

Laws Governing Not-for-Profits in Canada – Do Your Directors Know Their Personal Liability?

Canada has numerous laws that apply to Directors of Not-for-Profit organizations. But do your Directors understand their personal liability? In part one of this article, we underline references in Industry Canada's [Primer for directors of not-for-profit corporations \(Rights, Duties and Practices\)](#) that apply to Directors of Not-for-Profit organizations. You may want to send your Board a link to this article.

In part two, we focus on Canada's Competition law which applies to all of us.

Part One: Liability of Directors



Chapter 3: Liability of Directors

Primer for directors of not-for-profit corporations (Rights, Duties and Practices)

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Introduction

As a general rule, directors are not personally liable for the contracts of, or the actions or omissions of, the corporation that they serve because a corporation is considered to be a separate legal person at law. The liability protection afforded to directors as a result of incorporation is often referred to as the "corporate veil".

However, there are exceptions to this general rule and there are many instances of directors' liability at common law, under federal and provincial statutes, and under the *Civil Code of Québec*. Directors of non-for-profit corporations should be aware of these exceptions. This chapter explains the liability exposure of directors.

The chapter is organized under the following headings:

- Liability and contracts (This relates to situations where directors enter into a contract without proper authorization or on behalf of a non-existent corporation.)
- Liability in tort (This relates to situations where directors' own actions are tortious.)
- Liability for breach of fiduciary duty (This is discussed in detail in Chapter 2).
- Liability for breach of trustee duties (This relates to situations where the corporation is a charity or directors deal with assets that are impressed with a trust).

- Common law liabilities (This relates to directors acting without proper corporate authority).
- Statutory liabilities (This relates to the numerous obligations imposed on directors under federal and provincial legislation).

Liability and Contracts

Directors are not usually personally responsible for contracts that they sign on behalf of the corporation, provided that they have proper legal authority to sign. The corporation's bylaws should contain a provision on directors' and officers' authority to execute legal instruments on behalf of the corporation. The bylaws commonly also contain a clause providing that the board of directors may pass a resolution appointing specific directors or officers to sign on behalf of the corporation.

Note, however, that personal liability of directors for contracts can, in some cases, arise at common law or under statute if the corporation is not satisfactorily identified on documents. At common law, liability can arise where a director purports to enter a contract on behalf of a non-existent corporation. The relevant statutory provisions are discussed later in this chapter.

Liability in Tort

A tort is a civil wrong recognized by courts even though it may not be contemplated under statute, and for which the injured party may seek damages. Directors are not personally liable for torts committed in a corporate context unless their conduct itself is tortious.

Although there is limited case law on the issue, particularly in the context of not-for-profit corporations, one possible instance of directors' conduct constituting a tort is the case of negligent mismanagement. Negligent mismanagement arises when the injury suffered by the tort victim can be attributed to carelessness in the oversight of some aspect of the corporation's operations. It relates to situations where the board knew of, or ought to have foreseen, a systemic problem and failed to address it.

Example

Where the directors permitted an unsafe condition to exist on the corporation's property and that unsafe condition lead to a personal injury this could constitute negligent mismanagement on the part of the directors and result in personal liability.

Example

Where the board adopted a communications policy that resulted in, or failed to adequately safeguard against, libel and slander in corporate publications - such as where the practice of aggressively denigrating a corporate competitor is endorsed by the directors.

Directors' personal liability in tort may arise where the directors fail to adequately supervise the hiring of employees and volunteers or to adequately monitor the conduct of such employees and volunteers in their work for the corporation, particularly where there are allegations of sexual abuse of children and/or harassment of employees.

Liability for Breach of Fiduciary Duty

Directors who breach any of their duties to the corporation, as outlined in Chapter 2, may be liable if the corporation suffers a loss that can be directly attributed to their actions or omissions. To protect themselves from such liability, directors should always consider whether the decision(s) or action(s) being taken are in the best interests of the corporation. They must discharge their duties of skill and diligence, as well their duty of loyalty, including acting honestly and in good faith, not improperly delegating their responsibilities, and avoiding conflicts of interest.

Liability for Breach of Trustee Duties

Directors of charitable corporations have potentially higher exposure to personal liability than do directors of other not-for-profit corporations.

