



COMMUNITY
FOUNDATIONS
OF CANADA

CFC TIPS & TOOLS

for Community Foundations

Directors & Officers Liability Insurance (November 2016)

A number of you have called CFC over the years asking a variety of questions about Directors and Officers Liability insurance: Should we have it? If so, how much coverage should we have? Is there a “group plan” available for CFC members? And what kind of D&O coverage do other CFC members have? This Tips and Tools will look at some general aspects of D&O liability insurance.

When an individual agrees to serve on the board of directors of a community foundation, he or she assumes a degree of personal risk. Board members have certain duties and obligations to the organization and its stakeholders, to government, and to employees. These responsibilities carry with them the potential for liability. The best way to avoid pitfalls and minimize risk is to learn about and understand the obligations of being a board member. These are described below, and you will find on the last page of this issue of Tips and Tools a helpful sheet that lists “Guidelines for Minimizing the Risk of Personal Liability” from United Way of Canada – Centraide Canada’s Board Basics Manual. You may wish to distribute a copy of this sheet to each of your board members and to include it with new board members’ orientation packages. An additional safeguard to help your community foundation’s board members avoid possible liability is by purchasing liability insurance for directors.

What are the legal responsibilities of, and risks to, the directors and officers of a non-profit board?

Directors hold a fiduciary responsibility for the management of the organization’s funds, wrongful termination of an employee, breach of contract and the failure of the organization, among other things. The major issue is board members’ responsibility for the solvency of the organization: if it goes under, they may find themselves personally liable for paying unpaid taxes, wages, and pension contributions.[1] Specifically, the duties of the non-profit board are as follows:

Duty of obedience: requires that the directors act according to the terms of the organization’s bylaws and constitution, as well as the applicable statutes.

Duty of care: requires that the directors act with the care, competence, and attention, that a reasonable person in similar circumstances would exercise when in a similar situation. The duty of care may vary according to the specific skills of the director: for example, a lawyer or accountant might be held to a higher standard of care than someone without specialized knowledge.

Duty of loyalty: requires directors to act honestly, avoid personal conflicts of interest, and put the interests of the organization first.



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In order to avoid the risks of liability, a director must demonstrate that he or she has acted with due diligence in discharging these duties. Standards vary in different provinces, however, depending on whether common or statutory law provisions apply, and are different in application to charitable corporations and trusts. Under different statutes higher standards have been applied to the application of care for the fiduciaries of trusts, into which category directors of community foundations fall, than for those of non-profit or for-profit corporations.[2]

What are the potential consequences of a breach of any of the duties of Directors and Officers?

The breach, or alleged breach, of any of the principles described above, if it leads to financial loss for any of an organization's stakeholders, could be grounds for a legal action. Any financial damages awarded can lead to personal financial liability for directors and officers of the organization.

“Slip and fall” and other bodily injury claims are much more frequent and expensive than non-profit directors and officers liability claims, so organizations should have general liability coverage first.

What does a Directors and Officers Liability policy normally cover?

It covers claims for Wrongful Acts of Directors & Officers or the Corporation and for which either may become legally obligated to pay. It is important to have a policy that “will pay on behalf of” the Insured Persons or the Corporation and not require you to pay first and then be reimbursed by the insurer.

All policies are subject to definitions and exclusions. Look for a broad definition of “Insured Persons” to include directors, officers, trustees, volunteers, employees (whether salaried or not) and committee members including their estates, heirs, legal representatives or assigns.

While most bylaws allow for the indemnification for directors and officers for losses they incur while acting in their capacity as directors and officers, a compelling reason to obtain directors and officers insurance, in addition to that, is when the organization is unable to do so. For example, an organization will not be able to indemnify when it is financially impaired and does not have the funds available for indemnification.

How much coverage should we have?

Since the priority for insurance for a non-profit should be **General Liability** coverage, it is recommended a minimum limit of \$1 million to a maximum of \$5 million, but most organizations would be adequately covered by \$2 million. Policies should include Tenants Legal Liability if you are renting an office space, and Non-Owned Automobile Liability, Employee Benefits and Errors & Omissions Liability if you have staff.

