
ONTARIO LIBRARY ASSOCIATION

Toronto – January 31, 2015

The Duties and Liabilities of Directors of Public Library Boards

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

and Ryan M. Prendergast, B.A., LL.B.

tcarter@carters.ca and rprendergast@carters.ca

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The Duties and Liabilities of Directors of Public Library Boards By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent and Ryan M. Prendergast, B.A., LL.B. tcarter@carters.ca and rprendergast@carters.ca 1-877-942-0001 © 2015 Carters Professional Corporation	
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2	
OVERVIEW	
<ul style="list-style-type: none">• Introduction• What is a Public Library Board?• Who are the Directors and Officers of Public Library Boards?• General Statutory Duties and Liabilities of Directors of Public Library Boards• Common Law Duties of Directors of Public Library Boards• Common Law Liabilities of Directors of Public Library Boards• Protection Through Indemnification and Insurance	
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3

A. INTRODUCTION

- In order to determine the duties and liabilities of directors of public library boards, it is first necessary to understand the jurisdiction that applies to them
- The layers of jurisdiction that apply are like the layers of an onion
- The jurisdictional layers include:
 - Specific legislation, such as the *Public Library Act* and the *Municipal Act, 2001*
 - General legislation, such as the *Corporations Act* (Ontario), *Charities Accounting Act* (Ontario), and the *Income Tax Act* (Canada)
 - The common law as applicable to not-for-profit corporations and charities

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4

B. WHAT IS A PUBLIC LIBRARY BOARD?


- For purpose of *Public Libraries Act* (PLA), a “board” includes a public library board, a union board, a county library board or a county library co-operative board (PLA s. 1)
 - This presentation focuses on the “public library boards”, though general statutory and common law liabilities will also apply to directors of other library boards
- The council of a municipality **may by by-law** establish a public library (PLA s.3)
- A public library shall be **under the management and control of a board, which is a corporation**...(PLA s. 3(3))

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5


- Under the PLA, the public library board has the following powers and duties (PLA s. 20)
 - **shall seek** to provide, in co-operation with other boards, a comprehensive and efficient public library service that reflects the community's unique needs;
 - **shall seek** to provide library services in the French language, where appropriate;
 - **shall operate** one or more libraries and ensure that they are conducted in accordance with PLA and the regulations;
 - **may operate** special services in connection with a library as it considers necessary;



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6

- **shall fix** the times and places for board meetings and the mode of calling and conducting them, and ensure that full and correct minutes are kept;
- **shall make** an annual report to the Ministry of Tourism, Culture and Sport and make any other reports or provide any other information required by PLA and the regulations or requested by the Ministry from time to time;
- **shall make** provision for insuring the board's real and personal property;
- **shall take** proper security for the treasurer; and
- **may appoint** such committees as it considers expedient (PLA s. 20)



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7

- *Municipal Act, 2001*
 - Under s. 270(2) of the *Municipal Act, 2001*, “local boards” (**including public library boards**) are required to adopt and maintain policies with respect to the following matters:
 - sale and other disposition of land
 - hiring of employees
 - procurement of goods and services
- *Municipal Conflict of Interest Act*
 - **Applies to public library boards** through definition of “local board”
 - Provides expanded procedure in relation to conflicts of interest
 - Note, however, subject to charity law in Ontario as explained below

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- Composition requirements of a public library board(PLA s. 9 and s. 10)
 - Board shall be composed of at least five members appointed by municipal council
 - Council may only appoint up to one less than a majority of its own members, unless it is a county or co-operative library board, in which case a bare majority would apply
- Q. Can my municipal council appoint an equal or greater number of its own members to the board of my public library?
- No, the PLA requires that a municipal council must appoint one less than a majority of the public library board except as above

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- What is the relationship of a public library board with the municipality in the PLA?
 - Public library is established by by-law of municipality
 - Municipal councils appoint board members (PLA s. 9 and 10)
 - Municipality may authorize the CEO appointed under the PLA by by-law to call the first meeting of the board in each new term (PLA s.14(2))
 - The board must obtain consent of the municipality to do the following (PLA s.19(1)):
 - Acquire land for its purposes;
 - Erect, add to, or alter buildings;
 - Acquire or erect a building larger than is required for library purpose, and lease any surplus of the building; and
 - Sell, lease, or otherwise dispose of land

