

The Legal Responsibilities of Boards

by E. Grant MacDonald



The board of directors of an incorporated non-profit organization is legally accountable for the actions of the organization, including those of its employees and volunteers. The organization may be liable (subject to a penalty) if something goes wrong. The board members too may be liable if it can be shown that the board itself was negligent¹.

The concept of “fiduciary duty” is the term often used to refer to a board’s legal responsibilities. There are three elements usually cited: loyalty, care and obedience.”² These refer to the responsibility to act in the best interest of the organization, to be present and engaged as director and to ensure that one’s bylaws, policies and all applicable laws are followed.

More practically, governing boards must pay attention to four areas:³

1. Fiscal responsibility

The board must ensure that the organization operates in a financially responsible manner. This includes:

- Setting out a budget and monitoring financial performance relative to that budget
- Undertaking a regular review or independent audit of annual financial results and practices
- Ensuring the collection and remittance of required payroll deductions (in Canada these are income tax, EI and CPP)
- Operating according to accepted accounting standards

Fiscal responsibility may involve taking financial risks – living with some uncertainty about anticipated revenues. Monitoring the budget and adjusting it is essential here. There is no legal requirement that a non-profit must always avoid operating at a deficit. A board may decide that it has adequate reserves to weather a difficult year.

2. Statutory responsibility

All non-profit organizations are subject laws relating to individuals and employers. Boards or their primary “agent”, the organization’s executive director/CEO, must be familiar with labour standards

regulations and human rights and occupational health and safety legislation. Some organizations might need to be familiar with other laws (e.g. environmental protection).

Rules also come into play in terms of accepted fundraising practices and acquiring and maintaining one's non-profit incorporation and charitable status.

3. Contracts

The board should have a full understanding of the organization's major contractual obligations, especially to funders, and monitor the organization's compliance with them.

4. Standards of Care

A board must ensure that there are policies and practices in place to reduce the risk of harm to its clients, employees and volunteers. Staff training may be required to address this responsibility.

Due Diligence

The term *due diligence* is sometimes used in the context of a board's legal responsibilities. This means nothing more than being careful or cautious before making an important decision. Has enough information been collected and analyzed to assess the risk of making a mistake?

Due diligence typically focuses on contractual matters such as entering into a formal agreement. Have we checked out the reputation of the firm hired to install solar panels on our roof or hired a building inspector to assess a property we are considering buying? Due diligence means researching a person's work history (criminal record in some situations) before hiring them.

Insurance

Concern about legal responsibilities often bring up the topic of insurance. Insurance should be considered the last line of defence in risk management. Most organizations require:

- General liability insurance
- Motor vehicle public liability insurance (if they own/lease and operate one or more vehicles)
- Accident, fire, theft insurance

Most governing boards, and especially those of non-profits who provide care to vulnerable clients, will have:

- Directors' and officers' liability insurance⁴

¹ Negligence refers to the *failure* to do something a reasonable and prudent person would do or *doing* something a reasonable or prudent person would not do in the circumstances. While it is extremely rare in Canada for a volunteer board to be sued, and rarer still that it is found to be liable (i.e. successfully sued), the possibility exists.

² Due diligence refers to the degree of oversight, attentiveness or vigilance that would be expected from a reasonable and prudent person.

³ Legal responsibilities as used here equates with the possibility of liability.

⁴ Such insurance should pay the organization's legal costs as well as compensation in the unlikely event the board is found to have some liability. Where D&O insurance protects those in charge, errors and omissions insurance offers protection for employee mistakes and may be of value where a non-profit employs professional staff.