

The Liability of Volunteer Board Members

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Board members and prospective board members of non-profit and civic organizations often worry about the potential for personal legal liability if the organization should get into financial trouble or if they should be sued for a negligent act or omission.. This concern is becoming so prevalent that, in this time of heightened concern about legal liability, organizations sometimes have trouble recruiting good people to their boards.

Often the source of these anxieties can be traced to some popular misconceptions that are repeated all too often by well-meaning but misinformed members of the public or by insurance agents who want to sell board liability insurance.

In Nova Scotia, the Registry of Joint Stock Companies, the agency that grants and monitors the incorporation of Societies, out of a desire to be helpful, contributes unnecessarily to these anxieties by seeming to urge incorporated groups to buy unneeded insurance policies. Some government funding agencies have taken it upon themselves to advise that groups to buy expensive board liability insurance in the misguided belief that the group's insurance will limit the Government's exposure to liability claims.

So what's needed is some straight talk and some clear information.

Let's deal first with debt, because it is in many ways the easiest. As a rule, if the organization is incorporated (under the Societies Act or otherwise), there is little or no real chance that the individual board members would be required to pay the organization's debts personally, unless, of course, they signed a personal guarantee or in some other way assumed personal responsibility for the debt. That is because the debts are the debts of the corporation (a registered, paid up society is a "corporation"), and not a personal debt of the individuals serving as its directors.

The main exception to that rule is for amounts owing to the government as source deductions made from employees wages (Income Tax, EI, CPP, Workers Comp) and not remitted to the Government. In such a case board members may be held personally liable for those amounts where they cannot demonstrate that they acted with due diligence in causing them to be remitted. This liability arises directly from the relevant statutes. Fraud, theft and criminal acts are other exceptions, although they are very rarely seen.

Then there is the question of liability for wrongful acts or omissions (torts) committed by the organization or by the board or by an employee. The same general rule applies here: individual board members of incorporated bodies are not personally liable for damages caused by the organization or its staff. At one time it might have been argued that, if a volunteer board member personally made an error or omission that caused harm to a third party, that board member may have been personally liable as well as the organization. That source of personal liability (if it ever existed) was firmly plugged in Nova Scotia on May 30, 2002 when the Volunteer Protection Act was proclaimed.

The Volunteer Protection Act says that volunteers of any non-profit organization (which includes a society, a municipality, a school board, a regional library board or a hospital), directors and officers specifically included, are not liable "for damage caused by an act or omission of the volunteer on behalf of the organization". "Damage" under this Act" includes both physical and non-physical losses and both economic and non-economic losses".

The Volunteer Protection Act requires only that the volunteer must have been acting "within the scope of his/her authority" within the organization at the time of the act or omission and that the volunteer was properly licensed or certified to carry out that activity, if the law required any such licenses or certification.

There are some exceptions to the statutory exemption from liability, of course, but they are really quite minimal. There is no exemption from liability if "damage was caused by willful, reckless or criminal misconduct or gross negligence by the volunteer" or if "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" or if "the act or omission which caused the damage constitutes an offence" or if "the volunteer was unlawfully using or impaired by alcohol or drugs at the time of the act or omission which caused the damage".

It must be noted, of course, that even if the organization had board liability insurance it would likely be invalid in the circumstances amounting to the exceptions under the Volunteer Protection Act for conduct amount to "gross negligence" or unlawful activity. Indeed, board liability insurance wouldn't be of much help in a case of failure to remit source deductions either, because it involves a breach of a statute and insurance is generally not available where an insured has broken the law.

For these reasons, I would not hesitate to reassure voluntary board members that they have little to fear when joining a voluntary non-profit or (unpaid) civic board in relation to their personal liability and, that for the most part, and unless there are very unusual circumstances present, special board personal liability insurance is a huge waste of the organization's precious resources.

Prudent organizations will continue to maintain appropriate policies of general liability insurance covering the organization as a whole, as well as appropriate coverage for any special risks (for example, if alcohol is served at functions). And, of course, directors must make sure that their annual filings have been maintained with the Registry of Joint Stock Companies and that their annual fees are promptly paid.

Above all else, boards must act with due diligence in order to maintain the protection afforded by the corporate status of the organization. This involves good risk management and board governance habits including maintaining good record keeping practices for board meetings, proper financial and activity reports, ensuring that employee payroll deductions are being remitted as required, occupational health and safety awareness for the staff and volunteers, and having a realistic assessment of the risks associated with the organization's programs and activities and insuring appropriately for those risks.

One final word to the wise: voluntary organizations should not hesitate to obtain qualified professional advice on these important issues. Lawyers volunteering on boards may not always be the best source of this advice because, quite frankly, not all lawyers have training and experience in liability and board governance issues as they affect non-profit corporations. Further, lawyers will usually refrain from giving professional advice to themselves, or to others when they are personally involved as members of a board.

In the same way that you would not expect the accountant on your board to do the annual audit, you should not expect a lawyer who has volunteered to be on your board to provide free legal advice and services. Rather, in the same way that an accountant on your board would be sensitive to any accounting issues that the average person might not easily see, a lawyer would normally be quick to flag any legal issues. The lawyer should then feel comfortable to recommend that the organization seek independent professional advice, and if he or she does not do so, another board member should not be shy about making that suggestion.

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