Legal Roles & Responsibilities

“Ignorance is no defence”

– Legal maxim

Graham Boyce
Management Advisory Service
Agenda

Introduction & Background
- Purpose of workshop
- Incorporation: the legal environment
- NFP’s v. Charities
- Some definitions

The Board’s Role
- Responsibilities of the Board
- Exploring governance - the Rules
- Exploring governance - the 5 M’s
- The Board & the ED

The Director’s Role
- Responsibilities of a Director
- Fulfilling expectations
- The trouble with titles
- Indemnities & insurance

Challenges with NFP’s
- The top 3 problems
Introduction & Background

What is a “not-for-profit”?

“An organization organized and operated exclusively for social welfare, civic improvement, pleasure, sport, recreation, or any other purpose except profit (e.g. a club, society, or association). The organization will generally be exempt from tax if no part of its income is payable to, or available for, the personal benefit of a proprietor, member or shareholder.”

Source: Canada Revenue Agency

- Can run a business; can make a profit
- Lots of different legal structures: unincorporated, incorporated, co-operative, social club, national sports association...
Introduction & Background

Incorporation

The process of establishing a legal entity, separate from its members or shareholders

- Can provide legal protection, as it is the “corporation” that does things, not individual members, so it is the corporation that gets taken to court!

- Facilitates contracting – for financial services, for premises, for supplies etc. – as the corporation continues regardless of membership changes

Can be under federal legislation:

Canada Not-for-Profit Corporations Act (CNCA)

...or provincial legislation – for example:

Ontario – Corporations Act (OCA)

British Columbia – Societies Act
## Introduction & Background

### Incorporation

<table>
<thead>
<tr>
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</tr>
</tbody>
</table>
Introduction & Background

Incorporation

Application of Part II provisions to Part III corporations
133 (1) Section 22, clauses 23 (1) (a) to (p) and (s) to (v), subsection 23 (2), sections 59 to 61, 67, 69 to 71, 80 to 82, 84, 93 and 94, subsection 95 (1), sections 96 and 96.1, clauses 97 (1) (a), (c) and (d), subsection 97 (3) and section 113 apply with necessary modifications to corporations to which this Part applies, and in so applying them the words “company” and “private company” mean “corporation” and the word “shareholder” means “member”. R.S.O. 1990, c. C.38, s. 133 (1); 1994, c. 27, s. 78 (7); 1998, c. 18, Sched. E, s. 69 (1).
## Introduction & Background

### Incorporation

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</table>
Introduction & Background

Incorporation

**Letters Patent** granted under the current provincial Corporations Act (OCA)

**Certificate of Incorporation** granted under the Canada Not for Profit Corporations Act (CNCA)

**Certificate of Continuance** granted under the Canada Not for Profit Corporations Act (CNCA) to organizations originally incorporated under the OCA

…annexed to which are the Articles
Introduction & Background

Incorporation

The corporation’s Articles set out key information including:

- The classes of membership & their voting rights
- The number of directors or the minimum / maximum numbers
- The “purposes” (previously “objects”) of the corporation
- Any restrictions on its activities
Charities are a sub-set of Not-for-Profits

Not-for-profit:
“An organization organized and operated exclusively for social welfare, civic improvement, pleasure, sport, recreation, or any other purpose except profit (e.g. a club, society, or association). The organization will generally be exempt from tax if no part of its income is payable to, or available for, the personal benefit of a proprietor, member or shareholder.”

Charity:
“An organization established & operated for charitable purposes that devotes its resources to charitable activities. Its purposes must fall within one or more of the following categories:
• the relief of poverty; ✓
• the advancement of education; ✓
• the advancement of religion; ✓
• certain other purposes that benefit the community in a way the courts have said is charitable.
It must be resident in Canada and cannot use its income to benefit its members.”

Source: Canada Revenue Agency
Charities are a sub-set of Not-for-Profits

Charity:
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• the relief of poverty;
• the advancement of education;
• the advancement of religion;
• certain other purposes that benefit the community in a way the courts have said is charitable. It must be resident in Canada and cannot use its income to benefit its members.”

