



## **Boeing Termination Evidences Brave New World in Corporate Governance**

By Dan McKeown

The forced resignation in early March of Boeing Company's CEO, Harvey Stonecipher, offers further evidence that the conduct of employees - whether at work or at play, including senior management - will not be immune from corporate scrutiny.

Once the subject of water-cooler whispers and backroom acquiescence, employers are now demanding of their employees that their personal conduct not have the potential to negatively impact the organization's public reputation and credibility. Particularly, in the aftermath of the collapse of Enron and the enactment in the United States of Sarbanes-Oxley, businesses throughout North America have begun to focus in earnest on the creation, implementation and enforcement of comprehensive Codes of Employee Conduct.

In the case of Boeing, Mr. Stonecipher's resignation at the request of Boeing's Board of Directors resulted from a violation of the company's code of conduct, which prohibits "conduct or activity that may raise questions as to the company's honesty, impartiality, reputation or otherwise cause embarrassment to the company." According to public accounts, Mr. Stonecipher violated Boeing's code of conduct when he engaged in an extramarital affair with a female executive of the company. Ironically, Stonecipher had been brought into Boeing to restore its reputation amid a Pentagon procurement scandal that led to the jailing of two former Boeing executives. One of Stonecipher's first orders of business was to require Boeing's 150,000 employees to sign a Code of ethical conduct - the very Code the Boeing Board found Stonecipher to have violated by his actions.

### **The Trend**

So important are Codes of Employee Conduct now considered that, in a growing number of workplaces, they form part of the employment contract itself, requiring specific execution at the time of hire. Some organizations even require employees to periodically reaffirm their adherence to the Code by executing an annual certificate. In all cases, employees are being asked to acknowledge that a violation of the Code will expose the employee to disciplinary action up to and including termination of employment.

In terms of content, Codes of Employee Conduct vary in breadth from simple value statements to veritable "catch-basins" of actual or perceived corporate sins such as conflicts of interest, sexual harassment, nepotism, workplace violence, substance abuse, financial controls and reporting, business expenses, gift-giving/receiving, and dealings with government officials.

### **Proceed With Caution**

In Canada, employers need to proceed cautiously when developing and implementing Codes of Employee Conduct. There are a number of reasons for this:

1. Whereas in the United States, legislation such as the Sarbanes-Oxley Act applies throughout the Country, in Canada it is the provinces that have the constitutional authority to legislate in the field of employment law (in workplaces other than federal undertakings). As such, applicable law may vary from province to province.
2. In Canada, an employer risks legal challenge if it purports to unilaterally change a fundamental term or condition of employment without providing the employee adequate consideration for the change. As such, if an employer unilaterally and without consideration attempts to introduce into an employment relationship a Code of Employee Conduct that contains provisions that could be

regarded as new or amended fundamental terms or conditions of employment, the provisions may not be enforceable.

3. In a unionized workplace, the provisions of a Code of Employee Conduct may not be enforceable if they exist outside of, or are in conflict with, the terms of the collective agreement. In *McGavin Toastmaster*, the Supreme Court of Canada confirmed the legal principle that there can be only one employment contract for unionized employees - the collective agreement. As such, a Code of Employee Conduct that exists outside the terms of the collective agreement may not be enforceable.

4. Also in respect of a unionized workplace, a Code of Employee Conduct may have to satisfy the tests set out in the *KVP* decision - that is, are the terms of the Code consistent with the provisions of the collective agreement; reasonable; clear and unequivocal; brought to the attention of affected employees; described by the employer as a potential basis for a discharge; and consistently enforced?

***The lawyers at Sherrard Kuzz LLP have considerable experience assisting employers to develop and implement workplace rules and codes of conduct that comply with applicable legal requirements, as well as the practical realities of the workplace.***

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