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**FESTIVALS & EVENTS ONTARIO –  
2013 FEO ANNUAL CONFERENCE  
Celebrating Cultures**

**Mississauga – March 1, 2013**

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**Not-for-Profit Law Potpourri –  
Key Issues to Consider**

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**By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent**  
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**OVERVIEW OF SELECTED TOPICS**

- Changes in Federal and Provincial Corporate Legislation
- Maintaining Not-for-Profit Status under the *Income Tax Act*
- Legislative Changes – Including Anti-Spam and Privacy
- Key Issues in Directors' and Officers' Duties and Liabilities



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**A. CHANGES IN FEDERAL AND PROVINCIAL CORPORATE LEGISLATION**

**1. Status and Overview of *Canada Not-for-profit Corporations Act (CNCA)***

- *Canada Corporations Act* since 1917
- Enacted on June 23, 2009, in force October 17, 2011
- Replaced Part II of *Canada Corporations Act (CCA)*
- New rules do not apply automatically to CCA corporations
- Existing CCA corporations required to continue under the CNCA within 3 years– i.e., until October 17, 2014
- Failure will result in dissolution of the corporation
- See paper by Theresa Man "The Practical Impact of the *Canada Not-For-Profit Corporations Act*" May 2011, <http://www.carters.ca/pub/article/charity/2011/tlm1005.pdf>
- See Charity Law Bulletins Nos. 191, 193, 199, 213, 215, 220, 231, 239, 247 for practice tips

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- This means all CCA corporations will need to
  - Review letters patent and by-laws
  - Prepare Articles of Continuance, Notice of Directors and Registered Office, and new by-laws
  - Get membership approval - Articles must be approved by 2/3 vote
  - File required documents with Industry Canada, no filing fee
  - Industry Canada will issue a Certificate of Continuance
  - File approved new by-laws within 12 months of adoption



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## 2. Status and Overview of Ontario *Not-for-Profit Corporations Act* (ONCA)

- The Ontario *Corporations Act* (“OCA”) has not been substantively amended since 1953
- ONCA will apply to OCA Part III corporations
- ONCA received Royal Assent on October 25, 2010, expected to be proclaimed in force on July 1, 2013
- Outline of proposed regulations released on July 16, 2012 for public comment
- In December 2012, the Ministry of Consumer Services released helpful information, including a transition checklist and a list of frequently asked questions
- More tools will be available in the future
- Unlike the CNCA – Optional transition process for corporations to file articles of amendments or adopt new by-laws to comply with ONCA requirements within 3 years of ONCA in force

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- If no transition process taken, then
  - Corporation will not be dissolved
  - LP, SLPs and by-laws will be deemed amended to comply with new ONCA requirements, resulting in non-compliant provisions deemed invalid
  - Will result in uncertainty in relation to which provisions remain to be valid
- Better to do transition process to avoid confusion interpreting bylaw provisions



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- Social clubs with share capital will have 5 years to continue
- Charity Law Bulletins #262 "The Nuts and Bolts of the Ontario *Not-For-Profit Corporations Act, 2010*" and #299 "Transitioning under the Ontario *Not-For-Profit Corporations Act, 2010*: Practical Considerations" on our website at [www.charitylaw.ca](http://www.charitylaw.ca)
- This means that all OCA corporations will need to
  - Review letters patent and by-laws
  - Prepare Articles of Amendment and new by-laws
  - Get membership approval
  - File required documents
  - Certificate of Amendments will be issued

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### 3. Public Accountant and Financial Review

- CNCA
  - Corporations divided into two categories
  - Designated corporations:
    - A soliciting corporation with gross annual revenues for its last completed financial year that is equal to or less than \$50,000 or that is deemed to have such revenues under the Act;
    - A non-soliciting corporation with gross annual revenues for its last completed financial year that is equal to or less than \$1 million
  - Non-designated corporations are soliciting and non-soliciting corporations with annual revenues in excess of these amounts



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Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Soliciting	Designated	\$50,000 or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	More than \$50,000 and up to \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit, but members can pass a special resolution to require a review engagement instead
	Non-Designated	more than \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Non-Soliciting	Designated	\$1 million or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	more than \$1 million	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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- ONCA
  - PBCs are subject to higher thresholds for dispensing with the auditor and/or review engagement

Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation (PBC) with GAR of	\$100,000 or less (ss.76(1)(b))	May, by extraordinary resolution (80%), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than \$100,000 but less than \$500,000 (ss.76(1)(a))	May dispense with an auditor and have someone else conduct a review engagement. This requires an extraordinary resolution (80%)	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)
	\$500,000 or more (by implication of ss.68(1))	An auditor must be appointed annually	Audit is required

Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Non-PBC corporation with GAR of	\$500,000 or less in annual revenue (ss.76(2)(b))	May, by extraordinary resolution (80%), dispense with an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than \$500,000 in annual revenue (ss.76(2)(a))	May, by extraordinary resolution (80%), dispense with an auditor, and instead appoint a person to conduct a review engagement	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)

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#### 4. Directors and Officers – Powers, Duties and Defence

- Similar rules in CNCA and ONCA
- Directors may borrow money on the credit of the corporation without members' authorization, unless articles or by-laws provide otherwise
- Directors may view certain corporate records that the corporation is required to prepare and maintain (e.g. meeting minutes, accounting records, members' resolutions, etc.) and receive free extracts of them
- Objective standard of care for directors and officers to
  - Act honestly and in good faith with a view to the best interests of the corporation
  - Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

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- Objective standard of care replaces common law subjective standard of care
- Directors and officers must comply with the CNCA and ONCA, the articles and by-laws
- Reasonable diligence defence for directors (not officers)
  - Not liable if fulfilled their duty if they exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
  - Defence includes good faith reliance on financial statements and reports of professionals

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#### 5. By-laws

- CNCA - by-laws no longer require to be approved by Industry Canada, but must be filed with Industry Canada within 12 months, but failure to file will not affect validity
- ONCA – no need to file by-laws with the Ministry



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**6. Members**

- Both CNCA and ONCA provide the same principles but different detailed rules
- A corporation must have members
- Can have
  - One class of members in which case all are voting
  - Two or more classes as long as articles give right to vote to at least one class
- Where more than one class, the members of each class have certain built in protections
- All classes of members, even non-voting classes of members, are entitled to vote separately as a class on certain amendments to articles and by-laws dealing with rights and classes of membership

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- Non-voting members are given voting rights in some limited circumstances, e.g.,
  - Extraordinary sale
  - Amalgamation
  - Continuance to another jurisdiction
  - Change to any rights or conditions attached to those non-voting members or a change in the rights of other classes of members relative to the rights of the non-voting members
- Thus a class of members could reject a change - effectively resulting in a class veto (limited opt-out available)
- Corporations wanting maximum flexibility will have one class of members



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- Some corporations may want to collapse all membership classes into one class and remove non-voting membership classes
- Default rules to terminate membership and member's rights apply unless articles or by-laws state otherwise
  - Upon death, resignation, expiry of membership term, liquidation or dissolution of the corporation, expulsion, or termination of membership in accordance with the articles or by-laws
  - Rights terminated upon termination of membership
- ONCA - Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership

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**7. Members' Rights**

- CNCA
  - Right of any member to submit proposals to amend by-laws, or require any matter to be discussed at annual meetings, or nominate directors (5% member) (nominations can also be made at the meeting)
  - Right to access corporate records
  - May sign resolutions in writing
  - Availability of unanimous members' agreement (except for soliciting corporations)



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- ONCA
  - A member entitled to vote at an annual meeting may raise any matter as a "proposal" but must give 60 days notice
  - A proposal may include nominations for directors if signed by at least 5% of members or such lower percentage set out in the by-laws (nominations can also be made at the meeting)
  - Proposal must relate in a significant way to the activities and affairs of the corporation
  - Directors can refuse to discuss the proposal if they give at least 10 days notice, but a member may appeal the refusal decision to court

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- Members may requisition meetings of the members (but need 10% of the votes to do so, or lower if the by-laws so state)
- Right to access membership lists - to include name and address, by-laws may provide for more information
- Right to inspect financial records
- There are certain minimum rights in the event of a disciplinary action or termination of membership
- Default: 1 vote per member, unless articles provide otherwise

