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**NOT-FOR-PROFIT LAW &
GOVERNANCE IN THE CREATIVE
INDUSTRIES**

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**Duties of Directors and Officers of Charities
and NFPs**

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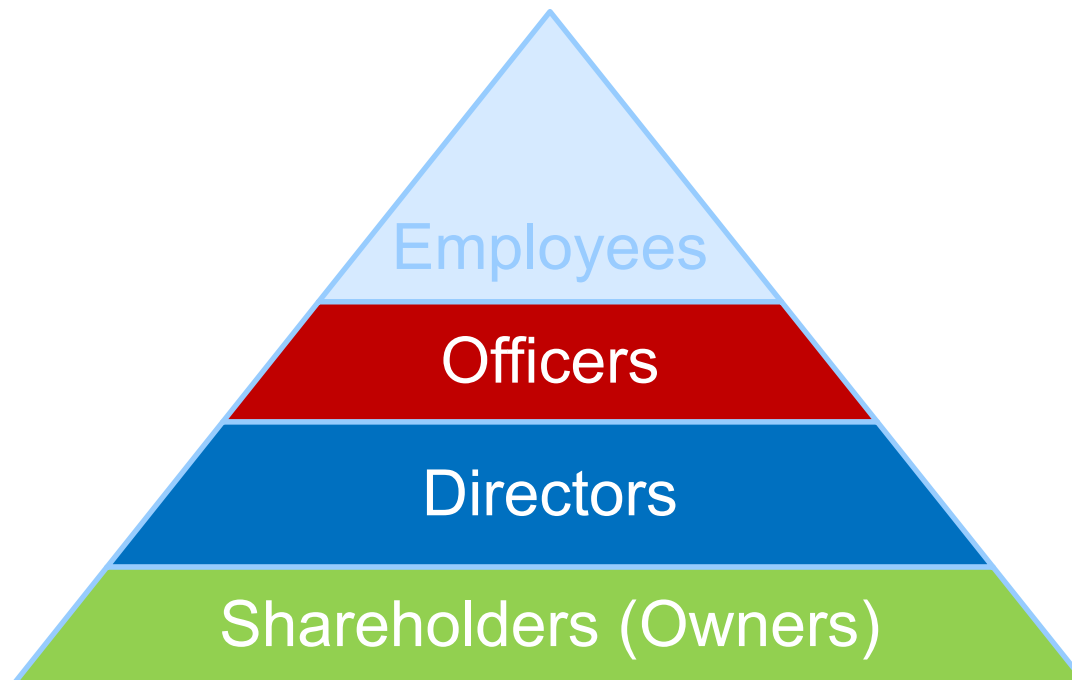
OVERVIEW OF TOPICS

- Comparison of Different Types of Corporations
- Who is a Director and Officer?
- Common Law and Statutory Duties
- Due Diligence in Helping to Manage Risks For Board Governance

