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BOARD GOVERNANCE - WHEN DOES IT BECOME DIRECTOR'S NEGLIGENCE

By Donald J Bourgeois, B.A., LL.B. (Counsel)

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A. INTRODUCTION

The directors are any organization's primary asset. This statement may seem to be inconsistent with other pronouncements on what is most important. For example, it is common for private sector, public sector and voluntary sector employers to state that their employees or volunteers are their greatest assets. Others argue that an organization's major asset is its reputation. All of these statements and others are likely accurate in general and for specific organizations.

Directors are, however, unique. An organization is a legal artifice. It exists in law and as a legal concept for practical purposes. An organization allows people to structure their internal relationships and external dealings with others in an efficient and effective manner. Nobody can touch, feel, see or hear an organization; it has no physical reality. It becomes real through the actions of people. And directors are responsible for making sure that:

(a) the organization relates to people in accordance with the law,
(b) it acts in a fiscally prudent manner, and
(c) it is efficient and effective in achieving its purposes.

The organization itself may exist as a separate legal entity. Corporations, for example, are established by law as "legal persons". A large number of organizations, however, have no or little "legal personalty". These organizations are unincorporated associations which are not legally "persons". In some cases, the common law or statutory law do recognize a limited legal personalty to these unincorporated associations, for specific purposes. In other cases, the organizations may be "trusts", in which the assets are held in trust by legal persons, such as individuals or corporations.

Regardless of the legal structure, it takes real people for an organization to act. The law - in the form of the courts, regulators and governments - and the public look to directors and officers as the primary method by which organizations act and for accountability purposes. The law and the public have developed expectations that directors and officers will ensure that the organization achieves its goals, complies with the law that applies to the organization and operates in a fiscally prudent and effective, efficient manner.

In order to assess when the individuals have acted properly - and not negligently - it is important to understand the test(s) that are in place and what is expected of directors. Good governance is intended to minimize the risks of things going wrong, to identify what may go wrong so that preventive steps can be taken, and, when things do go wrong, to address the problems. That things will go wrong is inevitable; it becomes director's negligence when a director does not exercise due diligence in carrying out his or her duties.

B. APPROACHES TO GOVERNANCE

The legal, governmental and public expectations of organizations are articulated and summarized in a number of ways - but they always focus on the organization and how it is governed by its directors. The terms "governance" and "stewardship" are used in *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector*.[1] This seminal report was the work of a panel of distinguished Canadians with experience and knowledge of the voluntary sector.

"Governance" for the Panel is a combination of both the overall processes and the structures that are used in directing and managing the organization's operations and activities. "Stewardship" is the responsibility of the board of directors of an organization and involves the active oversight by the board of the

[1] Panel on Accountability and Governance in the Voluntary Sector, Final Report, February 1999. See for a fuller discussion of the Panel's report, Donald J. Bourgeois, *Charities and Not-for-Profit Administration and Governance Handbook*, (Markham: Butterworths Canada Ltd., 2001).

organization's governance. These two concepts are easily stated, but a great deal is packed into them - something that is readily apparent by the length and complexity of the Panel's report and background materials.

There are two conceptual approaches to "governance" and "stewardship". The more traditional approach is that the directors "manage" the affairs of the organization. The board would make most substantive decisions based on materials provided for board meetings and the discussion or debate at the meeting. The second approach is based on an "oversight" role for the directors to ensure that the organization is effective and is accountable. The oversight role relies more on the development of operational and other "policies" by the board of directors, which then looks to the officers and staff to implement.[2] The two approaches are sometimes labelled the "administrative governance board" model and the "policy governance board" model.

In reality, most organizations have operated and will continue to operate using a mixture of these two approaches. If the organization has staff, by-laws would, for example, often permit the executive director to manage staff in accordance with board-established human resource policies.

There are both practical and legal limits to the extent to which boards may "delegate" their responsibilities through the issuance of policies. Boards will always have an "oversight" role in any organization but boards of corporations must be able to demonstrate that they "manage the affairs" of the corporation. Subsection 283(1) of the Ontario *Corporations Act*, for example, provides that the directors are to manage the affairs of the corporation.[3]

The proper mixture of "management" and "oversight" through policies is organization and time specific. There are practical limits to the abilities of directors to manage the affairs of large organizations with

[2] John Carver is the major proponent of another "policy" approach which gained prominence with the publication of his *Boards that Make a Difference: A New Design for Leadership in Non-profit and Public Organizations*, (San Francisco: Jossey-Bass Publications, 1991). This approach creates a different governance dynamic with the board establishing "goals" and staff determining how to achieve those goals.

[3] R.S.O. 1990, c.C.38.

many employees. It is physically impossible for these directors to make all of the decisions that are required to be made on a day-to-day basis. Arguably, these directors could be negligent if they attempted to do so because decisions would not be made by the person most competent to do so, the decisions would not be made in a timely manner and the directors would be wasting the skills and talents of its employees.

There is a spectrum between the two models of administrative governance and policy governance. Where on that spectrum an organization lays will depend upon a number of factors:

- the legal authority of the directors and officers and of the organization itself,
- statutory or common law obligations or restrictions,
- letters patent, by-laws, constitution or other constating documents,
- culture of organization, which is often at variance with the organizational documents and at times with the legal requirements,
- views and perspectives of key stakeholders, who sometimes are not sensitive to the legal niceties or are overly demanding of compliance with policies that are not relevant to the organization,
- skills, competence and training of staff (assuming the organization has staff),
- size and type of operations and activities carried out by the organizations and their complexity, and
- due diligence requirements of the directors and of the officers.

There is no clear legal articulation of what is meant by "manage the affairs" of an organization. It will differ depending upon the issue, the circumstances and the organization. There are also certain decisions that are so fundamental to the affairs of any organization, that only the board should be making those decisions. For example, the budget of any organization ought to be, at the very least, approved by the directors. In other situations, the law may require that the board be involved other than through policy statements - either directly or indirectly where the ramifications are such that no prudent director would consent not to be involved.

The Panel on governance and accountability recognized that there is no "one size fits all" approach to governance and stewardship. It recommended "a good practice guide for effective stewardship" for large and medium-sized organizations, which is also intended to be a checklist for smaller organizations. A board has, according to the Panel, eight primary tasks:

1. Mission and strategic planning for the organization,
2. Communication and putting in place an open and transparent organization,
3. Establishing organizational structures that reflect the needs of the organization and its culture,
4. Understanding the proper role of the board and of the directors, officers and staff,
5. Fiscal responsibility as a cornerstone of accountability,
6. Oversight of human resources, including staff and volunteers,
7. Assessment and control systems, including for financial accountability but from a broader accountability perspective,
8. Planning for succession and diversity.

