

Regina Community Clinic
Legal Responsibilities and Obligations
of
Directors and Officers

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I. Introduction

The only way that an organization like the Regina Community Clinic can function is through the individuals that are its directors and officers. They are its “directing minds”.

All directors of the Community Clinic have duties and responsibilities by reason of their position as directors. Some directors may be elected or appointed to positions as officers (eg. President, Vice-President, Treasurer, Secretary) and they are, therefore, both directors and officers at the same time. The Executive Director is not an officer of the Community Clinic in this sense.

Prudent directors and officers will acquaint themselves with their duties and responsibilities and with the areas of risk they face in performing their functions. This paper is meant to help directors and officers:

1. understand what the risks are; and
2. identify ways to avoid risks.

Please note the following points:

1. This paper is reasonably comprehensive. It describes in some detail the risks that face the directors and officers of the Community Clinic. However, it does not cover all possible areas of risk for directors and officers. To do so would be nearly impossible and likely impractical. This paper instead focuses on the most obvious and common sources of risk and liability.
2. Some of the risks identified here are more remote (less likely to result in liability or punishment) than others. Where the risks are remote, they have been so identified.
3. This paper is intended to provide directors and officers with general guidance, not specific legal advice. Where issues and questions arise the Community Clinic's board and management should obtain legal advice to address those specific issues and questions.

II. Directors' and Officers' Legal Duties and Responsibilities

Directors' and officers' duties and responsibilities can be divided into three main categories:

1. duty of loyalty (also known as "duty of trust" or "fiduciary duty");
2. duty of good management;
3. other specific statutory duties.

III. Duty of Loyalty – Duty of Trust – Fiduciary Duty

3.1 General duty of loyalty under *The Co-operatives Act, 1996* (“the Act”)

The general rule on the duty of loyalty is set out in clause 88(1)(a) of the Act:

Duty of care of directors and officers

88(1) Every director and officer of a co-operative, in exercising the powers and 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 co-operative;

The members of the Community Clinic elect directors and, in doing so, put their trust in those individuals to provide for the management of the Community Clinic. Directors then elect or appoint officers and so they, too, hold positions of trust.

3.2 Consequences of the breach of the duty of loyalty

If directors or officers breach their duty of loyalty to the Community Clinic, they risk being found civilly liable to the organization. Damages would be determined in one of two ways:

- (a) if a director or officer makes a profit from using information available only to that individual in his/her position as director, he/she may have to pay the organization all of the profit made.
- (b) if the Community Clinic suffers an actual loss as a result of a director’s or officer’s breach of the duty of loyalty, that individual may have to reimburse the organization for its loss.

IV. Duty of Good Management

4.1 General duty of good management under the Act

The general rules on the duty of good management is “the reasonable person rule” set out in clause 88(1)(b) of the Act:

Duty of care of directors and officers

88(1) Every director and officer of a co-operative, in exercising the powers and discharging the duties of a director or officer, shall:

- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

4.2 Consequences of breach of the duty of good management

If a court finds that directors or officers have breached their duty of good management, the court may order the directors or officers to pay damages to the Community Clinic.

V. Specific Statutory Provisions

5.1 Civil liability under section 90 of *The Co-operatives Act, 1996* (a) Subsection 90(1) – personal liability in certain cases

Subsection 90(1) of the Act sets out some specific, technical situations under which directors can be held personally liable if the directors' actions result in losses to the Community Clinic. This is one of those areas where the risk to directors is lower than it is in some of the other areas.

