Liability Issues Affecting Directors and Officers in the Voluntary Sector*

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1. Introduction

During the past 10 years there has been an increasing amount of attention paid to the role of governing boards in the voluntary sector. In the United States and in Canada we have seen a great outburst of articles, pamphlets, books and conferences dealing with different aspects of this issue. As more attention is paid to the role of governance in the voluntary sector, the responsibilities and liabilities of directors of not-for-profit corporations have come under increasing scrutiny. Studies suggest that a greater emphasis is being placed on ensuring that directors and senior officers of not-for-profit organizations fulfil their duties and obligations, not only to the organization and its members but, in some cases, to the general public as well.

The increasing attention to governance and liability issues in the so-called "third sector" may result from a greater public understanding of the importance of charities and not-for-profit organizations in a climate where fewer and fewer services are being supplied by government. Indeed, as the following excerpt points out, the increasing number of not-for-profit organizations represents a fundamental change in the approach to delivering community services:

> The scope and scale of this phenomenon are immense. Indeed, we are in the midst of a global "associational revolution" that may prove to be as significant to the latter twentieth century as the rise of the nation-state was to the latter nineteenth. The upshot is a global third sector: a massive array of self-governing private organizations, not dedicated to distributing profits to shareholders or directors, pursuing public purposes outside of the formal apparatus of the state. The proliferation of these groups may be permanently altering the relationship between states and citizens, with an impact extending far beyond the material services they provide.[1]

Of course the number of charities in Canada is also on the rise, although not as significantly as the number of not-for-profit organizations (due to the registration requirement for charities). Once again, the importance of the services provided by Canada's registered charities should not be underestimated. As one commentator recently noted:

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> Canada's 70,000 registered charities employ twice as many Canadians as the construction industry, and account for as much of Canada's economy as the entire province of British Columbia. It is almost impossible to imagine life in Canada without them: the social-service agencies, health organizations, hospitals, arts and culture groups, churches and religious charities, international-development agencies, service clubs, recreation groups, museums, universities and public foundations … they serve all the collective needs of Canadians that aren't met by either business or government.[2]

It is important to understand when and how personal liability may be imposed on directors of not-for-profit organizations and the ways in which personal liability can be minimized. The standard imposed on directors of not-for-profit organizations may vary depending on the type of organization involved, whether it is incorporated and whether it also happens to be a charity. Federal and provincial incorporating legislation establishes a variety of specific duties and liabilities for directors of not-for-profit organizations but, as we will discuss below, the standard of care is not always as clear.

Directors often perform their duties with little knowledge of what is expected of them and little understanding of the standard of care they are required to meet when carrying out activities on behalf of the corporation. Directors of business corporations are generally required to act honestly and in good faith with a view to the best interests of the corporation. In addition they are required to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstance.[3] For directors of not-for-profit organizations the standard is less clearly defined.

While an in-depth survey of the subject of directors' liability is beyond the scope of this article, we will review the following main areas:

- personal liability in a voluntary association and a not-for-profit corporation;
- the applicable standard of care;
- indemnification and insurance for directors;
- duties imposed by common law; and
- duties and liabilities imposed by statute.

2. Comparing Liability: Voluntary Associations and Not-For-Profit Corporations

Incorporation of an organization is the main method of limiting personal liability as it establishes a legal entity that is separate from its members, directors and officers. The existence of a separate legal entity creates a means by which the individual directors are afforded limited liability when carrying out duties and activities on behalf of the corporation. Voluntary associations, on the other hand, are not separate legal entities and generally have no legal status apart from that of the members. The members, directors and officers of voluntary associations can therefore be held jointly and severally liable for the

actions of the association and for their own actions in carrying out their duties on behalf of the association.

Directors and officers of voluntary associations are exposed to contractual liability and liability in tort. Individuals who direct the operation of a voluntary association may be liable if the association defaults under any of its contracts. The contractual liability of directors and officers of a voluntary association is a significant concern as the association, not being a separate legal person, cannot enter into a contract on its own. If a director of a voluntary association enters into a lease on behalf of the association, and leads the lessor to assume that the lease will be honoured by the association, he or she may be personally liable in the event that the association defaults on the lease.

Directors of voluntary associations are generally not protected from personal injury claims to the same extent as directors and officers of corporations. If someone sustains injuries while participating in activities sponsored by the voluntary association, or while in an area that is within the association's control, the directors involved may be exposed to personal liability. The directors may attempt to limit their exposure to liability when organizing activities that involve risk, such as sporting activities, by having participants sign a consent and waiver; however the law in this area is complex and one should be wary of relying exclusively on a waiver as protection from liability.

If it appears that a director acted for his or her association or on its behalf, a plaintiff may have a strong case against the director personally. In contrast, in a lawsuit in negligence or breach of contract against a not-for-profit corporation, the corporate entity is in a position to sue and be sued and thus a plaintiff must bring the action against the corporation. Of course this does not mean that the plaintiff will not also bring an action against a director personally but directors of corporations are, to a significant degree, protected from personal liability provided that they have conducted themselves in accordance with the applicable standard of care. As such, the general common law rule is that directors and officers are not liable for the torts committed by their corporations provided they acted in good faith and within the scope of their authority. In *Montreal Trust Co. of Canada* v. *Scotia McLeod Inc.*,[4] the Ontario Court of Appeal affirmed this general principle as follows:

> A corporation may be liable for contracts that its directors have caused it to sign or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called "directing mind". Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors…personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation.[5]

Increasingly, it appears that fewer and fewer experienced directors will agree to sit on the board of a voluntary association. The risk of personal liability is too great, even where there is an insurance policy in place. Imagine a lawsuit in negligence involving a voluntary association. Since the voluntary association has no legal status, an injured party will look to the directors, officers and possibly the members both jointly and severally, for compensation for the damage sustained.

As noted earlier, the standard of care required of directors of nonshare capital corporations in Ontario and federally is not that clear. For directors of voluntary associations, however, it is even more difficult to determine what standard of care is expected (unless the association is a charity) but it appears that insofar as the members of the association are concerned at least, the directors may have liability if the members suffer a loss because of the actions of the board. This is because the directors may be considered to be trustees or fiduciaries as far as their relationship to the members of the association is concerned.

Incorporation of a not-for-profit organization does not mean that directors of not-for-profit corporations are completely shielded from liability. It is important to keep in mind that the corporation can only act through its directors, officers, employees and agents. Senior officers are responsible for carrying out the directions of the board. A board of directors is ultimately responsible for the overall effective management of the corporation. Directors are expected to meet a standard of care in carrying out their obligations on behalf of the corporation and each director is responsible for his or her own acts or omissions while in office. Where the conduct falls short of the prescribed standard of care, directors, and sometimes officers, may be exposed to personal liability.

