



## **The Role of Directors in Rugby Ontario and Associated Member Organizations**

People become directors on the Boards of Rugby Ontario, Branch Unions, Clubs and Referee Societies for a variety of reasons. They have experience with rugby and its organizations, hold leadership positions in the sport to which they are committed or feel that they can bring professional and work-related experience to a rewarding voluntary position. Their experience, coupled with the knowledge that can be gained from the information outlined in this document, will hopefully ensure that directors are better prepared to perform their duties effectively and capably.

Rugby Ontario believes that volunteer board members are to be congratulated and supported for their willingness to take on both the responsibilities associated with directorships and the corresponding risks, at all levels of rugby administration in Ontario.

Sometimes, in spite of our personal commitment to rugby, directors may be unaware of the legal ramifications of their volunteer work. Personal liability has become an area of increased concern for many board members of not-for-profit organizations, including those in amateur sports. By informing Rugby Ontario board members and others in associated member organizations about their legal duties and obligations in an incorporated, not-for-profit environment, this document serves as a practical 'prevention checklist' to help minimize personal liability.

Rugby Ontario hopes that you will find the document to be beneficial in your volunteer position as a board member in rugby in Ontario.

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## 1.0 Introduction

As our society has become more litigation-oriented, the public expects not-for-profit organizations to be more accountable and business-like in managing their affairs. The intent of this document is to inform volunteers on the Board of Directors of Rugby Ontario and its member organizations about their legal responsibilities, and provides practical suggestions on how to minimize their personal liability. Volunteer directors need to understand the risks facing them so that they can act reasonably and appropriately.

**Although this document contains legal information, it is important to note that it does not provide legal advice.** Individuals seeking specific advice should consult with a lawyer.

Rugby Ontario and many of its member organizations are not-for-profit corporations which are incorporated under provincial or federal statutes, thereby giving their volunteer directors a measure of protection from legal liability. However, some clubs remain unincorporated and do not provide their directors with any coverage from legal liability.

The responsibility of a Board of Directors is to provide leadership and direction in managing the affairs of the organization on behalf of its members. It is guided in this through maintaining and applying such governance instruments as By-Laws, strategic and operational plans, policies and procedures.

The roles of volunteer directors on a Board remain fairly constant. Their basic responsibility is to represent the interest of the members in directing the affairs of the organization and to do so within the law. They have a relationship of 'trust' with the members of the organization. It is from this relationship that certain important legal duties and obligations arise.

## **2.0 Basic Duties of Directors**

### **2.1 Duty of Diligence**

Duty of Diligence is to act reasonably, prudently, in good faith and with a view to the best interests of the organization and its members.

When performing their duties, directors are expected to exercise the same level of care as a reasonable person with similar abilities, skills and experience would exercise in similar circumstances. If a director has a special skill or area of expertise, such as an accountant or lawyer would have, he or she has a duty to achieve a standard of care that corresponds to his or her professional abilities.

Directors have a responsibility to act cautiously and try to anticipate the consequences of their decisions and actions before they undertake them. They should be honest and forthright in their dealings with members, the public and each other. Directors should be well-informed about the activities and finances of the organization. They have an obligation to foresee potential risks inherent in a situation and to take reasonable steps to manage those risks.

### **2.2 Duty of Loyalty**

Duty of Loyalty is to place the interests of their organization first and to not use his or her position as a director to further private interests.

Directors who are involved in more than one organization may find that they cannot be loyal to both. Loyal directors will avoid putting themselves in a situation of a conflict of interest. When this is unavoidable, they should act properly by disclosing the conflict and ensuring that they play no part in discussing, influencing or making decisions relating to that conflict.

Confidentiality is also an important aspect of the duty of loyalty. Directors have an obligation to keep organizational business private and to not discuss with people outside the organization such potentially confidential matters as information about the organization's finances or legal matters, its personnel or clients.

A board acts as one entity. Loyal directors support the decisions of the board, even when they do not personally agree with the decisions and might not have voted to support the decisions in the board meeting.

