

# LIABILITY AND RISK MANAGEMENT FOR BOARDS

Board Leadership Calgary  
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## Community Development Unit



***Provides services generally at no charge to:***

- Provincial, regional and local non-profit organizations
- Community coalitions, alliances, collaborations and networks
- Public sector organizations (publicly funded such as town councils, school boards)
- Government departments and agencies

***Community and organizational development services:***

- Skill development training and presentations
- Facilitation (participatory workshops, public consultation)
- Consultation

***Board Development Program:***

- Workshop curriculum for non-profit organizations led by trained volunteers

## “Disclaimer”

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- I am not a lawyer.
- I am not an insurance broker or agent.
- Consult with a lawyer or insurance broker or agent for legal or insurance advice.

The logo for the province of Alberta, featuring the word "Alberta" in a white, cursive script font, followed by a small orange square containing a white stylized 'A'.

What attracted you to this workshop?

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## Context

Governance  
Concept

Is your organization incorporated and if so, under which legislative act?



Image Source: By Merijana - Own work, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=28033053>

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## Incorporation Options

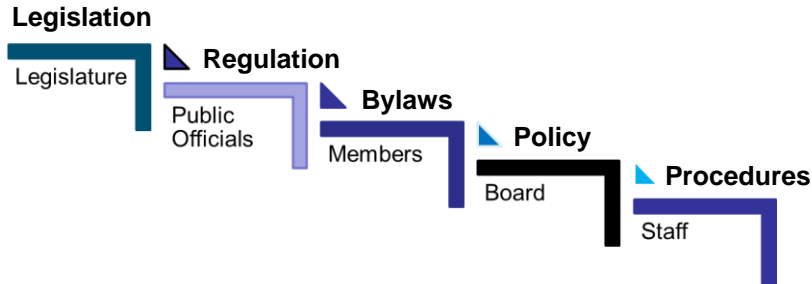
Governance  
Concept

- **Society** (Societies Act)
- **Non-profit Company or Part 9 Company** (Alberta Companies Act)
- **Not-for-profit Corporation** (Canada Not-for-Profit Corporations Act)
- **Extra-Provincial Corporation** (Business Corporation Act)
- **Religious Society** (Religious Societies Land Act)
- **Cooperative** (Cooperative Associations Act)
- **Private Act of the Legislature** (e.g. Libraries Act, Agricultural Societies Act)



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# Ladder of Authority



# Common Obligations of Incorporation



- Filing annual financial and other statements to government.
- Holding regular meetings of directors and members.
- Maintaining formal minutes of the meetings of directors and members.
- Holding and maintaining records of annual general meetings.
- Maintaining proper financial records of the organization.
- Maintaining records of any property purchased by the organization.
- Maintaining proper employee records.
- Complying with Occupational Health and Safety and Employment Standards legislation.
- Acquiring liability and other forms of appropriate insurance.
- Addressing issues with respect to the ownership of goods produced in the course of the organization's operation and copyright to any intellectual property.



## Advantages of Incorporation



- Permanence and autonomy
- Formal structure, framework and governing rules
- Ability to hold property and enter into contracts as an entity
- Access to funding
- Income tax benefits
- Goods and Services Tax (GST) considerations
- Eligibility for Registered Charity status with Canada Revenue Agency (CRA)
- Limiting Liability
- Litigation



## Implications of Incorporation



Incorporation as a society provides a way to limit the individual board member's liability – it does *not* eliminate liability entirely.



## What is “Liability”?

Legal  
Concepts

**Liability** is being responsible for the losses we cause and for compensating those who suffer as a result of our conduct failing to meet an acceptable standard in the eyes of the law.



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## Statutory, Regulatory & Constitutional Liability

Legal  
Concepts

Compliance with laws or legislation passed by government and related regulations

- Incorporation and charitable status
- Employment and labour law
- Income Tax Act
- Human rights
- FOIP, CASL, PIPA
- Disclosure obligations
- Fundraising, gaming
- Others that may apply (Boards of Trade Act, Traffic Safety Act)

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## Common Law / Case Law

Legal  
Concepts

**Case Law**, often used interchangeably with the term **Common Law**, refers to the precedents and authority set by previous court rulings, judicial decisions and administrative legal findings or rulings.

