"I Knew We Should Have Replaced that Crane"
Risks for Directors and Officers When Accidents Occur

Corporation**,** *n. "An ingenious device for obtaining individual profit without individual responsibility."*

– Ambrose Bierce, *The Devil's Dictionary*

Over a century has passed since Ambrose Bierce penned this cynical definition of a corporation. While Mr. Bierce's definition may still ring true to in many respects, legislators and courts have developed law that extends liability to individual directors and officers ("D&O's") personally when workplace accidents occur. This paper discusses the liability that can be imposed on D&O's of corporations when accidents occur. It examines some of the different sources of liability for D&O's including public welfare legislation, the Criminal Code, and the common law. It then addresses some policies corporations can put in place to protect D&O's from personal liability for accidents.

Occupational Health and Safety Legislation

Perhaps the most obvious source of liability for D&O's of construction companies when accidents occur is found in provincial occupational health and safety ("OS&H") laws. The duties placed on D&O's by British Columbia's *Workers Compensation Act*[1] and Ontario's *Occupational Health and Safety Act,*[2] and the potential penalties arising, will be used to illustrate the issues. Similar legislation is found in all other common law Provinces. No attempt is made to deal with the legislation in Quebec.

Section 121 of the B.C. *Workers Compensation Act* (the "*WCA*") states:

> Every director and every officer of a corporation must ensure that the corporation complies with this Part, the regulations and any applicable orders.

Section 32 of the Ontario *Occupational Health and Safety Act (the "OHSA")* is drafted thus:

> Every director and every officer of a corporation shall take all reasonable care to ensure that the corporation complies with,
> (a) this Act and the regulations
> …

There have been surprisingly few reported decisions involving the interpretation of these sections. In *R. v. A-1 Mushroom Substratum Ltd. et al.*[3] Mr. Justice Ball discussed the duty created by section 121 of the BC *WCA*:

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[1] R.S.B.C. 1996, c. 492.
[2] R.S.O. 1990, c. 0.1.
[3] 2011 BCPC 458 at para. 17 [*A-1 Mushroom et al.*].

> Since October of 1999, directors and officers of a corporation also have a statutory duty under the *Act* to ensure the health and safety of workers. Pursuant to s. 121, every director and officer of a corporation must ensure that the corporation complies with Part 3 of the *Workers Compensation Act,* the regulations, and any applicable orders. This means that even silent or non-participating directors and officers, and, in other words, those directors and officers not involved in the daily operations of a corporation, must still ensure that the corporation meets the health and safety standards provided under the *Act* and their regulations. No director or officer of a corporation is exempt from ensuring that the corporation meets the required standards of health and safety.

Section 213 of the BC *WCA* creates the personal liability for D&O's who fail to comply with their legislated duties:

> (1) A person who contravenes a provision of this Part, the regulations or an order commits an offence.
> (2) If a corporation commits an offence referred to in subsection (1), an officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence.
> (3) Subsection (2) applies whether or not the corporation is prosecuted for the offence.

Despite the wording of section 213(3), a prosecution will not succeed against a director or officer unless the prosecution can prove the corporation itself was guilty of an offence. The practical result is that D&O's charged under BC *WCA* section 213(2), or similar sections in other statutes, will be able to raise as their first line of defence that the prosecution has not proven that the corporation committed an offence. For example, if the corporate offence is one of strict liability the director or officer should argue the corporation exercised due diligence or operated under a reasonable mistaken belief in a set of facts which, if true, would render its conduct innocent.[4] Section 215 of the BC *WCA* creates an express due diligence defence for all persons charged with an offence. Only after the corporation's commission of the offence has been proven does the inquiry shift to whether or not director or officer "authorized, permitted or acquiesced" in such offence.

There is some question as to what is the fault component, the *mens rea*, of section 213 of the BC *WCA*. The issue is whether words like "authorize", "permit", or "acquiesce" import subjective fault or intent rather than simply negligence or lack of due diligence, into what is a underlying strict liability offence for the corporation. In addition to trying to establish a due diligence defence, D&O's charged with an offence under the BC *WCA* may want to consider arguing the offence requires the prosecutor to prove full *mens rea*. Guidance can be found in the judicial treatment of similar sections in other statutes.