3. The Applicable Standard of Care

A. The Standard of Care Applicable to Directors of Not-For-Profit Corporations

So, what is the applicable standard of care for directors of federal and Ontario not-for-profit corporations? In business corporations, we know that the standard is an objective one and is usually expressed as the standard of care that a reasonably prudent person would exercise in comparable circumstances. Unlike the legislation that governs business corporations (which has codified an objective standard of care), much of the provincial and federal legislation applicable to nonshare capital corporations does not define the applicable standard of care, with the exception of the legislation in British Columbia, Newfoundland, Manitoba and Saskatchewan.[6] These provinces have codified an objective standard of care similar to that found in business corporations' statutes.

In the absence of express statutory provisions setting forth the applicable standard of care for a not-for-profit corporation, it is necessary to look to the common law before the objective standard was codified into the legislation of

business corporations statutes. The standard at that time, expressed as a subjective standard of care, was defined in *Re City Equitable Fire Insurance Co.* as conduct that may reasonably be expected from a person of such knowledge and experience as the identified director,[7] i.e., the more sophisticated the director, the greater care he or she must exercise. It is generally accepted that the subjective standard of care applies to directors of nonshare capital corporations, both federally and in provinces where an objective standard has not been codified, such as Ontario.

The application of a subjective standard of care has many implications for would-be directors of not-for-profit corporations. There seems to be little doubt that directors with particular expertise or business acumen will be held to a higher standard than an unsophisticated director. In fact, the greater the skill level and experience of a given director, the greater the scope of potential liability. The application of a subjective standard means that a lawyer or other professional who sits on the board of a nonshare capital corporation will be held to a higher standard of care than a less skilled person. This fact does not assist corporations in their quest for experienced and skilled board members unless comprehensive directors' liability insurance is in place.

B. Directors as Trustees – Is there a Higher Standard of Care for Directors of Charities?

(1) *Cases Leading to Current Law*

Lawyers working in the charitable sector will be familiar with the issue regarding whether, and to what extent, directors for charitable corporations can also be said to be "trustees" of the charitable assets of the corporation they serve. If directors of charitable corporations can be said to be trustees or subject to the same rules as trustees, then they would be subject to a stricter common law standard than directors of other nonshare corporations. The imposition of this further standard on directors of charitable corporations means that such directors would be subject to the much higher, albeit objective, standard of a reasonable and prudent person in the management of his or her own affairs. In our view, the prudent approach when advising directors of charitable corporations is to advise them that while the law is not settled in this area, it appears likely that directors of charities in Ontario are bound by the same rules as trustees and may be considered to be trustees for certain purposes. As such, they will be held to the highest possible standard of care.

This state of affairs has been the subject of much debate. As it was so aptly put in the *Toronto Human Society*[8] case:

> The position on the one hand is that the corporation is the trustee of its property, and that since the corporation is without body to be kicked at or soul to be damned, its directors must be held to the duties and obligations of trustees. On the other hand is the argument that the corporation is a corporation duly regulated by statute and that,

> as long as the provisions of the statute are appropriately observed, the obligations of the directors have been met.[9]

There has been a handful of cases that are almost always referred to in the debate regarding whether directors of charitable corporations are trustees. One of these is the British case *Re French Protestant Hospital* which has attracted much attention for its characterization of directors as trustees[10]. In that case, a hospital incorporated by Royal Charter proposed to amend its bylaws to specifically provide that directors of the corporation could receive fees for services to the charity rendered in their professional capacity. The case held that the directors of the hospital corporation were "to all intents and purposes in the position of trustees" and the proposed amendment was held to be "repugnant to the law". Danckwerts J. said, in his reasons for judgment:

> The property of the charity is of course vested in and held by the corporation. The corporation however, exists only according to the rules of law, and it is not an actual person capable of acting on its own motion in any way whatever. It seems to me that in a case of this kind the court is bound to look at the real situation which exists. It is obvious that the corporation is completely controlled by the governor, deputy governor, and directors, and it is, therefore those persons who, in fact, control the corporation and decide what shall be done. Those persons are as much in a fiduciary position as trustees in regard to any acts which are done in regard to the corporation and its property. It would be entirely illegal if they were simply to put the property or the proceeds of the property of the corporation in their pockets and make use of it for their own individual purposes or for their purposes as a whole and not for the purposes of the charitable trust for which the property is held. Therefore, it seems to me plain that they are to all intents and purposes, and for the purposes of this case, bound by the rules which affect trustees.[11]

This case has been followed in Canada in *Re David Feldman Charitable Foundation*,[12] where the foundation was found to be a trustee by virtue of subsection 1(1) of the *Charities Accounting Act*[13] *and its directors also to be trustees since they controlled the foundation. The directors in that case were found to be in breach of trust in making an improper investment for the foundation. However, until the Toronto Humane Society*[14] decision, *Re French Protestant Hospital* was not universally relied upon in Canada as authority for the proposition that directors of charitable corporations are bound by the same rules as trustees.

In the *Toronto Humane Society* decision, the Court answered many questions about the status of a charitable corporation and its directors. The Court concluded that, without holding that the society was in all respects and for all purposes a trust, the society was unanswerable in certain respects for its activities and for the disposition of its property as though it were a trustee. Further, the Court found that the Society was subject to the supervisory equitable jurisdiction of the court.[15] In considering the issue of the payment of remuneration to the directors of the Society, the Court followed the reasoning

in *Re French Protestant Hospital* and found that the directors were *bound by the same rules that affect trustees*, and the Court declared that the Society could not pay any remuneration to its directors. In arriving at this conclusion, Andersen J. said:

> Whether one calls them trustees in the pure sense…the directors are undoubtedly under a fiduciary obligation to the Society and the Society is dealing with funds solicited or otherwise obtained from the public for charitable purposes. If such persons are to pay themselves, it seems to me only proper that it should be upon the terms upon which alone a trustee can obtain remuneration, either by express provision in the trust document or by the order of the court. The latter would appear to be the only practical mechanism. There is no trust document, and I have already indicated that I do not consider the ordinary corporate safe-guards to be adequate. …The Society is not a commercial corporation nor is it simply a non-profit corporation; it is a charitable institution. Where there is deemed to be sufficient warrant to pay a director a salary as an employee of the Society, some inconvenience will have to be accepted. I have no doubt that a mechanism could be worked out whereby on notice to the Public [Guardian and] Trustee approval could be given by fiat.[16]

Finally, if the directors of a charity are *de facto* trustees, then they cannot be paid, either as directors or otherwise, without the approval of the court. The case of *Harold G. Fox Education Fund* v. *Ontario (Public Trustee)*[17] involved a charitable corporation established for educational purposes. The directors of the corporation provided scholarships, *inter alia*, to Canadian law graduates to do research and work in law firms in England and for English law graduates to do the same thing in Canada. The question in that case was whether the directors had the right to receive reasonable payment for services rendered in a capacity other than as a director. In approving the payments made to the director, the Court held that, on such an application, the onus is on the applicant to show that the payment for services is in "the best interests of the trust in light of the circumstances and the basic rules of equity which affect trustees".[18] Interestingly enough, the Court also held that approval of the court should be obtained prior to any payments actually being made.

