
THE LAW REFORM COMMISSION OF SASKATCHEWAN

CONSULTATION PAPER

LIABILITY OF BOARD MEMBERS OF NOT-FOR-PROFIT ORGANIZATIONS

2001

INTRODUCTION

1. The Volunteer sector: Contributions and challenges

Volunteers and not-for-profit organizations make an important contribution to community life in Saskatchewan. Volunteers provide services to their communities ranging from soccer leagues for youth to advocacy for senior citizens. They contribute to a strong social fabric. Saskatchewan people have always known that they can improve the quality of life for everyone by cooperating to provide community services that would otherwise not be available in our sparsely-populated province. The ethic of community service has fostered strong democratic values and self-reliant local control of community development.

Census Canada reports that there are 4894 registered charities in the province, and there are many other groups that do not have formal charitable status which use volunteers to provide community services. According to the Canadian Centre for Philanthropy, "Saskatchewan has by far the highest number of charities for its population, 4.88 per 1,000, twice the national rate of 2.42 per 1,000." Saskatchewan volunteer

organizations provide a wide gamut of services. As in other provinces, religious organizations are the largest component of the volunteer sector. Many of these do community work. The second largest component is social service organizations. Voluntarism in health care and recreation comprise larger parts of the sector in Saskatchewan than in any other province.⁽¹⁾

In addition to the social value of the services it provides, voluntarism makes a real contribution to the province's economy. The unpaid labour and charitable contributions that fuel the volunteer sector make Saskatchewan a better province in which to live and carry on business. One of the largest components of voluntarism is social service, providing benefits to the community that would otherwise require more tax dollars to support them. It has been estimated that nationally, the volunteer sector has total revenues and assets that make it comparable in size to the entire economy of British Columbia.

It is vital that we do everything possible to ensure a healthy volunteer sector in the province. We must work to create and maintain a climate in which voluntarism will flourish. But the environment in which volunteer organizations operate is changing, creating both new opportunities and new challenges. As the report of the National Panel on Accountability and Governance in the Voluntary Sector (Broadbent Report) observed:

At the end of the millennium, voluntary organizations are facing a rapidly changing environment and fundamental restructuring of how they work. Changing government roles, increasingly diverse populations, and new economic and social realities facing both young and old are requiring the voluntary sector to broaden, deepen, and adapt its approaches - and to do all of these at once. . . .

As governments have redefined and reduced their roles, new demands have been placed on voluntary organizations. They must not only deliver more services, but also serve new groups of people who often have more complex needs. New sources of funding have had to be found and, with more groups chasing private and corporate donations that are growing (but only modestly), competition in fundraising has become intense.⁽²⁾

At the same time, public expectations of community service organizations are changing. Recent controversy about Canada's blood supply is only the most visible example of growing public concern about the accountability of non-governmental volunteer and not-for-profit institutions. Concerns about the ability of volunteer-based organizations that work with children and young people to ensure that their charges are not at risk of sexual abuse is another issue that has recently shaken the volunteer sector. But while these high-profile problems have captured the attention of the public and the media, they are merely indicative of a broader range of accountability problems now routinely faced by the volunteer sector. In Saskatchewan, questions have been raised about fund-raising methods of not-for-profit organizations, about the accountability of the volunteers who sit on their boards, and about the adequacy of insurance carried by volunteer organizations. As the

Broadbent Report noted:

There has been a general decline in trust in all public institutions and greater public scrutiny of the private sector as well as the voluntary sector. Although Canadians have a continuing belief in the sector and high expectations of it, they are looking more closely at how the voluntary sector works and how it spends its donated money. This public skepticism has been reinforced by an aggressive media. While a small number of disreputable organizations or activities are inevitable in the sector, the sector itself wishes to take all possible steps to develop ways of minimizing and containing these occurrences and building the confidence of the public in the sector as a whole⁽³⁾.

New policies, both from governments and volunteer organizations themselves, will be required in the future to ensure that voluntarism continues to play its essential role in the community life of our province. The Law Reform Commission has initiated an Accountability in the Volunteer Sector Project in response to the challenges facing volunteer and not-for-profit organizations in Saskatchewan. This report addresses what the Commission believes is an important ingredient in redefining the legal framework in which the volunteer sector operates: The liability of volunteer board members (directors and officers) of non-profit organizations.

2. Why directors and officers liability is an important issue

The board of directors of a not-for-profit organization is responsible for the management and direction of the organization. Board members carry a heavy responsibility, both to the organization of which they are part, and to the public which deals with it. The time and energy required of board members is often substantial, and the success or failure of an organization in carrying out its mandate often depends on the dedication of its board.

Despite the responsibility, most organizations have had little difficulty recruiting capable board members. As one commentator observed, at least until recently, it was regarded as "a simple matter to serve non-profit organizations . . . the rewards were great and the hazards almost non-existent"⁽⁴⁾. Service on the board of a not-for-profit organization can instill the satisfaction of contributing to the community. Most board members are recruited to the board after proving themselves as active volunteers, and many regard service on the board as both the culmination of their careers as volunteers and as a recognition of their contribution to the organization and its cause. In addition, a board may recruit prominent citizens with useful business or government contacts, and professionals with expertise useful to the board. For these "outside" directors, board membership is often regarded as an honour, an opportunity for community service, and even good business.⁽⁵⁾

But the climate in which board members are recruited and serve is

changing. The responsibilities of board members entail the possibility of personal legal liability for the actions taken by the board, and in some cases, for the actions of employees and volunteers. Because the board is jointly responsible for management of the organization, a board member may unwittingly expose himself or herself to liability by acquiescing in a decision made by the board or management employees. As the discussion of liability issues in this report will show, liability of board members of not-for-profit organizations is not new. But as society has become more litigious, public concern about the accountability of volunteer and not-for-profit service providers has grown, concern about liability has increased. As the Broadbent Report suggested, the environment in which not-for-profit boards operate has become more complex. Issues such as sexual harassment and abuse reflect growing awareness of problems too often ignored in the past, but certainly increase the responsibility and potential liability of not-for-profit organizations and their board members. The hazards of board membership are no longer regarded by many prospective board members as negligible.

The potential liability of board members should not be exaggerated. Generally, board members are monitors, not managers. They are responsible only to the extent that they knew or ought to have known of potential problems and failed to remedy them. For example, while boards have been held liable in Canada for failure to take preventative measures against foreseeable sexual abuse and harassment,⁽⁶⁾ they have also been exonerated when isolated incidents of abuse that could not have been expected to have occurred.⁽⁷⁾ In addition, some protections for board members are available, though never fool proof, such as indemnity agreements, waivers, and insurance. Nevertheless, the risks are real.

Although few Saskatchewan not-for-profit organizations currently appear to have difficulty recruiting and retaining board members because of fear of liability, concern is growing. At a recent seminar for Saskatchewan lawyers on governance in the not-for-profit sector, presenters warned lawyers to carefully investigate the way a board conducts its business before accepting appointment to a board, and to caution their clients to do likewise.⁽⁸⁾ Media coverage of the problems encountered by amateur sports organizations in dealing with sexual abuse of young athletes and the Red Cross tainted blood issue have sensitized opinion. There have also recently been several publicized, if not as spectacular, cases of potential liability for not-for-profit directors within the province.⁽⁹⁾ In other jurisdictions in the United States and Canada, liability issues have already made it more difficult to recruit board members. Arlene Wolfe, an Ontario legal specialist on non-profit corporation law has reported that it has become difficult to assure board members that the risk of liability can be satisfactorily minimized:

It is becoming increasingly complex to advise a director of all the potential liability and even if safeguards and controls are adopted, such safeguards and controls may not be sufficient or effective to establish the appropriate due diligence and avoid liability.⁽¹⁰⁾

In the United States, board members are increasingly concerned about

potential liability, and many business people and professionals have become reluctant to serve on the boards of charities. Ward notes that Evidence supporting the effect of this trend on non-profit organizations was first suggested in a 1979 Touche Ross Co. survey of business executives on non-profit boards. That study indicated that 69 percent of the survey's respondents had serious concerns about legal liability associated with board membership and expected those concerns to increase in the years ahead. Unfortunately, time has demonstrated that their fears were only too accurate.⁽¹¹⁾

Liability in the not-for-profit sector is not, of course, a problem for board members alone. In practice, board members are usually named as co-defendants in law suits brought against the organization as a body corporate. If the alleged injury or loss was caused directly by an employee or volunteer, he or she will also be joined as a defendant. While liability issues involving the organization, employees, and volunteers are significant, the liability of board members creates distinct and serious problems for the not-for-profit sector that justify addressing this issue independently of other liability concerns.

Organizational liability can of course have serious consequences. In the worst case, the organization will be left insolvent and in debt, and will likely be forced to dissolve. But in individual cases, it is likely that the void left by failure of a not-for-profit organization will be filled by another if a need for its services exists. While it may be appropriate as a matter of policy to protect valuable community services by limiting organizational liability in some cases, the right of injured parties to seek compensation from an organization that caused harm cannot be lightly dispensed with. When, on the other hand, a board member is found personally liable, the result can be personally devastating. An individual who joined a board out of a sense of community service may be, in the worst but not implausible case, be financially ruined.

A volunteer who is not a board member assumes some risk of liability. But in almost all cases, the liability will result from his or her own acts of negligence or dishonesty. So long as the volunteer is acting within the scope of his or her directions from the organization, it is unlikely that they will be held personally liable⁽¹²⁾. The risk is therefore largely under the control of the volunteer, and is more easily guarded against by appropriate insurance than the risks potentially faced by board members. **Board members may be held vicariously liable for the acts of volunteers or employees, and are jointly liable for decisions of the board, even if they did not directly participate in them.**

As will be seen below, the liability of board members of not-for-profit corporations is almost identical to the liability of directors and officers of business corporations. But unlike a director or officer of a business corporation, a board member in the not-for-profit sector is usually an unpaid volunteer, who can devote only limited time and attention to his or her duties⁽¹³⁾. While board members bring a variety of experience to the organization, many lack business or managerial experience. It is often difficult for volunteer board members to identify the risks that might lead to personal liability.

