

# FINANCIAL ACCOUNTABILITY FOR DEVELOPMENTAL SERVICE ORGANIZATIONS

Module 4- Board Liability and Responsibility



## Overview of Module 4

- Legal, statutory, ethical and administrative responsibilities for agencies have been referred to in each of the preceding modules
- This module will discuss the board's role related to these
- Please note that this entire module is presented as a discussion point and not as legal advice. Every agency should consider the issues presented, read the appropriate legislation, and/or consult a lawyer for interpretation and advice
- While some of the sections of this module refer to "Management", in most common law Management IS the board, and whoever they delegate to assist them

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# Ontario Corporations Act

## General information

- Please be advised that the Branch cannot give legal advice. This information is intended as a general guide only. For further or legal information, please consult private counsel.
- Please refer to Sections 130 and 131 of the *Business Corporations Act* for details on directors' liability and Sections 136 and 138 for information on indemnification of directors and insider liability.
- Directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages and up to 12 months' vacation pay (Section 131).
- Every director must act honestly and in good faith with the best interests of the corporation in mind when exercising powers and discharging duties (Section 134(1)).
- Every director and officer of an Ontario business corporation must comply with the *Business Corporations Act*, the Regulations to the *Business Corporations Act*, the Articles and bylaws of the corporation and any unanimous shareholder agreement (Section 134(2)).

## Other Potential Liability

- **There may also be potential liability** under Federal and other provincial statutes (e.g. *Income Tax Act*, *Employment Standards Act* and environmental statutes). If you have any questions about your potential liability as a director or officer, please contact your lawyer.

<https://www.ontario.ca/page/directors-liability-under-corporations-act#section-0>

# Ontario Employment Standards Act

## Directors' liability for wages

81. (1) The directors of an employer are jointly and severally liable for wages as provided in this Part if,
- (a) the employer is insolvent, the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;
  - (b) an employment standards officer has made an order that the employer is liable for wages, unless the amount set out in the order has been paid or the employer has applied to have it reviewed;
  - (c) an employment standards officer has made an order that a director is liable for wages, unless the amount set out in the order has been paid or the employer or the director has applied to have it reviewed; or
  - (d) the Board has issued, amended or affirmed an order under section 119, the order, as issued, amended or affirmed, requires the employer or the directors to pay wages and the amount set out in the order has not been paid. 2000, c. 41, s. 81 (1).

# Ontario Employment Standards Act

## Employer primarily responsible

- (2) Despite subsection (1), the employer is primarily responsible for an employee's wages but proceedings against the employer under this Act do not have to be exhausted before proceedings may be commenced to collect wages from directors under this Part. 2000, c. 41, s. 81 (2).

## Wages

- (3) The wages that directors are liable for under this Part are wages, not including termination pay and severance pay as they are provided for under this Act or an employment contract and not including amounts that are deemed to be wages under this Act. 2000, c. 41, s. 81 (3).

## Vacation pay

- (4) The vacation pay that directors are liable for is the greater of the minimum vacation pay provided in Part XI (Vacation With Pay) and the amount contractually agreed to by the employer and the employee. 2000, c. 41, s. 81 (4).

# Ontario Employment Standards Act

## **Holiday pay**

- (5) The amount of holiday pay that directors are liable for is the greater of the amount payable for holidays at the rate as determined under this Act and the regulations and the amount for the holidays at the rate as contractually agreed to by the employer and the employee. 2000, c. 41, s. 81 (5).

## **Overtime wages**

- (6) The overtime wages that directors are liable for are the greater of the amount of overtime pay provided in Part VIII (Overtime Pay) and the amount contractually agreed to by the employer and the employee. 2000, c. 41, s. 81 (6).

## **Directors' maximum liability**

- (7) The directors of an employer corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages, as described in subsection (3), that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than 12 months under this Act and the regulations made under it or under any collective agreement made by the corporation. 2000, c. 41, s. 81 (7).

# Ontario Employment Standards Act

## Interest

- (8) A director is liable to pay interest, at the rate and calculated in the manner determined by the Director under subsection 88 (5), on outstanding wages for which the director is liable. 2000, c. 41, s. 81 (8).

## Contribution from other directors

- (9) A director who has satisfied a claim for wages is entitled to contribution in relation to the wages from other directors who are liable for the claim. 2000, c. 41, s. 81 (9).

## Limitation periods

- (10) A limitation period set out in section 114 prevails over a limitation period in any other Act, unless the other Act states that it is to prevail over this Act. 2000, c. 41, s. 81 (10).



