Occupational health and safety law

Generally speaking, employers have a duty to ensure the health and safety of their workers. In Ontario, for instance, at the board level, this means that you and your fellow directors must ensure that the corporation is complying with Ontario’s [Occupational Health and Safety Act](#) (OHSA) and its related [regulations](#) (and/or with similar statutes in other provinces). In addition, failure to take reasonable care to prevent bodily harm is an offence under the [Criminal Code](#).

By way of an example of the importance of a director understanding the law that applies to the corporation as well as ensuing compliance, we should mention the [Metron](#) case, which concerned the collapse of a construction scaffold at a high-rise apartment building in Toronto. The platform, which was of a design that had not been properly tested, collapsed, and four of the six construction workers fell to their deaths (only one of them had been tied in by a lifeline, as required, and only two lifelines were available despite the presence of six men on the scaffold). The company’s owner was convicted of four offences under OHSA for failing, in his capacity as director, to comply with various parts of the [construction projects regulations](#) and was personally fined \$90,000. He was also charged personally under the [Criminal Code](#), although the charge was eventually withdrawn (the company’s project manager was convicted under the [Criminal Code](#), however, and was sentenced to 3½ years in prison.)

In the context of occupational health and safety legislation, it is important that, as a director, you:

- Understand the industry that the corporation operates in the laws that apply, in particular in circumstances where the safety of workers is of critical importance (like in manufacturing, industrial contexts, or construction);
- Be hands-on; and
- Ensure that appropriate programs and training on health and safety are formulated, implemented and followed.

For Further Information

Stikeman Elliott's new *Directors & Officers in Canada* guide provides a broader overview of the responsibilities and potential liabilities of Canadian directors and officers. This guide is designed to help directors productively discuss key issues at board meetings and with professional advisors.

[1] For the purposes of this note, we are not considering jurisdictions outside Canada. For more information on Canadian legislation that can apply to activities outside Canada see our [Corruption of Foreign Public Officials Act FAQ](#).

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