



STRATFORD PERTH
COMMUNITY
FOUNDATION

It all comes back to you

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

PRESENTATION TO THE GOVERNANCE COMMITTEE

STRATFORD PERTH COMMUNITY FOUNDATION

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Outline

- Charitable Corporations
- Definition of Directors and Officers
- Common Law and Statutory Duties of Directors and Officers
- General Fiduciary Duties that apply to 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
- Conclusion

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Charitable Corporations

- A Charity is similar to a public trust so we are bound by the “Trust Act” however, there are also numerous other Federal and Provincial Statutes that establish the rule of law specifically for charities
- Charities are Tax Exempt
- Charities can issue tax receipts for donations, however, not-for-profits cannot
- There is a hierarchy of responsibility in which at the top of a charity are employees and volunteers – they are responsible to its Officers and Officers are responsible to its Directors and finally Directors are responsible to its Members
- Members are non-owners, but are the group that has accountability as a quasi public trust
- According to our by-laws, the Community Foundation is a member organization
 - The only Members are the elected Board
 - Members are elected at the annual general meeting
 - Only members have voting rights

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Charitable Corporations

- 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
- However, the law does not recognize any difference between a “Governance” Board and an “Operational” Board
- Every element of 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
- Can also be known as 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
- If you are a Director, then 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 ahead of his or her own interest

Fiduciary obligations will be discussed later in this presentation

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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
- All Officers also have a fiduciary responsibility to the charity (*we don't review them separately in this presentation but wherever the word Director is used, you could substitute "Director and Officer"*)
- An Officer does not have to be a Director, although most SPCF Officers are Directors – our Executive Director is not a Director
- When an Officer is not a Director, the Officer will not be liable as a Board member but can still be liable for breaches of fiduciary duty as an Officer

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Common Law & 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
- To fulfill duties, Directors must ensure:
 - The "Objects" or "Purposes" of the charity are properly carried out and that all activities "fit" within those objects or purposes – of note: The Community Foundation's "objects" are explicitly detailed in our 'Letters Patent'
 - The Charity's financial stability
 - The overall operational performance
 - Proper training, hiring and supervision of management, staff and volunteers

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Common Law & Statutory Duties

- Management of the Charity
 - Failure to act/inaction or wrongful acts can result in personal exposure to liability
 - 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

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Common Law & Statutory Duties

Did you know that the “objects or purposes” of the Community Foundation are detailed in our “Letters Patent?”

This is critical because everything the Community Foundation is allowed to do emanates from this statement and is one of the most common areas where Directors get into trouble – it is often called “mission creep”

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Common Law & Statutory Duties

- "OBJECTS AND PURPOSES" OF THE COMMUNITY FOUNDATION

Our mission states the following:

"To enrich the lives of people in Perth County by providing support to charitable organizations through grants made possible by responsible stewardship of endowment funds"

- But these particular points are NOT listed in our "Letters Patent"
- If this was our "Objects and Purposes" then some things we currently do could be challenged and we could have serious issues

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Common Law & Statutory Duties

“OBJECTS AND PURPOSES” of the Community Foundation, according to our “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

It all comes back to you

Common Law & Statutory Duties

“OBJECTS AND PURPOSES” of the Community Foundation according to our “Letters Patent”

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
- The interests of the Director must not be placed in conflict with those of the charity

2. Duty of Diligence

- Directors have to 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
- This can be complied with by 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
- In order to justify accounts and decisions regarding the charity's assets, Directors must ensure proper maintenance of books, accounts, records and the minutes of the charity
- 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 cannot rely solely on the Executive Director to ensure compliance with applicable governing documents and applicable laws
- It is the responsibility of Directors to become familiar with applicable laws

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General Fiduciary Duties that apply to Directors & Officers of Charities

5. Duty of Confidence

- Directors must not disclose confidential information that they acquired in the course of their duties
- This means that 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

6. Duty to Avoid Conflict of Interest

- Directors must declare and avoid any conflicts of interest or anything that provides an actual, or appearance of a, personal benefit
- A conflict of interest will occur when a Director has a material interest outside of the charity that could influence him or her or be perceived to influence him or her in a manner contrary to the interests of the charity

