Liability & Legal Fundamentals for Nonprofit Boards

April 17, 2025
11:00 to 12:00 pm

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Liability and Legal Fundamentals

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Overview

- Legal Influences on an Organization
- Fundamental Duties of Board Directors
- Freedom to Care Act: What is protected and not protected?
- Directors and Officers Risk Management

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What basic influences govern an organization?

A very brief summary

Internal

- Creating instrument or legislation
- Objects or purposes
- Bylaws or other similar documents
- Policies and procedures

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What external influences govern an organization?

A very brief summary

External

- Federal Legislation such as the Income Tax Act
- Provincial Legislation such as the Charitable Fund-Raising Act, Occupational Health and Safety Act
- Municipal Bylaws
- Funding Agreements
- Plus too many more to list!

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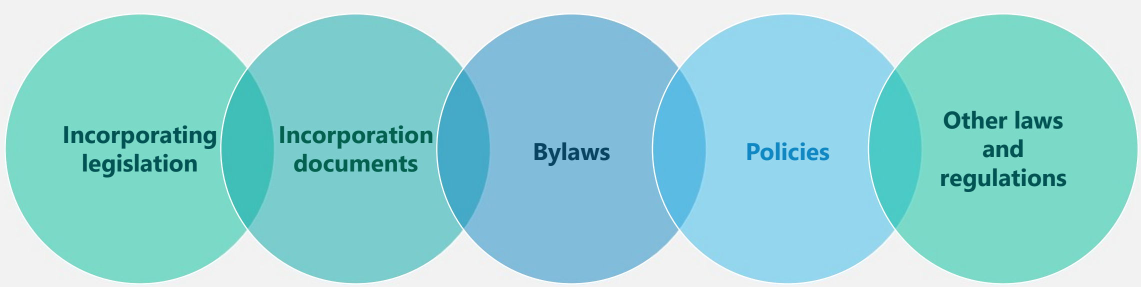
What governs your organization?



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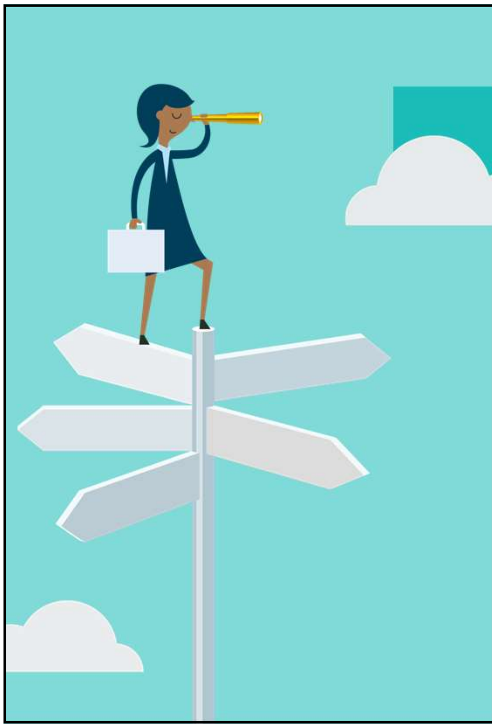

Fundamental Director Duties at Common Law

Each individual director on the board has a fiduciary duty to the organization, which is comprised of two main duties:

Duty of care — to act with the competence and diligence that a reasonably prudent person with similar knowledge and expertise would exercise in comparable circumstances.

Duty of loyalty — to act honestly and in good faith in the best interests of the organization, not their own interests.

Alberta Societies Act and Companies Act do not specifically change these common law duties.

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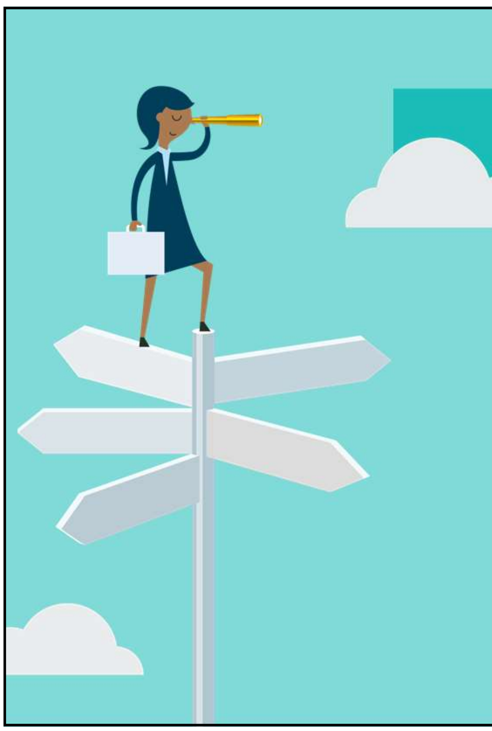

