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**BOARD GOVERNANCE – WHEN DOES IT
BECOME DIRECTOR’S NEGLIGENCE?**

(Power Point Presentation)

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Introduction

- **Directors are any organization's primary asset**
- **Others may say employees or volunteers greatest asset**
- **Organization is a legal artifice used for practical purposes – allowing people to structure their internal relationships and external dealings with others in an efficient and effective manner**

2

- **Organizations may be unincorporated associations, corporations (without share capital), cooperative corporations (without share capital), trusts**
- **Directors are responsible for making sure that the organization:**
 - **Relates to people in accordance with the law**
 - **Acts in a fiscally prudent manner**
 - **Is efficient and effective in achieving its purposes**

3

- **Assessing when individuals have acted properly – and not negligently – is dependent on understanding the common law and statutory tests and what is expected of directors**
- **Good governance is not “perfection” – rather good governance is intended to minimize risks of things going wrong, identifying what may go wrong and preventing it, and addressing problems when things go wrong in a legal and ethical manner**

4

What is Governance

- **“Governance” is a combination of both 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 and involves the active oversight by the board of the organization’s governance**
- **Two conceptual approaches to “governance” and “stewardship”**

5

Administrative Governance Model

- **“Traditional approach”**
- **Board makes most substantive decisions based on materials and discussion at board meeting**

6

Policy Governance Model

- **Board has “oversight” role rather than active role in managing affairs of the organization**
- **Approach relies more on development of operational policies implemented by staff and officers**

7

Reality

- **Most organizations will – and should – operate on the basis of a mixture of the two models**
- **Spectrum between “administrative governance” and “policy governance” based on several factors**
 - **Legal authority of directors, officers and organization itself**
 - **Statutory or common law obligations or restrictions or contractual obligations**
 - **Constating documents**

8

- **Culture of organization**
- **Views and perspectives of key stakeholders**
- **Skills, competence and training of staff and volunteers**
- **Resources**
- **Size and type of operation**
- **Activities carried out by the organization**
- **Due diligence requirements of the directors and officers**

9

Carver “Policy Governance”

- **Variation or different type of governance model**
- **Assumes board of directors represents “interests of the owners” – difficult concept to implement, especially in charitable sector**
- **Ends/Means distinction**

If the board has established Ends and has determined through monitoring that these Ends are actually accomplished, it can be argued that the staff Means must have worked

10

- **Categories of Policy (Carver)**
 - **Ends**
 - **Executive Limitations**
 - **Governance Policy**
 - **Board/Staff Linkages**

11

Duty of Directors and Officers

- **Duty to manage the affairs of the organization**
 - **statutory and common law duty**
- **No clear articulation of what is meant by “manage the affairs” – but more than monitoring**

12

- **Panel on Accountability and Governance in the Voluntary Sector**
 - **Mission and Strategic Planning**
 - **Transparency and Communication**
 - **Organizational Structures**
 - **Board’s Understanding of its Role**
 - **Fiscal Responsibility**
 - **Oversight of Human Resources (staff and volunteers)**
 - **Assessment and Control Systems**
 - **Planning for Succession and Diversity**

13

Duties of Directors

Case law

- **Fiduciary relationship (corporate law)**
 - **To act with a reasonable degree of prudence**
 - **To be diligent**
 - **To act in good faith, honestly and loyally**
 - **To avoid conflicts of interest**

14

- **Trustee or “Akin-to-Trustee” (charitable law)**
 - **To exercise vigilance, prudence and sagacity**
 - **To act in good faith**
 - **Duty not to delegate**
 - **Duty not to have conflict of interest**

15

- **Public Guardian and Trustee**
 - **To be reasonable, prudent and judicious**
 - **To carry out the charitable purposes**
 - **To avoid conflicts of interests**
 - **To act gratuitously**
 - **To account**
 - **To manage the charity's assets**

16

Duties of Directors

Statutes

- **Employees and the workplace**
- **Taxation and other imposts**
- **Environmental**
- **Business practices**
- **Competition**
- **Information and personal privacy**
- **Intellectual property**
- **Vulnerable clients**

17

Standards of Care

- **Statutes, common law and contracts impose duties on directors and set out standards of care on directors**
- **Potential for personal liability if the applicable “standard of care” is not met**
- **No clear “standard of care” or single standard of care that is applicable in all circumstances**
 - **May vary by statutory duty**
 - **May vary based on individual background, training and experience**

18

- **May vary by type of activity**
- **May vary by legal status of organization – trust, unincorporated association, corporation, statutory corporation**
- **May vary as between “not-for-profit” and charitable (trustee or “akin to trustee”)**

19

Standard of Care – Objective or Subjective?