There is a very real danger that the viability and health of

Saskatchewan's not-for-profit sector will be seriously compromised by fear of personal liability. While the fear may be exaggerated by media coverage and misinformation about the nature of potential liability, it is often justified. Few people will be willing to sit on the boards of not-for-profit organizations if they face a serious potential of personal liability for decisions taken in good faith or for the actions of individuals who work for the organization either as volunteers or as paid employees. For that reason, the Commission believes that alternatives to the existing liability regime should be investigated.

3. The Commission's approach

Wolfe asks: "Has director's liability become too excessive?". She answers her own question by suggesting that the public interest in ensuring accountability of not-for-profit activities must be balanced against the need to provide some security for board members in the not-for-profit sector.⁽¹⁴⁾ The Commission agrees that the goal of law reform should be an appropriate balance that protects the public while ensuring a healthy volunteer sector in the province.

Any change in the law governing not-for-profit and volunteer organizations must be guided by two complementary but sometimes conflicting goals:

1. The public must be satisfied that the not-for-profit sector is accountable for its activities. When the public's money is spent by volunteer organizations, whether raised by private donations, or from public sources such as lottery funds or grants, volunteer organizations are increasingly expected to be able to account for their stewardship. When volunteer organizations provide community services, they are increasingly held accountable by the public for the safety and quality of the services they provide.

2. Volunteers and not-for-profit organizations must be afforded some protection against liability when they conscientiously carry out their community service mandate. Volunteers will be discouraged if fear that the reward for their service is a law suit. Not-for-profit organizations may be forced to abandon essential community services if they are held liable for their decisions in the same way as the private sector or government.

Application of these principles to the problem of liability of board members must begin by identification of the nature and scope of potential liability, and the extent to which there are existing mechanisms for mitigating liability. This is the topic of the next chapter of this report.

Finding the right balance should not compromise the accountability of not-for-profit organizations or deprive the public of the right to

reasonable compensation for wrongs done by not-for-profit organizations. At present, the threat of personal liability is an inducement, perhaps the only legally-binding inducement, to board members to act diligently in carrying out their duties. The Commission has concluded, however, that both accountability and compensation can be ensured in better ways than holding volunteer board members personally liable for all board decisions and for acts done by the organization and its agents. These options will be considered in the final chapter of this report.

LIABILITY OF BOARD MEMBERS: THE LAW

1. Board members in corporation law

Most not-for-profit organizations are incorporated associations. Organizations that operate primarily in Saskatchewan are usually incorporated under the Saskatchewan Non-profit Corporations Act, 1995⁽¹⁵⁾. National organizations are often incorporated under Part II of the Canada Corporations Act, which applies to non-share corporations.⁽¹⁶⁾ In addition, clubs and some churches may be unincorporated associations. The discussion that follows will focus on organizations incorporated under the Saskatchewan Non-profit Corporations Act, but the principles applicable to federally incorporated non-share corporations are similar.

A corporation has been defined as "as an association of a number of people for some common object or objects"⁽¹⁷⁾. But when a not-for-profit organization is incorporated, it is recognized in law as a distinct legal entity that can sue and be sued, enter into contracts, and acquire property. The Non-profit Corporations Act provides that "a corporation has the capacity. And subject to this Act, the rights powers, and privileges of a natural person"⁽¹⁸⁾. Although the members of an incorporated association are in a real sense the owners of the corporation, its actions are those of the corporation, not of its individual members. The members chose, in accordance with the organization's by-laws and the Non-profit Corporations Act, a board of directors⁽¹⁹⁾. The corporation acts through the board and the agents it chooses. The Act states that "subject to any unanimous member agreement, the directors shall manage the activities and affairs of a corporation."⁽²⁰⁾

Perhaps the most important consequence of incorporation is the limited liability it confers on its members. This has been called the "fundamental attribute of separate [corporate] personality . . . [from which] most of the advantages of incorporation spring"⁽²¹⁾. The Saskatchewan Non-profit

Corporations Act provides that "no member of a corporation is liable for any liability, act or default of the corporation".⁽²²⁾ Thus a member of a not-for-profit corporation cannot be sued in consequence of decisions made by the board, or for the actions of other members, volunteers, or employees of the organization. A member who acts as a volunteer might be liable for his or her own negligence in dealing with members of the public or fellow volunteers, but never because of membership in the organization.

The limited liability enjoyed by members of a corporation extends in part to board members. For example, board members are usually not personally liable for ordinary debts incurred by the corporation, even though they approved the contract that gave rise to the debt, and even if the corporation is unable to pay the debt from its own funds. But because they are selected by the membership to manage and direct the affairs of the organization, board members are in a somewhat different position than ordinary members. The "corporate veil" that insulates members from the liability is not impervious, at least for directors, and as one Saskatchewan commentator has suggested, it is "increasingly shear" for directors of not-for-profit corporations.⁽²³⁾

Three ways in which the veil can be pierced can be identified⁽²⁴⁾. First, **limited liability was never intended to excuse board members from their responsibility to act in the interests of the organization**. The board has responsibility for directing the organization, and is accountable to the organization for their stewardship. Board members are fiduciaries, under a duty to act honestly and diligently. Breach of this duty will make board members liable to the organization. For example, if the board approves investments that a prudent investor would not have made, it may be in breach of its duty. The organization can then sue board members to recover the loss. Moreover, because board members are collectively responsible for management of the organization, even those who did not directly participate in the investment decision will be liable.

Second, because the board has over all responsibility for direction of the organization, it may be held responsible for injury done by volunteers and employees if it can be shown that the board, by its lack of diligence, contributed to the circumstances that led to the harm. For example, the board may be aware of a potential health problem in a shelter it provides to members of the public, and do nothing about it. If serious harm results, the organization may be sued. Board members would likely be held in such a case to be in breach of their duty to the organization, which could seek indemnity from them. In addition, board members might be joined as defendants in the law suit brought by injured clients of the organization.

Third, board members are exposed to liability under certain statutes which "pierce the corporate veil". For example, under Saskatchewan legislation, board members of both business and not-for-profit corporations are personally liable for back wages owed to the corporation's employees. The number of statutory exceptions to limited liability is increasing, and now includes such things as liability for taxes and environmental damage.

Each of these categories of potential liability will be discussed in more detail below. However, it should be stressed at the outset that personal liability is the exception rather than the rule for honest and reasonably conscientious board members in the not-for-profit sector, even when something goes wrong in an organization. It is the possibility that exceptional circumstances will occur that expose board members to potentially catastrophic liability that feeds legitimate concern.

2. The duty of board members to the organization

The boards of Saskatchewan not-for-profit corporations typically include members- at-large, recruited in recognition of service to the organization or as fund raisers, as well as officers such as the president, treasurer, and secretary who have specific management functions. In addition, many boards set up committees for particular management functions or to superintend special projects, and The Non-profit Corporation Act permits a board to appoint a managing director or management committee.⁽²⁵⁾ It has been suggested that the directors as a group are "monitors, not managers".⁽²⁶⁾

Nevertheless, the entire board is responsible for directing the organization. It is the board as a whole that has legal responsibility for the organization. Officers, managing directors, and committees are merely agents of the board. Under The Non-profit Corporations Act, officers are characterized as delegates of the board:

Subject to the articles, the bylaws or any unanimous member agreement:

(a) the directors may designate the offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them any powers that the directors may lawfully delegate except powers to do anything mentioned in subsection 102(3).⁽²⁷⁾

The Act applies a similar formula to managing directors and management committees:

Directors of a corporation may appoint from their number a managing director who is a resident Canadian or a committee of directors and delegate [except those powers mentioned in s.102(3)] to the managing director or committee any of the powers of the directors.⁽²⁸⁾

The Act prohibits delegation of certain board functions deemed to be critically important⁽²⁹⁾, but even when delegation is authorized, the board remains responsible for the decisions made by its delegates. Decisions made by officers and other board delegates must be reported to the board and approved by it. Under The Non-profit Corporations Act, ordinary board members and officers are placed under the same legal duty to the corporation⁽³⁰⁾.

Board members, individually and collectively, are fiduciaries of the organization they serve⁽³¹⁾. The rules of Equity applied by our courts place fiduciaries under a strict duty to those who they serve in their

fiduciary capacity. As Mr. Justice Cardozo observed in an often-quoted decision:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee [or other fiduciary] is held to something stricter than the morals of the market place. Not honesty, but the punctilio of an honor the most sensitive is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd.⁽³²⁾

The basic duties owed by board members, individually and collectively, to the organization they serve are diligence, prudence, and loyalty. The scope of potential liability to the organization can usually be discussed by considering each of these duties.

Ward writes that

Diligence refers directly to the duty to participate affirmatively and actively in the affairs of the governing board and the management of the institution. In more basic terms, the duty of diligence means that any individual who accepts a board position and then fails to attend meetings and/or actively participate in decision making is open to liability for mismanagement, nonfeasance or both.⁽³³⁾

On volunteer boards of not-for-profit corporations, lack of diligence most often arises either because a director lacks the knowledge and experience to deal with matters that come before the board, or because a director is unable to find the time to apply himself to the full range of board business. Both problems are perhaps inherent in the nature of the not-for-profit sector. Board members recruited because of their fund raising ability and connections may perceive their role as primarily fund raising, and take little active interest in other aspects of organization. As Kurtz notes:

Many charities have large boards because membership usually entails making a substantial contribution. While some directors may exercise their responsibilities with vigilance, others, serving primarily by virtue of their financial [fund raising] capacity, will neither be inclined, nor able, to carry out their duties adequately. The law however, does not distinguish among these types of directors. All are subject to the same duties; all are potentially subject to the same liabilities.⁽³⁴⁾

As the commentary to the American model Nonprofit Corporation Act observes, "many directors are elected to the board to raise money . . . or because of financial contributions they have made." They may possess no special skill otherwise useful to the organization, but are nevertheless "obligated to act as directors and may not simply be figureheads".⁽³⁵⁾

In other cases, board members may be recruited because they have

special knowledge of programs and services. A typical enough example is a Saskatchewan association of amateur naturalists. The board of the organization includes the field trip organizer, the chair of a committee that researches conservation issues, the editor of the newsletter, and other members active in the association's programs. While this appears to be a sensible and practical way to constitute a board, **whether a board of this type will be diligent about the full range of the board's activities will depend more on the individuals recruited than on its structure.**

Even experienced and well-motivated volunteer board members may find the demands made on their time by board business difficult to reconcile with other obligations. The time and attention which paid officers and board members of business corporations are able to give to the organizations they serve is of a different order than that which can be expected of volunteer board members in the not-for-profit sector. However, the law places the directors of not-for-profits and business corporations under much the same duties⁽³⁶⁾.