C. STANDARDS OF CARE

1. Introduction

Negligence is not measured against an abstract, but rather expectations and standards. These expectations and standards may be difficult to articulate, but they do exist. The standards may be established by generally accepted practices in the sector (or evolving ones after the Panel's report), by the common law or by statute.

Officers, directors and trustees of charitable and non-profit organizations have duties and obligations to the organizations themselves, to the members and to employees and the public. The potential for personal liability arises in the execution of such duties. Unfortunately, there is no simple definition of potential liabilities or of the standard of care for officers, directors and trustees. Instead, officers, directors and trustees are faced with a confusing amalgam of statutory and common law rights, duties, obligations and standards, some of which vary depending upon the activities and legal status of the organizations and the individual's background.

The confusion is exacerbated by uncertainty about which standard of care is to be applied. Moreover, different persons or authorities may have jurisdiction to apply differing standards or to have the rights, duties and obligations enforced. These persons and authorities include: members of the organization; members of the public; the department incorporating the corporation; Canada Revenue Agency; provincial revenue departments; departments responsible for labour and environmental legislation; the Attorneys General; the Public Guardian and Trustee in Ontario and the courts.

The level of personal liability of an officer, director or trustee will also vary depending on whether or not he or she acted within the scope of the objects of the organization and the terms and conditions of his or her office. Statutory provisions may impose personal liability for, among other infringements, unpaid wages or taxes that have not been remitted. Directors may also be liable for prosecution for a breach by the corporation if the director authorized, permitted or acquiesced in the breach or knowingly allowed the breach to occur.

There will, of course, be other statutory duties and obligations of officers, directors and trustees. A thorough list is not, however, possible. Typically, organizations will be governed by legislation related to (a) employees and the workplace, (b) collection and remittance of taxes, employment-related premiums and other imposts, (c) environmental protection, and (d) business practices. Some organizations may have statutory obligations under specific legislation under which they operate; others may operate facilities and are required to meet zoning by-laws and building codes or to fulfill contractual obligations. Legal advice that is sensitive to the character and circumstances of the specific organization should be obtained.

2. Defining the Standard of Care

a) Not-for-Profit Organizations

The standard of care that officers and directors must meet is difficult to define. In most jurisdictions, a common law standard of care is applied. The common law standard is one that has been and will continue to be reinterpreted by the courts to meet changing circumstances. It was originally developed for all corporations, including business corporations. That standard of care is subjective in nature. For business corporations, legislative changes have established an objective standard of care to ensure appropriate levels of governance are undertaken by directors of corporations.

Although the standard was subjective in nature, the courts were reluctant to enforce the standard too rigorously in circumstances where, for example, the director was not involved in managing the affairs of the corporation. However, in recent years, the courts have placed greater responsibility on officers and directors to fulfil their duties and obligations.

It is unclear in law what standard of care will apply to officers and directors of unincorporated associations. Unless the constituting documents provide otherwise, it is likely that the standard of care developed at common law and applied to officers and directors of corporations without share capital will probably apply to officers and directors of unincorporated associations.

The standard of care that generally applies to Ontario and federal incorporated corporations without share capital is a common law standard that is subjective in nature, not objective. In Re City Equitable Fire Insurance Co.[4], the court concluded that the degree of skill required of a director is what “may reasonably be expected from a person of his knowledge and experience”. This test means that the standard of care will differ as between two persons. A lawyer, for example, will be required to meet a higher standard of care than another director on the same board who has no legal training. Or, for example, a person with substantial business experience will have a higher standard of care than a person who has no business experience.

4 [1925] 1 Ch. 407 (C.A.) at 428.

Individuals who are sought after to be directors on the basis of their skills and experience are, therefore, subject to a higher standard of care than others, which may in turn disincline them from serving on the boards of charitable or non-profit corporations. The common law standard of care seems to make it more difficult for these organizations to obtain the voluntary services of persons for the very reasons that they should be on the boards — the skills that will assist the organization in meeting its objects and carrying out its activities are the grounds on which they will be judged.

Legislation may establish a statutory standard of care. Periodically, some argue that directors of charitable or not-for-profit corporations ought to be held to a different standard because they do not benefit personally from the position. The Federal Court of Appeal dealt with directors of a "not-for-profit" corporation with respect to income tax liability and the standard of care expected in Canada v. Corsano.[5] The statutory standard of care in the Income Tax Act is similar to that in many other statutes, i.e., reasonably prudent person.

The corporation had failed to remit the federal income tax for employee wages, which it was obliged to do as an employer. The corporation was a not-for-profit corporation and one of the arguments made in defence was that a different standard of care should be used for directors of these corporations. On the facts, different directors had differing levels of knowledge about the failure. Justice Letourneau commented, at pages 188 to 189, on this argument:

> It is true that in Soper, this Court wrote that "[t]he standard of care laid down in subsection 227.1(3) of the Act is inherently flexible". It is obvious, however, on the reading of the decision, that it is the application of the standard that is flexible because of the varying and different skills, factors and circumstances that are to be weighed in measuring whether a director in a given situation lived up to the standard of care established by the Act. For, subsection 227.1(3) statutorily imposes only one standard to all directors, that is to say whether the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

[5] [1999] 3 F.C. 173, 2 C.T.C. 395 (F.C.A.), leave to appeal dismissed by Supreme Court of Canada, S.C.C. Bulletin 2000, at p. 753.

> I agree with counsel for the appellant that the rationale for subsection 227.1(3) is the ultimate accountability of the directors of a company for the deduction and remittance of employees' taxes and that such accountability cannot depend on whether the company is a profit or not-for-profit company, or I would add whether the directors are paid or not or whether they are nominal but active or merely passive directors. All directors of all companies are liable for their failure if they do not meet the single standard of care provided for in subsection 227.1(3) of the Act. The flexibility is in the application of the standard of care since the qualifications, skills and attributes of a director will vary from case to case. So will the circumstances leading to and surrounding the failure to hold and remit the sums due.

