

Director's Liability

The role of director of a company incorporated in Canada comes with various duties that must be satisfied, and personal liability that may be imposed when these duties are not met. These duties are contained in established principles of law, as well as various statutes, and include (but are not limited to) the following:

1. Duty to act honestly and in good faith in the best interests of the company

Directors must exercise their powers in the best interests of the company as a whole. This means that they must not, without prior approval, act in any way that would be considered a conflict of interest or for their own personal gain. They must also not prefer the interests of a shareholder or other third party over the company. This is as the director is acting in a position of trust as a fiduciary of the company.

2. Duty to exercise the care, diligence and skill of a reasonably prudent person

Prior to making decisions on behalf of the company, directors are required to inform themselves by making reasonable inquiries and consider the consequences of a proposed course of action. This requires that they inform themselves of the activities of the company, which includes attending board meetings, reviewing financial statements, communicating with other directors and ensuring that officers and professionals relied on by the company are suitably qualified for their role.

The standard that is required is that of a reasonably prudent person in comparable circumstances. This sets a minimum standard for any director, regardless of any inexperience, but also requires more of directors with special skills or knowledge.

3. Duty to act in accordance with the *Business Corporations Act* (BC) and Articles

The *Business Corporations Act* (BC) (the "Act") governs companies incorporated in British Columbia and directors are required to act within the requirements it imposes. As one of many examples, the Act holds directors liable if they declare dividends on shares or redeem shares when the company is insolvent, or in situations that would render the company insolvent, or if they issue shares that have not been full paid for.

The directors are also required to act in accordance with the Articles of the company (essentially the 'rules' established for each company) and can be held liable if such Articles are not followed.

4. Duty to act in accordance with other statutes and common law

In addition to the guiding principles governing director's liability discussed above, there are also statutes and common law that hold director's responsible, including the following:

Employees

- For unpaid wages under the *Employment Standards Act* (BC);
- For unsafe work conditions under the *Workers Compensation Act* (BC);
- For unpaid remittances under the federal and provincial *Income Tax Act*, *Employment Insurance Act*, *Canada Pension Plan* and *Workers Compensation Act* (BC).

Taxes

- For unpaid income taxes under the federal and provincial *Income Tax Act*;
- For unpaid GST under the *Excise Tax Act*;
- For unpaid PST under the *Provincial Sales Tax Act* (BC).

Environmental

- For environmental offences under the *Canadian Environmental Protection Act* and the *Environmental Management Act* (BC)

Other

- For criminal acts under the *Criminal Code*;
- For insider trading under the *Securities Act*;
- For damages caused by torts committed by the directors personally;

Protection from liability

The best way for a director to avoid liability is to ensure that they are satisfying their various duties discussed above. For example, a director would typically be protected from liability for a tort committed by a company (for example, breach of contract, fraud, defamation, negligence, and many others) as long as the director did not personally commit a tortious act and is acting on behalf of the corporation and within the scope of their authority. In addition, in some circumstances, a director can avoid liability by recording their dissent or promptly resigning if they disagree with action the company proposes.

However, these options are not always available or effective. For example, in the case of insolvency of the company, regardless of a director's good faith decisions and careful actions, they may still find themselves personally liable for unpaid taxes, wages, remittances and so forth, or for debts they have personally guaranteed. Therefore, it is also possible and typically advisable for the company to provide directors with directors' insurance coverage and/or indemnification for additional protection.