



WATEROUS HOLDEN AMEY HITCHON<sup>LLP</sup>  
LAWYERS

## Directors' Duties and Liabilities

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A corporation can be a useful vehicle to separate business and personal liability and afford owner/operators protection from many potential liabilities of their business. However, many individuals who choose to serve as directors of private corporations incorporated under Ontario law are often unaware of the potential liability that could attach to them as a result of their director position.

Holding a director position carries fiduciary obligations under the *Business Corporations Act* (Ontario) (the "OBCA") to manage the corporation. These fiduciary obligations include a duty to comply with all laws, a duty to carry out management obligations with the care, diligence and skill of a person in comparable circumstances and a duty to disclose any conflicts of interest with the corporation.

Under the Common Law, the courts can impose liability on a director if they are found in breach of any of the aforementioned fiduciary obligations. The Common Law can also hold directors personally liable for corporate actions should they have resulted from the negligence of the director or negligent misrepresentation to a third party by a director.

In addition to Common Law imposed liabilities, the OBCA can impose personal liability to directors in situations where shares have been issued, redeemed or otherwise transacted at under fair market value. Additionally where the corporation fails to pay employee wages or vacation pay, or if a director declares and pays dividends to shareholders where the corporation is insolvent and not in a position to do so. Also, the OBCA sets out a mechanism whereby shareholders can make a claim against the corporation and the directors in the form of an "oppression remedy" when the directors have generally treated them unfairly.

Other provincial and federal legislation can impose personal liability on directors for their actions in managing the corporation. Directors can be personally liable to the Canada Revenue Agency for the corporation's failure to collect/remit HST or other required employee withholdings such as CPP and EI contributions. Other statutes such as the *Environmental Protection Act*, *Occupational Health and Safety Act* and *Consumer Protection Act* also contain provisions that can attach corporate liability to the individual directors.

As a result of all the potential liability a director can face sitting on the board of a corporation, it is important to carefully consider the position you are signing onto and remain diligent in the duties as required as a director. We would be happy to sit down with any directors or potential directors to discuss in more detail these potential liabilities and ways to manage and mitigate the risk of personal liability.