# Employment Standards Act

## **No relief by contract, etc.**

82. (1) No provision in a contract, in the articles of incorporation or the by-laws of a corporation or in a resolution of a corporation relieves a director from the duty to act according to this Act or relieves him or her from liability for breach of it. 2000, c. 41, s. 82 (1).

# Employment Standards Act

## Indemnification of directors

- (2) An employer may indemnify a director, a former director and the heirs or legal representatives of a director or former director against all costs, charges and expenses, including an amount paid to satisfy an order under this Act, including an order which is the subject of a filing under section 126, reasonably incurred by the director with respect to any civil or administrative action or proceeding to which he or she is a party by reason of being or having been a director of the employer if,
- (a) he or she has acted honestly and in good faith with a view to the best interests of the employer; and
  - (b) in the case of a proceeding or action that is enforced by a monetary penalty, he or she had reasonable grounds for believing that his or her conduct was lawful. 2000, c. 41, s. 82 (2).

# Employment Standards Act

## Civil remedies protected

83. No civil remedy that a person may have against a director or that a director may have against a person is suspended or affected by this Part. 2000, c. 41, s. 83.

# Ontario Not-for Profit Corporations Act, 2010

When ONCA comes into effect, it will:

- make the incorporation process for new not-for-profit corporations more efficient
- make a new distinction between public benefit corporations and other not-for-profit corporations
- allow a not-for-profit corporation to provide in its by-laws other means of voting (by mail, telephone or electronic means) in addition to, or in place of, voting by proxies
- clarify that not-for-profit corporations can engage in commercial activities if the activities support the corporation's not-for-profit purposes -a not-for-profit corporation may be subject to restrictions on its activities imposed by other legislation such as the [Income Tax Act](#)
- allow for a simpler process for reviewing the corporation's financial records -called a "review engagement," the process can take the place of an audit in some circumstances and, in some situations, neither an audit nor review engagement will be required

# Ontario Not-for Profit Corporations Act, 2010

When ONCA comes into effect, it will:

- require a corporation that has two or more classes or groups of members to set this out in the articles (instead of in the by-laws) -the by-law must set out the conditions of membership
- provide clearer rules for governing the corporation and increasing accountability -ONCA will provide a statutory duty of care for directors, which will require them to act honestly and in good faith with a view to the best interests of the corporation, and to exercise reasonable care, diligence and skill
- set out a due diligence and good faith reliance defence for directors -a director will not be legally liable in certain circumstances if they acted with the care, diligence and skill a reasonably careful person would have acted in similar circumstances
- list specific requirements for directors and officers to report a conflict of interest in certain circumstances

# Ontario Not-for Profit Corporations Act, 2010

When ONCA comes into effect, it will:

- state that corporations do not always have to include a member's proposal in meeting notices in certain circumstances
- provide members with actions they can take if they believe directors are not acting in the best interests of the corporation
- provide members with greater access to financial records
- streamline incorporation as a charitable corporation, which no longer requires Office of the Public Guardian and Trustee (OPGT) approval

## How ONCS Will Protect Directors from Legal Liability-Due Diligence

ONCA sets out a due diligence and good faith reliance defence under Section 44, which says that a director is not legally liable under Section 39 if they acted with the care, diligence and skill with which a reasonably careful person would have acted in similar circumstances.

The defence includes relying in good faith on the advice of advisors.

This defence allows directors to rely in good faith on professional advisors, and advice by management and other employees of the corporation

## How ONCS Will Protect Directors from Legal Liability-Due Diligence

44. A director is not liable under section 39 and has complied with his or her duties under subsection 43 (2) if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on,
- a) financial statements of the corporation represented to him or her by an officer of the corporation or in a report of the auditor of the corporation or of a person who conducted a review engagement of the corporation to present fairly the financial position of the corporation in accordance with generally accepted accounting principles;
  - b) an interim or other financial report of the corporation represented to him or her by an officer of the corporation to present fairly the financial position of the corporation in accordance with generally accepted accounting principles;
  - c) a report or advice of an officer or employee of the corporation, if it is reasonable in the circumstances to rely on the report or advice; or
  - d) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by them. 2010, c. 15, s. 44



## Section 40 of the Not-for-Profit Corporations act

40. (1) The directors are jointly and severally liable to the employees of the corporation for all debts not exceeding,

- a) six months' wages for services performed for the corporation that become payable while they are directors; and
- b) the vacation pay for not more than 12 months under the *Employment Standards Act, 2000* or under any collective agreement entered into by the corporation accrued while they are directors. 2010, c. 15, s. 40 (1).