If directors vote for, consent to, or approve by any other means any of the matters listed in subsection 90(1), the directors can be held liable. The situations that are most likely to apply to the Community Clinic are noted below:

Liability of directors

90(1) Directors are jointly and severally liable to make good any loss or damage suffered by the co-operative where they vote for, consent to a resolution authorizing or approve by any other means:

- (a) the purchase of shares contrary to section 42 [*relating to solvency and decreasing the number of members to fewer than the number required to incorporate – usually 6*];
- (b) the payment of a dividend or interest on shares contrary to section 36 [*not applicable*];
- (c) the payment of a patronage dividend contrary to section 36 [*not applicable*];
- (d) a loan or guarantee or the giving of financial assistance contrary to section 43 [*when the co-operative is insolvent*];
- (e) a payment of an indemnity described in section 91 to a person mentioned in that section [*a director or officer*], without the approval of the court required in subsection 91(5); or
- (f) an act not consistent with the purpose of the co-operative as set out in its articles and with respect to which the co-operative has paid compensation to a person.

These are fairly low risk areas.

(b) Subsection 90(1) – joint and several liability

Where more than one director is found liable for the Community Clinic's losses arising out of directors contravening subsection 90(1), they are jointly and severally liable. That

means each director is fully responsible for whatever the Community Clinic's damages are. The court's award of damages against directors is not automatically divided equally among all of the directors who are liable. If only one of the directors has money, that director is responsible for the entire damage award.

(c) Subsection 90(1) – no liability in certain cases

A director is not liable for losses arising out of the situations listed above if the director:

- (i) provided that he or she did not know or could not reasonably have known that the act authorized by the resolution was contrary to the Act; or
- (ii) relied and acted in good faith on statements made by an officer of the Community Clinic, or on statement made by the auditor or a professional person engaged by the Community Clinic who is competent to give the advice given.

5.2 Offences under *The Co-operatives Act, 1996* (a) Section 196 – false or misleading information

A director or officer who authorizes, permits, or acquiesces in the Community Clinic giving false or misleading information required under the Act is guilty of an offence. This would include information required to be filed with the annual return, amendments of the articles, and amendments of the bylaws.

This is not a high risk area.

(b) Clause 197(1)9a) – other contraventions of the Act

A director or officer who, without reasonable cause, contravenes any provision of the Act is guilty of an offence. This would include, for example:

- (i) paying a patronage dividend to members (see section 269); or
- (ii) using the Community Clinic's surplus for purposes other than as described in section 270.

This is a low risk area.

(c) Clause 197(1)(b) – failing to give notice or to file return

It is an offence to fail to give notice or to send any return or document that is required for the purposes of the Act (eg. file the annual return).

This is a low risk area.

(d) Due diligence is a defence

“Due diligence” is a defence to a charge under the Act. This means that a director or officer who can demonstrate that he or she took all reasonable steps to avoid the problem will not be found guilty of the offence.

(e) Section 200 – time limitations apply

Section 200 says that no prosecution for an offence under the Act can be commenced after two years from the time when the subject matter of the complaint arose.

5.3 The Local Authority Freedom of Information and Protection of Privacy Act (LAFOIPPA) and The Privacy Act

Under LAFOIPPA, the Community Clinic is a “local authority” because it is prescribed as one pursuant to the LAFOIPPA regulations. LAFOIPPA says a local authority is required to keep confidential personal information that comes into its possession by reason of its role as a local authority.

Note that LAFOIPPA does not apply to situations involving information that is defined as personal health information under *The Health Information Protection Act*.

Although LAFOIPPA requires the Community Clinic to comply with the legislation, it does not make the directors and officers of a local authority personally liable for breaches of that legislation. However, section 56 does provide that it is an offence for any person who knowingly collects, uses or discloses personal information in contravention of the legislation, and this provision would apply to a director or officer who breached the legislation.

In addition, *The Privacy Act* provides for civil remedies against anyone who willfully violates the privacy of another person, it would entitle a person to include the directors and officers in a civil claim against the Community Clinic for damages for a breach of LAFOIPPA by the Community Clinic.

