

# Strategic HR Management and the Board's Role

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## Introduction and Overview

- The topics to be covered during this presentation include:

- How Good Governance plays a Roles in HR Management?
- Understanding Different Types of Corporations
- Understanding the Legal Duties of Directors and Officers of NFP Corporations
- Understanding the Liabilities of Directors and Officers of NFP Corporations
- Issues with Delegation to Employees
- Due Diligence in Managing Risk in HR Matters

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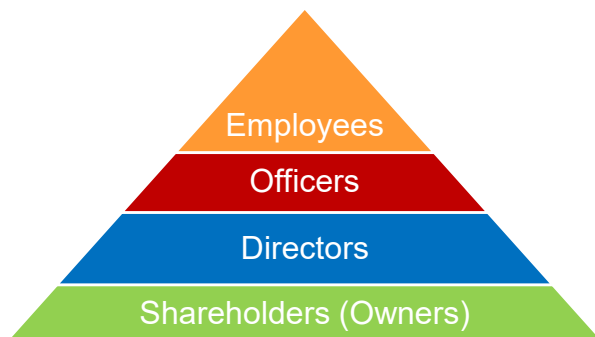
## How Good Governance plays a Roles in HR Management?

- Understanding what corporate good governance is requires an understanding of the legal requirements of the corporation and the corresponding legal duties and liabilities of its directors and officers
- A corporation is a legal fiction – it only becomes real by virtue of the actions of individuals
- The law and the public look to the corporation's governing body, *i.e.*, the board of directors, to put in place **the rules, processes and structures used to direct and manage the corporation's operations and activities**

- Governance includes having **clear lines of accountability and responsibility and ensuring that the corporation acts in accordance with the law**
- The goal of good governance is to ensure the effectiveness, credibility and sustainability of the corporation

## Understanding Different Types Of Corporations

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



- **Not-for-Profit Corporations (“NFP Corporations”)**
  - Non profit purpose
  - Tax exempt as non-profit organizations under the *Income Tax Act* (“ITA”)



- **Charitable Corporations**

- Charitable purpose akin to a public trust
- Tax exempt under the ITA
- Can issue tax receipts for donations and receive gifts from other qualified donees



## Who is a Director of a NFP Corporation?

- In general terms, a director of a NFP Corporation includes:
  - Anyone who takes on the role of the directing mind of the corporation
  - Can be known by different names, such as director, council member, governor, board member, trustee or elder
  - The name given to a director is not what is important
  - Instead, it is the authority that the person exercises that determines whether that person is a director
  - However, a director has no power to act on his or her own
  - Rather, the power under law to “manage or supervise the management of the Corporation” lies with the board of directors as a collective

## How Members are Different from Directors and Officers

- NFP Corporations are required to be membership based
- They must have both corporate members, as well as a board of directors and officers
- Members and directors have different duties, rights and obligations in their respective roles
- Directors are elected by the corporate members and are responsible to manage or supervise the management of the affairs of the corporation
- Corporate members have statutory protection from liability, whereas directors have some exposure to liability

- Corporate members elect the board of directors, receive the financial statements and appoint the auditor each year
- Other member rights/powers include:
  - The right to receive notice of members meetings and to vote
  - The right to nominate candidates for directors
  - The right to remove directors by simple majority
  - The right to requisition a members' meeting based on 5% of voting rights
  - The right to submit a proposal to the corporation to discuss a matter at the AGM
  - Member approval required for certain fundamental changes, like amendment of by-law or articles
  - The right to access corporate records and obtain membership lists
- However, members do not own the corporation and have no proprietary rights to any of the assets of the NFP

## Who is an Officer of a NFP Corporation?

- In general terms, an officer of a NFP Corporation includes:
  - The individuals (whether they be directors or not) who carry out the operative functions of the corporation at the direction of the board
  - Normally includes president, vice-president, secretary, treasurer, and CEO/executive director
  - Has fiduciary obligations to the corporation but not to the same degree as directors
- An officer can be a director but not necessarily
- An officer could become a *de facto* director if the officer takes on the functions and decision making of a director or is appointed as the “managing director” under the CNCA