The recent decision in Ontario (*Public Guardian and Trustee*) v. *Aids Society for Children (Ontario)* emphasizes the fiduciary responsibility of directors of charitable corporations as quasi-trustees. The court held that these fiduciary duties go beyond the mere furtherance of the charitable objects of the corporation. The case stipulates that although directors of a charity may not technically be trustees of charitable property, they "*are, to all intents and purposes, bound by the rules which affect trustees.*"

Although a lower court decision, this case strongly argues that directors of a charitable corporation have an obligation to apply charitable property towards the charitable objects of the charity. This, in turn, requires that directors take pro-active steps to protect charitable property. Any loss of charitable assets due to the inactivity or failure to act of the directors could make the directors liable for breach of their fiduciary duties, or possibly even breach of trust.

Liability risks from remuneration of directors

At common law, in Ontario at least, directors of charitable corporations must not receive any direct or indirect remuneration or benefit from the charity on which they serve as directors unless court approval is first obtained. It is not settled law whether such a requirement applies in other jurisdictions. This means that a director of a charitable corporation cannot be a paid employee, contractor, consultant or professional service provider of the charity, even if they are paid below fair market value for the services rendered or goods supplied. In such cases, both the director who received the remuneration and directors who authorized it would be at risk of personal liability.

Readers may note a potential conflict between this rule and section 98 of the *Canada Corporations Act* referred to earlier, which otherwise permits directors of not-for-profit corporations to declare a conflict of interest in a contract or pro-posed contract with the corporation and enables them to enter into a contract in which they have a personal interest. The prudent approach is to consider that the rule against paying remuneration to director of charitable corporations takes precedence over section 98.

The rule against remuneration does not apply to out-of-pocket expenses incurred by directors, such as mileage or other reasonable and related travel expenses. Directors may legitimately be reimbursed for these items.

In Ontario, the *Charities Accounting Act (Ontario)* allows charities to follow a procedure to obtain consent from the Public Guardian and Trustee to permit directors of charitable corporations to receive remuneration. However, charities do not often use this option, and it is not clear which cases will receive the approval of the Office of the Public Guardian and Trustee.

In jurisdictions other than Ontario (except Québec), an application to court under trust law may be possible to permit remuneration. However, the availability of this remedy appears never to have been tested in a Canadian jurisdiction.

Liability for breach of trust when dealing with charitable property

Because their duties are akin to those of trustees, directors of charitable corporations may be held personally liable for breach of trust if they mismanage charitable assets. This means they can be personally responsible for the full amount of any loss to the charitable assets.

Breach of trust involving investment decisions

Directors of charitable corporations face considerable liability risks from the improper investment of charitable funds. Liability of directors in this regard may arise as a result of their failure:

- to determine and comply with the investment power in the letters patent or special act creating the charitable corporation;
- to determine and comply with specific investment powers contained in agreements accompanying a gift, such as a last will and testament of a donor in making a testamentary gift or a gift agreement by a donor in giving a perpetual endowment;
- to determine and comply with the applicable statutory investment power that applies in a particular province in relation to investments made in that province, typically found in provincial trust legislation;
- to invest in accordance with the standards of a prudent investor where the provisions of the trust legislation apply, including any mandatory investment criteria required by the Act;
- to develop and implement an investment plan as required by applicable trust legislation; and,
- to undertake investment decision making them-selves, or in provinces that permit delegation of investment decision making, such as Ontario, to ensure that an appropriate agency agreement is in place appointing a qualified investment manager and that there is careful selection and monitoring of the investment manager chosen.

Liability risks to directors arising from investment of charitable property can be significant, as well as hard to protect against. Liability can range from losses arising from bad investments to liability for missed investment opportunities from overly conservative investment decisions.

Example

In the face of an economic recession - i.e. two consecutive quarters of negative economic growth in the national economy - failure of trustees to review their investment portfolio could be considered to be putting the charitable assets unduly at risk. It is important to note, however, that this entails a two-part requirement: the directors are obligated both to look at whether the portfolio should change and to take a decision about what changes, if any, to make.