Liability perhaps arises most often when board members do not pay enough attention to the finances of the organization. Volunteer directors may rely too completely on their treasurer, finance committee, or managerial employees, becoming mere "rubber stamps" for decisions made by others. Although board members are not usually responsible for debts of the corporation, liability can arise from a variety of financial transactions. For example, if the organization makes investments of its funds, the board may be held accountable if loss results because the investments were unacceptably risky, or were held when good advice would have suggested sale. Each director may be liable, and cannot usually plead that the treasurer's advice was relied upon⁽³⁷⁾. In a Saskatchewan incident recently reported in the media, a not-for-profit organization's manager failed to remit income tax deductions from employees to Revenue Canada. This created a statutory liability for board members when the organization became insolvent. The fact that payments to Revenue Canada had been withheld was reported in financial statements made available to the board, but board members did not appreciate the significance of the decision to withhold⁽³⁸⁾.

Lack of diligence in other areas of board activity is becoming more problematic as public demands for accountability in the not-for-profit sector increase. In addition to its role as monitor of the ordinary financial and management activities of the organization, **the board has what has been called a "stewardship responsibility", which includes strategic planning and risk management**⁽³⁹⁾. The board must assure itself that the corporation carries adequate insurance to cover possible personal injury claims against the organization, and that the way in which it carries out its programs do not create foreseeable and avoidable risks. Recent successful claims against athletic associations that did not take appropriate steps to vet coaches and volunteers to prevent sexual abuse of young athletes are examples of failures of organizational planning that were attributed in part to lack of diligence by board members⁽⁴⁰⁾.

The second of the trilogy of basic duties owed by board members is prudence. Board members are not expected to be perfect; errors of

judgment are inevitable. Nevertheless, board members are expected to act with care and prudence. The Saskatchewan Non-Profit Corporations Act provides that:

- (1) Every director and officer of a corporation, in exercising the power of discharging the duties of a director or officer shall
 - (a) act honestly and in good faith with a view to the best interests of the corporation; and
 - (b) exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.
- (2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, bylaws and any unanimous member agreement.
- (3) Subject to subsection 136(5), no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves him or her from the liability for a contravention of this Act or the regulations.⁽⁴¹⁾

Ward describes the prudence required of directors in these terms: Prudence refers to the duty to make informed decisions in regard to the affairs of the institution. Directors are expected to avail themselves of the best information and/or guidance obtainable in making management decisions. To act out of ignorance when pertinent information was available also leaves one open to liability. Further, once the necessary facts are known, directors are expected to act with reasonable skill and intelligence in decision making. In other words, directors are expected to act as an ordinarily prudent man would under similar circumstances⁽⁴²⁾. On one hand, the prudence rule mitigates some of the uncompromising character of the diligence rule. No more is expected of directors than "the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances". Prior to codification of this rule in The Non-Profit Corporations Act, the courts took the view that the prudence requirement is flexible. It was held that the standard of care differs from person to person, depending on their knowledge and experience⁽⁴³⁾. Under this approach, a director who was recruited to a board because of his knowledge about delivery of the organizations programs or in recognition of volunteer service might not be held liable for financial misdeeds of the treasurer, while an accountant or lawyer sitting on a board almost certainly would. Whether codification of the prudence rule in The Non-Profit Corporations Act now imposes a more objective standard that would not distinguish between the abilities of directors is open to question. No case has dealt with this issue in Saskatchewan.⁽⁴⁴⁾

On the other hand, the prudence rule requires a high standard of care from all directors. The board is expected to inform itself and to carefully access information. Once again, the passive director is open to potential liability. If, for example, investment decisions must be made, the advice and information the board asks for must be adequate in the

circumstances. The board must make itself aware of the risks. In all but the simplest cases, the board should satisfy itself that it is getting sound advice, and be prepared to seek a second opinion. Board members must seek out and carefully access information about all aspects of the organization's activities that may entail risk. **It is no defence that the board, though willful blindness or mere inattention, was unaware of a potential problem.** If a prudent person would have suspected a problem, the board, individually and collectively, may be held to account for the organization's losses if it did not take preventative steps.⁽⁴⁵⁾ Thus, for example, if vehicles are used in the organization's work, it is the board's responsibility to ensure that they are safe. This may involve setting policy requiring such things as periodic mechanical inspections, mandatory reporting of problems by drivers, and replacement of aging vehicles.

The third duty of board members is loyalty to the corporation. Ward writes that

Loyalty is the duty that requires board members to scrupulously avoid conflicts of interest. This basic principle is interpreted in two ways:

1. The board member must refrain from profiting personally from institutional transactions.
2. The board member must represent the institution as a whole⁽⁴⁶⁾

The most common breach of the duty of loyalty arises from conflict of interest⁽⁴⁷⁾. The courts have consistently taken a very hard line on conflict of interest in fiduciary relationships. As Sealy observes: Equity will refuse to permit the fiduciary to claim that he has done for himself something which might have been done by him in pursuance of his undertaking or in discharge of his obligation. A modern extension of the rule . . . is the proposition that a fiduciary is bound to surrender to his beneficiary all "secret profits" received by the fiduciary by reason of his position, whether the beneficiary has a proprietary or even a moral claim to them or not⁽⁴⁸⁾.

It is important to note that because of the importance attached to fiduciary duties by the courts, even the appearance or possibility of impropriety is unacceptable. In general, if a director uses his or her position to profit from the corporation, equity would force the director to surrender his profits, even if the corporation might not have done better dealing with an outsider. Even profits made by a director using information obtained through the board may be claimed by the corporation if it could have used the information for its own benefit.⁽⁴⁹⁾

A possible conflict of interest may arise whenever a director enters into a contract with the corporation. Because even the appearance of impropriety is enough to create liability for the director, even a contract made in good faith and in the interests of the organization would suspect if the rule formulated by the courts of equity had not been modified by statute. The Non-Profit Corporations Act allows a director or officer to contract with the corporation if the interest in the contract is disclosed:

- (1) A director or officer of a corporation shall disclose in writing to the corporation or request to have entered in

the minutes of meetings of directors the nature and extent of the director's or officer's interest where he or she:

(a) is a party to a material contract or proposed material contract with the corporation; or

(b) is a director or officer of or has a material interest in any person who is a party to a material contract or proposed material contract with the corporation. . . .

(5) No director mentioned in subsection (1) shall vote on any resolution to approve the contract unless the contract is:

(a) an arrangement by way of security for money lent to or obligations undertaken by him for the benefit of the corporation or an affiliate;

(b) one relating primarily to his or her remuneration as a director, officer, employee or agent of the corporation or an affiliate;

(c) one for indemnity or insurance pursuant to section 111; or

(d) one with an affiliate. . .

(7) If the director or officer disclosed his or her interest in accordance with subsection (2), (3), (4) or (6), as the case may be, and the contract was approved by the directors or the members and it was reasonable and fair to the corporation at the time it was approved, a material contract between a corporation and one or more of its directors or officers, or between a corporation and another person of which a director or officer of the corporation is a director or officer or in which he or she has a material interest, is neither void nor voidable:

(a) by reason only of that relationship

(8) Where a director or an officer of a corporation fails to disclose his or her interest in a material contract in accordance with this section, the court, on the application of the corporation or a member of the corporation, may set aside the contract on any terms that it considers appropriate.⁽⁵⁰⁾

The duty of loyalty also requires directors to treat board business and information received by them because of board membership confidential. Breach of confidence that harms the organization is actionable⁽⁵¹⁾. Thus, directors are advised that

It is imperative that all Board Members truly understand and adhere to the rule that Board Meetings are absolutely confidential, and the happenings at Board Meeting should remain within the confines of the Board Meeting Room.⁽⁵²⁾

3. Third Party Liability in Tort

The major source of potential liability for board members is breach of their duty to the organization, which is actionable by the organization or its representatives, including members and other directors. Breach of duty to the corporation is not, at least directly, a ground upon which a third party, a member of the public or volunteer injured by the

organizations activities, can sue a director or officer. The American Law Institute's commentary on its Principles of Corporate Governance: Restatement and Recommendations states this proposition categorically:

The duty of care standards . . . involve duties owed directly to the corporation . . . [and are] not intended to create new third party rights (e.g. for tort claimants or government agencies against directors and officers).⁽⁵³⁾

However, the organization itself may be held liable to third parties. At least two types of tort injury create potential organizational liability. The acts and omissions of its volunteers and employees acting in the scope of their duties may be attributed the organization under the doctrine of vicarious liability. Injuries on premises owned or leased by the organization may give rise to occupier's liability. In both cases, liability does not necessarily extend to board members as individuals as well as the organization, but it may. If decisions made by the board contributed to the circumstances that led to an injury, board members may be liable. The board's actions may amount, as the discussion in the last section suggested, to a breach of its duty to the organization. Board members may then be sued by the organization, claiming compensation from directors and officers for damages paid to third parties by the organization. In addition, the third party claimant may allege that the board contributed to the injury. In this case, the directors and officers may be directly liable to the injured party. Although the duty owed by board members to the organization is not the basis for the third party claim, it is certainly relevant in assessing the culpability of directors and officers for injuries caused by the organization.

The chain of connections that lead from an injury caused by a volunteer or employee to liability of board members obviously cannot be successfully followed by claimants in all cases. As Kurtz suggests, "the basic law in this area- which necessitates personal participation in a tortious act - makes tort liability of directors and officers difficult to establish". Writing in 1988, Kurtz described the liability of board members for third party injury claims as "rare".⁽⁵⁴⁾ Since then, there are indications that the courts are willing to take a more sympathetic view of third party claims against both not-for-profit organizations and their board members.⁽⁵⁵⁾

To assess the scope of third party liability that board members currently face, and may face in the future, it will be necessary to consider each link in the chain that may connect a board member with an injury caused by an organization or its agents.