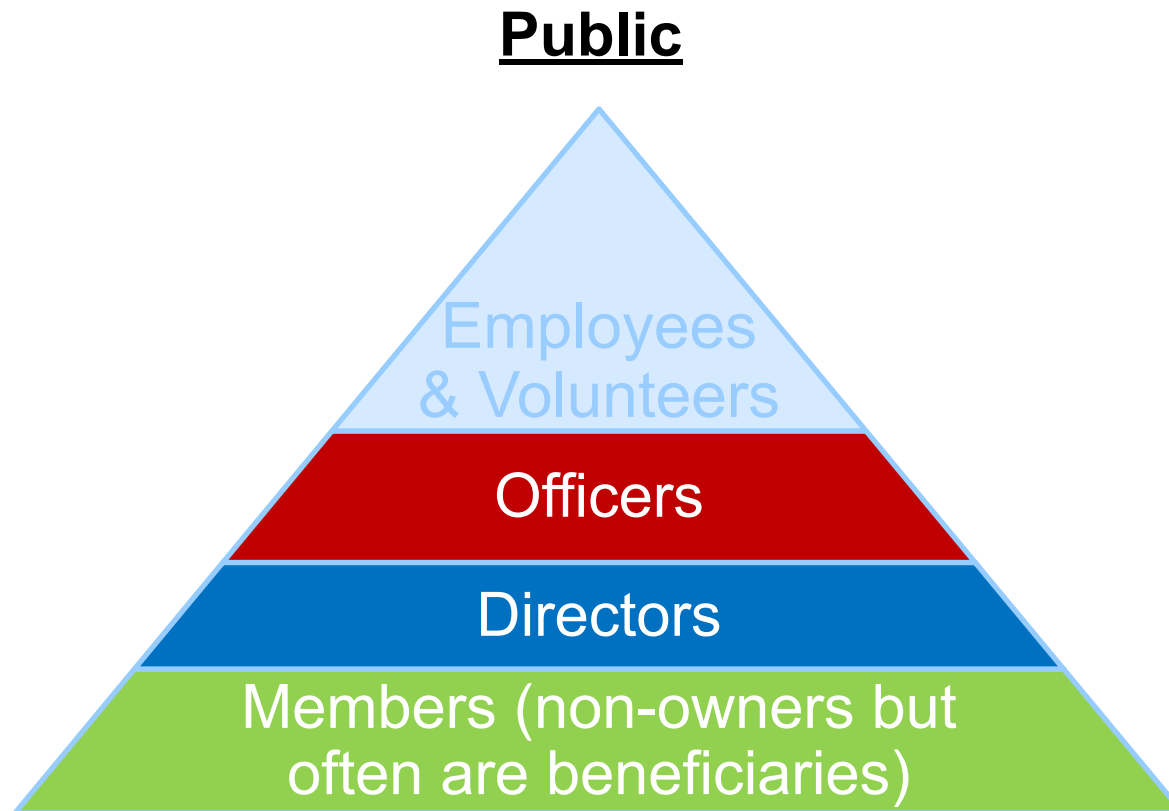
COMPARISON OF DIFFERENT TYPES OF CORPORATIONS

- Share Capital Corporations
 - Business purpose to make a profit
 - Pays tax

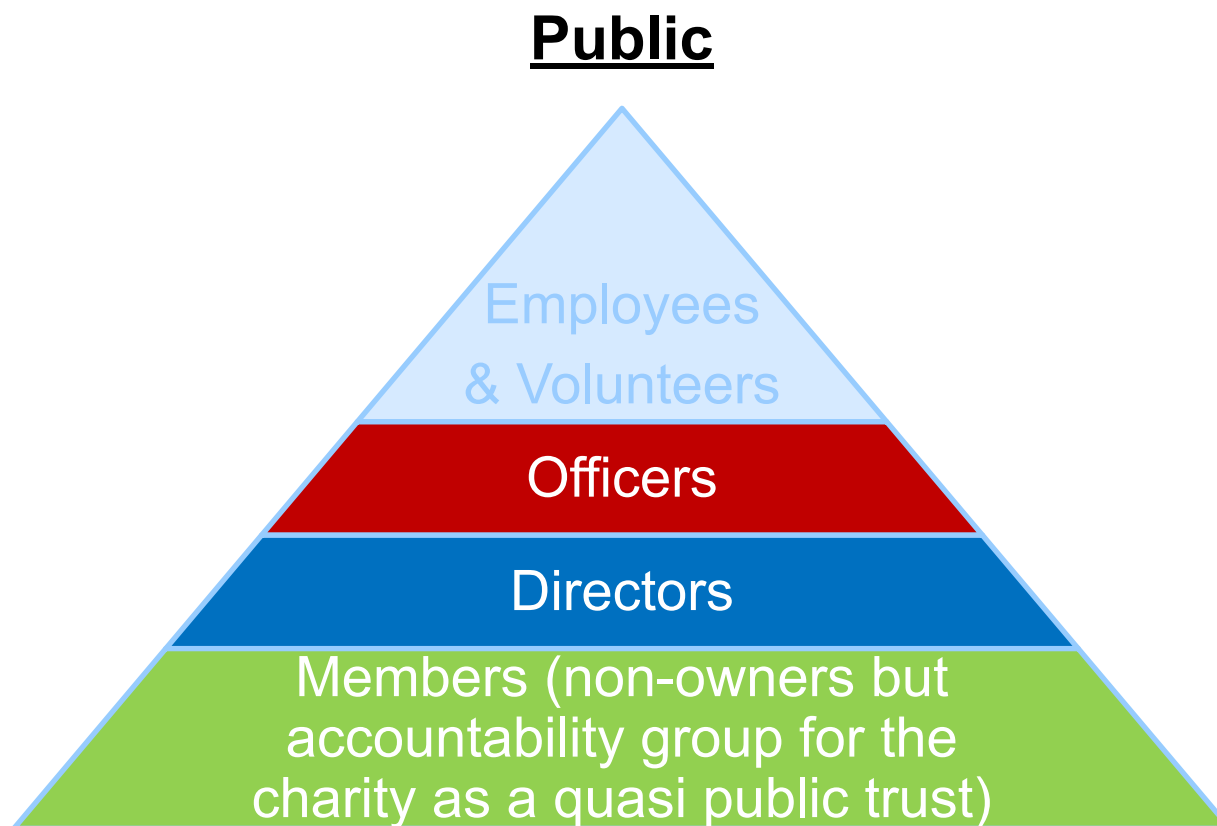
Public



- Not-for-Profit Corporations
 - Not-for-profit purpose
 - Tax exempt as non-profit organizations
 - Members rather than shareholders



- Charitable Corporations
 - Charitable purpose akin to a public trust
 - Tax exempt
 - Can issue tax receipts for donations



WHO IS A DIRECTOR AND OFFICER?

- All NFPs, including registered charities, have directors and officers
- Who is a director?
 - Generally anyone who takes on the role of the directing mind of a corporation
 - A Director can also be known by different names, such as governor, board member, trustee
 - The name given to a director is not the focus
 - Instead, it is the authority to govern that defines what a director is

- Who is an officer?
 - Generally an individual who carries out the operative functions of the corporation at the direction of the board
 - Normally includes president, vice-president, secretary, treasurer, and CEO or executive director
 - Has fiduciary obligation to the corporation
 - An officer can also be a director
 - An officer might become a *de facto* director if the officer takes on the functions and decision making of a director

COMMON LAW AND STATUTORY DUTIES

- Management of the Corporation
 - Directors are responsible to “manage or supervise” the management of the affairs of the corporation
 - To fulfill their duties, directors generally need to ensure:
 - The purposes of the corporation are properly carried out and that the activities undertaken fit within those purposes
 - The corporation remains financially viable
 - General oversight over the operations of the corporation
 - Proper hiring, training, and supervision of management, staff and volunteers

- Standard of Care and Duty of Care
 - Directors of NFPs under the *Canada Not-for-Profit Corporations Act* (“CNCA”), the Ontario *Not-for-Profit Corporations Act* (“ONCA”) (expected to be proclaimed later in 2021), and Ontario *Corporations Act* (“OCA”) are subject to:
 - Objective standard of care
 - Duty to exercise the “care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances”
 - “Business Judgment Rule” generally protects directors and senior officers against hindsight and second guessing by third parties and the courts

