



RISK NOTE

SUBJECT: Directors and Officers Liability

DUTIES OWED BY DIRECTORS AND OFFICERS

When individuals are duly elected or appointed as a director or officer of a Health Care Agency (a Director or Officer), they owe very specific duties to the organization they oversee. A breach of these duties can lead to action against the individual Director or Officer, or the organization itself. This means that Directors and Officers must act with due diligence and good faith with the best interests of the organization in mind. The duties fall into four categories:

1) Duty of Care

Directors must exercise the same degree of care that other reasonable, prudent individuals would exercise in the same circumstances. In other words, they must conduct themselves in the same way that Directors and Officers of similar organizations would do. They must act honestly and in good faith with the best interests of the organization in mind. Numerous provincial and federal legislation set out the various obligations with respect to the duty of care that is owed by Directors and Officers to the organization they oversee.

Example: Directors and Officers need to be knowledgeable about the organization they oversee. They should not make decisions that come before them without knowing enough about the subject matter to properly assess the impact of the decision on the organization. They should attend meetings, read reports, ask questions when clarity is needed, etc.

2) Duty of Loyalty

Directors and Officers should not profit as a result of being on the board of an organization. They cannot use the information they learn in this role for their own benefit. Directors and Officers should not be in a conflict position with respect to relationships of the organization and other entities. They must put the interests of the organization before their own.

Example: A Director or Officer should not be involved in an outside business that could influence their duties to the organization (e.g. own a business which provides services under contract to the organization, etc.). When a matter comes before the board of directors for a decision, which may impact on a personal matter of a Director, that Director must recuse him or herself from voting on the matter.

3) **Duty of Disclosure / Confidentiality**

Directors and Officers must disclose material information to those who need to know it. They must also keep information confidential and not disclose information to those who *do not* need to know.

Example: Directors and Officers need to ensure that executive Officers have the information needed to effectively carry out their roles. They also need to ensure appropriate policies are in place with respect to protecting personal information about individuals (e.g. patient information, staff employment records, etc.). Should a matter come before the Board of Directors and a Director has a personal involvement in the matter, that Director should disclose to the Board his or her involvement in the subject matter.

4) **Duty to Comply with Statute**

Directors and Officers must comply with relevant legislation in the management of the organization. It is incumbent upon them to inform themselves of applicable legislation and understand it. Lack of knowledge of the legislation is not a defence for noncompliance.

Example: Directors and Officers should ensure that they and the organization they oversee comply with applicable legislation and regulations such as the *BC Health Authorities Act, Society Act, Hospital Act, Freedom of Information and Protection of Privacy Act*, etc.

PROTECTION FOR DIRECTORS AND OFFICERS

Certain protection is available to individuals when serving as Directors and Officers of an organization:

1) **Statutory**

Legislation sets out protection for individuals serving as Directors and Officers of organizations.

Example: The *BC Health Authorities Act* provides that:

“Liability of members

14 (1) *No action for damages lies or may be brought against a member, officer or employee of a board because of anything done or omitted in good faith*

(a) in the performance or intended performance of any duty under this Act, or

(b) in the exercise or intended exercise of any power under this Act.

(2) Subsection (1) does not absolve a board from vicarious liability for an act or omission for which it would be vicariously liable if this section were not in force.

The BC *Society Act* has a similar provision:

“Liability of members

5 A member of a society is not, in the member's individual capacity, liable for a debt or liability of the society.”

The definition of ‘a member’ includes the directors and officers of the society.

2) Indemnification

The bylaws of many organizations set out indemnification provisions for individuals who serve as its Directors and Officers, in accordance with applicable legislation.

Example: Organizations incorporated under the BC *Society Act* will often indemnify their Directors and Officers under the bylaws of the organization. The bylaws must be approved by the Registrar of Societies and the language used usually mirrors that of the legislation.

3) Insurance

Subject to the terms and conditions of the policy wording, Directors’ and Officers’ Liability Insurance will respond to pay claims from the organization if it indemnifies a Director or Officer. This is called corporate reimbursement coverage. It will also respond to pay claims to the Director or Officer if the organization cannot indemnify them and the loss is not otherwise excluded (e.g. organization does not permit indemnification in its bylaws; organization is bankrupt so has no funds to fulfil indemnity obligations). HCPP provides coverage to Health Care Agencies subject to the terms and conditions of the Directors’ and Officers’ Liability Agreement.

CONDITIONS FOR PROTECTION

In order for each of the three types of protection mentioned above to respond, Directors and Officers must satisfy certain conditions. These include:

1) Good Faith

The Director or Officer must have acted honestly and in good faith with the best interests of the organization in mind.

Not disclosing a conflict of interest may be a breach of good faith.

2) Lawful Conduct

The Director or Officer must have not knowingly conducted him/herself in an unlawful manner. A Director or Officer must act within the law. A Director or Officer who breaches the law knowingly or with willful blindness is acting in bad faith. This means that she/he must use due diligence with respect to legislative requirements applicable to the organization. Ignorance of the law is not a defence. With respect to criminal activities of others, protection may still be available if the individual used due diligence, but was unwittingly drawn into the criminal activities of others.

Example: if a Director is falsifying financial statements to hide evidence that funds are being siphoned for personal gain, other Directors could still have protection if they can demonstrate they could not reasonably have known about the criminal activity. "Reasonably known" is important and means that due diligence is still expected.

RISK MANAGEMENT FOR DIRECTORS AND OFFICERS

Directors and Officers of an organization can take certain steps to mitigate the possibility of breaching the duties owed. These include:

- 1) Be aware of the responsibilities involved in accepting a position as Director or Officer of an organization.
 - Understand the statutory and common law obligations
 - Understand the specific role they play within the organization
 - Understand the charter, bylaws, activities and any operational rules of the organization
 - Understand finances of the organization
 - Ensure formal reporting structures are in place so that information is properly communicated from and to the Directors and Officers – everyone in the organization should have the information they need to properly perform their duties
- 2) Ensure there is no conflict between their duties to the organization and outside self-interests.
 - Avoid employment or business opportunities that could be perceived as influencing their role as a Director or Officer of the organization
 - Do not accept gifts, favours or services that could be perceived as influencing their role as a Director or Officer of the organization
 - If a conflict of interest arises, declare it and manage the conflict appropriately
 - When in doubt about whether to disclose a conflict, err on the side of caution and disclose or seek legal advice on the duty to disclose.

- 3) Handle confidential and sensitive information with care and ensure the organization appropriately handles confidential information in accordance with applicable legislation, policies or guidelines.
 - Understand confidentiality obligations and seek consultation with legal counsel or privacy specialists if necessary
 - Follow guidelines or policies set out by the organization around protection of personal information or public statements
 - Store confidential information appropriately, taking reasonable steps to ensure policies and procedures are in place that secure confidential information from those who should not have access (e.g. encryption, password protection, firewalls, etc.)

- 4) Ensure the organization has policies in place that formalize compliance with applicable legislation, regulations including:
 - Confidentiality and privacy policies
 - Human Resource Policies (e.g. job descriptions & qualifications, employee performance guidelines, respectful workplace, termination procedures, “whistleblower policies”, etc.)
 - Ensure formal reporting systems are in place to appropriately manage compliance discrepancies

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