## **2.3 Duty of Obedience**

Duty of Obedience is to act within the scope of applicable policies, laws, rules and regulations.

Directors have a duty to comply with the organization's governing documents and ensure that staff and committees do so as well. Over time, organizations may move away from their legal purpose, and policies may become out of date and no longer reflect the practices of the organization. Obedient directors ensure that governing documents remain current and accurate, and oversee the process for their amendment and updating.

Directors also have a duty to obey and to ensure that their organization obeys external laws and rules that may be applicable. In particular, an organization that is an employer has many statutory responsibilities to its employees.

## **3.0 Liability of Directors**

A director who fails to fulfill his or her duties as outlined above may be liable. The term 'liability' refers to the responsibility of directors and organizations for the consequences of conduct that fails to meet a pre-determined legal standard. Usually, the term 'consequences' refers to damage or loss experienced by someone, and being responsible for such consequences means having to pay financial compensation. Liability arises in the following three situations:

### **3.1 When a law (statute) is broken.**

Directors may have specific statutory obligations relating to:

- the election and appointment of directors and officers;
- calling meetings of members;
- paying taxes to government and submitting employment-related remittances;
- keeping decision records of meetings of the Board and its committees;
- reporting and disclosing prescribed information about the corporation to authorities and government agencies;
- paying wages and salaries and providing paid time-off for holidays;-
- maintaining a safe workplace, free from discrimination and harassment; protecting all participants in the sport from abuse and harassment;
- activities that cause pollution or other environmental damage

The consequences may be severe, ranging from fines to having restrictions placed on rights and privileges or, in extreme cases, imprisonment.

**3.2. When a contract, which is a legally enforceable promise between two or more parties, is breached or violated.**

Directors are responsible for ensuring that the organization's contractual obligations are fulfilled including those with employees and independent contractors. The consequences may vary from correcting the breach through some form of performance or service to paying financial compensation.

**3.3. When an act, or a failure to act, whether intentionally or unintentionally, causes injury or damage to another person (tort law).**

Directors are responsible for ensuring that they, as well as the organization's volunteers and staff do not behave negligently. The concept of negligence applies to such 'wrongful' acts as:

- errors or omissions; and
- actions or decisions that harm others, not through damaging their property or their physical person, but through interfering with their rights, opportunities or privileges

Directors, volunteers and staff are at all times expected to act in a reasonably diligent and safety-conscious manner so that others affected by their actions (e.g. players and the public) do not face an unreasonable risk of harm. The consequence of not doing so may be financial compensation.

## **4.0 Indemnification**

Volunteer directors take on a range of legal responsibilities and face many potential liabilities. Not-for-profit organizations recognize that this can be quite challenging. As a result, it is almost universal practice to 'indemnify' their directors for liabilities that they might incur in carrying out their duties as directors. Incorporated organizations are required by law to indemnify their directors for such losses. To 'indemnify' means to put someone back in the same financial position as they were in before. An indemnified director would be compensated for legal fees; fines that were paid under a statute; financial settlements resulting from lawsuits; or any other legal obligation that a director was required to fulfill.

## **5.0 Avoiding Liability Through Risk Management**

There is risk inherent in everything we do. Volunteer directors must always be mindful of risks. This means examining situations cautiously and thinking ahead to the potential consequences of decisions and actions. Most people manage risks most of the time and do so instinctively. However, it is a good practice to manage risks more systematically. The process of risk management can be as simple as looking at a situation and:

- asking what can go wrong and what harm could result;
- identifying practical measures to keep such harm from occurring; and
- if harm does occur, identifying practical measures to lessen their impacts and pay for any resulting damage or losses

Practical measures are usually those that would be taken by any other prudent and reasonable person. This is why the practice of risk management is based in large part on common sense and is linked to the concept of 'standard of care'. Measures will tend to revolve around:

- training and educating staff and volunteers;
- enforcing reasonable rules;
- inspecting and maintaining facilities and equipment;
- screening and supervising staff and volunteers;
- properly documenting meetings and decisions; and
- meeting all statutory reporting requirements

In 2009, Rugby Ontario developed and approved an organizational risk management plan containing these measures and has posted it to the Rugby Ontario website.