The Federal Court was dealing with a statutory obligation on the part of directors. That obligation established a standard of care of prudence on the part of directors. How that standard of care would be applied has some flexibility, but it does not create separate standards for different classes of directors - and certainly not on the basis of being a director of a not-for-profit corporation. A director is a director is a director.

b) Charitable Organizations

The directors of a charitable corporation must meet an even higher standard of care, that of or almost of a trustee. The higher standard of care is imposed indirectly through the *Charities Accounting Act*[6] and through the operation of trust law as it applies to charitable organizations. The Public Guardian and Trustee takes the position that the corporation holds the charitable assets in trust for charitable purposes. The directors, in turn, have fiduciary duties to the corporation to ensure that it fulfils its obligations as a trustee. The directors would appear to have the standard of care of a trustee in managing the charitable trust and the property that is subject to the trust.

Importantly, this standard of care would not appear to be limited to officers and directors of corporations that were incorporated as "charitable corporations" or that are registered with Canada Revenue Agency as charitable organizations. In the case of charitable corporations and

[6] R.S.O. 1990, c. C.10.

registered charities, by law all of the assets must be used to carry out the charitable objects of the organization. However, subs. 1(2) of the *Charities Accounting Act* would appear to apply to "any corporation incorporated for a religious, educational, charitable or public purpose". The subsection deems the corporation to be a trustee and that any real or personal property acquired by it shall be deemed to be property within the meaning of the Act. Statutorily, the ambit of the Act would appear to apply not only to property that was received subject to a "charitable trust" but also to property that would not otherwise be considered to be "charitable" in nature or intent.

Some of the case law provides an argument against the Public Guardian and Trustee's apparent position that the corporation holds the assets in trust for the charitable purpose and that the officers and directors, by extension, have duties of or similar to those of a trustee. In Re City Equitable Fire Insurance Co.,7 Romer J. commented that:

> It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement.

The position in Ontario is not clear. The courts have discussed the question of whether or not a charitable corporation and the directors and officers are in their nature trustees. In *Re David Feldman Charitable Foundation*,[8] the court concluded that the letters patent created both the foundation and a charitable trust. Mr. Justice Kerr commented that the "directors are also trustees of the foundation". He continued, quoting from British precedents:

> The property of the charity is, of course, vested in and held by the corporation. It is a perpetual person which exists, however, only according to the rules of law, and it is not an actual person capable of acting on its own motion in any way whatever. It seems to me that in a case of this kind the court is bound to look at the real situation which exists

[7] [1925] 1 Ch. 407 (C.A.) at 426.
[8] (1987), 58 O.R. (2d) 626 (Surr. Ct.).

> in fact. It is obvious that the corporation is completely controlled under the provisions of the charter by the governor, deputy governor and directors, and that those are the persons who in fact control the corporation and decide what shall be done. It is plain that those persons are as much in a fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property. It is quite plain that it would be entirely illegal if they were simply to put the property, or the proceeds of the property of the corporation into their pockets and make use of it for their own individual purposes or for their purposes as a whole, and not for the purposes of the charitable trust for which the property is held. Therefore it seems to me plain that they are, to all intents and purposes, bound by the rules which affect trustees.

Mr. Justice Kerr concluded that the directors were in a conflict of interest and thus committed a breach of trust by authorizing a loan to a director even where the transaction was not unlawful. The breach of trust occurred even where there was no loss to the charitable trust and the Public Guardian and Trustee could require the repayment of the loan under the *Charities Accounting Act*.[9]

In *Re Public Trustee and Toronto Humane Society et al.*[10] Mr. Justice Anderson found that a director is a fiduciary and not, therefore, entitled to make a profit from his or her office or to allow himself or herself to be placed in a position where his or her interests and duties conflict. Anderson J. noted at page 247 that:

> Whether one calls them trustees in the pure sense (and it would be a blessing if for a moment one could get away from the problems of terminology), the directors are undoubtedly under a fiduciary obligation to the Society and the Society is dealing with funds solicited or otherwise obtained from the public for charitable purposes. If such persons are to pay themselves, it seems to me only proper that it should be upon the terms upon which a trustee can obtain remuneration, either by express provision in the trust document or by the order of the court. The *Toronto Humane Society* case complicated an already confused situation. It would appear that directors are in a fiduciary relationship with charitable corporations, rather than in an explicit trust relationship. The relationship is, however, similar in nature to that of a trustee. The rules that apply to trustees regarding how they carry out their duties would appear to

[9] But see *Ontario (Public Guardian and Trustee v. Unity Church of Truth)* [1998] O.J. No. 1291, March 24, 1998, Ontario Court of Justice (General Division) where the court declined to order that the church pass its accounts as no useful purpose would be served. An accounting would not provide any further illumination to the materials already before the court.

[10] (1987), 60 O.R. (2d) 236 (Ont.H.C.).

> apply to directors of a charitable corporation. A director or officer of a charitable corporation would probably be prudent to exercise the same level of care that he or she would as a trustee.

The difference between the duty of a director as a trustee or as fiduciary was also addressed in *Re Faith Haven Bible Training Centre*. The court commented that:

> In law, Faith Haven held its net assets as a trustee for that purpose. Whether the directors — the only body through whom the corporate trustee could carry out the trust — should be designated as trustees as well or whether they should be classified as fiduciaries bound to see to the execution of the trust is surely a sterile consideration. In either capacity they have the same obligations as the corporation itself.[11]

Mr. Justice Cullity reiterated these statements in *Asian Outreach Canada v. Hutchinson*. In that case, he reviewed the case law and commented:

> The confusion has sometimes arisen is a consequence of the fact that the equitable jurisdiction of the Court includes both the enforcement of trusts and the supervision of charities whether the latter are established under wills or trust instruments inter vivos, or as corporations. As many of the general principles applied by the courts in supervising charitable trusts have also been applied to charitable corporations there was a tendency, particularly in 19th Century cases in England, to find the basis of the jurisdiction over charities in the law of trusts. This does not appear to be correct historically and it is clear that it does not represent the present state of the law in this jurisdiction.[12]

While Justice Cullity was discussing the supervisory jurisdiction of the superior court and the issue of beneficial ownership of property for general purposes of the corporation or for specific charitable purposes, it illustrates the background to the confusion.

D. DUTIES AND OBLIGATIONS TO THE ORGANIZATION

Directors and officers of an organization, such as a corporation, have fiduciary obligations to the organization. These obligations or duties require officers and directors to act with a reasonable degree of prudence, to be diligent, to act in good faith, honestly and loyally, and to avoid conflicts of interest.

