

## Definitions

*Directors' and Officers' Liability Insurance* - Liability insurance that covers the potential liabilities of the directors and officers of an organization resulting from mistakes in administering their duties.

Directors and officers have a duty to exercise due diligence in overseeing the activities of the organization that they serve. They are required to act in good faith and in the best interest of the organization. Directors have three basic duties:

1. Duty of Diligence (Duty of Care): Act reasonably, in good faith, in the organization's best interest.
2. Duty of Loyalty: Place the interest of the organization before your own.
3. Duty of Obedience: Act within the scope of the organization, within applicable rules and laws.

### Key Point

Directors and officers have very specific duties and obligations that must be known and practiced by all directors and officers.

## Legal Liability

Directors may be liable for:

- Failure to act as stated under a statute. For example, if a statute requires directors to file a report or maintain certain records, and these reports and records are not maintained, then the director may be liable for an offence under that statute.
- Non-compliance of the organization with a statute. For example, directors may be liable for mismanagement, financial losses, wrongful dismissal, employee discrimination or failure to remediate environmental damage.

It is also important to note that:

- Directors can be held personally liable.
- Ignorance is not a defense.
- Resignation is not necessarily a defense.
- Board indemnity may not be enough.
- Directors may be liable for nonperformance.

Consult a lawyer for more information on directors' and officers' legal liability. For a comprehensive review of legal liability for directors and officers of not-for-profits, visit Industry Canada's "Primer for directors of not-for-profit corporations" at <http://strategis.ic.gc.ca/epic/internet/incilp-pdci.nsf/en/c100689e.html>

## Risk Management

1. Provide awareness training in negligence and liability to all directors and officers.
2. Ensure directors are aware of:
  - risks associated with being a director or officer of the organization;
  - statutory and civil liabilities;
  - specific directors' obligations;
  - other rules associated with the organization's business for which directors may be liable due to acts or omissions of the organization; and
  - other responsibilities (including understanding finances and knowing the organization and its charter).
3. Ensure there is no conflict between the duty owed to the organization and the director's self-interest.
  - Avoid outside employment/business that may interfere with or influence the organization's duties.
  - Handle confidential and sensitive information carefully (prevent release of information).
  - Follow guidelines on the appropriateness of public statements (i.e., what and when information can be released).
  - Do not accept gifts, favours or services relating to company duties.
4. Ensure directors are aware of the organization's operations and affairs. Maintain formalized operating policies and procedures for all activities within the organization's control.
  - a. Implement a financial management policy. Establish clear financial reporting guidelines.
  - b. Store confidential materials and sensitive information in a proper place.
    - Determine who has access.
    - Encrypt all electronic confidential materials.
    - Ensure only those with passwords have access. The system should require that passwords be changed frequently.
    - Implement firewalls to prevent hackers from accessing information.
  - c. Create a human resources policy.
    - Prepare formal job descriptions for all employees and document the experience and training required for those positions.
    - Document specific aspects of unacceptable employee performance and advise employees of it well before termination.

### Key Point

Directors and officers should be given all the appropriate information that they require to perform their duties effectively.

5. Ensure all employees, visitors, customers, clients and other stakeholders are protected from harm.
6. Establish a formal information reporting system. Generally, a director is entitled to rely on information provided by officers or employees/volunteers of the organization, unless the director knows that relying on the officer/employee/volunteer is inadvisable.
7. Directors should have a clear understanding of all the activities in the organization and should question anything that is unclear. Directors should also clearly communicate their decisions.
8. Document decisions and how they were made.
9. Work closely with legal representatives in making decisions. If the director has provided full disclosure to counsel, requested counsel's advice as to the legality of the proposed action, received advice that the action would be lawful and proceeded in reliance on the advice, this may demonstrate that the director acted with due care.
10. Implement a "whistle blower" policy that is communicated to staff and volunteers, and that lets people know that they can contact a specific board member or representative to advise of any situation of which they feel the board should be aware.
11. Implement a director's indemnification policy that clearly states the rights and obligations of directors and what protection is provided to them by the organization.

## Claims Handling

1. Document all information related to incidents and report the incident to your insurer. Provide them with:
  - details of the incident; and
  - information about steps that had been taken to avoid the incident.
2. There are very strict reporting requirements under Directors and Officers insurance policies. Contact your insurance representative immediately upon becoming aware of a situation that could potentially give rise to a claim.
3. Investigate and consider how future incidents may be prevented.

**Key Point**  
Directors' and officers' claims or potential claims must be reported to your insurance representative promptly.

## Additional Resources

Government of Canada, Industry Canada, Strategis  
Primer for directors of not-for-profit corporations (Rights, Duties and Practices)  
<http://strategis.ic.gc.ca/epic/internet/incilp-pdci.nsf/en/cl00689e.html>

Canada Business Corporations Act  
<http://laws.justice.gc.ca/en/C-44/>

Canada Labour Code  
<http://laws.justice.gc.ca/en/L-2/>

Criminal Code  
<http://laws.justice.gc.ca/en/C-46/>

Human Resources and Skills Development Canada  
<http://www.hrsdc.gc.ca/en/home.shtml>

Priest, Margot. (1995). *Directors' duties in Canada: Managing risk*. North York, Ont.: CCH Canadian.