



By Scott Bomhof

There is growing recognition that the directors of an insolvent corporation owe a duty of care to the corporation's creditors. Although this duty is not a fiduciary duty, the directors, in determining whether the board is acting with a view to the best interests of the corporation, may need to consider the interests of, *inter alia*, shareholders, employees, suppliers, creditors, consumers, governments and other stakeholders. Until recently, it was believed that the U.S. and U.K. approach to such duties, which involve directors shifting their primary duties from shareholders to creditors as a company approaches the zone of insolvency, would apply in Canada as well.¹ The interests of these different constituencies may conflict, and the directors have the difficulty of balancing competing interests, with few clear criteria to guide their decision making.

Fiduciary Duty Is Not Owed

It is now clear that the directors of a company, even when the company is facing insolvency, do not owe a fiduciary duty to the creditors of the company. In *Peoples Department Stores Inc. (Trustee of) v. Wise*,² the Supreme Court of Canada examined the nature of a director's duties under Canadian law in the context of an insolvency proceeding. The *Peoples* case involved a claim by the trustee in bankruptcy of the bankrupt corporation against the former directors of the bankrupt corporation. In this case, the directors of Peoples Department Stores had implemented a joint procurement policy with its parent company, Wise Stores Inc. whereby Peoples acquired all of the inventory offered for sale at both Peoples and Wise. As a result of the manner in which the joint procurement arrangement was implemented, Peoples effectively provided free unsecured inventory financing to Wise and, upon Wise's bankruptcy, Peoples itself was placed into a bankruptcy proceeding. The trustee in bankruptcy of Peoples brought an action against the directors of Peoples, alleging that the directors had breached their fiduciary obligations to the creditors of Peoples; however, the trustee in bankruptcy did not pursue any claim against the directors under either the oppression remedy or a derivative action on behalf of Peoples.

At the trial level, the trial judge recognized that British, Australian and New Zealand courts have all held that when a company is near insolvency, the directors owe duties not only to the shareholders of the company but also to its creditors.³ The Quebec Court of Appeal overturned the lower court decision and rejected the concept that the duties of directors shift in favour of the creditors of the corporation as it

1 In a decision of the Ontario Superior Court of Justice in *Dylex Ltd. (Trustee of) v. Anderson* ([2003] O.J. No.833), Justice Lederman outlined the law on whether directors owe any fiduciary duty to creditors. In *Canbook Distribution Corp. v. Borins* (1999), 45 O.R. (3d) 565, Justice Ground at paragraph 16 observed that "Canadian law appears to be moving in the direction of recognizing such fiduciary duty, particularly in situations where the corporation was insolvent when it entered into the challenged transaction or the challenged transaction rendered the corporation insolvent."

2 [2004] 3 S.C.R. 461 [*Peoples*].

3 *Peoples Department Stores Inc. v. Wise*, [1998] Q.J. No. 3571.

nears the zone of insolvency.⁴ In examining the issue whether directors owe a fiduciary duty to the corporation's creditors, the Supreme Court of Canada affirmed the decision of the Quebec Court of Appeal and expressly held:

The principal question raised by this appeal is whether directors of a corporation owe a fiduciary duty to the corporation's creditors comparable to the statutory duty owed to the corporation. For the reasons that follow, we conclude that directors owe a duty of care to creditors, but that duty does not rise to a fiduciary duty. We agree with the disposition of the Quebec Court of Appeal.⁵

In analyzing where a director's duty falls under Canadian law, the Supreme Court examined both the issue of a director's duty of loyalty and a director's duty of care. In referring to section 122(1)(a) of the *Canada Business Corporations Act* (the CBCA), which requires that a director "act honestly and in good faith with a view to the best interest of the corporation," the Supreme Court held that the director's duty of loyalty at all times is a fiduciary obligation owed to the corporation itself. The Court held that the duty of loyalty does not extend to other stakeholders beyond the corporation. On the other hand, in examining section 122(1)(b) of the CBCA, which requires directors to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances," the Court held that the duty of care is owed to all stakeholders of the corporation. In casting the net for the duty of care widely, the Supreme Court has created a broad group of interested parties, including shareholders, creditors, employees and other similar parties, to whom directors owe a duty of care under Canadian law. On the other hand, by limiting the duty of loyalty to the corporation itself, the Supreme Court has excluded such stakeholders from the scope of a director's fiduciary duties. This distinction is summarized by the Supreme Court as follows:

