

Can I Be Held Personally Liable For Company Debts?

In our previous articles, where we help business owners and directors navigate various financial challenges, we discussed the importance of consulting with a licensed insolvency trustee (LIT) and the various options available when experiencing financial challenges. Another important question we are typically asked is, “Am I personally liable for my company’s debts?” Allan Nackan explains the possibilities.

In Canada, a legally incorporated business is technically considered a separate legal entity—with its own assets and liabilities. In most cases, this separate legal entity protects business owners and directors personally from a company’s financial liabilities. However, directors can be held personally liable, and the corporate veil can be pierced for certain debts of the company in certain instances and in extreme cases of fraud.

Personal liability of a director can broadly arise with the breach of:

- statutory duties
- fiduciary duties
- contractual terms if the directors may have given personal guarantees

Statutory

Various federal and provincial statutes prescribe statutory duties that impose specific liabilities on directors which can be primarily categorized into:

- liabilities relating to employees of the company, for unpaid wages and vacation pay
- liabilities for improper corporate actions, for instance, preferential payments or transfer under value in insolvent or near insolvent situations

- personal liability for the corporation's failure to remit or make certain tax and other payments

Fiduciary

In addition to the statutory duties that apply to directors under federal and provincial statutes, they also owe a fiduciary duty to act honestly, in good faith, and in the best interest of the corporation.

The directors are required to exercise their duties with a reasonable degree of care, diligence, and skill. These duties, in an insolvency scenario, require directors to balance diverging interests of all stakeholders including creditors, shareholders, employees, government, and even the environment—with duties to individual stakeholders being secondary to the overall best interest of the corporation.

Contractual

In addition to the above, directors and officers of insolvent companies can find themselves with significant personal exposure where a director or officer of the corporation has given a personal guarantee to secure financing or other obligations of the corporation. Banks and other lenders may seek personal guarantees as additional security for lending to the business, which may be capped at a fixed amount or unlimited. Personal guarantees may also have been given to landlords and other creditors. In situations where owner-managers have incurred extensive personal director liabilities, they may have to enter into arrangements with their lenders and creditors to repay those personal debts over time or may have to resort to filing a Proposal under the BIA or personal bankruptcy.

Instances where a director can be held personally liable

A breach of the duties or responsibilities, whether statutory or fiduciary, by a director can lead to the director being held personally liable, some of these instances are listed below:

- failure to remit statutory payroll deductions in respect of income tax, employment insurance, and Canada Pension Plan
- unpaid wages and vacation pay incurred in the previous 6 months and failure to remit Goods and Services Tax (GST/HST) collected but not remitted
- declaring dividends where the corporation is insolvent or approaching insolvency
- misappropriation of corporate assets or fraud

- failure to take reasonable steps to minimize losses to creditors
- breach of directors' and officers' duties and responsibilities under securities, employment, tax, and environmental law
- triggering of a personal guarantee, if any, upon default by the company
- oppression remedies under corporate legislation may also result in director liability

Implications

Breach of duties and responsibilities by a director generally lead to civil liabilities. Further, directors or officers can be convicted of a bankruptcy offence where the corporation commits such an offence and the directors authorized, directed, or acquiesced in the offence. In such cases, if convicted, a director may then face either imprisonment or fine, or both.

The court can also order a director or officer to make restitution. Directors or officers may also be civilly or criminally liable under tax, employment, environmental, and securities legislation. In these cases, directors may be fined or imprisoned for specific violations.

Remedies

Most statutes provide for conditions that may mitigate personal liability exposure for a director from liability. These include:

- exercise the degree of care, diligence, and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances
- take actions on an informed basis after due consideration of relevant material and appropriate deliberation
- reliance on consultants and professionals
- reading the fine print and being aware of implications of the personal guarantees
- having in place a Directors & Officer's insurance policy which can provide protection for obligations incurred while acting as a director or officer of the corporation

Conclusion

It is recommended that as a corporate director you fully understand your duties and liabilities and continue to comply with those duties especially when approaching or in an insolvency scenario. Legal and financial advice is highly recommended to properly navigate and manage any personal exposure.

Your company is insolvent, what now?

Learn about some of the options available to you. [Read article](#)

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