Since *Toronto Humane Society*, there have been a couple of other cases that have either touched on the particular characterization of directors of charities or on the legal nature of the assets owned by charities (as being trust property or not), but these cases have not made any inroads on the specific question of whether directors of charities are trustees.[19]

(2) *The Current State of the Law*

In Ontario, the *Charities Act* specifically characterizes the legal nature of any corporation that is "incorporated for a religious, educational, charitable or public purpose" as that of a trustee for the purposes of the *Act*.[20] The Office of the Public Guardian and Trustee in Ontario takes the position that directors of charitable corporations in general are also to be considered trustees of charitable property:

> We think that there ought to be a single regime applicable to the administration and management of charitable property (as distinct from organizational and other issues) rather than a multiplicity depending only upon how charities may organize themselves. We think also that the law of charitable trusts ought to apply to the administration and management of charitable property, regardless of the form in which a charity may be organized. The considerations that have led the courts to impose the obligations of trustees upon those holding property for charitable purposes are just as compelling if a charity is organized otherwise than as a trust.[21]

In essence, this means that directors of any type of charity carrying on activities in Ontario must meet the higher standard of care of a trustee in charge of property that is subject to a trust. Given the case law on this subject and the position of the Office of the Public Guardian and Trustee, the prudent approach is to assume that the standard of care applicable to directors of charities in Ontario is that of a reasonable and prudent person in the management of his or her own affairs.

Not only does this higher standard of care mean that a director of a charity must discharge his or her duties in accordance with the highest possible standard but it also has the following practical implications:

(1) a director may not receive any payment for services as a director or receive any benefit or payment from the charity, directly or indirectly in any other capacity without court approval; and

(2) a charity may only provide an indemnity and purchase directors' and officers' liability insurance on behalf of its directors provided that it meets the requirements set forth in Ontario Regulation 4/01 under the *Charities Accounting Act.*

Section 5.1 of the *Charities Accounting Act* allows the Attorney General to make regulations providing that acts or omissions that would otherwise require the approval of the Superior Court of Justice in the exercise of its inherent jurisdiction in charitable matters shall be treated as though they had been so approved. One of the areas in which regulations may be made is in relation to the giving of benefits from charitable property to directors of corporations that are deemed to be trustees under the *Act.* While Ontario Regulation 4/01 dealt with the area of indemnification and insurance, it did not, (as it was expected to do) outline any circumstances in which it would be permissible for a charity to remunerate its directors.

As a result, where a charity wishes to have, for example, its executive director sit on the board as a voting director, it will still be necessary to apply for a court order approving the payment. Section 13 of the *Charities Accounting Act* now provides a simplified procedure to obtain a court order, although it is not entirely clear under what circumstances this procedure can be used. It appears that one purpose may be to obtain a court order authorizing one or more directors of a charity to receive remuneration. Although approval will not be

granted lightly we understand that in certain situations there may be compelling enough reasons for the Public Guardian and Trustee to consent to an order. In essence, the procedure requires the filing of court documents with the Office of the Public Guardian and Trustee including a draft order. There is no requirement for oral argument and the whole process currently takes about two months. The material to be used in connection with the simplified procedure is available from the Office of the Public Guardian and Trustee, on request.

Section 13 of the *Charities Accounting Act* provides as follows:

> 13.(1) A draft order or judgment that could have been made by the Ontario Court (Superior Court of Justice) under this Act, under any other Act dealing with charitable matters or in the exercise of its inherent jurisdiction in charitable matters, shall be deemed to be an order or judgment of that court if the following persons give a written consent to its terms:
>
> 1. The Public Guardian and Trustee.
> 2. Every other person who would have been required to be served in a proceeding to obtain the order or judgment.
>
> (2) In the case of the Public Guardian and Trustee, the consent shall be sealed.
>
> (3) The terms of the draft order or judgment take effect when it is filed with the Ontario Court (Superior Court of Justice).

C. Duties of Directors Concerning Special Purpose Charitable Trusts and Liability for Breach of Trust

(1) *What is a Special Purpose Charitable Trust?*

While there is continued debate concerning the issue of whether directors of charities are, or should be, considered to be trustees of the general assets of a charitable corporation, there appears to be little disagreement over the proposition that where a charitable corporation holds restricted trust funds or endowment funds, the corporation itself and its directors are trustees in relation to those assets. While it is beyond the scope of this article to review the subject of restricted trust funds in any detail, it is important to mention some common situations in which directors may unwittingly find themselves to be in a situation of breach of trust.[22]

In the most general terms, a special purpose charitable trust is property held by a charity for a specific purpose within its charitable mandate. While unrestricted gifts are beneficially owned by a charity for its general charitable purposes, a special purpose trust is held by the charity and its directors for the stated purposes of the trust and is not owned beneficially by the charity. As a result, the directors must apply the gift to the purpose for which it was given and for no other purpose. It should be noted that special purpose charitable trusts are also commonly referred to as "endowment funds", "restricted funds" and "special purpose funds".

It is important to realize that not all conditions placed on gifts by donors will turn the gift into a special purpose trust or another type of restricted gift. For example, most lawyers are familiar with the term "precatory trust", where a donor merely expresses his or her wish that a gift be used for a particular purpose, creating a moral, not a legal obligation on the charity and its board. In that case, there can be no breach of trust by the directors. Second, not all fundraising appeals undertaken by a charity that mentions a purpose will necessarily constitute the funds raised as a special purpose charitable trust at law. Careful analysis of each fact situation must be undertaken to determine whether the restriction is sufficient to constitute a special purpose charitable trust since, if it is not, then there is probably no breach of trust.

(2) *Duties of Directors in Relation to a Special Purpose Charitable Trust*

The overriding duty of directors with regard to special purpose charitable trusts held by the charity is to carry out the restrictions attached to the special purpose charitable trust. If the directors fail to do so, they will be in breach of trust and may be personally liable for any loss occasioned by the breach of trust.

Directors also have other duties arising out of their fiduciary obligations. They must ensure that donor-restricted charitable gifts which are not to be used for immediate purposes are properly invested. Directors are required to invest the property in accordance with the document by which the special purpose trust is created (if any terms are expressed therein) and if the document is silent, in accordance with the letters patent of the charity and if the letters patent are silent, then in accordance with the *Trustee Act*.[23] Note that if the document creating the restricted gift contains investment powers, the directors must comply with the terms of that document since failure to do so could expose the directors to liability for breach of trust and for any loss occasioned from the particular investment made by the directors.

Directors are also under the usual duty to protect and conserve the trust property under their administration. This may also be interpreted as imposing a duty on directors of a charity to protect special purpose charitable trusts from seizure by creditors of the charity.