The various shifts in interest that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(a) ... At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders ... In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interest by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.⁶

In the *Peoples* case, the Supreme Court affirmed that courts should respect the business judgment of the directors of a corporation in reviewing the conduct of these directors. The Court ruled that judges are ill-suited to second-guess the application of a director's business expertise in considerations that are involved in corporate decision making; judges should rather focus their review on determining whether the directors brought an appropriate degree of prudence and diligence to the table.⁷

In assessing whether or not directors have fulfilled their duties, different considerations apply to the procedural and substantive aspects of their conduct. The procedural aspect requires directors to make reasonable inquiry into all relevant information available to them before making a decision (i.e., directors are required to make *informed decisions*). This means that directors should take a direct and active role, especially in key matters affecting the corporation. Although directors are not bound to attend all meetings of the board, they should make an effort to attend: it would be a breach of their duty of diligence to deliberately ignore the corporation's affairs.

4 *Peoples Department Stores Inc. v. Wise*, [2003] Q.J. No. 505.

5 *Peoples*, *supra* note 2 at para. 1.

6 *Ibid.* at para. 43.

7 *Ibid.* at para. 67.

If a director has fulfilled this duty of care, any substantive decision made should be subject to the “business judgment rule.” In other words, if business decisions have been made honestly, prudently, in good faith and on reasonable grounds, the courts will be reluctant to interfere or to substitute their judgment for the director’s judgment. In short, directors should not be liable for errors in judgment if they had otherwise acted properly.

The sanctity of the business judgment rule was also recently re-affirmed by the Supreme Court of Canada in *Re BCE Inc.*⁸ In the *BCE* case, which did not involve an insolvency proceeding, the Supreme Court gave an overview of directors’ duties, considered the interests that are protected under the oppression remedy available under most Canadian corporate statutes and discussed the test for approval of a plan of arrangement. The Court re-affirmed its earlier decision in *Peoples* and held that the directors have a duty to act in the best interests of the corporation, which requires directors to consider the interests of all stakeholders and not to equate the interests of the corporation with the interests of shareholders alone. The Court rejected the “shareholder primacy” model derived from U.S. jurisprudence and held that the duties of directors in Canada:

comprehends a duty to treat individual stakeholders affected by corporate acts equitably and fairly. There are no absolute rules. In each case, the question is whether, in all of the circumstances, the directors acted in the best interests of the corporation, having regard to all of the relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner.⁹

In examining the conduct of the directors in this case, the Supreme Court specifically noted that the directors had considered the interests of the complaining debentureholders and that this had fulfilled the duty of the directors to consider such parties’ interests and did not amount to unfairly disregarding the interests of such creditors. The Court went on to hold that the business judgment rule prevailed:

Provided that, as here, the directors’ decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one.¹⁰

It follows that directors have a duty to ensure that their corporation carries on business only if it can meet its liabilities as they become due and if there is a reasonable expectation of newly incurred obligations being satisfied. The latter issue is a highly sensitive one for directors of financially troubled companies and is sometimes referred to as “the risk of trading while insolvent.” Directors are often placed in the difficult position of having to balance this concern with the need to maximize the prospects of the corporation by continuing to carry on business in the ordinary course for as long as possible.

While there is no bright-line test in this regard, it is clear that the directors of a corporation that is experiencing financial difficulties should, and should be seen to, maintain a high degree of diligence and care regarding the dealings of the corporation. If it becomes evident that the corporation can no longer pay its debts as they become due, and additional funding is not imminently available, it would be prudent and consistent with the directors’ duties for the corporation to enter into insolvency proceedings for its restructuring or liquidation. Until that time, the directors should continue to consider the interests of creditors, which may involve ensuring that outstanding debts to creditors are not increased pending completion of a restructuring or financing or other event that resolves the company’s financial difficulties.

In Canada, directors must also be aware of the scope of the oppression remedy, which is common to most corporate statutes in this country. As noted by the Supreme Court in *Peoples*, the corporate oppression remedy gives stakeholders of a corporation, including creditors, a very powerful remedy if the

⁸ [2008] 3 S.C.R. 560 [*BCE*].

