

## **NO PROFIT DOESN'T MEAN NO RISK**

### Liability and Governance Issues for School Boards and Not For Profit Organizations

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For use by members of the Canadian Bar Association – Alberta Branch

## *NOTICE*

This paper is made up from the slides of the oral presentation and are only intended to offer some thoughts and reflections about governance, director and officer liability, insurance, etc. and other matters related thereto. These documents are not to be construed as giving of legal, insurance or risk management advice or opinions either generally or with respect to any particular matter or transaction.

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“Children are always the only future  
the human race has: Teach them  
well”

## *Dey Report - Corporate Governance (1995)*

- 64% made changes because of Dey Report
- 64% had specific committee re governance
- 47% had committee to assess board
- 58% had outside directors only on nominating committee
- In 1995 disclosures 96% described the mandate of their board

## *Dey cont'd*

- 66% describe board mandate with specific reference to responsibilities
- 45% described decisions requiring board approval
- 24% (CEO and BOD) limits of Mgt. Authority
- 47% have orientation program for new directors

## *Follow up study – “Five Years to the Dey”*

- Survey of 1250 TSE listed CEOs
- 635 responded (51%)
- Response rate is 2-3 times the national response rate for participation in business surveys
- Results are within 3% if all companies participated

## *It was not a new Dey*

- 95% - Board size suitable for individual accountability
- 79% - involved in strategic planning
- 77% - majority of board unrelated directors
- 76% - internal controls and mgt. systems
- 76% - satisfactory compensation to directors
- 69% - CEO was not Chair or lead director
- 68% - only non-management on nominating committee

## *Not exactly a hay Dey*

- 60% - risk management systems in place
- 49% - orientation for new directors
- 48% - explicit attention to governance
- 48% - position description and objectives for CEO
- 39% - known procedure by which directors can retain outside advisors

## *Dey cont'd*

- 33% - separate nominating committee
- 28% - succession planning for senior mgt.
- 25% - communications policy
- 24% - process for assessing director effectiveness other than ad hoc discussion with the Chair
- 21% - Board meets occasionally without management present

## *Last slide but not the end of Deys*

- 18% position descriptions for directors
- 18% process for assessing board effectiveness
- Interesting request for guidelines
  - Board diversity – gender and race
  - Preparedness of International markets
  - How to prevent a long-standing board from perpetuating its own entrenched weakness, if there is no catalyst for change

## *The Hype*

- Gone are the days of lunch, sleep through meetings and pick up a cheque
- 1991 OSC reprimanded a Standard Trustco director who had not attended meetings in 12 years
- Personal liability, new environmental laws, tax legislation, high profile bankruptcies

## *The Reality*

- Directors rarely successfully sued
- Senate Banking, Trade and Commerce committee recommends liability be eliminated if director can prove they exercised reasonable prudence
- recent court rulings have lessened obligations on directors

## *Still in the news and real*

- *“Shareholders file \$78M suit against Philip”* Financial Post, Oct. 28, 1998
- *“Merrill Lynch directors sued on behalf of firm”* Financial Post, October 22, 1998
- *“Class action suits on the rise”* Globe & Mail, March 2, 1998
- *“Boards slow to embrace self-evaluation”* Globe & Mail, July 27, 1999

## *More news*

- *“Investor files suit against First Marathon over sale”* Globe & Mail, July 23, 1999
- *“Spar revolt to launch an era of activism?”* Globe & Mail, May 14, 1999
- *“YBM directors face footing own legal bills”* National Post, April 16, 1999
- *“The responsibilities that go with being on the board”* Globe & Mail, August 2, 1999

## *Not for profits are different?*

- Do they have a lower standard? NO!
- In fact may be more vulnerable
- 1993 article *“D&O Liability Exposure of Non-Profit and Privately-Held Organizations”* Dan Bailey & Katherine Bills
  - Market pressures – reporting and regulatory oversights for companies do not have the same monitoring effect on non-profits



## *Not for profits are different?*

- D&Os for non-profits receive little or no compensation and perceive their roles as voluntary and/or part-time, requiring only minimal attention to the org's affairs
- Limited resources for non-profits mean limited access to consultants & professionals
- Less able to indemnify, pay legal costs, etc.
- Public benefit trust and charitable orgs may have additional standards of trust/fiduciary

## *Are School Boards different?*

- In a word – NO!
  - Same financial and governance pressures
  - In Ontario MPPs had to file annual declaration of private holdings including spouses – Liberal Tony Lupusella's wife was a salaried employee of the Toronto Metro Separate School Board – behind all this is *conflict of interest*. (May 22, 1989)

## *More articles from the print media*

- “School boards taking fiscal hit on teacher retirement” November 26, 1995 – *“It’s devastating to boards and they can’t handle the fiscal burden this has put on them”* – Pat Smith
- 1996 22 school boards amalgamated in six regional boards and one province-wide board for Acadians and Francophones

## *More articles*

- SIP will top up on volunteer vehicles making it easier for parent drivers. Needed UARB to allow changes to Motor Carrier Act to move responsibility for coverage (May 26, 1997)
- “Nova Scotia to absorb school board deficits to keep teachers” (May 4, 2000)

## *What does this mean*

- It is only a sampling
- Financial pressures
- Liability issues
- Restructuring
- All part of the operational realities and the new order of things

## *PWC Strait Regional School Board Report (March 2002)*

- Challenges
  - Limited financial resources in the face of many competing demands
  - Increasing legal, regulatory and statutory reporting requirements
  - Complex financial and accounting transactions and related reporting and disclosure requirements

## *Strait Report Cont'd*

- New and ever-changing information processing systems
- Internal controls and management of risks
- Regular financial reporting, comparisons to plans, variance analysis and future forecasts

## *Education Act Regulations*

- 24(1) pursuant to s. 65(1) of the Act requires that each school board within 3 months of fiscal year end complete a report
- Includes:
  - Salaries and expenses and all benefits
  - On members (honoraria, stipends, and other taxable remuneration) and employees
  - Expenses include travel, conferences, meetings and professional development seminars

## *Community Colleges*

- Reimbursement (no stipend, honoraria, etc.)
  - Cannot be reimbursed as a member of a board or committee except “*actual and reasonable expenses necessarily incurred as a member of the Board or a member of a committee in accordance with a policy adopted by the Board.*”

## *Education Act*

- S. 10B – limits responsibilities of school board but include
  - All teaching and support staff
  - Policy development
  - Interaction with school advisory councils
  - KEY – carry out duties of as enumerated in s. 64(2)

## *Section 64(2) of Education Act*

- Subsections a to d – standard requirements to provide an educational program
- (f) - promote schools as safe, quality learning environments
- (l) – hire and pay superintendent and staff
- (t) policies for protection of students and employees from harassment and abuse

## *Section 64(2) cont'd*

- (v) develop regional strategic and business plans
- (ab) provide for the effective and efficient management of the financial affairs of the board
- (ac) supervise capital expenditures
- (aj) establish a public tendering and procurement policy
- Similar provisions in the Community Colleges Act are found in s. 63(1)

## *Section 64A*

- Commercial activity
  - “A school board shall not engage in or carry out any commercial activity, including lending, without the approval of the Governor in Council”
- “commercial” – engaged in commerce – the buying and selling of goods especially on a large scale

## *Section 64B*

- Unauthorized activity
  - “For greater certainty, a school board shall not engage in or carry out any activity that is outside the authority, powers, duties and responsibilities of the school board pursuant to this Act and the regulations.”

## *Section 82*

- Disbursement of funds

“The funds of a school board shall be disbursed only by the board, and if the board determines the services provided by it or some of them shall be provided by others, payment for those services shall be made only on certification of accounts in a manner satisfactory to the school board.”