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**8. Members' Remedies**

- CNCA
  - Right to seek an oppression remedy against the corporation
  - Right to seek a court order to commence a derivative action
  - Compliance and restraining orders
  - Court ordered wind-up and liquidation on application of a member



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- ONCA
  - Compliance Order (If the corporation is not complying with its duties)
  - Rectification Order (If the registration or records are incorrect)
  - Derivative Action (Members taking action to enforce the corporation's rights)
  - Dissent and Appraisal Remedy (Limited to corporations that are not public benefit corporations)
  - Investigation Order (Member applies to Court for an investigation of the corporation)



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**B. MAINTAINING NPO STATUS UNDER THE INCOME TAX ACT (ITA)**

- The terms "non-profit" and "not-for-profit" ("NPOs") are used interchangeably and generally refer to organizations whose profits are not passed on to their members
- This section provides an update on recent CRA views on the tax exempt status of NPOs, including
  - Capacity of NPOs to earn profits
  - Carrying on a trade or business through an NPO
  - Tax consequences of losing NPO tax exemption
- Recent CRA views create much uncertainty for NPOs and substantially limit their revenue-generating capacity

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**1. Four Basic Requirements for NPOs**

Are you qualified?

- To qualify as an NPO, organization must meet all 4 criteria under paragraph 149(1)(l) of the ITA throughout any taxation year in order to maintain tax-exempt status
  - a) Not be a charity
  - b) Be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
  - c) Be operated exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
  - d) Not distribute or otherwise make available for the personal benefit of a member any of its income

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- It is a question of fact that can only be determined after a review of the purposes and activities of the NPO
- NPO status must generally be reviewed on a year by year basis
- It is possible for an organization to qualify for exemption as an NPO for a period shorter than its fiscal year
- Being incorporated as a not-for-profit under corporate legislation does not mean that the organization is an NPO for tax purposes
- See CRA *IT-496R, Non-Profit Organizations*  
<http://www.cra-arc.gc.ca/E/pub/tp/it496r/README.html>

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a) Must not be a charity

- If CRA considers an organization to be a "charity" as defined in subsection 149.1(1), then it cannot qualify in that period as a tax-exempt NPO
- No explicit opinion from CRA is required and no ruling would be issued because it is always a question of fact
- If an NPO is denied charitable registration, this does not automatically mean that it is not a charity
- An organization with exclusively charitable purposes does not qualify as an NPO, even if it is not a registered charity



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- b) Must be *organized* for non-profit purposes
  - NPOs must be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
  - NPOs may be established to further any purpose other than for a profit purpose, no requirement that an NPO must have a "benevolent" or "social" purpose
  - When determining the purpose for which an association was organized, the instruments creating the association will normally be reviewed, including letters patent, articles of incorporation, memoranda of agreement, by-laws, etc.
  - Rarely an issue

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- c) Must be *operated* for non-profit purposes
  - NPOs must in fact be *operated* exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
  - This is the criteria that is the subject of the most uncertainty for NPOs
  - CRA is generally of the view that an NPO can engage in commercial activities and earn an unintentional profit, but if it would be unable to undertake its not-for-profit activities but for its profitable activities, the organization cannot be an NPO because it has a profit purpose



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- Issues
  - Carrying on a trade or business
  - Accumulating excess income
  - Earning investment income
  - Carrying on a trade or business through a wholly owned subsidiary

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- Document 2010-038058117 – summary of CRA's view
  - NPOs must operate "exclusively" for purposes other than profit (incidental profits do not amount to a profit purpose)
  - May receive incidental profits through basic fundraising (lotteries, bake sales, chocolate bar sales, etc.) and soliciting gifts and grants
  - Can earn profits, but the profits should be incidental and arise from activities that are undertaken to meet the organization's not-for-profit objectives ("incidental profits")



