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Corporate Governance: What In-House Counsel in Ontario Need to Know

By Zev Zlotnick

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In-house counsels in Ontario serve as critical advisors not just to senior management, but often to boards of directors as well. Understanding the statutory and common law duties of directors is essential for advising on governance, risk, and compliance matters. Failure to meet these duties can lead to personal liability for directors and reputational damage to the company. Here are some matters to look out for.

1. Statutory Duties Under the OBCA and CBCA

Directors of Ontario corporations are governed by either the *Ontario Business Corporations Act* (OBCA) or the *Canada Business Corporations Act* (CBCA), depending on the company's jurisdiction of incorporation. Both impose two core duties:

- **Fiduciary Duty:** Directors must act honestly and in good faith with a view to the best interests of the corporation (OBCA, s. 134(1)(a); CBCA, s. 122(1)(a)).
- **Duty of Care:** Directors must exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances (OBCA, s. 134(1)(b); CBCA, s. 122(1)(b)).

These duties are owed to the corporation, not shareholders, employees, or other stakeholders directly.

2. The Business Judgment Rule

Ontario courts apply the business judgment rule to defer to reasonable business decisions made in good faith. In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, a leading case on duties of corporate directors and their obligations to the company, the Supreme Court emphasized that directors may consider a range of stakeholder interests, provided their decisions are rooted in the best interests of the corporation as a whole.

In-house counsel should ensure board directors are aware of their fiduciary and legal obligations to the company and that minutes and briefing materials from meetings reflect a thoughtful, informed process as such documentation is key if decisions are challenged later.

3. Avoiding Conflicts of Interest

Directors must disclose any interest in a material contract or transaction that may lead to a conflict of interest, as required by OBCA s. 132 and CBCA s. 120.

Failing to do so may void the transaction and expose the director to liability.

Again, awareness is key and in-house counsel should implement annual disclosure processes for directors and management to encourage early identification of conflicts, and resolution processes should any arise.

4. Corporate Opportunity Doctrine

Directors must not appropriate corporate opportunities for personal gain. In *Canadian Aero Service Ltd. v. O'Malley*, [1974] SCR 592, the Supreme Court held that senior officers and directors who took a corporate opportunity for themselves were liable for breach of fiduciary duty, even after resigning from the company.

Counsel should ensure that there are adequate policies in place to define and restrict acceptance of external opportunities by directors and officers or, at the very least, clearly limit such opportunities where and if they may conflict with or adversely affect the interests of the company.

5. Delegation and Reliance

Directors are permitted to rely on reports from officers, legal counsel, and external advisors, provided that reliance is in good faith (OBCA s. 134(4)). In-house counsel should ensure that legal and financial advice is clearly documented, well explained and efficiently communicated to directors to ensure effective decision making.

Directors face increasing scrutiny from regulators, courts, and company stakeholders. In-house counsel play a key role in guiding governance practices, managing conflicts, and reinforcing fiduciary standards. Embedding strong governance processes today protects your directors, and more importantly your company, tomorrow.

For any related questions or to suggest a topic, please contact the writer. To see my previous 1-Minute Reads for In-House Legal Counsel, please visit the Blog portion of my profile at <https://www.grllp.com/profile/zevzlotnick>

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If you are in need of legal advice, please do not hesitate to contact [Zev Zlotnick](mailto:Zev.Zlotnick@grllp.com), at 416.865.6601 or zzlotnick@grllp.com.

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