

Business Personal By Olev Edur

# A COURSE FOR DIRECTORS

Sometimes trying to do the right thing comes with a price. Just ask the members of the Hamilton Philharmonic Society's board of directors. Money problems led the Society to cease operations in January, with the result that its assets were turned over to the City of Hamilton and its directors were sued for some \$411,000 in unpaid musicians' wages and pension contributions.

"These were all good, public-spirited citizens, philanthropists giving their time and energy so that Hamilton could enjoy good music," says Bruce Thomas, a partner with Cassels, Brock & Blackwell in Toronto, the law firm that represented one of the directors.

What happened in Hamilton sends a clear message: if you're thinking about donating your time as a director of a non-profit organization, you may be in for more than you bargained for. In fact, you have much the same liabilities as your corporate counterparts who are paid to ensure their companies are on the straight and narrow. While you may not have to face disgruntled shareholders clamoring for dividends, as a non-profit board member you are accountable to a more diverse community—people who make donations and governments offering life-giving grants. The same standards of negligence apply as in a bottom-line-oriented business.

"Our business corporations acts don't really differentiate between the two," says William Thomson of Toronto-based Thomson Associates Inc., a corporate crisis-management firm whose duties often entail sitting on troubled companies' boards.

What exactly are those liabilities? *Guidelines for Corporate Directors in Canada*, a book published by the Institute of Corporate Directors (IOCD), states that all directors have a fiduciary responsibility for ensuring satisfactory operation of the corporation, approving strategic objectives, monitoring progress and efficiency, and so on. Basically, you should treat the company's assets and objectives as if they were your own. As a director, you must ensure that the organization pays its bills and keeps expenses under control.

So even non-profit directors, who, for the most part, are not paid for their services, may be held liable for mismanagement of funds, wrongful terminations or breaches of contract. And, as in the case of the Hamilton Philharmonic, they can be asked to fork over payment of employee wages, holiday pay, withheld taxes and Canada Pension Plan or Employment Insurance premiums.

But that's not where liability ends. There is also the entirely separate issue of the environment. While toxic spills may be more of a front-and-centre concern for directors of manufacturing companies, non-profit board members should not be lulled into a false sense of security. "Say you're a director at a hospital and some of its infectious hazardous waste is dumped rather than burned," points out Thomson. "If someone contracts a disease from it, you're it."

But even if you have done all the right things—you have taken care not to harm the environment; you have used money responsibly; and you have acted with a level of "care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances," as you are required to by law—you can still be on the hook if the organization fails.

Suppose you join the board of an organization that's in financial distress because you want to help save it, but it goes under anyway. According to the letter of the law, your valiant efforts may not be enough. Directorial liability is usually "joint and several," meaning you could be held accountable for failures or shortcomings of other directors, or of the board in general, or even of past directors. Everyone shares the blame.

Nor may quitting the board provide absolution. "It is important to bear in mind that, by resigning, a director cannot escape any liabilities he may previously have incurred," warns the IOCD's *Guidelines*. Liabilities that extend beyond the act of resignation include unpaid wages and commissions, accrued vacation pay and unremitted withholding taxes.

What's more, states the *Guidelines*, "directors who have resigned but were party to a contract that may subsequently become the subject of liti-

gation may find themselves involved in the suit if it is alleged that they were negligent." It doesn't matter whether you were an officer of the organization or just a member of the board; the litigant can sue anyone and everyone. In the U.S., lawyers attract greater exposure to liability because there is a perception that they have a better understanding of the implications of decisions.

"So, you have to ask yourself, 'Do I want this responsibility?'" says Thomson. "You may feel that you must contribute something, but would you actually want to step into this situation knowing the potential liabilities? Well, many people now are saying that they're willing to go canvassing or do anything else, but would stop short of being a director at a not-for-profit organization."

Pretty grim stuff. But don't throw in the towel just yet. According to Hartley Nathan, a partner specializing in corporate law with the Toronto firm of Minden, Cross, Grafstein & Greenstein, "The government is currently looking at ways to amend the Canada Business Corporations Act to reduce the exposure of directors. They're concerned that, given the growing worry, corporations are no longer getting the best people."

William A. Dimma, a retired chief executive who has sat on some 55 boards during his career, and who still sits on 14 corporate boards and four non-profit boards, including York University, says the problem of increased liability exposure is more one of perception than reality. "Sure, we read about environmental liabilities and boards resigning *en masse*," says Dimma. "It creates a heightened awareness that slops over to non-profit organizations and makes people more concerned there, too. But it was never an issue on any of the non-profit boards on which I've sat. If the organization were facing dissolution, yeah, I'd be concerned, but the chances of this occurring are pretty small. Besides, you can see the corporation's financial statements every month, so there's always lots of warning before a problem gets serious."

There are also steps you can take before you even sign on that will minimize your exposure. One of the first things you should do is ask yourself if being a director is what you really want or whether there is some other role you could fill that would leave you open to less risk.

"Lawyers, for example, often join boards to meet new clients or become more well known," says Nathan. "Now, many are becoming members of advisory committees instead, where they don't have the same risks. Or they might serve as legal counsel to the organization."

And take a look at who else is on the board. Are they people of integrity? Are they credible?

Do they have experience?

"We also recommend that on a regular basis, directors ask the chief financial officer for a letter confirming that areas of financial exposure—CPP, EI, taxes and especially wages—have all been attended to, and if not, why not," says Nathan.

He also strongly advises the purchase of directors' and officers' liability insurance if it's not already provided by the organization. Such policies can cost as little as \$200 a year or as much as \$25,000, depending on the size of the organization and complexity of the contract. As with any purchase, *caveat emptor*. Some insurance policies don't cover legal fees or environmental liabilities, so read the fine print.

Typically, not-for-profit corporations buy policies covering the organization itself as well as directors and officers. Proceeds paid out as claims don't usually carry any income-tax liability, although policyholders do pay tax on the premiums.

Contrary to popular belief, you may be able to work for a non-profit organization in a paid capacity even if you sit on its board. However, if you go this route, you could leave yourself open to conflicts of interest. Are you working in the organization's best interest or for your own profit? At the very least, you would have to declare any such conflicts, and in some cases you might have to abstain from participating in board decisions that could be affected by your other role.

"Certain provincial statutes provide for directors of non-profit corporations to receive 'reasonable remuneration' for any duties they might perform," says Nathan. "But if it's a charity [as opposed to a non-profit association], you may need court approval, because directors of charities are also considered to be trustees."

In the end, if your desire to do good is stronger than any concerns about the potential pitfalls and you do decide to accept a directorship of a not-for-profit organization, protect yourself. Be sure the organization has liability insurance and take a close look at the books before you sign on. That way you can at least avoid most of the foreseeable problems.

This is exactly what the beleaguered members of the Hamilton Philharmonic's board wish they'd done earlier. But luckily this story has a happy ending. A new organization, the New Hamilton Orchestra, was formed in the fall of 1996 with the help of Hamilton's arts-loving citizens who came to the rescue with a healthy infusion of much-needed cash. The musicians who had played with the original symphony were offered their jobs back and the lawsuit was dropped. The music plays on. ■