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- Earning profits to fund not-for-profit objectives is not considered to be itself a not-for-profit objective (i.e., no destination test)
- Should fund capital projects and establish (reasonable) operating reserves from capital contributed by members, from gifts and grants, or from accumulated, incidental profits
- Capital contributions, gifts and grants, and incidental profits should generally be accumulated solely for use in the operations of the organization (including funding capital projects or setting up operating reserves) and should not be used to establish long-term reserves designed primarily to generate investment income

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- Maintaining reasonable operating reserves or bank accounts required for ordinary operations will generally be considered to be an activity undertaken to meet the not-for-profit objectives of an organization - incidental income arising from these reserves or accounts will not affect the status of an organization
- May engage in limited fundraising activities involving games of chance (e.g., lotteries, draws), or sales of donated or inexpensive goods (e.g., bake sales or plant sales, chocolate bar sales)



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- In determining whether an organization has any profit purpose, the activities of the organization must be reviewed both independently and in the context of the organization as a whole
- CRA gave the following examples of acceptable activities that result in incidental profit
  - Operation of a canteen at a hockey arena
  - Charging admission above direct cost for a children's concert (where the not-for-profit purpose of the organization was to organize and promote youth participation in music)

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d) Must not distribute income to members

- An NPO must not distribute or otherwise make available for the personal benefit of a member any of its income unless the member is a RCAA
- No part of the income of an NPO, whether current or accumulated, can be paid to a member, nor may it declare and pay dividends out of income
- An NPO may fail to comply with this requirement on a winding-up, dissolution, or amalgamation resulting in tax liability
- Certain types of payments will not, in and by themselves, disqualify an NPO, such as reasonable salaries, wages, fees or honorariums for services rendered to the NPO



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## 2. Consequences of Losing NPO Status

- Automatically becomes a taxable entity
- A deemed year end for the corporation is created and corporation deemed to have disposed of and reacquired all of the corporation's assets for fair market value [paragraph 149(10) if the ITA]
- It also affects the corporation's ability to carry forward losses and other balances or reserves
- Members of an unincorporated NPO would become responsible for any taxable income in the organization

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### 3. NPO Risk Identification Project

- The NPO Risk Identification Project is in its final year of a 3-year research project on tax compliance in the non-profit sector
- NPOs have been under the microscope of CRA, particularly with respect to the revenue they earn in addition to membership fees
- CRA randomly selected NPOs to review from the 39,000 NPOs that file T2, T3 and/or T1044 returns
  - Over the three years of the project, 1440 NPOs will have been reviewed



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- The key question for an NPO that has generated a surplus in a particular year is can it be considered to have been operated exclusively for, and in accordance with, its non-profit purposes
  - This determination is usually made by CRA in respect of a particular taxation year of an NPO on the basis of a review of its yearly activities during the course of an audit



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- CRA now has an informative question and answer section for NPOs to consult <http://www.cra-arc.gc.ca/tx/nnprft/ga-eng.html>
- CRA states that education letters were meant to “raise awareness of the rules governing the benefits available” to NPOs under the ITA and that reassessments are only occurring in the most “egregious cases”
- CRA maintains its position that it is possible for an NPO to generate a profit but
  - The profit must be incidental; and
  - Arise from activities that support the organization’s not-for-profit objectives

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#### 4. Some Practical Issues/Comments

- Questions to ask:
  - Does the organization continue to meet the definition of a non-profit organization under the ITA?
  - Are the organization's objects sufficient to ensure that it is not a charity, e.g., by including in its objects a disqualifying clause such as lobbying for legislative change?

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- Does the organization earn a profit from a particular activity? If so, is the earning of the profit incidental or intentional, how much profit is earned from each activity and what is the profit used for?
- Does the organization maintain reserves in excess of a reasonable level acceptable to CRA?
- Be careful about how capital projects are funded, CRA suggests this may only occur through increased member fees
- Does the organization carry out revenue activity within a taxable entity? If so, governance issues will need to be carefully considered
- Is the organization filing all required income tax forms?