## The Statutory Duties of Directors

- Statutory Fiduciary Duties
  - Every director and officer of a NFP Corporation has a duty to “**act honestly and in good faith with a view to the best interest of the corporation**”
  - The common law aspects of what this statutory fiduciary duty involves is explained later in the presentation and represents the core duty that a director has under statute

- Statutory Standard of Care

- Every director and officer of an NFP Corporation have an objective standard of care *i.e.* they are to “**exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances**”
- “Business Judgement Rule” protects directors and officers against hindsight and second guessing by third parties and courts
- Directors should ask themselves the following questions in meeting the objective standard of care
  - Have they analyzed and understood the issue before them?
  - Have they retained independent advisors or advisors recommended by management and do the advisors have the requisite expertise and experience?

- Have they tested and challenged their advisors, or merely followed recommendations without question?
- Is the amount of time that they have spent on the issue proportionate to its importance and complexity?
- Have they debated the issue amongst themselves and engaged in a candid exchange of views?
- Were they actually present at the applicable board meeting?
- Were the summary of the discussions and the decisions properly documented, for example, in minutes or resolutions of the board?

- Statutory Duty to Manage the Corporation
  - Subject to permitted delegation the directors have a duty to **“manage or supervise the management of the activities and affairs of [the] corporation”**
  - To fulfill this duty to manage or supervise the management of the corporation, directors must ensure:
    - Proper hiring, training, and supervision of management, staff and volunteers
    - The overall operating integrity of the corporation
  - Supervising management of the corporation, though, does not involve interference with day to day operations by management
  - Good relationship with senior management is essential in respecting the authority delegated to them

- Summary of common law fiduciary duties of directors

Duty to act in good faith with honesty and loyalty

Duty of diligence

Duty to exercise power

Duty of obedience

Duty of confidence

Duty to avoid conflict of interest

Duty to Continue

- Common Law Liabilities, including risk in HR matters

Liability for Breach of Fiduciary Duty

Liability for Breach of Corporate Authority

Liability Risk for Negligent Mismanagement (Tort)

Liability Risk in Contract

Liability for Special Purpose Charitable Trusts

Liability for Investments Losses

- Statutory Liabilities dealing with HR matters

Directors can be subject to strict liability offences, for example;

– *Income Tax Act* for failure to remit source deductions

– *Excise Tax Act* for failure to remit HST

– Unpaid employee wages up to six months

– 12 months unpaid employee vacation depending upon jurisdiction

– *Employer Health Tax Act* for failure to remit health tax

## Issues with Delegation to Employees

- Delegation of Board Authority
  - Directors are responsible for managing or supervising the management of the corporation's activities and affairs.
  - The board may appoint:
    - A managing director from among the directors, or
    - A committee of directors
    - And delegate to them any powers of the board, except certain non-delegable powers.

- Examples of Non-Delegable Powers
  - Submitting questions or matters to members that require member approval
  - Filling vacancies on the board or in certain key officer positions
  - Issuing debt obligations (unless authorized by the board) Approving financial statements
  - Adopting, amending, or repealing by-laws
  - Establishing member contributions or dues

## Delegation to Officers

- Directors may:
  - Designate corporate offices and appoint persons of full capacity
  - Specify duties and delegate powers to manage the corporation's affairs
  - Appoint directors to officer roles, and allow one person to hold multiple offices
- Officer delegation is also subject to the same list of non-delegable powers

- Potential Scope of Delegation
  - The board could delegate nearly all of its role to a single managing director or a committee, except for the non-delegable matters
  - In certain corporations, the board's role could even be delegated entirely to members under a unanimous members agreement