⁹ *BCE*, *ibid.* at para. 82.

¹⁰ *Ibid.* at para. 112.

activities of the corporation or its directors amount to oppressive or unfairly prejudicial conduct. The oppression remedy gives the court very broad powers to impose any remedy it sees fit when oppressive conduct has been proven. While provincial corporate statutes each have their own oppression remedy provisions, most are similar to section 241(2) of the CBCA, which is as follows:

Grounds – If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

- (a) any act or omission of the corporation or any of its affiliates effects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

A final area of personal liability for directors arises from the common law jurisprudence on negligent misrepresentation. Under these cases,¹¹ directors and/or officers of corporations have been held personally liable to creditors where the directors/officers have made negligent misrepresentations to creditors regarding the creditworthiness of the corporation in situations in which such creditors could establish that they reasonably relied on such statements in advancing new credit to the company. These cases highlight the delicate balancing act that directors face when the corporation is near insolvency but still operating in the normal course. Care must be given to answering creditor enquiries regarding the financial health of the corporation. While no one wants to start a panic by informing a creditor that the corporation is facing liquidity concerns or is otherwise in financial distress, directors must avoid portraying an overly optimistic picture to creditors, otherwise they may face personal liability risks if there is a subsequent insolvency.

Statutory Liabilities

In addition to their general duty of care to creditors and common law liability exposure to creditors, directors are exposed to a broad array of liabilities that become most pronounced during insolvent circumstances. In simple terms, these liabilities can be placed into three key categories: (i) liabilities relating to employees of the company; (ii) liabilities for improper corporate actions, most notably relating to transfer of value in insolvent or near insolvent situations; and (iii) personal liability for the corporation's failure to remit or make tax and other payments.

Employee Obligations

Directors can, under various statutes, be personally liable for unpaid claims of employees. Under the CBCA, for example, directors are personally liable for the corporation's debts to its employees for services performed. The employee must sue for the debt while the director is still in office or within two years thereafter, and the amount to be recovered cannot exceed six months' wages of the employee. The meaning of the corporation's "debts" to its employees encompasses not only wages but also other forms of remuneration, such as vacation pay. However, Canadian courts have not extended these liabilities to termination or severance pay (in fact, the Ontario *Employment Standards Act* specifically excludes termination and severance pay from the definition of "wages" for which directors are liable).¹² A director is not liable for unpaid wages under the CBCA if he or she relied in good faith on financial statements

¹¹ For instance, *NDB Bank, Canada v. Dofasco*, (1999) 46 O.R. (3d) 514 (Ont. C.A.); leave to appeal refused (2000) 254 N.R. 400, (S.C.C.).

¹² On the other hand, in the case of certain corporations, the *Canada Labour Code* imposes specific director's liability for severance and termination pay, as discussed in more detail later.

represented by an officer of the corporation, or the corporation's auditor, as fairly reflecting the financial condition of the corporation or on a report of a professional.

Improper Corporate Actions

Claims may be made against directors for improper corporate actions that impair the company's ability to meet its liabilities (e.g., paying out dividends or repurchasing shares while the corporation is unable to meet its liabilities). The typical threshold is the "solvency test" – namely, whether there are reasonable grounds for believing that the corporation would, after the particular action is taken, be unable to pay its liabilities as they become due, or that the realizable value of the corporation's assets would be less than the aggregate of its liabilities. If there are reasonable grounds for believing that the corporation would remain solvent, the corporate actions taken cannot be said to be improper. Directors can also be personally liable if they approve the issuance of shares for non-cash consideration that has a fair equivalent value less than the amount of money the corporation would have received if the shares were issued for money.

Statutory Liabilities for Failure to Make Remittances and Payments

Claims may be made against directors for a corporation's failure to remit and pay a broad array of taxes and other obligations. In certain cases (e.g., payroll and other source deductions), directors may avoid personal liability if they can establish that they exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

Generally, the statutes impose "joint and several liability" on directors, meaning that any one of the directors may be sued for the entire sum and, if found liable, that director has a right to claim against the other directors and the corporation. Directors are personally liable only for the amount not remitted or paid by the corporation.

Schedule A to this paper summarizes the key statutory liabilities to which corporate directors may be exposed, particularly in insolvent or near insolvent circumstances. The statutory liabilities set out in this schedule focus on federal laws and Ontario laws.