[4] *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

For example, section 242 of the *Income Tax Act*[5] (the "*ITA*") provides:

> Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who direct, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

In *R. v. Rohan's Rockpile Ltd.*[6] the British Columbia Court of Appeal found that the offence of failing to remit monies contrary to section 153(1) and 238(2) of the *ITA* were strict liability offences. In allowing the appeal and ordering a new trial, the court commented as follows:

> There is a matter which should be mentioned. During argument we were informed that at the trial and on appeal in the County Court separate consideration was not given to the requirements of conviction of the appellant Lowther under s. 242. Accordingly, counsel for the appellants was of the view that he could not raise the matter before us. However, it ought to be considered at the new trial which I would order. Without commenting on the correctness of the decision, I refer counsel to the judgment of Gould J. *R. v. Tri-City Truck Sales Ltd. et al.* (1966), 63 D.L.R. (2d) 507, 59 W.W.R. 736. It was an appeal by way of stated case from the conviction of the individual appellant of failing to remit sales tax collected under the *Social Services Tax Act*, R.S.B.C. 1960, c. 361. Section 32 of that statute is quite comparable to s. 242. The learned Judge held that *mens rea* was an essential ingredient in an offence charged against a person in his capacity as a director of a company.

Similarly, in *R. v. Bodnarchuck*[7], Judge Challenger reviewed various decisions considering section 242 of the *ITA,* and similarly worded sections (although not the BC *WCA*) and concluded:

> If a person is charged in their capacity as a director of a corporation, the Crown must prove that they were a principal or a party pursuant to s. 242 beyond a reasonable doubt. There is clearly a certain mental element involved in that position. To be found guilty as a principal or a party as a corporate director requires *mens rea*, as has been settled by the law. In other words, the mental elements of s. 242 are that a person directed, authorized, assented to, acquiesced in, or participated in the commission of the offence.

[5] R.S.C. 185 (5th Supp.), c. 1.
[6] (1981), 57 C.C.C. (2d) 388.
[7] 2004 BCPC 235.

Note, however, that in *R. v. Felderhof* [8], the Bre-X prosecution, the court considered section 122(3) of the Ontario *Securities Act*[9] which contains the same language as the BC WCA:

> Every director or officer of a company or of a person other an individual who authorizes, permits or acquiesces in the commission of an offence under subsection (1) by the company or person, whether or not a charge has been laid or a finding of guilt has been made against the company or person in respect of the offence in respect of the offence under subsection (1), is guilty of an offence and is liable on conviction to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or both. [Emphasis added]

Unfortunately for D&O's, after a thorough review of a good number of authorities Mr. Justice Hyrn concluded that the "authorizes, permits or acquiesces" type of language creates a strict liability offence for D&O's, and a full subjective *mens rea* is not required. While *Felderhof* is not binding on a BC court, Justice Hyrn's reasoning will likely be persuasive in light of its thorough review of the case law on the subject.

In terms of penalties for failing to meet the legislated duty, section 66(1) of the Ontario *OHSA* stipulates that if a director or officer is found guilty of an offence they are liable to a fine of not more than $25,000, or imprisonment for a term of not more than twelve months, or both.

The fines under the BC *WCA* are significantly higher. Section 217 of the BC *WCA* imposes, in the case of a first conviction, a fine of not more than $660,339.64[10] and, in the case of a ongoing offence, to a further fine of not more than $33,017.01 for each day the offence continues after the first day. Imprisonment for a term of not more than six months, or both a fine and imprisonment, are available to a first offender. In the case of a second offence, the allowable fines are $1,320,697.27 and $66,033.97 respectively, and the maximum term of imprisonment rises to 12 months.