[11] (1988), 29 E.T.R. 198 (Ont. Surr. Ct.) at 207.

[12] [1999] O.J. No. 2060, June 9, 1999, Ontario Superior Court of Justice at para. 27.

The courts have applied, for example, the common law duty of loyalty to corporate officers and directors. In *Can. Aero Service Ltd. v. O'Malley*[13] Chief Justice Laskin concluded that a director, as a fiduciary, had a duty to act loyally, honestly, in good faith and to avoid personal profit. Liability does not turn on whether or not the director acted in bad faith. Rather, no fiduciary may "have an interest that possibly conflicts with the interests of those whom he is bound to protect", according to *Aberdeen Railway Co. v. Blaikie Bros.*[14] In *Regal (Hastings) Ltd. v. Gulliver*,[15] the House of Lords decided that the test is whether or not the director has a personal conflict. If there is a personal conflict, the director could be liable to account for any profits he or she makes. The rationale is that the director has a fiduciary relationship to the corporation and out of that relationship the director made a profit.

The Supreme Court of Canada took a similar approach in the *Can. Aero* case. The court looked to the circumstances to determine whether or not a conflict existed. The types of factors that the court should consider included the:

> …position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.[16]

In practical terms, a prudent director or officer of a non-profit organization, either incorporated or an unincorporated association, should probably avoid having an interest in any contract of the corporation. An exception exists if the director declares an interest in the contract at the board meeting where the contract is considered or arises and refrains from voting or participating in the discussion or attempting to influence the vote. If the corporation is a charitable corporation, the director should avoid any interest in any contract with the corporation because directors are held, at least nominally, to a higher standard of conduct that is akin to

[13] [1974] S.C.R. 592.
[14] (1854), 2 Eq. Rep. 1281 (H.L.).
[15] [1942] 1 All E.R. 378 (H.L.).
[16] [1974] S.C.R. 592 at 620.

that of a "trustee". An exception to this general rule would be where with the court's approval the corporation is paying for professional services that are additional to the director's duties.

The *Charities Accounting Act* was amended to permit certain types of transactions by directors. Section 5.1 was added to the *Act*[17] and authorized the Attorney General to make regulations on the advice of the Public Guardian and Trustee that would otherwise require the approval of a superior court justice. A regulation was enacted in 2001 that permits, for example, the purchase of indemnification insurance.

There are a number of acts on the part of a director or officer that will give rise to liability. A director who breaches his or her duty to be honest in the exercise of powers and discretion would be liable for any damages to the corporation that result from the breach. Examples of this type of breach include: misuse of corporate funds; misappropriation of corporate property; improper loans to directors; or appropriation of a corporate opportunity. A breach of the duty of honesty involves misfeasance or active error and not merely inactivity or nonfeasance. However, given the standard of care for officers and directors, turning a "blind eye" or not exercising due diligence where the director is aware or ought to be aware of misfeasance on the part of another director or another person could give rise to liability to the corporation.

It would appear that officers and directors would not be liable if they were acting within their authority as officers and directors. An officer or director who acts outside his or her authority is in a different situation. In some cases, the acts may be confirmed by the corporation, if the acts themselves were within the objects and powers of the corporation. The director involved should not vote on the ratification or confirmation of any such acts, since there would be, in all likelihood, a conflict of interest between his or her duty as a director and his or her personal interests.

Certain acts that are outside the authority of the director may also be beyond the objects and powers of the corporation, as set out in its letters patent, constituting documents or the applicable legislation. In

[17] S.O. 1999, c.12 Sched. B, s. 1(4).

Ashbury Railway Carriage and Iron Co. v. Riche,[18] the House of Lords held that ratification was not legally possible if the contract was beyond the scope of the corporation's powers. Similarly, if an activity is within the capacity of the corporation but is otherwise prohibited by law, the director's act cannot be ratified.

Corporations without share capital under the Ontario *Corporations Act* and the *Canada Corporations Act* do not have all of the powers of a natural person or of a business corporation. They are generally treated as persons within the context of their objects. The legislation provides for ancillary and incidental powers which cover most of the needs of a corporation. Unless the incorporating documents place a restriction on the powers or the capacities of the corporation (as with charitable corporations, for example), there are few occasions that would give rise to the director's acts being *ultra vires* the corporation. It could occur, for example, if a charitable corporation attempted to ratify the acts of a director that were intended to cause gain to the members of the corporation. Similarly, a charitable corporation could not ratify a donation to a political party.

The officers and directors owe a duty of diligence to the corporation. They should attend meetings and be prepared for the business at hand. Attendance and preparation are particularly important because most of the decisions that affect charitable and non-profit organizations must be taken at meetings and the responsibility for making decisions rests with the directors, more so than in business corporations. In business corporations, much of the decision making is left to the management of the corporation and implemented by employees; boards of charitable and non-profit organizations are usually substantially more involved in the operations of the organization.

The duty of diligence involves participating in decision making. Directors should not rely on the opinions of others, but should ask questions and be certain in their own minds and on reasonable grounds that a decision is appropriate in the circumstances. The director should be involved as fully as possible, asking for clarification when uncertain about an issue or the impact of a proposed decision.

[18] (1875), L.R. 7 H.L. 653 (H.L.).

Officers and directors must also balance the objects of the organization against its ability to attain the objects. They must be cognizant of the financial integrity of the organization to ensure that it is preserved and able to carry out its activities in the future. Accountability of officers and directors means that the organization not only achieves its objects but that it does so in a manner that does not unduly place the organization at risk. Indeed, officers and directors who knowingly place a charitable organization at risk, financially or otherwise, may be breaching their duties to the beneficiaries of the trust.

E. TRUSTEES

A trustee is obliged to discharge his or her duties in accordance with the terms of trust. The terms of trust are usually set out in the trust instrument. However, as noted above, s. 1 of the *Charities Accounting Act*,[19] deems corporations that are incorporated for a religious, educational, charitable or public purpose to be trustees. It would appear that the officers and directors of corporations to which the Act applies have duties comparable to those of a trustee. The following discussion would, therefore, be relevant to officers and directors of those corporations. The trustee has three duties to the trust and its beneficiaries — to carry out his or her tasks with due care and attention; not to delegate; and not to permit his or her own interests to conflict with his or her duty to the beneficiaries of the trust.