- ***Re City Equitable Fire Insurance Co.* – early 20th century**

Degree of skill required in what “may reasonably be expected from a person of his knowledge and experience”

- **Subjective, not an objective standard of care**

20

- ***Canada v. Corsano* – late 20th century with statutory standard of care**

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 qualification, 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

21

Standard of Care – Charitable Organizations

- *Re Public Trustee and Toronto Humane Society et al.*

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

22

- *Charities Accounting Act*
- *Asian Outreach Canada v. Hutchinson*

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 will 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 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

23

- **Confusion over “standard of care”, especially for directors and officers of charitable organizations**
- **Directors need to be prudent in deciding upon governance approach and to be able to defend that choice**

24

What is “Policy”

- **A policy is a governing principle. It allows the board to delegate to others (staff, volunteers, agents) the authority to act on behalf of the organization**
- **Board control over the implementation of a policy is essential**
- **Policy allows staff, volunteers, agents and others to know what the board wants and expects and why**

25

- **Policy is intended**
 - **To bring a reasoned approach to a particular matter or issue**
 - **To provide for consistency and overall fairness and predictability to decisions**
 - **To encourage full consideration of all relevant factors before a decision is made on the merits of a particular matter**
 - **To carve out areas of specific responsibility and accountability so that those who know the job best are the ones who have the responsibility to do it**

26

What Types of Policies Are Common?

- **Governance Policies**
 - **Letter patent, memorandum of association, trust deed or similar constating documents**
 - **By-laws**
 - **Board structure and decision-making processes (e.g. committees)**
 - **Rules of procedures or rules of orders**
 - **Conflict of interest policy**
 - **Communications policy**
 - **Access to information and protection of privacy policy**

27

- **Strategic Planning**
 - **Mission statement**
 - **Statement of goals and objectives**
 - **Business plans**
 - **Budgets and resource allocations**

28

- **Operational Policies**
 - **Financial management (cash management, internal procedures, banking arrangements, internal audit)**
 - **Compliance management**
 - **Human resource management (management, staff, volunteers)**
 - **Program management**

29

Policy Process

- **Identification of need for a policy – experience, legal requirement (e.g., *Occupational Health and Safety Act, Trustee Act*)**
- **Terms of reference for policy development, format and research**
- **Review of legal requirements and standards that are applicable**
- **Drafting a policy**
- **Discussion of draft policy and preparation of final version**

30

- **Approval by the board**
- **Development of implementation plan**
- **Approval of the implementation plan, which may require resource allocation**
- **Evaluation of policy and its effectiveness**
- **Revision of policy**

31

Selected Policy Documents

- **Conflict of Interest**
- **Code of Conduct**
- **Personal information and Privacy**
- **Human Resource and Workplace Policies – occupational health and safety, harassment and discrimination, hiring and retention**
- **Financial Management and Overview**
- **Regulatory Compliance Management**

32

- **Asset Protection – insurance and indemnification (officers and directors, general liability, professional or other activity/client specific insurance)**
- **Fiscal Management**
- **Program Review**
- **Investment Policy (charitable property)**
- **Program Policies**

33

Conclusion

- **Most organizations will have “policies” in place that are used by the board and/or staff to guide decision-making**
- **The degree to which policies are required will vary depending upon type of organization, its size and operations, its resources, statutory or contractual obligations**
- **Board of directors, regardless, must “manage the affairs” of the organization and cannot simply delegate to others**

34

- **Nobody is perfect**
- **Directors must make 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, regulators, members, donors, other stakeholders, and the public**

35

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36