



Pro Bono Consulting for Non-Profits

Legal Roles and Responsibilities Board of Directors

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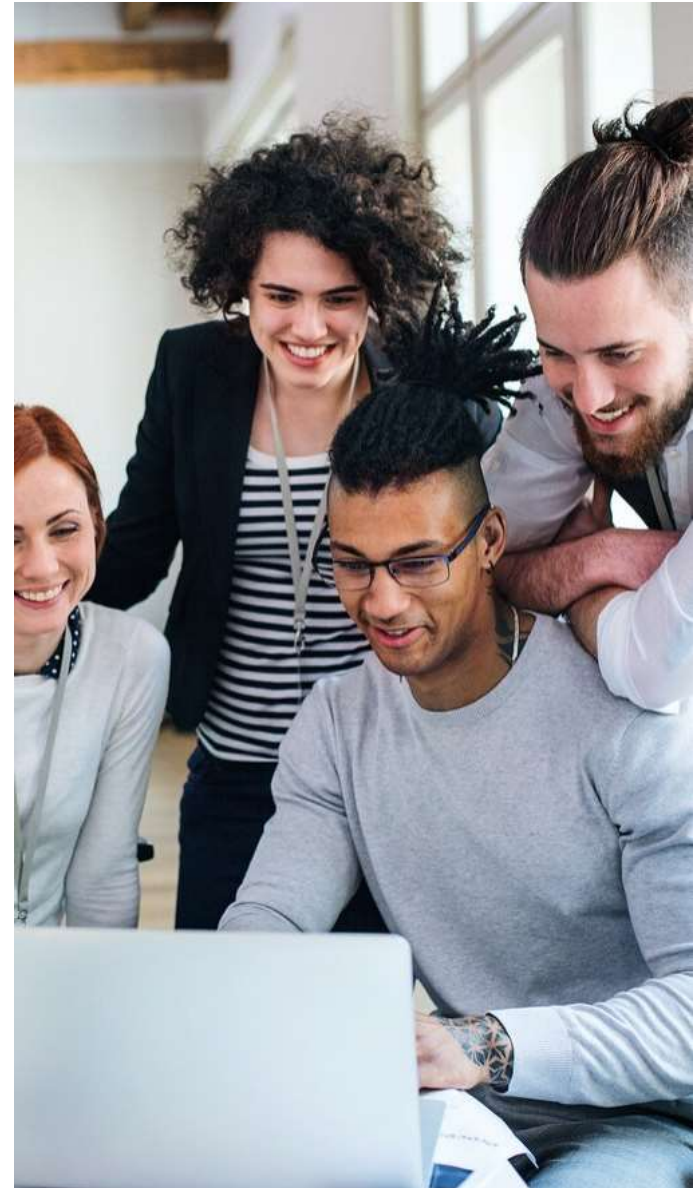
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About MAS



- **Management Advisory Services (MAS) offers *pro bono* consulting services for non-profit organizations, based on the extensive knowledge and expertise of Volunteer Consultants**
- **MAS does not charge fees for its services but accepts donations - all Consultants' time is donated.**
- **For more than 25 years, MAS has worked collaboratively with over 1,300 non-profit organizations in the Greater Toronto Area.**
- **Clients have ranged in size from very small – 2 to 3 people working out of church basements – to major, high profile social service agencies.**

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Purpose of Presentation and Learning Outcomes

Purpose

- Introduction to the legal context of non-profits and charities
- Exploration of the Board's Role and Responsibilities
- Clarification of the Director's Role and Responsibility
- Discussion of some key challenges facing Not for Profits.

Learning Outcomes

- Knowledge of the legal instruments that have created your non-profit/charity
- Ability to identify the Board's Role and Responsibility
- Clearer understanding of the Director's Role and Responsibility
- Knowledge of key challenges facing Not for Profits as well as ways to address these challenges

LEGAL ROLES AND RESPONSIBILITIES

Module 1 - Introduction

- a. Introduction to Incorporation
- b. Not for Profits and Charities
- c. Legal environments

Module 2 – The Board

- a. Rules
- b. Role
- c. Responsibility
- d. Relationship - Board and ED

Module 3 – The Director

- a. Fiduciary Duty
- b. Individual accountability

Module 4 – Challenges

- a. Top 3 and how to address them

LEGAL ROLES AND RESPONSIBILITIES

Module 1 - Introduction

- a. Introduction to Incorporation
- b. Not for Profits and Charities
- c. Legal environments

Incorporation - legislation

The process of establishing a legal entity, separate from its members or shareholders

- ☑ Provides legal protection, as it is the “corporation” that does things, not individual members, so it is the corporation that gets taken to court!
- ☑ Facilitates contracting – for financial services, for premises, for supplies etc. – as the corporation continues regardless of membership changes

Incorporation can be under ...