All directors of a charity are obliged to keep proper books of accounts with respect to the affairs of the charity, including donor-restricted charitable trust funds.[24] Regulation 4/01 under the *Charities Accounting Act* now permits trustees (and directors) to combine property received by the trustee for a restricted or special purpose with other property received by the trustee for another restricted purpose and to hold the combined property in one account in a financial institution or invest it as if it were single property, provided that all gains, losses, income and expenses are allocated rateably, on a fair and reasonable basis to the individual properties in accordance with generally accepted accounting principles and provided further that the trustee complies with the strict record-keeping requirements set forth in the regulations.

Finally, directors of a charity that holds special purpose trust funds have a duty to apply for a court order to impose either a *cy-près* or administrative scheme where they determine that the charitable purposes cannot be accomplished without departing from the terms of the trust.

(3) *Consequences to the Directors of a Finding of a Breach of Trust*

Where a charity fails to comply with the terms of a special purpose charitable trust, then all of the directors of the charity will be in breach of trust and are jointly and severally liable for the full amount of any loss suffered by the charity as a result of the failure to comply with the terms of the trust. This means that each director is personally responsible for the full amount of the loss and may be held accountable as such.

If donor-restricted charitable funds have been misapplied or depleted, it may be possible to replace the funds and if so, this should be done as quickly as possible, together with any accrued interest.

Terrance S. Carter cites the following useful examples of situations where courts have found that a breach of trust by directors or trustees has occurred for failure to observe the terms of special purpose charitable trusts:[25]

- A charity diverting a fund intended for one charitable program for use in another charitable program. For example, a charity using monies from an estate that was intended by the testator to help the poor in one parish by diverting those monies to help the poor in another parish.
- A charity withholding a fund and not having it applied to the purpose for which it was intended by the donor.
- The trustees of a charity concealing the existence of a charitable trust fund by not communicating its existence to the persons or groups intended to benefit from it.
- A charity placing funds into a perpetual endowment fund when all of the funds were intended by the donor to be expended in the short term in support of a particular operational program of the charity.
- A charity mixing its funds with another charity and then applying the combined funds for the purposes of the other charity.
- A charity encroaching upon the capital of an endowment fund that was intended by the donor to be held in perpetuity.
- A church that had received land in trust to further a particular doctrinal statement subsequently using the land for the benefit of individuals adhering to a different doctrinal statement.
- A charity borrowing monies from a donor-restricted charitable trust fund notwithstanding that there was a bona fide intent to repay those monies together with interest.

- A charity using surplus funds from a public fundraising appeal for different charitable purposes from those communicated in the public appeal without first obtaining court authorization.

The most common way for a breach of trust to become a "problem" for directors is through a public complaint under either of Sections 6 or 10 of the *Charities Accounting Act*. Section 6 provides a means for donors to make a complaint about the fundraising practices of a charity by delivering a written complaint to any judge of the Superior Court of Justice. The judge may then order an investigation by the Public Guardian and Trustee. It is interesting to note that Section 6(1) provides as follows:

Any person may complain as to the manner in which a person or organization has solicited or procured funds by way of a contribution or gift from the public for any purpose, *or as to the manner in which any such funds have been dealt with or disposed of*. [emphasis added]

Section 10(1) provides a mechanism whereby two or more people can allege a breach of trust involving a charitable purpose and may apply to the Superior Court of Justice for an order or direction as the Court considers just, including an order for an investigation by the Office of the Public Guardian and Trustee. If an investigation ensues, it could eventually lead to a demand for a formal passing of accounts by the charity under Section 3 of the *Act*. It could also result in an order under Section 4(d) to enforce donor restrictions or in a demand for payment by the directors of the amount of the loss occasioned by the breach of trust.

4. Indemnification and Insurance

A. Incorporating Statutes

Section 93 of the *Canada Corporations Act*[26] provides for the indemnification of directors by the corporation where consent to such indemnification has been given by the members of the corporation. Under this section, a corporation may indemnify a director against all costs and expenses incurred in any law suit brought against the director for any act done or permitted to be done by the director while in office unless it is caused by the director's wilful neglect or default. Section 80 of the Ontario *Corporations Act*[27] provides a similar form of indemnification except that the *Act* has been amended to provide under Section 133 (2.1) that "…sections 80 [indemnification] and 96.1 [exemption from audit] do not apply to a corporation referred to in subsection 1(2) of the *Charities Accounting Act*". In other words, charities incorporated in Ontario do not have authority under their incorporating statute to indemnify their directors.

The *Canada Corporations Act* is silent on the matter of directors' and officers' liability insurance but it is presumed to be within the corporation's powers under the *Act* to provide for such liability protection for its directors. But in

Ontario, Section 283(5) of the *Corporations Act* specifically authorizes the purchase of insurance by providing as follows:

> 283(5) Subject to subsection (6), a corporation may purchase and maintain insurance for a director or officer of the corporation against any liability incurred by the director or officer, in the capacity as a director or officer of the corporation, except where the liability relates to the person's failure to act honestly and in good faith with a view to the best interests of the corporation.

Again, the *Corporations Act* was amended in Subsection 283(6) to prevent a charitable corporation from purchasing directors' and officers' liability insurance unless the charity either:

(a) obtains a court order authorizing the purchase; or

(b) complies with the *Charities Accounting Act* or a regulation made under that act that permits the purchase.

B. Charities Accounting Act and Regulations

The result of the above provisions is that until the advent of Ontario Regulation 4.01 under the *Charities Accounting Act* in 2001:

(i) not-for-profit corporations (federally and provincially) that were non-charities had statutory authority to indemnify their directors and to purchase and maintain directors and officers liability insurance;

But:

(ii) not-for profit corporations that were also “charitable” and incorporated in Ontario had no authority to indemnify their directors and to purchase and maintain directors and officers liability insurance without a court order.

In practical terms, of course, most charities continued to purchase and maintain directors' and officers' liability insurance and most bylaws of not-for-profit corporations in Ontario still contained an indemnification provision as a matter of course.

It is worth noting that well before the above amendments to the *Corporations Act* which prohibit charities from indemnifying their directors or purchasing insurance, the Public Guardian and Trustee took the position that charities should not pay premiums on behalf of directors for directors and officers liability insurance coverage without obtaining a court order. The Public Guardian and Trustee took the same position with respect to indemnity by a corporation even without directors' and officers' liability insurance in place. The rationale of that Office was that (and of course continues to be) since directors of charities cannot be remunerated for services (since they are considered to

be trustees), it is inappropriate for charitable funds to be used for this form of protection.

Given the fact that it is relatively new, we will now reproduce Ontario Regulation 4/01 under the *Charities Accounting Act* in full since, as readers will note, boards of directors are required to comply with certain restrictions and to consider a number of factors before giving an indemnity or purchasing insurance:

2.(1) In the circumstances and subject to the restrictions set out in this section, an executor or trustee and, if the executor or trustee is a corporation, each director or officer of the corporation may be indemnified for personal liability arising from their acts or omissions in performing their duties as executor, trustee, director or officer.