An occupier of premises owes a duty to take that care that anyone who is invited onto the premises will be protected from foreseeable harm.⁽⁵⁶⁾

The occupier will be liable if it did not

take reasonable care in all the circumstances to ensure that persons were reasonably safe on the premises both in respect to . . . [the] conditions [of the premises]

and regarding the activities carried on therein.⁽⁵⁷⁾

Thus, for example, if premises used by an organization in its programs are not kept in good repair, and injury results to a client or volunteer, the organization will be liable. While a finding that the organization failed to take reasonable steps to prevent injury does not necessarily imply fault on the part of the board, it may be liable if it knew or ought to have known that the state of repair of the premises was a source of risk to the organization, its volunteers, and clients.

Vicarious liability has its origins in the law of law of master and servant. A servant is bound to act under the direction and control of the master. In consequence, so long as the servant is acting within the scope and terms of employment, the acts and omissions of the servant are attributable to the master.⁽⁵⁸⁾ Both employees and volunteers are servants of the not-for-profit corporations they serve.⁽⁵⁹⁾

The difficulty in determining whether a not-for-profit organization will be vicariously liable for injuries committed by volunteers and employees lies in the phrase "scope and terms of employment". There is little problem concluding, for example, that if a volunteer is under strict instructions to take a group of children to the zoo took them swimming instead, the organization would likely not be vicariously liable for any mishap that occurred at the beach⁽⁶⁰⁾. However, a master is expected to control and supervise its employees. Thus when a servant engages in "unauthorized acts so connected with authorized acts that they may be regarded as modes (although improper modes) of doing an authorized act", the master is vicariously liable.⁽⁶¹⁾ This implies a duty on the part of the master to adopt policies and supervision techniques that minimize the risk that a servant will abuse his or her position.

In *Children's Foundation v. Bazley*, the Supreme Court of Canada suggested that in determining whether there is sufficient connection between the scope of employment and the harm done to impose vicarious liability, consideration should be given to, among other factors, the opportunity that the enterprise afforded the employee to abuse his or her power, the extent of power conferred on the employee in relation to the victim, and the vulnerability of potential victims.⁽⁶²⁾ Thus even in the case of a volunteer who takes children swimming instead of to the zoo, the organization employing the volunteer might be liable if it made insufficient effort to ensure that volunteers followed their instructions.

Whether a lapse in supervising employees could be brought home to the board may depend on whether the board knew, or ought to have known, that the organization's methods of supervision were inadequate. Because the organization, not the board, is the master, the liability of directors and officers in such a case is not, strictly speaking, vicarious. However, in any case in which the harm done to a third party can be brought within the scope of employment of the wrong doer because of a failure on the part of the organization to supervise and control its agents, there is at least reason to suspect that the board's duty to monitor the organization's activities has been breached.

Kurtz gives this example:

If the driver of a delivery van for a nonprofit organization causes an accident resulting in serious injuries to two individuals and property damage, the nonprofit corporation, the driver and, perhaps, the organization's directors may be sued for the resulting injuries and property damage. Generally, the directors could not be held liable because the negligence here, if any, would be that of the driver. However, if the driver's negligence could be attributed to some failure of oversight in the selection, training, and recruitment of drivers generally, or the organization's failure to have an adequate vehicle maintenance and inspection program for its automotive equipment (assuming an equipment failure), the directors might be liable for their failure in overseeing the organization's activities.⁽⁶³⁾

Kurtz suggested that liability in such cases such as this would be unusual. But it is precisely in "failure of oversight" cases that a new judicial attitude can be discovered. This is most evident in sexual abuse and harassment cases in both the United States and Canada.⁽⁶⁴⁾ In Canada, third party liability for sexual abuse has been found against school boards⁽⁶⁵⁾, hospitals⁽⁶⁶⁾, police officials⁽⁶⁷⁾, child welfare agencies⁽⁶⁸⁾, non-profit shelters⁽⁶⁹⁾, and churches⁽⁷⁰⁾. In all cases, the courts have focused on institutional responsibility to supervise activities and prevent possible harm that was known, or might to have been known to exist. Thus, for example in *Jane Doe v. Board of Commissioners of Police for Municipality of Toronto*, the Board of Commissioners was held liable for abuse of a woman in police custody because the court found that, based on experience and the vulnerability of individuals in custody, the risk that incidents of abuse would occur was foreseeable.⁽⁷¹⁾ Liability has been avoided in cases in which appropriate precautions had been taken, and the incident of abuse was unexpected and isolated..⁽⁷²⁾

The recent Supreme Court of Canada decisions in *Children's Foundation v. Bazley* and *Jacobi v. Griffiths* have been described as "landmark decisions for non-profit and charitable organizations"⁽⁷³⁾ because of the expansive interpretation of scope of employment they set out⁽⁷⁴⁾. In the view of many advisors to the non-profit sector, the Supreme Court has created a test of liability that is, at least until it has been elaborated in other decisions, uncertain in its scope. In the past, for example, screening programs to weed out volunteers and employees that are potential risks have been regarded as a first line of defence. In *Children's Foundation v. Bazley*, however, the defendant organization had checked the identity of the worker who latter committed abuse, and had been told that he was a suitable employee. Liability was attributed to the organization in large part because the vulnerability of potential victims, emotionally troubled children in residential care facilities, created an exceptional risk of abuse.

The Supreme Court did not consider the question of the personal liability of board members in *Children's Foundation v. Bazley* or *Jacobi v. Griffiths*. However, it is clear that board members are potentially liable.

Lack of knowledge of potential risks at the operational level will not relieve the board of responsibility. It has been suggested that it is now the case that "a person in authority in an institution may be required to expand their knowledge . . . through special training and may be required to provide special education programs for other personnel."⁽⁷⁵⁾ This injunction undoubtedly applies to the board of any service-providing organization.

4. Statutory liability

The Non-profit Corporations Act underlines the duty board members owe to the corporation by expressly imposing personal liability to the corporation on directors and officers. The Act provides that:

(1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a security pursuant to section 25 for a consideration other than money are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the security had been issued for money on the date of the resolution [under s.25, subject to the articles, the bylaws and any unanimous member agreement, securities of a corporation no security of a corporation shall be issued until it is fully paid in money or in property or past services that constitute the fair equivalent of the money that the corporation would have received if the security had been issued].

(2) Directors of a corporation who vote for or consent to a resolution authorizing any of the following are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation:

- (a) a loan, guarantee or other financial assistance contrary to section 27 [loans etc. to directors, officers and members in certain circumstances];
- (b) a payment to a member, director or officer contrary to section 30 [distribution of corporate profits to directors, officers and members];
- (c) a payment of an indemnity contrary to section 111 [indemnity paid to a director or officer in respect of damages etc. who acted dishonestly or in bad faith]; or
- (d) a payment contrary to section 177 or 225 [certain payments to members on dissolution etc.]⁽⁷⁶⁾.

All of these matters are examples of breach of duty deemed to be

particularly serious. Most involve preferences to directors, officers, or certain members of the corporation. It is likely that in almost all situations in which this provision applies, board members would be personally liable even if the provision did not exist.

Directors and officers are also personally liable for breach of a variety of other provisions in federal and provincial legislation. The liability under these statutes is usually to third parties injured by the corporation or to government agencies. Apparently without exception, these statutes apply to business corporations as well as not-for-profit organizations.

For not-for-profit corporations, the most important examples of statutory liabilities imposed on board members relates to employees. Under The Occupational Health and Safety Act, when breaches of work-place standards occur, both the corporation and board members are guilty of offences. The Act provides that:

60 Where a corporation is guilty of an offence mentioned in section 57, every officer, director, manager or agent of the corporation who directed, authorized or participated in the commission of the offence is also guilty of the offence and is liable on summary conviction to the penalties for the offence that are set out in section 58 whether or not the corporation has been prosecuted.

61 In a prosecution of an offence pursuant to this Act, any act or neglect on the part of a manager, agent, representative, officer, director or supervisor of the accused, whether or not the accused is a corporation, is deemed to be the act or neglect of the accused⁽⁷⁷⁾.

Perhaps the most significant statutory liability imposed on directors and officers is for wages and employee deductions. Under The Non-profit Corporations Act, directors and officers are personally liable for wages owing to employees of the corporation:

Directors of a corporation are jointly and severally liable, in accordance with The Labour Standards Act, to employees of the corporation for all debts payable to each of those employees for services performed for the corporation while those directors are directors.⁽⁷⁸⁾

The Labour Standards Act defines wages and other "debts payable" in regard to employment for this purpose⁽⁷⁹⁾. Liability for wages is strict: In general, it makes no difference why the corporation has failed to pay its employees. However, The Non-profit Corporations Act does relieve a director or officer from liability for wages if he or she "relies in good faith" on financial statements "represented to him or her by an officer of the corporation" or the auditor's report.⁽⁸⁰⁾

Liability for employee deductions is largely governed by federal statutes. Directors and officers are liable for deductions that must be remitted under the Canada Income Tax Act⁽⁸¹⁾, the Canada Pension Plan Act⁽⁸²⁾, and the Employment Insurance Act⁽⁸³⁾. A similar formula is applied in the Excise Tax Act to GST collected by a corporation⁽⁸⁴⁾. The formula used in these federal statutes differs from the wage liability formula in

provincial legislation in certain important respects. Most importantly, a defence of due diligence is available:

A director is not liable for failure under subsection (1) [to remit deductions] where he exercised the degree of care, diligence, and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.⁽⁸⁵⁾

This defence will likely protect a director if an accounting system is in place for ensuring that deductions are made and remitted or if remittances were incorrectly reported in financial statements,⁽⁸⁶⁾ but provides little protection if the board of a corporation in financial difficulty agrees to postpone remissions in that hope that the organization's finances will improve.

