



STRATFORD PERTH
COMMUNITY
FOUNDATION

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Roles, Responsibilities, Duties and Liabilities of Directors and Officers of a Charitable Organization

RESOURCE FOR BOARD CANDIDATES

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Outline

- Charitable Corporations
- Definition of Directors and Officers
- Common Law and Statutory Duties of Directors and Officers
- General Fiduciary Duties of Directors and Officers of Charities
- High Fiduciary Duties of Directors and Officers
- Common Law Liabilities of Directors and Officers
- Due Diligence Steps to Manage the Risks to Directors and Officers

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Charitable Corporations

- A charity is similar to a public trust bound by the **Trust Act** however, there are numerous Federal and Provincial Statutes that establish the rule of law specifically for charities.
- Charities are Tax Exempt.
- Charities can issue tax receipts for donations, not-for-profits cannot.
- Employees and volunteers are responsible to the charity's Officers. Officers are responsible to its Directors. Directors are responsible to its Members.
- Members are non-owners, but have accountability as a quasi public trust.
- According to SPCF's by-laws, the Foundation is a **member organization**.
 - Members are the elected Board; voting rights are limited to SPCF's members.
- It is common for Boards to consider themselves either a **Governance Board** or an **Operational Board**, and indeed other types as well. These are **types** of Boards.
- The law does not recognize any difference between a Governance Board and an Operational Board.
- This presentation applies equally to both types of Boards.

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Definition of Directors & Officers

What is a Director?

- Generally anyone who takes on the role of directing the charity.
- Also be known as a governor, board member, trustee etc.
- The name given to a Director is not the focus of the law, instead it is the authority that the person exercises that determines whether that person is a Director.
- As a Director you have very specific legal duties and legal liability exposure.
- First and foremost, Directors have a **fiduciary** obligation to put the interest of the charity before his/her/their own interest.

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Definition of Directors & Officers

What is an Officer?

- Generally, the person who carries out the operative functions of the charity at the direction of the Board.
- According to our by-laws, the Officers of the SPCF include: Executive Director, Chair, Vice-Chair, Past Chair, Secretary, and Treasurer.
- Officers* have a fiduciary responsibility to the charity.
- Officers do not have to be Directors, although most SPCF Officers are Directors.
 - SPCF's Executive Director is not a Director.
- If an Officer is not a Director, the Officer is not liable as a Board member but can be liable for breaches of fiduciary duty as an Officer.

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Common Law and Statutory Duties of Directors & Officers

- Management of the Charity
 - Directors are responsible for all aspects of the charity's operation.
 - Directors must manage or supervise the management of the activities and affairs of the charity. However, supervising does not involve interference with the day-to-day operations of management.
 - Courts can interfere if a charity is not administered in accordance with its charitable objects, or if funds are mismanaged. Failure to act/inaction or wrongful acts can result in personal exposure to liability.
- To fulfill their duties, Directors must ensure:
 - the **Objects** or **Purposes** of the charity are properly carried out and the charity's activities fit within its objects or purposes.
 - SPCF's objects are explicitly detailed in their **Letters Patent**.
 - the charity's financial stability.
 - the charity's overall operational performance.
 - proper training, hiring and supervision of management, staff, and volunteers.

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Common Law and Statutory Duties

Did you know that the Objects or Purposes of a charity are detailed in its Letters Patent?

This is critical because everything the charity is allowed to do emanates from this statement.

Mission Creep is one of the most common ways Directors and Officers get into trouble.