Liability risks from co-mingling of donor restricted funds

Donor restricted funds consist of gifts to a charity that are subject to restrictions, limitations, conditions, terms of reference, directions, or other restricting factors imposed by the donor that constrain or limit a charity concerning how the gift can be used. Donor restricted funds, also referred to as special charitable purpose trusts, can include:

- endowment funds, i.e., gifts of capital to be held and invested in perpetuity;
- donor restricted use, i.e., monies given to a building fund; and,
- ten year gifts, i.e., gifts of capital to be held for a minimum of ten years in accordance with the requirements of the *Income Tax Act*.

At common law, each donor restricted fund is required to be held in a separate account from other restricted trust funds and cannot be co-mingled. Few charitable corporations, though, comply with this common law prohibition against co-mingling restricted funds.

In Ontario, regulations have been enacted under the *Charities Accounting Act* to allow charities to co-mingle donor-restricted funds into a single account for investment purposes. However, restricted funds cannot be co-mingled with the general funds of a charity. In addition, there are numerous statutory requirements under the regulations of the *Charities Accounting Act* that must be complied with before donor-restricted funds can be co-mingled in Ontario.

Co-mingling of donor-restricted funds in contravention of the regulations under the *Charities Accounting Act* in Ontario will expose directors to personal liability for breach of trust. Also, where legislation in other provinces does not permit commingling of restricted funds, directors of charitable corporations may face exposure to liability even if they comply with the regulations in Ontario.

Breach of trust involving charitable objects

Directors are obligated to apply charitable property in accordance with the corporate objects contained in the letters patent of the corporation. Failure to do so may expose directors to liability for breach of trust.

Breach of special purpose charitable trust involving donors

Directors may be held liable for breach of trust if they fail to apply funds in accordance with donors' restrictions or if they redirect funds given for one purpose, for example, a building fund, and use them for another purpose, for instance, to pay for general operating expenses. Breach of trust may also occur if there is a failure to hold and invest the capital of an endowment fund in perpetuity, unless the donor has authorized that encroachments can be made upon the capital of such a fund.

Common Law Liabilities

Liability for lack of corporate authority

Directors acting outside the scope of their authority as defined by the letters patent, supplementary letters patent, or other governing documents of the corporation are personally responsible for any decisions or actions they take. This liability may arise owing to statutes, contracts, torts or the common law. Effectively, the directors are considered to have taken the decision(s) or action(s) as individuals rather than as a corporate body, so the 'corporate shield' does not apply.

Statutory Liabilities

Many provincial and federal statutes impose personal liability on directors of not-for-profit corporations.

The most common of these relate to employees, reporting requirements, taxation and environmental regulations. Boards of directors should get legal advice to determine the precise scope of statutory liability affecting them. This will vary according to the activities of the corporation and the jurisdiction(s) in which it carries out those activities. This chapter focuses on some of the more common areas of statutory liability.

To whom does liability apply?

Most of the legislation imposing liability on directors does not actually define who is a 'director.' Individuals who are acting in the capacity of directors - de facto directors - but who may not have actually been elected as such may nonetheless be exposed to directors' liability. This could include those serving as de facto directors, ex-officio directors, those dubbed 'honorary' directors and those sitting on an executive committee or otherwise acting as part of a group managing the corporation's affairs, no matter what it is called. If these individuals act like directors, they can attract the liability of directors.

Can directors avoid liability by resigning? Resigning as a director does not affect a director's exposure to liability for actions or omissions while in office. However, resignation will limit the potential for liability after the date of resignation and will also start the limitation period running. Most of the legislation contains limitation periods that provide, for example, that no action can be commenced against a director more than a specified number of years after he or she ceased to be a director of the corporation.

Director liability under the Canada Corporations Act

The *Canada Corporations Act*, under which all federal not-for-profit corporations are incorporated (other than those established by special act of the Parliament of Canada), contains a range of duties and statutory liabilities for directors. Many provincial incorporation statutes provide for similar liability. Provincially incorporated not-for-profits will need to determine the particular requirements that apply to them.

Directors should be particularly alert to liability relating to four areas:

- government reporting requirements;
- proper identification of the corporation;
- membership list disclosure provisions; and,
- winding-up procedures.

Reporting requirements

Failure to file the required information with Industry Canada can lead to personal liability for directors.