The policy behind placing statutory liability on directors and officers is protection of the public. By piercing the corporate veil and imposing obligations directly on the "directing mind" of the corporation, legislators seeks to ensure that corporate limited liability is not to avoid obligations to third parties and the public. Personal liability has become increasingly attractive to policy-makers. Thus directors and officers have been made personally liable for offences and damages assessed against corporations in environmental protection legislation⁽⁸⁷⁾ and other legislation designed to protect the public interest.⁽⁸⁸⁾ The list of statutes in this category can be expected to grow in the future.

5. Protections for board members

The law presently provides several mechanisms that allow board members to guard against potential liability. All of them are useful, though it is likely that many board members and not-for-profit organizations are unaware of what is available to protect directors and officers. And while available protections should be part of the risk-management plan of any not-for-profit organization that faces significant potential liability, none of them are "magic bullets" that will confer immunity on directors and officers.

(a) Dissenting

Because board members are jointly responsible for the management and direction of the corporation, a board member is presumed to have accepted a board decision, even if he or she was not present when it was voted on, and even if he or she voted against the proposal. However, a director or officer can distance him or herself from a board decision by recording a formal dissent. The Non-profit Corporations Act provides that

(1) A director who is present at a meeting of directors or committee of directors is deemed to have consented to any resolution passed or action taken at that meeting unless he or she:
(a) requests that his or her dissent be entered in the

minutes of the meeting;

(b) sends a written dissent to the secretary of the meeting before the meeting is adjourned; or

(c) sends a dissent by registered or certified mail or delivers it to the registered office of the corporation immediately after the meeting is adjourned.

(2) A director who votes for or consents to a resolution is not entitled to dissent pursuant to subsection (1).

(3) A director who was not present at a meeting at which a resolution was passed or action taken is deemed to have consented to the resolution unless, within seven days of becoming aware of the resolution, he or she:

(a) causes his or her dissent to be placed with the minutes of the meeting; or

(b) sends dissent by registered or certified mail or delivers it to the registered office of the corporation.⁽⁸⁹⁾

A dissent will protect a board member from liability for acts approved by the rest of the board. However, the dissent rule does not protect against liability for management decisions that do not come before the board if, as will often be the case, board members should have been aware of the decisions. Similarly, it is hardly possible to use the right of dissent to guard against omissions, such as failure to put an adequate system of supervision of volunteers in place.

(b) Indemnification of board members

The Non-profit Corporations Act permits a corporation to indemnify its directors and officers for liabilities incurred as a result of their activities on behalf the corporation⁽⁹⁰⁾. It is not uncommon to include an indemnification clause in the corporation's bylaws. In addition, directors and officers who have been unsuccessfully sued or prosecuted has a right to indemnification for "costs, charges, and expenses reasonably incurred" in his or her defence⁽⁹¹⁾ whether the corporation has an indemnity bylaw or not.

The scope of the indemnity protection which an organization can extend to its board members is controlled by The Non-profit Corporations Act. In the absence of court approval, a board member can only be indemnified for damages, costs, and expenses awarded in in third party actions. Section 111(1) of the Act provides.

Except respecting an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, a corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which the corporation is or was a shareholder, a member or creditor, and his or her heirs and legal representatives, against all costs, charges

and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him or her respecting any civil, criminal or administrative action or proceeding to which he or she is made a party by reason of being or having been a director or officer of that corporation or body corporate, where:

- (a) he or she acted honestly and in good faith with a view to the best interests of the corporation; and
- (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he or she had reasonable grounds for believing that his or her conduct was lawful.⁽⁹²⁾

Note the requirement that the board member act "in good faith with a view to the best interests of the corporation". Because the concept of the "faithless director" is a broad one, covering more than fraudulent or dishonest acts, some commentators have suggested that the scope of indemnity is too narrow.⁽⁹³⁾ However, it is likely that the statutory formula is adequate to allow indemnification in those cases in which honest board members have reason to liability.⁽⁹⁴⁾

An indemnity bylaw may also promise to indemnify a board member for a judgment in favour of the corporation against a director who has nonetheless acted "in good faith with a view to the best interests of the corporation", but court approval is required in this case. The Non-profit Corporations Act provides:

With the approval of the court, a corporation may indemnify [a director or officer] . . . respecting an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, to which he or she is made a party by reason of being or having been a director or an officer of the corporation or body corporate, against all costs, charges and expenses reasonably incurred by him or her in connection with that action if he or she fulfils the conditions set out in clauses (1)(a) and (b) [of section 111].⁽⁹⁵⁾

Since there is little authority on the grounds on which the court might approve an indemnity in such a case, the requirement of court approval makes indemnification bylaws less attractive to prospective board members.⁽⁹⁶⁾ As the discussion of potential liability above has shown, a third party claim may rest on an allegation that the defendant organization failed to supervise and control its volunteers and employees. If a claim made on this basis is successful, it may be possible in turn for the organization to allege that its directors and officers breached their duty of care in conducting the organization's affairs. Even if a corporation generally takes a charitable view of its board, the incentive to avoid paying third party damages by passing responsibility to individual board members may be strong, particularly if the litigation has created rifts within the organization. In the result, an organization might oppose payment of an indemnity in court.

However, the most important limitations on the value of indemnity bylaws has little to do with their statutory foundation. Indemnification is

merely a promise to compensate a board member for costs and damages in a law suit. It does not, of course, affect the right of the claimant to collect damages from the board member. Thus the indemnity is only as good as the corporation's ability to pay it. Thus as Kurtz observes, "the comfort afforded by indemnification may be illusory if an organization lacks the resources to meet its indemnification obligations."⁽⁹⁷⁾ The danger is increased by the fact that in most third party actions, both the organization and its directors are named as defendants. It is unusual for judgment to be given against directors and not against the corporation as well. Thus the organization may have most difficulty paying an indemnity just when indemnity protection is needed.

Because indemnification is not mandatory, the protection may be withdrawn. If there is a change in board membership, the indemnity may be withdrawn to expose former directors to liability.⁽⁹⁸⁾ Since litigation often has a divisive effect on organizations, the danger that board members facing legal action will be left unprotected is very real.

(c) Directors and officers insurance

The Non-profit Corporations Act authorizes a corporation to purchase insurance for directors and officers against any liability incurred by that person:

(a) in his or her capacity as a director or officer of the corporation, except where the liability relates to the person's failure to act honestly and in good faith with a view to the best interests of the corporation; or

(b) in his or her capacity as a director or officer of another body corporate where he acts or acted in that capacity at the corporation's request, except where the liability relates to the person's failure to act honestly and in good faith with a view to the best interests of the body corporate.⁽⁹⁹⁾

Directors and officers insurance can replace and supplement indemnification bylaws. It has the obvious advantage that it does not expose the organization to the risk of responsibility for large claims when board members are sued. As Kurtz notes For nonprofits, the financial reasons to purchase D&O insurance remain the most compelling. Unlike many business corporations, nonprofit organizations will often lack the resources to mount a vigorous defence. Most nonprofits could not sustain the cost of a substantial judgment against its officers and directors.⁽¹⁰⁰⁾ Unfortunately, many not-for-profit corporations do not carry directors and officers insurance⁽¹⁰¹⁾, though it can be purchased as a rider to the general insurance policy covering the organization.

Despite its benefits, available directors and officers insurance has some

pitfalls for nonprofit organizations⁽¹⁰²⁾. Although standard policies typically cover third party claims and claims made on behalf of the corporation against a director, they also contain certain exclusions. Some of these, such fraud and criminal acts are perhaps not a problem, but standard policies also typically exclude claims for "bodily injury, sickness, disease, or death of any person, or damage to or destruction of any tangible property." Extended coverage to include injury claims is not generally available. In the result, insurance cannot be used to shield board members from the potentially large damages that might be avoided against them if they are held accountable for incidents of sexual abuse committed by volunteers.

The cost of adequate directors and officers insurance may also be a problem for many not-for-profit organizations. The cost of insurance increased sharply during the "insurance crisis" of the 1980's, and remains expensive for organizations with limited resources. As Kurtz noted: "The insurance crisis, for nonprofit organizations has been especially acute because of their limited financial resources and restricted ability to pass on the increased cost of doing business."⁽¹⁰³⁾

ANALYSIS AND RECOMMENDATIONS

1. The need for reform

Few Saskatchewan not-for-profit organizations have faced unmanageably large damage claims, and fewer claims still have been made against volunteer board members. But the risk of substantial liability for board members is real. Advisors to prospective directors recommend caution before accepting an invitation to sit on a board⁽¹⁰⁴⁾. Increasing public concern about accountability, the increasing litigiousness of our society, and the emergence of new liability issues such as sexual abuse and sexual harassment contribute to a growing concern. The frequency of lawsuits against directors and officers appears to be increasing in North America⁽¹⁰⁵⁾. We cannot expect Saskatchewan to be immune to this trend. As Daniel Morgan suggests, the "corporate veil" that protects board members is "increasingly sheer".⁽¹⁰⁶⁾

There is as yet no compelling evidence that community minded citizens in Saskatchewan are concerned enough about liability issues to reconsider serving on volunteer boards, but there is concern, and experience elsewhere suggests that it can be expected to grow. As the commentary to the American Model Corporation Act bluntly observes:

When both the amount and cost of litigation have skyrocketed, it would be difficult or impossible to persuade responsible persons to serve as directors if they were compelled to bear personally the cost of vindicating the propriety of their conduct in every instance in which it might be challenged.⁽¹⁰⁷⁾

The not-for-profit sector in Saskatchewan depends on the willingness of volunteers to serve on boards. It is volunteer directors and officers who are often at the heart of a not-for-profit organization. If concern about liability issues discourages citizens from serving on volunteer boards, the community fabric of our province will suffer. The problem of directors and officers liability should be confronted before it reaches dangerous proportions.