Fundamental Director Duties in Modern NFP Legislation

Statutory Duties

Canada Not-for-profit Corporations Act (NFP Act) includes:

- Duty to manage or supervise management
- Act honestly and in good faith with a view to the best interests of the corporation; and
- Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- Duty to comply with the Act
- Verify the lawfulness of the articles and the purpose of the corporation.

Canada Not for Profit Corporations Act (NFP Act) includes the reasonable diligence and good faith defences for Directors and Officers

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Confidentiality and Disclosure

Similar to for profit corporations

Confidentiality – litigation, employment, donor lists, board discussions, how individual board members voted

Disclosure – obligation arises if it affects a vital aspect/required by law

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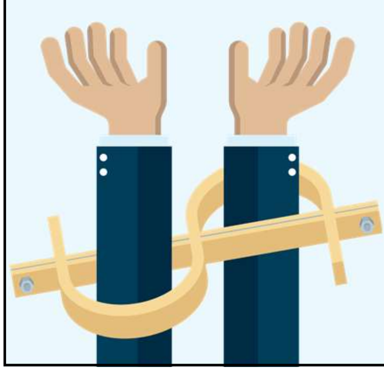
Conflict of Interest at Common Law



Basically, at common law, **a director cannot benefit from his or her position.**

- Directors must declare and avoid any conflicts of interest
- Refrain from voting or may have to resign
- Cannot receive remuneration for acting as a director

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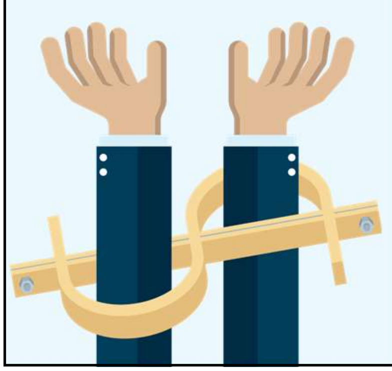
Conflict of Interest in Nonprofit Legislation



Canada Not-for-profit Corporations Act *and* **Companies Act** contain rules for conflict of interest situations

Societies Act is silent on the matter

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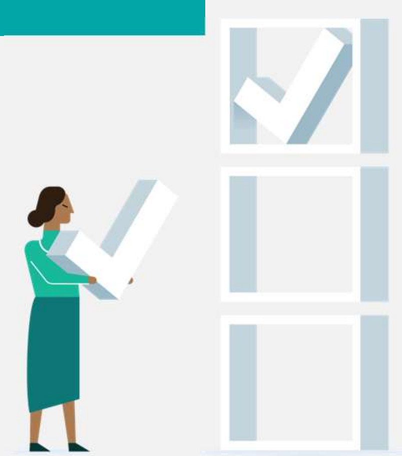
Liabilities of Directors in Legislation

Some legislation imposes liability on directors

Examples:

- Income Tax Act, Excise Tax Act, Canada Pension Plan etc.
- Criminal Code
- Canada Not-for-profit Corporations Act & Companies Act liability for wages
- Environmental Protection legislation
- Occupational Heath and Safety legislation
- Anti-terrorism legislation
- Plus many more examples!



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Liability Protection

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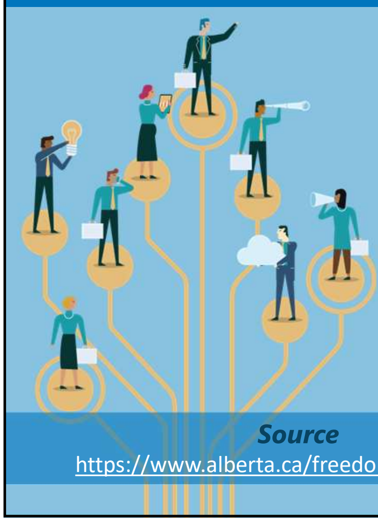

Freedom to Care Act
SA 2021, c F-25.4 ("the Act")

In Alberta there is liability protection for volunteer directors, officers, or trustees of a nonprofit organization as defined by the Act