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## Contract Liability

Legal  
Concepts

- Understand and monitor major contractual obligations, including funders
- Set and follow policies and procedures for procurement and requests for proposal processes

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## Criminal Liability

Legal  
Concepts

If the organization is charged with a criminal offence, directors may also be charged if they are a party to, actively participated in, assisted with, encouraged, or failed to report a crime.



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## Negligence and Liability

Legal  
Concepts

- Tort law deals with wrongful acts that lead to physical, emotional or financial damage, loss or injury to another person.
- The Tort of 'Negligence' relates to carelessness rather than deliberate acts and is often defined as not doing something which a reasonable person would do, or doing something which a reasonable person would not do.
- If found liable, wrongdoers must compensate victims for losses.

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## Fiduciary

Legal  
Concepts

A legal term that refers to a person who, because of the position s/he holds, has a responsibility to act primarily for another's benefit.



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## Fiduciary Duty

Legal  
Concepts

- The duty to act honestly, in good faith, and in the best interest of the organization at all times while using the care and diligence of an ordinarily prudent and reasonable person.
- Stakeholders entrust the direction and success of the organization to the board of directors.
- The fiduciary role as trustee must be at the heart of the board member's commitment.
- The public and the law look to the directors to ensure accountability.

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# What are Directors' Fiduciary Duties?

Legal  
Concepts

## 1. Duty of Care

The requirement to act with a certain standard of attention, competence, diligence and to be informed about issues in order to make good decisions for the organization.

## 2. Duty of Loyalty

The requirement to act honestly and in good faith in the best interests of the organization. This means one must avoid conflict of interest.

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# Standard of Care

Legal  
Concepts

The **objective standard** judges all directors against the same criteria. Directors are required to exercise the degree of care and skill of a '**reasonably prudent person**'.

The **subjective standard** judges directors against their own personal characteristics, attributes, skill level, education, experience, and profession.

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## How can a Director fulfil the Duty of Care?

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Legal  
Concepts

### Pay attention and exercise ‘due diligence’

*Due diligence refers to the level of judgment and degree of care, diligence, skill and activity that a person would reasonably be expected to exercise under particular circumstances.*

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## How can a Director fulfil the Duty of Loyalty?

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Legal  
Concepts

Be familiar with the organization’s conflict of interest policy.

Avoid actual conflict of interest and the appearance of conflict for self or another organization by immediately declaring any conflict of interest and following the process and requirements of the policy (i.e. abstain from discussion and voting).

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## Role of the Board: Collective Action

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**See with many eyes, think  
with many minds, speak with  
one voice**



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## Areas of Individual Liability

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Legal  
Concepts

- Non-Management
- Negligence or Willful Mismanagement
- Conflict of Interest and Self-Dealing



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## Personal Liability

Legal  
Concepts

Personal liability is minimized when board members are acting prudently, within their authority, and are not negligent.



Image Source: [insurance-expats.com](http://insurance-expats.com)

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## What Is “Indemnification”?

Legal  
Concepts

Indemnification: covering, assuring or guaranteeing another against loss

An organization may agree to pay the costs associated with a claim related to a director’s service on the board by ‘indemnifying’ board members in its bylaws.

While indemnification helps protect board members, indemnity clauses do not provide absolute protection to the officers and directors.

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As fiduciaries, can directors delegate their authority and/or responsibility?

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What if a director disagrees with a decision of the board?

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## Tools to Help Board members Reduce Liability

Risk  
Concepts

- Board orientation
  - Peer mentorship
  - Board development training
  - Board retreats
  - Meeting minutes
  - Policies and procedures
  - Financial information
  - Professional advice
  - Risk management
- Board Manual**
- Incorporation documents
  - Current bylaws
  - Code of conduct for directors
  - Policies
  - Registered Charity information

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## Focus On The Right Things

**CAUTION:  
THIS SIGN HAS SHARP EDGES**

Also, the bridge is out ahead

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# Risk Management for Non-Profit Organizations

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## What is Risk?