In carrying out their duties, the trustees have a number of powers under the trust instrument, at common law and by legislation, such as the *Trustee Act*.[20] The powers are administrative and dispositive in nature and are intended to permit the trustees to carry out their duties. For example, the trustees may appoint new trustees, sell property, renew leases and insure property. The *Act* also provides for investment of the trust assets, which is discussed in more detail. The statute was amended in Ontario to put in place a prudent investor rule as opposed to the more traditional list of permitted investments.

[19] R.S.O. 1990, c. C.10.
[20] R.S.O. 1990, c. T.23.

A trustee has the duty to carry out his or her tasks with care and attention. A trustee must exercise the level of diligence and care that an ordinary prudent person of business would in conducting his or her own business. The trustee must exercise "vigilance, prudence and sagacity".[21] A trustee may be held liable if he or she carries out the tasks negligently by omission or commission. The duties must be exercised to carry out the objects of the trust.

The trustee must act in "good faith" at all times, which complements the basic duty of care. "Good faith" is not an easily defined term. He or she must have an honest belief that what he or she is doing or proposes to do is proper and appropriate. If not, the trustee may be accountable for any losses. The trustee is not, however, an insurer and proof of loss on its own is not sufficient to bring about personal liability. There must be evidence of wrong doing or failure to exercise his or her duties properly for a trustee to be held liable.[22]

Interestingly, the standard of care that is applied to any given situation would appear to be an objective one and not the subjective one that seems to apply to officers and directors at common law. The level of skills of the individual trustee or how he or she handles personal business affairs are not relevant to a determination of whether the trustee met the requisite standard of care. Rather, the courts will ask the question "did the trustee act as an ordinary prudent person of business would have acted in the same circumstances?" If not, and a loss resulted from the failure to do so, the trustee will be personally liable for the loss.

The rationale for this test seems to be an assumption that individuals will take the greatest care with their own business affairs. Whether they do take such care in their own business affairs is not relevant. The courts do exercise an "excusing" power to avoid unfairness where the individual trustee is inexperienced or does not have the skills or experience of "an ordinary prudent person of business". In *Fales v. Can. Permanent Trust Co.*, the Supreme Court of Canada took into consideration the fact that one of the trustees

[21] *Fales v. Can. Permanent Trust Co.*, [1977] 2 S.C.R. 302 at 318.
[22] *Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 763 (C.A.) At 775.

was not experienced and relieved that individual trustee from liability for the breach of trust committed by a co-trustee.

It is not clear how the intrusion of this subjective standard into the otherwise objective standard for trustees will affect the duties of trustees of charitable organizations. Furthermore, what is the affect of the objective standard on the subjective standard that would appear to exist for officers and directors at common law? On the face of it, a director of a corporation that has charitable objects to which the *Charities Accounting Act* applies may have to meet an objective standard rather than the subjective standard. This area of law is clearly one that requires clarification, presumably by statute.

The trustee has a duty not to delegate, which arises from the creation of the trust itself. The trust already provides for a delegation of the power to the trustees to control and manage the property for a specified purpose. The trustee must carry out his or her duties personally and may not subdelegate the power to control and manage the property.

A power could be delegated if the terms of the trust permit it to be delegated in accordance with the terms. Furthermore, the trustee may delegate at common law certain administrative functions where the nature of the task necessitates the delegation, or if it is common business practice to do so in the circumstances. Where a trustee seeks the advice of a professional, the trustee must act prudently and exercise care before relying upon that advice.

The *Trustee Act* permits the trustee to delegate certain functions. For example, s. 20 provides that a trustee may appoint: a solicitor as an agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust; or a manager or a branch manager of a chartered bank; or a solicitor to be an agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance or otherwise. The trustee may also seek the advice of professionals or others to assist in making decisions. The trustee should be satisfied, though, that the advice is sound before relying upon it. The trustee has a duty to act prudently and to exercise care before relying upon the advice.[23]

A trustee has a duty to avoid conflicts of interest. A trustee must avoid a conflict of interest between his or her own personal interests and those of the trust and its beneficiaries. A trustee may not, for example, profit from the trust, a rule which is strictly applied.[24] The issue is not whether the trustee acted with or without integrity or if the benefit would have accrued to the trust; rather, the issue is whether the trustee was in a position where his or her duty could be in conflict with the duty to the trust when the profit was made or the gain acquired. A prudent trustee would, without authority otherwise, avoid the receipt of commissions from third parties on investment instruments or at least donate those commissions to the trust.

Courts apply the rule strictly because they cannot readily determine what motivated the trustee. A motive can be indirectly determined when there is evidence of a profit that was received or that a gain occurred. However, an exception to the rule exists if the trustee has explicit authority to make a profit or gain. The authority may be provided by the trust document, by the beneficiaries or by the court. Authorization by the trust document to make profit or gain is circumscribed by the Public Guardian and Trustee's apparent position that trustees not receive any remuneration from a charitable trust or charitable corporation.

In the case of a charitable corporation, this restriction is implemented by the inclusion of the mandatory special provisions in the letters patent. If the terms of the trust do not permit payments to a trustee, a court order is required for trustees of a charitable trust to be paid for services that he or she supplies to the charitable trust.[25] Section 35 of the *Trustee Act* provides some protection to trustees. If the

[23] *Fry v. Tapson* (1884), 28 Ch. D. 268.

[24] *Keech v. Sandford* (1726), 25 E.R. 223 (L.C.).

[25] Re Harold G. Fox Educational Fund v. Ont. (Public Trustee), (1989), 69 O.R. (2d) 742. See also Re Public Trustee and Toronto Humane Society et al. (1987), 60 O.R. (2d) 236 (H.C.).

breach of trust was technical in nature, the trustee acted honestly and reasonably and the court considers it to be fair to excuse the trustee for the breach, the court may relieve the trustee from any personal liability.[26]

F. PREVENTION OF PROBLEMS

1. Effective Boards

In general, the board is responsible for overseeing the day-to-day operations of the organization. The directors have a duty to manage the organization - but they also have a duty to operate it, i.e., to ensure that it has activities that carry out its objects. It may do so through the development and implementation of policies and programs that meet the objectives of the organization. The directors are also responsible for ensuring that the organization complies with its common law and statutory obligations.

The board is, however, made up of individuals. This fact is sometimes overlooked and individuals have differing views and personalities. One of the critical, practical roles of the board is to ensure that the board and the directors that comprise this human institution work in an effective and efficient manner - at the same time, recognizing and taking into account the different backgrounds, cultural and personal experiences, interests and personalities of the individuals.