Model purposes

- Promotion of health
- Addressing and preventing specific problems faced by:
  – children or youth
  – families
- Relieving conditions attributable to being aged
- Relieving conditions associated with disability
- Providing public amenities

Source: Canada Revenue Agency
Charities are a sub-set of Not-for-Profits

The objects of the Society are:

(a) To provide educational forums, classes, workshops and seminars to immigrant women in order that they may be able to find or obtain employment or self-employment.

(b) To carry on political activities provided such activities are incidental and ancillary to the above purposes and provided such activities do not include direct or indirect support of, or opposition to, any political party or candidate for public office.

(c) To raise funds in order to carry out the above purposes by means of solicitation of funds from governments, corporations and individuals.

(d) To provide services and to do all such things that are incidental or conducive to the attainment of the above stated objects, including the seeking of funds from governments and/or other sources for the implementation of the aforementioned objectives.

“Immigrants” not a defined charitable group c.f. “the poor”
Introduction & Background

Charities are a sub-set of Not-for-Profits

What are the advantages of being a registered charity?
The primary advantages of being a registered charity are:

- Registration allows an organization to issue official receipts for gifts it receives. This reduces the individual donor’s income tax payable, and reduces the taxable income of a corporate donor.
- Once the organization is registered, it is exempt from paying income tax under Part I of the Act.
- Eligible to receive gifts from other registered charities, such as foundations.
- Increased credibility in the community, as registered charities must follow rules and guidelines.

What % of revenue?

Same for N-F-P

Do you apply?

More demanding bookkeeping

More reporting

Required spending

Added cost...
Introduction & Background

Four different legal environments

<table>
<thead>
<tr>
<th>CNCA</th>
<th>CNCA</th>
</tr>
</thead>
<tbody>
<tr>
<td>NFP</td>
<td>Charity</td>
</tr>
<tr>
<td>OCA</td>
<td>OCA</td>
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<tr>
<td>NFP</td>
<td>Charity</td>
</tr>
</tbody>
</table>
Introduction & Background

Definitions

“Board” of Directors:

“A group of people comprising the governing body of a corporation.”
Introduction & Background

Definitions

“Advisory” = expert panel; never exists by itself

“Executive” = a true board, likely involved in operating

“Governance” = a true board but with no hands on involvement

“Main” = a true board usually with an advisory one

“Managing” = a true board; operational involvement uncertain

“Policy” = a true board but with no hands on involvement

“Working” = a true board but involved in hands on operations

“…”

Many different descriptors; are they the same?

Beyond “Advisory”, descriptor makes no difference to legal status
Introduction & Background

Definitions

“Advisory”
“Working”
“Executive”
“Main”
“Managing”
“Policy”
“Governance”

Governance model

“Working”
“Management”
“Policy”
Introduction & Background

Evolutionary/Maturity State

...where are you?

Starting up
Board = everyone
High energy
Maximum involvement
Managing
No ED

Developing
Board = elected
Lower energy
Start of burn out
Managing / policy making
Vision/mission ED

Growing / maturing
Board = recruited Committees
Renewed commitment
Fundraising emphasis
Managing & policy making split ED & staff

Stagnating / declining
Declining interest
Board / staff disconnect
Operational / funding challenges

Transforming
Corporate-like Board
Professional management
Strategic alliances
Introduction & Background

Definitions

“Advisory” ❌

“Working” ✔

“Executive” ✔

“Main” ✔

“Managing” ✔

“Policy” ✔

“Governance” ✔

Governance model

Board of Directors

“Working” ✔

“Management” ✔

“Policy” ✔

Model descriptor makes no difference to legal status or accountability
Board of Directors:

“A group of people comprising the governing body of a corporation.”
Introduction & Background

Definitions

Governance =

“The act, manner, function of governing”

“The action, manner or system of governing”

“Direction; control; management”

“The way that [an organization] is controlled by the people who run it”

“The process of decision-making and the process by which decisions are implemented (or not implemented)”
Introduction & Background

Definitions

Board of Directors:

“A group of people comprising the governing body of a corporation.”