In addition to fines and imprisonment, the BC *WCA* provides for disgorgement of monetary benefits that accrued to a director or officer as a result of an offence and various other penalties including community service, posting of security, the publishing of the facts relating to the offence(s), and prohibiting the director or officer from working in a supervisory capacity at any workplace for a period of not more than six months, among other sanction. [11]

While the B.C. *WCA* and the Ontario *OHSA* create potentially sweeping exposure to liability for D&O's of corporations, the reported decisions involving prosecutions and the sentencing of individuals illustrates a wide range of sentences imposed, depending on the circumstances of the offence and the accuseds.

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[8] 2007 ONCJ 345.
[9] R.S.O. 1990, c. S.5.
[10] Pursuant to sections 25 and 25.2 of the BC *WCA*, the board, WorkSafeBC, determines the value of fines under section 217 and other sections based on annual changes to the consumer price index and other factors. To view the board minutes which set the fine amounts as of January 1, 2013, see http://www.worksafebc.com/regulation_and_policy/policy_decision/consumer_price_index_adjustments/assets/PDF/2012/Act.pdf .
[11] S*upra* note 1 at ss. 218-219.

In *R. v. A-1 Mushroom Substratum Ltd. et al.,* the corporate accused operated a commercial facility growing mushrooms. In 2008, three employees died and two suffered permanent brain damage as a result of exposure to poisonous gas released during maintenance work at the facility. The incident received widespread publicity in British Columbia.

As the employer, the corporate accused pled guilty to three offences: (i) under s.115(1)(a)(i) of the *WCA* for failing to ensure the health and safety of its workers and other workers; (ii) s.115(2)(e) for failing to provide its workers with information, instruction, training and supervision necessary to ensure the health and safety of those workers; and (iii) s. 9.4 of the B.C. *Occupational Health and Safety Regulation*[12] for failing to ensure that all confined-space hazards were eliminated or minimized and that work was performed in a safe manner. Three individual defendants pled guilty as officers and directors to offences under BC *WCA* section 121 and 213(1) for failing to ensure that the corporate defendants complied with the *WCA* and the *OHSR*. One of the three individuals, who was a supervisor, also pled guilty under s.117(1)(a) for failing to ensure the health and safety of workers under his direct supervision.

In sentencing the defendants, Prov. Ct. Judge Ball cited *R. v. Cotton Felts*[13], a decision of the Ontario Court of Appeal considering sentencing for offences committed under the Ontario *OHSA*, for the proposition that the paramount principle in sentencing public welfare offences was general deterrence and the imposition of a fine to achieve that. In *Cotton Felts*, the court held:

> Without being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere license for illegal activity. In determining the appropriate fine for each of the accused, the authorities provide a number of factors which the court is bound to consider. These factors include:
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> (a) the actual and potential harm to workers or other members of the public;
> (b) the degree of blameworthiness attributed to each of the accused;
> (c) the size and net worth of the accused corporations;
> (d) the scope of economic activity at issue;
> (e) the financial ability of each of the accused to pay a fine;
> (f) the prior safety record of each accused, and
> (g) whether the accused have taken steps to prevent the recurrence of injuries and death in the workplace.

Judge Ball considered the following factors in *A-1 Mushroom*:

- the individual accuseds had minimal exposure to occupational health and safety legislation as employees prior to starting their own businesses;
- neither the individual accuseds nor the professional contractors advising them were aware of poisonous gas presenting a health or safety hazard in mushroom farming prior to the incident;

[12] B.C. Reg. 296/97 [BC *OHSR*].
[13] [1982] O.J. No. 178 [*Cotton Felts*].

- the Workers Compensation Board of British Columbia had not issued any warnings or published materials related to the accumulation or dangers of poisonous gas in mushroom farming prior to the incident;
- one of the corporate accuseds had become a model farm for safety practices following the incident;
- one of the individuals had no involvement in the day to day business operations of either corporate accused and was a director in name only;
- decreases in value of the corporate accused, with the resulting decrease in value of the shareholdings of the individuals, both as a result of the offences and a result of general business problems the companies faced;
- the high debt level of one of the corporate accuseds;
- the modest income of the individual accuseds;
- the accuseds acknowledged they fell short of their obligations as employers and supervisors; and
- Crown counsel not seeking jail time.

