



**Waterloo Regional Arts Council
and
Carter & Associates**

BOARD SCHOOL

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**Governance 101:
The Foundation Seminar**

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Purpose of the WRAC/Carter Board School

- **Good governance starts – and ends – with the Board of Directors**
- **The WRAC/Carter Board School is intended to provide officers and directors with tools for them to do their jobs in an effective manner**

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- **WRAC/Carter Board School is a series of seminars and workshops**
- **Governance 101 – the Foundation Seminar to be offered annually**
- **Other seminars and workshops for 2005/06 include – Financial Statements (November 14, 2005); Incorporation (January 14, 2006); and Charitable Registration and Compliance (March 25, 2006)**

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- **Future Seminars and Workshops are intended to reflect what our community groups need**
 - Risk management
 - Human resources
 - Privacy legislation
 - Organizational reviews
 - Strategic planning
 - Ideas?

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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

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- 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

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- 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

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- **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**

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- **While good governance is not perfection – it matters and matters a great deal**
- **Good governance is the primary role of the board of directors**
- **The board cannot look to others to achieve good governance**

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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”**

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Administrative Governance Model

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

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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

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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
 - Constatng documents

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

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• **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**

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• **Important overall drivers behind the Panel’s recommendations are:**

- **member participation**
- **“democratic” organizations are accountable to membership and other stakeholders**

- **Approach has been carried over to Bill C-21 – proposed new federal corporation without share capital legislation, i.e., oppression remedy**

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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

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- **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

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- **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

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Duties of Directors

Statutes

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

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Boards and Directors

- **Decisions are made by the *Board of Directors* and not by individual directors or groups of directors**
- **Decisions are articulated through resolutions**
- **Once decisions are made, the “corporation” has spoken through the *Board***

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- **Procedures (By-Laws, Board Policies, Rules of Order, etc.) are the processes by which decisions of the Board are made**
- **Important to follow and comply with the procedures that are in place to ensure full and proper discussion and decision-making**

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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

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- 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”)

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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

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- *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

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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 duty 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.

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- *Asian Outreach Canada v. Hutchinson*

The confusion has sometimes arisen is a consequence of the fact that 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 may 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.

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- *Charities Accounting Act*
- *Charitable Gifts Act*
- *Trustee Act*

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- 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

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Conflict of Interest

- Directors owe duties to the corporation
- It is a conflict of interest for a director to place personal interest ahead of interests of the corporation
- It is also a conflict of interest for a director to place another organization ahead of the interests of the corporation

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- **Fiduciary duty of a director is owed to the corporation and not to stakeholders, even an important stakeholder such as a majority shareholder or other person who is responsible for the director’s appointment**
– *820099 Ontario Inc. v. Harold E. Ballard Ltd.*

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- **Common law applies to nominee directors who have divided loyalties**
- **Being a nominee director does not relieve the director of his or her obligation to fulfill his or her duties to the corporation – even where those duties conflict with the nominator’s wishes**

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- ***Harold E. Ballard Ltd.***
It may well be that the corporate life of a nominee director who votes against the interests of his “appointing” shareholder will be neither happy nor long. However, the role that any director must play (whether or not a nominee director) is that he must act in the best interests of the corporation ...

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The nominee director’s obligation to his “appointing” shareholder would seem to me to include the duty to tell the appointer that his requested course of action is wrong if the director in fact feels this way. Such advice, though likely initially unwelcome, may well be valuable to the appointer in the long run. The nominee director cannot be a “Yes man”; he must be an analytical person who can say “Yes” or “No” as the occasion requires (or to put in another way, as the corporation requires)

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- *Deluce Holdings Inc. v. Air Canada*
 - Court took similar approach and commented further that a mere assertion of good faith on the part of the directors not sufficient
 - Need to have a “reasonable analysis of the situation”
- *Scottish Co-Operative Wholesale Society Ltd. v. Meyer* takes a similar approach

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- If a director is in an “untenable position” of serving two masters, the director should resign
- Director nominated to the board by another does not entitle the director to prefer the interests of that person to the interests of the corporation
- Director must be concerned first and foremost with the interests of the corporation

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- **Duty to Disclose**
 - A director who is a nominee may have a duty to disclose confidential information which the director has by virtue of another relationship, if it affects a vital aspect of the corporation
- *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.*

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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

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- **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

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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

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• **Strategic Planning**

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

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• **Operational Policies**

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

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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

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- 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

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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

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- **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**

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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**

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- **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**

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