

---

**BDO AND RBC PRESENT:**

***HOT TOPICS***

**A NOT-FOR-PROFIT KEY MESSAGE UPDATE**

**Mississauga – October 21, 2015**

---

**DIRECTORS' AND OFFICERS' DUTIES AND  
LIABILITIES: WHAT YOU NEED TO KNOW**

---

**By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent**

[tcarter@carters.ca](mailto:tcarter@carters.ca)  
1-519-942-0001


© 2015 Carters Professional Corporation

**CARTERS**

**Carters Professional Corporation / Société professionnelle Carters**  
Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce  
[www.carters.ca](http://www.carters.ca)   [www.charitylaw.ca](http://www.charitylaw.ca)   [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca)

Toronto · Ottawa  
Mississauga · Orangeville  
Toll Free: 1-877-942-0001

---

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p><b>BDO and RBC Present:</b> <b><i>Hot Topics</i></b> <b>A Not-for-Profit Key Message Update</b> <b>October 21, 2015</b></p>
<p><b>Directors' and Officers' Duties and Liabilities: What You Need to Know</b></p> <p><b>By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent</b> tcarter@carters.ca 1-877-942-0001 © 2015 Carters Professional Corporation</p>	
<p>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</p>	<p>Ottawa Toronto Mississauga Orangeville <a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.antiterrorismlaw.ca">www.antiterrorismlaw.ca</a></p>

2

**A. OVERVIEW OF TOPICS**

- Comparison of Different Corporations
- Definition of Directors and Officers
- Common Law Duties
- Common Law Liabilities
- Statutory Duties and Liabilities

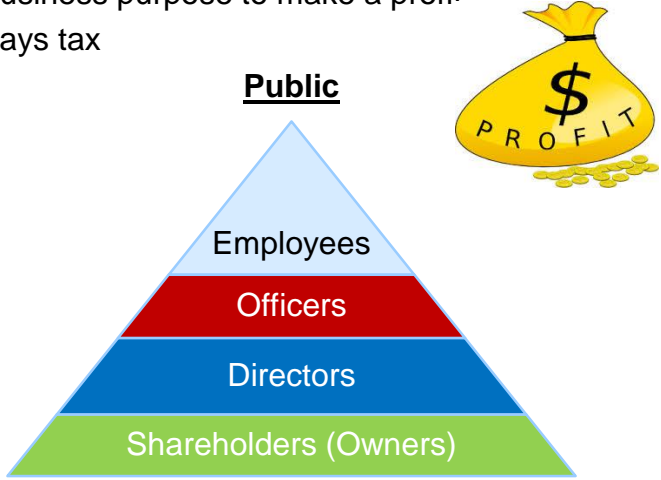


[www.charitylaw.ca](http://www.charitylaw.ca) [www.carters.ca](http://www.carters.ca)

3

## B. DIFFERENT TYPES OF CORPORATIONS

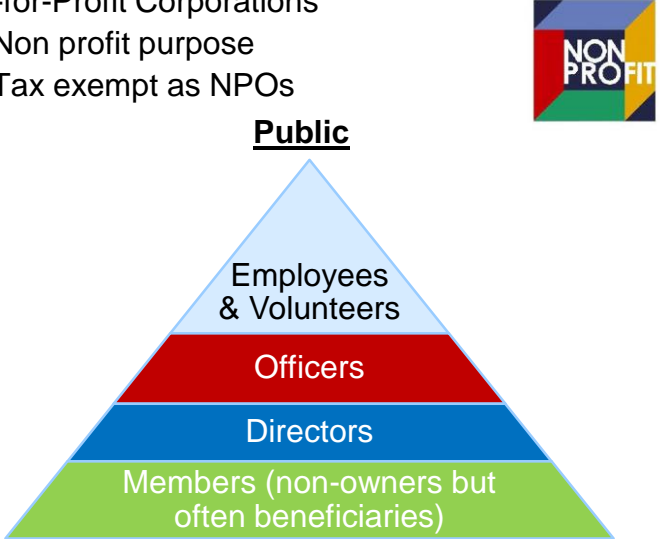
- Share Capital Corporations
  - Business purpose to make a profit
  - Pays tax



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

4

- Not-for-Profit Corporations
  - Non profit purpose
  - Tax exempt as NPOs



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

5

- Charitable Corporations
  - Charitable purpose akin to a public trust
  - Tax exempt
  - Can issue tax receipts for donations

**Public**

www.charitylaw.ca www.carters.ca

6

### C. WHAT IS A DIRECTOR OR OFFICER OF AN NFP?

- All corporations, including charities and other types of not-for-profit corporations (“NFPs”), have directors and officers
- What is a director?
  - Generally anyone who takes on the role of the directing mind of a corporation
  - Can also be known by different names, such as governor, board member, trustee
  - The name given to a director is not the focus
  - Instead, it is the authority that the person exercises that determines whether that person is a director
  - Has a fiduciary obligation to put the interest of the corporation ahead of personal interest

www.charitylaw.ca www.carters.ca

- What is an officer?
  - Generally anyone who carries out the day to day functions of the corporation at the direction of the board of directors
  - Normally includes president, secretary, treasurer, and CEO/executive director
  - Has fiduciary obligation to the corporation
  - An officer can also be a director
  - An officer could become a *de facto* director if the officer takes on the functions of a director
- When an officer is not a director, the officer will not be liable as a board member (unless the officer becomes a *de facto* director) but can still be liable for breaches of fiduciary duty as an officer
- Therefore, it is important for the CEO/executive director to understand the duties and liabilities of directors