5.4 The Health Information Protection Act (HIPA)

This legislation protects the health information of individuals in Saskatchewan. The Community Clinic is a “trustee” under HIPA. As a trustee, the Community Clinic is required to establish policies and procedures to maintain administrative, technical and physical safeguards to:

- protect the integrity, accuracy and confidentiality of health information;
- protect against reasonably anticipated hazards to the security and integrity or loss of the health information; and
- ensure compliance with the legislation.

The Chair of the Board of the Community Clinic, or a person designated by the Chair, is responsible for making decisions that are required to be made by trustees under HIPA.

If the Community Clinic commits an offence under HIPA, then a director or officer of the Community Clinic is also guilty of that offence if the director or officer:

- directed;
- authorized;
- assented to;
- acquiesced in; or
- participated in; the offence.

Due diligence is a defence to charges under HIPA. Therefore, directors and officers may avoid being convicted if they are able to establish that they took all reasonable steps to avoid the offence being committed.

5.5 *The Saskatchewan Employment Act* (a) payment of wages to employees

Directors are jointly and severally responsible to employees for up to six months' wages and salaries if:

- (i) the directors were in office throughout the six-month period; and
- (ii) the Community Clinic itself has not paid the wages and salaries.

The term "wages" is defined to include salary, commission and any other monetary compensation for work or services or for being at the disposal of the employer and includes overtime, vacation pay, public holiday pay and pay instead of notice.

(b) collective bargaining

The Board enters into the collective bargaining agreement with its unionized employees. Neither an employer, nor any person on behalf of an employer, is permitted to engage in any of the unfair labour practices listed in section 6-62 of the Act. Unfair labour practices include intimidation of employees in the exercise of their rights to unionize, discrimination on the basis of union activity, failing or refusing to bargain collectively, threatening to shut down operations, declaring or causing a lock-out in certain circumstances, etc.

(c) offences under the Act

If the Community Clinic commits an offence under the Act, then a director or officer of the Community Clinic is also guilty of that offence if the director or officer:

- directed;

- authorized;
- assented to;
- acquiesced in; or
- participated in; the offence.

Offences under the Act include, amongst others, failure to pay wages, failure to keep records relating to wages and deductions, keeping false records, taking discriminatory action against employees, failure to comply with a notice of contravention relating to occupational health and safety, obstructing or delaying officials investigating complaints, offences relating to collective bargaining, etc.

Due diligence is a defence to charges under *The Saskatchewan Employment Act*. Therefore, directors and officers may avoid being convicted if they are able to establish that they took all reasonable steps to avoid the offence being committed.

5.6 Taxation and “taxation-like” statutes

If the Community Clinic fails to pay, directors are responsible for remittances that the Community Clinic is obligated to pay. These include:

- (i) *Income Tax Act* – the employees’ income tax remittances;
- (ii) *Employment Insurance Act* – both the employees’ and the employer’s premiums;
- (iii) *Canada Pension Plan Act* – both the employees’ and the employer’s portions;
- (iv) *Excise Tax Act* (if applicable) – for GST;
- (v) *The Provincial Sales Tax Act* (if applicable) – for PST.

5.7 The Dangerous Goods Transportation Act

If the Community Clinic commits an offence under the Act, then a director or officer of the Community Clinic is also guilty of that offence if the director or officer:

- directed;
- authorized;
- assented to;
- acquiesced in; or
- participated in; the offence.

Due diligence is a defence to charges under *The Dangerous Goods Transportation Act*. Therefore, directors and officers may avoid being convicted if they are able to establish that they took all reasonable steps to avoid the offence being committed.

5.8 Criminal Code (Canada)

Section 217.1 of the *Criminal Code* says:

Duty of persons directing work

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

This would cover harm to employees of the Community Clinic, similar to that contemplated under the occupational health and safety provisions of *The Saskatchewan Employment Act*, and would also include harm that might come to patients of the Community Clinic.

VI. How to Avoid Liability

6.1 Loyalty

Be open, honest, and truthful in all dealings with and on behalf of the Community Clinic.