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Common Law & Statutory Duties

SPCF's Objects and Purposes

**SPCF's Letters Patent*

1. To receive and maintain a fund or funds and to apply all or part of the principal and income therefore, from time to time, by way of a formal grants program to qualified donees in the furtherance of the following charitable purposes:
 - To advance education at the primary, secondary and post-secondary levels;
 - To promote and advance social welfare and health programs and activities that contribute to the development of healthy communities;
 - To relieve the condition of poverty;
 - To preserve and protect the environment through hands on projects, as well as through courses and seminars directed at educating the public;
 - To advance the arts through the presentation of performances and exhibitions of an artistic nature, instructional seminars and workshops related to the arts;
 - To prevent and address problems of delinquency and substance abuse amongst youth;
 - To relieve loneliness and isolation of the aged and to provide health services for the aged and the disabled.
2. To promote the efficiency and effectiveness of other registered charities through the provision of central administration services and resources to charitable groups who meet the criteria as set out in "Object" (1) above.

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General Fiduciary Duties that apply to Directors & Officers of Charities

1. Duty to act in good faith, honesty, loyalty

- A Director's sole interest is to the charity.
- A Director's duty is to the charity and not the interest of any organization that they may represent on the Board.
- A Director's interests must not be placed in conflict with those of the charity.

2. Duty of Diligence

- Directors must diligently attend to their duties by being familiar with all aspects of the charity.
- Directors may have liability exposure for failure to attend to their legal duties.
- Being familiar with all aspects of the charity's operations through attending Board meetings and reviewing minutes of missed Board meetings and/or seeking advice of qualified professionals when necessary.

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General Fiduciary Duties that apply to Directors & Officers of Charities

3. Duty to Exercise Power

- Directors are responsible for managing or supervising the management of the charity.
- Directors must ensure proper maintenance of books, accounts, records and the minutes of the charity in order to justify accounts and decisions regarding the charity's assets.
- Delegation to management is permissible and indeed advisable, but Directors must supervise and 'require' accountability from staff.

4. Duty of Obedience

- Directors must comply with governing documents (by-laws, policies, terms of references).
- Directors must ensure valid decisions are implemented.
- Directors must not rely solely on the Executive Director to ensure compliance with applicable governing documents and applicable laws.
- Directors are responsible for becoming familiar with applicable laws.

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General Fiduciary Duties that apply to Directors & Officers of Charities

5. Duty to Avoid Conflict of Interest

- Conflict of interest occurs when a Director has a material interest outside of the charity that could influence him/her/them or be perceived to influence him/her/them in a manner contrary to the interests of the charity. *Examples that may give rise to a conflict of interest:*
 - Pecuniary or financial interest
 - Personal relationship
 - Competing duties
 - Undue Influence
 - Adverse interests
 - Perceived Conflict
- Directors must declare and avoid any conflicts of interest that provide an actual, or appearance of a, personal benefit. Directors must not participate in any discussions or vote where a conflict is declared.

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General Fiduciary Duties that apply to Directors & Officers of Charities

6. Duty of Confidence

- Directors must not disclose confidential information that they acquired in the course of their duties.
- Directors must protect the discussions at all Board and/or Committee meetings and ensure the confidentiality of information of the charity, its Directors, Officers, employees and members.

7. Duty to Continue

- Directors have continuing obligations to the charity which cannot be relieved by simply resigning (some liabilities last up to two years).
- Resignation to avoid personal liability may constitute a breach of fiduciary duty.

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High Fiduciary Duties

Where Charitable Property is involved (e.g. endowments), there are additional ***High Fiduciary Duties***.

1. Duty to Carry Out Charitable Objects or Purposes

- The resources of the charity must be used to carry out the ***Objects*** or ***Purposes*** of the charity as specified in its ***Letters Patent***.

2. Duty to Protect and Conserve Charitable Property

- Directors must protect charitable property including ***restricted*** charitable property (e.g. SPCF's endowments).

3. Duty to Account

- Directors must ensure records are kept to evidence that the charitable property has been properly managed.

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High Fiduciary Duties

Where Charitable Property is involved (e.g. endowments), there are additional ***High Fiduciary Duties***.

4. Duty to Invest

- Directors must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investment decisions.
- Directors can delegate investment decisions to an investment manager.
- Social Investments have very specific and complex requirements. Legal advice is recommended.