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10

- Municipality may approve, or amend and approve, annual budget estimates submitted by public library board, or approve variations of prior approved estimates (PLA s.24)
- Municipality may issue debentures for library purposes (PLA s.25)
- Municipality may makes grants of money, lands, or buildings to a library board (PLA s.27)
- What authority does a municipality have over a public library board under the *Municipal Act, 2001*?
 - “public library board” is included as a “local board” at s.1(1) of the *Municipal Act, 2001*

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- What are “local boards” under the *Municipal Act, 2001*?
 - “local board” means:
 - a municipal service board
 - transportation commission,
 - **public library board**,
 - board of health,
 - police services board,
 - planning board,
 - or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority



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12

- Under *Municipal Act, 2001*, a local board **is not** required to have it's own auditor “despite any Act” (s. 296(12))
- The municipality is responsible for appointing an auditor who is responsible for annually auditing the accounts and transactions of the municipality and **its local boards**
- Under s. 296(11) of the *Municipal Act, 2001*, if financial statements of a municipality and local board are consolidated, the municipality may require the local board to be audited as if it were part of the municipality
- The auditor reports to the council of the municipality (s.296(5)), and by implication, not to the local board

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13

- However, public library boards are distinguished from other local boards throughout the *Municipal Act, 2001*
 - A municipality may pass by-laws respecting the governance structure, accountability and transparency, financial management, or other matters concerning local boards
 - A municipality, though, may not do so for a public library board
 - A municipality may establish codes of conduct for members of local boards
 - A municipalities, though, may not do so for a public library board
 - A municipality may dissolve local boards
 - A municipalities, though, may not dissolve a public library board

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- Under section 24 of the PLA, a municipality is to consider and deal with estimates submitted to it by a public library board, and approve, or amend and approve, annual budget estimates
 - Board must apply the monies paid to it in accordance with the estimates approved, subject to council authorizing a variation (PLA s. 24(3))
- **Case Study:** *Case Study: Stinton v. Waterloo City* [1984] O.J. No. 2380
 - “...it is clear that the statutory foundation for the existence of a public library board and its power to operate the library are derived from the *Public Libraries Act*. **It is not simply a committee operating under the aegis of a municipal corporation.**”

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15

C. WHO ARE THE DIRECTORS AND OFFICERS OF PUBLIC LIBRARY BOARDS?

- Who are directors?
 - All corporations, including those incorporated by general act of the legislature, like public library boards, 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, etc.
 - Has a fiduciary obligation to put the interest of the corporation ahead of personal interest



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- PLA sets out qualification requirements and composition requirements for board members
 - Qualifications (PLA, s. 10(1)) - is a member of the appointing council **or**:
 - 18 years of age
 - Canadian citizen
 - Complies with residency requirements (see PLA para 10(1)(c)) which generally require residency in the applicable municipality
 - Is not employed by the board or by the municipality or county as applicable

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- A person will no longer be a member of a public library board when he or she (PLA s. 13):
 - is convicted of an indictable offence;
 - becomes incapacitated;
 - is absent from the meetings of the board for three consecutive months without being authorized by a board resolution;
 - ceases to be qualified for membership under s. 10(1)(c) (i.e., residency requirements); or
 - otherwise forfeits his or her seat
 - Unclear what effect “otherwise forfeits” was intended to mean
 - See reference to “ineligible individual” provisions below that will apply to public library boards that are also registered charities

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- 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
 - An officer may also be 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
- Officers cooperate with the board, but ultimately report to the board

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- Public library boards under PLA are required to appoint certain officers:
 - Public library board **shall appoint** a chief executive officer who shall have general supervision over and direction of the operation of the public library and its staff, shall attend all board meetings and shall have other powers or duties as the board assigns from time to time (PLA s. 15(2))
 - Public library board shall appoint a secretary; (15(3))
 - Public library board shall appoint a treasurer; (15(4))
 - The same person may be both the secretary and treasurer, and the CEO may be both (s. 15(5))

Q. Can my public library board appoint a committee to supervised the public library and not a CEO?

- No, public library board must appoint a CEO

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Q – Can the public library board appoint a municipal employee to the position of CEO under the PLA?

