

# Risk Protection

Terrance S. Carter\*  
Carter & Associates, Barristers & Solicitors

## INTRODUCTION

### Generally

Risk can be defined as the possibility that something harmful or undesirable may happen. In their work, directors of not-for-profit corporations potentially face two distinct harmful or undesirable happenings:

- (a) that something will occur that adversely affects the corporation; and,
- (b) that they will be sued or otherwise held to account for a detrimental occurrence arising from their actions or inactions.

This chapter focuses on the second of these.

None of the various protections available to directors – due diligence, indemnification by the corporation, statutory provisions, insurance – are intended to provide an absolute protection against wrong-

doing. However, they are meant to provide some latitude for honest mistakes, without unduly endangering the corporation.

Risk assessment is a key part of any director's job, so it is perhaps appropriate that one of the first things a prospective director should do is assess whether there are sufficient protections available to make him or her comfortable in serving on the board of a particular not-for-profit corporation. The information set out below should be helpful in making that determination.

### Exposure

Liability risks for directors of not-for-profit corporations can arise by statute and at common law. A director can be held personally liable for his or her own actions or inactions – jointly (together with one or more of the other directors) and severally (individually). A summary of the most common

\* B.A., LL.B. Mr. Carter's firm, Carter & Associates, ([www.charitylaw.ca](http://www.charitylaw.ca)) is based in Orangeville, Ontario. He acts as counsel to Fasken Martineau DuMoulin LLP, in Toronto. The author would like to acknowledge the assistance of Jacqueline Connor, an associate with Carter & Associates, for reviewing and editing this chapter and Wen Wu, student-at-law, for assisting in research.

liability risks faced by directors of not-for-profit corporations, including specific reference to charitable corporations, where applicable, may be found in Chapter 3.

### Chapter scope

This chapter deals with selected legal risks faced by directors of not-for-profit corporations, and provides an overview of some steps that can be taken to protect against liability exposure. An exhaustive discussion of all liability risks would make the chapter disproportionately long. The chapter begins with a review of due diligence in various contexts, then discusses corporate indemnification, statutory protections, and insurance. A final section deals with some miscellaneous means of reducing liability exposure.

## DUE DILIGENCE

### Generally

As part of their fiduciary duty, directors of not-for-profit corporations have an obligation to exercise due diligence in overseeing and managing the operations of the corporation. This includes, for instance, attending board of directors' meetings, supervising the operations of the corporation, monitoring compliance with the corporate objects as set out in the corporation's letters patent, and ensuring that resolutions adopted by the board are based upon informed decisions of the directors.

Due diligence also means that directors must be familiar with all aspects of the corporation. For this reason, directors should avoid missing board of directors' meetings if at all possible. If a director cannot be present at a board meeting, the director

should arrange to review the minutes of the meeting and any financial statements or reports that were presented. If a matter is not clear to the director, he or she should follow up with appropriate questions at the next board meeting.

The obligation of directors of not-for-profit corporations to oversee the operation of the corporation and ensure compliance with the corporation's objects is an onerous one. Some models of board governance – notably originating in the United States – advocate that directors limit themselves to policy matters only and leave responsibility for administration and day-to-day matters with the executive staff of the corporation.<sup>1</sup> This limited role for directors does not reflect the obligations that are legally imposed upon directors, particularly directors of charitable corporations, in Canada.

The implementation of due diligence by the board of directors provides a good defence to claims of negligence and to alleged violations of some statutory liabilities.

### EXAMPLE

Under the *Income Tax Act* (Canada), directors of not-for-profit corporations have a duty to provide various governmental filings and to remit source deductions of income tax to the Canada Customs and Revenue Agency. To avoid liability, directors must be able to show that they took positive action to see that the corporation complied with the requirements of the Act. If directors can show that they exercised the degree of care, diligence and skill that a reasonably prudent person would have in the same circumstances, they will not be

personally liable for the corporation's failure to comply with the Act.

Due diligence does not provide a defence for all statutory violations, however. Under the *Anti-terrorism Act* (Canada), directors of charitable corporations may be liable for the actions of the charity in facilitating a 'terrorist activity' even though the directors may have exercised appropriate due diligence to prevent such events from occurring. Directors and their legal advisors should carefully review the *Anti-terrorism Act* (Canada) and related federal legislation to ensure that the corporation complies with the provisions and guards against becoming unwittingly caught by such legislation.