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General Fiduciary Duties that apply to Directors & Officers of Charities

6. Duty to avoid Conflicts of Interest (continued)

- Where a conflict arises, it must be declared and the Director must not participate in any discussions or vote
- The following are examples that may give rise to a conflict of interest (NOT a complete list):
 - Pecuniary or financial interest
 - Personal relationship
 - Competing duties
 - Undue Influence
 - Adverse interests
 - Perceived Conflict

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. our endowments)

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High Fiduciary Duties

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

3. Duty to Invest

- Directors must “exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investment decisions”
- This includes the ability to delegate investment decisions to an investment manager
- There are very specific and complex requirements related to so-called “social investments” so legal advice should be sought
- These duties are very restrictive so Boards have to exercise additional due diligence

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High Fiduciary Duties

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

4. Duty to Act Gratuitously for the Charity

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

5. Duty to Account

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

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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

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Common Law Liabilities

3. 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 (e.g. our outside events like the Mayors' Gala or Vital Conversations etc.)
 - Knowingly drawing cheques against insufficient funds
 - Knowingly depleting corporate assets

4. 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
- To reduce liability exposure, Directors need to ensure contracts are duly authorized by the Board

It all comes back to you

Common Law Liabilities

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

6. Liability for Investment Losses

- Directors need to 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”

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Common Law Liabilities

7. General Liabilities

- Many Federal and Provincial statutes impose offences and penalties for acts and omissions of Directors of charities
 - Income act – Directors are liable to pay source deduction if not done
 - Excise act – Directors are liable for payment of HST if not done
 - 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
 - Many others
- Directors in certain cases can be held personally liable
- Ignorance of the law is not an excuse
- Generally the best defense is due diligence
- Resigning as a Director may not limit liability

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Due Diligence Steps to Manage the Risks to Directors and Officers

1. Understand the role of the Board

- Continually educate Board Members
- Prepare and regularly update a Board manual

The Community Foundation does this

2. Development of Governance policies covering all aspects of the Charity and to follow them

- Confidentiality
- Conflict of Interest
- Code of conduct
- And many other areas (see policy manual)

The Community Foundation does this

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Due Diligence Steps to Manage the Risks to Directors and Officers

3. Development of operational policies

- Facility use
- Investing
- Anti-spam
- Whistle-blowing
- Privacy
- Human Resources
- Granting – continue to ensure grants “fit” within our letters patent
- And many other areas (see policy manual)

The Community Foundation does this

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Due Diligence Steps to Manage the Risks to Directors and Officers

4. Insurance Policies

- General liability
- Errors and omissions
- Directors and Officers

The Community Foundation has some insurance – reviewed regularly

5. Plan for Diversity and Succession of the Board

- Determine specific needs of the Board
- Plan for an orderly succession of Directors
- New Board Members are rarely complacent so tend to pay attention to these issues and can be educated from the start with a good “orientation” package

The Community Foundation does this

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Due Diligence Steps to Manage the Risks to Directors and Officers

6. Committee and Advisory Boards

- Can be an effective means of attracting volunteers without the risk of being Directors
- Can be an effective way to demonstrate due diligence
- However, Directors must always remain in control and have oversight and thus responsibility for acts of volunteers

The Community Foundation has Directors or at least an Officer on all Committees

7. 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

The Community Foundation has done a good job in this area and now has a “Governance” check-list (to be reviewed regularly as policies change) and is looking at developing a “Risk Management” check list

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Conclusion

- Being a Director or Officer of any Charity is a serious responsibility and should be viewed in that light
- One of the best ways for Board members to do this is to attend and actively participate at Board and Committee meetings, read the minutes of missed Board/Committee meetings and become familiar with all Community Foundation materials (especially By-laws, Policies and Terms of References)
- We will continue to review our policies regularly (every 5 years or as needed)
- The Community Foundation is “on top of” most of the Governance issues raised in this presentation, so we are in good shape
- Over the past few years the Community Foundation has moved to an elevated level of Governance and is taking every opportunity to continue this growth of Governance

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