- Factors Affecting Delegation Decisions
  - Size of the corporation
  - Nature and frequency of the corporation's activities
  - Frequency of power use
  - Expertise of the board and senior management
  - Risk and scale of delegated matters (e.g., real estate transactions, guarantees)
- Similar delegation rules exist in for-profit corporate legislation
- Case law is limited, but courts have recognized that directors may delegate authority to managers for operational matters, such as hiring and firing employees

## Due Diligence in Managing Risk in HR Matters

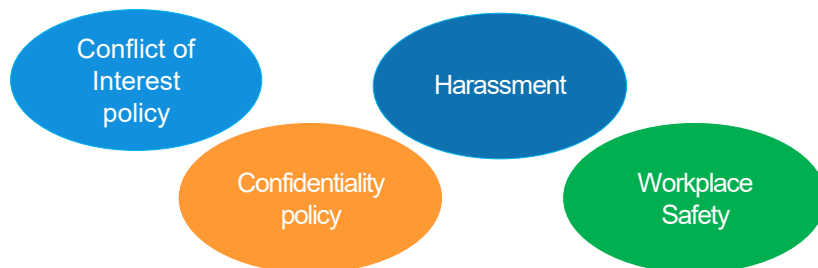
- The Board needs to lead by:
  - Regularly developing, implementing and updating a strategic plan in line with the mission, vision and values of the corporation (every 2 to 3 years), from which the corporation's operational business plan and then the annual budget are created
  - Developing and implementing an effective plan for the ongoing recruitment of new directors, as well as ensuring there is ongoing board training for existing directors
  - Developing governance and operational policies and ensuring their effective implementation, including ongoing compliance by the directors with the terms of such policies

- Developing and overseeing the budget process early in the board's term, as well as monitoring financial matters on a regular basis in line with the approved budget
- Developing a business continuity plan and regularly monitoring reserves
- Recruiting and regularly evaluating the executive director
- Overseeing staff through the executive director
- Promoting the professional public image of the not-for-profit corporation

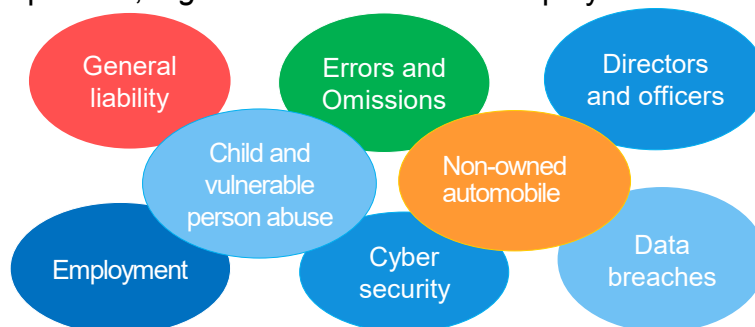
- The Board needs to build a strong and healthy relationship with the Executive Director:
  - What authority is being delegated to the executive director and what authority is required to remain with the board?
  - Need for a clear job description for the executive director and a succession plan
  - Need to ensure there is a good working relationship between officers and the executive director on day to day basis
  - Imposing limitations on the executive director is not the correct approach; rather proper delegation of authority by the board and its officers is what is required
  - Need to understand the limitations on operational capacity that the executive director may have at times

- There needs to be clarity on the Board's delegation to committees:
  - To the executive committee
    - The extent of delegation is determined by general operating bylaw and any terms of reference in place from time to time
  - To all standing and ad hoc committees
    - The extent of delegation is determined by the terms of reference
    - Committee members have a fiduciary duty to fulfill their committee mandate, which includes regularly reporting back to the Board on completion of the duties they are tasked with as well as any recommendations on new ideas

- Additional Due Diligence Measure
  - Understand the role of the board
    - Continually educate board members on legal duties of being a director and their responsibilities with employees and safe workplace expectations
    - Prepare and regularly update board manual with key legal documents
  - Development of applicable policies, e.g. and oversight



- Insurance policies, e.g. to ensure D&O and employment liabilities are insured



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

## Committees and advisory boards

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

## Establish effective risk management in operations

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

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