fast facts

- Directors owe fiduciary duties to the corporations which they serve
- Conflicts of interest must be disclosed
- Directors owe a duty of care when exercising their authority
- Legislation imposes liability on directors for specific matters such as unpaid employee wages or unremitted taxes
- Corporations can indemnity their directors and maintain insurance for them

duties & liabilities of directors in Canada

Directors of Canadian corporations are required to fulfill two principal duties—a fiduciary duty and a duty of care. Failure to comply with either duty can subject the director to personal liability. Corporation statutes also impose other specific duties on directors (e.g. to provide financial statements to shareholders annually), and employment, tax and other legislation impose personal liability on directors in specific circumstances where the corporation fails to act or directors fail to provide proper oversight or fulfill their duties.

The principal duties of directors and areas of potential personal liability are summarized below.

fiduciary duty

In Canada, directors are regarded as fiduciaries of their corporation and, as such, directors must ensure the corporation’s interests are paramount. It is the fiduciary duty of the director to act honestly and in good faith, with a view to the best interests of the corporation. If a director fails to meet his or her fiduciary duty, courts will hold the director strictly liable.

The fiduciary duty has several ramifications. It obliges the director to prefer the interests of the corporation over others (including, for example, a shareholder who might have nominated the director to the board). Directors also must not disclose the confidential information of the corporation and generally must share with the corporation any significant information within his or her knowledge acquired from others.

The fiduciary duty also prevents directors from pursuing, for their own benefit, business opportunities that belong to the corporation. The prohibition may extend even further, creating a duty whereby directors must bring to the attention of the corporation opportunities of which they become aware and in which the corporation may be interested.
conflicts of interest
Historically, the common law in Canada generally prohibited directors from doing business with the corporation that it served; to permit otherwise could result in the director’s private interests conflicting with the bests interests of the corporation. Modern corporation legislation has modified the common law prohibition provided the director discloses his or her interest and abstains from voting in accordance with the applicable legislation.

duty of care
Canadian corporation statutes require that when directors act, they exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This is referred to as a director’s duty of care.

The duty of care requires directors to take appropriate steps to make informed decisions. Directors must ensure they have the information needed in order to make decisions, assess the information critically and seek input from and test the recommendations of management and the corporation’s advisors.

As a general rule, the same duty of care applies to all directors, without regard to the special skills or experience that a particular director may possess. However, directors with special skills are expected to apply those skills when they make decisions affecting the corporation.

liabilities of directors
A director may be held personally liable for damages arising as a result of various actions (or inaction) by the director, including any act that is illegal (such as a breach of their fiduciary or statutory duties), permitting the corporation to act outside of its authority, and for torts they commit individually or on behalf of the corporation.

As well, numerous statutes impose personal liability on directors. Examples include statutory liability for unpaid employee wages and vacation pay; failure by the corporation to remit source deductions for employee income taxes as well as Employment Insurance and Canada Pension Plan contributions; and misrepresentations in prospectuses or other public company disclosure documents. Potential plaintiffs in these cases include the corporation itself, shareholders, creditors, employees and government agencies.

indemnification of directors
Under most Canadian corporation statutes, corporations may indemnify and purchase insurance to protect directors and former directors against liabilities incurred by reason of them acting as director, provided the director acted consistent with his or her fiduciary duties and had reasonable grounds for believing his or her conduct was lawful. It is common to put director indemnity provisions in a corporation’s by-laws.

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