

---

# INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO

---

## DIRECTOR AND OFFICER LIABILITY AND BEYOND

Fall/Winter 2004  
(revised)

- Part I – The Legal Duties of Directors of Charities and Not-for-Profits**
- Part II - Good Governance in Meeting the Duties of Directors of Charities and Not-for-Profits**
- Part III - Due Diligence in Avoiding Risks for Directors of Charities and Not-for-Profits**
- Part IV - How to Avoid Liability in Fundraising**
- Part V - Recent Changes to the Income Tax Act and Policies Relating to Charities and Charitable Gifts**
- Appendix A,B and C**

---

**By Terrance S. Carter, B.A., LL.B.**

© 2004 Carter & Associates

**CARTERS**.ca

**CARTER & ASSOCIATES**  
PROFESSIONAL CORPORATION

BARRISTERS, SOLICITORS & TRADE-MARK AGENTS  
Affiliated with Fasken Martineau DuMoulin LLP

**Main Office Location**

211 Broadway, P.O. Box 440  
Orangeville, ON, Canada, L9W 1K4  
Tel: (519) 942-0001  
Fax: (519) 942-0300  
Toll Free: 1-877-942-0001

[www.carters.ca](http://www.carters.ca)

**National Meeting Locations**

**Toronto** (416) 675-3766  
**Ottawa** (613) 212-2213  
**London** (519) 937-2333  
**Vancouver** (877) 942-0001  
"Proactive Advice"®

[www.charitylaw.ca](http://www.charitylaw.ca)

---



**INSTITUTE OF CHARTERED  
ACCOUNTANTS OF ONTARIO  
DIRECTOR AND OFFICER LIABILITY  
AND BEYOND  
Fall/Winter 2004  
(revised)**

---

**Part I**

**The Legal Duties of Directors  
of Charities and Not-for-Profits**

By Terrance S. Carter, B.A., LL.B.

**CARTERS.ca** © 2004 Carter & Associates  
PROFESSIONAL CORPORATION  
 BARRISTERS, SOLICITORS & TRADE-MARK AGENTS  
 Affiliated with Paquet Martineau DuMoulin LLP

Main Office - Orangeville, ON  
 National Meeting Locations  
 Toronto - Ottawa  
 London - Vancouver  
 Toll Free: 1-877-942-0001  
[www.carters.ca](http://www.carters.ca)  
[www.charitylaw.ca](http://www.charitylaw.ca)

---

---

---

---

---

---

---

---

---

---

**A. OVERVIEW OF TOPICS**

- Introduction
- Common Law Duties and Liabilities
- Statutory Duties and Liabilities

**Note: For a more detailed discussion, see  
attached Appendix A**

2

---

---

---

---

---

---

---

---

---

---

**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 with objects
    - Corporation’s financial stability and overall performance
    - Proper hiring and supervision of management and staff

3

---

---

---

---

---

---

---

---

---

---

- **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

4

---

---

---

---

---

---

---

---

- **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

5

---

---

---

---

---

---

---

---

- **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

6

---

---

---

---

---

---

---

---

- **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 or inaction 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

---

---

---

---

---

---

---

---

- **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

---

---

---

---

---

---

---

---

- **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

---

---

---

---

---

---

---

---

- **Duty of diligence/duty to act in good faith**
  - Directors to diligently attend to duties by being familiar with all aspects of corporation
  - Directors may have liability exposure at common law for failure to attend to their legal duties or those of the corporation
  - Where necessary, advice of qualified professionals to be sought
- **Duty to exercise power**
  - Directors responsible for managing corporation

---

---

---

---

---

---

---

---

- 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

---

---

---

---

---

---

---

---

- **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

---

---

---

---

---

---

---

---

- **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**

13

---

---

---

---

---

---

---

---

- **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**

14

---

---

---

---

---

---

---

---

- **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 cannot receive direct or indirect remuneration, e.g. as employee or contractor, without court approval**
    - **Indemnification and directors' insurance now available**

15

---

---

---

---

---

---

---

---

- **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

16

---

---

---

---

---

---

---

---

- **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 have a duty to invest charitable property

17

---

---

---

---

---

---

---

---

- 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](http://www.charitylaw.ca)
  - But cannot co-mingle with general funds

18

---

---

---

---

---

---

---

---

**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

19

---

---

---

---

---

---

---

---

- **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

20

---

---

---

---

---

---

---

---

- *Income Tax Act (Canada)*
  - Directors jointly and severally liable to pay employee income tax deductions for two years after term of office
  - Directors maybe personally liable if charity fails to comply with numerous reporting requirements, e.g. annual charity information return or improper charitable receipts, or for giving improper tax advice
  - Directors may also face fines and imprisonment if they are involved in making false or deceptive statements or evading compliance with the *Income Tax Act*
  - Avoid liability by showing positive steps taken to ensure compliance

21

---

---

---

---

---

---

---

---

– *Excise Tax Act (Canada)*

- Directors jointly and severally 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

22

---

---

---

---

---

---

---

---

– *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

23

---

---

---

---

---

---

---

---

- Risks include seizure of charitable property, loss of charitable status and criminal code charges
- See [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca)

– *Criminal Code*

- Bill C-45 (Westray Mines) for gross negligence in work place safety
- Section 336 – criminal breach of trust

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

24

---

---

---

---

---

---

---

---

– *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

25

---

---

---

---

---

---

---

---

– *Retail Sales Tax*

- Directors jointly and severally liable where corporation fails to remit

– *Workplace Safety and Insurance Board Act (Ontario)*

- Directors are not liable for corporation’s failure to remit premiums unless it can be shown they did not intend to pay them

26

---

---

---

---

---

---

---

---

– *Pension Benefits Act (Ontario)*

- 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

27

---

---

---

---

---

---

---

---

– *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

28

---

---

---

---

---

---

---

---

- Persons in control of contaminants are responsible for cleanup and related costs
- Appropriate environmental 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

29

---

---

---

---

---

---

---

---

– *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](http://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

30

---

---

---

---

---

---

---

---

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:
    - *Income Tax Act* (Canada)
    - *Charities Accounting Act* (Ontario)
    - *Charitable Gifts Act* (Ontario)

31

---

---

---

---

---

---

---

---

- *Religious Organizations' Lands Act* (Ontario)
- *Charitable Fund-Raising Act* (Alberta)
- *Charitable Fund-raising Businesses Act* (Saskatchewan)
- *Charities Endorsement Act* (Manitoba)
- *Charities Act* (Prince Edward Island)
- General statutes affecting charitable fundraising:
  - *Competition Act* (Canada)
  - *Privacy Act* (Canada)

32

---

---

---

---

---

---

---

---

- *Insurance Act* (Ontario)
- *Loan and Trust Corporations Act* (Ontario)
- *Securities Act* (Ontario)
- *Trustee Act* (Ontario)
- *Business Name Act* (Ontario)

33

---

---

---

---

---

---

---

---