Source
https://www.alberta.ca/freedom-to-care.aspx

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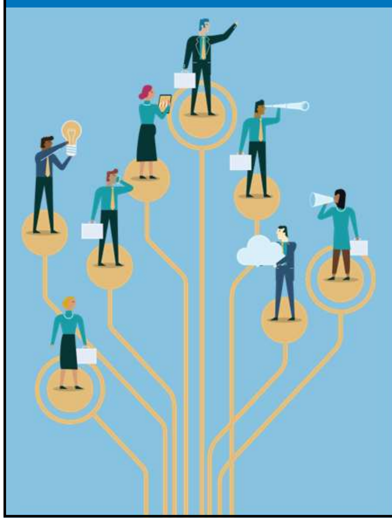
Freedom to Care Act

SA 2021, c F-25.4 ("the Act")



What is protected?

The Act is intended to provide protection from liability for volunteers and remove potential barriers/concerns to volunteering.

The Act provides broad liability protection for individual volunteers acting within the scope of their duties on behalf of an organization.

The definition of a volunteer?

The Act defines a volunteer as including a **director**, **officer** or **trustee** of a nonprofit organization who is not compensated for their role, apart from reasonable reimbursement for expenses.

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What is not protected?

The Act does *not* afford liability protection to any individuals that cause damages where:

- the damage was caused **by willful, reckless or criminal misconduct or gross negligence** by the volunteer,
- the damage was caused by the volunteer while **operating a motor vehicle**, vessel, aircraft or other vehicle for which the owner is required by law to maintain **insurance**,
- the act or omission that caused **the damage constitutes an offence**, or
- the volunteer was unlawfully using or **impaired** by alcohol or drugs at the time of the act or omission that caused the damage.

This Act **does not affect the liability of any nonprofit organization itself.**

The nonprofit organization has **no right of recovery against the volunteer if the volunteer is not liable.**

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First Reported Alberta Judicial Decision on the Freedom to Care Act!

The Judge concluded the President's actions were in breach of her duty of loyalty to this Alberta Society and therefore was unable to conclude she was acting within the scope of her responsibilities as President.

"Actions taken in breach of a director or officer's common law duty of care and fiduciary duty to an organization are the antithesis of acting within the scope of their responsibilities"

Therefore … the Freedom to Care Act does not insulate her from liability

Edmonton (Hakka Tsung Tsin Association) v Demei, 2025 ABKB 80 (CanLII), <https://canlii.ca/t/k9fwg>

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A note on…

Indemnities

Indemnities are intended to cover certain liabilities.

Effectiveness of an indemnity contract depends on the organization's ability to enter into an indemnification contract, governing legislation, bylaws, ability to pay etc.

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A note on…

Insurance Coverage for Directors and Officers

In a claim, legal costs of defending the action can be high!

Consider insurance to cover legal costs and claims against directors and officers (there are exclusions).

Nonprofit organizations should discuss their insurance needs with a knowledgeable broker or agent.

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Protections for Directors
Risk Management

Importance of process and good records

Due diligence defence and business judgement rule require **a record of the process, considerations, expert advice and decisions.**

Most important record is minutes!

- Sometimes incomplete or over done
- Old records not well maintained

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Protections for Directors
Risk Management

Job descriptions
Board orientation and education
Board agenda item
Committee role
Review of governance practices

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Risk Management Resources

CPA Canada

20 questions nonprofit board directors should ask about overseeing management of risk

https://www.cpacanada.ca/en/business-and-accounting-resources/strategy-risk-and-governance/not-for-profit-governance/publications/20-questions-for-nfp-directors-on-risk-management

20 questions nonprofit board organizations should ask about director's duties

https://www.cpacanada.ca/business-and-accounting-resources/strategy-risk-andgoverance/not-for-profit-governance/publications/not-for-profit-director-duties-20-questions

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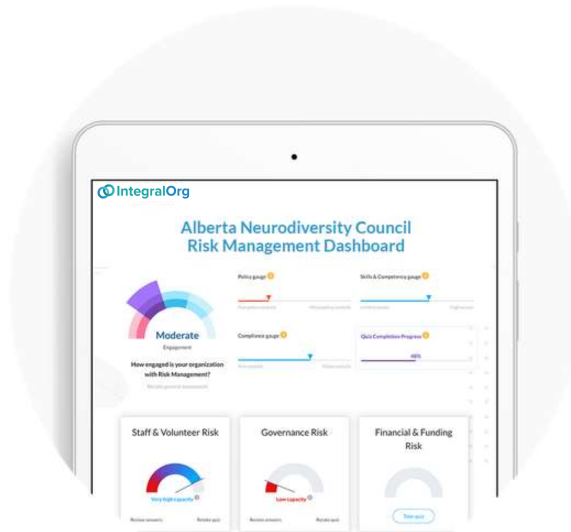
Risk Management Toolkit