### **Liability risk for lack of corporate authority**

The activities of a not-for-profit corporation can only be undertaken within the parameters of the corporate objects set out in its letters patent, and any amendments in its supplementary letters patent. Certain activities may also require authorization by bylaw.

If directors allow the corporation to undertake activities that are outside the authority of the corporation's objects or not duly authorized by bylaw (i.e., *ultra vires* activities), they will become exposed to personal liability for the consequences of those actions.

*To avoid this type of liability, directors should:*

- obtain and carefully review the corporation's letters patent and any supplementary letters patent when they first become a director;

- obtain and carefully review the current general operating bylaws for the corporation; and,
- ensure that the board of directors reviews all of these corporate documents at least once a year.

If the corporation is considering undertaking new activities that go beyond what is spelled out in its letters patent, it must amend its corporate objects. This is done in supplementary letters patent. These must be obtained before undertaking any new activities. Supplementary letters patent amending the corporate objects cannot be granted retroactively. If a charitable corporation is considering amending its objects, the board of directors must first obtain approval from Canada Customs and Revenue Agency and, for charities incorporated in Ontario, from the Office of the Public Guardian and Trustee.

### **Contract liability risk for directors**

Directors who sign contracts for a not-for-profit corporation may face potential liability if the contracts entered into were not properly authorized by board resolution, or if the directors knowingly induced breach of the contract subsequent to the contract being signed. To reduce this possibility, directors should ensure that corporate contracts are duly authorized by the board of directors, and by members of the corporation when this is required by statute. Directors also need to exercise due diligence in ensuring that the terms of the contracts are complied with in order to avoid any allegations of their wrongful interference in inducing breach of contract.

### **Liability risks for negligent mismanagement**

Directors of not-for-profit corporations may also face personal liability where the activities of the

corporation are alleged to have been negligently mismanaged by its board. Some examples of negligent mismanagement are where the directors have permitted unsafe conditions to exist on the corporation's property which leads to a slip and fall incident, or they have permitted the negligent operation of a corporate vehicle or a third party vehicle that is involved in activities on behalf of the corporation.

Directors need to exercise due diligence in ensuring that, in situations where third party injury may be fully or partly attributable to a board policy or arise directly out of the conduct of board members, they carefully scrutinize the possible implications of their action or inaction.

### Screening

A number of high profile court cases involving not-for-profit corporations in recent years have dealt with abuse claims. The most common allegations are of sexual, physical and/or emotional abuse. To date, these cases have focused on the corporation's liability, rather than the liability of directors. Directors need to be concerned about the prevalence of such claims, however, for two reasons:

- the damages resulting from abuse claims can render a corporation bankrupt, insolvent or so impoverished that – for all practical purposes – it ceases to be able to function; and,
- where the abuse was partly attributable to corporation policy or occurred where there was direct involvement of directors, they could be personally liable.

Because of this, in a corporation dealing with clients or others vulnerable to abuse, such as children, there

should be a screening policy or protocol in place. Screening can also be implemented to reduce other liability risks, such as fraud or theft.

An appropriate screening process will, at a minimum, involve:

- risk assessment (i.e., determining the nature and extent of the risk);
- adoption of reasonable measures to take in the circumstances (in view of the risk assessment, standard of care required, costs, etc.);
- consistent application of screening (i.e., assessment of all those who seek or hold a particular position in the same way);
- integration of the results of screening into decision making;
- appropriate controls on the information gathered through the screening;
- on-going assessment of the effectiveness and implementation of the process; and,
- implementation of criminal record checks, where appropriate.

In developing a screening process, legal advice should be sought to ensure the policy or protocol meets statutory requirements arising from privacy, human rights, labour and other legislation.

Not-for-profit corporations should obtain consents from both current and applicant employees or volunteers and conduct criminal record checks before permitting them to work with children and others vulnerable to abuse. Criminal record checks should be supplemented by other means of verifying the background and reliability of individuals.