(2) An executor, trustee, director or officer cannot be indemnified for liability that relates to their failure to act honestly and in good faith in performing their duties.

(3) In the circumstances and subject to the restriction set out in this section, insurance may be purchased to indemnify the executor, trustee, director or officer for the personal liability described in subsection (1).

(4) The terms of the indemnity or insurance policy must not impair a person's right to bring an action against the executor, trustee, directors or officer.

(5) The executor or trustee or, if the executor or trustee is a corporation, the board of directors of the corporation shall consider the following factors before giving an indemnity or purchasing insurance:

1. The degree of risk to which the executor, trustee, director or officer is or may be exposed.

2. Whether, in practice, the risk cannot be eliminated or significantly reduced by means other than indemnity or insurance.

3. Whether the amount or cost of the insurance is reasonable in relation to the risk.

4. Whether the cost of the insurance is reasonable in relation to the revenue available to the executor or trustee.

5. Whether it advances the administration and management of the property to give the indemnity or purchase the insurance.

(6) The purchase of insurance must not, at the same time of the purchase, unduly impair the carrying out of the religious, educational, charitable or public purpose for which the executor or trustee holds the property.

(7) No indemnity shall be paid or insurance purchased if doing so would result in the amount of the debts and liabilities exceeding the value of the property or, if the executor or trustee is a corporation, render the corporation insolvent.

(8) The indemnity may be paid or the insurance purchased from the property to which the personal liability relates and not from any other charitable property.

(9)

> If the executor, trustee, director or officer is deceased, the indemnity or the proceeds of the insurance may be paid to his or her estate.

A few comments are in order. First, the practice of providing a general authorization to indemnify in the bylaws of charitable corporations may no longer be acceptable given the mandatory criteria which must be considered before the corporation agrees to indemnify or purchase insurance on behalf of its directors. Second, in practical terms, the mandatory criteria which must be considered will be very difficult for both charities and those advising charities to weigh when assessing whether insurance should be obtained – surely the conclusion that most charities will reach is that the insurance should be purchased, the risks of liability being somewhat unfathomable in the best of cases.

Finally, it is important to keep in mind that while a general indemnification may be of some comfort, its usefulness is limited since a general indemnification depends on the financial ability of the corporation to satisfy the indemnity. For those not-for-profit organizations that have limited resources, it will likely be impossible to satisfy an indemnity. Of course, the most common way of providing financial protection to directors and officers is through the purchase by the organization of directors' and officers' liability insurance but it is important to realize that the liability insurance protection for directors and officers of not-for-profit organizations may not afford directors the protection that they intend since most policies contain a number of exclusionary clauses. For example, liability insurance does not cover directors for certain liabilities imposed by legislation, such as liability for failure to remit taxes, CPP or UI for employees or for remitting GST.

The best way of minimizing liability is for directors to exercise the appropriate degree of care and diligence in the performance of their duties.

5. Duties Imposed at Common Law

A. Overall Responsibility of a Board

The board of directors has the sole responsibility for the effective management of the corporation that it serves. The board is fundamentally responsible for defining the organization's mission and for accomplishing its objectives. As such, the board has a duty to comply with the organization's objects in carrying out the corporation's mandate, to be responsible for senior staff, to provide guidance and policy development and to be knowledgeable about the business and financial affairs of the organization. As discussed earlier, where the corporation is also a charity, the board also has a heightened duty of care in the protection of the organization's charitable property.[28] The Ontario Public Guardian and Trustee has referred to the board's duty of care in relation to charitable property as follows:

> Directors and trustees must handle the charity's property with the care, skill and diligence that a prudent person would use. They must treat the charity's property the

> way a careful person would treat their own property. They must always protect the charity's property from undue risk of loss and must ensure that no excessive administrative expenses are incurred.[29]
>
> As discussed earlier, where directors fall short of the prescribed duty of care in relation to charitable property, they may be found liable for breach of trust. As such, the board should play an active role in managing its assets, including: (a) making sure that it has a comprehensive investment policy in place; (b) being aware of the terms of any special purpose trust fund and complying with those terms; and (c) actively overseeing the organization's fundraising program so that it is aware of the fundraising methods being employed by staff or professional fundraisers.

We should also mention the potential trap of the "ex-officio" director. Many organizations have ex-officio directors, i.e., individuals who sit on a board of directors as a matter of right by virtue of holding some other office. Some ex-officio directors are specified to be voting and some are nonvoting. In order to avoid such a director being considered a full director (with all of the attendant duties and potential liabilities), it is very important for the bylaws of the organization to specifically state that such a director is "nonvoting". The same applies in some organizations with regard to advisory boards. In one charity, the advisory board consisted of the founders of the organization and to all intents and purposes, the advisory board functioned as the board of directors, with the "real" board of directors functioning in an advisory capacity to the named advisory board (the reason it was set up this way was so that the founders could be paid for their services). In my view, in a situation such as this, the members of the advisory board may have exposure to liability since they were acting as the directors of the organization (the real board having abdicated its responsibility).

I would recommend that organizations develop their own statement of individual board member's responsibilities (which serves to clarify expectations for board members). However, this article will limit its review to the underlying common law duties of directors which form the basis of any statement of responsibilities.

B. Directors as Fiduciaries and Resulting Duties

It has been settled law for some time that the position of a director with respect to the corporation is that of a fiduciary. (A fiduciary is a person having a duty, created by his or her undertaking, to act primarily for another person's benefit. It is a relationship that involves good faith, trust and special confidences.) There is no doubt that directors of nonprofit corporations are fiduciaries and are subject to the same common law fiduciary obligations as directors of business corporations generally. This means that the same standards of honesty and loyalty to the corporation must prevail in the exercise of a director's powers and discretion. It also means that a director must act in good faith and in the best interests of the corporation, always disclosing the entire truth in his or her

dealings with the corporation and avoiding a conflict of interest. As a result of the fiduciary duty, a director must subordinate personal interests to the best interests of the corporation. All of a director's duties spring from the fiduciary relationship of a director to the corporation. These other duties may be summarized as follows:

(i) *Duty of Honesty and Loyalty*
Probably the most fundamental duty of a fiduciary is honesty. A director must disclose the entire truth in his or her dealings as a director and must act with loyalty at all times.

(ii) *Duty of Diligence*
A director has a duty of diligence in the management of the affairs of the corporation. A director must attend meetings and become as fully informed as possible regarding all aspects of the corporation, including any issues that affect the corporation. While there is no legal obligation to attend board meetings, consistent failure to do so would probably be a breach of a director's duty of diligence.