Protective Measures Available to Directors of Insolvent Companies

Prior to accepting an appointment as a director, individuals should ensure that appropriate directors' and officers' insurance is in place to minimize the risk of personal liability claims. As a company nears the zone of insolvency, directors should ensure that the D&O insurance payments are up to date and, if appropriate under the circumstances, that arrangements have been made for the payment of any premiums that may come due for the remainder of the term of the policy. The policy should be carefully reviewed to ascertain the types of risks that are covered, and all riders to the policy should be examined to see if any risks are specifically excluded from coverage. Furthermore, the policy should be reviewed to determine if it is a "claims-made" policy or an "occurrence" policy. While occurrence-based policies tend to be more expensive, such policies provide ongoing coverage for any insured events that happened during the policy period whether or not a claim is made within the specified claims period. On the other hand, a claims-made policy applies only to actual claims that are asserted against directors and officers during the term of the policy (subject to purchasing a "claims tail" period). In the case of a claims-made policy, it is important to ascertain any potential claims before the expiry of the policy and to provide notice of such claims to the insurer.

The following are additional actions that directors can take to minimize personal liability exposure, particularly if the corporation in question is insolvent or near insolvency:

1. Attend all board meetings and ensure that personal dissents on any resolution are recorded in the minutes.
2. Ensure that the financial reporting and payment systems of the corporation are timely and effective.

3. Carefully review the financial statements of the corporation, question the management and pursue any inconsistencies. Directors may also want to obtain written confirmation from management that statutory liabilities (i.e., source deductions, GST remittances) are being paid when due.
4. Where appropriate, obtain expert advice on the corporation's compliance with its obligations and/or financial condition.¹³
5. Ensure that segregated trust accounts or remittance procedures have been established to deal with taxes and source deductions.
6. Ensure that adequate and comprehensive directors' liability insurance is in effect.
7. Ensure that the corporation has entered into an indemnity agreement with each director to the full extent permitted by the by-laws and the relevant governing statute.
8. Consider the appropriateness of resigning as a director, subject to issues that might arise in the event of a proposed *en masse* resignation of the board of directors.
9. Consider conflicts or appearances of conflicts and consider abstaining from board deliberations and decisions as appropriate.
10. Consider the appropriateness and availability of security arrangements to support the indemnities granted to directors, such as the creation of a segregated trust or issuance of letters of credit (subject to ensuring compliance with material company agreements and consideration of fraudulent preference issues).
11. Become familiar with relevant corporate obligations and monitor the company's compliance with those obligations.

In the event that an insolvency proceeding is required for a company, directors and officers may want to consider the benefits of pursuing a restructuring under the *Companies' Creditors Arrangement Act*.¹⁴ If a plan is approved by the necessary number of creditors and sanctioned by the court, the CCAA expressly allows the court to release claims against the directors of the company that arise from their role as directors. Under section 5.1 of the CCAA, a court-sanctioned plan of arrangement may provide for the compromise of claims against the directors that arose before the CCAA proceedings commenced and that relate to the obligations of the company for which the directors are liable in their capacity as directors for the payment of such obligations. Under the CCAA, such directors' release may not include claims that relate to contractual rights of creditors (i.e., personal guarantees signed by directors) or that are based on directors' alleged misrepresentations to creditors or of directors' wrongful or oppressive conduct. In addition, under section 11.5(1) of the CCAA, during the pendency of a CCAA proceeding, the court may issue a stay of proceedings in favour of directors.¹⁵ By allowing a compromise of claims and a stay of proceedings against directors (and officers) of a corporation, the CCAA provides a useful mechanism to allow directors and officers to focus on a successful restructuring of the corporation rather than dealing with litigation aimed at pursuing the directors in their personal capacity.

13 Certain provisions in corporate statutes, such as ss. 123(4)(b) and 123(5)(b) of the CBCA provide directors with a due diligence defence if they relied in good faith on "a report of a person whose profession lends credibility to a statement made by the professional person."

14 R.S.C. 1985, c. C-36, as amended [CCAA].

15 Although not specifically mentioned in the statute, courts have held that the release of claims and stay of proceedings may be extended to officers as well as directors (see, for instance, *Re Canadian Airlines Corp.* 2000 ABQB 442; aff'd [2001], 4 W.W.R. 1 (Alta. C.A.); leave to appeal refused, [2001] S.C.C.A. No. 60 (S.C.C. July 13, 2001).

