

## Board Member Responsibilities

### Why does this matter?

- Good governance is important for a not-for-profit and its board to function effectively. It provides organizations with the right framework and tools to make decisions and achieve results
- Being a Board member carries a great deal of responsibility. The sustainability of a Non-Profit Organization (NPO) is founded in good governance.

### Directors of not-for-profit organizations have various duties and responsibilities.

- Directors are sometimes referred to as the “directing” mind of the organization. Since the organization itself is an “artificial construct”, the law and the public look to the directors to ensure the organization remains accountable.
- Where do directors’ duties and responsibilities come from? Some of them are codified in statutes such as the Societies Act, and other are found in court decisions.

### Eligibility to be a Director

The British Columbia Societies Act lists criteria for the eligibility of directors:

- Directors have to be at least 18 years of age;
- Directors cannot have been found by any court to be:
  - Incapable of managing their own affairs;
  - Be an undischarged bankrupt;
  - Be convicted of an offence involving fraud.
- These requirements are not exhaustive and the bylaws of a NPO may set out more requirements.
- If a director ceases to be qualified, the director must promptly resign.

### Directors’ Duties and Responsibilities

A Director of a NPO must:

- Act honestly and in good faith (without ulterior motives) in the best interests of the organization;
- Act towards the purposes of the NPO;
- Exercise the care, diligence, and skill of a reasonable person in the circumstances;
- Follow the bylaws of the organization; and
- Follow the law, including the Societies Act.

### The Duty of Loyalty-Conflicts of Interest

- The duty of loyalty is also known as the “fiduciary duty”. It requires that a director act honestly and in good faith in the best interests of the organization.
- It is one of the primary duties of the directors and it cannot be delegated.
- The duty of loyalty also means, among other things, that a director is not allowed to profit from their office and must avoid all conflicts of interest.

### How a Conflict of Interest May Arise

A conflict of interest can develop in two general ways:

1. A personal conflict between the director's self interest and their duty to act in the organization's best interest. For example:
  - A director stands to gain financially, or some other intangible way, from a proposed contract or transaction between the director (or their corporation) and the organization.
  - A director has a child, relative, friend, business party or contact who may benefit from the organization.
2. A conflict between the duties the director owes to the organization they serve and those they owe to another organization. For example:
  - A director serves on the board of two organizations-and owes the same duty of loyalty to each-and the organizations are involved in a transaction.

### Tips in Avoiding Conflicts of Interest

To help avoid conflict-of-interest situations or deal with conflicts as they arise, you may find the following tips useful:

- Remind yourself of the reason you wanted to join the organization as a director;
- Ask yourself who you want to benefit: is it the organization and the individuals it was established to serve? Or is it yourself, a family member, friend or business connection?
- If you, or a person related to you, are going to benefit in some way (either directly or indirectly, materially or intangibly), then you will likely be in a conflict position. Whether you are indeed in a conflict will depend on the facts of the particular situation. That said, you must disclose all real or potential conflicts to the other directors so that they can be dealt with appropriately.
- If the organization has a conflict-of-interest policy, review it on a regular basis, understand it, and apply it to the situations you face as they come up.

### What to do in the Event of a Conflict of Interest

- Conflicts of interest are bound to arise in a NPO at some point. They only cause an issue if they are not properly dealt with.
- A director with a conflict of interest must:
  - Immediately disclose to the Board that they have a conflict of interest and the full nature and extent of the conflict;
  - Not vote on the matter;
  - Not attempt to influence the vote or discussion on the matter;
  - Leave the meeting while the matter is discussed except when they are required to be present to provide information; and
  - Leave the meeting while the rest of the board votes on the matter.
  - Where the conflict places the director in a situation in which they believe they cannot act in the organization's best interest, they would resign.

### **“Duty of Care” Owed by Directors**

- A director is expected to exercise care, diligence, and skill in fulfilling their duties.
- This means that a director must generally be informed about an issue before making a decision relating to that issue.
- The law does not require directors to be experts but rather to act in exercise the skill and care expected of a reasonable person.
- It is generally accepted that the duty of care is heightened for directors of a charitable organization.

