

What it means to be on a Board of Directors

WHO IS A DIRECTOR?

A director is an individual who is a member of an organization's board of directors. The responsibility of the board is to provide leadership and direction to the organization, and to govern its affairs on behalf of its members.

Directors are elected or appointed to their positions on the board in accordance with the organization's Bylaws. Directors may also be officers, where an officer fulfills certain corporate roles and functions, such as those duties of a 'president', 'vice-president' or secretary'. Officers can also be senior staff persons. Directors and officers have a relationship of "trust" with the members of the organization, and it is from this trust relationship that certain important legal duties arise.

LEGAL DUTIES OF DIRECTORS

The basic responsibility of directors is to represent the interest of the members in directing the affairs of the organization, and to do so within the law. This legal duty is described in statutes (such as the Canada Not for Profit Corporations Act) and has been expanded and interpreted in the common law.

In representing the members of the organization and acting as their "trustee", directors have three basic duties:

- a) The duty of diligence: this is the duty to act reasonably, prudently, in good faith and with a view to the best interests of the organization and its members.
- b) The duty of loyalty: this is the duty to place the interests of the organization first, and to not use one's position as a director to further private interests.
- c) The duty of obedience: this is the duty to act within the scope of the governing policies of the organization and within the scope of other laws, rules and regulations that apply to the organization.

These three duties are discussed more fully below.

DUTY OF DILIGENCE

Diligent directors always act prudently and in the best interests of the organization. When exercising their duties as directors, they are expected to exercise the same level of care that a reasonable person with similar abilities, skills and experience would exercise in similar circumstances. And, if a director has a special skill or area of

expertise, such as an accountant or lawyer would have, they have a duty to achieve a higher standard of care that corresponds to their professional abilities.

Directors have a responsibility to act cautiously and to try to anticipate the consequences of their decisions and actions before they undertake them. They are honest and forthright in their dealings with each other, with members and with the public. They are well-informed about the activities and finances of the organization. They have an obligation to foresee potential risks inherent in a situation, and to take reasonable steps to manage those risks.

DUTY OF LOYALTY

Directors are required to put the interests of the organization first. These interests will always take precedence over any other interest, including a director's personal interests. As well, directors who are involved in more than one organization may find that they cannot be loyal to both.

Loyal directors will avoid putting themselves in a situation of a conflict of interest, and when this is unavoidable, they will act properly in disclosing the conflict and ensuring that they play no part in discussing, influencing or making decisions relating to that conflict.

Confidentiality is also an important aspect of the duty of loyalty. Directors have an obligation to keep the organization's business private, and to not discuss certain matters with people outside the Board of Directors. Confidential matters may include information about personnel, clients served by the organization, the organization's finances or legal matters.

A board acts as one entity. Loyal directors support the decisions of the board, even if they might not personally agree with the decision and might not have voted to support the decision in the board meeting.

DUTY OF OBEDIENCE

The organization is a "private tribunal" – an autonomous organization that has the power to write rules, make decisions and take actions that affect their members and participants. Legally, private tribunals are recognized as having a contractual relationship with their members. This relationship is defined in the organization's governing documents, which include its constitution, bylaws, policies, rules and regulations.

Directors have a duty to comply with the organization's governing documents, and to ensure that staff and committees of the organization do as well. Over time, the organization may move away from their legal purpose and policies may become out of date and no longer reflect the practices of the organization. The duty of obedience extends to ensuring that governing documents remain current and accurate, and overseeing the process that is used to amend and update governing documents.

Directors also have a duty to obey external laws and rules that are imposed upon the organization. A wide gamut of laws and statutes apply to the organization: the obedient director ensures that the organization complies with these.

LIABILITY OF DIRECTORS

A director who fails to fulfill his or her duties as outlined above may be liable. The term "liability" refers to the responsibility for the consequences of conduct that fails to meet a pre-determined legal standard. Usually, the term "consequences" refers to damage or loss experienced by someone, and being responsible for such consequences means having to pay financial compensation.

Liability arises in the following three situations:

1. Statute - a law is broken. The consequences are payment of a fine, having restrictions placed on one's rights or privileges, or imprisonment.
2. Contract - A contract is breached or violated, where a contract is a legally enforceable promise between two or more parties. The consequences are correcting the breach through some form of performance or service, or financial compensation
3. Tort - an act, or a failure to act, whether intentionally or unintentionally, causes injury or damage to another person. The consequences are payment of a remedy in the form of financial compensation.

Regarding statutes, there are a variety of statutes that impose liability on directors in specific circumstances relating to managing the affairs of the organization. Thus, directors have specific statutory obligations relating to:

1. The election and appointment of directors and officers
2. Calling meetings of members
3. Paying taxes to government and submitting employment-related remittances
4. Keeping minutes of meetings of directors and members
5. Reporting and disclosing prescribed information about the organization to authorities
6. Paying wages and salaries
7. Maintaining a safe workplace
8. Activities of the organization that cause pollution or other environmental damage

Regarding contracts, directors are responsible for ensuring that the organization's contractual obligations are fulfilled. This includes contracts with employees and independent contractors.

Regarding *torts*, directors are responsible for ensuring that they, as well as the organization's volunteers and staff, do not behave negligently. Negligence refers to the duty that we all have to ensure the safety of those persons affected by our actions. Directors, volunteers and staff are at all times expected to act in a reasonably diligent and safety-conscious manner so that others affected by our actions (fellow employees, volunteers, participants, clients, the public) will not face an unreasonable risk of harm.

The concept of negligence also applies to "wrongful acts" – these are errors, omissions, actions or decisions that harm others, not through damaging their property or their physical person, but through interfering with their rights, opportunities or privileges. Wrongful acts relate primarily to how directors govern the organization, manage its funds, supervise its staff and make decisions that affect members, clients and the public.

For more information on what it means to be on a Board of Directors and how to protect yourself, please contact:

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