- Public library board has discretion to appoint anyone as CEO, though, there may be issues concerning fiduciary duty loyalty to two employers, together with potential for cross-over liability
- Clear that appointment, removal, determination of the terms of employment and of the staff is within the prerogative of the public library board, not the municipality (PLA s. 15(1))

• **Case Study:** *Aurora Public Library Board and Town of Aurora (Re)* 111 D.L.R. (3d) 757

- Ability of municipal council to approve budget “does not in any way derogate from the exclusive responsibility of a [public library] board to fix the remuneration of its staff”

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21

D. GENERAL STATUTORY DUTIES AND LIABILITIES OF DIRECTORS OF PUBLIC LIBRARY BOARDS

- Overview
 - Many federal and provincial statutes impose offences and penalties for acts and omissions of corporate directors, which would include public library boards
 - Directors 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



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- Corporate Statutes
 - A general corporate statute, like the *Corporations Act* (Ontario), applies to a special act corporation (including those incorporated under a general act of legislature like the *Public Libraries Act*) unless the special act contains a provision to expressly exempt the application of the general corporate statute
 - Generally, any provisions in the corporate statute that conflict with the special act do not apply
 - Some provisions are meant to fill in the “gaps” where the special act is silent, i.e., the ability to indemnify directors, or the authority to pass by-laws



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- Examples of possibly non-applicable general corporate provisions include:
 - Provisions that relate to membership issues, such as admission of members, holding membership meetings, proxy votes at members meetings, keeping a register of members
 - Provisions in relation to board issues, such as having three directors, election of directors, removal of directors, employees not being able to be directors, conflict of interest of directors, holding board meetings, declaring conflicts at board meetings
- The issue of when a general corporate statute applies, and when the special act trumps the general corporate statute needs careful review by legal counsel

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- Ontario *Corporations Act* (“OCA”)
 - Directors are jointly and severally liable to the employees, apprentices and other wage earners for all debts due for services performed for the corporation, not exceeding six months wages and twelve months vacation pay
 - Failure to keep proper books, records and registers at the head office of the corporation and failure to make such books, records and registers available for inspection by entitled persons may result in personal liability for the directors

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- Ontario *Not-for-Profit Corporations Act* (“ONCA”)
 - Application of ONCA to public library boards is unclear
 - Bill 85, *Companies Statute Law Amendment Act, 2014* would have amended *Municipal Act, 2001* to exclude application of ONCA to “local boards”, including public library boards, unless prescribed by regulation
 - Bill 85 died as a result of the last provincial election
 - Unclear if Bill 85 will be reintroduced in the provincial legislature and whether the same proposed amendments to the *Municipal Act, 2001* excluding the ONCA for local boards will return



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- If the ONCA applies, some benefits will apply to public library boards which are not currently available under the OCA:
 - Capacity of a natural person (ONCA s.15(1))
 - Elimination of *ultra vires* doctrine (ONCA s.16(3))
 - Objective standard of care for directors and officers (ONCA s.43(1)) (as discussed below)
 - Due diligence defence for directors (ONCA s.44)
 - Protection of “indoor management rule” (ONCA s. 19)
 - Indemnification (ONCA s. 46)
- If it applies, directors can be held jointly and severally liable for the following debts in certain circumstances for 6 month’s wages for employees and vacation pay (up to 12 months)

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27

- General Provincial Statutes
 - *Charities Accounting Act* (“CAA”)
 - Many public library boards are registered charities for purposes of the *Income Tax Act* (Canada)
 - In addition, many public library boards would be deemed to be charities at common law (CAA s. 1(2)) because of their purpose to advance education and to benefit the public
 - CAA includes specific authority for local boards, including public library boards, to receive property for charitable purposes, e.g., through a will or *inter vivos* gift agreement (CAA s. 9)
 - PGT can seek an order under section 4 of the CAA if, for example, it is of the opinion that there was failure to apply charitable property as directed by the donor