Risk  
Concepts

**Risk** is the possibility that something harmful or undesirable may happen.

This could include harm, injury, or abuse to your organization's clients, volunteers, funders and supporters, board members, employees, property, or reputation.



Source: Knowledge Development Centre, Imagine Canada 2005, Developing a Risk Management Strategy: Five Steps to risk Management in Nonprofit and Charitable Organizations by Karen Six, Eric Kowalski

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## Areas in which Risk can Occur...

Risk  
Concepts

- People
- Premises and property
- Operations, programs, services
- Special events
- Finances
- Reputation and goodwill
- Technology, information, data, intellectual property
- Governance
- Regulatory compliance
- Natural disasters

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## What Is 'Risk Management'?

Risk  
Concepts

- Risk Management is a process that an organization uses to identify, assess, control, and minimize the risks of bodily injury or financial loss from its activities and operations.
- Any organization that provides programs and/or services to the public has a moral and legal obligation to institute appropriate risk management practices.
- It is legally required under the duty of care.



Source: Knowledge Development Centre, Imagine Canada 2005, Developing a Risk Management Strategy: Five Steps to risk Management in Nonprofit and Charitable Organizations by Karen Six, Eric Kowalski

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## Questions Boards should ask about Risk Management....

Risk  
Concepts

- Who is responsible for risk management?
- How does the organization identify the risks that it faces?
- How does the organization assess the risks that it faces?
- What strategies does the organization use to manage risks?
- What records does the organization keep related to risk management?
- What is the organization's financial capacity to take on risks?
- How are the board's expectations for risk management coordinated across the organization and communicated to staff and volunteers?
- What plans does the organization have for responding to crises?

Source: 20 Questions Directors of Not-For-Profit Organizations Should Ask about Risk (Chartered Accountants of Canada 2009)

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## Risk Management Process

Risk  
Concepts

1. Identify the risks
2. Assess the risks
3. Determine how to manage the risks
4. Lay out what will be done if something does go wrong
5. Develop, communicate and implement the risk management plan
6. Set up and maintain risk-related monitoring, recording and reporting systems (including close calls)
7. If something goes wrong, review the situation for lessons learned and take swift action to make improvements

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# Organizational Risk Assessment

(Centre for Sector Development Checklist handout)



- Organizational Policies and Procedures
- Financial Management
- Board Governance
- Human Resources
- Volunteer Management
- Information and Privacy Protection
- Insurance



## Risk Assessment Heat Map

*Impact x Likelihood = Risk Level*



Potential Impact	3-High	3	6	9
	2-Medium	2	4	6
	1-Low	1	2	3
		1-Remote	2-Possible	3-Probable
		Likelihood		



## Determine how to Manage the Risk

Risk  
Concepts

1. **Eliminate or avoid the risk**
  - Stop doing the activity or fix the problem
2. **Mitigate or reduce the risk**
  - Change the activity or create procedures to decrease the risk
3. **Transfer the risk**
  - Outsource or purchase insurance to transfer the responsibility to someone else. Not all responsibility can be transferred.
4. **Accept the risk**
  - Some activities have risks that cannot be avoided. Plan for the possibility and move on.

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## Everybody, Somebody, Anybody, Nobody

There was an important job to be done and everybody was asked to do it;  
Everybody was sure that somebody would do it;  
Anybody could have done it, but nobody did;  
Somebody got angry because it was everybody's job;  
Everybody knew anybody could do it;  
But nobody realized that somebody wouldn't do it;  
And everybody blamed somebody because nobody actually asked anybody.

Adapted from Charles Osgood

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## Risk Management: Whose Job is it?

Risk  
Concepts

Without clear policies and procedures, risk management can be both everyone's job and no one's job.

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## Did you know?