## *Section 83*

- Financial Statements

- “Every school board for each fiscal year shall prepare financial statements in the form prescribed by the Minister and shall submit the statements to the Minister and to each municipality in the school district or school region before July 1<sup>st</sup> of the ensuing fiscal year.”
- See s. 72(1) of Community Colleges Act



## *Section 85*

- Audit committee s. 85A
  - “A school board shall establish an audit committee of the board composed of those persons and with the terms of reference prescribed in the regulations.”
- s. 84 – pick external auditor
- In Community Colleges Act it all falls under s. 72 and 73

## *Community Colleges – Special Immunity*

- See s. 86 for special immunity from liability arising out of:
  - Act or omission
  - Out of obligations of board or college
  - Acts of students

## *The Atlantic Procurement Agreement*

- For procurement for goods, services and construction
- Paragraph 1
  - Goods: \$25,000 or greater
  - Services: \$50,000 or greater
  - Construction: \$100,000 or greater
- Paragraph 5 – conducted by public tender
- Appendix B – includes school boards and community colleges

## *Additional standards and burdens*

- Strait Regional School Board Report
  - Indicated that the Board had various trust funds
  - Also indicated that there was a charitable trust
- This is of key importance
- Your standard of duty goes up when you are in a trustee situation. You have a fiduciary relationship
- The rules governing charities are different including proper accounting for tax purposes included reporting on financial statements, segregation of funds, etc.

## Saying

- *“If someone accused you of being a good employer – could you gather enough evidence to prove them right?”*



## *Due Diligence*

- “...to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.” s. 122(1) (b) of CBCA
- Essentially codification of the Common Law standard before the CBCA
- “reasonable” varies according to the qualifications and experience of the individual

## *Due Diligence*

- Common Law and statutory defence
- You must prove:
  - Balance of probabilities
  - All due diligence taken to prevent the offence
- “All due diligence” – lesser amounts of due diligence are not a defence
- After incident does not cure failure to exercise preventative diligence

## *Due Diligence*

- Maintenance of a standard of practice of care commonly acknowledged as a reasonable standard of care in that particular business or industry
- Has the standard been met?
- Whether there are special circumstances known (or should have been known) which require an increased standard

## *What is the standard?*

- Was the violation foreseeable?
- Specific rules, laws, codes, policy in the industry or workplace
- Customary practice in the industry (if it exceeds legal minimums)
- High level of potential hazard? probability of harm?
- High level of needed expertise and high ability in the accused to control the conduct involved?

## *What the courts will do*

- The courts will compare the amount of care *proven* by the accused to this reasonable standard, to see if it fell short.
- Due diligence helps to ensure you meet the standard and are potentially able to prove you meet it.

## *Prosecutions*

- Many cases settled through negotiation before going to court
- Conviction rate at trial is 60%
- Since 1997 fines range \$1 to \$125,000
- Alternative sentencing
  - Require paid advertising, employer/employee training, community service

## *Special Circumstance*

- Gravity of potential harm
- Alternatives available to you
- Likelihood of harm
- Degree of knowledge or skill expected of you
- The extent that underlying causes are beyond your control

## *Why is due diligence an issue?*

- Courts view OHS and Environmental offences as *strict liability* offences
- Unlike criminal liability – *not* necessary to prove *intentional wrong doing*
- Due diligence is the defence in strict liability cases
- You are *strictly liable* for the unlawful act unless you produce proof that you were *not negligent, ...took all reasonable care, etc.*

## *Due Diligence*

- Primary purpose: PREVENTION or RISK REDUCTION
- defence is a side benefit
- Management – a performance measure and risk reduction driver
- Legal defence
- Other legal: may avoid prosecution in first place & reduce sentence if just miss the standard

## *Take every precaution reasonable in the circumstances*

- “Take every precaution” is 0 risk based and is tempered
- “reasonable” – objective, common sense, operating at an optimal level...what would a jury of your peers who are unbiased, knowledgeable and motivated say about your actions?



## *Cont'd*

- “in the circumstances” – means that steps for reasonable care will vary depending on the risk, opportunities and constraints, knowledge, authority and other factors.
- No recipes. Laws and regulations are minimum standards. You have to take the initiative and review constantly. Standards are going up...continuous improvement

## *MYTHS – due diligence*

- Due diligence is documentation
- Due diligence merely regulatory compliance
- Due diligence is an attitude
- The Committee and the OHS/Environmental manager do the due diligence for the executive, company, etc.

## *The biggest myth*

- If you are generally due diligent in the workplace as to safety issues that you have a defence – NO
- The court is not interested in what you did GENERALLY
- You must provide evidence that specific steps were taken to prevent the alleged contravention.

## *What due diligence means*

- It does not mean accidents will not happen
- It means doing reasonable things to try to prevent harm to workers, etc.
- If an employer cannot demonstrate that it as a minimum has fulfilled all of its statutory duties, then it can never establish due diligence

## *Levels of Due Diligence*

- It operates at several levels simultaneously
- Employer
  - Comply with regulatory standards
  - Create new workplace specific standards that go beyond the regulatory standards

## *Good Faith Reliance*

- S. 123(4) director not liable for failure to act honestly and in good faith (re s. 122) if relies in good faith on:
  - financial statements by officer or auditor that represents they fairly reflect financial condition of the company
  - a report of lawyer, accountant, engineer, appraiser or other profession that lends credibility to statements made

## *Environmental Liability*

- One of the biggies
- Due diligence defence in statute and the Common Law
- Need Environmental Management System
  - written environmental policy
  - designation of person(s) responsible for envir.
  - Assessment or audit program (law and policies)

## *Environment cont'd*

- Establish reporting system - reports to BOD
- ongoing training for mgt. and employees
- contingency plans (corp. activities may arise)
- allocation of adequate resources for implementation and maintenance of environmental management system

## *Additional Steps - Environment*

- Keep informed of practices and standards
- Keep on agenda and be informed as member
- Env. decisions supported by expert advice
- Read env. Reports - be proactive - ask ?
- Ensure decisions involving the environment are fully reviewed and considered
- Respond immediately and personally to problems

## *Internal Responsibility System*

- Foundation of OHS legislation
- All parties share responsibility: employers, contractors, employees, suppliers, etc.
- Primary responsibility – based on each one's authority and ability to act
- Framework: participation, exchange information and right to refuse

## *Internal Cont'd*

- Dept. of Labour
  - Establish and clarify roles of parties
  - Provide support
  - Intervene appropriately when responsibilities not carried out

## *Who has a duty*

- Just about everybody
- The greater your control, the greater your accountability (section 23 – OH&S Act)
- Employer, constructor, contractor, employees, supervisors, self-employed, owner of premises, suppliers of goods and services.

## *4 pillars of system*

- Implementation of due diligence by employer
  - Continuous improvement
- Information exchange
- Committee structure
- Protection of individuals

## *Not for Profit- Due Diligence*

- Constitution and by-laws
  - review, in good standing - Jt. Stocks
  - activities coincide with society constitution
  - mission statement, annual reports, changes
- Financial
  - review last 2 years audited statements (read qualifications)
  - D&O insurance

## *Not for Profit - cont'd*

- By-laws allow for indemnification
- Is charity registered? Returns filed?
- Who are the association's prof. advisors
- Specific concerns
  - Significant capital assets - add/delete
  - Significant borrowing or lending
  - Is annual budget approved in advance
  - Is there a 3-5 year strategic plan

## *Not for Profit - more of the same*

- Entered/lost significant contracts
- Assoc. - union, history of labour relations, current contract (expiry date?)
- What is assoc. public profile/reputation? Media or government attention?
- Good standing with national body, business/professional associations
- Significant turnover in management, review employment contracts, job descriptions, employee policies



## *Not for Profit - More*

- Conflict of interest policy
- Substantial litigation, current events trigger default under financing or other agreement
- Review fundraising reports
- Personnel development policy and allocation of resources

## *Not for Profit - Directors*

- Attend a few meetings
- Review minutes
- D&O job description
- Unusual board turnover, skills of other directors
- How is board chosen? What is the nature of the board (fundraising, rubber stamp)
- Who is responsible for leadership?

## *Not for Profit – Other*

- What skills/experience do they need? What do you have to offer?
- Time commitment and commitment to goals of association
- Remuneration, expectation of donations
- Is it a good fit?