There are several important "policies" or statements that should be in place so that existing and new directors understand what their roles are and what limits exist. These statements should first set out whether or not the board is to operate on the basis of "policy governance" or "administrative governance".

Increasingly, boards are also establishing codes of conduct to ensure that directors understand their roles and that they behave in an appropriate manner. The codes may include a conflict of interest

[26] See Re Faith Haven Bible Training Centre for a case in which section 35 is considered.

policy, or that policy may be separate. There may also be “job descriptions” for directors, which identify expectations of each director with respect to, for example, fundraising or public speaking. Just as with staff, it is a good idea to include criteria to assess board performance and how well a director carried out his or her duties.

The overall purpose of the board is to provide the direction to the organization to permit it to carry out its objects, to ensure that the organization meets its legal obligations (including maintenance of its status) and is financially responsible. The board must plan on how it intends to carry out the objects of the organization and to use the available resources to do so.

The board should allocate specific functions and tasks to specific positions, which are filled by individuals. Typically, the by-laws will do so for the president, vice-president, treasurer and secretary, and for larger organizations, for certain staff, such as the executive director. The individuals filling those positions are responsible to the board for their performance of the functions and tasks.

Boards often operate through committees, both standing and *ad hoc* committees. Care must be taken to ensure that any committees that are established comply with the governing law. For example, the Ontario *Corporations Act* permits the establishment of an executive committee with decision-making powers in certain circumstances but all other committees may be advisory only. The committees should each have terms of reference, even if it is functioning only in an advisory capacity.

The proper and respectful conduct of the board meetings is essential for the board to fulfil its obligations. If decisions are to be made by the board of directors - either to establish policies and monitor their implementation as a “policy governance board” or to make day-to-day decisions as an “administrative governance board” - there must be a controlled forum in which to make those decisions.

Effective boards are possible.[27] They generally have in place mechanisms to assess the community need for the organization so that it remains relevant. At times, these mechanisms may reveal that the organization is no longer needed and that its resources could be better used elsewhere. However, more often the organization will identify a better way to operate in the community or to alter itself to meet the needs in a more effective manner. Sometimes, changes will be needed to the organization's by-laws or letters patent or, more simply, to its policies. The board is responsible for undertaking such assessments on a periodic basis or as needed.

The board must also plan within the context of the organization's mission and strategic plans. These plans are used to state what activities the organization will carry out and what outcomes are expected, what tasks are to be done and by whom, and how these plans relate to the organization's objects and resources and the budgetary process. They are intended to ensure that the organization's priorities are being met, in accordance with its legal obligations. It is useful to identify options during the planning process and the pros and cons for each option so that the directors can determine which activities best meet and affect the organization's objects and resources.

The implementation of the plans involves the carrying out of the tasks identified in the plans and the ongoing coordination of the tasks. The board must be sensitive in implementing the plans should circumstances change. An unanticipated shortfall in revenues, for example, will require that the board either locate new resources, reallocate resources or amend the plan. The board should also evaluate plans and how they were implemented - both for purposes of accountability and monitoring, and to learn from what worked and what did not work. The evaluations will also assist in determining how relevant and effective the organization is in the community which it serves.

Boards should also manage relationships. They need to communicate internally and externally to stakeholders. Conflicts need to be managed so that they become productive outcomes or are resolved.

[27] See Diane Abbey-Livingstone and Bob Wiele, *Working with Volunteer Boards: How to Improve Their Effectiveness*, (Toronto: Ontario Ministry of Citizenship and the Ontario Association of Volunteer Bureaux/Centres, 1994).

If conflict is not managed, the board will have difficulty in developing and implementing plans and in carrying out the objects of the organization. Relationships with others outside the organization are equally important - be they regulators, governments, funders, corporate partners, clientele or the general public. Management of volunteers and their proper motivation is also part of the role of the board.

2. Due Diligence

The first opportunity for a director to exercise due diligence is before he or she becomes a member of the board, either by election or by appointment. A potential director or officer should develop a good understanding of the organization and the area in which it operates before agreeing to be appointed or elected. For example, the individual should determine and understand:

- the objects and activities of the organization. These objects should be set out in the letters patent or similar document incorporating the organization, in the trust deed if the organization is a trust or in the other constating documents, such as a memorandum of association, if an unincorporated association. The activities would usually be identified in an annual report, strategic plan, report to funders, financial statements, brochures or similar document,
- the statutes, regulations and policies under which the organization operates. The first step is to review the incorporating legislation, if the organization is a corporation. In addition, it is important to understand the legal framework that may exist for the organization, including taxation legislation, supervisory statutes and similar statutory regimes. These statutes will often set out or define obligations and thus areas for potential liability for the organization and for individual directors,
- the regulators who have jurisdiction over the organization. What are the formal and informal expectations of the regulators? Is the organization in compliance with the requirements? Has the organization completed its annual filings?
- financial position of the organization. This type of information is usually (or ought to be) available in the financial statements, reports to regulators (including Canada Revenue Agency) and to funders. There may be restrictions on the use of funds, either by statute, contract or internal decisions. In addition, the potential director would want to determine if there is any outstanding or potential litigation involving the organization, its directors or its officers for breach of contract, statute or other legal obligation.

Once the individual is a director, he or she must exercise due diligence in carrying out his or her fiduciary duties. Due diligence is both a question of fact and of law. What is due diligence will depend on the circumstances, the type of organization and the activities undertaken. In general, directors or officers will meet their obligations if they act reasonably, prudently and sagaciously and within the law, including the objects of the organization and the scope of their position or office. They should participate fully in the decisions of the organization. Participation means attending meetings and being prepared for those meetings by reviewing and understanding the materials and issues. Directors should also express their views and participate in the discussion of issues and information. Minutes of meetings should accurately reflect the discussion and the decisions.

The Ontario Public Guardian and Trustee has summarized the general duties of the directors of charities as follows:

> Directors and trustees must handle the charity's property with the care, skill and diligence that a prudent person would use. They must treat the charity's property the way a careful person would treat their own property. They must always protect the charity's property from undue risk of loss and must ensure that no excessive administrative expenses are incurred.[28]

This summary is designed for directors and trustees of charities, but it is illustrative of the duties of directors of other organizations in the voluntary sector.