There is no limitation or possible defence for a director who permits or acquiesces in permitting a breach to occur. The relevant provisions are as follows:

- Section 133 creates an obligation on corporations to file an annual summary on or before June 1st in each year containing information effective as of the immediately preceding March 31st. The information required in the annual summary is listed in subsection 133(1) and the form must be signed by a director or officer of the corporation. Section 133(3) provides that a corporation that defaults in filing an annual summary is guilty of an offence and is liable on summary conviction to a fine of not less than twenty dollars and not more than one hundred dollars for each day that the default continues and every director or officer who "...knowingly authorized, permitted or acquiesced in any such default is guilty of an offence and is liable on summary conviction to a like fine."
- Subsection 150(2) provides in part that if all or some of the directors are aware of the corporation's default or failure to comply with the provisions of Section 133 (filing of annual returns), a court may hold the directors personally liable for costs incurred in the winding-up of the corporation pursuant to a court order under the *Winding-Up and Restructuring Act*.
- Section 114.2(5) of the *Canada Corporations Act* provides that if a corporation or officer is required to file any report, return, bylaw or other document with Industry Canada and the corporation or officer defaults in its filing, the Minister may require the corporation or officer to make a report upon any subject connected with its default and any director or officer who knowingly authorizes or permits a default in providing such report is guilty of an offence and may be liable for a penalty of up to \$50 per day while such default continues.

Identification of the corporation

Directors have an obligation to ensure against flawed or incomplete identification of the corporation on business documents and in representations to outside parties. Section 27 of the *Canada Corporations Act* creates an offence dealing with this and also imposes personal liability on directors in some situations.¹¹

The penalty imposed on directors for failing to comply with Section 27 is stated to be two hundred dollars, but the director is also personally liable to the holder of any such bill of exchange, promissory note, endorsement, cheque, or order for money or goods, for the full amount, if the same is not paid by the corporation.

Membership lists

Most governing statutes contain provisions that allow members, and sometimes others, to obtain a membership list containing the names and respective addresses of the members of the corporation. Section 111.1 of the *Canada Corporations Act* contains the requirements for obtaining such a list and also makes directors personally liable in the following instances:

1. where the corporation fails to furnish a member-ship list when properly requested to do so, subsection 111.1(1) provides that every director and officer who "...knowingly authorized, permitted or acquiesced" while in the office is guilty of an offence and is liable on summary conviction to a fine of up to \$1,000.00 or six months imprisonment or both;
2. subsection 111.1(3) makes it an offence to use a membership list for any of the prohibited purposes listed under the section and together with the corporation, every director or officer who

"...knowingly authorized, permitted or acquiesced" while in the office is guilty of an offence and is liable on summary conviction to a fine of up to \$1,000.00 or six months imprisonment or both;

3. subsection 111.1(5) provides that every person who offers for sale, purchases or otherwise traffics in membership lists or copies of such lists is guilty of an offence and every director or officer who "...knowingly authorized, permitted or acquiesced" is also guilty of an offence and liable on summary conviction to a fine of up to \$1,000.00 or up to six months imprisonment or both.

Liability on winding-up

The *Canada Corporations Act* imposes liability on directors where, upon the application of the Attorney-General of Canada to a court, the corporation is wound up and dissolved under the federal *Winding-up and Restructuring Act*. A corporation may be wound up in this manner under section 5.6 of the *Canada Corporations Act* if the corporation has been operating outside of its letters patent (either outside of its corporate objects or powers). Upon an application to the court for an order winding up the corporation, the court may determine whether the costs of the winding up shall be borne by the corporation or personally by the directors who participated or acquiesced in the offence.

Similarly, under section 150 of the *Canada Corporations Act*, upon application of the Attorney-General of Canada, a not-for-profit corporation may be wound up if it:

1. fails to hold an annual meeting of members for two consecutive years; or
2. fails to file an annual return for six months or more.

Subsection 150(2) provides that upon an application to the court for an order winding up the corporation, the court may determine whether the costs of the winding up shall be borne by the corporation or personally by any or all directors who were knowingly responsible for the corporation's failure or default.

General offence provision

The *Canada Corporations Act* contains a general offence provision for the breach of any of the sections of the legislation for which no express penalty has been prescribed. Section 149 of the *Canada Corporations Act* provides that a director, manager or officer will be liable, on summary conviction, to a fine of not more than \$1,000, or to imprisonment for not more than one year, or both, for doing anything contrary to the legislation or for failing to comply with any requirement in the legislation.