The *Nortel* proceedings illustrate the benefit of a stay.¹⁶ Justice Morawetz was asked to extend the stay of proceedings issued in favour of the directors and officers of the Canadian Nortel entities that were subject to CCAA proceedings to an action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the U.S. Action). In the U.S. Action, certain directors and officers of the Canadian Nortel entities were named defendants with respect to the U.S. legislation known as the *Employee Retirement Income Security Act, 1974* (ERISA). The plaintiff in the U.S. Action claimed that the named officers and directors of the Canadian Nortel parties were being sued in their capacity as fiduciaries under ERISA and not in their capacity as directors or officers of the Nortel entities. In reviewing the claim issued against Nortel and the named directors and officers, Justice Morawetz noted that the allegations raised against the named directors and officers were not limited to claims in their role as fiduciaries under the ERISA legislation and determined that the named directors and officers should have the benefit of a stay of proceedings under the CCAA to prevent the litigation from proceeding against them in their personal capacities.

¹⁶ *Re Nortel*, Court File No. 09-CL-7950, Ontario Superior Court of Justice, August 18, 2009.

SCHEDULE A: Directors' and Officers' Statutory Liability

The following is a summary of notable federal and Ontario statutory liabilities for directors. Statutory liabilities in Canada can be complicated because more than one statute can impose similar (or dissimilar) directors' liabilities on the same subject matter. For example, a company incorporated under the *Business Corporations Act* (Ontario) (OBCA), having employees in Ontario, is subject to both the OBCA and the *Employment Standards Act* (Ontario) (ESA), both of which make directors liable for unpaid wages to employees. A company incorporated federally (such as under the CBCA) and having employees in Ontario, would be subject to both the CBCA and the ESA. Federal works and undertakings are subject to the *Canada Labour Code* (CLC). While none of the OBCA, the ESA and the CBCA impose liability for termination pay, the CLC does. The summary below is only general in nature and not exhaustive.

(i) Claims Related to Employees and Employment

Description	Statute	Liability
<ul style="list-style-type: none"> Unpaid wages (and other debts for services performed by employees) 	OBCA, s. 131 CBCA, s. 119 ESA, s. 81(7) CLC, s. 251.18	Maximum amount equal to six months' wages.
<ul style="list-style-type: none"> Vacation pay 	ESA, s. 81(4) OBCA, s. 131 CLC, s. 186, s.183	Greater of 4% of wages or contractual amount of vacation pay for the last 12 months.
<ul style="list-style-type: none"> Severance and termination pay 	ESA, s. 81(3) CLC, s. 235	No liability except if corporation is a federal work, undertaking, or business subject to the <i>Canada Labour Code</i> where liability is greater of: (i) two days' wages x years of employment; or (ii) five days' wages.
<ul style="list-style-type: none"> Source deductions for taxes not deducted, withheld and remitted 	<i>Income Tax Act (ITA)</i> , s. 227.1	Liability for amount not withheld only if execution against the corporation has been returned unsatisfied or the corporation has commenced liquidation or dissolution proceedings or has had an assignment or a bankruptcy order issued against it and a claim for the corporation's liability has been proved within six months after the date of the assignment or bankruptcy order. Due diligence defence is available.

(ii) Corporate Finance

Description	Statute	Liability
<ul style="list-style-type: none"> Issuing shares in return for property or past services 	OBCA, s. 130(1) CBCA, s. 118(1)	Directors must make good any amounts by which the consideration received is less than the fair equivalent of the money that the corporation would have received had the shares been issued for money.
<ul style="list-style-type: none"> Payment of dividends <ul style="list-style-type: none"> ⇒ in violation of the solvency or impairment of capital tests 	OBCA, s. 130(2) CBCA, s. 118(2)	Directors can be liable for the amount of the dividend not recovered by the corporation.

