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**Directors and Officers Liability:
Real World Examples of Insurance Claims
Against Charities in Canada**

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Directors And Officers Liability

Real World Examples of Insurable Claims Against Charities in Canada

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Horizontal lines for notes.

Plaintiffs, courts and juries are treating Christian charities with the same standards of legal liability as for-profit entities

Potential Sources Of Legal Liability:

- Employees, Donors, Contractors, Participants, Outside User Groups, Creditors, Members, Regulatory Bodies, Other Third Parties, Volunteers

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Horizontal lines for notes.

The decision makers of charitable organizations should have a clear understanding of:

- (1) the potential liability exposures facing their organization
(2) the potential personal liability of board members and trustees
(3) the scope and limitations of liability insurance protection

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Horizontal lines for notes.

Negligence Lawsuits and Fiduciary Duties:

The 4 elements of a Negligence Lawsuit

1. **Duty**
A duty of care existed on the part of the defendant
2. **Breach of Duty**
That duty was breached through a lack of care i.e. "The reasonable and prudent standard"
3. **Causation**
The breach of duty caused a third party injury and/or financial loss
4. **Damages**
The injury or loss can be identified and quantified in terms of pecuniary or non-pecuniary civil damages

Keep in Mind...

Professionals are held to a higher standard of care
Examples: Doctors, lawyers, accountants, engineers, police officers.

Directors and Officers are the "directing mind" of a corporation or organization and the directors of a charity owe a higher standard of care in the form of fiduciary duties.

FIDUCIARY = FIDES (Latin Root) = FAITH

A fiduciary relationship is one founded on good faith, loyalty and trust whereby one party is expected to act with integrity and fidelity for the benefit of another party.

Examples: •Trustee •Director •Officer

The directors and officers charities owe fiduciary duties to their organization, its charitable objects and to the general public.

Examples: •Duty of Loyalty •Duty of Obedience
•Duty of Diligence •Duty of Reasonable Care and Diligence
•Duty of Confidentiality

A Brief History of Fiduciary Obligations Owed By Charities in Canada

Ontario (Public Trustee) v. Toronto Humane Society, 1987

- ◆ Precedent-setting case holding directors and officers, whether as fiduciaries or as trustees, responsible to apply charitable property solicited from the general public in accordance with the charitable objects of the organization.
- ◆ This duty of care involves the fiduciary obligations to act with prudence, diligence, good faith, obedience, loyalty and to avoid conflicts of interest.
- ◆ Failure to do so could now be remedied through civil action by the public trustee or third party donors to hold the directors and officers of Canadian charities personally liable for a breach of trust or fiduciary duties.

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A Brief History of Fiduciary Obligations Owed By Charities in Canada

Ontario (Public Trustee) v. Toronto Humane Society, 1987

Since 1987, the size and frequency of civil liability actions against the directors and officers of Christian charities have grown significantly

Between 30 and 50 liability claims are made annually against our client organizations. Over half of those claims name the board members as defendant parties in the lawsuit!

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Fiduciary Duties and Insurance

Traditional Responsibility

Buying adequate property insurance to cover against fire, theft and other insurable loss or damage to buildings and chattels.

Current Legal Climate

Understanding and obtaining the right liability insurance for protection against lawsuits that could threaten:

- ◆ Organization's assets and resources
- ◆ Members, employees and volunteers
- ◆ Directors, officers and trustees

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“Sometimes in order to save a few premium dollars, consumers make costly mistakes when purchasing insurance by falling prey to common myths about liability insurance.”

MYTH #1 - ALL LIABILITY INSURANCE POLICIES ARE THE SAME

REALITY

...policy differences can be significant and are often contained in the “fine print” of insuring agreements, conditions, limitations, exclusions, definitions and endorsements...

- ◆ Choose your insurance provider carefully
- ◆ Ask lots of questions and review regularly with your agent or broker
- ◆ Keep your insurer up-to-date with changes to your operations
- ◆ Maintain limits of liability protection that are adequate, based on your risks and on trends in civil damage awards in Canadian courts
- ◆ Remember the amount of coverage you choose now may have to be enough for court awards years into the future for certain kinds of claims (eg. Abuse)

MYTH #2 - WE ONLY NEED ONE KIND OF LIABILITY COVERAGE

REALITY

Almost all non-profit and charitable organizations require two or more kinds of liability protection in order to cover the entire range of insurable risks faced by their directors, officers, trustees, members, employees and volunteers, including:

- ◆ General Liability
- ◆ Directors and Officers Liability

General Liability (CGL)

TABLE 1
Common Liability Coverages

BODILY INJURY
Physical injury, disease, death, mental injury, etc.

