
GRACE APOSTOLIC CHURCH LEGAL SEMINAR

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Board Governance Issues for Church Boards and Trustees The Legal Duties of Directors of Charities (Power Point Presentation)

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A. OVERVIEW OF TOPICS

- **Introduction**
- **Common Law Duties and Liabilities**
- **Statutory Duties and Liabilities**
- **See Handout on Legal Duties of Charities at www.charitylaw.ca for details**

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B. COMMON LAW DUTIES AND LIABILITIES

- **Management of the Corporation**
 - **Directors responsible for all aspects of corporations operations**
 - **To fulfill duties, directors must ensure:**
 - **Objects are properly carried out and activities comply**
 - **Corporation's financial stability and overall performance**
 - **Proper hiring and supervision of management and staff**

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- **Duty of Care**
 - **Directors of all corporations must exercise certain standard of care in carrying out duties**
 - **But standard of care varies depending on type of corporation**
 - **Business corporation**
 - **Statutory objective standard of care**
 - **Reasonably prudent person**

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- **Not-for-profit corporation (non-charity)**
 - **Common law subjective standard of care**
 - **Director's own knowledge and experience important**
- **Charitable corporation**
 - **Additional expectations beyond subjective standard**
 - **Directors of charities also subject to fiduciary duties as quasi-trustees of charitable property**

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- **Liability Risk for Lack of Corporate Authority**
 - **Corporate authority defined by corporate objects in governing documents**
 - **All corporate activities must fall within parameters of these objects**
 - **Liability results where directors act outside scope of this authority**

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- **Liability Risk for Negligent Mismanagement (Tort)**
 - **Tort is civil wrong for which injured party can seek damages from the court**
 - **Directors can be personally liable for corporation's torts where own conduct contributed to victim's injury**
- **Liability Risk in Contract**
 - **Directors generally not personally responsible for contracts signed for corporation**
 - **However, need to have proper corporate authority to sign contracts and ensure contractual terms are complied with**

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- **Liability Risk for Breach of Fiduciary Duty**
 - **Overview**
 - **Directors of charitable corporations, subject to fiduciary duty to act as quasi trustee of charitable property**
 - **Directors have primary obligation to exercise due diligence in overseeing corporation**
 - **Fiduciary duties owed to charitable objects, corporation, donors and creditors**

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- **Summary of fiduciary duties**
 - **Duty to act honestly**
 - **Conflicts of interest to be avoided and disclosed**
 - **Directors must not act fraudulently**
 - **Duty of loyalty**
 - **Director's sole interest is to the corporation**
 - **Director's interests not to be placed in conflict with those of corporation**

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- **Duty of diligence/duty to act in good faith**
 - **Directors to diligently attend to duties by being familiar with all aspects of corporation**
 - **Where necessary, advice of qualified professionals to be sought**
- **Duty to exercise power**
 - **Directors responsible for managing corporation**

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- **Delegation to management, staff and volunteers is possible, but directors must always supervise**
- **Duty of obedience**
 - **Directors must comply with applicable legislation and corporations governing documents**
 - **All valid corporate decisions must be implemented**

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- **Duty to avoid conflict of interest**
 - **Conflicts of interests to be avoided**
 - **Directors must also avoid anything that gives director appearance of a personal benefit**
 - **Where conflicts occur, they are to be declared, director to not participate in discussions or vote, and may even have to resign**

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- **Duty of prudence**
 - **Directors with special expertise must use it prudently to achieve best result for corporation**
- **Duty to continue**
 - **Resignation as director will not relieve all obligations**
 - **May even constitute breach of trust**
 - **Independent legal advice should be obtained in considering resignation**

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- **Liability for Breach of Trust**
 - **Overview**
 - **In addition to fiduciary quasi trustee duties, directors of charitable corporations may also be trustees of charitable property**
 - **However, fiduciary duties and trustee duties essentially the same**
 - **Aids Society case emphasizes that directors have obligation to apply charitable property to charitable objects**

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- **Where charitable property lost as a result of actions or inactions of directors, breach of trust could be found**
- **Potential liability risks**
 - **Remuneration of directors**
 - **In Ontario, directors of charitable corporations can not receive direct or indirect remuneration, e.g. as employee or contractor, without court approval**
 - **Indemnification and directors' insurance now available**

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- **Dealing with charitable property**
 - **Directors responsible for handling of charitable property**
 - **Personal liability results where mismanagement occurs**
- **Dealing with charitable objects**
 - **Charitable property only to be applied to charitable objects**
 - **Failure to properly apply charitable property may result in liability**

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- **Dealing with special purpose charitable trusts**
 - **Directors of charitable corporations have fiduciary obligations to donors**
 - **Liability for breach of trust possible where donor restrictions or terms of endowment funds are not complied with**
- **Investment of charitable funds**
 - **Directors may sometimes have specific duty to invest charitable property**