Carry out directors' and officer's functions with a view to upholding the trust that the members have placed in you.

Always act for the benefit of the Community Clinic as a whole. Keep, and be seen to keep, the Community Clinic's interest above your own and anyone else's interests, including the interests of individual members or groups of members.

Avoid conflicts of interest. If a conflict of interest arises, follow the procedures set out in section 93 of *The Co-operatives Act, 1996*, which relates to the disclosure of information required when a director or officer has an interest in a material contract.

Keep confidential all information that comes to your attention by reason of your position with the Community Clinic. This means directors and officers are not entitled to share this information with family members.

6.2 Good management

Determine before you embark on the role of director or officer if you have the time available to do a proper job in the role. Find out from other directors or officers what is involved in the job before taking it on.

Apply to your role as director or officer the same or a higher level of knowledge and care that you apply to your own affairs.

Become and remain knowledgeable about the Community Clinic's business.

If the scope of the Community Clinic's business changes, learn about the changes in scope and keep current on the operations:

- attend all appropriate training opportunities;
- obtain and read all publications that are available to directors and officers on matters relating to their roles within the Community Clinic.

Attend board and committee meetings.

Do your homework before board and committee meetings. A director or officer must be prepared for the meetings. If materials are circulated before the meetings (which they should be), read and familiarize yourself with the content of the materials so you are prepared to make thoughtful, well-considered decisions on the issues.

Ask tough questions of management, If management is not giving directors enough information on a matter under consideration, directors should ask for and ensure they obtain the necessary information before making decisions.

Allocate appropriate amounts of time to issues that come before directors at meetings. If a matter is momentous, it must receive more time and attention to details than a matter that is routine and of little consequence.

Properly document decisions in the minutes of board meetings.

Keep records in secure places and, where they are committed to electronic storage, ensure secure and regular off-site storage and backup

Hire the best management you can find. Management should have reasonable levels of expertise in the fields for which they are responsible.

Develop and follow policies and procedures on sensitive areas of management (eg. hiring and dismissal; salary administration; employee appraisal; communication on

behalf of the Community Clinic; board roles and responsibilities; board and employee expenses, etc.).

Develop terms of reference for all board and committee positions.

Ensure that management develops job descriptions for all employee positions at the Community Clinic.

6.3 Compliance with statutory duties

Become familiar with the requirements of all legislation that applies to the Community Clinic.

Obtain a written certificate from management annually stating that all requirements of *The Co-operatives Act, 1996* and other legislation have been satisfied (eg. all returns have been filed, all employees' wages and employee-related remittances have been paid) and that there have been no contraventions. Document in the minutes the fact that the certificate has been received.

Make sure that all equipment is appropriate and maintained.

Ensure that management allocates resources to:

- policies and procedures relating to compliance with all statutes;
- training of staff on all aspects of their jobs, especially those that are the subject of legislation;
- policies and procedures relating to emergency response.

If breaches of legislation have occurred, follow up with management to ensure that corrective actions are taken and that policies and procedures are improved, if necessary.

6.4 Indemnification

Directors and officers should consider obtaining indemnification from the Community Clinic. This can be accomplished by:

- including a specific indemnification provision in the bylaws; and
- having the Community Clinic sign an indemnification agreement with each director and officer.

6.5 Insurance

Directors and officers could also consider obtaining directors' and officers' liability insurance. Check with your insurance provider.

6.6 Resignation

One final means of avoiding liability is to resign from office.

Resignation is effective on the later of:

- the date a written resignation is sent to the Community Clinic; or •
- the date specified in the written resignation.

A director who resigns escapes liability for matters arising after the effective date of the resignation but remains responsible for liabilities that arose before that date.

NOTE: A director who is aware of a problem at the Community Clinic has an obligation to take steps to see that the problem is rectified. Resignation may not always be the most prudent course of action and may not always relieve the director from liability. In these circumstances, obtain legal advice.