



## Lancaster, Brooks & Welch LLP

BARRISTERS AND SOLICITORS

"The Director's Shield"

By Michael A. Mann and Vita M. Gauley  
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When a business incorporates it becomes an "artificial person" under the law and acquires certain rights and obligations; however, the corporation is only able to act through its "agents". These agents are the officers and directors of the corporation. Since the directors are typically given the authority to represent the corporation they have implied responsibilities when dealing on behalf of that company.

Therefore, like a knight preparing for battle, a director of a corporation must give serious consideration to the potential for exposure to personal liability. Over the years, the law has expanded the duties of directors and has raised their required standards of care. For example, the *Criminal Code* of Canada exposes directors to criminal liability for failing to protect the safety of a corporation's employees in the workplace. Similarly, a failure to remit source deductions to the appropriate taxing authority could result in personal claims against directors.

To avoid personal liability, directors should keep informed of legal developments that affect their exposure to liability. A starting point for any director is to gain a good understanding of the corporation's structure and to consider the specific roles that have been assigned to the directors by the originating documents and by-laws of the corporation.

Directors are required to act as "fiduciaries" of the corporation, meaning that directors must serve the corporation "selflessly, honestly and loyally". When put to the test, courts will consider the actions or omissions of directors on a case-by-case basis but will also apply general standards of required conduct. Directors are required to act in a manner that puts the interests of the corporation first. A concrete example of this requires directors to avoid personal conflicts of interest to the extent that their personal involvement in a matter outside of the corporation would conflict with their duties to the corporation.

Depending on the circumstances, directors and officers may be held liable alone or together with the corporation, as well as with their fellow directors or officers. For example, many environmental statutes provide that if a corporation commits an offence such as contaminating the lands of the corporation with a hazardous substance, then any officer or director who authorizes or permits the activity is deemed to have committed the same offence and is liable to a penalty whether or not the corporation is convicted of the offence.

Becoming familiar with the corporation before accepting a directorship is similar to acting like a prudent investor. One should consider the financial position of the corporation, the business activity, the composition and structure of the board, the company's potential for exposure to liability based upon the type of business that it operates, the litigation history, and the insurance coverage for directors and officers that is in place. While a director may not have many "weapons" in his/her arsenal, using a shield in appropriate circumstances is necessary to protect the personal assets of any would-be director. You are strongly encouraged to seek appropriate legal advice before assuming the role of a director in any corporation.

***The foregoing information is provided to you for information purposes only.  
We caution you to obtain legal advice specific to your situation in all circumstances***

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