1. Federal legislation:

Canada Not-for-Profit Corporations Act (CNCA)

2. Provincial legislation

Ontario – **Corporations Act (OCA)**

Incorporation - legislation

Canada Not for Profit Corporations Act

Modern legislation (2009)

Single regulator for corporate changes

Electronic filing / retrieval

\$250K audit exemption limit

Stable & known

Ontario Corporations Act

Dated, adapted legislation (1990)

Public Guardian & Trustee also involved

Paper/microfiche filing / retrieval

\$100K audit exemption limit

uncertain!
Subject to replacement (“ONCA”)

Incorporation – legal documents

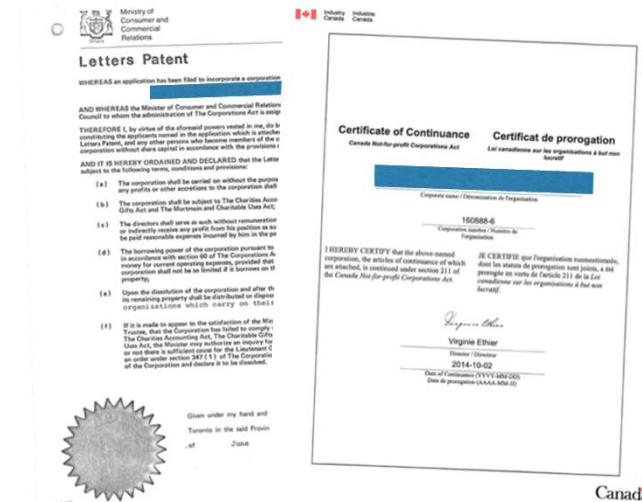
Letters Patent granted under the current provincial *Corporations Act* (OCA)

Certificate of Incorporation granted under the *Canada Not for Profit Corporations Act* (CNCA)

Certificate of Continuance granted under the *Canada Not for Profit Corporations Act* (CNCA) to organizations originally incorporated under the OCA

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...annexed to which are the Articles



Incorporation - Articles

The corporation's Articles set out key information including:

- ▶ The classes of membership & their voting rights
- ▶ The number of directors or the minimum / maximum numbers
- ▶ The “purposes” (previously “objects”) of the corporation
- ▶ Any restrictions on its activities

The image shows two overlapping forms for incorporating a non-profit corporation in Canada. The front form is 'Canada Not-for-profit Corporations Act (NFP Act) Form 9211 Articles of Continuance (Import)'. It contains sections for: 1a - Corporate name on continuance; 1b - Corporate name in the other official language; 2 - The province or territory in Canada where the registered office is situated; 3 - Minimum and maximum number of directors; 4 - Statement of the purpose of the corporation; 5 - Restrictions on the activities that the corporation may carry on; 6 - The classes, or registered or other groups, of members that the corporation is authorized to establish. The back form is 'Canada Not-for-profit Corporations Act (NFP Act) Form 9211 Articles of Continuance (Import)'. It contains sections for: Statement regarding the distribution of property remaining on liquidation; Additional provisions, if any; Book name (if there is a change of name on continuance); Date of incorporation; and Signatures of directors or authorized officers.

Incorporation – Not for Profit, Charity

Not-for-profit

“An organization organized and operated exclusively for social welfare, civic improvement, pleasure, sport, recreation, or any other purpose except profit (e.g. a club, society, or association). The organization will generally be exempt from tax if no part of its income is payable to, or available for, the personal benefit of a proprietor, member or shareholder.”

Charity

“An organization established & operated for charitable purposes that devotes its resources to charitable activities. Its purposes must fall within one or more of the following categories:

- the relief of poverty;
- the advancement of education;
- the advancement of religion;
- certain other purposes that benefit the community in a way the courts have said is charitable.

It must be resident in Canada and cannot use its income to benefit its members.”