## **6.0 Taking Practical Measures To Reduce Risks**

### **6.1. Directors' Liability Insurance**

Insurance is a common risk management measure that is very important in minimizing directors' liability. Insurance is one of many techniques used to manage risks. It involves transferring the liability associated with a risk to another party by means of a written contract. In the case of insurance, the party that the risk is transferred to is the insurance company, and the written contract is the insurance policy. Transferring risks through written contracts is a very common business practice. Directors' (and officers') insurance is like general liability insurance, and covers costs that directors might become legally obligated to pay as a result of damages to another party. Rugby Ontario pays premiums through Rugby Canada's Insurer for Officers and Directors Insurance.

However, unlike a general liability insurance policy that covers losses arising from physical injury or property damage, directors' liability insurance covers only those losses arising from a director's own 'wrongful acts', which may be defined as:

- an error or mis-statement;
- a misleading statement, act or omission; or
- other breach of duty by an insured person in his or her insured capacity

The purpose of this insurance is to provide the financial backing for the indemnity that the organization provides to its directors. Directors' and officers' liability insurance is a fairly recent risk exposure action for many not-for-profit organizations. The risk is not so much that a director is found guilty of a wrongful act, but simply that there is an allegation of a wrongful act. Although few claims against directors are substantiated and fewer of these result in large financial awards, the cost of defending any claim can be significant. This is where directors' insurance tends to prove its value.

Directors' insurance policies vary and there is no standard level of coverage.

Importantly, many of these policies *exclude* coverage for:

- directors acting outside the scope of their duties, including any actions that are dishonest, fraudulent or criminal;
- breach of contract, including wrongful dismissal of employees;
- fines and penalties under a statute or regulation; and
- complaints under a human rights code, including a complaint of discrimination, harassment or sexual harassment

Insurance is a complex subject, and directors' insurance is especially so. For more additional information on this subject, call the Executive Director of Rugby Ontario or consult with an insurance representative or a lawyer.

## **6.2 Incorporation**

Incorporation under a federal or provincial statute establishes an organization as a legal entity that exists separate and distinct from its members and can:

- own property in its own name;
- acquire rights, obligations and responsibilities;
- enter into contracts and agreements; and
- sue and be sued as if it were a real person

An unincorporated organization is not a separate legal entity and has no legal status apart from that of its members. While carrying out their duties on behalf of the members, directors can be held personally and jointly liable for the activities of the organization. For example, an unincorporated entity [e.g. a rugby club] cannot enter into contracts of its own, so a director who executes a contract on behalf of the organization might be held to that contract in their personal capacities. Likewise, a third party cannot sue the organization (as it is not a legal entity) but can, and likely would, sue the directors collectively and individually.

An incorporated organization offers directors the protection of what is termed the 'corporate veil.' As a separate legal entity, the organization is one step removed from the directors and members. Lawsuits must be brought against the corporation, and directors of such corporations are, to a large extent, protected from liability for actions they took in their capacity as directors. The minor costs and inconveniences of incorporation are far outweighed by the benefits that such incorporation provides to the members and directors.

## **7.0 Protecting Yourself as a Director**

There is no substitute for knowledgeable governance and thoughtful risk management, and the organization that manages its affairs in a conscientious and responsible manner will reduce its directors' liability risks considerably. Nonetheless, the following practical tips should be helpful to both existing directors and volunteers thinking about becoming a director:

- Be sure you have the time, interest and commitment to do the job well.
- Learn as much as you can about the organization. What is its mission? What activities does it undertake? How is it perceived in the community?
- Ask for a written job description for the position of director.
- Educate yourself about your legal duties as a director.
- Look at the composition of the entire board, and satisfy yourself that it can govern effectively and provide competent direction to committees, staff and volunteers within the organization.
- Confirm that the organization carries directors' liability insurance.

Once you have accepted a directorship, managing your personal liability risks is an ongoing process. The following guidelines identify steps that can be taken to manage these risks as they relate to issues such as policy, finances, meetings, personnel and training.