- Summary of common law fiduciary duties of directors

Duty to act in good faith with honesty and loyalty

Duty of diligence

Duty to exercise power

Duty of obedience

Duty of confidence

Duty to avoid conflict of interest

Duty to Continue

- Higher fiduciary duties for directors of charities

Duty to carry out the charitable purpose



Duty to protect and conserve charitable property

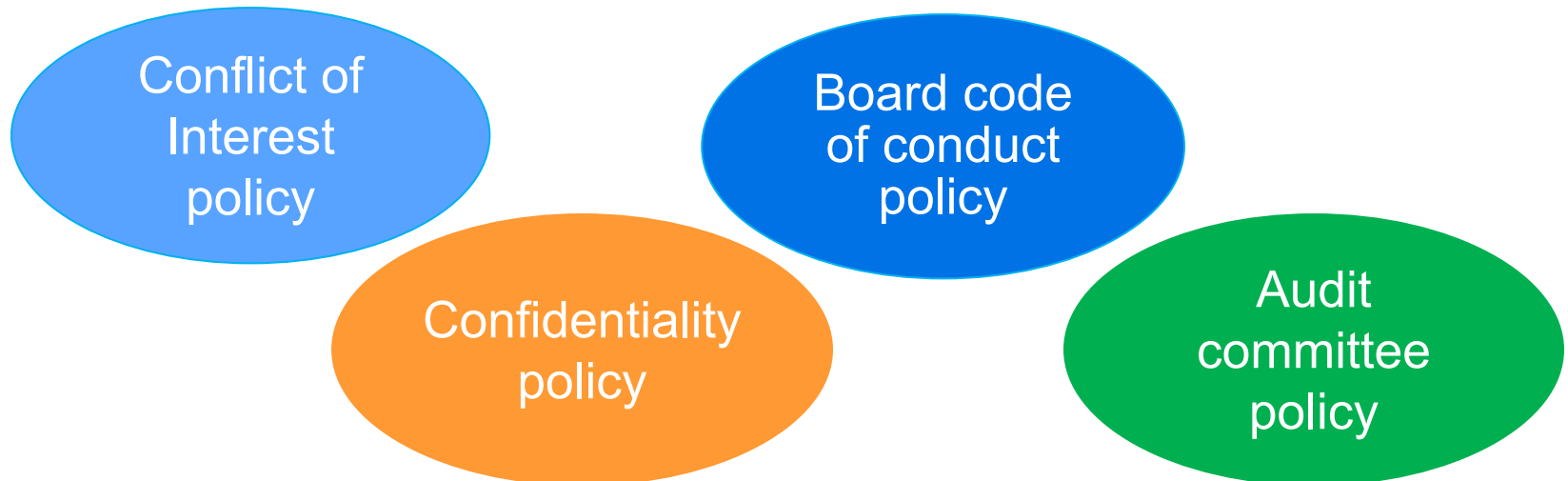
Duty to invest

Duty to act gratuitously for the charity

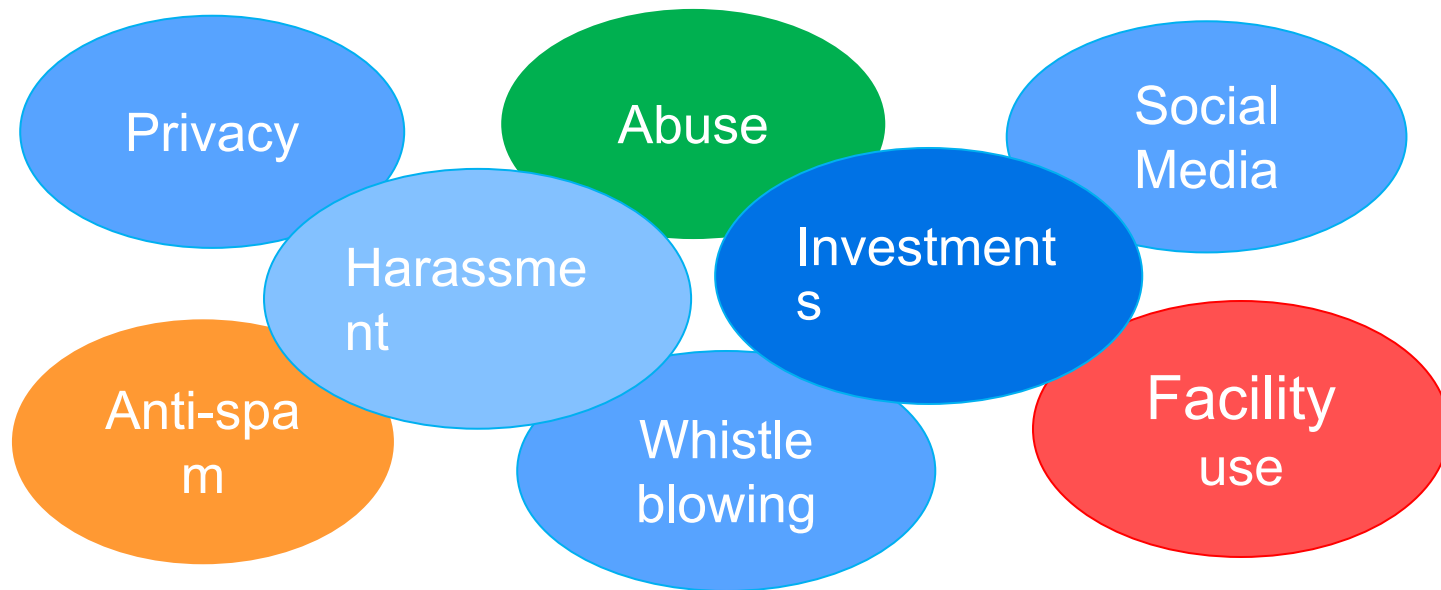
Duty to account

DUE DILIGENCE IN HELPING TO MANAGE RISKS

- Understand the role of the board
 - Continually educate board members on legal duties of being a director
 - Prepare and regularly update board manual with key legal documents
- Development of governance policies, *e.g.*