PROPERTY DAMAGE
Damage to tangible Third Party property

PERSONAL INJURY
Libel, slander, defamation, invasion of privacy, etc.

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IMPORTANT POINTS TO REMEMBER

- ◆ Traditional form of liability protection
- ◆ Covers risks with potential for highest damages, awards and costs (i.e. bodily injury claims)
- ◆ Standard coverage limits between \$2,000,000 to \$15,000,000
- ◆ Abuse is a form of bodily injury (if not excluded)
- ◆ "Occurrence" form coverage basis
- ◆ "Compensatory damages" versus "non-compensatory damages"
- ◆ Should cover entity, directors, officers and employees as insureds
- ◆ Should cover members and volunteers as insureds while acting within the scope of their duties

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Directors and Officers Liability (D&O)

TABLE 2
Common Liability Coverages

NEGLIGENT ACTS, ERRORS, OMISSIONS, MISSTATEMENTS, BREACHES OR NEGLECT OF DUTY, etc.

EXAMPLES:

- Wrongful Dismissal and Employment Practices
- Discriminatory Practices
- Discipline Proceedings
- Financial Mismanagement
- Insurable Breaches of Contract
- Breaches of Fiduciary Duties

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IMPORTANT POINTS TO REMEMBER

- ◆Recent form of protection in response to legal trends (1987 in Canada)
- ◆Covers risks with moderate damages, awards and costs
- ◆Standard coverage limits between \$1,000,000 to \$5,000,000
- ◆No overlap with General Liability (i.e. excludes bodily injury, property damage, personal injury)
- ◆“Claims-Made” form coverage
- ◆“Compensatory damages” versus “all insurable civil damages”
- ◆Should include Optional Retroactive Feature
- ◆Should include Wrongful Dismissal and Employment Practices

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6000 client organizations

35 years experience

Robertson Hall has a unique cross-Canada perspective on Christian ministries through the patterns and precedents of our client claims, including:

- Frequency of liability claims
- Amount of settlements and court awards
- Who is being sued and why

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The focus of this presentation will not be on claims that are insurable on a traditional General Liability policy, such as bodily injury, libel or third party property damage claims.

Today's examples will be claims based on breaches of fiduciary duties
insurable contracts
wrongful dismissal
employment practices

and other matters that can, or should, be covered under a Directors and Officers Liability insurance policy.

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Disclaimer

The names, locations and full details of claim case studies have not been disclosed, in order to respect and maintain client confidentiality.

Case Study #1 – Breach of Trust/Breach of Contract

Facts of the Case:

- A church with a large piece of property severed a parcel of land and had it rezoned for a retirement condominium community
- A separate not-for-profit corporation was created to manage the development and to advertise the unit amenities to potential purchasers
- The proceeds of the development sales were to go to the church to reduce the debt of existing building facilities and for the future expansion of the sanctuary, gymnasium and Christian education facilities
- The development failed to be completed on time and purchasers claimed that the finished units lacked the amenities advertised by the developer

Case Study #1...continued

Legal Action:

- A civil liability suit was launched by disgruntled purchasers against the development corporation alleging that over 40 units lacked an average of \$25,000 in advertised kitchen, bathroom and climate control amenities

Outcome:

- The development corporation which was uninsured, was deemed by the court to be a bare trustee acting solely for the benefit of the church. The corporation board was composed primarily of church board members
- The church board is being held liable for almost \$1,000,000 in civil damages to make good on the lack of advertised amenities

Case Study #2 – Employment Practices

Facts of the Case:

- A licensed day care operated by a church was experiencing a decline in enrollment and due to resulting budgetary pressures, the board members made the decision to terminate several staff members, including the day care director
- As part of their strategy to cut costs, the board reasoned they could replace the director with a replacement at a lower salary and compensation package
- The terminated director had provided many years of service to the organization, going above and beyond the call of duty and putting in many hours of unpaid overtime. She was also a member of the church congregation
- The severance package offered by the board provided compensation based on the minimum Employment Standards Act (ESA) standard of one week per year of service but failed to recognize common law standards or her contributions and service
- She was a single parent, sole breadwinner in the household and her age was such that it would be difficult for her to find equivalent employment easily

