Section 8 Duties of Directors

The role of directors falls into two broad categories. First, directors are expected to supervise the management of the affairs of the organization. In Owl's case, direct management of the day-to-day operations falls under the Executive Director's responsibilities. Secondly, directors are expected to act within the scope of the bylaws of the organization.

There are 11 duties of directors of a non-profit organization:

- Duty of Knowledge
- Duty of Care
- Duty of Skill & Prudence
- Duty of Diligence
- Duty to Manage
- Fiduciary Duty
- Duties as Trustees
- Investment Powers
- Delegation by Directors
- Duty of Avoid Conflict of Interest
- Duty to Act Within Scope of Authority

We will examine each of these in turn.

Duty of Knowledge

There are documents that outline Owl's fundamental purpose. Examples of these documents include the Corporations Act, Owl's Bylaws, etc. Directors must be constantly aware of the general content of these, although not necessarily the detail.

Directors must understand how Owl puts its purposes, mission and values into practice. Board members should therefore review, at least annually, Owl's fundamental documents.

Duty of Care

Directors have a duty to act with a minimum standard of care. A director may incur personal liability where their conduct falls short of this standard of care.

It is important to note that a director with more skill, sophistication and experience will face a greater standard of care and a greater risk of personal liability. This has implications for directors with professional designations (e.g. lawyers, accountants, etc.).

For charitable organizations, directors may be held to an even higher standard of care. A director who acts honestly and meets these standards of conduct and care will not be liable for simple errors of business judgment that occur while the director performs the duties of office.

Duty of Skill and Prudence

If a director has a particular level of skill or expertise, it must be used in the best interest of the organization.

In the duty of prudence, a director must act with practicality and not necessarily expertise in mind. This forces us to act cautiously and anticipate any probable consequences.

Duty of Diligence

Directors are expected to act prudently and reasonably to:

- Review the agenda and support materials in advance of each meeting
- Attend meetings of the board and board committees, where applicable. If attendance is not possible, a director should review the information in

advance and offer comments to the Chair. If the minutes reflect that an illegal act has been undertaken, the absent director should immediately register a dissent so as to remove liability

- Be prepared to discuss the business of the meeting
- Vote on matters that come before the board, unless a conflict of interest has been declared

Duty to Manage

Management duties of directors include, but are not limited to:

- Election of officers
- Recruitment, selection and performance management of the Executive Director
- Establishing governance policy and providing guidance
- Compliance with legal requirements
- Acquiring adequate knowledge of the business and functioning of the organization
- Enacting the by-laws as necessary and useful to the operations of the organization
- The role of the board and ED must be clearly defined so as to avoid conflict arising from misunderstanding of the respective roles
- Conflict arises when directors attempt to manage operations or the ED exceeds his/her operational authority
- In general terms:
    - Directors → Create policy (i.e., governance policy, strategic plan, etc)
    - Management → Implements policy
    - Directors → Monitor implementation

Fiduciary Duty

Definition: A *fiduciary* is a person who maintains a position of trust. A fiduciary, therefore, has a higher standard of care.

A director is considered a fiduciary because directors are in a position of trust with public funds and are held accountable for the funds and assets of the organization.

Owl is subject to common law fiduciary obligations. Directors are required to act honestly and in good faith, to avoid any conflict of interest, and to subordinate every personal interest to that of the organization. Even if the by-laws permit a director to enter into a contract with Owl, after declaring a conflict of interest, the fiduciary obligation of the director may prevail over the permission contain in the by-law.

Duties as Trustees

Directors of a charitable organization are held to the same standard of care to which a trustee is held. A trustee cannot be paid, even for work performed in a professional capacity. Similarly, a director cannot profit from his/her position.

Investment Powers

Directors face potential liability with respect to losses on Owl's investments, and therefore must: develop investment policies, clearly define the level of acceptable risk, ensure compliance with the policy, and ensure regular and frequent reporting to the BOD on all investments.

Delegation by Directors

Delegation of responsibility does not relieve a director of potential liability. The extent to which a director may delegate is governed by the test of what a reasonably prudent person would delegate.

Directors must maintain a supervisory role over committees, staff or external parties (e.g. lawyer, accountant).

Duty to Avoid Conflicts of Interest

A conflict of interest arises any time that a director has a personal interest in the same subject matter as Owl. The fiduciary obligation requires them to act in Owl's best interest.

It is important to note that there is nothing inherently wrong with having a conflict of interest. Problems only arise if a directors fails to disclose that conflict and/or puts their personal interests ahead of Owl's. If a director declares a conflict and does not participate in, or influence, the decision making, it is possible to enter into a contract, for example, despite having a personal interest.

For example: If a director was to negotiate a contract with Owl, that director could not negotiate terms which are personally advantageous but are not of at least equal advantage to Owl. On the other hand, an independent third party does not have this duty and would not be barred from negotiating a personal advantage at Owl's expense.

Duty to Act within Scope of Authority

A director must know the scope of their own authority, and the permitted activities of the corporation. These are outlined in the corporations act, letters patent, by-laws, resolutions (motions) of the board and our policies.

Personal liability can attach to any director that, by positive action or neglect, has permitted the corporation to carry on activities that are *ultra vires* (i.e., beyond the authority of the corporation; or, has acted outside the actual authority granted in the corporation's records.

To avoid personal liability in these situations, a director must oppose the action at the meeting where it was authorized by the board (or register a dissent as soon as possible thereafter if not in attendance) and should demand that their opposition be recorded in the minutes.

On the next page you will find a brief self-test, covering material from this section.

(Answers will be found on the page afterwards.)

Use this self-test to evaluate for yourself how well you grasped the material covered. Go back and review any areas you need to.

Self-Test

Duties of Directors

1. Which of the following is not one of the identified 11 duties of directors of a non-profit organization:

   a) Duty to manage

   b) Duty to protect

   c) Investment powers

   d) Duty to avoid conflicts of interest

2. True or False. Directors are required to avoid all situations and decisions in which they have a conflict of interest.

3. Directors must maintain a supervisory role over committees, staff or external parties. This is an example of which duty:

   a) Delegation by directors

   b) Duty to act within scope of authority

   c) Duty to manage

   d) Duty of diligence

Self-Test Answers

Duties of Directors

1. b) Duty to protect

2. False. The problem is not in having a conflict, but rather when the director fails to disclose the conflict and/or puts their personal interests ahead of Owl's.

3. a) Delegation by directors