Corporations dealing with vulnerable individuals or groups should adopt and implement writ-

ten sexual abuse and harassment policies addressing such issues as screening, reporting procedures and discipline. Written policies assist in demonstrating that the corporation and its directors exercised due diligence with respect to potential abuse of children and other at-risk populations.

### **Reliance on assistance and advice**

Directors of not-for-profit corporations are required to exercise due diligence in making decisions about the operations of a corporation and the management of its assets. However, a board of directors does not always have all of the knowledge, expertise and experience required to fully perform the statutory and common law duties imposed upon them. They often need to rely on assistance and advice from management of the corporation and on advice from outside professionals.

### **Reliance on management**

Directors of not-for-profit corporations are entitled to rely on assistance and advice from management of the corporation to the extent that it would be prudent for them to do so. The board of directors can delegate the day-to-day operation of the corporation to management, but directors must remain responsible. They must maintain proper supervision and control over the decisions and actions taken by management. Delegating responsibilities or relying on assistance and advice from management does not relieve directors from liability. It is therefore important that the board of directors receives and reviews reports from management at each board meeting.

### **Reliance on outside professionals**

Directors of not-for-profit corporations, particularly charitable corporations, often need to obtain advice from outside professionals (e.g., lawyers, accountants, and tax professionals). These professionals are typically called in whenever the complexity of an issue or the degree of liability involved are beyond what the board is able to handle competently on its own.

Indeed, it is often wise to retain outside professionals because:

- Operating a not-for-profit corporation, particularly a charitable corporation, involves complex legal, accounting, tax and other issues. If neither the board of directors nor management of the corporation have sufficient knowledge about these issues, then the board of directors has a duty to seek advice and assistance to ensure compliance with the applicable laws and the common law duties imposed upon them.
- The corporation and its board of directors will be able to more effectively 'shift the legal risk away' from the corporation and themselves by downloading those risks to outside professionals, who will likely carry professional liability insurance.
- Reliance on outside professionals provides evidence of due diligence by the directors and helps to insulate the directors from liability.

When retaining outside professionals, the board of directors of a not-for-profit corporation must:

- ensure that the professionals chosen are qualified;
- ensure that the professionals have been given appropriate instructions and terms of reference; and,
- exercise prudence in requiring appropriate reports

of the work being performed by the outside professionals and in making decisions to either act or not upon the advice that is given by the outside professionals (i.e., merely obtaining outside reports and endorsing them without considering their pertinence or merit will not be sufficient to discharge the duty of a director).

Board members who are professionals themselves should not be asked to provide professional advice to the corporation. For both economic and practical reasons this should be avoided:

- It is unfair to these board members because they will not likely fully charge for their services. If the corporation is a charitable corporation operating in Ontario, these board members would be statutorily prohibited from charging at all for their services.
- Other directors may be reticent about questioning the professional opinion of a colleague. If the opinion turns out to be unsound, it could be both awkward and unpleasant to hold a fellow board member liable for negligence for his or her advice. This is especially true when the board member in question was only intending to act as an unpaid volunteer in giving the advice.

## INDEMNIFICATION

### Generally

Indemnification is an agreement by the corporation to cover the cost of, or compensate directors for, losses or damages caused by lawsuits based on the director's actions or inactions in his or her capacity as

a director. The undertaking to pay these costs must be set out in the corporate bylaws. Indemnification usually includes coverage for the cost of defending legal actions. Coverage may or may not extend to situations where the action is successful and the director is culpable; however, normally indemnification will not apply in situations where the act is illegal.

### All not-for-profit corporations

#### *Federal statutory provisions*

The *Canada Corporations Act*<sup>2</sup> permits a not-for-profit corporation to adopt a bylaw indemnifying the directors and officers of the corporation against all costs relating to any action or legal proceeding that arises from the execution of their duties of office. This does not apply to legal action that results from directors' or officers' own wilful neglect or default.

It is advantageous and advisable to adopt an indemnification bylaw. However, such a bylaw would be of little help in situations where:

- the corporation does not have sufficient assets or insurance coverage to meet the financial obligations of the indemnity;
- a director's or officer's acts were beyond the scope of his or her authority as a director, or a director acted without good faith or acted dishonestly;
- a director's or officer's actions or inactions constitute wilful neglect or default;
- a director's or officer's actions or inactions constitute a breach of his or her own fiduciary obligations to the corporation, even if this did not amount to wilful neglect or default;
- a director or officer is held personally liable for statutory monetary payments, such as unpaid wages or government deductions; or

- a director or officer is involved in a *Criminal Code* offence, such as sexual abuse against children or violation of provisions of the *Anti-terrorism Act* (Canada).

