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Directors and Board Governance: What is Leadership?

Margaret H. Mason, Q.C.
Partner
Norton Rose Fulbright Canada LLP
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Overview

- what role do directors play?
- what role does staff play?
- legal obligations of directors
- what is a conflict of interest?
- what is a divided loyalty?
- what role do members have?
- what are the classic “sins” of a poorly performing director?
- what are the qualities that make a good director?
- what does “good” governance mean?
- governance case studies

What Role do Directors Play?

- directors direct and control **all** activities of the society
- directors are the “deciders”
- why? – because they have the potential for personal liability for the decisions they make
- responsibility = liability

What Role does Staff Play?

- staff are under the direction and control of the directors
- the directors *delegate* certain decision-making tasks to staff
- in a well functioning organization decision-making powers are clearly defined
- “executive limits” policies
 - should be in writing
 - between board and CEO
 - should be regularly reviewed

Legal Obligations of Directors

- duty to act
- duty not to delegate*
- duty of care
- duty of loyalty

Duty to Act

- *must* participate in board activities
 - discussions
 - tasks
 - committees
- cannot be passive
 - risk of non-contribution (*Descheneaux* 2020 passive reliance on a more knowledgeable fellow director is insufficient to establish a due diligence defence to strict liability offence)

Duty not to Delegate

- directors themselves must make decisions which require the exercise of discretion
- can delegate implementation
- where is the line?

Duty of Care

- legal standard to which directors are held
- that of a prudent person managing the property of another
- cannot be reckless or cavalier
- bias to conservatism but does not mean the avoidance of *all* risk
 - thoughtful assessment of risk is required

Duty of Loyalty

- must act in good faith
 - acting with honest intentions
- legally obligated to avoid conflicts of duty and interest
- must act solely in the interest of the organization
- cannot have regard to own interests or personal/social/political views
- other roles/titles held by the individual cannot impinge on obligation as director
- disregarding the duty of loyalty is:
 - the most common failure of directors
 - the most significant cause of dysfunction

What is Conflict of Interest?

- an individual is in a conflict of interest when their *personal* interest interferes with their duty to the organization
 - direct or indirect
 - financial or non-financial

If a Director is in Conflict What is Required?

- best and highest standard of conduct – avoid conflicts
- establish a board culture, and policy, that inhibits/restricts conflicts
- requirements of section 56 of *Societies Act* must be followed

If a Director is in Conflict What is Required? (cont'd)

- requirements of section 56 of *Societies Act*
 - a director has a conflict
 - if he or she has a direct or indirect material interest in a contract or transaction or proposed contract or transaction
 - must disclose *fully and promptly*
 - the nature and extent of the director's interest
 - existence of conflict to *all* other directors
 - abstain from voting or signing a consent resolution in respect of the contract or transaction
 - leave the meeting or call where the contract or transaction is being discussed
 - unless the other directors ask the director to stay to present information
 - but **MUST** leave before the vote is taken
 - refrain from any act intended to influence the discussion or vote

If a Director is in Conflict What is Required? (cont'd)

- protects both the director and the foundation
- consequences of failure to comply with *Societies Act*
 - conflicted director must pay to the foundation the amount equal to any profit unless the matter is approved by special resolution of the members after full disclosure of the nature and extent of the director's interest in the contract or transaction
 - court can prohibit the contract or transaction, or set it aside

What is a Divided Loyalty?

- often misunderstood as a conflict of interest
- director owes a duty of loyalty to more than one organization and those organizations are in conflict
- best governance practice is to prevent/avoid/require a resignation from one of the organizations
- at the very least should have a policy in place
 - similar to conflict of interest
- a director with a divided loyalty must not vote on an issue when he or she has a divided loyalty and should not participate in any discussions involving the two organizations
- a director with a divided loyalty *cannot* favour one organization over another
 - breach of a fiduciary obligation x2

What Role do Members Have?