Risk  
Concepts

- In a non-profit organization, the board is responsible, and potentially liable, for the programs and services of the organization.
- To reduce risk, board must be aware of their responsibilities and develop policies to ensure these responsibilities are met.

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## Types of Policies

Risk  
Concepts



1. Framework Policies
2. Board Self-Governance Policies
3. Operational Policies
  - Program
  - Personnel
  - Financial
4. Advocacy Policies

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## Nose In, Fingers Out



In a policy governance board, the board's job *is not* to do it, but it *is* their job to make sure it is done.

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How can the board be sure the information it gets on risk is accurate and reliable?

## Code Of Conduct

Risk Concepts

- Sets out the organization's ethical values and standards that determine how board members, staff, volunteers and other stakeholders behave and treat each other with honesty and integrity.
- Establishes boundaries of acceptable behaviour.



## What does the Board do to Assess its Effectiveness in Overseeing Risk?

Risk  
Concepts

- Does the board champion and support risk management?
- Does the board support a Code of Conduct and lead by example?
- Does the board have members with knowledge and experience in risk management?
- Do board members receive orientation and updates on risk issues?
- Does the board agenda provide for regular reporting and discussion on risk issues?
- Are the board and its committees effectively organized to oversee risk management?
- Does the board make use of opportunities to integrate risk management with other board processes, such as strategic planning, business planning, budget reviews, new program approval, etc.?

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Source: 20 Questions Directors of Not-For-Profit Organizations Should Ask about Risk  
Chartered Accountants of Canada 2009

## The Difference between Risk Management and Insurance

Risk  
Concepts

Insurance is one form of risk management

Not all risks can be insured against

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# Insurance

Insurance  
Concepts

- Organizations have an obligation to acquire liability and other forms of insurance appropriate to the activities of the organization.
- Liability insurance covers the cost of legal defense if needed.



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# Types Of Insurance

Insurance  
Concepts

- Commercial General Liability (CGL)
- Directors and Officers Liability (D&O)
- Errors and Omissions (E&O, professional liability, malpractice)
- Employment Practices Liability
- Automobile
- Property
- Tenant / Leasing
- Crime
- Business Interruption
- Liquor Liability
- Machinery Breakdown
- Special Event Liability



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## Insurance Buying Tips

Insurance  
Concepts

- Understand the difference between brokers and agents
- Find advisors with non-profit organization expertise
- Meet to discuss needs and coverage options
- Be prepared to provide complete and accurate information
- Ensure you understand coverage and exclusions
- Disclose all prior losses and claims
- Negotiate coverage and cost / request bids



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## Remember....



No organization can eliminate *all* risk!

Risk Management is all about good business practices

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Managing risk is an integral part of good governance. It is a consideration in everything a board, staff, and volunteers do and the reason for establishing a risk-aware culture in an organization.

Source: 20 Questions Directors of Not-For-Profit Organizations Should Ask about Risk  
Chartered Accountants of Canada 2009

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## The Greatest Risk of All: Do Nothing!

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# A Few Good Resources

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## **Chartered Accountants of Canada**

- '20 Questions Directors of Not-For-Profit Organizations Should Ask' Series (...About Risk, ...About Fiduciary Duty, ...About Codes of Conduct)
- Liability Indemnification and Insurance for Directors of Non-For-Profit Organizations

## **Alberta Voluntary Sector Insurance Council**

- Insurance Toolkit for the Voluntary Sector. Prepared by Calgary Chamber of Voluntary Organizations (CCVO)
- Directors' & Officers' Liability: How Are You Managing?

## **Insurance Bureau of Canada**

- Insurance for Voluntary Organizations: Are Your Volunteers and Clients Covered?

## **Imagine Canada**

- Developing a Risk Management Strategy

## **Volunteer Alberta**

- Volunteers and The Law in Alberta
- Risk Management Strategies and Tactics
- Protect Your Assets training sessions

## **The People's Law School**

- Volunteers and the Law

## **Charity Village**

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***Presented by:***



**Community Development Unit**

[www.culture.alberta.ca/communitydevelopment](http://www.culture.alberta.ca/communitydevelopment)

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