## **7.1 Meetings**

- Attend meetings, be prepared to discuss the items on the agenda and participate fully in decision-making.
- Provide written reports.
- Ensure that minutes reflect abstentions, votes for and against motions.
- Declare any real or perceived conflict of interest when the issue first arises and do not vote, participate in or influence the decision-making process. Have your disclosure recorded in the meeting minutes.
- Do not rush important decisions. Ensure that board members receive meeting materials in ample time to digest them. If important information is lacking, postpone the decision until this information can be obtained.
- Keep copies of key documentation and minutes of controversial meetings.

## **7.2 Finances**

- Take an interest in finances by reviewing regular financial reports, approving and monitoring the organization's annual budget.
- Use a professional, independent accountant to perform an annual audit of the organization's finances.
- Know who is authorized to sign cheques and for what amount.
- Do not be shy about asking questions and seeking clarification on financial matters from staff.
- With the assistance of your auditor, develop a list of statutory reporting requirements and assign a staff person or director to monitor that they are being fulfilled.

## **7.3 Contracts**

- Ensure that all contracts entered into by the organization are carefully reviewed.
- When the organization partners with other entities on joint projects or enters into agreements, be sure that all terms and conditions are clearly expressed in a written contract, and that risks and liabilities are appropriately shared.

## **7.4 Policy**

- Ask for a copy of the organization's policy manual. If it does not have one, develop a work plan for staff (or others, as appropriate) to prepare one.
- Be familiar with the content of the organization's constitution and bylaws. If they are out of date or no longer adequately reflect the mandate and activities of the organization, then undertake to update them.
- On important matters and for decisions that have the potential to adversely affect someone, ensure that the organization's policies are adhered to as written. If the policy is unsuitable for dealing with the particular circumstance, then take steps to change the policy.
- Commit staff and volunteer time and financial resources to developing risk management policies.

## **7.5 Personnel**

- Ensure that all staff and volunteer positions have written job descriptions.
- Insist that the organization develop a clear personnel policy and ensure that staff evaluations are performed at least annually or as required by the policy.
- Be sure that suitable screening measures are in place for those staff and volunteer positions that involve interaction with children, youth, seniors or other vulnerable persons in positions of trust.

## **7.6 Insurance**

- Ask for copies of the organization's insurance policies and become familiar with their scope of coverage.
- Consider asking the insurance broker to meet with the board and make a brief presentation on these policies.

## **7.7 Training**

- Support professional development for staff and training for volunteers.
- Encourage the board to engage in training. Bring in a board development instructor or a facilitator to help the board improve its effectiveness.
- Offer board members training opportunities in association with board meetings or annual general meetings.
- Commit resources to the development and updating of board and staff orientation materials.
- Leave aside a short portion of every board meeting to allow the board to evaluate its effectiveness in conducting the meeting and making governance decisions.

## 7.8 General

- If the organization is unincorporated, strongly consider incorporation.
- If something seems not right, go with your intuition and check it out.  
**Remember**, directors are held responsible for circumstances and situations that they *ought* to have known about, whether or not they actually did know about them.
- Do not speak negatively about the organization to the public. Publicly support the board's decisions, even if you voted against the majority of directors.
- If the organization needs to deal with a complex matter in which staff or directors lack expertise, consider the services of a professional.

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<http://www.boarddevelopment.org> (a website on board development training, accountability and governance in the Canadian voluntary sector)

Ontario Ministry of the Attorney General website

<http://www.attorneygeneral.jus.gov.on.ca>

United Way of Canada / Centraide Canada website

<http://www.unitedway.ca>

Voluntary Sector Roundtable (VSR) website (the VSR website is hosted and maintained by United Way of Canada / Centraide Canada—see web listing above) <http://www.vsr-trsb.net/main-e.html>

Volunteers and the Law: A guide for volunteers, organizations and boards. (a web document prepared by the People's Law School)

<http://www.publiclegaled.bc.ca/volunteers>

Volunteer Canada: [www.volunteer.ca](http://www.volunteer.ca)