- required under *Societies Act*
- in fundraising foundations where services are not provided to members nor is there any real need for a separate class of members for oversight, the typical structure is members = directors
- some US jurisdictions allow the incorporation of member-less organizations
- members are not fiduciaries, not involved in day-to-day decision making for the foundation
- certain “control” features are given to members in the *Societies Act*
 - the right to remove and replace directors
 - the right to change the name and charitable purposes
 - the right to alter the governance structure by amending the Bylaws

What Role do Members Have? (cont.)

- to qualify for gaming funding relatively open membership is required
 - this requirement should not wag the tail of the governance dog and there are ways to manage it
- there are many governance models and it is important for the organization to consciously decide what is most appropriate
 - members = directors
 - members elect directors, directors appoint officers
 - members elect directors and officers
 - mix of appointed and elected directors

Seven Sins of Directorship

- acceptance...without commitment
- membership...without attendance
- affiliation...without dedication
- meetings...without participation
- decisions...without integrity
- involvement...without advocacy
- association...without giving

A Good Director's Checklist

1. mission is the foundation of everything

- work to understand the mission and history of the foundation and its current programs
- ensure that the resources are used exclusively for the mission of the foundation

2. courageous

- bring an open and probing mind to every board meeting
- challenge/examine the status quo – no sacred cows
- stand up to bullies
- examine each decision against the mission

Checklist (cont'd)

3. preparation and attendance

- must be conscientious about attending board and committee meetings
- full and open participation
- never vote without full understanding
- come prepared for meeting
 - read package in advance of meeting

4. passion

- enthusiastic supporter of the foundation at every opportunity
- encourage others to become involved, to provide assistance, to donate
- give your undivided loyalty to the foundation and its mission

Checklist (cont'd)

5. business judgment

- bring all your business judgment/financial acumen, compassion and sensitivity to the board
- be prudent stewards of the resources of the foundation
- once a decision is made, support that decision

6. appreciate staff

- have high expectations
- recognize staff for good performance

What Makes a High-Functioning Board?

- an engaged board loyal to the organization eager to consider strategic issues
- board decides strategy and priorities
- staff develops plans/policies/budget for board review and approval
- streamline board business to focus on complex strategic issues:
 - utilize consent agendas
 - delegation and focus on ends/outcomes, not means

What Makes a High-Functioning Board? (cont'd)

- board time is valuable, use it for complex, high impact decisions that require the skills of the directors
 - make the meeting interesting, engaging, enjoyable
 - the directors feel of use and actually accomplish something

Governance Case Study #1

- the Board of the We Know Best Social Services Society has 8 directors. Two of the directors are new, attending their first meeting. The other 6 directors have each served as directors for at least 10 years, with the Chair serving as a director for 15 years, the last 8 of which as Chair.
- at the Board meeting, one of the agenda items is a decision regarding an engagement for design services to create the Society's new logo and website. One of the long serving directors immediately makes a motion proposing the wife of one of the other directors for the contract and the motion is seconded. The Chair immediately moves to a vote.

Governance Case Study #1 (cont'd)

- one of the new directors interjects to request discussion on the motion as she has a number of questions. Firstly, she asks what the scope of the contract is and the proposed amount. No explicit answer is forthcoming, particularly with respect to the amount of the contract. Secondly, she asks what professional design training the proposed individual has – the answer is nothing formal but she “does great work” and has done this for other organizations. Thirdly, she asks what efforts have been made to see what interest there might be from design firms to donating their time. No such queries have been made.

Governance Case Study #1 (cont'd)

- a long serving director attempts to stop the discussion by “calling the question”. Both new directors indicate that no vote should be taken until the discussion is complete. The meeting degenerates into a shouting match without the vote being taken.
- the next day the Chair calls the 5 other long standing directors to a meeting. At that meeting they vote to remove the 2 new directors and vote to engage the wife of the director to provide the graphic identity services. The Chair then advises the other 2 directors of their purported removal.

Governance Case Study #1 (cont'd)

Questions for Discussion

- what governance issues arise?
- what *Societies Act* compliance issues arise?

Governance Case Study #2

- the Board of the Zoolander School for Kids Who Don't Read Real Good operates a school. There has been a “revolving door” of directors because the organization does not function very well and people get frustrated and move on. Most of the directors have only been on the Board for one or two years. There is a CEO/Headmaster and approximately 25 teachers.

