

VELA
LIABILITY: HOW TO MANAGE YOUR RISK

DIRECTORS' LIABILITY: PLAN LANGUAGE INFORMATION

When you form a Microboard it is important to understand the risks involved. This paper offers Microboards some suggestions for lowering these risks, whether you are doing advocacy or providing a service (hiring staff or contracting for respite or a home share provider) to support your loved one.

General Information

An organization can be 'incorporated' as a society under federal or provincial law. This society can be for-profit (that is, organized for commercial objectives), or it can be non-profit (that is, organized for charitable purposes). A non-profit society can also be referred to as:

- a club;
- an association;
- a corporation;
- a league, or
- a committee (as in the Canadian Olympic Committee).

What is a board?

A board of directors is a body of elected or appointed members who together oversee the activities of the society and can have other names such as:

- board of trustees,
- board of managers,
- board of governors, or
- executive board.

It is often simply referred to as "the board."

What is a director/officer?

Directors of non-profit organizations are volunteers and are rarely paid for their services, although they can be paid back for certain expenses. A director fulfills certain roles and functions, such as the duties of a 'president,' 'treasurer' or 'secretary'.

Legal duties of directors

- *diligence;*
- *loyalty;* and
- *obedience.*

Liability of directors

A director who does not fulfill his or her duties as outlined above may be liable. The term 'liability' refers to the responsibility of directors and organizations for the 'consequences' of their conduct

that does not meet a pre-decided legal standard. Usually, the term 'consequences' means damage or loss experienced by someone, and being responsible for such consequences means having to pay financial compensation.

Liability arises in the following three situations:

- a law (*statute*) is broken;
- a contract is broken, breached or violated; and
- where an act, or a failure to act, whether intentionally or unintentionally, causes injury or damage to another person.

Indemnification

To 'indemnify' means to put someone back in the same financial position as they were in before something happened. An indemnified director could be compensated for the following:

- legal fees;
- fines that were paid under a statute;
- a financial settlement that resulted from a lawsuit; or
- any other legal obligation that a director was required to fulfill.

Indemnification is only as good as the organization's financial ability to pay it.

Avoiding liability through risk management

There is risk in everything we do. Even so, directors should think about the risks and try to limit them through risk management. The process of risk management is a simple three-part activity. It involves:

1. Looking at a situation and asking what can go wrong and what harm could result.
2. Identifying practical measures that can be taken to keep such harm from occurring.
3. If harm does occur, identifying practical measures that can be taken to lessen the impacts of harm and pay for any resulting damage or losses.

The practical measures that can be taken to manage risks fall into four categories:

- Assume the risk (decide that the risk is minor and do nothing).
- Reduce the risk (find ways to change people's behaviour or the environment in which people work so that the degree of risk is reduced).
- Eliminate the risk (choose *not* to do the risky thing).
- Transfer the risk (accept the risk but transfer the liability

associated with it to someone else through a written contract).

Risk management is based on general standards that a reasonable person would follow such as:

- properly documenting meetings and decisions;
- meeting all legal reporting requirements;
- making sure directors fulfill their roles; and

if you hire staff:

- training, educating and monitoring staff and volunteers;
- inspecting and maintaining the work place and equipment; and
- screening and overseeing staff and volunteers.

Directors' and officers' liability insurance

Directors' and officers' insurance is like general liability insurance. It covers the costs that the directors might have to pay because of damages to another party. Directors and officers' liability insurance only covers those losses that come from a directors own 'wrongful acts'. Wrongful acts is defined as:

- an error;
- a misstatement;
- a misleading statement, act, omission; or
- not doing some other duty the director should have, while they are insured.

The risk is not so much that a director will be found guilty of a wrongful act, but simply that someone will make a legal claim that there has been a wrongful act. The cost of defending a claim can be high.

All insurance policies are different and many do not cover the following:

- Directors acting outside the scope of their duties as they are described in this discussion paper, including any actions that are dishonest, fraudulent or criminal.
- Not following a contract, including wrongful dismissal of employees.
- Fines and penalties for not following a law or regulation.
- Complaints under a human rights code, including a complaint of discrimination.
- Harassment or sexual harassment.

If your Microboard is doing advocacy and does not hire staff, you will **not** have directors and officers liability insurance to help limit your risk.

An incorporated society still offers its directors the protection of

what is termed the 'corporate veil.' As a separate legal entity, the society is one step removed from the directors and members. Lawsuits must be brought against the society, and directors of the society are, to a large extent, protected from liability for actions they took in their role as directors.

Once you have agreed to become a director on a Vela Microboard, the following guidelines will help you to take steps to manage these risks even if you don't have insurance. Some sections don't apply to Microboards that don't hire staff.

Meetings

Attend meetings, be prepared to discuss the items on the agenda and participate fully in decision-making.

- Provide your reports to the board in written form.
- If you have any real or believed conflict of interest, declare it when the issue first arises, and do not participate in or influence the decision-making process.
- Have your disclosure recorded in the meeting minutes.
- Do not rush important decisions. Make sure that board members receive meeting materials in enough time to read them. If important information is missing, postpone the decision until this information can be obtained.
- Keep your own personal copies of key documentation and minutes of controversial meetings.

Finances

- Take an interest in finances by reviewing regular financial reports, and approving and monitoring the organization's annual budget.
- Know who is authorized to sign cheques and for what amount.
- Do not be shy about asking questions and seeking clarification on financial matters.
- Develop a list of your legal reporting requirements and assign a director to make sure that these requirements are being fulfilled.

Contracts

- Make sure that all contracts the organization enters into are carefully reviewed by several directors.

Policy

- Be familiar with the content of the organization's constitution and bylaws.
- On important matters and for decisions that have the potential to adversely affect someone, ensure that the organization's policies are adhered to as written. If the policy is unsuitable for dealing with the particular circumstance, then take steps to change the policy for the future.
- Commit time and to developing risk management policies.

Personnel/Staff

- Make sure that all staff and volunteer positions have written job descriptions.
- Insist that the organization develop a staff policy manual.
- Be sure that suitable screening measures are in place for those staff and volunteers.
- Review and update your material yearly.

Insurance

- Ask for copies of the organization's insurance policies and become familiar with their scope of coverage.

Training

- Support professional development for staff and training for volunteers.

General

- If you suspect that something is not right, go with your intuition and check it out! Be curious. Remember, as a director you will be held responsible for circumstances and situations you *ought* to have known about, whether or not you actually did know about them.
- If the organization needs to deal with a complex matter in which directors lack expertise, consider the services of an outside professional (for example, a Vela facilitator, a lawyer, financial advisor, human resources consultant or a risk management specialist).

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