### **How can a Director Fulfill the “Duty of Care”**

The duty of care requires that directors pay attention and try to make good decisions for the organization. This duty comprises the following responsibilities:

1. The Duty to Act Honestly;
2. The duty of Diligence
  - Directors must be diligent in attending to their legal duties. They do by being familiar with the organization, being informed, and preparing for and attending meetings
  - Where advice of a specialized nature is required, the board should engage qualified professionals.
3. The Duty to Exercise Power  
Directors are ultimately responsible for the organization and thus must make decisions. Because they are responsible for furthering the organization’s goals and objectives, they can breach their duty through inaction and inattention.
4. The Duty of Obedience
  - Directors must comply with all applicable laws and the organization’s governing documents.
  - Directors must ensure that corporate decisions are being implemented,

### **How Knowledgeable do Directors Have to be in Order to Discharge their Duties**

- The law does not require directors to be experts.
- While directors of not-for-profit organizations owe a duty of care, it is not realistic to expect directors to understand in detail all of the operations, laws and government policies affecting the organization.
- However, directors should be well informed.
- The courts recognize that directors must be guided by what is referred to as the “business judgement rule”.
  - For example: they look to see that the directors made a reasonable decision, not a perfect one.
  - In coming to a decision, directors must show that they acted prudently and on a reasonably informed basis.

### **Liability of Directors**

- The term liability refers to the responsibility of directors and organizations for the consequences of conduct that fails to meet a predetermined legal standard.
- A director can be held personally liable for:
  - A failure to fulfill their duties as director;
  - A failure to disclose a conflict of interest;
  - A failure to deduct and remit employee income taxes to the CRA (including CPP and EI);
  - Failure to pay wages owed to employees;
  - Authorizing the distribution of money or property contrary to the bylaws or Societies Act.

### **Can Contracts or Bylaws Reduce a Director's Liability?**

- No. Neither a contract nor the NPO's bylaws can relieve a director from their duties under the Societies Act nor from liabilities arising from the director's negligence, default, breach of duty.
- NOTE: Liabilities do not go away if the non-profit is dissolved.

### **Liability for Decisions Based on False Information**

- In general, a director must ensure the information they act upon is correct. However, a director will not be held liable if they reasonably and in good faith relied on any of the following:
  - Financial statements of the NPO;
  - Written reports of the NPO's auditor;
  - The written report of a person whose profession lends credibility to that statement (e.g. lawyer, accountant, engineer, appraiser)
  - A statement by another director or a senior manager; and
  - Any record, information, or statement that was reasonable for the director to rely upon, even if the same was a forger, fraud, or inaccuracy.

### **Consequence of being held Liable**

- Generally, a director who is found personally liable must return whatever money or property owed. However, directors should be aware that certain misconduct constitutes a criminal offense.
- If liability arises from a resolution passed by the directors, each director who voted for or consented to the resolution is held responsible for the entire amount owed.

### **What can Directors do to Protect Themselves from Liability**

- The best protection is to proactively learn about director's duties and to always act honestly in the best interests of the NPA using the best available information.
- Directors should not vote for or consent to resolutions when they are unsure about the consequences or legality of that resolution.

**Discrimination and the Human Rights Code**

B.C. non-profits that serve and promote the interests of people on the basis of physical or mental disability, race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, may be exempt when it comes to granting a preference to those they serve.

BUT it remains best practice to act without any discrimination in all activities and services.

It should be kept in mind that **not all types of discrimination**, nor all acts of discrimination are illegal.

For example, refusing to hire a person who has facial tattoos is unlikely to be an illegal discriminatory act as it would be difficult to fit the discriminatory act into one of the prohibited grounds under the Human Rights Code.

**Liability of Directors**

Note the British Columbia Societies Act sets out the roles and responsibilities of non-profit organizations and boards.

Acknowledgement of reading and fully understanding this document.

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Print Name

Signature

Date