After considering the sentencing principles of deterrence and denunciation, Judge Ball determined the appropriate sentences for each accused was a fine but no jail time. Despite being bankrupt, A-1 Mushroom Ltd. was fined $200,000. H.V. Truong Ltd. was fined $120,000. The active D&O was fined $15,000, the silent D&O was fined $5,000, and the third accused was fined $10,000 due to his supervisory role.

While the fines of the officers and directors in *A-1 Mushroom et al.* may appear modest in the context of three people dying and two others suffering brain damage, it is easy to imagine a situation in which the penalty to the D&O's could be much larger. Factors which would likely result in a much larger fine would include individuals with relatively significant financial means, persons knowledgeable about OH&S requirements or working in an industry where the risks and requirements have been extensively published, purposefully disregarding OH&S, and involvement in previous industrial accidents.

In *R. v. Pack All Manufacturing Inc.*[14] the directors of the corporate accused were found guilty under section 31(a) of the Ontario *OHSA* for failing to take all reasonable care as a director to ensure that the corporation complied with the Ontario *OHSA* and its regulations. An employee of the corporate accused suffered fractures to his hand and had to have a finger surgically removed as a result of a workplace accident involving an industrial grinder. The court found that hands on management and onsite involvement in supervisory roles connected the directors to the safety concerns on the floor of the plant and that there was no evidence before him to support the conclusion that the directors fulfilled the requirements of the Ontario *OHSA*.

In ordering a fine of $5,000 each for the two guilty directors the reviewed prior fines in similar cases and considered the following factors:

- the continuity of the illegal actions;
- the severity of the worker injury and suffering;

[14] 2009 ONCJ 671 [*Swartz*].

- the health and safety history of the corporate defendant;
- improvements in the corporate defendant's health and safety program following the accident;
- the size of the company and the number of employees; and
- the involvement of a young worker.[15]

The review by the court of case law submitted to it *Pack All* illustrates the lack of a consistent penalty being imposed. For example, an accident leading to a worker's death resulted in a $30,000 fine ($10,000 to the director), an injury resulting in amputation of an arm up to the shoulder saw a $40,000 fine, while the loss of the tip of a finger resulted in a $50,000 fine. One would have expected that the seriousness of the consequence, would more closely mirror the amount of the fine, but as the cases illustrate the consequences of the incident is only one factor. This is borne out by the well-publicized incident involving Metron Construction Corporation.

On December 24, 2009, six of Metron's employees were working in a suspended work platform when it fell approximately 14 floors to the ground. Four workers died as a result of the fall and the fifth suffered significant injuries but survived. The sixth worker in the platform was properly harnessed and did not fall. In *R. v. Swartz*[16] the accused sole director of Metron, pled guilty to 4 charges under section 31(a) of the Ontario *OHSA* for failing to take all reasonable care as a director to ensure that the corporation complied with the Ontario *OHSA* and its regulations. The Crown and defence made a joint submission that fines of $22,500 per charge were appropriate. After stating that the overriding principle to be considered when determining the amount of a fine is deterrence, and citing *Cotton Felts*, Mr. Justice Bigelow accepted the joint submission, resulting in total fine of $90,000 plus a statutorily required victim surcharge of 25%.

Environmental Legislation

With an ever increasing public emphasis on environmental protection, it is not surprising that environmental protection legislation is a second area of public welfare legislation that commonly exposes directors and officers to personal liability.

Under the *Canadian Environmental Protection Act*[17] D&O's have a duty to take reasonable care to ensure a corporation complies with that Act, its regulations, and orders and directions made pursuant to the Act.[18] Further, D&O's are party to and guilty of an offence committed by a corporation if they directed, authorized, assented to, acquiesced in or participated in the offence, again regardless of whether the corporation is prosecuted or convicted.[19] Section 283 of the *Canadian EPA* provides a due diligence defence for the D&O's.