## D. COMMON LAW DUTIES

- Management of the Corporation
  - Directors are responsible for all aspects of the corporation's operations on a joint and several basis
  - Directors must generally 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
    - Overall operating performance
    - Proper hiring, training, and supervision of management, staff and volunteers



9


- Supervising management of the corporation, though, does not involve interference with day to day operations of management
- For charities, the courts also have an inherent equitable jurisdiction to supervise and can interfere in charitable matters if mismanagement occurs
  - The court may interfere if the charity is not administered in accordance with its charitable purposes or if funds are misapplied
  - i.e. *The Toronto Humane Society* decision (2010) where the court ordered the destruction of charitable property (a dangerous dog)



www.charitylaw.ca www.carters.ca

10

- Standard of Duty of Care
  - Directors of for-profit corporations are held to an objective standard of care under the *Canada Business Corporations Act* (“CBCA”) and the *Ontario Business Corporations Act* (“OBCA”)
  - NFPs under the *Ontario Corporations Act* (“OCA”)
    - Do not provide statutory standard of care
    - Common law subjective standard applies
    - i.e. they need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience
    - Personal knowledge and experience of each director is a factor



www.charitylaw.ca www.carters.ca

- NFPs under the *Canada Not-for-Profit Corporations Act* (“CNCA”) and the *Ontario Not-for-Profit Corporations Act* (“ONCA”)
    - Objective standard provided for under the CBCA and OBCA applies
    - Duty to exercise the “care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances”
    - Known as the “Business Judgment Rule”, the rule protects directors and senior officers against hindsight and second guessing by third parties and the courts
- Courts will defer to the expertise of the directors and will not interfere with reasonable business decisions



- Directors will need to ask themselves the following questions in meeting the objective standard of care under the CNCA and ONCA
  - Have they analyzed and understood the issue before them?
  - Have they retained independent advisors or advisors recommended by management and do the advisors have the requisite expertise and experience?
  - Have they tested and challenged their advisors, or merely followed recommendations without question?





- Is the amount of time that they have spent on the issue proportionate to its importance and complexity?
- Have they debated the issue amongst themselves and engaged in a candid exchange of views?
- Were they actually present at the applicable board meeting?
- Were a summary of the discussions and decision properly documented, for example, in minutes or resolutions of the board?

- Summary of general fiduciary duties

Duty to act in good faith, honestly, loyalty

Duty of diligence

Duty to exercise power

Duty of obedience

Duty of confidence

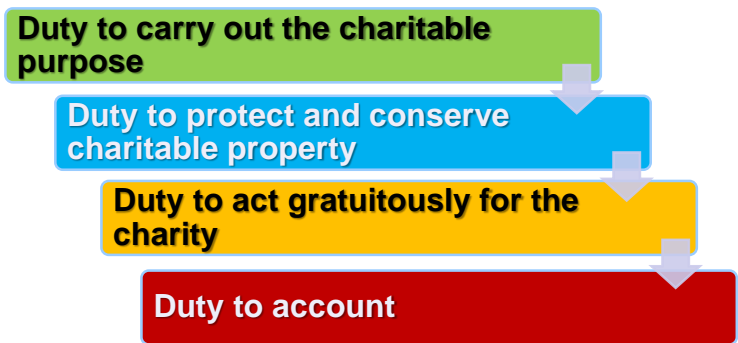
Duty to avoid conflict of interest

Duty to continue



15

- High fiduciary duties with regard to charitable property
  - The following duties relate specifically to the high fiduciary duties where charitable property is involved, whether such property is held by a charity or by other NFPs



**Duty to carry out the charitable purpose**

**Duty to protect and conserve charitable property**


**Duty to act gratuitously for the charity**

**Duty to account**

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

16

## E. COMMON LAW LIABILITIES OF NFP DIRECTORS



**Liability for Breach of Fiduciary Duty**

**Liability for Breach of Corporate Authority**

**Liability Risk for Negligent Mismanagement (Tort)**

**Liability Risk in Contract**

**Liability for Special Purpose Charitable Trusts**

**Liability for Imprudent Investments**

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

## F. STATUTORY DUTIES AND LIABILITIES

- Overview
  - Many federal and provincial statutes impose offences and penalties for acts and omissions of corporate directors, including charity directors
  - Directors of charities and NFPs can be held personally liable, as well as jointly and severally, with other directors for breach of statutory duties
  - Ignorance of the law is not an excuse, as offences are generally strict liability
  - Generally, the only defence is due diligence
  - Resigning as a director may not limit liability, though there are generally limitation periods that apply



- Example of Federal Statutes

*Income Tax Act (Canada)*

*Excise Tax Act (Canada)*

*Canada Pension Plan*

*Criminal Code*

19


- Example of Ontario Statutes
  - *Ontario Corporations Act* (“OCA”)
  - *Ontario Not-for-Profit Corporations Act* (“ONCA”)
  - *Charities Accounting Act* (“CAA”)
  - *Retail Sales Tax*
  - *Workplace Safety and Insurance Act* (Ontario)
  - *Employer Health Tax Act* (Ontario)

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

20

- *Occupational Health and Safety Act* (Ontario)
- *Environmental Protection Act* (Ontario) and Related Legislation
- *Child and Family Services Act* (Ontario)
- *Human Rights Code* (Ontario)

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

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>Disclaimer</h2>
<p>This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.</p> <p>© 2015 Carters Professional Corporation</p>	
<p>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</p>	<p>Ottawa Toronto Mississauga Orangeville <a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.antiterrorismlaw.ca">www.antiterrorismlaw.ca</a></p>