Other statutory offences under the Canada Corporations Act

In addition to those described above, directors should be aware of the following offences and penalties that apply to directors under the *Canada Corporations Act*: section 71 - Omission from Register of Mortgages, section 72 - Refusal of Inspection (mortgages), section 98 - Interest of Director in a Contract where no Declaration and section 99 - Employees. Since liability with respect to employees is one of the most common areas of potential liability, this area will be reviewed separately below.

Director liability under other federal and provincial statutes

The statutory laws that apply to a given not-for-profit corporation depend on the activities it carries on in meeting its mandate. For instance, a nursery school carrying on activities in Ontario is subject to the requirements of the *Day Nurseries Act*. In order to determine the scope of their liability, directors need to be knowledgeable about the legislation that applies to the corporation's activities and programs.

However, some statutory provisions apply across the board to most business corporations and not-for-profit corporations. These relate to employees, taxation and environmental regulations.

Employees

Wages

Under most circumstances, the employment legislation governing not-for-profit corporations will be provincial. However, corporations operating within areas of federal jurisdiction - such as airport authorities

- will be subject to federal statutes and regulation. Typically, directors can be personally liable for up to six months of unpaid wages and vacation pay owed to employees. This only applies, however, to services performed during the period that one served as a director, and may be subject to other limitations. For instance, in Ontario, a director is not liable unless:

- the corporation has been sued for the debt within six months after it became due and the employees have been unable to collect from the corporation;
- or
- the corporation has gone into liquidation, been wound up or declared bankruptcy.

Directors must be sued for the debt while they are still directors or within one year after they ceased being directors.

In Québec, the *Companies Act* does not hold directors of not-for-profit corporations liable for the unpaid wages of their employees.

Source deductions

Failure to Remit Federal Taxes

Directors must ensure that proper deductions are made on staff salaries and other remuneration paid to employees. Under the *Income Tax Act*, directors who were in office at the time that the corporation failed to deduct, withhold or remit or pay the amount due are liable, together with the corporation, for the amount and any interest or penalties.

If a director can show that he or she exercised the degree of care, diligence and skill to prevent the failure to deduct source deductions that a reasonably prudent person would have exercised in comparable circumstances, he or she may not be found liable. Therefore, directors should take positive action to ensure that controls are in place, such as establishing a payroll trust account and requiring the treasurer or CEO to report on a regular basis to the board that all required remittances have been made to the government.

Directors should also ensure that the corporation treats those who provide services to it as employees where the law requires. This is particularly important when dealing with independent contractors. If an independent contractor is found to be, in fact, an employee, the directors may be liable under the *Income Tax Act*. In a number of cases, the courts have found not-for-profit organizations liable for unpaid source deductions, plus interest and penalties, for employees whom the organizations improperly characterized as independent contractors. Where the corporation is unable to meet this obligation, directors may be personally liable for amounts owing.

Failure to Remit Employment Insurance Premiums and Canada Pension Plan Contributions

Every employer paying remuneration to a person employed in insurable employment must deduct and remit to the Receiver General insurance premiums as prescribed by the *Employment Insurance Act* and Canada Pension Plan Contributions as prescribed by the *Canada Pension Plan Act*. Failure to do so could result in personal liability for directors.

The *Employer Health Tax Act* establishes a health tax payable by employers carrying on business or programs in Ontario. Directors and officers who directed, authorized, assented to, acquiesced in or participated in the commission of an offence by the corporation under this Act are themselves guilty of an offence and are liable to the punishment provided for the offence. Similar provisions may apply with regard to payment of health insurance premiums or a dedicated health tax in other provinces.

Other employee related liability

Depending on the activities of the corporation, directors may also be exposed to personal liability under the *Canada Labour Code* and provincial pension benefits/standards legislation, pay equity legislation, occupational health and safety legislation and workplace safety legislation.

Taxation

Income Tax Act

Registered charities and not-for-profit corporations are exempt from tax under Part I of the *Income Tax Act*. However, they are not exempt from the reporting and compliance requirements set out in the Act. The penalties for failure to abide by these provisions are steep. A registered charity could lose its charitable status or directors and officers could be liable for criminal sanctions.