Incorporation – Charity

What are the advantages of being a registered charity?

The primary advantages of being a registered charity are:

- Registration allows an organization to issue official receipts for gifts it receives. This reduces the individual donor's income tax payable, and reduces the taxable income of a corporate donor.
- Once the organization is registered, it is exempt from paying income tax under Part I of the *Act*.
- Eligible to receive gifts from other registered charities, such as foundations.
- Increased credibility in the community, as registered charities must follow rules and guidelines.

Source: Canada Revenue Agency

Some
Disadvantages

- ▶ More demanding bookkeeping
- ▶ More reporting
- ▶ Required spending

Incorporation – legal environments

Four different legal environments:

Easiest to navigate

(CNAC)
Canada Not for Profit
Corporations Act

CNCA NFP	CNCA NFP/Charity
OCA NFP	OCA NFP/Charity

(OCA)
Ontario
Corporations
Act

Most challenging to navigate

Quiz

1. Which legislation forms the basis of your incorporation?
2. The incorporation Articles identifies key information for Directors, including the Objects/Purposes of the corporation. Do you know what your Objects/Purposes are?

LEGAL ROLES AND RESPONSIBILITIES

Module 2 – The Board

a. Rules

b. Role

c. Responsibilities

d. Relationship - Board and ED

Board – Rules

Follow the Rules

Duty to comply

(2) Every director and officer of a corporation shall comply with

(a) this Act and the regulations; and

(b) the articles, the by-laws and any unanimous member agreement.

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s. 148 (2) Canada Not-for-Profit Corporations Act

Board – Rules

Where do you find the Board's Rules?

Externally imposed

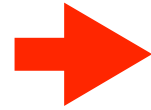
1. The laws of the land, including the relevant legislation covering incorporation: e.g. *Ontario Corporations Act, Canada Not-for-Profit Incorporations Act, Charities Accounting Act, Income Tax Act*

Internally imposed

1. "Constituting documents" (i) Articles (e.g. purposes/objects of incorporation) (ii) By-laws;¹⁶
2. Policies and procedures.

Board – Rules

Rules Externally imposed

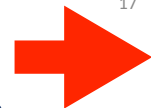


general knowledge

Framework set by **legislation**

Typically regulates membership & powers, meeting notices, record keeping & audit requirements, and Board composition. Also imposes duties and responsibilities on directors

Rules Internally imposed



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detailed knowledge

Framework set by **Articles** (Purposes / Objects), **By-laws, Policies and Procedures**

Specify limits and operating requirements ... are drafted by the organization itself

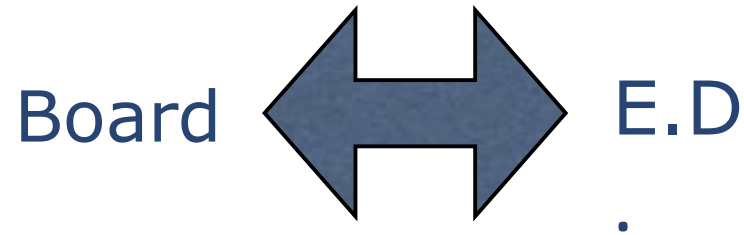
Board – Role

- Compliance
- Stewardship
- Oversight
- Accountability - community

Board – Responsibilities

- Governance
- Strategic Planning
- Organizational Performance Oversight
- Risk Management Oversight
- Human Resources Management – ED
- Financial Management (e.g. approval of annual budget and financial statements)
- Material Transactions Oversight (e.g. purchase of property, closing of programs)
- Service Quality Oversight
- Stakeholder Management

Board – Board/ED Relationship



The Board and the ED work in partnership, each focused on their own responsibilities

- Board – governance
- ED - operations

Quiz

1. Where can you find your agency's internally imposed rules?
2. What are some of your Board's responsibilities?
3. What is the primary difference between Board and ED roles?
 - a. Hiring and firing a program supervisor is a Board responsibility ... true or false?
 - b. Approval of the annual budget is an ED responsibility ... true or false?
 - c. Approval of a Staff Harassment Policy is an ED responsibility ... true or false?