## *Personal Risk Management*

- Director is appointed but who is an officer?
  - Not always a title - Who is the “directing mind”?
  - The degree of control which a person exerts on a corporation, the degree of control over a particular operation, and the power to issue directives, orders and to supervise.

## *Duty to Manage*

- Know your org chart and admin. functions
- Get access to quality information
- Monitor important subjects (audit, compensation, environment, etc.)
- Follow up on resolutions
- Assess competency/integrity of management

## *Duty of Independence & Conflict*

- Be free of legal, work or personal constraints that prevent you from acting in the best interest of the corporation
- ascertain all direct/indirect business relations between corporation and shareholders, officers, etc. are in best interest of company
- same for subsidiary/affiliated companies

## *Self Dealing and Conflict*

- Aware of conflict and conduct of others
- Corp. key employees & contracts as assets
- Disclose personal interest
- Inside information to obtain secret profits
- Insider info. tipping of non-public info.
- Loans to D&Os or shareholders in self-deals
- Transactions with other D&Os and entities

## *Statutory Liabilities*

- Mergers
- Reduce share capital, dividends, purchase or redeem shares, loans to shareholders
- Wages and taxes (wages, source deductions, pensions, taxes)
- Minority interests - reorganization, change on debt/equity ratios, accuracy of representations

## *Statutory liabilities - legislation*

- Tax and securities
- Bankruptcy and insolvency
- Occupational health and safety
- Environmental
- Advertising
- Privacy of information

## *Potential Liabilities*

- Source - Dan Bailey "*Canadian Director & Officer Liability and Insurance*" 1993
- Acquiesce in conduct of other directors
- Aid/abet misconduct of others
- Appearance before stock analysts
- Attending director and committee meetings

## *Potential liabilities*

- Unlawful political contributions
- Awareness of internal mgt. controls
- Compensation of D&Os
- Continuing unlawful activity after notice
- Cooperation with regulatory authorities
- Acquisition resulting in loss of assets
- Corporate compliance programs

## *Potential Liabilities*

- Corp. financial delinquencies
- Responsibly dealing with corp. debt
- Defamatory statements
- Discrimination against employees
- Dishonored corporate cheques
- Dissent from improper acts of BOD
- Adequate disclosure system

## *Potential Liabilities*

- Establishing/termination employee benefits plan
- Executive committee proceedings
- Extending credit only as warranted
- Filing annual and periodic reports
- Guarding against corporate payment or bribes or making illegal payments

## *Potential Liabilities*

- Inefficient mgt. resulting in losses
- Informal liquidation of corporation
- Intellectual property infringement
- Minutes of BOD and committees
- Misuse or nonuse of EDP
- Procedures for monitoring management
- Monthly ops. reports & fin. statements

## *Potential Liabilities*

- News releases
- Public speeches re value of corporate stock or non-public information
- Qualifying corporation in other jurisdictions it does business
- Org. funds used to pay BOD liabilities
- Creditor claims if org. is near insolvency

## *Potential Liabilities*

- D&O receiving personal benefit or gain
- dissent from wrongful acts at meetings not attended after reviewing minutes
- Reliance on reports w/o reasonable cause
- Reports of auditors and audit committee
- Reports to regulatory agencies
- Sale/transfer of assets for less than adequate consideration



## *Potential Liabilities*

- Shirking responsibility
- Statements of corporate policy in areas that frequently generate litigation
- Supervision of internal audit procedures
- Supervision of subordinate employees

## *Risk Checklist - Board Organization*

- Structure is clearly outlined in bylaws
- Specific lines of authority - BOD/staff
- Purpose clear in bylaws
- Duties of officers described in bylaws
- Bylaws - election to BOD, tenure of board members and appointment to committees
- Power of executive to handle issues between meetings

## *Board Organization cont'd*

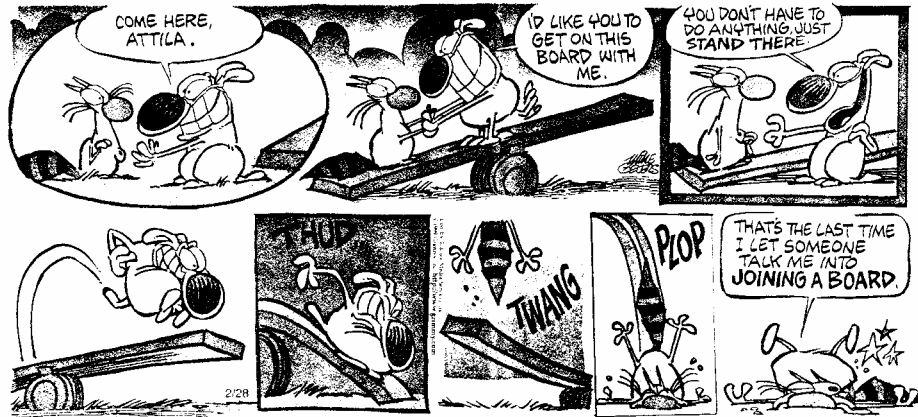
- Committee responsibilities in writing and copies to members
- Work is assigned through committees and they are reviewed and evaluated periodically
- Board chair supervises committee chairs

## *Board Organization cont'd*

- Written job descriptions for BOD members
- Bylaws specify attendance expectations, filling vacancies, staggered terms
- Nominations to board - criteria - expertise in resource development, program development, evaluation, finance, personnel, marketing
- Ability to represent with community groups and reflect issues that affect operations

Mother Goose & Grimm

By Mike Peters



## Recruitment

- Demonstrate interest in society and commitment to goals, take on assignments, attend meeting
- Nominating Committee solicits nominations to BOD from BOD, clients, staff and active society participants
- Orientation process for new BOD members
- Identify and train for key leadership positions, succession, Board manual

## *Board Meetings*

- Regularly scheduled, sufficient to ensure control and direction of society, attendance is recorded
- Materials sent in advance for review
- Primarily policy, planning reviews, authorization and evaluation of society
- Written and circulated minutes
- Regular reports from committees to BOD

## *Board Minutes*

- Good minutes are good housekeeping
  - Help prevent future misunderstandings
  - Reference source when implementing decisions taken at a meeting
  - Information to directors or members unable to attend a meeting
  - KEY – written evidentiary record – consideration of issues, and there were proper intentions and motives

## *Minutes cont'd – critical matters*

- Sensitive and confidential issues
  - Key personnel
  - Employee terminations
  - Critical decisions
    - Be extra careful and thorough
    - Have them reviewed by legal counsel
  - *In camera* meetings – if minutes are taken they can be kept in privileged files of law firm or recorded and prepare transcriptions on an “as required” basis

## *Minute form and content*

- Date, time and place
- Name of chair and secretary
- Persons present, who is absent, when people arrive or leave meeting, it affect quorum and who participated in the decision, etc.
- Motions properly moved, seconded, passed or defeated
- Rulings of chair, nature and result of any objections that were raised

## *Minute form and content cont'd*

- Names of main speakers during debate and summary of important and relevant issues raised during the debate of motions
- list of all important documents presented (should be attached to minutes or stored and named for ease of retrieval and reference)
- Commitments made by officers, directors or others at the meeting
- Minutes reviewed and signed by chair and secretary

## *Help for the secretary*

- Take clear notes and prepare as soon as possible after meeting
- Minutes should be objective. Personal comments and expressions of opinion to be avoided
- Use language that helps people understand what happened at the meeting and in context

## *More help for the secretary*

- Insert full text of all resolutions
- Record events in the past tense
- Allow the secretary to ask questions to clarify the meaning of motions, proposals, comments, etc. (It is preferable to have motions written and presented to the secretary before the meeting)

## *Special tips*

- Try and relate actions at a meeting to date of meeting and number on the agenda circulated
- Allows for ease of reference for those not there and for later follow up
- Distribute minutes as soon as practicable and no later than before the next agenda is circulated. Once corrections made and approved then they are signed by the chair and retained by secretary.
- Review and correction ensures that minutes are accurate. Errors should be corrected by moving an amendment to the motion to approve the minutes. There should be no discussion of the business of the previous meeting.