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- **Liability can result from failure to comply with investment powers as well as bad investments, overly conservative decisions and missed opportunities**
- **Co-mingling of donor restricted funds**
 - **Are gifts subject to restrictions or limitations**
 - **Co-mingling of donor restricted gifts now possible under *Charities Accounting Act* (Ontario) regulations**
 - **See charity law bulletin #4 at www.charitylaw.ca**

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C. STATUTORY DUTIES AND LIABILITIES

- **Overview**
 - **Many federal and provincial statutes impose offences and penalties for acts and omissions of corporate directors**
 - **Directors can be held personally liable, as well as jointly and severally, with other directors**
 - **Only defence is due diligence**
 - **Resigning as a director may not limit liability though there are generally limitation periods**

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- **Federal Statutes**
 - *Canada Corporations Act*
 - **Wages and vacation pay**
 - **Conflict of interest**
 - **Reporting requirements**
 - **Books, minutes and records**
 - **Identification of corporation**
 - **Membership lists**
 - **Winding up**
 - **General penalty**

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- *Income Tax Act (Canada)*
 - **Directors liability to pay employee income tax deductions for two years after term of office**
 - **Personal liability possible for failure to comply with reporting requirements, e.g. annual charity information return or improper charitable receipts, or for giving improper tax advice**
 - **Avoid liability by showing positive steps taken to ensure compliance**

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- *Excise Tax Act (Canada)*
 - **Directors liable for corporation's failure to collect & remit GST**
 - **Liability continues for two years after cease to be director**
- *Canada Pension Plan*
 - **Joint and several liability where corporation fails to remit employee pension premiums**

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- *Canadian Environmental Protection Act*
 - **Positive duties imposed on directors to ensure compliance in relation to air and water pollution as well as toxic substance storage and disposal**
 - **Failure to comply could result in prison terms and fines**
- *Anti-terrorism Legislation*
 - **Legislation has serious liability risks for charitable corporations and directors, particularly those involved in overseas work**

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- **Risks include seizure of charitable property, loss of charitable status and criminal code charges**
- **See antiterrorism.ca**
- **Criminal Code**
 - **Bill C-45 amending the Criminal Code provides for criminal liability for injury or death arising from actions or inaction by the charity**
 - **Bill C-250 (Hate Crimes) or replacement legislation amends the Criminal Code for Hate Crimes**

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- **Ontario Statutes**
 - *Corporations Act (Ontario)*
 - **Reporting requirements**
 - **Conflict of interest**
 - **General offence provision**

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- *Employment Standards Act (Ontario)*
 - **Fines imposed on directors for failure of corporation to pay wages, vacation pay and severances**
 - **6 months liability for wages and 12 months liability for vacation pay, plus fines**
 - **However, limitation periods are available**

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- *Retail Sales Tax*
 - **Directors jointly and severally liable where corporation fails to remit**
- *Workplace Safety and Insurance Board Act (Ontario)*
 - **Directors liable for corporation's failure to remit premiums unless it can be shown they did not intend to pay them**

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– *Pension Benefits Act (Canada)*

- **Directors who fail to pay corporation premiums for employee's pension plans and to hold monies in trust may be ordered to make up contribution**
- **Failure to comply may subject directors to fines**

– *Ontario Health Insurance Program*

- **Directors will be held personally liable for premiums and health tax not paid by corporation**

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– *Occupational Health and Safety Act (Ontario)*

- **Directors required to take reasonable steps to comply with workplace health and safety requirements**
- **Failure to do so will result in fines to corporation and its directors**

– *Environmental Protection Act (Ontario) and Related Legislation*

- **Directors required to take reasonable care to prevent unlawful discharge of contaminants**

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- **Persons in control of contaminants are responsible for cleanup and related costs**
- **Appropriate environments audits need to be obtained before purchasing or receiving land**
- ***Child and Family Services Act (Ontario)***
 - **Failure to report child abuse is an offence**
 - **A charitable corporation and its directors may be liable where employees fail to report abuse or where it occurs because of failure to monitor employees and operations**

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- ***Trustee Act (Ontario)***
 - **Act establishes that directors of charitable corporations have power and duty to invest assets of charity**
 - **Investments must be in accordance with prudent investor standard**
 - **See charity law bulletin #8 at www.charitylaw.ca**
- ***Charities Accounting Act (Ontario)***
 - **Act gives rights to donor and Public Guardian and Trustee (PGT) to call directors to account for improper use of**

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Charitable property as well as fundraising practices

- **Co-mingling of donor restricted funds is permitted provided there is strict compliance with the act's requirements**

- **Fundraising**
 - **Specific charitable statutes concerning fundraising**
 - **General statutes affecting charitable fundraising**

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