Description	Statute	Liability
⇒ within 12 months preceding bankruptcy if the dividend was paid when the company was insolvent or if the payment made the company insolvent	<i>Bankruptcy and Insolvency Act (BIA)</i> , s. 101(2)	Directors can be liable to trustee in bankruptcy for the amount of the dividend, plus interest. Due diligence defence is available.
<ul style="list-style-type: none"> • Share purchases, acquisitions or redemptions ⇒ in violation of the solvency or impairment of capital tests ⇒ within 12 months preceding bankruptcy if the redemption or repurchase was done when the company was insolvent or if the payment made the company insolvent 	<p>OBCA, s. 130(2) CBCA, s. 118(2)</p> <p>BIA, s. 101(2)</p>	<p>Directors can be liable for the amount paid and not recovered by the corporation.</p> <p>Directors can be liable to trustee in bankruptcy for the amount of the payment, plus interest.</p>
<ul style="list-style-type: none"> • Prohibited financial assistance to any person in violation of requirements for management proxy circulars as per the prescribed form (CBCA) 	CBCA, ss. 150(1), (3), (4), Reg. s. 57(z.7)	Directors may be subject to a fine of \$5000 and imprisonment up to six months.
<ul style="list-style-type: none"> • Payment of an unreasonable commission to a purchaser (or someone who procures purchasers) on the purchase of the corporation's shares 	OBCA, s. 130(2) CBCA, s. 118(2)	Directors can be liable for the amount paid and not recovered by the corporation.

(iii) Miscellaneous

Description	Statute	Liability
<ul style="list-style-type: none"> • Payment of indemnities to directors and officers who have failed to act in the best interests of the corporation or did not believe their conduct was legal 	OBCA, s. 130(2) CBCA, s. 118(2)	Directors can be liable for the amount paid and not recovered by the corporation.
<ul style="list-style-type: none"> • Payment of amounts to security holders under statutory dissent rights or to complainants in an oppression remedy action in violation of the solvency or impairment of capital tests 	OBCA, s. 130(2) CBCA, s. 118(2)	Directors can be liable for the amount paid and not recovered by the corporation.

(iv) Securities

Description	Statute	Liability
<ul style="list-style-type: none"> • Contravention by the corporation of Ontario securities law 	<i>Securities Act</i> (Ontario), ss. 122(1), (3), s. 129.2	Directors who authorize, permit or acquiesce to a contravention by the corporation can be fined up to \$5,000,000 and imprisoned for up to five years.
<ul style="list-style-type: none"> • Misrepresentation in a prospectus, take-over bid circular or an offering memorandum 	<i>Securities Act</i> (Ontario), s. 130, s. 130.1, s. 131.	Directors in office at the time of filing of the document may be personally liable to investors for damages, subject to a due diligence defence (maximum liability equal to the price at which securities were offered to the public for misrepresentations under s. 130 and s. 130.1).
<ul style="list-style-type: none"> • Insider trading 	<i>Securities Act</i> (Ontario), s. 122(4), s. 122(1), s. 122(3), s. 129.2	Fines are a minimum of the profit made or loss avoided and a maximum of the greater of \$5,000,000 and three times the profit made or loss avoided, in addition to any imprisonment imposed.

(v) Pensions/Health & Safety

Description	Statute	Liability
<ul style="list-style-type: none"> • Canada Pension Plan premiums 	<i>Canada Pension Plan</i> , s. 21.1	Directors can be liable for the amount (plus penalties or interest) that the corporation fails to deduct and remit.
<ul style="list-style-type: none"> • Failure to comply with the obligations and standards of care under pension benefits legislation 	<i>Pension Benefits Act</i> (Ontario), s. 110(2), s. 110(3)	Directors may be subject to a fine of up to \$100,000 on the first offence and up to \$200,000 on subsequent convictions.
<ul style="list-style-type: none"> • Failure to comply with obligations relating to workplace safety 	<i>Occupational Health & Safety Act</i> (Ontario), s. 66(1), s. 32 CLC, s. 148, s. 149(2)	Directors may be subject to a fine of up to \$25,000 and imprisonment of up to 12 months. On conviction on indictment, directors may be subject to a fine of up to \$1,000,000 and imprisonment of up to two years; or summary conviction to a fine of up to \$100,000.