Excise Tax Act

Not-for-profit corporations are generally required to pay GST on most goods and services (and certain charities and not-for-profit corporations are entitled to some rebate of GST paid by them). Not-for-profit corporations may also be required to collect and remit GST on goods and services provided by them to the public.

One of the most common mistakes made by not-for-profit corporations is failing to collect and remit GST on membership dues or sales of items to members or clients. Whether or not GST is payable depends in part on whether members receive a material benefit as a result of their membership. Mere entitlement to receive a newsletter or other fringe benefit is not sufficient to make memberships subject to GST.

In some circumstances, the *Excise Tax Act* imposes liability on the corporation and its directors personally for GST remittances. Such personal liability only arises, however, if certain steps - relating to registering and proving the debt and corporate dissolution or bankruptcy being underway - have been taken.

In addition, directors have a due diligence defence similar to the one under section 227 of the *Income Tax Act*. Subsection 323(3) of the *Excise Tax Act* provides that a director is not liable for GST amounts due where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances. Also, liability for any assessment of amounts payable by a person who is a director of a corporation expires within two years after the person ceases to be a director.

Environment

Directors and officers of not-for-profit corporations are subject to the same liability under the environmental protection legislation as are directors and officers of business corporations. While the legislation may not apply to most not-for-profit corporations, depending on their nature and the location of their activities and programs, it may be an area worth considering in more depth. In many cases, the potential liabilities contemplated under environmental statutes are far-reaching and quite onerous. So, for instance, if a not-for-profit corporation is offered a gift of real property, legal counsel should review whether contaminants already exist in the property.

The *Canadian Environmental Protection Act, 1999* imposes obligations on directors with respect to air and water pollution and the proper storage and disposal of toxic substances. It says that directors and officers have a positive duty to ensure that the corporation complies with the Act and related regulations. Failure to comply can result in prison terms and fines of up to \$1 million. The *Ontario Environmental Protection Act* requires directors to take reason-able care to prevent the unlawful discharge of a contaminant into the natural environment.

Statutory liability risks of directors of charities

In addition to the statutory liabilities that apply to all not-for-profit corporations, directors of charitable corporations are subject to statutory liabilities that are only applicable to charities. Some of the more important of these are:

Statutory Liability For Registered Charities Under *Income Tax Act* (Canada)

Directors of charitable corporations can face personal liability if the corporation does not comply with mandatory requirements under the *Income Tax Act* concerning the charity's operations, reporting requirements, the disbursement of funds and the receipting of donations.

Statutory Liability For Charities Under The *Charities Accounting Act* (Ontario)

Directors of charitable corporations that operate in Ontario face additional liability under the *Charities Accounting Act* (Ontario). This legislation gives certain statutory rights to donors and to the Public Guardian and Trustee that allow directors to be called to account for the improper use of charitable property.

Section 6 of the *Charities Accounting Act* (Ontario) allows a donor to make a complaint about the fundraising practices of a charitable corporation. The donor needs only to deliver a written complaint to a judge of the Ontario Superior Court of Justice, who may then order an investigation by the Public Guardian and Trustee. This does not apply to 'religious' or 'fraternal' organizations.

Charities Accounting Act (Ontario) (section 4) provides penalties to a charity and its directors if they do not abide by specific directions about a donation made by a testator in a will or by a donor in a gift agreement. The Public Guardian and Trustee can bring the matter to court, either on its own initiative or as a result of a complaint received from a donor. It can ask the court to require the charity to comply with the terms of the directions given by the donor, and to impose a penalty on the charity or even imprisonment of its directors. It can also ask that the charity be removed as the trustee of the directed fund and that a new trustee be appointed.