(iii) *Duty to Avoid Conflict of Interest*
A director must have undivided loyalty to the corporation. Directors should not put themselves in a position which would create a conflict between their duty to act in the best interests of the corporation and their personal interest. In general terms this means that a director should not have any personal interest in any proposed contracts with the organization. In addition to a duty to avoid conflicts of interest, a director must not take personal advantage of opportunities that arise because of the association with the corporation.

There has been discussion with respect to whether this duty is more prohibitive than is necessary and whether or not it is feasible to prohibit directors from having any conflict of interest.[30] Many provinces allow for a director to participate in a contract or a proposed contract with the corporation if the director discloses the conflict of interest. For example, in Ontario, if a director declares his or her interest in the contract and the director's interest in the contract is confirmed by a majority of the votes cast at a general meeting of the members duly called for that purpose, the director will not be accountable to the corporation or to any of its members for any profit realized.[31] A similar provision is found in the *Canada Corporations Act.*[32]

(iv) *Duty to Comply with Letters Patent and Bylaws*
Every director of a corporation is under a duty to comply with the objects stated in the Letters Patent and the Bylaws. A director is only protected from liability when he or she is acting in accordance with the applicable standard of care and when acting within the authority granted by the corporation. When directors act beyond the scope of the authority set out in the corporation's objects, a director may be found personally liable.

(v) *Delegation by Directors*

Directors are, of course, entitled to delegate some of their responsibilities to committees, officers, or members of the corporation. In those cases, prudence suggests that the directors maintain a supervisory function with respect to the delegated tasks since the fact of delegation alone will not automatically relieve the directors from responsibility. It must always be remembered that directors are ultimately responsible for the overall management of the organization.

6. Statutory Duties and Liabilities

Various provincial and federal statutes impose personal liability on directors and officers of not-for-profit corporations in specific circumstances. In general the common statutory duties arise in relation to employees, reporting requirements, taxation and environmental regulations. Outlined below are some examples of statutory provisions under which directors or officers may be found liable. This is by no means an exhaustive list but provides a general idea of some of the more common areas of statutory liability. Depending on the particular activities of the organization and the province in which it carries on activities, it would be advisable to consult a solicitor to determine if there are any other areas of statutory liability affecting the directors.

A. Employees

(i) *Wages*

Many directors and would-be directors of not-for-profit corporations are not aware that they can be personally liable for debts to employees who have performed services for the corporation. For example, section 99 of the Canada Corporations Act provides as follows:

> The directors of the company are jointly and severally liable to the clerks, labourers, servants and apprentices thereof, for all debts not exceeding six months wages due for services performed for the company while they are directors respectively.[33]

There are a number of limitations to this liability: the services must have been performed during the directorship and a director is not liable unless (i) the corporation has been sued for the debt within six months after it became due and the employees have been unable to collect from the corporation; or (ii) the corporation has gone into liquidation, been wound up or declared bankrupt. In addition, directors must be sued for the debt while they are still directors or within one year after they cease to be directors.[34]

The Ontario *Corporations Act* imposes a similar liability on directors. Section 81(1) provides:

> The directors of a company are jointly and severally liable to the employees, apprentices and other wage earners thereof for all debts due while they are directors for services performed for the company, not exceeding six months wages, and for the

> vacation pay accrued for not more than twelve months under the *Employment Standards Act* or any predecessor thereof and the regulations thereunder or under any collective agreement made by the company.[35]

It is of note that unlike the federal legislation, the Ontario *Act* includes vacation pay. The Ontario *Act* also provides limitations for an action against a director. It provides that the director will not be liable unless the corporation has been sued for the debt within six months after it became due and execution on the judgment has been returned unsatisfied in whole or in part, or the company has gone into liquidation or has made an authorized assignment into bankruptcy or a Receiving Order under the *Bankruptcy Act* has been made against it and the claim has been fully filed and proved. In addition, the suit must be instigated while the person is a director or within six months after he or she ceases to be a director.[36]

(ii) *Source Deductions*

One of the most glaring areas of potential liability for directors is the liability imposed upon directors for the corporation's failure to remit federal taxes under subsection 227.1(1) of the *Income Tax Act*.[37] That subsection states:

> 227.1(1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold or remit or pay the amount are jointly and severally liable, together with the corporation, to pay that amount and interest or penalties relating thereto.

This section addresses source deductions in respect of wages, commission or remuneration paid to employees as well as withholding taxes. Directors must ensure that proper deductions are made from staff salaries.

Subsection 227.1(3) of the *Income Tax Act* does allow a director a defence:

> 227.1(3) A director is not liable for a failure under subsection (1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

Therefore, if the director has taken some positive action to ensure that controls are in place, such as establishing a payroll trust account, then the director will have exercised due diligence and may escape any personal liability. Similarly, directors may be found to have exercised due diligence by requiring the treasurer or CEO to report on a monthly basis to the board that all required remittances have been made to the government.

The issue of liability of directors of nonprofit corporations under Subsection 227.1(1) was considered by the Federal Court of Appeal in *Wheeliker* v. *Canada*.[38] At trial, O'Connor T.C.J. found as a matter of fact that the nonprofit

corporation at issue had failed to remit federal taxes owing. In determining whether the directors were liable under Subsection 227.1(1) or whether they had met the standard of care imposed by Subsection 227.1(3), the Court held that the standard demanded of volunteer directors of nonprofit corporation under section 227.1 "should not be as rigorous as the standard applied to directors of normal corporations run for profit". Applying this lower standard, O'Connor T.C.J. found that the directors had met the standard and were not liable. The Federal Court of Appeal overturned this decision, rejecting the notion of a different, lower standard of care applying to directors of nonprofit corporations. The Court found the six volunteer directors of the nonprofit corporation personally liable for the organization's failure to remit source deductions from the employees' wages.

Directors should also ensure that the corporation treats those who provide services to the organization as employees where appropriate. It should be noted that with more organizations hiring independent contractors to perform services, directors should ensure that they are protected against a claim that the independent contractor is in fact an employee and the organization has failed to deduct taxes. In several recent cases, the courts have found nonprofit organizations liable for unpaid source deductions, plus interest and penalties for employees whom the organizations had improperly characterized as independent contractors.[39] Directors are potentially liable under section 227.1 of the *Income Tax Act* in the event that the corporation is unable to satisfy the debt owed to Her Majesty for unpaid source deductions in these types of circumstances.

The federal *Employment Insurance Act*[40] *is another source of potential liability for directors. Every employer paying remuneration to a person employed in insurable employment must deduct insurance premiums in an amount prescribed by the Act for any week or weeks in respect of which remuneration is paid and must remit such amount to the Receiver General in the manner set out in the Act.* The *Act* imposes, in Section 39, penalties on employers who commit certain offences and also a penalty on any officer, director or agent who has "directed, authorized, assented to, acquiesced in or participated in the improper act". In addition, Section 46.1 provides that, if an administrative penalty is assessed against a corporation, the directors at the time of the improper act or omission are jointly and severally liable to pay the penalty if they did not exercise the degree of care, diligence and skill of a reasonably prudent person to prevent the breach.