Directors and Officers Liability: There is no hard and fast formula to determine how much coverage one should have. Limits for smaller organizations will normally exceed actual assets, and since the most common exposures are related to employment issues, dismissal, payroll deductions and the like, \$1 million should be adequate in most cases. For larger organizations, the Executive Director, Finance Director or Treasurer, Accountant or Auditor, and an Insurance Broker should discuss the maximum probable loss given the value of assets to determine a limit. In the case of community foundations with larger endowments there will likely be more experienced directors and committees managing the funds. The professionals on the board and committees may have their



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own Errors and Omissions Liability coverage relating to their profession, but not for actions outside their expertise (e.g. the accountant depends on the lawyer and vice versa). There is no need for D&O coverage in excess of \$5 million, no matter how large the assets since it is hard to find many examples of non-profit directors and officers liability claims, and to the best of our knowledge none has exceeded \$1 million.

Sources for Insurance

Over the years CFC has been asked about a national or group insurance plan, however we defer to other sources to provide this service. Here are two options available to the charitable sector that CFC would recommend members exploring in addition to talking to brokers in your own community.

Community Guard – The Cooperators

This program is designed specifically for non-profits and charitable organizations in Canada. It involves a Cooperators agent meeting with you to perform a risk management assessment (determining your needs) and then providing a quote. The program provides D and O Liability insurance, general liability, special events coverage, general property coverage and more. It is a very comprehensive program for Canadian charities.

Talk to your local Cooperators agent and more information can be found at:

<http://www.cooperators.ca/en/Insurance/business/insurance-for-nonprofits.aspx>

Volunteer Canada – Under Our Wing

Volunteer Canada offers Directors and Officers Liability insurance to its members. It does not provide any additional coverage that an organization may need i.e. special events or commercial general liability, but does include a cyber and privacy policy. The cost to join Volunteer Canada is \$125 and the insurance rate is based on the annual budget/revenue of the organization. For more information visit: <https://volunteer.ca/membership/under-our-wing-insurance>.

Imagine Canada has dedicated a section on their website on risk management and insurance as it relates to charities. Advice from industry experts and resources are featured. Visit: <http://sectorsource.ca/managing-organization/risk-management>

Guidelines for Minimizing the Risks of Personal Liability [3]

Individual responsibility

1. Attend board meetings whenever you are reasonably able to do so.
2. Read the minutes of board meetings.
3. Ask that all reports be written and circulated or given orally at board meetings.
4. Be familiar with your organization's purpose, objectives, goals, and programs.
5. Satisfy yourself that the organization is fulfilling the requirements of its bylaws and those of the Canada Revenue Agency.
6. Ensure the organization's affairs are being managed in a manner consistent with its mission and mandate as stated in the constitution.
7. Be certain that you are a member of the organization as outlined in the bylaws.
8. Avoid any conflict of interest or any appearance of personal gain.



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Financial responsibility

9. Become familiar with your organization's finances, including the budget and budget process.
10. Know who is authorized to sign cheques and for what amount.
11. Be sure your organization's books are audited on an annual basis by a reputable firm of chartered public accountants.

Responsibility for organizational policies

12. Be certain that policies are written in a clear and unambiguous manner and are acted on.
13. Insist that there are clear personnel policies, including job descriptions and annual staff evaluations.
14. Insist that nomination and membership procedures set out in the bylaws are followed.
15. Be sure your organization has a policy on volunteer responsibility, authority, and eligibility.
16. Question all matters concerning policy and practice.

Responsibility for public profile

17. Discover how the organization is viewed in the community. Scrutinize and monitor any publications put out by the organization.

If you have any additional questions, contact Cindy Lindsay Director of Member Services, Community Foundations of Canada at clindsay@Communityfoundations.ca or 613.236.2665 x 301.

Other Resources

[Insurance Toolkit for the Voluntary Sector](#) - Volunteer Alberta

[About Risk Management Committees: An Invaluable Resource](#) (Nonprofit Alliance)

[Getting started managing your risk](#) (Insurance Bureau of Canada, 2010)

[20 Questions Directors of Nonprofit Organizations Should Ask About Risk](#) (CICA, 2010)