5. Duty to Act Gratuitously for the Charity

- Directors cannot receive any remuneration either directly or indirectly.
- Directors and Officers insurance is available, provided they meet the requirements of the Charities Accounting Act (CAA).

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Common Law Liabilities

1. Liability for Breach of Fiduciary Duty

- Examples of breaches include mismanagement of charity funds and property or the misappropriation of charity opportunity.
- Directors can be found liable for any loss the charity suffers as the result of a breach of fiduciary duty.

2. Liability for Breach of Charity Authority

- Directors that permit the charity to act beyond what is set out in the charity's **Objects** and **Purposes** can be held personally liable.

3. Liability in Contract

- Directors generally are not personally responsible for contracts signed for the charity, however, they have to ensure that management have proper corporate authority to sign contracts and ensure compliance with the terms of the contract.

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Common Law Liabilities

4. Liability Risk for Negligent Mismanagement

- If carelessness in the oversight of the charity's operations lead to injury, Directors can be found liable for negligent mismanagement.
- Failure to monitor the on-going conduct of staff especially in regard to sexual harassment of employees.
- Permitting unsafe working conditions.
- Knowingly drawing cheques against insufficient funds, or depleting corporate assets.

5. Liability for Special Purpose Trusts

- To the extent that a gift constitutes a special purpose charitable trust, Directors have to ensure the charity can only use the gift to accomplish the specific charitable purpose of that gift.
- Co-mingling of charitable trusts is allowed but they cannot be co-mingled with common funds.

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Common Law Liabilities

6. Liability for Investment Losses

- Directors must have an investment plan that reflects the prudent investor standard in the Trustee Act in order to obtain statutory protection from liability for investment losses.
- Unlike with prudent investments, there is no protection exempting liability for losses from social investments – this is one of the hazards of social investing.

7. General Liabilities

- Many Federal and Provincial statutes impose offences and penalties for acts and omissions of Directors of charities. Directors in certain cases can be held personally liable.
 - Income Act – Directors are liable to pay source deductions, if not paid.
 - Excise Act – Directors are liable for payment of HST, if not paid.
 - Canada Pension Plan Act – Directors liable if charity fails to remit premiums.
 - Canadian Anti-Spam Legislation – Directors liable if charity sends electronic messages without consent under CASL.
 - Human rights code – Directors could be exposed to liability in egregious situations.
- Ignorance of the law is not an excuse.
- Best defense is due diligence.

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Due Diligence Steps to Manage the Risks to Directors and Officers

- 1. Understand the role of the Board (Board Training)**
 - Continually educate Board Members.
 - Prepare and regularly update Board resources.
- 2. Governance policies covering all aspects of the Charity (SPCF Policy Manual)**
 - Confidentiality
 - Conflict of Interest
 - Code of conduct
- 3. Insurance Policies (SPCF has all three below)**
 - Commercial Liability; Directors and Officers Liability; Cyber
- 4. Plan for Diversity and Succession of the Board (Executive Committee focus)**
 - Determine specific needs of the Board and plan for an orderly succession of Directors.
 - New Board Members are rarely complacent and can be educated with a good orientation package.

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Due Diligence Steps to Manage the Risks to Directors and Officers

5. Committee and Advisory Boards

- Effective means of attracting volunteers without the risk of being Directors.
- Effective way to demonstrate due diligence.
- Directors must always remain in control and have oversight and responsibility for acts of non Board volunteers.

SPCF has a least one (1) Director or one (1) Officer on all Board Committees.

6. Establish Effective Risk Management in Operations

- Develop and implement a risk management checklist
- Develop and implement operational policies dealing with employees, volunteers, work place safety, etc.
- Ensure policies are followed and violations addressed

SPCF has developed a risk management register/check list.

7. Development of Operational Policies

SPCF has an HR Policy Manual and key operating policies in finance and investment, governance, fundraising, granting reviewed every 5 years.

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