Available for free! toolkits.integralorg.ca



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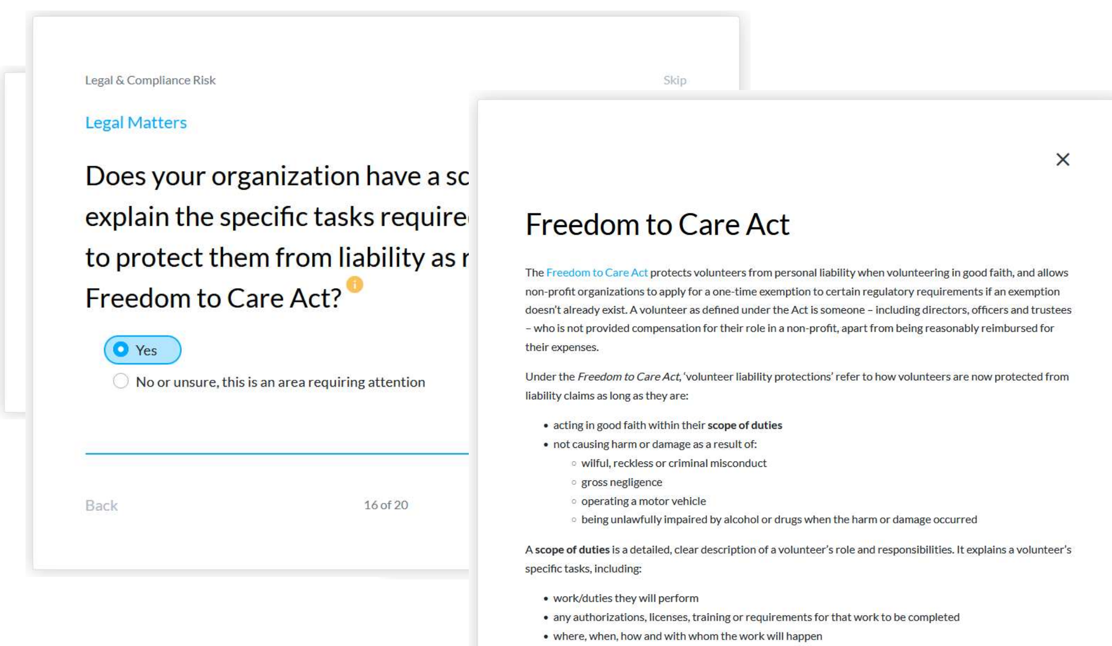

Legal & Compliance Risk

Skip

Legal Matters

Does your organization have a sc
explain the specific tasks require
to protect them from liability as r
Freedom to Care Act?

Yes

No or unsure, this is an area requiring attention

Back

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Freedom to Care Act

The Freedom to Care Act protects volunteers from personal liability when volunteering in good faith, and allows non-profit organizations to apply for a one-time exemption to certain regulatory requirements if an exemption doesn't already exist. A volunteer as defined under the Act is someone – including directors, officers and trustees – who is not provided compensation for their role in a non-profit, apart from being reasonably reimbursed for their expenses.

Under the *Freedom to Care Act*, 'volunteer liability protections' refer to how volunteers are now protected from liability claims as long as they are:

- acting in good faith within their **scope of duties**
- not causing harm or damage as a result of:
  - wilful, reckless or criminal misconduct
  - gross negligence
  - operating a motor vehicle
  - being unlawfully impaired by alcohol or drugs when the harm or damage occurred

A **scope of duties** is a detailed, clear description of a volunteer's role and responsibilities. It explains a volunteer's specific tasks, including:

- work/duties they will perform
- any authorizations, licenses, training or requirements for that work to be completed
- where, when, how and with whom the work will happen

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Questions?

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When you have questions, IntegralOrg has services to help

A virtual or phone conversation

or

A clinic, a 1-hour problem-solving session between IntegralOrg subject matter experts and your team.

You might have questions about

- Attaining charitable status
- Strategic planning
- Policies & bylaws (writing and review)
- Social enterprise legal structures
- Governance and board development

These services are free of charge!
Find out more at *integralorg.ca/who-we-work-with/clinics/*

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