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- Third-parties can bring applications under subsection 6(1) without notice to the charity or anyone else, with the court being able to order the PGT to conduct a public inquiry under the *Public Inquiries Act*
- Could result in an application by the PGT to obtain a court order requiring the charity to comply with the terms of the donor direction in accordance with s.4(d) of the CAA
- Subsection 10(1) of the CAA permits two or more individuals to make a court application where they allege a breach of a trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose

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- *Workplace Safety and Insurance 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
- *Employer Health Tax Act (Ontario)*
 - Directors will be held personally liable for premiums and health tax not paid by corporation
- *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



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- *Environmental Protection Act (Ontario) and Related Legislation*
 - Directors required to take reasonable care to prevent unlawful discharge of contaminants
 - 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
 - Public library boards and their directors and officers could be liable where employees fail to report abuse or where it occurs because of failure to monitor employees and operations



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31

– *Human Rights Code (Ontario)*

- Possible claims of discrimination by employees or by the public for provision of services
- Based upon violation of prohibited grounds of discrimination, such as, race, creed, marital status, sexual orientation, etc.
- Important to understand what exemptions apply
- Directors and officers could be exposed to liability in egregious situations



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32

• General Federal Statutes

– *Income Tax Act (Canada)*



- Directors are jointly and severally liable to pay employee income tax deductions for claims brought within two years after end of term of office as a director
- 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* (e.g. improperly characterizing employees as independent contractors)

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33

- Members of public library boards that are registered as registered charities under the *Income Tax Act* (“the Act”) need to also be aware of its general application to registered charities
- Compliance matters under the Act directors should be aware of include:
 - Issuing official tax receipts in accordance with the Act and regulations
 - Filing a complete and accurate T3010 annual return
 - Compliance with CRA fundraising guidance
 - Compliance with the Act and CRA administrative policies concerning political activities

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34

- Directors, officers, trustees and managers of charities can become “ineligible individuals” and be prohibited from being a director, officer, trustee, manager or a person in control of another registered charity for a period of five years, if:
 - The person was convicted of a criminal offence under Canadian law or an offence elsewhere that would be a criminal offence if it were committed in Canada, that relates to financial dishonesty or other matters relevant to the operation of the charity, unless a pardon has been granted or issued and has not been revoked or ceased to have effect



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35



- The person has been convicted of an offence (other than the above) under Canadian or provincial law or an offence elsewhere that would be such an offence if it took place in Canada, within the last five years, involving financial dishonesty or other matters relevant to the operation of the charity; or
- The person was a director, trustee, officer, manager or was in control of a charity during a period of a serious non-compliance that resulted in the loss of charitable status within the last five years

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36



- *Excise Tax Act (Canada)*
 - Directors jointly and severally liable for corporation's failure to collect and remit HST
 - 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
- *Criminal Code*
 - Bill C-45 (Westray Mines) potential criminal liability for negligence in work place safety
 - s. 336 - criminal breach of trust

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37

E. COMMON LAW DUTIES OF DIRECTORS OF PUBLIC LIBRARY BOARDS

- Management of the Corporation
 - Under the PLA, public library “shall be under the management and control of a board...” (PLA s. 3(3))
 - Public library boards may make rules regulating all other matters connected with the management of the library and library property (PLA s. 23(4))
 - To fulfill duties, directors must ensure:
 - Compliance with duties under the PLA
 - Corporation’s financial stability
 - Overall operating performance
 - Proper hiring, training, and supervision of management, staff and volunteers
 - CEO remains accountable to board



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38

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



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39

- Standard of Duty of Care
 - PLA does not set out the duty of care for directors, and neither does the OCA
 - As a result, the current legislative framework for public library boards
 - Does not provide statutory standard of care (which is the case for businesses under the *Business Corporations Act* (Ontario))
 - 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