Although the *Canada Corporations Act* allows not-for-profit corporations to indemnify directors and officers, some corporations do not adopt indemnification bylaws. Others fail to ensure that the bylaw is properly adopted. Typically this happens because:

- the corporation has been in existence for a number of years and its board of directors was never advised of the importance of passing an indemnification bylaw;
- the wording of the indemnification bylaw incorrectly reflects the indemnification provision of a business corporation rather than the indemnification provisions contained in the *Canada Corporations Act* for not-for-profit corporations<sup>3</sup>; or
- the indemnification bylaw was never approved by the members of the corporation as required by the *Canada Corporations Act*.

#### *Provincial statutory provisions*

In Ontario, the *Corporations Act* (Ontario)<sup>4</sup> allows not-for-profit corporations to adopt a similar form of indemnification bylaw as that found in the *Canada Corporations Act*. Under the *Corporations Act* (Ontario) and similar corporate legislation in other provinces, a corporation may indemnify its directors and officers for personal liability arising from an act or omission in performing their duties. However, an Ontario not-for-profit corporation may not indemnify a director or officer for liability arising

from a failure of the director to act honestly or in good faith in performing those duties.

In Québec, the *Companies Act* allows directors to be indemnified “with the consent of the corporation given at any general meeting thereof” for costs, charges and expenses sustained in relation to a suit or proceedings brought against them with respect to the execution of their duties or in relation to the affairs of their office, if they are not occasioned by their own fault.<sup>5</sup> This bylaw can either be in regard to a particular action or apply more generally. In practice, a general bylaw providing for mandatory indemnification is preferred. This avoids directors being at the mercy of the members when the need for indemnification with respect to a specific matter arises.

Sometimes provincial statutes provide for indemnification within court proceedings, as well as or instead of by way of a bylaw.

For instance, the *Societies Act* (British Columbia) requires court approval of indemnification. It also requires honesty and good faith, and – in some contexts – reasonable grounds for believing the conduct was lawful. Section 30(2) of the Act provides:

A society may, with the approval of the court, indemnify a director or former director of the society or a director or former director of a subsidiary of the society, and his or her heirs and personal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, actually and reasonably incurred by him or her, in a civil, criminal or administrative action or proceeding to which he or she

is made a party because of being or having been a director, including an action brought by the society or subsidiary, if:

- (a) he or she acted honestly and in good faith with a view to the best interests of the society or subsidiary of which he or she is or was a director, and
- (b) in the case of a criminal or administrative action or proceeding, he or she had reasonable grounds for believing his or her conduct was lawful.

Directors of not-for profit corporations need to carefully determine what, if any, indemnification provisions govern in their jurisdictions.

### Charitable corporations

**NOTE**

*The following comments deal both with indemnification and insurance; see below for a discussion of the more general aspects of insurance.*

The Office of the Public Guardian and Trustee in Ontario has taken the position that a charitable corporation in Ontario cannot indemnify its directors or purchase directors and officers liability insurance without first obtaining court approval. Its rationale is that these measures are a perceived benefit to directors. This extension of the common law rule prohibiting remuneration of directors of charitable corporations has proved to be an awkward restriction on the operation of charitable corporations.

As a result, the *Charities Accounting Act* has

been amended and now includes regulations that allow a charitable corporation in Ontario to indemnify its directors or officers from personal liability for acts or omissions arising from the performance of their duties. Charities must follow the requirements of the regulations and cannot indemnify a director for liability arising from a failure to act honestly or in good faith.