However, adequate protection of the public cannot be sacrificed. As the role of the not for profit sector expands, particularly as a provider of community services, it is more important than ever that the sector be accountable to the public. The Broadbent Report suggests that the public will accept nothing less⁽¹⁰⁸⁾. In response to increasing litigation and insurance costs some jurisdictions in the United States have adopted "tort reform" measures that limit or eliminate the liability of not-for-profit service providers⁽¹⁰⁹⁾. In *Children's Foundation v. Bazley* the Supreme court of Canada considered the argument that not-for-profit service providers should be shielded from liability in sexual abuse cases. Madam Justice MacLachlin observed that "It is difficult not to be sympathetic "with organizations that provide "needed services on behalf of the community as a whole". However, she also recognized "another perspective", which made it impossible for her to to relieve the Children's Foundation from liability:

that of the innocent child who was the victim of the abuse. From his perspective, the appellant's institution, however meritorious, put him in the intimate care of Mr. Curry and in a very real sense enhanced the risk of his being abused. From his perspective, it is fair that as between him and the institution that enhanced the risk, the institution should bear legal responsibility for his abuse and the harm that befell him. It may also deter other incidents of sexual abuse by motivating charitable organizations entrusted with the care of children to take not only such precautions as the law of negligence requires, but all possible precautions to ensure that their children are not sexually abused.⁽¹¹⁰⁾

A general immunity in tort would not achieve an acceptable balance between the protection of the integrity of not for profit service providers and the public interest.

Most jurisdictions in the United that have rejected general immunity have opted instead for limitation of the personal liability of directors and officers⁽¹¹¹⁾. This approach is more acceptable. Volunteers join boards to make a contribution to their community and their organization. They are motivated to assist the organization to do the job it sets out to do, and to Their commitment is a strong incentive to protect the organization's interests and minimize risk to the public, other volunteers and clients. In the Commission's opinion there are better ways to insure that not for profit organizations are accountable than imposing fear of potential liability on community spirited directors and officers.

When a volunteer board fails, the reasons usually have little to do with factors that would be mitigated by fear of liability. Volunteer board

members may have difficulty balancing the time required by board business with other obligations. As discussion of the challenges facing volunteer board members in the last chapter has sought to show, this is an inevitable problem when volunteers must be relied upon. Fear of personal liability will rarely make it possible for board members to find more time for the organization. In other cases, volunteer board members lack skill and experience in management roles, and thus may rely too readily on the advice of managerial employees and officers. However, the structure of not for profit boards also makes this problem inevitable. Volunteer board will appropriately include fund raisers and individuals whose experience lies in providing services rather than in business management.

Perhaps the most difficult problem for many volunteer boards is lack of adequate management plans and the information necessary to manage risk. The Broadbent Report suggests that education and information are keys to ensuring accountability in the not for profit sector.⁽¹¹²⁾ The volunteer sector itself recognizes the importance of educating its activists and sharing information. In Saskatchewan, following the lead of other provinces, "volunteer centres" have recently been organized to share information and training opportunities among local organizations. The Broadbent Report recommended adoption of codes of conduct by not for profit organizations. The Canadian Centre for Philanthropy is currently formulating a code of conduct for Canadian not for profit organizations. These initiatives will make a much more important contribution to insuring accountability in the volunteer sector than retaining the fear of personal liability for board members.

2. Limiting the liability of board members

In the Commission's opinion, board members in the not-for-profit sector should be substantially relieved of personal liability. Any other approach to the problem of director's and officer's liability would be piecemeal and unsatisfactory. For example, it might be suggested that indemnity provisions in The Not for profit Corporation Act might be revamped to provide broader protection. However, unless this reform could be coupled with expanded directors and officers insurance at affordable premiums, there would be little point in pursuing it. Given concern in the insurance industry about increasing litigation, changes in directors and officers insurance is unlikely unless governments are willing to become insurers.

Limitation of personal liability of board members in the not-for-profit sector has been widely adopted and accepted in the United States⁽¹¹³⁾. The American experience can serve as a guide to law reform in Saskatchewan.

Although the American legislation relieving board members of liability all appears to seek similar goals, it differs considerably in detail. The Illinois provision is perhaps typical of the most common formula. It provides that

No director...shall be liable...for damages resulting from exercise of judgement or discretion in connection with

the duties of such director...unless [the directors default] is willful.⁽¹¹⁴⁾

Note that the immunity would not extend to fraud or dishonesty. The Alaskan immunity provision is similar, providing that directors and officers of not-for-profit corporations are immune from tort liability except in cases of gross negligence.⁽¹¹⁵⁾ Other states depart from the Illinois/Alaska formula in various directions. In Tennessee full tort immunity is conferred on directors, presumably even in cases of wilful fault or gross negligence.⁽¹¹⁶⁾ The California provision applies only to nonprofit "directors, officers or trustees" who are "not compensated for their services", but volunteer board members are immunized against all civil liability for damage or injury resulting from any act, error, or omission made in the exercise of policy or decision making responsibilities if such person was acting in good faith and within the scope of his duties . . . ⁽¹¹⁷⁾.

In the Commission's opinion, an appropriate immunity provision would have the following features:

1. Directors and officers of not-for-profit corporations should not be personally liable (unless otherwise excepted) in any civil action, including both third party actions and actions brought against a director or officer on behalf of the corporation, that arises out of an act or omission connected with the responsibilities of a director or officer. Although much of the public concern about liability has focused on tort actions brought by individuals injured by not-for-profit organizations, it is probably more common at present for directors to be sued for breach of their duty to the corporation. The discussion above has noted that volunteer directors operate under constraints of time, experience and knowledge quite different to those in the business sector. If the breach is innocent, due to an individual director's failure of judgment or reliance on other directors' and officers' advice, relief from liability would be appropriate.

In addition, the potential liability of directors for third party torts is most apt to arise in cases in which a breach of the directors' duty to the corporation to manage its affairs in a prudent manner might be alleged. Directors and officers should be immune from both direct third party actions, and actions on behalf of the corporation to recoup damages from board members that have been paid to third parties.

2. All directors and officers of not-for-profit corporations should be covered by the immunity, whether they receive compensation or not. The policy considerations underlying the proposed immunity are based largely on the circumstances of volunteer directors and officers. Paid management employees of Saskatchewan not-for-profit organizations are not usually board members or

"officers" within the meaning of The Not for Profit Corporation Act. However, the Act permits compensation of directors and officers. Some are paid a per diem or honorarium for attendance at meetings, and others receive expenses for attendance. In practice, it may be difficult to distinguish a compensated director from one who is merely reimbursed, directly or indirectly, for expenses. The immunity provision should be as straightforward as possible, providing clear protection for those who serve on not-for-profit boards. For that reason, no distinction should be made between compensated and purely volunteer directors and officers.

3. The immunity should extend only to acts done in the course of carrying out duties as a member of the board in good faith, and should not extend fraud or profit-taking at the expense of the corporation. The purpose of the immunity is protection of honest board members who act in good faith in their capacity as directors and officers. It is not intended to be a protection for board members who abuse their position.

4. The immunity should not exclude acts or omissions that may be deemed "wilful" or "grossly negligent". Once again, the immunity provision should be as straightforward as possible, providing clear protection for those who serve on not-for-profit boards. In other areas of tort law, concepts such as gross negligence have proved to be too vague to provide consistent, predictable guides to behaviour.

5. The immunity should not affect statutory liabilities of directors and officers under Saskatchewan law, but consideration should be given on a case by case basis to modifying or removing statutory liabilities with respect to directors and officers of non-profit corporations. Adoption of a general immunity from civil liability of the kind recommended above will not relieve board members from specific liabilities imposed by statute. In some cases, it may be appropriate to reconsider statutory liability under provincial statutes. Once again, it must be recognized that volunteer directors and officers should not be equated with their counterparts in business corporations. Thus, for example, it may not be appropriate to make volunteer directors personally liable under environmental protection legislation. The non-profit corporation is not apt to be used a shell to avoid responsibility for activities that are dangerous to the environment.

Some of the statutory liabilities within provincial jurisdiction have persuasive policy foundations. In particular, liability for wages under The Not for Profit Corporation Act and The Labour Standards Act cannot be

easily dispensed with. If employees are not paid for work done because the board has applied available funds to other purposes, board immunity should not prevent the employees from seeking compensation. Placing the responsibility on the directors who made or agreed to divert funds required to pay wages is fairer than allowing the burden to fall on the employees. A director or officers who objects to diversion of funds may register a dissent in accordance with The Not for Profit Corporation Act to avoid personal liability. The Act affords another protection to board members: They are entitled to rely on financial statements presented to them, so they will not be liable if misled by mistaken or fraudulent reports that conceal the wage debt. For that reason, the Commission is not prepared to recommend any change in the liability for wages presently imposed in Saskatchewan law.

Summary of Recommendations

The Commission recommends that:

1. Directors and officers of not-for-profit corporations should not be personally liable (unless otherwise excepted) in any civil action, including both third party actions and actions brought against a director or officer on behalf of the corporation, that arises out of an act or omission connected with the responsibilities of a director or officer.
2. All directors and officers of not-for-profit corporations should be covered by the immunity, whether they receive compensation or not.
3. The immunity should extend only to acts done in the course of carrying out duties as a member of the board in good faith, and should not extend fraud or profit-taking at the expense of the corporation.
4. The immunity should not exclude acts or omissions that may be deemed "wilful" or "grossly negligent".
5. The immunity should not affect statutory liabilities of directors and officers under Saskatchewan law, but consideration should be given on a case by case basis to modifying or removing statutory liabilities with respect to directors and officers of non-profit corporations.