Similarly, under the *Canada Pension Plan Act*,[41] every employer paying remuneration to an employee for pensionable employment must deduct Canada Pension Plan contributions with each payment of remuneration in an amount prescribed by the *Act*, and must remit such amounts to the Receiver General. Section 21.1 of the *Act* extends liability for failure to deduct or remit the

prescribed amounts to the directors of a corporation that has failed to comply with this requirement.

With respect to both the *Canada Pension Plan Act* and the *Employment Insurance Act* the same statutory defence under section 227.1(3) of the *Income Tax Act* is available to the directors where they have exercised the degree of care, diligence and skill to prevent the failure to remit that a reasonably prudent person would have exercised in comparable circumstances.

B. Incorporating Legislation

There is a wide range of reporting requirements in the statutes governing nonshare corporations, such as filing annual summaries or special returns. While ensuring that all reporting requirements are met may not seem to be something that directors should be concerned about, ultimately the board is responsible for the actions and omissions of the organization. Failure to file the requisite information with the appropriate ministry or government department can lead to personal liability for any and all directors as there is generally no limitation or possible defence for the director who permitted, or acquiesced in permitting, a breach to occur.

For example, section 114.2(5) of the *Canada Corporations Act* provides that if a corporation or officer is required to file any report, return, bylaw or other document with the Department of Industry and the corporation or officer defaults in such filing, the Minister may require the corporation or officer to make a report upon any subject connected with its default and any director or officer who knowingly authorizes or permits a default in providing such report is guilty of an offence and may be liable for a penalty of up to $50 per day while such default continues.

Liability may also be imposed if a director knowingly and wilfully permits a federally incorporated corporation to default in its obligation to file annual returns with the Department of Industry. Section 133(3) of the *Act* provides that a director may be liable for a penalty of up to $100 per day while such default continues. Under section 150(2), one finds one of the more onerous provisions of directors' liability: if all or some of the directors are aware of the corporation's default or failure to comply with the provisions of section 133 (filing of annual returns) or if the corporation fails for two or more consecutive years to hold an annual meeting of its members, the directors may be held personally liable for costs incurred in the winding-up of the corporation pursuant to a court order under the *Winding-Up and Restructuring Act.*

The Ontario *Corporations Act* sets out similar penalties for failure to file annual reports, special notices, or other information which the Ministry requires. In addition, in Ontario failing to file a notice in the *Ontario Gazette* may result in personal liability.

The Ontario *Act* also sets out a number of offences which can occur with respect to the organization's records and membership access to minute books. Section 304 makes it an offence if any director, officer or employee fails to keep records of proceedings, documents and registers, books of account and accounting records at the head office of the corporation or at another authorized location so that they may be opened to inspection during business hours. Under section 305, any person who fails to permit a person entitled thereto to inspect the minutes, documents or registers of the corporation and to take extracts therefrom may be liable to a fine of not more than $200. If a director or officer fails to provide or acquiesces in failing to provide a list of members to a person entitled thereto, under section 307 he or she may be liable to a fine of up to $1000.

Although there are few provisions in the statutes governing corporations that provide for imprisonment, one should note that if the director or officer does or assists in doing something that is criminal in nature, there may be consequences under the statute. For example, Section 303 of the Ontario *Act* provides that if a director or officer makes or assists in the making of an untrue entry in the minute book of the corporation or in any of the accounting or other records of the corporation as prescribed by that section, he or she may be liable to a fine of up to $1000 or imprisonment for up to three months or both.

Both the *Canada Corporations Act* and the Ontario *Corporations Act* contain general offence provisions for the breach of any of the provisions set out in the legislation and for which no express penalty has been described. For example, Section 149 of the *Canada Corporations Act* provides:

> Every one who, being a director, manager or officer of a company, or acting on its behalf, commits any act contrary to the provisions of this Part, or fails or neglects to comply with any such provision, is, if no penalty for such act, failure or neglect is expressly provided by this Part, liable, on summary conviction, to a fine of not more than one thousand dollars, or to imprisonment for not more than one year, or to both, but no proceeding shall be taken under this section without the consent in writing of the Minister.

The Ontario *Corporations Act* has a similar provision, however it is not a summary conviction offence, the Minister's consent is not required and the penalty is limited to $200.[42]

In Ontario, directors should also be aware of the *Corporations Information Act* which, in section 14(1) imposes liability on directors or other persons who make false or misleading statements in any documentation required under the *Act.* It also contains a general offence provision which provides that where a corporation is guilty of contravening the *Act* or regulations, every director and officer is also guilty of the offence and if the corporation is an extra-provincial corporation, every person acting as its representative in Ontario is guilty of an offence and on conviction is liable to a fine of not more than $2,000.[43]

C. Taxation

In addition to the potential liability for taxes and source deductions in relation to employees, directors and officers could be liable for criminal sanctions under sections 238 and 239 of the *Income Tax Act.*[44] Both registered charities and nonprofit corporations are exempt from tax under Part 1 of the *Income Tax Act;* however, they are not exempt from the reporting and compliance requirements set out in the *Act.* The penalties imposed for failure to abide by these provisions are steep: a registered charity could lose its charitable status or directors and officers could be liable for criminal sanctions.

In addition to liability imposed on directors under the *Income Tax Act,* the *Excise Tax Act*[45] has several provisions which impose joint and several liability on directors personally for failing to comply with the *Act.* As a general proposition, nonprofit corporations are required to pay GST on most acquisitions of goods and services (and certain charities and nonprofit corporations are entitled to a rebate of GST paid by them equal to the prescribed percentages set out in the *Public Service Body Rebate (GST) Regulations* which varies between 50 per cent and 83 per cent. In addition, nonprofit corporations may be required to collect and remit GST on goods and services provided by them to the public.

One of the most common mistakes made by directors of not-for-profit organizations is failing to collect and remit GST on membership dues. Whether or not GST is payable depends in part on whether there is a material benefit enjoyed by members as a result of their membership in the corporation. For example, a mere entitlement to receive a newsletter or other fringe benefit is not sufficient to make memberships subject to GST.

Section 323 of the *Excise Tax Act* imposes liability on directors of corporations that fail to remit "net tax" as required by subsection 228(2) of the *Excise Tax Act.* The limitation on claims expires within two years after the person ceases to be a director and the defence of due diligence is available in a manner similar to that under the *Income Tax Act.*

D. Environment

Although liability for failure to comply with environmental protection legislation is, for the most part, more of a concern only for directors in the business world, directors of not-for-profit organizations should also be aware of the potential liability in this area.