The same regulations permit charities to purchase directors and officers insurance to cover personal liability arising from the acts or omissions of directors or officers in performing their duties. However, the terms of the directors and officers insurance and the terms of the indemnification bylaw may not impair a third party's right to bring legal action against the director or officer. The regulations also state that the purchase of the insurance policy must not unduly impair the carrying out of the religious, educational, charitable or public purposes for which the charity holds property. The board of directors of the corporation must consider the following criteria before giving an indemnity or purchasing directors and officers insurance:

- the degree of risk to which the director or officer is or may be exposed (e.g., a charity engaged in research will likely be at less risk than a charity engaged in service delivery);
- whether, in practice, the risk cannot be eliminated or significantly reduced by means other than the indemnity or insurance (e.g., can the charity institute procedures or designate staff to monitor and respond to the risk);
- whether the amount or cost of the insurance is reasonable in relation to the risk;
- whether the cost of the insurance is reasonable in



relation to the revenue available to the charity;  
and,

- whether it advances the administration and management of the charitable property to give the indemnity or purchase the insurance.

The regulations state that a charity cannot pay an indemnity or purchase insurance if, as a result, the amount of debt and liability of the corporation would exceed the value of the charitable property or would render the corporation insolvent. In addition, the indemnity may only be paid or the insurance purchased from the charitable property to which the personal liability relates and not from any other charitable property. This means that income from donor restricted funds, such as endowment funds, that would otherwise not normally attract liability for a director or officer should not be used to purchase directors and officers liability insurance or to pay an indemnity claim. Diversion of such monies for indemnification or insurance could be challenged as use of the charitable property for an improper purpose.

For federally incorporated charities, and in common law provinces other than Ontario – where the matter has been dealt with through legislation – the question of whether indemnification or insurance constitutes a benefit for directors of charities has not been settled. If not improper, such measures in these jurisdictions are at least subject to being challenged unless sanctioned by a court. Since Québec is a civil law jurisdiction, this issue does not arise.

## INSURANCE

### Generally

Boards should consider obtaining one or more of the various types of insurance coverage available, as is appropriate given their corporation's work and resources.

### All not-for-profit corporations

#### *Directors and officers liability insurance*

The general liability insurance policy of a not-for-profit corporation provides only limited protection to directors or officers against any alleged wrongful acts. This type of policy, which is commonly carried by corporations, usually protects against claims arising in the context of the organization's operations.

A corporation that is involved in activities that may expose directors or officers to personal liability should obtain a separate insurance policy for its directors and officers to supplement its general liability insurance coverage. Directors and officers liability policies typically protect against claims arising out of board decisions or omissions, or out of actions or activities performed directly under the auspices of the board or directors. Where directors and officers act as trustees, claims arising from that aspect of their work are not covered by standard directors and officers liability insurance. A 'fiduciary liability' policy is required to protect against these types of claims.

There are as many different kinds of directors and officers liability insurance policies as there are insurance companies. Typically, these policies protect directors and officers of not-for-profit corporations for the following:

- damages which they become legally obligated to pay and for which the corporation cannot or will not pay; and,
- claims made against a director or officer whom the corporation is obliged to indemnify.

Some of the more important considerations to keep in mind when obtaining directors and officers liability insurance are the following:

- The policy should extend to all past and present directors, officers and committee members of the corporation.
- Directors and officers insurance policies are normally issued on a "claims made basis." This means that the corporation must notify the insurer before the termination of the policy period of any possible or potential claims that the directors and officers of the corporation may be aware of.
- The policy should include a provision that notice of cancellation of the policy be directed not only to the corporation but also to the chair of the board of directors. This will ensure that the board is notified of any intended cancellation of the policy.
- Directors and officers liability insurance complements the general liability insurance coverage of the not-for-profit corporation. Therefore, the amount of coverage should, if possible, match that of the general liability policy, assuming that this much coverage is available and the not-for-profit corporation can afford the premiums.
- A directors and officers liability policy insures against risks that are not covered under the general liability insurance policy, but does not cover all actions against directors and officers. Therefore, it is important for directors to review the exclusions in the coverage and, where possible, to consider obtaining any necessary additional coverage (such as a fiduciary liability policy).

■ Directors and officers liability insurance of a not-for-profit corporation will probably not provide coverage for actions by public authorities for breach of trust arising out of a mishandling of trust funds, improper investments, violations of the *Anti-terrorism Act* or other statutory violations.