## Section 40 of the Not-for-Profit Corporations act

### Limitation

- (2) A director is liable under subsection (1) only if,
- a) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part; or
  - b) before or after the action is commenced, the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy and Insolvency Act* (Canada), or a receiving order under that Act is made against it, and, in any such case, the claim for the debt has been proved. 2010, c. 15, s. 40 (2).

### Same

- (3) If execution referred to in clause (2) (a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution. 2010, c. 15, s. 40 (3).

## Section 40 of the Not-for-Profit Corporations act

### **Rights of director who pays debt**

- (4) If a director pays a debt under subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, the director is entitled to any preference that the employee would have been entitled to, and if a judgment has been obtained, the director is entitled to an assignment of the judgment. 2010, c. 15, s. 40 (4).

### **Same**

- (5) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim. 2010, c. 15, s. 40

## Ontario Charities Accounting Act

- There may be liability risks from co-mingling of donor restricted funds.
- The Charities Accounting Act in Ontario allows for the co-mingling of funds for investment purposes, but contravention of regulations controlling this in the act could expose directors to personal liability for breach of trust.
- Specifies that directors and officers may be indemnified only when they have acted honestly and in good faith in performing their duties

## Canada Income Tax Act- Donations and Retaining Charitable Status

- Canada Revenue has an excellent website to assist charities in complying with its regulations
- <http://www.cra-arc.gc.ca/chrts-gvng/menu-eng.html>
- There is a simple video on its website which gives a tutorial in gifting and receipting, which shows what does and doesn't qualify as gifts, how to fill out the receipt <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/vds-gftng-rcptng-eng.html>

## Canada Revenue Agency – Directors’ Liability (IT Information Circular IC89-2R3)

- <http://www.cra-arc.gc.ca/E/pub/tp/ic89-2r3/ic89-2r3-14e.pdf>
- This circular outlines circumstances where directors might be held liable personally for unpaid amounts held in trust for the crown should the corporation be unable to pay them.
- In order to avoid the liability the directors must show they exercised the degree of care, diligence, and skill (due diligence”) required to prevent the failure to deduct, withhold, remit, or pay.
- Examples of amounts held in trust for the crown are:
  - Payroll deductions such as CPP, EI and Employee income tax
  - HST

## Responsibility for Audited Financial Statements

Generally accepted accounting principles specify in Section 1001 of the CPA Handbook-Accounting that “Management is required to be knowledgeable about the primary sources of GAAP”

A standard auditor’s report includes this paragraph, titled “Management’s Responsibility for the Financial Statements”:

“Management is responsible for the preparation and Fair presentation of these financial statements in accordance with Canadian accounting standards for not-for-profit organizations, and for such internal control as management determines is necessary to enable the preparation of financial statements that are free from material misstatement, whether due to fraud or error.”

# Written Representations to Auditor

Module 2 provided details of written representations made by management and, where appropriate those charged with governance, regarding:

- Fraud
- Laws and Regulations
- Evaluation of Identified Misstatements
- Litigation and Claims
- Accounting Estimates
- Related Parties
- Subsequent Events
- Going Concern



## CPA Canada Directors Series

A series of publications - “20 Questions Directors of Not-for-Profit Organizations Should Ask About” -the following topics:

- Board Recruitment
- CEO Succession
- Fiduciary Duty
- Governance
- Human Resources
- Mergers
- Risk
- Social Enterprise
- Strategy and Planning

Other Publications for Not-for-Profit Boards:

- Liability Indemnification and Insurance for Directors of Not-for-Profit Organizations
- Board Oversight of Not-for-Profit Program Evaluation

# Insurance

- Exclusions in policies usually include claims made alleging personal misconduct such as fraud, criminal activity, willful breaches of the law and the gaining of illegal profit.
- Exclusions may also include professional services which can be triggered when a director who holds a professional designation goes beyond his or her oversight role and could be construed as professional advice
- “Duty to defend coverage”- the insurer must defend claims and bear the cost of the defence”
- “Duty to indemnify coverage”-the insured person and/or organization is responsible for mounting the defence, and then seeks to recover the costs from the insurer
- Damages are sometimes covered under the terms of a policy, but not normally actual liabilities for unremitted amounts such as those under the Employment Standards Act or Income Tax Act.

## Insurance Board of Canada

- The IBC also weighs in with a website on risk management, with some great tips on managing risk from an insurance perspective
  - <http://www.ibc.ca/on/business/risk-management>
- The IBC lists 3 Basic Duties for Directors and Officers
  - Duty of Diligence (Duty of Care): Act reasonably, in good faith and in the organization's best interest
  - Duty of Loyalty: Place the interest of the organization before your own.
  - Duty of Obedience: Act within the scope of applicable bylaws.