

SERVING ON NOT-FOR-PROFIT BOARDS: Rewards and Risks

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Not-for-profit and charitable organizations provide many valuable community services. The activities of such organizations are usually guided by volunteer boards of directors, who have the opportunity to “give back” to the community, enjoy a rewarding experience and expand networking connections.

However, even volunteer directors bear responsibility and can face related liability. Recognizing this will help you be a better director and avoid liability. A director should start by understanding the purpose and history of the organization, its legal background and that of not-for-profits and charities generally, because the law differentiates between commercial and not-for-profit organizations.

For example, directors of corporations incorporated under the Ontario *Business Corporations Act* are required to exercise the care, diligence and skill of a reasonably prudent person acting in similar circumstances. This objective standard does not require a director to act beyond the capabilities of an average person.

By contrast, directors of not-for-profit corporations are required to exercise the skill that could reasonably be expected of a person with their specific knowledge and experience. For example, a doctor serving on the board of a health care organization must exercise a higher degree of expertise in respect of health care-related issues than an accountant serving on the same board. Conversely, there would be higher expectations of the accountant in respect of financial matters.

The standard is even higher for directors of charitable organizations. The Public Guardian and Trustee of Ontario, which monitors the activities of trusts and charities in Ontario, takes the position that directors of charitable organizations act as trustees in managing the affairs of the organization and therefore have a duty to:

- be reasonable, prudent and judicious,
- carry out the purposes of the organization,
- avoid conflict of interest,
- act gratuitously (i.e. without charge),
- account for the use of property, and
- manage the assets of the organization.

There can be potential conflicts for directors. For example, if someone runs a website development business and serves as a director of a charitable corporation, could that corporation hire and pay the director's business for website services? Generally speaking, directors may not charge for services that

they provide to the organization as directors. Practically, it would often be difficult to draw the line between when directors are acting as directors and when as contractors. Additionally, the director in question would have a conflict of interest in respect of all matters related to the issue. Arguably, the organization would be better served by using the director's expertise to help it make decisions, rather than for providing specific services.

Another common question relates to directors' use of their specific expertise. For example, what should an accountant on the board of a charity do if she suspects mismanagement of the organization's funds? To do nothing would be negligent. The best practice would be to engage the organization's auditors or an outside professional to make this determination. This insulates the director/accountant from personal liability and evidences her due diligence. The board would then be entitled to rely upon the recommendations of the outside expert.

What about board members' political activities? For example, could a director of a local historical association, which is campaigning to save an historical building, lobby politicians with whom he has connections? Generally, neither a registered charity nor its directors can engage in political activities, no matter how noble the cause, except in very limited circumstances that further the objects of the organization.

We all benefit when community members with business and professional expertise donate their time for not-for-profit and charitable causes. It is prudent, however, to understand the related responsibilities and liabilities and to obtain legal advice for that purpose. The Business Law Group at Lawrences has extensive experience assisting not-for-profit and charitable organizations and can help you determine your liability.



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