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#### 5. Conclusion

- Recent CRA views create much uncertainty for NPOs and substantially limit their revenue-generating capacity
- While these views are open to challenge on the basis that they contradict existing jurisprudence, NPOs seeking to comply will have to look closely at their revenue-generating activities and take proactive measures to ensure that they are not caught offside the CRA's recent administrative positions
- Still remains to be seen though what the outcome of the Risk Identification Project will be and whether activities such as ABCs will continue to be off-side of CRA requirements



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**C. Legislative Changes – Including Anti-Spam and Privacy**

**1. Background to Legislation**

- On December 14, 2010, Bill C-28, *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (the "Anti-Spam Legislation") received Royal Assent
- Anti-Spam Legislation will have a broad impact on businesses, charities and NPOs

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- Industry Canada will have general oversight over the Anti-Spam Legislation
  - Anti-spam Legislation will be enforced by:
    - Canadian Radio-television and Telecommunications Commission ("CRTC")
    - Competition Bureau; and
    - Office of the Privacy Commissioner of Canada
- CRTC published final regulations under the Anti-Spam Legislation on March 7, 2012 and Information Bulletins on October 10, 2012
- Industry Canada first published regulations on July 9, 2011. Revised regulations were released on January 5, 2013 for a 30 day consultation period
- It is anticipated that the Anti-Spam Legislation will come into force late 2013



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**2. Overview of Anti-Spam Legislation**

- NPOs that send "commercial electronic messages" will need to ensure that they comply with the Anti-spam Legislation
- Anti-spam Legislation prohibits sending commercial electronic message ("CEM") without:
  - The express or implied consent of the recipient; and
  - Ensuring that certain form/content requirements are met
- CEMs include emails containing offers concerning goods, products or services, or that advertise or promote such opportunities as defined in the Anti-spam Legislation



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- Consents previously obtained for the purposes of PIPEDA are not sufficient for the purposes of the Anti-Spam Legislation
  - NPOs will need to verify if they have the express or implied consent of the receiver prior to sending an CEM
- Implied consent can arise from “existing non-business relationships”
  - An “existing non-business relationship” can arise in the context of not-for-profit organizations where the recipient is a member of a “club, association or voluntary organization”
  - Proposed regulations define “club, association or voluntary organization” as an NPO

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- Proposed regulations define “membership” as “the status of having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements”
- Significant monetary penalties for non-compliance (e.g. maximum penalty is \$1 million (individuals) and \$10 million (any other person)) and private right of action is available for breach of the prohibition
- NPOs will want to review their privacy and electronic communications policies to comply with the Anti-Spam Legislation when it does come into force, and that they are keeping appropriate records of express and implied consent prior to sending members a CEM

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**D. KEY ISSUES IN DIRECTORS' AND OFFICERS' DUTIES AND LIABILITIES**

**1. Definition of Directors and Officers**

- A director is generally anyone who takes on the role of the directing mind of a corporation
- A director can be known by different names, such as, a governor, a board member, or a trustee as a member of the board of management
- The name given to a director is not what is important, rather it is the authority that the person exercises that will determine whether that person is a director



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- 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 be found to have become a *de facto* director if the officer takes on the functions of a director
- Directors and officers have a fiduciary obligation to the corporation
- Directors of NPOs corporations can be found liable for their actions under more than 200 statutes or regulations (in Ontario and federally), as well as under legislation in other provinces and under common law
- For purposes of this presentation, reference to directors is deemed to include officers unless otherwise stated



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## 2. Common Law Duties

- Management of the Corporation
  - Generally, directors are required to manage or supervise the management of the activities and affairs of the corporation
  - To fulfill duties, directors must ensure:
    - Objects or purposes are properly carried out and activities fit within those objects or purposes
    - Corporation's financial stability and overall performance
    - Proper hiring, training, and supervision of management, staff and volunteers
  - Failure to act, i.e. inaction, can result in personal exposure to liability, i.e. liability of WorldCom and Enron directors



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- Duty of Care
  - Since neither the Ontario *Corporations Act* nor the *Canada Corporations Act* provide a statutory standard of care, the duty of care for directors under those acts remains the common law subjective standard
  - As such, personal knowledge and experience of each director is a factor
  - Meanwhile the *Canada Not-for-Profit Corporations Act* ("CNCA") and the Ontario *Not-for-Profit Corporations Act* ("ONCA") set out an objective standard, requiring directors to exercise the "care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances"