*Benjamin Franklin*

“He that lives upon hope will die  
fasting”

*Robert Patzelt*

“Trust in God but tie up your own  
horse”



## *Planning and goal-setting*

- Process for forecasting and for planning
- BOD approves operational goals that reflect society purposes
- Administration and program operations are time-limited and reviewed periodically
- Planning process includes volunteers, consumer representatives in determining delivery of services

## *Use the “SMART” system*

- Specific – articulate exactly what you want
- Measurable – you must be able to count something
- Attainable – it must be possible given your features, assets, limitations, timelines
- Realistic – test it on how you present it to others – If you are defensive about your goals, it probably lacks realism
- Time-based – everything needs a completion date

## *Missed goals*

- Only one thing to note
- Missing a target or goal does not mean you failed. You achieved a different result
- You must tell the truth, reevaluate and set another more realistic target date.

## *Decision Making*

- Policies, procedures and standards to guide decision making
- Procedures for presentation to BOD
- Executive Director ensures BOD has all relevant information for policy decisions
- BOD has opportunity to consider issues
- Policy is made proactively for attaining new goals and directions (seldom reactive)

## *Evaluation*

- Internal evaluation of BOD, administration and program evaluation
- Standards of performance to measure effectiveness
- Proper collection of statistics to meet planning and reporting requirements
- Service accessible to consumers
- Costs are appropriate for services

## *Public and Community Relations*

- Cooperation with other organizations
- BOD and staff participate actively in other community planning programs
- Opportunity for input from consumers, funders and community in planning
- Address national concerns of society
- Regular communication with other groups, public, private and government orgs.

## *Personnel*

- Staff vs. BOD function clearly defined
- BOD, staff and clients consulted on policy
- BOD sole responsibility for setting policy
- Executive Director responsible for policy implementation and internal administration
- Written personnel policies, job descriptions, job classifications

## *Personnel cont'd*

- Periodic review and revision of policies, etc
- Procedures to respond to employee grievances and disciplinary procedures
- Regular performance reviews
- Procedure for conducting performance review of Executive Director

## *Finance*

- BOD has finance committee
  - oversees all finance aspects including legal financial requirements and that society fiscal policies are followed, regular reports to BOD
- Committee assists staff in annual budget preparation and monitors expenses
- BOD approves annual budget and regularly reviews reports of operating budget

## *Finance cont'd*

- Financial reports are adequate as management tools for program areas
- Follow GAAP
- Annual audit that meets legislation
- BOD responsible to ensure society is in fiscally solvent financial position

## *Laurie Beth Jones*

“Make sure you have – and preserve  
– your own set of eyes

## *The audit committee*

- Recommendations of the Strait Regional School Board Report
  - Charter an audit committee (required by law s. 85A)
  - Audit committee charter: purpose, authority, composition, meetings and responsibilities.
  - Responsibilities include: financial statements, internal control, internal audit (liaise with Department of Education), external audit, compliance with laws and regulations, financial reporting and other responsibilities as assigned.

## *Audit committee cont'd*

- Audit committee members recruited from region
- Minimum of quarterly reports and ensure a system of regular financial reporting

## *Examples of risk indicators*

- Frequent organizational changes
- High turnover of senior management and staff
- Lack of succession plans
- Inexperienced management
- Autocratic management, management override or inappropriate “tone at the top”

## *More risk indicators*

- Untimely reporting and poor responses to audit committee inquiries
- Excessive or inappropriate performance-based compensation
- Unusual results and trends
- Lack of transparency in the business model and purposes of transactions

## *More risk indicators*

- Exposure to rapid technical, regulatory and other changes or events
- Overly complex organizational structures and transactions
- Ongoing or prior investigations by regulators or others



## *Audit committee – basic assessment*

- Financial statement and budget reviews
- Operating reviews
- Information technology changes
- Legal briefings
- Understand senior management compensation programs
- Meetings with senior management
- Current and emerging risks and issues

## *Audit committee – financial reporting*

- Review financial statements and recommend approval to the board
- Review periodic reports
- Management overview of financial results quarterly and for the year
- Critical accounting policies
- Developments in auditing, acctg. & reports

## *Audit committee – process control*

- Compliance with codes of conduct
- Control policies and procedures
- Management assessment of third party providers
- Internal and external auditor control observations and recommendations
- Compliance with regulations

## *Audit committee – audit process*

- Coordination of internal and external audit effort
- External auditors – engagement letter, audit team, independence letter, scope, procedures, timing of audit, audit results, audit reports, other non-audit services performed, executive sessions

## *Audit committee – internal audit department*

- Assess needs for internal auditing
- Mandate and objectives
- Budgeting, staffing and resources
- Scope, procedures and timing
- Audit results and reports
- Executive session
- Compensation of chief auditor

## *Resource Development*

- Resource development plan approved by BOD to ensure adequate financial resources to meet society objectives
- Plan for alternative funding when time-limited funding expires or phase-out of services
- Diverse funding base - reduce risk if loss of funding and innovation in getting new funds

## Carrying on Business

- Beware you are not *ultra vires* Society Act or Income Tax Act or own objects
- Not a lot of case law *Shaw, Woolsey & Stoney v. Real Estate Board of Greater Vancouver*, [1974] 5 W.W.R. 193 (B.C.S.C.)
- Is there a similar *private-sector* business with similar activities and org.

### *Shaw, Woolsey & Stoney v. Real Estate Board of Greater Vancouver*

- Unsuccessful declaration that the multiple listing service was *ultra vires* of the objects of the Real Estate Board
- Also argued restraint of trade and being engaged in business activities
- One does not necessarily become a business just because it encourages or is involved in a business-like activity
- The accumulation of a reserve is O.K. provided used to further the org's objects

## *Carrying on Business*

- Is the activity profit-oriented? What are the profits going to be used for?
- Is the activity clearly authorized by the objects of the society?
- Revenue Canada is far more attentive
- BOD could be liable for any consequences that are found adverse to the society

## *Ultra vires and Unauthorized*

- Activities within corp. powers, be obedient to charter and bylaws
- Compensation and benefits to D&Os verified as reasonable
- Consult counsel as to powers under statutes, charters and bylaws
- Distribute assets only after making provision to pay debts

## *Keep Your Stick On The Ice*

- Be inquisitive, adequate investigation
- Use experts, legal, auditors, corp. officers
- Decide based on intelligent and adequate information
- Inspect corp. books, records and financial statements - understand before signing
- Use personal expertise and that of others

## *Indemnification*

- Federal and provincial Business Corp. acts generally provide for indemnifying D&Os
- Includes costs, charges, amounts to pay settlements or satisfy judgments
- If acted *honestly* and in *good faith* with a view to the *best interests* of the entity
- If criminal action enforced by monetary penalty – if reasonable grounds for believing conduct was lawful

## *Indemnification Incomplete*

- Insolvency or insufficient cash flow to pay losses or expenses
- Indemnity is often discretionary – composition or attitude of board may change (refuse to indemnify)
- Public policy – Ontario – derivative actions – need court approval – usually only get court costs

## *Canadian Claims Experience*

- Past, current, prospective employees or unions – 10% of claims
  - Wrongful termination
  - Breach of employment contract
  - Harassment/humiliation
  - Discrimination
  - Employment conditions and safety
  - Union or other contract group

## *Canadian Employment Claims*

- Senior employee, non-profit trade assoc.
- Dismissed due to budget cuts, did not want to pay severance
- Memo “not meeting the expectations of the board”
- Sued assoc. and board – defamation, memo damaged reputation and ability to obtain future employment

## *More Cdn. Employment Claims*

- Social services org. agreed with union to increase employee death benefits from \$25k to \$60k.
- Agreement not incorporated into collective agreement. Board forgets to tell insurance broker to increase limit.
- Employee dies and widow sues for difference against board as being negligent in failing to ensure the increase of insurance coverage



## *Canadian Experience cont'd*

- Customers, clients and consumer groups account for 48% of claims
  - Debt collection/foreclosure
  - Extension/refusal of credit
  - Lender liability
  - Trade practices (deceptive – restraint of trade)
  - Product/service – cost/quality