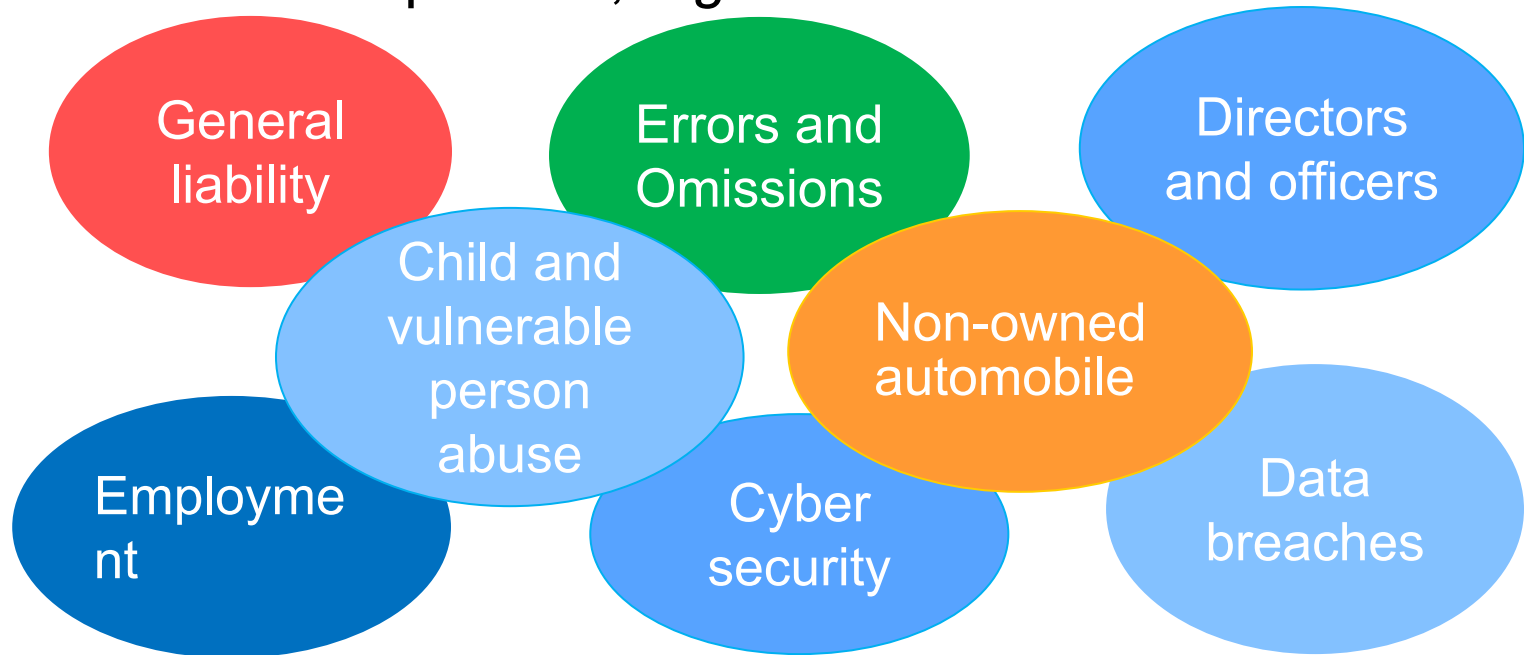


- Development of operational policies, e.g.



- Corporate indemnity, e.g. the corporation indemnifies
 - Directors
 - Officers
 - Others

- Insurance policies, e.g.



- Plan for the diversity and succession of the board
 - Determine specific needs of the board
 - Plan for an orderly succession of directors

Committees and advisory boards

- Can be an effective means of attracting volunteers without the risk of being directors
- Committees are accountable to the board

Establish effective risk management in operations

- Develop and implement a legal risk management checklist, see sample checklist at:
<https://www.carters.ca/pub/checklist/Charity-Checklist.pdf>
- Establish a legal risk management committee, either on its own or in conjunction with another committee to oversee legal risk compliance issues

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