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**UNITED WAY/CENTRAIDE  
Windsor – Essex County  
DIRECTOR AND OFFICER LIABILITY AND BEYOND**

**Windsor – January 19, 2005**

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

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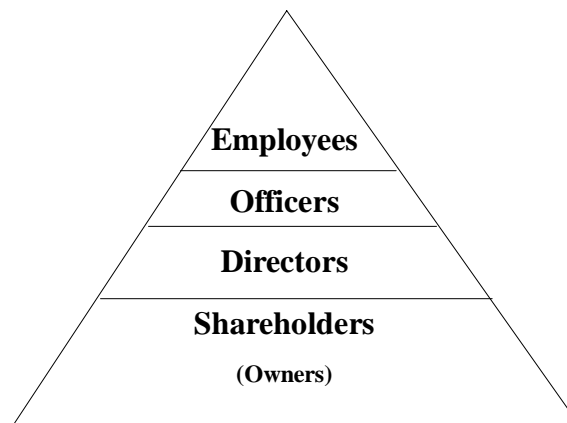
**A. DEFINITION OF DIRECTOR AND OFFICER**

- **For this presentation, references to corporation include an unincorporated association or a trust**
- **A director is generally anyone who takes on the role of the directing mind of a corporation**
- **A director can be known as a trustee, governor, board member, or even an elder or deacon of a religious organization**
- **An officer carries out the day to day functions of the corporation at the direction of the board**
- **An officer can also be a director or can become a *de facto* director**
- **For purposes of this presentation, reference to director is deemed to include officer**

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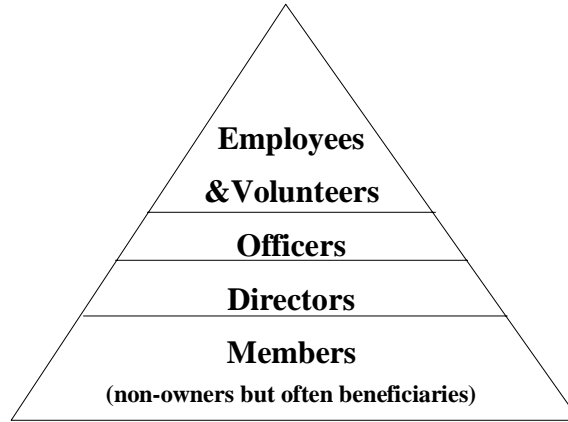
**B. DIFFERENT TYPES OF CORPORATIONS**

- **Share capital corporations  
(business corporation to make a profit)**



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- **Not-for-Profit Corporations**  
(non profit purpose but not charitable)



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- **Charitable Corporations**  
(charitable purpose akin to a public trust)



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**C. COMMON LAW DUTIES AND LIABILITIES**

- **Management of the Corporation**
  - **Directors are 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**
  - **Failure to act, i.e. inaction, can result in personal exposure to liability i.e. liability of Worldcom directors**

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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**
  - ***New Canada Not-for-Profit Corporations Act* will establish an objective standard of care**
- **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 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

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- **Liability Risk for Breach of Fiduciary Duty**
  - **Overview**
    - Directors of charitable corporations are subject to fiduciary duty to act as quasi trustee of charitable property
    - Directors of not-for-profit corporations also have fiduciary duties to put the interest of the corporation ahead of their own interest
    - Fiduciary duties owed to charitable objects, corporation, donors, members 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**
  - **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 should 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 the corporation's 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 some charitable property**
    - **However, fiduciary duties and trustee duties essentially the same**
    - **Recent *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 cannot 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 can only to be applied to charitable objects**
  - **Failure to properly apply charitable property may result in personal 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 have a 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](http://www.charitylaw.ca)**
  - **But cannot co-mingle with general funds**

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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 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**

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– *Excise Tax Act (Canada)*

- **Directors jointly and severely 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 [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca) and Charitylaw Bulletin #35**
- *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**

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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 are not 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 (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**

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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 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**

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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](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**

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

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- *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)*
- *Upcoming ULCC Model Fundraising Act*
- **General statutes affecting charitable fundraising:**
  - *Competition Act (Canada)*
  - *Privacy Act (Canada)*

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

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