## *Canadian Experience cont'd*

- Competitors/suppliers/other contractors account for 4% of claims
  - Anti-trust
  - Intellectual property infringement
  - Defamation – product/company
  - Breach of contract

## *Oh Canada – More Claims Experience*

- Government and Regulatory Agencies (5%)
  - Anti-trust
  - Environmental
  - Dishonesty and fraud
  - Taxation (big one for not for profits)

## *Canada Eh! – More Claims*

- Third Party Claimants – all others (8%)
  - Environmental
  - Prospective acquisition of a company

## *Wheeliker case*

- Non-profit to enhance economic activity in the Town of Louisbourg
- 96% of shares owned by the Louisbourg Harbourfront Society and 4% by directors
- Maximum of 7 directors and all had to own at least one share
- Failed to remit income taxes \$17,886.91

## *Wheeliker cont'd*

- Tried to argue not *de jure* directors as defined by the Act
- Federal Court of Appeal justice would not buy it
- Agreed not directors under the Act but “*I do not believe the respondents can raise this lack of qualification as a defence to their liability under subsection 227.1(1) of the ITA*”

## *Wheeliker – Try a Different Standard For Not For Profit*

- Get your teeth kicked in
- *“I would add whether 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 not meet the single standard of care provided for in 227.1(3) of the Act*

## *Keep Trying*

- *“In my respectful view, it was an error for the Tax Court judge to conclude that the standard of care was different and less rigorous in not-for-profit corporations.”*
- It gets worse – the problems started in November of 1992 and the directors learned of it in January 13, 1993 at a board meeting

## *Here's What The Justice Says*

- *“Yet, somewhat surprisingly, the failure to withhold and remit the sums due lasted until October 1993 when the Corporation went bankrupt. This means that, as of their learning of the financial difficulties of the Corporation or its failure to remit, all of the respondents were under a positive duty to act to prevent failure to make current and future remittances and not simply cure default after the fact. At best, the duty existed for some directors nine months. At worst, for others, the omission to prevent failure lasted 12 months.”*

## *Sympathy But No Cigar*

*“As sad as it may be, especially with respect to the respondents who acted as benevolent directors and gave of their time. It is simply not possible to find that they have exercised the degree of care and diligence expected to prevent a failure to withhold and remit when such known failure was allowed to repeat itself uninterrupted for one year.”*

## *My Favorite Case: Moosejaw Kinsmen Flying Fins. v. MNR*

- Hired head coach & others on part-time basis (all but one had other jobs)
- Each – written contract – set hourly rates – independent contractors – no payroll deductions
- Pool leased from municipality on non-exclusive basis
- FCA had sympathy but they were deemed to be employees based on 4 part test: control, ownership of tools, chance of profit, risk of loss, etc.

## *Last Canadian Claims Slide*

- Shareholders, investors, partners and members – 25%
  - Merger, divestiture and acquisition
  - Recapitalization
  - Proxy or consent solicitation
  - Financial Performance
  - Exec. Compensation/golden parachutes
  - Public offering & dividend declaration
  - Inadequate disclosure
  - Gross negligence/breach of fiduciary duty

## *Organizational Risk Management*

- Step 1 – identify risks
- Step 2 – evaluate risks
- Step 3 – reduce risks to an acceptable level
- Step 4 – obtain insurance or make other financial arrangements as needed
- Step 5 – monitor activities, the environment, risk control actions, as needed

## *Identifying Risks*

- Consult with others in the org. to learn about the risks they perceive
- Review procedure manuals for legal compliance, dangers and feasibility of implementation of procedures (*setting impossible standards invites litigation if you cannot live up to them*)

## *Identifying Risks cont'd*

- Reference sources – checklists from insurers, brokers and risk management manuals
- Government – look at Dept. of Labour, workers compensation, other orgs. for info.
- Review responsibilities of volunteers and staff and their ability to perform tasks – look at their *skill* and *judgment*.

## *Identifying Risks – cont'd*

- Walk the premises – look for hazards.  
View the setting from an emergency situation and from the perspective of others
- Risk audit – invite (as appropriate) insurance broker, lawyer, safety engineer, risk manager, director from a similar org. – tremendous resource of people in community – trade a favour



## *Controlling Risk*

- Avoidance – prohibit the activity
- Modification – change the activity to reduce the likelihood or severity to an acceptable level
- Retention – accept the risk intentionally or because there is no alternative
- Transfer – shift to another – contractual transfer – indemnities, insurance, etc.

## *Modification – The Usual Way*

- Written guidelines – policies and procedures – incident reports, speaking to media, record retention, specific to activity
  - Beware if you ignore written policies
  - Need regular monitoring and enforcement
- Training – everything from lifting heavy objects to interviewing volunteers – it reduces mistakes and lawsuits

## *Modification – The Usual Way*

- Safety programs – inspection of physical environment
  - Regular inspections and follow up
  - Commitment from the top
  - Monitor dangerous behavior patterns
  - Reporting of potential hazards
- Ensure legal compliance – pensions, local health rules, employment law, etc.

## *Responding to a Potential Liability Incident*

- Steps to help prevent or mitigate a claim
- May reduce misery & negative publicity
- Preserve legal defence & insurance coverage
  - Express concern for the injured party – Aid without admitting or implying liability – people less likely to sue if treated well
  - Do not admit liability – do not say anything about why you think the incident occurred

## *Responding to Incident*

- If car accident – consult legal before paying fine or ticket
- Unless immediate changes are needed to protect safety – do not modify conditions until reviewed by legal
- Write down names of witnesses and other information
- Take photos

## *Responding - More*

- notify insurer, legal and sponsor
- Do not assume other party liable or that you do not need to report incident
- Insurance – notify broker and insurer – if doubt about which policy – notify all
- Legal – good early advice important – discuss with insurer who will be counsel

## *Responding – More Again*

- Sponsor – notify according to your procedures
- ASAP – record your recollections – memories fade – answer 5W's
  - Limit your statements to what YOU know
  - Do not assume anything
  - If using other information – note source

## *Responding – last slide*

- Do not discuss the incident without getting proper advice – legal, PR, etc.
- Support the people involved – distress of staff involved can be made worse by a feeling of being ostracized
  - May need extra support to maintain morale
- Response plan – have one before the accident, train staff in its use

## *General Liability Insurance*

- Usually part of a package and includes property insurance
- Look carefully at exclusions
- Areas of concern: board action, vehicles, boats, rendering “professional” services
- Concern yourself with types of harm that are not *bodily injury* or *property damage*

## *Volunteers*

- Two key concerns
  - Injury to a volunteer
  - Harm caused by a volunteer
- Does definition of “insured” include volunteers – check endorsement
- Do you have the insurance coverage for what you intend to cover or thought was covered?

## *Motor Vehicle Coverage*

- Obvious need, often missed or not met
- Volunteers and staff use own cars
- Insurers like to reduce exposure for non-owned vehicles
- Org. can get drivers to carry a specified minimum of insurance with the org. insuring damages in excess
- Problem: shift to volunteer. Volunteer needs to verify they are covered when doing org. work and org. needs to ensure volunteers have cover

## *Coverage Gaps*

- What about intentional wrongdoings – defamatory statements, etc.
- Claims in excess policy limits
- Duty to defend – does it reduce policy limit?
- Use of umbrella, all coverages from one insurer, etc.