Case Study #2...continued

Legal Action:

- In addition to seeking damage for a severance package that was not in accordance with common law standards, she also claimed against the church board for employment-related stress, anxiety and defamation, alleging that the board had justified their decision by publicly stating that she had been overpaid

Outcome:

- The church board settled out of court upon the advice of an employment practices lawyer, with a settlement that included 3 weeks severance per year of service, one-half of all unpaid overtime, an undisclosed amount for injury of reputation and a public apology

Case Study #3 – Breach of Fiduciary Duties

Facts of the Case:

- The full-time minister of a church congregation operated a for-profit business on the side
- Several members of the church congregation either provided loans for, or invested in, the minister's private business
- These loans and investments have allegedly never been repaid
- At the same time the minister continued to provide pastoral services, including confidential counselling, to these church members

Case Study #3...continued

Legal Action:

- One of the members with a larger investment initiated a civil action against the minister for intentional breach of fiduciary duty and abuse of power. The plaintiff also claimed against the board members for breach of their duty of care in overseeing their employee, providing sufficient supervision and ensuring a safe environment that prevented those in positions of leadership from using their spiritual influence to harm members and clients by encouraging them to invest in "kingdom business"

Outcome:

- This case is still in litigation

Case Study #4 – Wrongful Dismissal

Facts of the Case:

- A Christian school was looking to hire a full-time janitor on contract to clean and maintain the premises. Previous volunteer and part-time maintenance staff had always had a personal connection to the school, including parents of students
- The school was a tight-knit community, with an enrollment of less than 150 students and understandably, parents and teachers had always viewed anyone having duties on the premises as an integral part of the development of the academic and spiritual life of its students
- The school board members hired a new janitor on the assumption that he was a professing and practicing Christian
- As the weeks and months passed it became apparent to staff and board members through his actions, behaviour and language that he was not an appropriate choice
- Without giving any warning or formal reasons, the board terminated his contract and instead awarded the job to another candidate who was related to a teacher on staff

Case Study #4...continued

Legal Action:

- The terminated janitor hired a lawyer and sued the school board on the grounds of wrongful dismissal and discrimination, arguing that his job performance was satisfactory and that he was never hired with any formal understanding that faith beliefs or conduct was a prerequisite for the job
- The plaintiff's lawyer argued (in a vein similar to the 2008 Christian Horizons Human Rights Tribunal Proceeding) that faith beliefs and lifestyle cannot be used as grounds for hiring or firing in non-ministry positions

Result:

- The school board settled out of court with a payout structure based on over 75% of the multi-year contract amount

Case Study #5 – Breach of Contract

Facts of the Case:

- A Christian campground had entered into an agreement to rent a camp property to an outside business that provided outfitting tours for adventure seekers and hunters
- This rental contract was made between the camp director and business owner without the knowledge of the national religious denomination who held title to the land
- The income derived from this rental was intended to offset the declining revenue of the summer camping programs
- The nature of the outfitter's activities (including hunting and trapping) came to the attention of the camp insurance company and raised major safety concerns for cottage owners and residents, as well as for rental groups using the property in the off-season, causing the insurer to provide notice of impending policy cancellation

Case Study #5...continued

Legal Action:

- The business owner filed a Statement of Claim against the camp board and denomination, claiming substantial financial damages incurred by the business owner from loss of revenue over the course of the 5-year land-use agreement

Outcome:

- The business owner and denomination through their respective legal counsels are engaged in an out-of-court settlement to indemnify anticipated loss of revenue and/or to modify the activities of the outfitter's clients to reduce safety concerns and render the camp insurable again

Summary

It is important for church and charity leaders to have a clear understanding of the risks associated with their ministries and programs, the potential personal liability they face as board members and the duty of care required they owe as a fiduciary or trustee.

Only then can they make diligent, informed decisions and take effective action to fulfill their fiduciary duties, avoid unnecessary and preventable liability claims and arrange effective insurance coverage to protect charitable and personal assets.

Thank you!

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