[15] *R. v. Pack All Manufacturing Inc*., 2009 ONCJ 672.
[16] 2012 ONCJ 505.
[17] S.C. 1999, c. 33 [*Canadian EPA*].
[18] *Ibid.* at s. 281.1.
[19] *Ibid.* at s. 280(1).

The British Columbia *Environmental Management Act*[20] makes it an offence to breach various provisions of the act, resulting in fines up to $1Million. Section 121(1) provides that any director or officer that authorized, permitted, or acquiesced in the offence by a corporation commits the offence as well.

Section 194 of the Ontario *Environmental Protection Act*[21] creates duties on D&O's to take all reasonable care to prevent the corporation from, among other things:

- discharging or causing or permitting the discharge of a contaminant in contravention of the Ontario *EPA*, its regulation, or an approval, certificate, license, or permit under it;
- failing to notify the Ministry of the Environment of the discharge of a contaminant in contravention of the Ontario *EPA*, its regulation, or an approval, certificate, license, or permit under it;
- contravening the sections of the Ontario *EPA* regulating the hauling of industrial or hazardous waste;
- hindering or obstructing a provincial officer or any employee or agent of the Ministry of the Environment in the performance of his or her duties;
- providing false or misleading information to a person carrying out his or her duties pursuant the Ontario *EPA* or its regulations;
- refusing to furnish information required for the purposes of the Ontario *EPA* or its regulations;
- failing to install, maintain, operate, replace, or alter equipment as required by an approval, certificate, license, or permit under the Ontario *EPA*; and
- contravening an order made pursuant to the Ontario *EPA*.

In *R. v. Bata Industries Ltd*.[22] three officers of Bata Industries Ltd. were charged under the *Ontario Water Resources Act*[23] and the Ontario *EPA* for failing to take all reasonable care to prevent a discharge contrary to the acts. Thomas Bata was the president of the international Bata Shoes organization. Douglas Marchant was president of Bata Industries Ltd., the Canadian division of the international Bata Shoes organization. Keith Weston was vice-president of Bata Manufacturing, the division of Bata Industries Ltd. responsible for the plant in Batawa, Ontario, that was found to be discharging pollutants.

The main issue pertaining to the liability of the directors was whether they had established a defense of due diligence. In considering what was reasonable for each director in the circumstances Mr. Justice Orston specifically said the directors are, "…justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties"[24] and considered each director's, "…degree of authority in general and specific responsibility for health and safety practice, including hazardous waste disposal."[25]

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[20] S.B.C. 2003, c. 53 [BC *EMA*].
[21] R.S.O. 1990, c. E.19 [Ontario *EPA*].
[22] [1993] O.J. No. 1679 [*Bata*].
[23] R.S.O. 1990, c. O.40.
[24] *Bata, supra* note 21 at para. 134.
[25] *Ibid.* at para 131.

Thomas Bata successfully established a due diligence defense. Mr. Justice Orston found he had little contact with the Batawa, Ontario plant but when he was there he personally reviewed the operation and responded to matters brought to his attention appropriately.

Douglas Marchant was not able to establish a due diligence defense and was fined $6,000. He was found to have knowledge of the discharge for six months and done nothing about it and had an obligation to give instructions and see that they were carried out.

Keith Watson was not able to establish a due diligence defense and was fined $6,000. Mr. Justice Orston found he was an on-site officer and as such had the highest responsibility and the highest bar to meet to establish due diligence. He chose the cheapest cleanup quote without inquiring why it was the cheapest and failed to adequately inform himself of the goings on of the plant because he did not "walk-about" enough.

Mr. Justice Orston summarized the principle of delegation in environmental matters as follows:

> Delegation is a fact of life. The Environmental Enforcement Amendment Act is not intended to prevent a reasonable degree of delegation. However, the Legislature has clearly declared that environmental protection is too important to delegate entirely to the lower levels of a corporation. Although the Legislature does not expect the Board of Directors or the officers of the Corporations to make all environmental decisions, it is not acceptable for them to insulate themselves from all responsibility for environmental violations by delegating all aspects of compliance to subordinates.[26]

The Criminal Code

There are no special provisions in the *Criminal Code*[27] that create liability for directors and officers in their capacity as such. However, if a director or officer is directing the corporation to commit crimes that will benefit the corporation, or are otherwise participating in criminal activities within the corporate context, they may be held criminally responsible.