## *Liability Mistakes to Avoid*

- “Premises policy” – only covers incidents at the office – no good if out in the field
- No coverage for “personal injury” claims – e.g. defamation
- Relying only on D&O to cover the org.
- Overlooking coverage for volunteers
- No cover for injury to volunteers

## *Liability Mistakes to Avoid*

- Thinking your general liability policy covers employment disputes
- Switching insurers to save a few \$ - stable and long term relationships are valuable
- Ignoring non-owned auto exposures (boats and other transportation too)
- D&O limits or other limits too low
- D&O policies that do not cover non-monetary claims- brought to force change not get \$
- Finished goods cover – if you produce & sell stuff

## *D&O Insurance Policies*

- This is an indemnity policy
- Protect D&Os acting in their executive capacity (Clause 1) - typically past, present and future directors
  - Usually no deductible
- Corporate reimbursement (Clause 2) – pay on behalf of org. to the extent it indemnifies D&Os
  - Usually a deductible and requires by-law, contract, articles etc. to indemnify

## *D&O Insurers*

- 1991 Wyatt Survey – Chubb (24%), Guardian (23%), Encon (13%), Guarantee (11%), Stewart Smith (10%), Others (19%)
- Wyatt survey – 136 not for profits surveyed  
59% carried the insurance



## *Why Buy D&O Insurance?*

- Board and others willingness to risk personal liability
- The organization's ability to indemnify
- The organization's financial resources to mount an effective defence and pay settlement or judgment
- The extent that effective risk management can reduce the exposures
- The anticipated likelihood and expense of claims
- The cost of coverage

## *Policy Continued - Definitions*

- "Loss" – means the total amount which any Insured Person becomes legally obligated to pay resulting from "Wrongful Acts". Loss does not include fines and penalties imposed by law or matters uninsurable under the law.
- "Wrongful Act" – means any actual or alleged error, misstatement, misleading statement, act or omission, neglect or breach of duty committed in his insured capacity or such other matter claimed against him solely by reason of his serving in such insured capacity.

## *Policy Exclusions*

- Key exclusions
  - Insured elsewhere – e.g. bodily injury, property damage, pension liability
  - Uninsurable by law – insider trading, personal gain, fines and penalties
  - Outside the intent of the policy – pollution (clean up costs), insured suing another insured

## *Other Policy Exclusions*

- Personal profit or advantage
- Fines and penalties
- Punitive or exemplary damages
- Criminal or deliberate fraudulent acts
- Failure to maintain adequate insurance e.g. Medical malpractice, etc.
- Employee claims from collective agreements

## *Policy Exclusions cont'd*

- Acts or omissions of another entity or due to their status as director, officer, etc.
- Pollution
- Nuclear hazard
- Violations, obligations by statute or common law with respect to fiduciary duty
- Medical or other professional services

## *Policy Extensions*

- Employment practices liability – coverage for an expanded group of insureds including employees for claims arising out of employment – wrongful dismissal, discrimination, sexual harassment, etc.
- Predetermined counsel
- Pollution coverage (very narrow) – not for clean up – e.g. diminution of share value and cost of defending a pollution related action

## *Other Extensions*

- Allocation of defence costs – predetermined percentage for covered vs. uncovered persons or matters
- Entity coverage – provide defence and settlement against the entity – usually for specific claims

## *Some Things to Look For in D&O Coverage*

- Covers past, present and future directors
- Definition of “claim” is broad and includes any circumstances in which the director has knowledge of a fact which may give rise to liability – not just “commencement of proceedings”
- Ensure retroactive reporting dates do not exclude potential claims that could arise from past incidents

## *Some More to Look For*

- Policy may be void for material misrepresentation or non-disclosure
  - Ensure all directors review the completed application and it is reviewed by new incoming directors
  - “Severability” clause – misrepresentation or non-disclosure by one director does not void coverage for the others

## *Still More to Look For*

- Clarify insurer’s defence obligation in advance. Reimbursement for defence costs and how to deal with allocation issues
- Ensure policy limits are adequate: per claim, aggregate or annual basis and if include defence costs

## *More Once Again*

- Deductibles – corp. versus personal reimbursement
  - “presumptive indemnification” – the larger corporate deductible applies where the org. is legal permitted/obligated by articles/bylaws to indemnify but is unable or chosen not to do so
- Make sure covers heirs, successors and representatives of insured director (estate)

## *Last Slide on D&O Coverage*

- If you are a director and org. solicitor – make sure that the policy will cover you in both capacities to prevent coverage gaps
- Extended reporting or coverage periods – usually an option to purchase on policy cancellation or refusal to renew
  - Ensure a refusal to renew extends to terms, limits & premiums significantly different from expiring policy

## *D&O Claims*

- What is a claim – Chubb policy

*A written demand for monetary damages, a civil proceeding commenced by the service of a complaint or similar pleading, a criminal proceeding commenced by a return of an indictment, or a formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document*

## *Claims – Notice – A Bit Vague*

*Information and cooperation as it may reasonably require, including but not limited to a description of the Claim or circumstances, the nature of the alleged Wrongful Act, the nature of the alleged or potential damage, the names of actual or potential claimants, and the manner in which the Insured first became aware of the Claim or circumstances (from Chubb)*

## *Claims Notice*

- Seems to require some form of notice other than a reasonable suspicion that a claim potentially exists
- Seems to require some written threat, demand or formalized process or proceeding

## *Claims Notice Correspondence*

- Names of D&Os involved
- Names and contact information for the org. (the originator of the claim will be the recipient of insurers communications)
- Copy of complaint or other written info
- Whether the summons has been served
- Identity of defence counsel or org.
- What preliminary steps have been taken
- Request of insurer to consent to the incurring of costs, charges and expenses



## *Insurer Response*

- Decline coverage with respect to certain matters
- Reservation of rights
- defence counsel issues
- Allocation of defence costs & expenses
- Request for further information

## *Declination of Coverage*

- Insurer will review facts and policy
- Exclude such items:
  - Fines, penalties, punitive damages
  - Elements of claims not covered (personal profit, fraud, etc.)
  - Claims outside capacity of D&O
  - Claims prior to inception date of policy
  - Claims of subsidiary before entity was part of insured's network
  - Claims against the org. itself

## *Reservation of Rights Letter*

- First communication & least understood
- Simply – providing coverage but right to decline at a later date
- People panic – use it to raise coverage issues early and deal with them constructively
- May include: areas of claim where exclusion may apply; misrepresentation or non-disclosure issues; and facts insufficiently clear to indicate capacity in which the D&Os were acting

## *Defence Counsel*

- Rejection – usually lack of expertise, conflict of interest
- Insurers and insureds usually trying to reduce costs and eliminate duplication
- Your own transactional lawyer may be a witness or defendant
- Interim funding and claims handling should be addressed in policy and in advance of the claim

## *Status Reports by Counsel*

- Initial and ongoing strategy including factual analysis as to liability/damages
- Timetable for discovery
- Copies or brief of significant documentary evidence, pleadings, correspondence
- Court and discovery dates, settlement conferences, etc.
- Documentation of all settlement demands

## *Key Success Factors for an Effective Board of Directors*

- Outstanding leadership
- Unquestioned legitimacy and effective power
- Enlightened definition of function, role and responsibilities
- Outstanding competence
- A supportive and functional culture
- Efficient management of function, structure and process

## *Problem Signs*

- Board Leadership
  - Lack of leadership in focusing on central issues
  - Chair lacks knowledge, attitude & skills
  - Board functions overlooked, downgraded or blocked by Chair
  - Important topics/problems avoided because of sensitivity and resistance of Chair
  - Board preempted by CEO/ED who is Chair

## *Problem Signs*

- Legitimacy and Power
  - Members without power and voice
  - Unaccountable minority control blocks
  - Management or staff takeover or preemption of board
  - Job of CEO and Chair combined
- Job Definition
  - Unclear and disconnected from org's strategic agenda
  - Lack of board evaluation and director effectiveness

## *Problem Signs*

- Competence
  - Lack of meaningful qualifications for directors and the Chair
  - Too many insider or related directors
  - Lack of needed expertise and knowledge
  - Lack of ordinary member/shareholder/stakeholder point of view

## *Problem Signs*

- Board Culture
  - Board is stuck in negative and dysfunctional culture
  - Board is passive and/or reactive
  - Failure of directors to dissent
  - Inability to change approach or unwillingness to upgrade board operations

## *Problem Signs*

- Board Management
  - Board not facing critical problems including emergencies and special situations
  - Poor administration of board tasks
  - Meetings are disappointing & frustrating
  - Poor organization of board committees
  - Lack of needed and well-organized information
  - Board too large to function effectively
  - Lack of board succession planning