1. Michael H. Hall and Laura G. Macpherson, "The Structure of the Charitable Sector: A Provincial Perspective", Canadian Centre for Philanthropy, Research Bulletin, Vol. 2, No. 3 (August 1995). The authors report that "Saskatchewan has a larger percentage of its charities in the Recreation category than any other province (7.1% vs. the national rate of 3.8%). The percentage of charities that are Social Service organizations is second only to Quebec. Places of Worship and Hospitals comprise a higher percentage of charities than in most other

provinces". [Back to text](#)

2. Volunteer Sector Round Table, Final Report of the Panel on Accountability and Governance in the Voluntary Sector, February, 1999. (Chapter 1). [Back to text](#)

3. Final Report of the Panel on Accountability and Governance in the Voluntary Sector, February, 1999. (Chapter 1). [Back to text](#)

4. S. L. Ward, Tort Liability of Nonprofit Governing Boards, (New York) Garland Publishing, 1993, p. 8. [Back to text](#)

5. For example, it has been noted that in Saskatchewan, "Lawyers are frequently asked to sit on non-profit corporation boards. Lawyers are viewed as having strong ties to the business community and as such should be good fundraisers . . . [Board membership] can enrich and broaden a lawyer. It can also be a good marketing opportunity": Donald R. Morgan, "Risks and Myths about Directors of NFP's", Risk Management for Directors of Non-profit Organizations, Saskatchewan Legal Education Society, December, 1998, p. 1. [Back to text](#)

6. Jane Doe v. Board of Commissioners of Police for Municipality of Toronto (1990) 72 DLR (4th) 480 [Back to text](#)

7. AIB et. a.I v. YWCA 4 ACWS (3rd) 445. [Back to text](#)

8. Donald R. Morgan, "Risks and Myths about Directors of NFP's", and James M. Scharfstein, "The Prudent Board Member" in Risk Management for Directors of Non-profit Organizations, Saskatchewan Legal Education Society, December, 1998. [Back to text](#)

9. See, for example a recent report under the headline "Charity on hook for \$116,000 in unpaid tax deductions" (Saskatoon StarPhoenix, April 11, 2001). The news item reported that "A former director of [a local not-for-profit corporation] says he was shocked to find out he may be personally liable for part of the more than \$116,000 . . . owed to Canada Customs and Revenue". [Back to text](#)

10. Arlene D. Wolfe, "Liability of Directors and Officers of Non-share Corporations", Fit to be Tithed: Risks and Rewards for Charities and Churches, Department of Continuing Legal Education, Law Society of Upper Canada, November 10, 1994, p. E-28. [Back to text](#)

11. S. L. Ward, Tort Liability of Nonprofit Governing Boards, (New York) Garland Publishing, 1993, p. 10. [Back to text](#)

12. Gerald Kemp, The Legal Status of Volunteer Workers and Volunteer Organizations, The Volunteer Center of Calgary (Calgary, 1980), p.51. [Back to text](#)

13. Board members of not-for-profit corporations may receive "reasonable remuneration" for services and expenses under s 112 of

the Saskatchewan Non-profit Corporations Act, 1995. However, most of the nearly 5,000 registered charities in Saskatchewan have small budgets, and can rarely offer board members more than remuneration for out-of-pocket expenses. [Back to text](#)

14. Arlene D. Wolfe, "Liability of Directors and Officers of Non-share Corporations", *Fit to be Tithed: Risks and Rewards for Charities and Churches*, Department of Continuing Legal Education, Law Society of Upper Canada, November 10, 1994, p. E-29. [Back to text](#)

15. Non-profit Corporations Act, 1995, S.S. c. N-4.2 of the 1995 (effective May 15, 1995) as amended by the S.S. 1997, c.T-22.2; and 1998, c.C-45.2. A few membership-based organizations such as co-operatives, condominium associations, political parties and credit unions are governed by special statutes. While these organizations share some characteristics with not-for-profit associations, they have been excluded from the scope of this report. [Back to text](#)

16. Canada Corporations Act, R.S.C. 1970, c. C.32. [Back to text](#)

17. L.C. Gower, *The Principles of Modern Company Law*, Stevens & Sons (London, 1975), p. 10. The Non-profit Corporations Act distinguishes between "membership corporations" that "carry on activities that are primarily for the benefit of its members", such as a sports or recreation club, and "charitable corporations" that are registered as charities and "carry on activities that are primarily for the benefit of the public". However, both types of not-for-profit corporation have members (though in some charitable corporations, the membership and the board may be essentially the same). The distinction is not of much significance in the present context. [Back to text](#)

18. s. 15(1) [Back to text](#)

19. The terminology used is somewhat variable. Some associations refer to board members as "trustees" or "executive members", and the board itself may be called the "executive". However, the term "director" is used in The Non-profit Corporations Act. The duties imposed on directors and basic rules for their selection. Contained in the Act obviously apply, whatever designation they may be given by the association. [Back to text](#)

20. s.88 [Back to text](#)

21. L.C. Gower, *The Principles of Modern Company Law*, Stevens & Sons (London, 1975), p. 79. [Back to text](#)

22. s. 32. [Back to text](#)

23. Donald R. Morgan, "Risks and Myths about Directors of NFP's", *Risk Management for Directors of Non-profit Organizations*, Saskatchewan Legal Education Society, December, 1998, p. 2. [Back to text](#)

24. This classification follows Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), p.91, but similar classifications are explicitly or implicitly adopted by most writers on the subject. See for example Harvey, "The Public-Spirited Defendant and Others: Liability of Directors and Officers of Not-For-Profit Corporations, 17 Maryland Law Review, 665 (1984). [Back to text](#)

25. s. 102(1) [Back to text](#)

26. Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), p.8. Large boards appear to be the rule in the not-for-profit sector in most jurisdictions. Kurtz (p. 5) notes that "Nonprofit boards, with some categorical exceptions (for example, private foundations) . . . tend to be substantially larger than business corporations [One] survey puts the average size of nonprofit boards upwards of thirty". [Back to text](#)

27. s. 108(1). Officers may come from outside the board of directors. In business corporations, officers are usually employees, and not board members. In not-for-profit corporations in Saskatchewan, officers are usually volunteer board members, and management employees, if any, are usually not designated "officers". This appears to be common practice throughout North America (Kuntz, p. 124). [Back to text](#)

28. s.102(1) [Back to text](#)

29. s.102(3) prohibits delegation of submission to the members of matters requiring the approval of the members, filling vacancies on the board, appointing an auditor, issue of securities without board authorization, purchase etc. of securities issued by the corporation, approval of financial statements, or amendment of bylaws. [Back to text](#)

30. See s. 109 (set out below). [Back to text](#)

31. Sealy, "Fiduciary Relationships" [1962] C.J.L.69. Several classes of fiduciary duty are recognized. The discussion here applies to fiduciaries in Sealy's "Category II", which arises when someone has been "entrusted with a job to be done" on behalf of others. Corporate directors are placed in this category by Sealy. See also Note, "Corporations: Fiduciary Duty", 24 Catholic University Law Review, 656 (1975). [Back to text](#)

32. Meinhard v. Salmon 1163 N.E. 545 (1928), N.Y. C. App. [Back to text](#)

33. S. L. Ward, Tort Liability of Nonprofit Governing Boards, (New York) Garland Publishing, 1993, p. 65. [Back to text](#)

34. Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), p.30. Expansion of board size to give recognition to fund raisers appears to be common practice for charities. The charities that raise the most money appear to have the largest boards (Uterman and Davis, "The Strategy Gap in Not-for-Profits", Harvard

Business Review, 30 (May-June 1982). [Back to text](#)

35. Revised Model Nonprofit Corporation Act, 8.30 [Back to text](#)

36. Manning, "The Business Judgment Rule and the Director's Duty of Attention: Time for Reality", 39 Business Law 1477 (1984). [Back to text](#)

37. See for example *Fales v. Canada Permanent Trust Co.*, [1976] 6 W.W.R. 10 (S.C.C.) [Back to text](#)

38. "Charity on hook for \$116,000 in unpaid tax deductions" (Saskatoon Star Phoenix, April 11, 2001). [Back to text](#)

39. James M. Scharfstein, "The Prudent Board Member", Risk Management for Directors of Non-profit Organizations, Saskatchewan Legal Education Society, December, 1998, p. 5. [Back to text](#)

40. See the discussion of vicarious liability below. [Back to text](#)

41. s. 109. Except for Ss.(3), which generally prohibits relieving a director or officer of the duties imposed by the Act, this provision essentially codifies a rule adopted by the courts in common law jurisdictions. The qualification in SS. (3), referring to s. 136(5) only applies to cases in which management has been transferred to members by a "unanimous shareholder agreement". The Canada Business Corporations Act does not contain a statutory prudence rule, but the common law equivalent undoubtedly applies to federally incorporated not-for-profit corporations. On the background and history of the prudence rule, see generally L.C. Gower, *The Principles of Modern Company Law*, Stevens & Sons (London, 1975), p. 210, and S. L. Ward, *Tort Liability of Nonprofit Governing Boards*, (New York) Garland Publishing, 1993, p. 57. [Back to text](#)

42. S. L. Ward, *Tort Liability of Nonprofit Governing Boards*, (New York) Garland Publishing, 1993, p. 65. [Back to text](#)

43. *Re City Equitable Insurance Co. Ltd.* [1925] 1 Ch. 407 (C.A.) (England). [Back to text](#)

44. Donald R. Morgan, "Risks and Myths about Directors of NFP's", Risk Management for Directors of Non-profit Organizations, Saskatchewan Legal Education Society, December, 1998, p. 2, assumes that codification was not intended to impose a stricter rule than the common law and equity. It is worth noting in this context that trustees are held by equity to a higher standard than was demanded of directors. Trustees, whatever their background, are expected to exercise the care of "a prudent man of business". In some American jurisdictions and under the Ontario Charities Accounting Act, directors of charitable organizations are considered to be trustees, and thus held to the higher standard. See Arlene D. Wolfe, "Liability of Directors and Officers of Non-share Corporations", *Fit to be Tithed: Risks and Rewards for Charities and Churches*, Department of Continuing Legal Education, Law Society of Upper Canada, November 10, 1994, p. E-

6. [Back to text](#)

45. Jane Doe v. Board of Commissioners of Police for Municipality of Toronto (1990) 72 DLR (4th) 480 [Back to text](#)

46. S. L. Ward, Tort Liability of Nonprofit Governing Boards, (New York) Garland Publishing, 1993, p. 65. [Back to text](#)

47. Harvey, "The Public-Spirited Defendant and Others: Liability of Directors and Officers of Not-For-Profit Corporations, 17 Maryland Law Review, 665 (1984) states that "the greatest number of complaints asking relief against officers and directors as individuals allege conflict of interest or wrongful taking of a corporate opportunity". [Back to text](#)

48. Sealy, "Fiduciary Relationships" [1962] C. L. J. 69 [Back to text](#)

49. See Canadian Aero Service Ltd. v. O'Malley [1974] S.C.R. 592. [Back to text](#)

50. s. 107. Omitted portions are procedural. Section 98 of the Canada Corporations Act provides for similar disclosure. [Back to text](#)

