

# 2002 Church and The Law Seminar – November 5, 2002

## The Legal Duties of Directors & Leaders of Churches & Religious Charities

by Jacqueline M. Connor, B.A., LL.B.  
(519) 942-0001 [www.charitylaw.ca](http://www.charitylaw.ca)

**2002 CHURCH & THE LAW  
SEMINAR**

**The Legal Duties of Directors & Leaders  
Of Churches & Religious Charities**

**Jacqueline M. Connor, B.A., LL.B.**  
**November 5th , 2002**

**CARTERS**  
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**A. OVERVIEW OF TOPICS**

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

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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 and Activities Are Properly Carried Out
    - 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* Regulations
  - See Charity Law Bulletin #4

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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*

- 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*

- 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 Antiterrorismlaw.ca

• Ontario Statutes

– *Corporations Act*

- Reporting Requirements
- Conflict of Interest
- General Offence Provision

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– *Employment Standards Act*

- 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*

- Directors are Not Liable for the 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*

- 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*

- 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 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*

- 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*

- 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

– *Charities Accounting Act*

- 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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