By way of example, directors need to be wary of potential liability in the event that the organization receives a gift of real property from a donor. There are a number of guidelines that the organization and its directors should follow. In essence, when an organization receives a gift of real property, it should carry out all of the usual searches that would be carried out in any purchase of real property. But in addition, it is important that the organization carry out an

environmental assessment, which may include an environmental audit, and accept the property only if (a) it contains no toxic substances, or (b) that the toxics are removed. If there are toxics on the property, the organization assumes liability for them. Directors should ensure that all of these searches and assessments are carried out prior to the organization taking title in order to ensure that they have carried out due diligence to the best of their ability and have met the standard of care that is expected in the particular situation.

It should be noted that under the *Canadian Environmental Protection Act, 1999*,[46] directors can be prosecuted even when the corporation itself is not being prosecuted. The statute imposes a variety of obligations and provides for fines of up to $1 million. Similarly, the *Ontario Environmental Protection Act*[47] requires that directors take reasonable care to prevent the unlawful discharge of contaminants into the natural environment. Section 194 of the Ontario *Environmental Protection Act* provides:

> Every director or officer of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge.

E. Occupational Health and Safety Legislation

The Ontario *Occupational Health and Safety Act*[48] is treated by the courts as public welfare legislation, violations of which are to be treated as offences of strict liability. The *Act* imposes on directors and officers a positive duty to take all reasonable care to ensure that the corporation complies with the *Act*, its regulations and any orders made thereunder. Under the *Act* and regulations, a corporation is required, among other things, to ensure the safety of a plant including providing prescribed and functioning safety equipment to workers, and carrying out the prescribed safety procedures. Failure to perform these statutory duties can expose a director to a fine of up to $25,000 and up to one year in prison.[49]

7. Summary

Given the legal risks assumed by directors in the voluntary sector, it is very important for directors to be aware of the laws and regulations affecting the organization and their own duties and potential liability within that legal framework. In addition, directors must be familiar with the internal regulating documents of the organization (bylaws, letters patent) and should take an active role in developing director responsibility statements, policies (such as conflict of interest policies or investment policies) and a legal risk management approach to the operations and activities of the organization (including fundraising).

FOOTNOTES

1. Lester, M. Salamon, "The Rise of the Nonprofit Sector", (1994), 73 *For. Aff.* 109.
2. M. Connell, "How will Canada pay for its charities", *Globe and Mail,* Nov. 29, 1994 A21.
3. *Ontario Business Corporations Act,* R.S.O. 1990, c. B.16,s. 134(1).
4. *Montreal Trust Company of Canada* v. *Scotia McLeod Inc.* (1995), 129 D.L.R. (4th) 711.
5. *Ibid.,* at 120.
6. *Society Act,* R.S.B.C. 1996, c. 433, section 25; *The Corporations Act,* R.S.N. 1990, c. C-36, subsection 203(1); *The Non-profit Corporations Act, 1995,* S.S. 1995, c. N-4.2, section 109; and *The Corporations Act,* R.S.M. 1987, c. C225, subsection 117(1).
7. [1925] A11 E.R. 485 (Eng. C.A.), Ch. 407, at 428, *per* Romer J.
8. *Re Toronto Humane Society and Ontario (Public Trustee)* (1987), 40 D.L.R. (4th) 111 (H.C.).
9. *Ibid.,* at 121.
10. [1951] 1 A11 E.R. (Eng,. Ch. Div.) 938 at 940.
11. *Ibid.,* at 938.
12. [1987] 58 O.R. (2d) 626, 26 E.T.R. 86 (Surr. Ct.).
13. *Charities Accounting Act,* R.S.O. 1990, c. C10.
14. *Supra,* footnote 8.
15. *Ibid.,* at 119.
16. *Ibid.,* at 122.
17. [1989] 60 O.R. (2d) 742, at 748, 34 E.T.R. 113, at 120 (H.C.).
18. *Ibid.,* at 747.
19. See *Re Christian Brothers of Ireland in Canada* (2000), 47 O.R. (3d) 674 (C.A.), rev'g (1998), 37 O.R. (3d) 367 (Gen. Div.) and *Public Guardian and Trustee* v. *Unity Church of Truth,* [1998] O.J. No. 1291 (Ont. Gen. Div.) (unreported).
20. *Supra,* footnote 8, s. 1(2).
21. Public Trustee for Ontario. "Submission to the Ontario Law Reform Commission: Project on the Law of Charities", *Estates and Trusts Journal,* Vol. 10 (1990–91) 272, at 277.
22. For an excellent review of restricted charitable gifts, see "Donor Restricted Charitable Gifts: A Practical Overview Revisited", by Terrance S. Carter, prepared for the Canadian Bar Association Ontario conference, *Fundamental New Developments in the Law of Charities In Canada,* October 27, 2000.
23. *Trustee Act,* R.S.O. 1990, c. T.23.
24. Hubert Picarda, *The Law and Practice Relating to Charities,* second ed. (London: Butterworths, 1995), at p. 374.
25. *Supra,* footnote 22, at p. 60.
26. *Canada Corporations Act,* R.S.C. 1985, c. C-32.
27. *Corporations Act,* R.S.O. 1990, c. C.38.

28. Ontario Law Reform Commission, *Report on the Law of Charities*, vol. 2 (Toronto: Ministry of the Attorney General, 1996) at 570.
29. "Duties, Responsibilities, Powers of Directors and Trustees of Charities", *Charities Bulletin*, No. 3: Information from the Public Guardian and Trustee's Charitable Property Program (Toronto: Office of the Public Guardian and Trustee of Ontario, July, 1999). (Also found at <www.attorneygeneral.jus.gov.on.ca/pgt)>.
30. See, for example, *Report on Conflicts of Interest: Directors and Societies*, Vols. 1 and 2, Law Reform Commission of British Columbia, 1995.
31. *Supra*, footnote 27, s.71.
32. *Supra*, footnote 26, s.98.
33. *Ibid.*, s. 99(1).
34. *Ibid.*, s. 99(2).
35. *Supra*, footnote 27, s.81(1).
36. *Ibid.*, s. 81(2).
37. R.S.C. c.1 (5th Suppl.).
38. *(sub nom Canada* v. *Corsano)*, [1999] 3 F.C. 173 (C.A.), leave to appeal denied April 20, 2000.
39. See for example, *Moose Jaw Kinsmen Flying Fins Inc.* v. *The Minister of National Revenue*, [1988] 2 C.T.C. 2377 and *Thunder Bay Symphony Orchestra Ass. Inc.* v. *Canada (Minister of National Revenue – M.N.R.*), [1998] T.C.J. No. 955.
40. R.S.C. 1985, c. E-5.6.
41. R.S.C. 1985, c. C.8.
42. R.S.O. 1990, c. C.38, s. 331.
43. *Corporations Information Act*, R.S.O. 1990, c. C.39, s. 14(2).
44. R.S.C. c. 1 (5th Suppl.).
45. R.S.C. 1985, C E-15.
46. R.S.C. 1999, c. 33.
47. R.S.O. 1990, c. E. 19.
48. R.S.O. 1990, c. O.1.
49. *Ibid.*, S. 66(1).