Criminal Code section 217.1, passed in response to the Westray coal mining disaster in Nova Scotia, imposes a duty similar to the duties found in occupational health and safety legislation. Section 217.1 provides:

> Everyone who undertakes, or has authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

[26] *Ibid.* at para. 139.
[27] R.S.C. 1985, c. C-46.

In *R. v. Kazenelson,*[28] a preliminary inquiry relating to charges brought against the project supervisor of Metron, the court considered *Criminal Code* section 217.1 as well as s.220 (criminal negligence causing death), and s.221. (criminal negligence causing bodily harm). Justice Sparrow stated:

> 33 The definition of the *mens rea* and *actus reus* of criminal negligence has been the subject of substantial jurisprudence over many decades. The characterization of the elements of the offence has evolved, largely through cases involving extremely negligent driving, and extreme negligence in the care of children.
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> 34 Ultimately, Crown and defence agree that the *actus reus* requires evidence of an act or omission which constitute a failure to perform a duty; if an omission is alleged, it must involve a duty imposed by law. The failure to perform must rise to the level of "wanton or reckless disregard".
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> 35 The meaning of "wanton or reckless" in jurisprudence was summarized recently by Hill, J. in R. v. Menezes, [2002] O.J. No. 551, at para 72;
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> > "The term wanton means "heedlessly" (Regina v. Waite (1996), 28 C.C.C. (3d) 326 (Ont. C.A.)) "ungoverned" and "undisciplined" (as approved in Reginal v. Sharp (1984), 12 C.C.C. (3d) 428 (Ont. C.A.) at 430, Morden J.A.) or an "unrestrained disregard for the consequences" (Regina v. Pinske (1988)), 6 M.V.R. (2d) 19 (B.C.C.A.) at 33, Craig J.A. (affirmed on a different basis [1989] 2 S.C.R. 979, Lamer J. The word "reckless" means "heedless of consequences, headlong, irresponsible." Sharp, Supra, at 30."
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> 36 The duty of a supervisor such as the accused is clearly established in law by s. 217.1 -- the duty to take reasonable steps to protect workers from bodily harm.
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> 37 With respect to *mens rea*, counsel again agree on the test - namely that the impugned act or omission must amount to a marked and substantial departure from the standard of a reasonable person in the accused's circumstances. The test is described as a "modified objective one" - requiring the Court to consider the accused's conduct, in view of the accused's perception of the facts. …
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> 38 In *R. v. Roy*, 2012 SCC 26 at para 27, the Supreme Court of Canada stated that two questions could be asked:
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> > "It is helpful to approach to the issue by asking two questions. The first is whether, in light of all of the relevant evidence, a reasonable person would have foreseen the risk and steps to avoid it if possible. If so, the second question is whether accused's failure to foresee the risk and take reasonable steps to avoid it, if possible, was a marked and substantial

[28] [2013] O.J. No. 701 [K*azenelson*].

> departure from the standard of care expected of a reasonable person in the accused's circumstances."

Justice Sparrow went on to consider the duties imposed by the Ontario *OHSA* to determine the duty imposed on the accused under section 217.1 in *Kazenelson*. She found evidence that the accused failed to ensure all workers were tied to lifelines which was sufficient proof of wanton disregard and a failure to take reasonable steps as required by sections 217.1, 220, and 221 so as to warrant a committal for trial on all charges.

It should be noted that the accused in *Kanzenelson* was not a director or officer of Metron and in *Schwartz* the accused director and owner of Metron was not charged under the *Criminal Code*.

In *R. v. Scrocca*[29] the accused was found guilty of criminal negligence causing death for driving a dangerous backhoe. The accused owned and operated an unincorporated landscaping company. His employee was killed when a backhoe being driven by Mr. Scrocca failed to brake and pinned the employee against a wall.

