



How to Manage Your Potential Liability as a Director

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In November, the OBA's Charity and Not for Profit Section held an interesting session for lawyers involved with clients in the not-for-profit and charity sectors. The Session was chaired by Victoria Prince of Borden Ladner Gervais LLP, and included speakers Bill Pashby, Antonella Ceddia and Kathleen Waters.

The following is a brief summary of some of the information provided during the session.

A. Background

Many not-for-profit organizations and charities are interested in having lawyers become members of their boards of directors, regardless of the lawyer's area of expertise. Members of our profession are generally happy to oblige; after all, volunteering supposedly helps to achieve a work-life balance. However, the truth remains that liability exists for those who agree to sit on a board, even a volunteer board. For example, directors may be held liable for up to six months of unpaid wages for employees of their respective organizations under employment legislation.

B. Tips

The speakers had great suggestions on how one can manage the risks of sitting on a board, including the following:

1. Understand the organization and its expectations. Before accepting any position on a board of directors, you should conduct due diligence regarding the organization.

What is its purpose?

Review its letters patent, by-laws, and policies or codes. What is the mission of the organization? Is it a not-for-profit entity or a charity?

Not-for-profit corporations and charities are limited in their actions by their by-laws and constating documents. It is not uncommon for them to sometimes act beyond the scope of their authority. As a director, you will be responsible for ensuring that the corporation acts appropriately. Therefore, it is important for you to know what exactly the corporation can and cannot do.

Does the organization have internal or external legal counsel?

If not, what are its expectations towards you as a lawyer? Will you be asked to provide free legal advice?

What does it expect from you as a director (e.g. Financial contributions? Time commitment? Committee participation?).

Are you going to be able to meet all of the expectations competently? Could a conflict of interest arise from your position as a director?

2. Understand what protection is offered by your organization. Determine the extent of the organization's insurance coverage, particularly its Directors' and Officers' Liability Insurance coverage. If it does not have D&O Insurance, ask that such insurance be obtained. Also determine if the organization indemnifies its directors and officers.

3. Understand your own professional liability insurance.

Review LawPro's position and coverage with respect to your activities with the organization. The following is a link to a risk management checklist provided by Law Pro:

http://www.practicepro.ca/practice/pdf/Nonprofit_board_risk_management_checklist.pdf.

C. Other Things To Keep in Mind

If the above has not deterred you from sitting on a board, keep in mind the following:

1. Remuneration

Directors of not-for-profit organizations and charities usually do not get paid due to restrictions set out in the common law and statute. However, directors are often reimbursed for expenses incurred while acting as a director and may be paid for services rendered to the organization in a position other than as a director.

2. Do not create conflict

Directors have a fiduciary obligation to their corporations. This includes acting in the best interests of the corporation. As a result, whenever a potential or actual conflict of interest arises between yourself and the corporation, you will be responsible for taking certain steps to minimize the effect of such a conflict.

3. Do not advise if inappropriate

Do not provide advice outside of your sphere of expertise. The fact that the legal advice is unpaid does not exonerate you from liability.

4. No delegation allowed

Remember that directors' duties cannot be delegated, despite an extensive general misunderstanding to that effect. Therefore, if you do not believe that you will have the time or interest necessary to be an effective and diligent director, do not accept a position on a board.

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