(vi) Taxes

Description	Statute	Liability
<ul style="list-style-type: none"> Source deductions for taxes not deducted, withheld and remitted (also shown under “Claims Related to Employees and Employment” above) 	ITA, s. 227.1	Liability for amount not withheld only if execution against the corporation has been returned unsatisfied in whole or in part or the corporation has commenced liquidation or dissolution proceedings or has had an assignment or a bankruptcy order issued against it and a claim for the corporation’s liability has been proved within 6 months after the date of the assignment or bankruptcy order. Due diligence defence is available.
<ul style="list-style-type: none"> Taxes not withheld and remitted on account of withholding taxes in respect of certain payments to non-residents 	ITA, s. 227.1	Liability only if execution against the corporation has been returned unsatisfied and the corporation has commenced liquidation or dissolution proceedings or has had an assignment or a bankruptcy order issued against it and a claim for the corporation’s liability has been proved within six months after the date of the assignment or bankruptcy order. Due diligence defence is available.
<ul style="list-style-type: none"> Federal income taxes 	ITA, s. 238(1), s. 242	Director can be fined from \$1,000 up to \$25,000 and imprisoned up to 12 months.
<ul style="list-style-type: none"> Employment insurance premiums 	<i>Employment Insurance Act</i> , s. 83(1)	Directors can be liable for the amount (plus any interest or penalties) that the corporation fails to deduct and remit.
<ul style="list-style-type: none"> Goods and Services Tax 	<i>Excise Tax Act (Canada)</i> , s. 323, s. 329, s. 330	Directors can be held liable for unremitted amounts plus interest and any penalties. Can also be imprisoned up to six months and fined \$1,000 plus 20% of amount of tax (plus interest and penalties) that director willfully failed to pay, collect or remit. Due diligence defence is available.

Description	Statute	Liability
<ul style="list-style-type: none"> Retail sales tax 	<p><i>Retail Sales Tax Act</i> (Ontario), s. 43</p> <p><i>Retail Sales Tax Act</i> (Ontario), s. 32(4.1)</p>	<p>Director can be held liable for unpaid amounts in certain circumstances, including an assignment in bankruptcy or a receiving order. Due diligence defence is available.</p> <p>Can also be fined up to double tax payable and imprisoned up to two years if director consented to tax evasion.</p>
<ul style="list-style-type: none"> Ontario corporate taxes 	<p><i>Corporations Tax Act</i> (Ontario), s. 76(5), s. 96, s. 110</p>	<p>Fines up to twice the amount of tax payable and up to two years imprisonment/general maximum fine of \$5,000 for other offences.</p>
<ul style="list-style-type: none"> Customs and excise taxes 		<p>Various fines and penalties.</p>

(vii) Environmental Protection

Description	Statute	Liability
<ul style="list-style-type: none"> Preventing contamination (unlawful discharges) 	<p><i>Environmental Protection Act</i> (Ontario), s. 194, s. 187</p> <p>Also see <i>Ontario Water Resources Act</i>, s. 116</p> <p><i>Canadian Environmental Protection Act</i> (Canada) 1999, s. 280, s. 272</p>	<p>Liability of up to \$50,000 per day (or up to \$100,000 per day and/or imprisonment up to one year on subsequent convictions) for permitting discharge of contaminants or failure to prevent contamination (even if no actual discharge).</p> <p>Liability of up to \$1,000,000 or imprisonment of up to three years, or both.</p>

(viii) Bankruptcy

Description	Statute	Liability
<ul style="list-style-type: none"> Bankruptcy Offences ⇒ Listed in BIA s. 198 	<p><i>BIA</i>, s. 198, s. 204</p>	<p>Directors who direct, authorize, assent to or acquiesce or participate in the commission of a bankruptcy offence may be liable (on summary conviction) for up to \$5000 and/or imprisonment up to 12 months; or may be liable (upon conviction on indictment) for up to \$10,000 and/or imprisonment up to three years.</p>

Description	Statute	Liability
<ul style="list-style-type: none"> Reviewable Transactions 	<i>BIA</i> , s. 100	Directors, officers and others may be liable for the difference between the actual consideration given or received by the bankrupt and the fair market value of the property or services concerned.
<ul style="list-style-type: none"> Failure to Keep Proper Books of Account 	<i>BIA</i> s. 200(1), s. 204	Directors and officers may be liable for up to \$5000 and/or imprisonment up to one year.
<ul style="list-style-type: none"> Unlawful Transactions 	<i>BIA</i> s. 201(3), s. 204	Directors and officers may be liable for up to \$5000 and/or imprisonment up to one year.