51. Lac Minerals Ltd. v. International Corona Resources Ltd. [1989] 2 S.C.R. 574. [Back to text](#)

52. James M. Scharfstein, "The Prudent Board Member", Risk Management for Directors of Non-profit Organizations, Saskatchewan Legal Education Society, December, 1998, p. 15. [Back to text](#)

53. American Law Institute Principles of Corporate Governance: Restatement and Recommendations, Tentative Draft No. 4. [Back to text](#)

54. Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), p.97. [Back to text](#)

55. See, for example, comments by Arlene D. Wolfe, "Liability of Directors and Officers of Non-share Corporations "and John P. Hamilton, "Sexual Abuse" in Fit to be Tithed: Risks and Rewards for Charities and Churches, Department of Continuing Legal Education, Law Society of Upper Canada, November 10, 1994, and Michael Pucylo and Miller Thompson, "Vicarious Liability Imposed on Charities and Non-Profit Organizations", Edmonton Federation of Community Leagues, 2001. [Back to text](#)

56. Allen Linden, Canadian Tort Law, (5th Ed.), Butterworth's, (Toronto, 1993), p. 619. Distinctions are made in the law between social guests, business invitees, and trespassers. The highest duty is owed to invitees, which includes clients and volunteers of not-for-profit agencies. [Back to text](#)

57. Allison v. Rank City Wall Canada Ltd. (1984), 45 O.R.. (2nd) 141

(Ont.) [Back to text](#)

58. Halsbury's Laws of England (3rd ed.), vol. 28 (1959), p. 50. [Back to text](#)

59. "A volunteer is a person, who, not being under a paid contract, puts himself under the control of an employer to act in the capacity of a servant." (Halsbury's Laws of England (3rd ed.), vol. 28 (1959), p. 47). [Back to text](#)

60. Gerald Kemp, The Legal Status of Volunteer Workers and Volunteer Organizations, The Volunteer Center of Calgary (Calgary, 1980), p.53. [Back to text](#)

61. Salmond and Heuston, Salmond on the Law of Torts, (19th ed.), (London, Sweet & Maxwell), 1987. P. 520. [Back to text](#)

62. Children's Foundation v. Bazley, [1999] 2 S.C.R. 534. [Back to text](#)

63. Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), p.98. [Back to text](#)

64. A complete account of the increasingly complex legal issues in sexual harassment and abuse cases will be attempted here. For present purposes, it is enough to show that concern about third party liability for harassment and abuse is justified. For more complete discussions, see John P. Hamilton, "Sexual Abuse", Fit to be Tithed: Risks and Rewards for Charities and Churches, Department of Continuing Legal Education, Law Society of Upper Canada, November 10, 1994, and Michael Pucylo and Miller Thompson, "Vicarious Liability Imposed on Charities and Non-Profit Organizations", Edmonton Federation of Community Leagues, 2001. [Back to text](#)

65. Lyth v. Dagg (1988), 46 C.C.L.T. 25 (B.C.C.A.) [Back to text](#)

66. Aleck v Canada [1991] B.C.J. no. 3058 (B.C.S.C.) [Back to text](#)

67. Jane Doe v. Board of Commissioners of Police for Municipality of Toronto (1990) 72 DLR (4th) 480 (Ont. C.A.) [Back to text](#)

68. Madelena v. Kunn (1987), 39 C.C.L.T. 81 (B.C.S.C.) [Back to text](#)

69. Children's Foundation v. Bazley, [1999] 2 S.C.R. 534.(S.C.C.) [Back to text](#)

70. M.T. v Poirier [1994] O.J. no. 1046. [Back to text](#)

71. Jane Doe v. Board of Commissioners of Police for Municipality of Toronto (1990) 72 DLR (4th) 480 (Ont. C.A.). [Back to text](#)

72. When adequate precautions have been taken, the doctrine of vicarious liability has been held not to apply, even if there was close contact between the abuser and the victim, as for example, between a

worker and victim in a youth club *Jacobi v. Griffiths* [1999] 2 S.C.R. 570; *AIB et. al v. YWCA 4 ACWS (3rd)* 445. [Back to text](#)

73. Michael Pucylo and Miller Thompson, "Vicarious Liability Imposed on Charities and Non-Profit Organizations", Edmonton Federation of Community Leagues, 2001. [Back to text](#)

74. See above. [Back to text](#)

75. Susan Vella, "Sexual Abuse: The Civil Remedy", Law Society of Upper Canada, 1993. [Back to text](#)

76. s. 105. [Back to text](#)

77. The Occupational Health and Safety Act, 1993, S.S. C. O-1.1 as amended. [Back to text](#)

78. s. 106. [Back to text](#)

79. The Labour Standards Act, R.S.S 1978 C..L-1 as amended, s. 63. Since this Act also provides on its own terms that directors and officers are liable for wages, the liability applies to directors and officers of organizations incorporated under the Canada Corporations Act. [Back to text](#)

80. s.110(4). [Back to text](#)

81. Income Tax Act, R.S.C. 1985, c.1 (5th Supp.) s. 227.1. [Back to text](#)

82. Canada Pension Plan Act, R.S.C. 1985, c. C-8 s. 36 (making s. 227.1 of the ITA applicable to CPP deductions). [Back to text](#)

83. Employment Insurance Act, S.C.1996, c. 23) s. 54(2) (making s. 227.1 of the ITA applicable to EI deductions). [Back to text](#)

84. Excise Tax Act, R.S.C. 1985, c. E-15 , s. 323. [Back to text](#)

85. Income Tax Act, s. 227.1. (3). In addition, Revenue Canada can look to directors and officers only if execution against the corporation has not been successful, or the corporation is insolvent or undergoing liquidation (s. 227.1(2)). [Back to text](#)

86. Arlene D. Wolfe, "Liability of Directors and Officers of Non-share Corporations", Fit to be Tithed: Risks and Rewards for Charities and Churches, Department of Continuing Legal Education, Law Society of Upper Canada, November 10, 1994, p. E-19. [Back to text](#)

87. See for example the Canada Environmental Protection Act, 1999 S.C. 1999, c. 33 and the Hazardous Products Act R.S C. 1985, c. H-3. [Back to text](#)

88. For example, business practices offences under the Competition

Act [Back to text](#)

89. s. 110 [Back to text](#)

90. s. 111. The Canada Corporations Act, s. 93, also permits indemnity, but the provision may apply to directors only. [Back to text](#)

91. s.111(3) [Back to text](#)

92. s. 111(1) [Back to text](#)

93. Arlene D. Wolfe, "Liability of Directors and Officers of Non-share Corporations", Fit to be Tithed: Risks and Rewards for Charities and Churches, Department of Continuing Legal Education, Law Society of Upper Canada, November 10, 1994, p. E-11. [Back to text](#)

94. Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), p.105, commenting on similar standards in American legislation, observes that "for example, although a well-intentioned, honest, but mistaken approval of an economically disadvantageous transaction might violate a director's duty of care, in . . . [states with this standard in indemnity statutes], a director generally still can be indemnified." [Back to text](#)

95. s. 111(2) [Back to text](#)

96. Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), p.104. [Back to text](#)

97. Kurtz, p. 107. [Back to text](#)

98. Dale Linn, "Insurance Coverage", Risk Management for Directors of Non-profit Organizations, Saskatchewan Legal Education Society, December, 1998, p. 6. [Back to text](#)

99. s. 111(4). Clause (b) allows and organization to protect its board members when they serve on the boards of affiliates. More generally, when a professional of business person is asked to sit on a non-profit board, his own firm may protect him by purchasing "outside directors" insurance. For example, law firms may purchase outside director's insurance through the Canadian Bar Association to protect members who serve on corporate boards. [Back to text](#)

100. Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), p.108. [Back to text](#)

101. This is part of a larger problem in the not-for-profit sector. A study in Alberta found that "many agency directors were confused about the kind of insurance they carried and uncertain about what coverage they had. General knowledge about the kind of insurance that is available . . . was lacking". (Gerald Kemp, The Legal Status of Volunteer Workers and Volunteer Organizations, The Volunteer Center of Calgary (Calgary,

1980), p.58). [Back to text](#)

102. For a summary of available D&O insurance, see Dale Linn, "Insurance Coverage", Risk Management for Directors of Non-profit Organizations, Saskatchewan Legal Education Society, December, 1998. [Back to text](#)

103. Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), p.99. [Back to text](#)

104. See for example James M. Scharfstein, "The Prudent Board Member" in Risk Management for Directors of Non-profit Organizations, Saskatchewan Legal Education Society, December, 1998. [Back to text](#)

105. Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), p.99. [Back to text](#)

106. Donald R. Morgan, "Risks and Myths about Directors of NFP's", Risk Management for Directors of Non-profit Organizations, Saskatchewan Legal Education Society, December, 1998, p. 1. [Back to text](#)

107. Revised Model Business Corporations Act, 8.44 [Back to text](#)

108. Final Report of the Panel on Accountability and Governance in the Voluntary Sector, February, 1999. (Chapter 1). [Back to text](#)

109. For example, in Maryland, charities are immune from tort liability (Maryland Code 48f. 480 (1991). In Arkansas (Ark. Code 23-79-210) and Colorado (Nonprofit Corporation Act, 1986, 7-20-108), not-for-profit corporations are liable in tort only to the extent of their insurance coverage. [Back to text](#)

110. [1999] 2 S.C.R. 534.(S.C.C.) [Back to text](#)

111. American legislation following this approach will be discussed below. [Back to text](#)

112. Final Report of the Panel on Accountability and Governance in the Voluntary Sector, February, 1999. (Chapter 1) [Back to text](#)

113. For discussion of the American legislation see, Daniel L. Kurtz, Board Liability: Guide for Nonprofit Directors, Moyer Bell (New York, 1988), chapter 5. S. L. Ward, Tort Liability of Nonprofit Governing Boards, (New York) Garland Publishing, 1993, (appendices), provides a state-by-state summary of relevant American law. [Back to text](#)

114. Ill. Not for Profit Corporation Act 24b. [Back to text](#)

115. Alaska Statutes 09.17.051 (suppl. 1991. [Back to text](#)

116. Tenn. General Corporations Act 48-1-852. [Back to text](#)

117. California Corporation Code 5239 (1990). [Back to text](#)