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- The ONCA, if applicable, will provide:
 - Objective standard of care
 - Duty to exercise the “care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances”
- Note, however, unclear if statutory standard of care under ONCA will be extended to directors under the PLA
- If ONCA is excluded from application to public library boards, public library board members will continue to be subject to subjective standard of care

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41

- The following are the general fiduciary duties that apply to corporate directors in putting the best interest of the corporation ahead of their own
 - Duty to Act in Good Faith, Honesty, Loyalty
 - A director's sole interest is to the corporation
 - A director's duty is to the corporation and not to the interest of those who the director may be representing on the board, e.g. where a director is an appointee from the municipal council or a school board
 - The interests of the director must not be placed in conflict with those of the 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
 - This can be complied with by being familiar with all aspects of the corporation's operations through attending board meetings and reviewing the minutes of missed board meetings
 - Where necessary, the advice of qualified professionals should be sought



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43

– Duty to Exercise Power



- Directors are responsible for managing or supervising the management of the corporation
- In order to justify accounts and decisions made regarding corporate assets, directors must ensure that there is proper maintenance of books, accounts, records and minutes of the corporation
- Delegation to management, staff and volunteers is permissible and often advisable (mandatory with CEO), but directors must always supervise and require accountability from staff and volunteers
- This requires that questions be asked and enquiries made of senior management at board meetings

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– Duty of Obedience



- Directors must comply with applicable legislation and the corporation's governing documents (legislation, by-laws, etc.)
- All valid corporate decisions must be implemented
- Directors cannot rely solely on the officers to ensure compliance with the laws
- It is the obligation of the directors to be familiar with applicable laws

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– Duty of Confidence

- In general, directors must not disclose confidential information that they acquire to outside parties
- This generally means that directors must protect discussions at any board or committee meeting and ensure the confidentiality of information of the corporation, its directors, employees and members
- Under PLA, however, all meetings shall be open to the public (16.1(2))
 - Subject to requirements under PLA that permit public library board to hold a closed meeting (PLA s. 16.1(4) and (5))



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– Duty to Avoid Conflict of Interest

- Directors must declare and avoid any conflicts of interest or anything that gives a director an actual or appearance of a personal benefit
- In general, a conflict of interest will occur when a director has a material interest outside of the corporation that could influence him or her, or be perceived to influence him or her to act in a manner contrary to the best interests of the corporation
 - Generally, the procedure for conflict of interest concerning directors is set out in the incorporating statute or applicable general corporate law



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47

- However, public library boards as “local boards” are subject to the *Municipal Conflict of Interests Act*, which provisions would supersede the OCA or ONCA and provides a complex procedure for addressing conflict of interest
- To the extent that the public library board is a charity (registered or at common law), or the matter of conflict concerns charitable property, the common law in Ontario will prevail (see below)

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- Duty to Continue
 - Directors have continuing obligations to the corporation which cannot be relieved by simply resigning if the corporation is facing difficulties
 - Resignation to avoid personal liability may be ineffective and constitute a breach of fiduciary duty where a director puts his or her own self interests ahead of those of the corporation
 - A director considering resigning due to concerns about personal liability should obtain independent legal advice



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- 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 not

Duty to carry out the charitable purpose

Duty to protect and conserve charitable property

Duty to act gratuitously for the charity

Duty to account

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- The following are the High Fiduciary Duties with Regard to Charitable Property
 - Duty to Carry Out the Charitable Objects
 - Charities can have one or more charitable objects or purposes (i.e., duties and powers in section 20 of the PLA)
 - The charity's resources must be used to carry out the purposes of the charity
 - Directors have a positive duty to further the charitable purposes of the corporation



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51

- Duty to Protect and Conserve Charitable Property
 - Directors must protect charitable property
 - Directors in Ontario must ensure that such property is appropriately invested in accordance with terms of the *Trustee Act* (Ontario), save and except for “reserve funds” under the *Municipal Act, 2001*
 - Restricted charitable purpose trusts are no longer recognized as separate trusts distinct from the general assets of the charity for purposes of exigibility (i.e. claims by third parties)
 - Therefore, it is important for directors to consider what steps can be taken to assist in protecting restricted charitable purpose trusts in the future