LEGAL ROLES AND RESPONSIBILITIES

Module 3 – The Director

a. **Fiduciary Duty**

b. **Individual accountability**

Directors – Fiduciary Duty

- ❑ Directors of a non-profit have a fiduciary duty of **care** and **loyalty** to act in the best interests of the corporation
- ❑ Fiduciary duty places a director in a **legal** and **ethical** obligation of trust: directors act primarily for the benefit of others served by the corporation

Directors – Fiduciary Duty

Duties of directors and officers

148. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Directors – Duty of Care

- ❑ Duty of Care includes stewardship of the corporation to ensure that the assets are effectively used
- ❑ Duty of Care requires a board director to
 - ✓ act honestly
 - ✓ act diligently
 - ✓ exercise power appropriately²⁵
 - ✓ act obediently

Directors – Duty of Care

- * Historically, the *Ontario Corporations Act* standard of care was **subjective** – what is reasonable given the knowledge & experience of the director concerned. Individual directors could be held to different standards depending on professional qualifications and experience. (e.g., a lawyer would be held to a higher standard than a clerk)
- * Under the *Canada Not for Profit Corporations Act* and now the *Ontario Corporations Act* (following an amendment), the standard of care is **objective** – what is reasonable given the nature of the organization and the expectation regarding skills and expertise. Individual directors are held to the same standard.

Directors – Duty of Care

- ❑ **Honesty** – acting truthfully in word and deed
- ❑ **Diligence** – becoming knowledgeable of the organization, reading Board materials, attending meetings and participating fully in discussion and decision-making
- ❑ **Power** - exercising decision-making appropriately to further corporate goals and objectives - not succumbing to inaction or inattention
- ❑ **Obedience** – complying with applicable laws and the corporation's governing documents (e.g. policies, procedures), and supporting implementation of decisions

Directors – Duty of Loyalty

- ❑ Duty of Loyalty requires board directors to act in the best interest of the corporation and to:
 - ✓ avoid conflict between the corporation's interest and a director's self-interest (actual or perceived conflict)
 - ✓ avoid situations where a director may have competing fiduciary duties (e.g., an individual is on the board of two different organizations that have competing interests)

Directors – Duty of Loyalty

Conflict of Interest

141. (1) A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of committees of directors, the nature and extent of any interest that the director or officer has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer

1. (a) is a party to the contract or transaction;
2. (b) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or
3. (c) has a material interest in a party to the contract or transaction.

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Directors – Confidentiality

Comply with Board Confidentiality Policy. Failure to do so may result in:

- Harm to the organization
- Removal from the Board

Directors – Breach of Fiduciary Duty

- ❑ If you breach your fiduciary duty, you are at risk of being found personally liable if the organization suffers a loss which can be attributed to your actions or omissions
- ❑ In each case, liability will depend upon the particular facts and circumstances at play and legal advice is critical
- ❑ Many corporations have director liability insurance which depending on the policy can protect directors from liability which might result from a breach of fiduciary duty, providing the breach was not a result of willful negligence

Directors – Insurance Indemnification

Can avoid “duty of care” liability through showing:

- (i) proper diligence and
- (ii) good faith reliance on...

“(a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the public accountant of the corporation fairly to reflect the financial condition of the corporation; or
(b) a report of a person whose profession lends credibility to a statement made by that person.”

Source: sample insurance provision

Directors – Individual Accountability

A collective Board responsibility

An individual accountability

Directors – Individual Accountability

1. Know your stuff
2. Do the work
3. Participate fully
4. Behave appropriately

Quiz

1. As a director, your duty of care legally requires you to act in a certain way. How?
2. As a director, your duty of loyalty requires you to avoid what?
3. If you breach your fiduciary duty, you are at risk of being found personally liable. True or False?

LEGAL ROLES AND RESPONSIBILITIES

Module 4 – Challenges

a. Top 3 and how to address them

Legal Roles and Responsibilities - Challenges

- Knowledge of legal roles and responsibilities
- Resources to support effective governance
- Recruitment of qualified directors

Legal Roles and Responsibilities - Solutions

- ❑ Knowledge: Governance Committee champion, creation of Board Manual, ongoing Board education, mentorship, signing of annual declaration regarding roles and responsibilities
- ❑ Resources: Creation of digital Board portal, part time Board support admin
- ❑ Recruitment: robust Policy and Process, including postings on key recruitment boards, Governance Committee screening of applicants, comprehensive interviews and reference checks



Management Advisory Services

<https://masadvise.org/>

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Thank you!



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