## *Unproductive Meetings*

- Poor agendas – too much on routine and unimportant and too little on the important
- Reporting and repetition of material that was already sent out & reviewed by board
- Too much disorganized/undigested info.
- Meetings that turn into management discussions of operating problems

## *Unproductive Meetings*

- Decisions made or issues/positions jelled too late to benefit from thorough analysis, questions and advice
- Meetings too long or too short
- Closing off discussion or cutting off dissenting analysis prematurely
- Process without substance – slave to old routine
- Too many or too few meetings

## *A Few of My Favorite Things - NOT*

- Too much time spent on the trivial (chunky soup - spoon or fork? WHO CARES!)
- Short term thinking (or worse – rehashing the past)
- 3-Rs – review, rehash and redo ~ what staff has already done
- CEO/ED leaky accountability – boards relate officially with other staff by giving orders or judging performance

## *A Few More*

- Authority leak – unsure of division of responsibility – safe executive response is to take it to the board – instead of clarifying whose decision it should be
- Side meetings – “talking in class” – bad manners and disruptive
- Repetitious debate and time wasters – practice self restraint. Contribute new fact, idea or if it assists others in reaching a decision

## *A Final Few More*

- No holding back – have open, honest and frank discussion – discussion for board ears only and it is left in the boardroom
- See the big picture – may be representing a region, etc. but have a moral and legal obligation to act, speak and vote in the best interest of the organization as director
- Ruts – comfortable but are repetitious and settled way of doing things. Avoid sitting in the same spot, change rooms, cities, refreshments, have variety



## *Last One*

- Minutes are not reports – Do not use minutes as substitute for proper reports
  - Board should not get the minutes of committees but regular reports from committees on what they are doing (one page or so)
  - Board members have enough information to digest
  - Staff will say overburdened – one page reports do not take that long to prepare. Staff exist to do the necessary tasks that cannot be done by volunteers
  - Proper governance will free up a lot of “wasted” staff time and activity

## *Director Performance Standards*

- Overall good judgment
- Compatibility with group – Team Player but independent
- Major contributions in the past
- Special skills, experience – legal, financial, marketing, etc.
- Public profile and prestige
- Contacts: fundraising, special contributions
- Overall value of contribution in fulfilling board duties

## *Board Evaluation*

- Written and clear policy including definition as to what the organization's role is
- Long and short term objectives established that meet the expectations of the organization and members
- Specific plan for meeting objectives

## *Board Evaluation*

- CEO/ED job is defined and board has confidence in that person
- Standards of performance are in place and communicated to management
- Board supports CEO/ED with assistance and counsel
- CEO/ED succession issues dealt with

## *Board Evaluation*

- Issues identified, solutions determined and action taken on all major problems
- Duties and responsibilities of board and committees are defined and carried out
- Recruiting procedure for board members and plan for a sound board including retirement plan for directors

## *Board Evaluation*

- Constructive board meetings including an adequate flow of information for the board to carry out its duties
- Adequate staff support for board & committees
- Full and fair reporting of the organization's affairs to members
- Proper legal and other documentation complete and up to date

DILBERT®

By Scott Adams



## *You Are Not Alone!*

- 1998 Heidrick & Struggles with *The Corporate Board* did a survey of 3000 of largest US companies
- Less than half of chairs conduct board evaluations and less than one in five conduct individual director evaluations
- Greatest benefit is not from the data but the group discussion it generated

## *You Are Not Alone*

- Generally an outside director leads discussion of results (usually chair of nominating or governance committee)
- 23% of chairs felt it “*would undermine the trust and cooperation of the board*” and 14% believed that evaluating individual directors “*would make it harder to recruit good directors.*”

## *You Are Not Alone*

- Apprehension may be due to the fact that only half of the companies conducted *confidential* director evaluations
- They should always be *CONFIDENTIAL* – The purpose is self-improvement and full disclosure is not needed for that
- The purpose is for improving effectiveness

## *You Are Not Alone*

- NEVER use it for identifying and removing non-performing directors
- Avoid it as a chilling effect to enforce silence – see dissent
- All directors should feel free to state their opinion, whether or not they agree with the Chair, without fear of retribution. Results of evaluations should not be shared with the Nominating Committee – not a popularity contest

## *The Evaluation Payoff*

- 35% - improved communication and relations among directors
- 26% - helped board identify strengths and weaknesses
- 20% - improved board focus on corporate objectives
- 18% - Clarify roles and responsibilities of the BOD
- 15% - Improved efficiency & time mgt. of board
- 14% - Shift BOD agenda to strategic planning

## *Evaluating the “Informal” Structure*

- Who seems to know everything that goes on in the organization?
- Who seems to be asking all the good questions at board meetings?
- Who seems to be most organized on the board?
- Who unofficially “*needs to be present*” for important decision to be made or stick?

## *More on the Informal*

- Another way to check is – who do meetings regularly get scheduled around?
- Who seems to be responsible when:
  - Financial difficulties arise?
  - Administrative difficulties arise?
- Who do staff and other board members go to for advice? To gather support?

## *Suggested Criteria for Board Recruitment*

- Experience with organization
- Influence or connections to persons/orgs.
- Passion or dedication to the cause
- Member of target population
- Former staff member
- Former or present volunteer
- Former or present stakeholder of org.
- Skills, training or education in desired area(s)
- Other qualities (member of special group – sex, race, age, ethnic, etc.)

## *BIG BOARD, little board*

- Big – greater diversity
  - Greater community representation
  - Increase numbers involved in policy making
  - A lot of committees – need lots of members
  - Easier to get quorum
- Small – easier consensus on hard issues
  - No need for committees
  - Large board creates “inner board”



## *Ralph Waldo Emerson*

“Nothing is at last sacred but the  
integrity of your own mind.

## *Reasons For Lack of Dissent*

- Culture inhibits dissent – group think, unspoken rules of behavior, social ties, etc.
- Many directors unfit or incompetent – lack of professional ability, self-confidence, courage, poor training of the new board
- Lack of understanding of board process: lone wolves, loose cannons, lack of credibility, self serving, unprofessionalism

## *Reasons For Lack of Dissent*

- Directors lack necessary information – data from management incomplete, inaccurate, too little time to have input
- Dissent involves potentially large risks – conformity is cheap: Ability, wisdom, logic, credibility, reputation, status and power – on the line
  - Stress, personal costs

## *Constructive Dissent*

- Dissent early in issue development cycle
- Do your homework
- Degree and form of dissent appropriate
- Beware of dissenting too little/too much
- Understand the risks and costs of dissent
- Avoid personalities and politics – focus on evidence, analysis, conclusions
- Lobby for support
- Minimize personal & political carryover baggage

## *Constructive Dissent*

- Be responsible and courageous
- Look beyond the surface manifestations of dissent – significant interpersonal problems are often hidden below surface
- Be prepared to handle the legal problems of dissent – record it in the minutes, refuse to sign legal documents that have not been thoroughly checked and corrected.

*Alfred Lord Tennyson*

“The shell must break before the bird  
can fly.”