Liability risks from fundraising

A charitable corporation and its board of directors must comply with a number of statutes affecting charitable fundraising. Failure to do so could expose the directors to personal liability. While it is beyond the scope of this chapter to provide anything more than a cursory overview of the applicable statutes, some of the more important of these are:

Specific charitable statutes concerning fundraising

- *Income Tax Act* (Canada)
- *Charities Accounting Act* (Ontario)
- *Charitable Gifts Act* (Ontario)
- *Religious Organizations' Lands Act* (Ontario)
- *Charitable Fund-Raising Act* (Alberta)
- *Charities Endorsement Act* (Manitoba)
- *Charities Act* (Prince Edward Island)

General statutes affecting charitable fundraising

- *Competition Act* (Canada)
- *Privacy Act* (Canada) and any provincial privacy legislation
- provincial insurance legislation, such as the *Insurance Act* (Ontario)
- provincial loan and trust corporation legislation, such as the *Loan and Trust Corporations Act* (Ontario)
- provincial securities legislation, such as the *Securities Act* (Ontario)

- provincial trustee legislation, such as the *Trustee Act* (Ontario)

Anti-Terrorism Legislation

The *Anti-terrorism Act* (Canada), formerly Bill C-36, enacted in December 2001, and related federal legislation, has created new and serious liability risks for charitable corporations and in some instances their directors. These range from seizure of charitable property, loss of charitable status, to Criminal Code charges against the charity, its directors and even donors for fundraising that directly or indirectly supports or facilitates broadly defined 'terrorist activities' or 'terrorist groups.'

As a result of the breadth of application of the *Anti-terrorism Act* (Canada) and the serious consequences which flow from it, directors of charitable corporations must now be extremely diligent in ensuring that they do not contravene the many criminal and civil law offences under the Act and related federal legislation.

Sample Questions for Prospective or Current Directors to Ask the Organization

1. Do the organization's current activities reflect its corporate objectives as set out in its incorporating documents?
2. Does the corporation carry out its obligations under the corporate bylaws, such as the requirement to call an annual general meeting?
3. Does the board have a process for authorizing contracts entered into by the corporation?
4. Is the corporation fulfilling all of its statutory obligations, such as filing mandatory reports with the appropriate government bodies and making the proper source deductions for employees?
5. If the corporation is a registered charity, is it taking precautions to ensure the proper investment of charitable funds?
6. If the corporation is a registered charity, is it complying with applicable laws regulating its fundraising activities?

Sample Questions for Directors to Ask Themselves

1. When I am unable to attend a board meeting, do I read the minutes of the meeting and voice any concerns I may have?
2. Do I voice my opposition to matters that I disagree with and make sure that my objections are recorded in the minutes of the meeting?
3. Have I read and understood the corporation's constitution or letters patent and bylaws?
4. Do I understand all of the corporation's legal obligations?
5. If I am a director of a charitable corporation, do I understand the special legal liabilities that both I and the corporation face?

Liability Checklist

Liability Checklist			
Subject	To Be Conducted By	How Often	Comment
1. Awareness of liability arising from acting beyond the corporation's authority	Director, in consultation with board colleagues and/or executive director	Annually	Does the director know the scope of the corporation's mandate, as defined by its corporate documents, and that the corporation is required to restrict its activities to that mandate?
2. Awareness of contractual liability	Director, in consultation with	Annually	Do corporate documents provide for authority to sign contracts?

Liability Checklist			
Subject	To Be Conducted By	How Often	Comment
	board colleagues and/or executive director		Does the director know in what specific ways personal liability may arise?
3. Awareness of liability in tort	Director, in consultation with board colleagues and/or executive director	Annually	Does the director know in what specific ways personal liability may arise for claims of injurious conduct? Does he or she know that negligent mismanagement can result in claims?
4. Awareness of liability arising from common law duties	Director, in consultation with board colleagues and/or executive director	Annually	Does the director know that he or she is liable to the corporation for losses suffered as a result of failure to meet his or her 'fiduciary duties'? Does the director understand the scope of these fiduciary duties?
5. Awareness of liability arising from statute	Director, in consultation with board colleagues and/or executive director	Annually	Does the director know that, under certain statutes, personal liability of directors may arise?
6. Statutory liability relating to incorporating legislation (including filings), wages, taxes - income, goods & services, sales, source deductions, employment, environmental protection	Director, in consultation with board colleagues and/or executive director	Annually	Does the director know and understand the requirements stemming from each of these issues, and the obligation on directors to ensure that these requirements are met?
7. Assessment of statutory liability arising from the specific mandate or activities of the corporation	Full board	Every two years, or more frequently if the regulatory environment is changing rapidly	Has a review been prepared, either internally or through seeking external legal advice, identifying regulatory requirements that the corporation is required to meet?

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Part Two: Canada's Competition Law

What is the purpose of Competition laws?