Governance Case Study #2 (cont'd)

- the Headmaster is a very strong willed individual and he is frequently rude to directors and dismissive to the Board Chair. The Chair is not a particularly confident individual. A number of the directors are becoming concerned about the conduct of the Headmaster (the “Concerned Directors”). The Concerned Directors perceive that the Headmaster withholds information and is not forthcoming with explanations when questioned about particular decisions. The Concerned Directors believe that their ability to monitor the Headmaster is being actively thwarted by the Headmaster.

Governance Case Study #2 (cont'd)

- the Board decided to acquire land for expansion of the school and approved the purchase of the property. It will be necessary for construction financing to be obtained to build the school. The Concerned Directors wish to be directly engaged in the budget development for the project as well as the design and construction, most particularly because it represents a very significant financial commitment for the school. The Headmaster is adamant that these decisions are his to make, not the Board's. The Chair doesn't know what to do and settles for doing nothing.
- what could the Concerned Directors do?

Governance Case Study #3

- Hannah Dogooder is 75 years old and is the founder of the Save the Sagebrush Antelope Society. She has served as a director, and the chair of the society, for more than 30 years. Over the years other directors have come and gone but none generally serve for longer than two or three years because Hannah continually makes decisions regarding the society herself and simply advises the board what she has done. On occasion, directors have tried to institute appropriate governance procedures but Hannah has thwarted every attempt. Most directors ultimately leave because of conflict with Hannah.

Governance Case Study #3

- There are 3 part time employees. The executive director, Alison, is a recent hire and relatively experienced and knows that from a governance perspective, the organization is not functioning well. She is, however, very committed to the cause and is a successful fundraiser. Prior to Alison being hired, the society raised about \$80K a year by direct mail. Alison recently secured a \$1m grant which will be a game changer for the organization. There are 2 directors who have spoken to her privately about issues with Hannah. Hannah has harsh words for Alison in almost every interaction that they have. One of the other employees has advised Alison that they feel that Hannah creates a toxic workplace and they are thinking of quitting. There are approximately 100 members of the society but they are not very engaged. AGM turnout is generally about 20 members.

Governance Case Study #3

- what issues and risks arise?
- what might Alison and the concerned directors do?

Governance Case Study #4

- The Community Services Society of Mason, a city somewhere in BC, has been operating in the community for 50+ years. It primarily receives its funding from the Province and has 70 employees. The CEO is very active in the community, serving on the Board of Trade, and is very well connected provincially. The Board generally functions well but is trying to diversify (in every way possible) its voices to better reflect the community. A local talk radio host (Jimmy Flash) who has been vocally supportive of CSSM and who has a large following in the community is recruited and agrees to serve as a director.

Governance Case Study #4

- Jimmy Flash is elected and attends the first Board meeting held after the AGM without incident. At the second Board meeting, a community outreach strategy is discussed. Jimmy offers his views very forcefully on the use of social media and advertising and recommends a particular course of action. Most of the other directors are very uncomfortable with Jimmy's proposal. Jimmy asserts (rudely) that he is an expert in the area and that his views should carry the day. The Chair and the CEO both explain some of the legal and other restrictions which might make Jimmy's proposed course of action problematic. Jimmy continues to act inappropriately, talking over both the Chair and CEO, and raising his voice. The meeting concludes with the agenda item deferred to a future meeting for discussion.

Governance Case Study #4

- The next day on his radio call in show, Jimmy Flash speaks very negatively about CSSM. When callers try to disagree with Jimmy, or to talk about good experiences with CSSM, Jimmy blares a klaxon horn (his signature) and cuts them off. Jimmy also uses his social media channels to suggest that the CSSM is in financial trouble, that there are suspicions that the CEO has been funnelling funds to a political party she supports, and that CSSM is being sued by a number of its clients for sexual improprieties.
- The Chair of the Board tries to call Jimmy to discuss his conduct but he does not respond.
- The Deputy Minister of Community Services calls the CEO to ask what is going on.

Governance Case Study #4

- what governance issues arise?
- what can the Board do?



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