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- Summary of general fiduciary duties that apply to both NPOs and charities in putting the best interest of the corporation ahead of their own
  - Duty to Act in Good Faith, Honestly, Loyalty
    - A director's sole interest is to the corporation
  - Duty of Diligence/Duty to Act in Good Faith
    - Directors to diligently attend to duties by being familiar with all aspects of corporation
  - Duty to Account
    - Directors of NPOs, particularly charities must keep records to evidence that the corporate property has been properly managed



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- Duty to Exercise Power
  - Directors responsible for managing or supervising the management of the corporation, such as by maintaining proper books, records and minutes of the corporation
  - Delegation to management, staff and volunteers is permitted, but directors must always supervise and require accountability
- Duty of Obedience
  - Directors must comply with applicable legislation and the corporation's governing documents (letters patent, articles, by-laws, etc.)
  - All valid corporate decisions must be implemented



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- Duty of Confidence
  - Directors must not disclose confidential information that they acquire to outside parties
- Duty to Avoid Conflict of Interest
  - Directors must declare and avoid any conflicts of interest or anything that gives a director the appearance of a personal benefit
- Duty to Continue
  - Resignation to avoid personal liability may be ineffective and constitute a breach of fiduciary duty where a director puts their own self interests ahead of those of the corporation
- Duty to Act Gratuitously for a Charity
  - Directors in Ontario cannot receive any remuneration, either directly or indirectly, from the charity without approval from the court



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- To Whom is the Fiduciary Duty Owed?
  - The Corporation
    - Case law has affirmed that directors of NPOs are in a fiduciary relationship to the corporation, not to its members
  - Duties Owed to Members
    - Directors must ensure that the corporation abide by the terms of its letter patent, articles, and by-laws
- High Fiduciary Duties Regarding Charitable Property
  - Duty to Carry out the Charitable Purpose – The charity's resources must be used to carry out the purposes of the charity
  - Duty to Protect and Conserve Charitable Property – Directors must protect charitable property, such as by appropriately investing the property



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### 3. Common Law Liabilities

- Liability for Breach of Fiduciary Duty
  - Directors and officers can be found liable for any loss that the corporation suffers as a result of a breach of fiduciary duty
- Liability for Breach of Corporate Authority
  - This issue arises when directors permit the corporation to act beyond the scope of the authority set out in the corporation's objects
- Liability Risk for Negligent Mismanagement (Tort)
  - If their carelessness in the oversight of the corporation's operations leads to injury, directors of NPOs can be found liable in tort for negligent mismanagement



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- Liability Risk in Contract
  - Directors generally are not personally responsible for contracts signed for the corporation, however, to reduce liability exposure, directors should ensure contracts are duly authorized by the board before entering into them
  - Common problems:
    - The directors do not properly identify the corporation in the contract or to the other party
    - The other party believes the director is signing in his or her own name
    - The directors are found to have induced a breach of contract with other parties
    - The directors do not follow through to ensure that the corporation complies with the contract



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**4. Case Law on Resignation of Directors**

a) *Adams v. Association of Professional Engineers*, 2012 ONSC 3850, June 28, 2012

- In Adams, a member of Council for the Association of Professional Engineers of Ontario ("PEO") submitted a resignation by email to the other Council members indicating that he had resigned. The following day he sent a further email to the Council of PEO indicating that his resignation would be effective at the next annual general meeting of PEO



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- Ten days after sending this resignation the Council member sent a further email indicating that he was revoking his resignation
- The court noted that the rationale that directors of for-profit corporations should be able to effectively resign without having their resignation accepted applied equally to directors of non-share capital corporations
- Having found that the resignation was unequivocal, the court found that the resigning director could not thereafter revoke his resignation without the consent of the other directors



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b) *Kandolo v. Kabelu*, 2012 ONSC 3850

- A lawyer for two directors of a foundation wrote a letter of resignation to the foundation's board of directors
- Enclosed with the letter were signed written resignations
- Approximately two months later, the lawyer wrote to the foundation attempting to revoke the resignations
- The court followed the decision in *Adams* and considered the resignations effective when they were sent, subject to there being a contrary provision in the by-laws

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