Competition law (known in the US as antitrust law) has three main elements:

1. Prohibiting agreements or practices that restrict free trade and competition between business entities
2. Banning abusive behaviour by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position
3. Supervising the mergers and acquisitions of large corporations

The Canadian Competition Bureau has four priority areas of enforcement: (i) conspiracy/cartel enforcement; (ii) mass marketing fraud; (iii) merger review; and (iv) abuse of dominant position. The following are two areas that not-for-profit organizations and/or their members may be vulnerable.

Abuse of Dominance

Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially. These provisions, contained in sections 78 and 79 of the *Competition Act*, establish the bounds of legitimate competitive behaviour and provide for corrective action when firms engage in anti-competitive activities that damage or eliminate competitors and that maintain, entrench or enhance their market power. Ed. note: For an association, undue restriction to membership may constitute an abuse.

Where appropriate, the Commissioner will open discussions to try to obtain voluntary compliance with the law; sometimes this is all the action needed to correct the situation. A more formal solution would involve the registration of a consent agreement with the Competition Tribunal when all parties agree on a solution that will restore competition to the marketplace.

The Competition Tribunal is like a court, chaired by a judge and independent of any government department.

If voluntary compliance cannot be achieved, the Commissioner may file an application for an order before the Competition Tribunal to remedy the situation.

Subsection 79(1) sets out three essential elements that must be found to exist for the Competition Tribunal to grant an order. The Tribunal must find that:

1. One or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business
2. That person or these persons have engaged or are engaging in a practice of anti-competitive acts
3. The practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market

The Tribunal has a number of remedies at its disposal to overcome the effects of anti-competitive acts and restore competition. The most common remedy is an order that requires the anti-competitive conduct to stop.

(Source: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html)

Ensuring Truth in Advertising

The Competition Bureau promotes truth in advertising in the marketplace by discouraging deceptive business practices and by encouraging the provision of sufficient information to enable informed consumer choice.

The [Competition Act](#) contains criminal and civil provisions to address false or misleading representations and deceptive marketing practices in promoting the supply or use of a product or any business interest. Under the criminal regime, the general provision prohibits all materially false or misleading representations made knowingly or recklessly. Other provisions specifically prohibit deceptive telemarketing, deceptive notices of winning a prize, double ticketing, and schemes of pyramid selling. The multi-level marketing provisions prohibit certain types of representations relating to compensation. Under the civil regime, the general provision prohibits all materially false or misleading representations.

Other provisions specifically prohibit performance representations that are not based on adequate and proper tests, misleading warranties and guarantees, false or misleading ordinary selling price representations, untrue, misleading or unauthorized use of tests and testimonials, bait and switch selling, and the sale of a product above its advertised price. The promotional contest provisions prohibit contests that do not disclose required information.

(source: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00529.html)

What amendments were made this year to the Competition Act?

The *Competition Act* (Act) was substantially amended in March 2009. The key amendments include the:

1. Reform of Canada's conspiracy law to make certain types of agreements between competitors (those that fix prices, allocate markets or restrict supply) illegal *per se* without there being any need to prove an undue lessening of competition as required under the prior law
2. Introduction of administrative monetary penalties for the abuse of a dominant position
3. Decriminalization of price maintenance and repeal of the criminal pricing provisions (price discrimination and predatory pricing)
4. Adoption of a two-stage U.S. style merger review process. The changes to the merger process and abuse provisions are now in effect; the change to Canada's conspiracy law will become effective in March 2010

(source: <http://www.osler.com/resources.aspx?id=8696>)

Can Not-for-Profit Organizations be Charged Under the Competition Law?

Incorporated not-for-profit organizations are corporations governed by the *Canada Corporations Act*, Part II and subject to Competition laws.

How to keep current with Canada's Competition Law developments:

You can subscribe to be on an electronic distribution list for information pertaining to:

- Business information
- Consumer information & warnings
- Enquiries
- Complaints
- Legislation
- Mergers
- Small & Medium Enterprise

By visiting <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/frm-eng/PJSH-6X9J7C>

This article is by no means an exhaustive list of director liability, but rather a reminder that your not-for-profit organization must ensure that your directors (volunteers, staff, consultants, etc.) understand their responsibilities to uphold the laws that apply.

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