3. <u>Policies and the Prevention and Minimization of Risk</u>

Boards make decisions, but do not always implement them in person. One way to ensure implementation is to put in place policies that must be followed by staff, volunteers and agents in carrying out their respective duties. A policy is a governing principle. It allows the board to delegate to others (staff, volunteers or agents) the authority to act on behalf of the organization, but does so in a way that maintains the board's control. Essentially, it establishes the framework on what is to be done. Policies are often philosophically based, providing a brief statement of the board's views or

[28] *Charities Bulletin No. 3* - Duties, Responsibilities and Powers of Directors and Trustees of Charities, (Toronto: Office of the Public Guardian and Trustee, July 1999).

approach on the matter. It may set out beliefs, values and desires. A policy allows staff, volunteers, agents and others to know what the board wants and expects and why.

Usually, a policy will identify the direction but leaves the methods to those implementing the policy. However, this need always be the case. There are different approaches to governance - the “policy governance” and “administrative governance”. There is no right or wrong approach. In reality, most organizations will (or ought to) find a comfortable and appropriate place along the spectrum between the two approaches - which place may move as the organization matures, undergoes stress or change in senior staff, or is adapting to an new environment.

There is another factor that mediates against full acceptance of the “policy governance” approach. Volunteers want to do good, which is why they volunteered in the first place. Directors are no different in this regard than any other volunteer. It is very difficult to get personal satisfaction on an ongoing basis from having adopted a good policy on some matter. Those who developed the policy may obtain a higher level of personal satisfaction, but merely approving a policy after some discussion does not usually make one’s heart flutter with happiness. People want - and will - attempt to participate in decision-making whenever they can. Not to recognize this factor ignores the human dynamic in organizations.

On the other hand, this factor also mediates against adopting the full “administrative governance” approach. Policies are intended, among other things, to bring a reasoned approach to a particular matter or issue. They also assist in bringing consistency and overall fairness to decisions. They encourage (or should encourage) full consideration of all relevant factors before a decision is made on the merits of any particular matter. Indirectly, a policy will also carve out areas of responsibility so that those who know and do the job best are the ones who have the responsibilities to do so. Directors will be discouraged from getting involved in decisions for which they bring little or no expertise, knowledge, understanding or value.

This factor leads one to another purpose of policies - accountability. If the policy identifies who is to do what, when and what results are expected, than the policy also provides a basis for evaluation of the "doer" and for accountability. The staff or volunteer should know what is expected of him or her and he or she can be assessed against that standard.

4. Policies Governing the Board

The board is also subject to "policies". These policies are more process, planning and decision making in nature. Traditionally, they have not always been seen as policies and have been called by other names. For example, a basic policy that all organizations must have are by-laws, which sets out who does what, when and often how. By-laws will cover such matters as financial affairs, record-keeping, timing of and conduct at meetings and so forth. Yet too often boards will forget about or even worse not be aware of the by-laws.

Policies are also set out in resolutions of the board. These resolutions may set up committees or identify methods by which the board will operate. The resolutions may prescribe certain approaches to issues or document how certain decisions are to be made or even what the decisions will be in similar situations. For example, a board that decides on who gets a scholarship or bursary may set out by resolution what the eligibility criteria will be for applicants to be considered.

What types of policies ought to be in place or considered? Context, obviously is important to answering this question. If the organization does not have employees or volunteers, there is no point in having human resource policies.

There are a number of possible policies for most organizations:

- Governance Policies
  - letters patent, memorandum of association, trust deed or similar constating documents

- by-laws, organizational structure or chart, especially if the organization is larger and has employees. This chart should set out decision-making levels so that it is clear who (or what position) makes what types of decisions. A "job description" for each position would also assist in making clear who does what

- board structure, including executive committee and its role and responsibilities, standing and *ad hoc* committees and their terms of reference and lines of accountability. Often, this information will also be in the by-laws and may be required in some cases

- rules of procedure or rules of order at meetings

- conflict of interest policies, either as a separate document or as part of a code of conduct for directors

- communications policy, both internal and with outside stakeholders. This policy could include advocacy

- access to information and privacy policy. This area of policy is becoming increasingly important as a result of legislative changes and an increased focus on privacy in a wired world. Clearly, organizations that have employees or who provide social services will have a greater need for a policy in this area than an organization that puts on the occasional play

- Strategic Planning

  - - mission statement that is based on the letters patent or other constating document

  - - statement of goals and objectives

  - - business plans

  - - budgets and resource allocations based on plans

- Operational Policies

  - financial management, such as cash management, internal procedures, banking arrangements, internal audit

- compliance management to demonstrate compliance with significant regulatory requirements that face the organization

- human resource management, which would include policies with respect to workplace and sexual harassment, hiring, promotions and retention, volunteer management, training, discipline and conflict of interest (including use of the assets of the organization, such as computers)

- program management, which will include review of programs to ensure that they are meeting their objectives. The programs ought to include overall assessment criteria so that it is easier to determine if and when a program is successful or requires further adjustment, refinement, resources or elimination

The size, nature and level of sophistication of an organization, its context and the expertise of its staff (if any) need to be taken into account in how any such policy process actually works. The overall "governance approach", i.e., policy governance or administrative governance will also be an important factor in how the board addresses the policy process. In any event, the following elements could be included in a policy process:

- identification of a need for a policy, which may include a corporate policy to review all policies on a periodic basis or to require senior management to do so and identify areas that require new policies or revisions to existing policies

- terms of reference for the committee or person who is to prepare the draft policy, including membership, time allocated for the preparation, consultation and so forth. In many cases, it is probably desirable to include staff and senior staff representation on the committee or, at least, consult with them. A committee may also need to retain external expertise, such as a lawyer, accountant or management consultant

- format to be used for policies, in particular where consistency is desired for clarity purposes

- research into the policy issue, assessment of current situation and its risks, need for policy and the proposed content of the policy. The research should also examine what options are available with respect to the policy and how any policy proposal will inter-relate with other policies and the overall mandate of the organization

- review of any legal requirements or standards that are applicable

- drafting of policy for review and comment, including any background materials that will assist the board in making a decision on the proposed policy. The board may want to consult on the draft policy, in particular where internal and/or external input have not been provided

- discussion of the draft policy and preparation of final version

- development of an implementation plan, which may include communications with staff and volunteers and with external stakeholders, training, allocation of resources for implementation, scheduling of activities, allocation of responsibilities and determination of who is accountable for implementation

- approval of the policy and implementation plan and any related requirements, e.g., resource allocation

- evaluation of policy after a prescribed period to determine if it is effective and addressed issues.