## *New Code of Board Behavior*

- Manage the affairs and business of the organization – due diligence, good faith
- Function as trustee and consultant – high standards of professionalism and performance
- Take the job seriously and do it well
- Do what is right

## *New Code of Board Behavior*

- Support those who are worthy
- Use the board routines and infrastructure – “work the system” – use of committees, recording of minutes, special presentations or reviews
- Get the information you need
- Build good relationships in the board and the organization network

## *New Code for Board Behavior*

- Create the right culture – open up the dialogue, encourage debate
- Rock the boat, IF NECESSARY
  - Repeated leadership mistakes lead to decline
  - Every decision needs to be fine tuned
  - All organizations make mistakes
  - Initiatives need to be reviewed, challenged, constructively criticized and even killed

## *The New Model on Governance*

- Love your baby but let it grow – administrative systems may overshadow broader purpose – “Where’s the beef”, dare to dream, challenge authority – even your own
- Focus on values not on events
- Focus on the external – avoid navel gazing, have a market-like external responsiveness
- Measure all functions and decisions against the standard of purpose – mission with outcomes

## *Directors' Manual*

- Summary of org. goals, mission & policies
- Org. charts – board, staff and committees
- Budget, chart of accounts, financial reports
- Expense policy and report forms
- List of directors, key staff [addresses and telephone (home and work)]
- By-laws

## *Directors' Manual*

- Committees, terms of reference, chairpersons and support staff
- Board minutes
- Annual meeting minutes and minutes of other meetings of members
- Long range plan
- Calendar of important dates
- Code of ethics
- Organization's statistics and relevant information

## *Are Your By-laws Complete?*

- Official name of the organization
- Mandate or purpose of the organization
- Who is eligible to be a member
- What are membership dues, if any
- How may memberships be revoked/cancelled
- How often must meetings be held and how
- How many members must be present for *quorum*

## *Are Your By-Laws Complete?*

- What officers are required, how chosen, how long do they serve
- What are the duties for the officers
- When are elections held
- What committees exist and how are members chosen
- How are by-laws changed

## *Miscellaneous*

- No place for secret ballots at the board.  
You have a right to know how people voted
- Confidentiality – e.g. salaries, other items – stay in your head and in the room
- Cliques – no place for voting allies
- Support the CEO/ED – avoid “we-they” attitude between board and staff

## *Miscellaneous*

- Performance reviews of CEO/ED – remember their performance is to be measured against agreed upon goals not whether they met your personal hopes or expectations. Employees are to *perform not conform*.
- Expenses – should be approved before payment. Treasurer approves others and Chair approves the Treasurer's



## *Toward Modern Governance*

- Big versus small – system to identify big issues and allocate time to those in priority
- Strategic forward thinking – go long term
- Be proactive – lead not react – spend more time *creating* versus *approving*
- Balance diversity and unity – Like a choir – sing one song without drowning out individual voices

## *Toward Modern Governance*

- Governance model to impose discipline – have something that allows you to be decisive without being impulsive, stick to job descriptions, stay focused
- Good information – the right amount, avoid too much, too little, too late or wrong data
- Balance control and over control (*meddlers & rubberstamps*) and use board time effectively

## *Delegation*

- The blinding flash of the obvious
    - Explain: what is wanted, when & why
    - Assign: responsibility and authority
    - Monitor:
      - Ensure it is on schedule
      - Detect any problems
- Monitoring is probably the most important of the 3

## *Board Versus Staff Relationship*

- The members decide who sits on the board
- The board:
  - Hires/fires the CEO/ED
  - Decides what it wants done
  - Sets the deadlines
- The CEO/ED
  - Decides who other staff will be
  - Decides how things are to be done

## *Crossing the Line*

- Directors should do their job not that of staff
- The CEO/ED reports to the whole board not individual directors
- Directors cannot order staff to do things – They should state “I apologize but I take my instruction only from the CEO/ED”
- CEO/EDs inadvertently invite board interference – discussing administrative matters should not be a request for a director’s assistance.

## *Crossing the Line – 2 Key Areas*

- The CEO/ED as a member of the board
  - CEO/ED is important and key to the org.
  - They are an employee and report to the board
  - Ensure that the dichotomy is preserved
- Administrative Committees
  - “advising CEO/ED about admin. matters
  - Ensure you *advise* not *order*
  - If CEO/ED follows every bit of advice – who is really accountable? CEO/ED or the Admin. Committee

## *Assessing if You are “Crossing The Line”*

- Do board, staff and volunteers have clear titles?
- Where do board committees approximate staff titles (i.e. administration, finance, etc.)?
- Where do board committees approximate volunteers?
- Where are staff/volunteers represented on committees? Is it appropriate?

## *Assessing if You Are “Crossing the Line”*

- Note if there have been any “turf” issues or problems between committee members, staff, volunteers and the board
- Note if there have been duplications of work or decisions between committee members, staff, volunteers and the board
- Note if decisions have been revisited by any other party

## *Improving Board & Staff Relations*

- Employment:
  - Valid and clear contract
  - Full and realistic job description
  - Fair wage and benefits
- Clear & confidential opportunity to deal with staff grievances to be brought to the CEO/ED, or if required, to the board

## *Improving Board and Staff Relations*

- Invite staff to present at board meetings to educate the board about their areas
- Invite staff to board social functions
- Use proper channels for using staff for board activities
- Clarify to staff when you as a board member are acting in a role other than as a board member

## *Yet Another Checklist Mini – Org./Board Checklist*

- Mission statement – reviewed and reaffirmed
- Review and evaluation of by-laws and approval at annual general meeting
- Was there an annual general meeting?
- Clear organizational goals
- Approved budget for the year including income for operations and fundraising

## *Checklist cont'd*

- Evaluated programs
- Evaluated CEO/ED
- Goals with timelines and action plans
- Elected Executive Committee for board
- Committees fully staffed
- Committees have clear structure & responsibility

## *Checklist cont'd*

- Is the Board fully staffed?
- Have we trained and integrated new board members?
- Have we successfully resolved conflicts between board members?
- Is our board properly representative of skills, stakeholders, etc.?
- Are board succession issues properly dealt with?
- Are board meetings productive?

## *Volunteers & Interviews*

- Need to match - determine the interests and abilities and their suitability for certain jobs, their “rightness” for the organization, style of operation and mission
- Recruitment – answer the concerns and questions potential volunteers may have and sell them on their ability to make contributions to the organization and/or derive personal satisfaction from helping

## *Not Corporate Hiring*

- You are fitting a person for *a job* not evaluating them for *the job*
- Employment interview: *Who can do this job?*
- Volunteer interview: *How can this person help us?*

## *Interview Preparation*

- List of possible jobs with descriptions of required work and qualifications
- List of questions to ask re qualifications
- Application form with background information
- Open ended questions to explore motivations of volunteer
- Information/materials on the organization & programs



## *Opening the Interview*

- Make them feel welcome. You are evaluation each other. Express appreciation for them coming
- Build rapport – explain what you would like to accomplish and how they might fit in the process
- Let them feel in charge – tell them the discussion is to decide whether volunteering is suitable
- Give them org. background info. Ask if they have questions about org. It allows you to “sell” the org. and discover interests and concerns

## *Conducting the Interview*

- Explore their interests, abilities and situation. Why are they volunteering and find out the type of work they prefer
- Discuss various job possibilities. Discuss options, see how they would approach various jobs – it reveals interest and person’s intentions

## *Interview cont'd*

- Discuss org. requirements: time requirements, training, procedures, confidentiality, etc. They are going to find out sooner or later. Don't be afraid to tell them
  - Robert's rules: People prefer to join a successful & well run org.
  - An honest decline at start is better than a disappointment later (resignation/fire)

## *Interview cont'd*

- **YOU ARE STILL RECRUITING** – at this stage
  - Do not forget to explain why each job is important to the org. and its customers
- Keep an eye out for “personality indicators” to match them to a situation where they will be happy
  - Consider the little things – smoking, individual vs. group work, paperwork, etc.

## *Interview – misc.*

- Do not assume what they are doing now as work qualifies them to be a volunteer
- Resist reaching conclusions – their comments on their intentions may not be a complete picture
- Shift from “open ended” exploration to “structured” interview to do matching – also a screening tool
- Interviewer!!! - with the skill to *perceive the unexpected talent*

## *Closing the Interview – Possible Steps*

- Make an offer of a possible position or politely decline stating no positions
- Explain what happens next: background and reference checks, second interviews, training, etc.
  - Explain process, time frame and schedule the necessary meetings
- Ask permission to conduct background and reference checks

## *Phone or phace to phace*

- Phone is less personal & harder to evaluate
- Face to face is generally used:
  - Job requires significant time commitment and/or higher motivational level on volunteer
  - Job requires great responsibility, capacity or skill above what is ordinary
  - Job is highly sensitive because of the nature of the work or relationships with types of people

## *Anthropologist - Margaret Meade*

“Never doubt that a small group of thoughtful committed citizens can change the world: Indeed it is the only thing that ever has.”

*The End*



Thank you for your attention

Go out and have fun

*Robert Patzelt*



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