#### *Limitations in general liability protection*

General liability insurance policies often contain limitations in coverage. Directors of a not-for-profit corporation should review their general liability coverage and be aware of any limitations. These may include:

- insufficient amount of insurance to cover all anticipated risks;
- exclusion of coverage for sexual and/or physical abuse of children;
- exclusion of coverage for sexual harassment;
- limitation on the geographic area covered by the policy;
- limitation on who is covered under the terms of the policy;
- exclusion of coverage for penalties and fines;
- limitations on legal cost coverage;
- exclusion of coverage where the corporation has failed to advise the insurer of changes in insurable risks; and
- exclusion of coverage where the corporation has failed to report claims to the insurer on a timely basis.

### *Insurance coverage for sexual abuse and/or harassment*

If the not-for-profit corporation's current insurance policy does not provide protection for sexual abuse and/or harassment, but the corporation faces a risk in this regard, the board of directors must be made aware of this lack of coverage. The directors stand a significant risk of being exposed to personal liability if such claims should arise.

Where insurance coverage for sexual abuse and/or harassment is available, it is advisable to obtain it on an "occurrence basis" rather than a "claims made basis."

"Occurrence based" policies provide coverage for all incidents occurring during a particular period in time (i.e., the coverage period of the policy), regardless of when the claim is made and whether or not a future board of directors remembers to maintain the insurance policy in the future.

"Claims made" policies, in contrast, provide coverage only if the policy is in effect when the claim is made, regardless of when the event causing the claim occurred. It is not retroactive. This means that claims for abuse allegations that were made prior to the implementation date of the "claims made" coverage would be expressly excluded from coverage. This may result in gaps in insurance coverage for either past or future incidents, which in turn could lead to increased liability exposure for the directors of the corporation.

In summary, it is generally in the best interests of the board of directors to ensure that the corporation has insurance coverage for sexual abuse and/or harassment and, if possible, that is "occurrence based."

### **Charitable corporations**

All of the above comments concerning insurance for not-for-profit corporations apply equally to charitable corporations, except for the purchase of directors and officers liability insurance policies. In Ontario, as explained above, the Office of the Public Guardian and Trustee in Ontario takes the position that the purchase of directors and officers liability insurance by a charitable corporation provides a personal benefit to the directors. However, regulations under the *Charities Accounting Act* (Ontario) now permit charitable corporations to purchase directors and officers insurance, provided that they comply with the statutory requirements contained in the regulations. (For a summary of the Ontario regulations, and a discussion of the law in other jurisdictions, please refer to the note on **Charitable corporations** in the section of this chapter that deals with indemnification.)

## **STATUTORY PROTECTION**

### **Generally**

Directors of not-for-profit corporations are, by-and-large, not accorded as much statutory protection as their counterparts in business corporations. The *Canada Corporations Act* provides only limited statutory protections to not-for-profit directors. These are set out below.

### **Protection from third party contractual liability**

Under the *Canada Corporations Act*,<sup>6</sup> directors and officers of a not-for-profit corporation are not in the normal course subject to personal liability to any

third parties when they enter into a contract, agreement, or engagement with another entity, so long as they are acting within the scope of their authority as agents or servants of the corporation. (Note, however, that in such dealings section 27 of the Act holds directors potentially liable in circumstances where there is flawed or incomplete identification of the corporation in the written instrument relating to the transaction.)

### Protection from conflict of interest

Directors of not-for-profit corporations have a duty to avoid conflicts of interest or even the appearance of a conflict of interest. This means that if a director directly or indirectly profits from his or her dealings with or from his or her position in a not-for-profit corporation, the director will be in breach of his or her fiduciary duty and will be held accountable to the corporation for the benefits received. The *Canada Corporations Act*, however, has relaxed this common law rule by allowing directors to enter into otherwise improper arrangements without running the risk of being in breach of their fiduciary duty.

The *Canada Corporations Act*<sup>7</sup> states that if a conflict exists, the director must declare the conflict of interest at the meeting of the board of directors and not participate in any discussion or vote (see Chapter 2 for fuller discussion of these provisions). If these statutory requirements are met, the interested director will not be held accountable for the benefit received and the director will not be liable for the profit realized by any contract that he is directly or indirectly interested in where a contract has been confirmed by the vote of members at a special general meeting called for that purpose.