The policy ought to identify clearly what the issue is, the goals for the policy, the fundamental values or beliefs being advanced by the policy and how they relate to the mandate of the organization. It should also identify who is responsible for the policy and its implementation - both initially and on an ongoing basis.

G. SELECTED POLICY DOCUMENTS

There are a number of policy areas that have become or are becoming particularly important in the governance of charitable and not-for-profit organizations. These policies have developed either from legal requirements or from a consensus around the need for such policies:

1) Conflict of Interest - although conflicts of interest are inevitable, it is important to identify areas of conflict of interest, to attempt to prevent them and to address them when they do arise. Any legal requirements (set out in the incorporating statute or at common law) must be complied with yet the policy ought to be reasonable.

2) Code of Conduct - another useful policy that is intended to regulate the behaviour of the directors. It allows directors to understand their roles and the limits to those roles. It also assists in ensuring that meetings and activities are carried out in a civil manner, with a view to making appropriate decisions in a timely manner.

3) Personal Information and Privacy Policies - The federal *Personal Information Protection and Electronic Documents Act*[29] has reinforced the need for organizations to have in place policies with respect to the collection and use of personal information and the protection of individual privacy, especially with respect to confidential personal information.

4) Financial Management Policies - the board should establish some level of financial overview of the affairs of the organization either as a board function or a committee function. The level will depending upon the size and sophistication of the organization. The level of review, for example, need not include detailed analysis of the procedures used by management unless there have been problems with those procedures. The board or a committee may assess the integrity of the internal controls and information systems of the organization but it would leave the day-to-day monitoring to management.

5) Regulatory Compliance Management Policies - The board has a role to ensure that any regulatory requirements are complied with in the operations of the organization. It may do so as a board or through a committee that reports to the board, such as the audit committee or a compliance committee. What those regulatory requirements are and how they will be monitored will depend upon the activities of the organization and its status.

6) Risk Identification and Indemnification - The board needs to be able to identify its likely areas of risk and to protect against those risks through preventive activities. In addition, it needs to put in place appropriate insurance policies and indemnification to protect the organization and its

[29] S.C. 2000, c.5.

employees, officers and directors. General liability insurance is often the essential underpinning of a good risk minimization program. Any liability insurance policy, though, should recognize the unique risks that may exist for an organization or the sector in which it operates.

For charitable organizations, in particular those in Ontario, the directors need to comply with the requirements of the *Charities Accounting Act*.[30] The regulations under that *Act* allow for the indemnification of directors and officers and the purchase of liability insurance by the charity.[31] The board must, however, consider a number of issues before it authorizes the indemnification and/or purchase of liability insurance. The board must consider:

- the degree of risk to which the executor, trustee, director or officer is or may be exposed,
- whether, in practice, the risk cannot be eliminated or significantly reduced by means other than the indemnity or insurance,
- whether the amount or cost of the insurance is reasonable in relation to the risk,
- whether the cost of the insurance is reasonable in relation to the revenue available to the executor or trustee,
- whether it advances the administration and management of the property to give the indemnity or purchase the insurance.

7) Investment Policy - Organizations will have a number of reasons to invest whether they are charitable or not-for-profit in nature. Although charitable organizations may be more restricted in their investments, boards of both need to take due consideration in designing and implementing an investment policy and in monitoring its implementation and investments. For charities operating in Ontario, amendments to the *Trustee Act* came into effect on July 1, 1999. The *Trustee Act* requires a

[30] Section 5.1 to the *Charities Accounting Act* was enacted by the *Courts Improvement Act*, S.O. 1996, chapter 25, subsection 2(2).
[31] Ontario Regulation 04/01.

board to establish an investment policy on the basis of the “prudent investor rule”. The board must consider the following statutory criteria:

- general economic conditions
- the possible effect of inflation or deflation
- the expected tax consequences of investment decisions or strategies
- the role that each investment or course of action plays within the overall trust portfolio
- the expected total return from income and the appreciation of capital
- the needs for liquidity, regularity of income and preservation or appreciation of capital
- an asset’s special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

H. CHECKLIST FOR DIRECTORS, OFFICERS AND TRUSTEES

This paper attempts to discuss the standards of care for directors, officers and trustees in context of their common law and statutory duties and their role in the governance of a charitable or not-for-profit organization. The intention is not, however, to scare off individuals from contributing to their community; rather it is to provide a rationale and explanation for due diligence on the part of directors, officers and trustees.

The paper discusses a number of ways for individuals to recognize and deal with risk. These, in summary, include the following individual activities:

- always act with a view to the best interests of the organization
- understand and comply fully (in spirit and letter) with the conflict of interest policy by actively avoiding conflicts of interest and, where a conflict arises, disclosing the conflict and do not participate in the decision

- be informed about your organization's mandate, its constating documents (letters patent, trust deed, memorandum of association, by-laws) and its incorporating statute if incorporated
- discuss matters that are before the board fully and with frankness and candidness
- exercise due diligence, care and skill in carrying out responsibilities as officer or director
- fulfill fiduciary duties of good faith, honesty and loyalty
- get independent or outside advice where it is required to ensure that decisions are well-informed
- ensure effective internal monitoring and reporting systems are in place, including for financial matters but also in areas where there is high risk or regulatory requirements
- attend meetings and, if not available, ensure informed about the issues and decisions through minutes and agenda items and any required follow-up
- keep abreast of the organization's activities and how those activities fit within mandate and its strategic plan and annual plan
- ensure that the resources are available or become available to implement decisions
- monitor compliance with statutes and regulations, especially those that regulate directly the fields in which the organization operates, e.g. day care
- never forget that the role of the director is to manage the affairs of the organization
- obtain confirmation that source deductions (taxes, EI, CPP and other pension benefits) have been remitted and that any taxes collected on behalf of governments are remitted
- prepare adequately for all board and committee meetings
- question whether the matters being discussed are within the mandate of the organization and the decision is authorized by the by-laws

- if any concerns or objections, state them clearly and ensure are recorded in the minutes, especially if there is a reason to believe there may be a contravention of the law or there is a risk of liability

- test treatment of assets against the standards of what a reasonably prudent person would do in comparable circumstances if he or she were dealing with his or her own assets - which may be a higher standard than what individuals actually do with their own assets

- examine your own performance objectively and determine if you meet your expectations of what a good director does or ought to do

Nobody is perfect; but that statement cannot excuse a director from making an honest and good faith effort to meet their legal and moral obligations. Evidence of good faith goes a long way to satisfy a court, regulator, members and the public.

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