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- Duty to Act Gratuitously for the Charity
 - Directors in Ontario cannot receive any remuneration, either directly or indirectly, from the charity
 - Can seek approval for remuneration from the court under section 13 of the CAA for payment for services other than as a director but difficult to attain
 - The onus will be on the applicant to show that such payment for services “is in the best interest of the trust in light of the circumstances and the basic rules of equity which affect trustees”
 - Directors and officer insurance, as well as indemnification, is available provided that regulations under the CAA are complied with



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Q. My spouse is the CEO and I am a member of the public library board. If I comply with the *Municipal Conflict of Interests Act* will I avoid any liability?

- At common law, a director of a charitable corporation is prohibited from receiving any direct or indirect benefit from acting in that capacity
- In addition to complying with the *Municipal Conflict of Interests Act*, directors may need to vacate his or her position on the board or be exposed to liability to the charity for any benefit he or she received
- Need to review conflict with legal counsel or PGT as applicable

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54

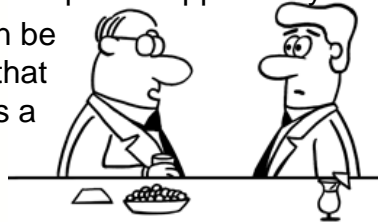
- Duty to Account
 - Directors of charities must keep records to evidence that the charitable property has been properly managed
 - The PGT can compel the directors of a charity under the CAA to pass the accounts of the organization before the court
 - This can be a long and expensive process
 - It can also result in personal liability for the directors

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55

F. COMMON LAW LIABILITIES OF DIRECTORS OF PUBLIC LIBRARY BOARDS

- Liability for Breach of Fiduciary Duty
 - Directors and officers have a fiduciary duty to put the best interests of the corporation ahead of their own
 - Examples of breach of fiduciary duty can include mismanagement of corporate funds and property, or the misappropriation of corporate opportunity
 - Directors and officers can be found liable for any loss that the corporation suffers as a result of a breach of fiduciary duty



This "fiduciary" thingy really complicates pillaging a corporation.

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56

- Liability for Breach of Corporate Authority
 - When directors permit the corporation to act beyond the scope of the authority set out in the corporation's objects, the directors may be found personally liable for *ultra vires* actions
 - Public library boards should be familiar with their powers and duties under the PLA in this regard
 - *Ultra vires* will not be a concern under the ONCA, if the ONCA applies to public library board
 - However, every director is still under a duty of obedience to comply with the PLA, the by-law establishing it, or its by-laws
 - i.e., public library boards have a duty of obedience to comply with the PLA in relation to the composition of the board

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57

- Liability Risk for Negligent Mismanagement (Tort)
 - Tort is civil wrong for which injured party can seek damages from the court
 - If their carelessness in the oversight of the corporation's operations leads to injury, directors of charities can be found liable in tort for negligent mismanagement, for instance:
 - Failing to adequately supervise hiring of staff and volunteers
 - Failing to implement a child protection policy



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58



- Failing to monitor the on-going conduct of staff and employees, especially in regard to sexual harassment of employees
- Wrongful dismissal - where directors acted with malice or otherwise improperly dismissed the employee
- Permitting unsafe conditions on corporation's property leading to an accident
 - **Case study:** *Nickell v. Windsor (City)* [1926] O.J. No. 76
 - Windsor Public Library Board found liable as a corporation for an accident occurring on its steps due to ice
- Knowingly drawing cheques against insufficient funds

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59

- Liability Risk in Contract
 - Directors generally are not personally responsible for contracts signed for the corporation unless they are found to have intended to assume personal liability
 - However, they need to have proper corporate authority to sign contracts and ensure contractual terms are complied with
 - To reduce liability exposure, directors need to ensure contracts are duly authorized by the board before entering into them