The backhoe had been purchased in 1976 and had not undergone any regular maintenance. Inspections after the accident showed the backhoe had no braking capacity in the front two wheels, a major oil leak from the brake system, and total braking capacity reduced by 30%. The accused admitted the last work by a professional mechanic on the backhoe was done more than five years before the accident and that he had not checked the brake fluid in the previous year because he could not remove the reservoir cap. The accused's argument that the machine was brought to a certified mechanic when there was a major problem was not accepted as meeting the standard of a reasonably prudent person.

The court found it was not necessary to look to section 217.1 to attribute fault to the accused and made the following comment:

> Section 217.1 creates no offence but confirms the duty imposed on every one who is responsible for any work to take the necessary steps to ensure the safety of others. It facilitates proof of charges of criminal negligence against corporations and organizations, although the meaning of "everyone" extends the scope of this provision to any person.

Common Law

D&O's are not liable for a corporation's torts simply by virtue of their positions as D&O's. However, if a director or officer commits a tort in the course of his or her employment he or she may be personally liable. From a policy perspective, where an individual is acting outside the scope of his or her authority from the corporation it does not offend the idea of limited liability to hold the D&O personally liable.

[29] 2010 QCCQ 8218 [*Scrocca*].

In *Scotia Macleod Inc. v. Peoples Jewellers Inc.*[30] the Ontario Court of Appeal held that for a claim against D&O's to succeed it is necessary to allege that they had committed tortious behavior outside their formal decision making roles. The court identified fraud, deceit, dishonesty, and want of authority as the usual categories of torts giving rise to personal liability for D&O's and added:

> Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.

When courts pierce the corporate veil to hold D&O's personally liable the reasoning for that is not always based on sound principles which are immediately obvious from the decision. Jurisprudence on the tortious liability of D&O's for accidents, the topic of this paper, is not common.

In *Berger v. Willowdale A.M.C.*[31] the plaintiff was injured when she slipped and fell on the icy, snow-covered sidewalk leading from the building she worked in. The trial judge found the president of the company employing the plaintiff owed her a duty, had breached that duty, and was personally liable for her injuries. The defendant appealed on the basis that he owed no duty to the plaintiff and that he directed the corporation did not make him personally liable for its tortious acts.

The majority of the panel at the Ontario Court of Appeal dismissed the appeal concluding: "…there is no reason why the plaintiff cannot maintain this action against Mr. Falkenberg, the president of her employer, for his negligent omission to rectify a dangerous situation."[32]

The majority indicated liability of an officer of a corporation would be dependent on the facts of the individual case including:

- the size of the company;
- the number of employees;
- the nature of the business;
- whether the risk was or should have been readily apparent to the executive officer;
- the length of time the dangerous situation was or should have been apparent to the officer;
- whether that officer had the authority and ability to control the situation; and
- whether that officer had ready access to the means to rectify the danger.[33]

A strongly worded dissent in *Berger* found the personal defendant owed no personal duty to the plaintiff and would have found him not liable to the plaintiff.

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[30] (1996), 26 O.R. 3d 481.
[31] [1983] O.J. No. 2959 [*Berger*].
[32] *Ibid.* at para. 37.
[33] *Ibid.* at para 45.

The majority in *Berger* relied on definition of "employee" in the *Workmen's Compensation Act*[34], which it found specifically did not include officers. That Mr. Falkenberg was not an "employee" was significant because the *Workmen's Compensation Act* barred claims against fellow employees for injuries suffered during the course of employment.[35] Since *Berger,* the occupational health and safety legislation in Ontario has been changed. Sections 28 and 29 of the Ontario *Workplace Safety and Insurance Act*[36], the Ontario OH&S statute currently in force, bars claims against directors, executive officers, and fellow employees by workers or their survivors for accidents that give rise to benefits under the act. Section 10 of the BC *WCA* contains a similar prohibition.