## OTHER MEANS OF REDUCING LIABILITY EXPOSURE

There are a number of other practical measures that can be taken for board members to reduce their exposure to liability. A few of the simpler means that can be adopted are:

- Strike a legal risk management committee to identify areas of risks, to recommend remedial steps that can be taken, and generally to advise the board of directors on implementing appropriate procedures or measures to establish the due diligence of the board.
- Encourage directors to obtain independent legal advice in situations where they may be facing a high degree of exposure to personal liability (e.g., where the corporation faces insolvency). This allows directors to independently determine the level of personal risk that they are prepared to accept.
- Reduce the numbers of persons serving as members on the board of directors (i.e., diminish the likelihood of an ill-advised decision being taken).
- Increase the use of committees and advisory boards made up of individuals who are not board members (i.e., create a structure that increases resources and diversifies responsibility for dealing with various aspects of the corporation's operations).
- Transfer personal assets of board members to their spouses before joining the board of directors.



#### SAMPLE QUESTIONS FOR PROSPECTIVE OR CURRENT DIRECTORS TO ASK THE ORGANIZATION

- 1) Are the corporation's policies written down and distributed to all board members?
- 2) Has the corporation conducted an assessment of its legal risks? When was this done? By whom?
- 3) Do the corporation's bylaws provide for indemnification of directors?
- 4) Does the corporation do everything it can to inform directors about and protect them from any possible litigation?
- 5) Does the corporation routinely deal with children or other vulnerable populations? Does the corporation have a screening policy? If so, what is it and how is it carried out? Is there provision in the screening policy for obtaining consents from individuals subject to security checks? Does the corporation have a written policy dealing with sexual abuse?
- 6) Does the corporation have in place adequate insurance to cover potential liability? How often is this insurance coverage reviewed? By whom?
- 7) Does the corporation have directors and officers liability insurance for its directors? What is covered and what is excluded?

#### SAMPLE QUESTIONS FOR PROSPECTIVE OR CURRENT DIRECTORS TO ASK THEMSELVES

- 1) Have I read all of the corporation's policies and do I understand them?
- 2) Do I understand any legal risks that the corporation may face?
- 3) Do I understand the legal risks that I may face when serving as a director of a not-for-profit corporation?
- 4) Do I know how to limit my liability as a director of a not-for-profit corporation?
- 5) I am satisfied that the corporation's screening practices are appropriate given the nature of its activities?
- 6) Do I understand the insurance coverage that is in place for the corporation and for its directors?
- 7) Do I understand what is covered and what is not covered?

## RISK PROTECTION CHECKLIST

SUBJECT	TO BE CONDUCTED BY	HOW OFTEN	COMMENT
1. Due diligence	Full board	Annually and/or at the time of the decision or transaction	Have the requirements of due diligence been met before a particular decision is taken or particular transaction is entered into?
2. Screening	Full board	Annually	Are the corporation's screening practices appropriate in light of our current operations? What is the mechanism for monitoring implementation of the screening, and is this adequate?
3. Reliance on management	Full board	Annually	Is there adequate and on-going supervision of management in light of the responsibilities that have been delegated to them?
4. Reliance on experts	Full board	At the time of the decision or transaction	Is the board satisfied with the expert's credentials and with the quality of the work or advice? Has the board carefully weighed the expert's input, and then taken an independent decision on the issue?
5. Indemnification	Full board	Annually	Do the corporation's bylaws provide for indemnification, and does that indemnification accord with the requirements of the incorporating legislation? If the corporation is a charity, is the indemnification authorized by statute or a court; if not, what steps (e.g., obtaining a legal opinion) has the corporation taken prior to providing indemnification?

6. Insurance, general	Full board	Annually	Does the corporation have adequate and appropriate insurance coverage, considering its mandate and activities. What are the scope and limitations of the insurance policies it has in place?
7. Insurance, directors and officers liability	Full board	Annually	Does the insurance coverage extend to committee work by board members, and/or to committee work by non-board members? Does it cover individuals who may be involved in corporate governance even through they do not sit as board members – i.e., members of advisory bodies? If not, is insurance necessary and provided for in these instances?
8. Other measures to reduce liability	Full board and individual directors	Annually	Have the directors as a group, and as individuals, taken all possible steps to reduce their exposure to liability?