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60

- Common problems in relation to breach of contract for directors:
 - The directors do not properly identify the corporation in any contract or to the contracting 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 prior to the signing of the contract
 - The directors do not follow through to ensure that the corporation complies with a contract



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61

- Liability for Special Purpose Charitable Trusts
 - Case law has confirmed that a charitable corporation owns its general assets beneficially and not as trustee for those assets, a corporation can still receive charitable property under express or implied terms in trust and thereby be trustee of such funds
 - To the extent that a gift constitutes a special purpose charitable trust the charity can only use the gift to accomplish the specific charitable purpose established by the donor and for no other purpose



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62

- Commingling of special purpose charitable trusts
 - Gifts subject to restrictions or limitations by the donor
 - Commingling of donor restricted gifts possible under *Charities Accounting Act* (Ontario) regulations
 - But cannot commingle special purpose charitable trusts with general funds
 - See Charity Law Bulletin #4 for details at <http://www.carters.ca/pub/bulletin/charity/2001/chylb04-01.pdf>



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63

- Liability for Imprudent Investments
 - Section 10.1 of the CAA confirms that sections 27 to 30 of the *Trustee Act* apply to all charities that deal with charitable property unless the constating documents of the charity or the gift agreement state otherwise
 - The *Trustee Act* establishes a prudent investment standard governing investment decision-making of trustees of charitable property
 - The board needs to have a investment policy in order to obtain protection under the *Trustee Act* where there is delegation of investment decision making, save and except where the funds are a “reserve fund” under the *Municipal Act, 2001*



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64

G. PROTECTION THROUGH INDEMNIFICATION AND INSURANCE

- PLA contains no liability protection for directors or officers of public library boards
 - Other “local boards” for purposes of the *Municipal Act, 2001* such as police services boards or boards of health under the *Health Protection and Promotion Act* do have limited protection from liability in their incorporated statute
- As a result, public library boards must defer to the OCA, and to the ONCA to the extent that it will apply to the PLA

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65

1. Indemnification

- OCA permits a corporation, with the approval of the members at a meeting of the members, to indemnify a director or officer for all “costs, charges and expenses” arising from an action in relation to the director’s execution of the duties of his office except costs due to their own willful neglect or default
- ONCA permits a present or former director or officer, due to their association with the corporation, to indemnification against all costs, charges and expenses reasonably incurred by them in connection with the defence of any civil, criminal, administrative, investigative or other action/proceedings if:

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66

- Was not judged to have committed any fault or omission
- Acted honestly and in good faith
- For criminal or administrative actions, had reasonable grounds for believing conduct was lawful



- Regulation 4/01 under the CAA requires that prior to a charity indemnifying its directors, the directors must consider certain factors enumerated in the regulation, which consideration need to be documented in the minutes

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67

2. Insurance Protection

- Note, paragraph 20(g) requires the public library board to “make provision for insuring the board’s real and personal property
- Insurance coverage should generally include, where applicable:
 - All risk property insurance
 - General liability insurance
 - Directors’ and officers’ insurance
 - Sexual abuse and/or harassment coverage
 - Insurance for particular risks, i.e. counseling, non-owned auto, third-party use of property, etc.
 - Wrongful dismissal coverage
 - Errors and omissions coverage



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68

- ONCA, if applicable, permits a corporation to purchase and maintain personal liability insurance for the benefit of a present or former director or officer of the corporation, or another individual who acts or acted at the corporation’s request as a director or officer or in a similar capacity of another entity
- Under both the ONCA and OCA, however, director and officer insurance may not be purchased for a charity unless the corporation complies with the *Charities Accounting Act* and its regulations that permits the purchase of such insurance

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3. Additional Factors to Consider with Director and Officer Insurance

- How much coverage does the policy provide for?
- Who are the named insureds?
- Does insurance cover all former and existing directors, officers and committee members?
- Are there exclusionary clauses that limit the protection offered by the policy, such as sexual abuse?
- Is coverage on a “claims made basis” or on an “occurrence basis”?
- Is there a historical record of insurance policies?
- Are there geographical limits to the coverage?



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