Limiting Liability and Exposure

The scope of directors' and officers' liability for accidents is growing. In the face of new and expanding liability, D&O's should use their authority at corporations to put policies in place that shelter them from the potential liability discussed above.

Obviously the way a director or officer can avoid liability for offences is to ensure they exercise due diligence in their roles. To quote the Canadian Centre for Occupational Health & Safety: "[t]o exercise due diligence, an employer must implement a plan to identify possible workplace hazards and carry out the appropriate corrective action to prevent accidents or injuries arising from these hazards."[37]

Following is a list of suggested steps that, if taken, could help establish due diligence on the part with regard to compliance with public welfare legislation. The D&O's should ensure:

- the employer has written policies, practices, and procedures applicable to the possible areas of liability. The policies, practices, and procedures should ensure and document that the employer carries out workplace safety audits, identifies hazardous practices and hazardous conditions and makes necessary changes to correct those conditions, and provided employees with information to enable them to work safely;
- the employer provides appropriate training and education to employees so that they understand and carry out their work according to established polices, practices, and procedures put in place;
- the employer monitors the workplace and ensures that employees are following the policies, practices and procedures put in place. Written documentation of progressive disciplining for breaches of rules should be kept;
- the employer has an accident investigation and reporting system in place. Employees should be encouraged to report "near misses" and they should be investigated. Information from investigations should be incorporated into revised, improved policies, practices, and procedures;

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[34] R.S.O. 1970, c. 505.
[35] *Berger, supra* note 28 at para. 19.
[36] S.O. 1997, c. 16.
[37] "OH&S Legislation in Canada-Due Diligence", online: The Canadian Centre for Occupational Health and Safety http://www.ccohs.ca/oshanswers/legisl/diligence.html .

- the employer should document, in writing, all of the above steps. First, this gives the directors, officers, and employer a history of how the company's policies, practices, and procedures progressed over time. Second, it will provide up-to-date documentation that can be used as a defense to charges in case an accident occurs despite directors' and officers' due diligence efforts; and
- the D&O's should document their efforts to ensure the above has taken place, including getting regular reports from appropriate employees and keeping good minutes at board and other meetings.

In the event D&O's are charged with and offence, and, in some cases, found guilty of an offence, they can protect themselves through indemnification from the corporations for whom they work.

The British Columbia *Business Corporations Act,*[38] the Ontario *Business Corporations Act*[39], and the *Canada Business Corporations Act*[40] and all allow for, and in some cases require, indemnification of D&O's for all costs incurred, including the satisfaction of a judgment, in respect of: (i) under the Ontario *BCA* and the *CBCA* any civil, criminal, administrative, investigative, or other proceeding; and (ii) under the BC *BCA,* any legal proceeding or investigative action which the individual is involved in due to their association with the corporation.

For indemnification to be allowed the director or officer must have been acting honestly and in good faith with a view to the best interests of the corporation and, in the case of a criminal or administrative proceeding, the director or officer must have had reasonable grounds for believing that his or her conduct was lawful. Note that under any of the above referenced legislative provisions it is not a prerequisite of indemnification that a director or officer be successful in their defense.

Under the Ontario *BCA* and the *CBCA* a corporation must indemnify a director or officer if they are found by a court or other competent authority: (i) not to be at fault or to have omitted to do anything they ought to have done; (ii) to have been acting honestly and in good faith with a view to the best interests of the corporation, and (iii) in the case of a criminal or administrative proceeding, to have had reasonable ground to believe his or her conduct was lawful.

Under the BC *BCA* a corporation must indemnify a director or officer if they are, "…wholly successful, on the merits or otherwise, in the outcome of the proceeding or … substantially successful on the merits in the outcome of the proceeding."[41]

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[38] S.B.C. 2002, c. 57, ss. 159-164 [the BC *CBA*].
[39] R.S.O. 1990, c. B.16, s. 136 [the Ontario *BCA*].
[40] R.S.C. 1985, c. C-44, s. 124 [the *CBCA*].
[41] *Ibid.* s. 161(b).