**Directors and Officers**

*Duty to manage or supervise management*

124 Subject to this Act, the articles and any unanimous member agreement, the directors shall manage or supervise the management of the activities and affairs of a corporation.

---

**Directors**

283 (1) The affairs of every corporation shall be managed by a board of directors howsoever designated. R.S.O. 1990, c. C.38, s. 283 (1).
Agenda

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The Board’s Role
- Responsibilities of the Board
- Exploring governance - the Rules
- Exploring governance - the 5 M’s
- The Board & the ED

The Director’s Role
- Responsibilities of a Director
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- The trouble with titles
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Challenges with NFP’s
- The top 3 problems
The Board’s Role

What are the responsibilities of a Board?

1. Following the Rules

Duty to comply

(2) Every director and officer of a corporation shall comply with
   (a) this Act and the regulations; and
   (b) the articles, the by-laws and any unanimous member agreement.

s. 148 (2) Canada Not-for-Profit Corporations Act
The Board’s Role

Governance: What are the Rules?

1. The laws of the land, including the relevant act covering incorporation

2. “Constating documents” (i) Articles (ii) By-laws
The Board’s Role

Governance: What are the Rules?

- **Externally imposed**

  Framework set by **Incorporating Act, Income Tax Act & other legislation** e.g. Ontario Corporations Act, CNCA, Charities Accounting Act…

  - typically regulate membership & powers, meeting notices, record keeping & audit requirements and Board composition. They also impose duties & responsibilities on directors

- **Internally imposed**

  Further refined by **Articles (Purposes / Objects) & By-laws**

  - these specify limits and operating requirements & are drafted by the organization itself

**2 sources; 3 levels**
The Board’s Role

Governance: What are the Rules?

3 levels:

1. Incorporating Act etc. - overall framework

2. Articles - purposes / objectives
   Charitable status - specific, limited & CRA approved

3. By-laws - rules of operation
The Board’s Role

Governance: What are the Rules?

OCA - overall framework

(2) The board of directors of a corporation shall consist of a fixed number of directors not fewer than three.

“...shall consist of a fixed number of directors not fewer than three”
The Board’s Role

Governance: What are the Rules?

3 levels:

1. Incorporating Act etc.  - overall framework

2. Articles  - purposes / objectives
   Charitable status  - specific, limited & CRA approved

3. By-laws  - rules of operation
Governance: What are the Rules?

Articles - specific, limited & approved purposes / objects

“To relieve poverty by providing food and other basic supplies to persons of low income, by establishing, operating and maintaining shelters for the homeless, and by providing counselling and other similar programs to relieve poverty.”
The Board’s Role

Governance: What are the Rules?

3 levels:

1. Incorporating Act etc. - overall framework

2. Articles - purposes / objectives
   Charitable status - specific, limited & CRA approved

3. By-laws - rules of operation
The Board’s Role

Governance: What are the Rules?

By-laws

- rules of operation

Section 3 The affairs of the Association shall be managed by a Board of ten (10) Directors, each of whom at the time of their election or within ten (10) days thereafter and throughout the term of office shall be an Active Member of the Association.

6.01 Time and Place of Meetings

The Board shall meet at least four (4) times in each fiscal year, and no more than one hundred and twenty (120) days shall elapse between meetings.

Directors’ meetings may be called at any time by any two Directors.
The Board’s Role

Governance: What are the Rules?

By-laws - rules of operation

2. Membership

<table>
<thead>
<tr>
<th>Provision</th>
<th>Default Rule</th>
<th>Alternate Rule Permitted in by-laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transferability of membership1</td>
<td>Membership can only be transferred back to the not-for-profit corporation.</td>
<td>Can specify different rules for transferability.</td>
</tr>
<tr>
<td>Place of meeting of members</td>
<td>The meeting of members is to be held at a place in Canada that the directors determine or a place outside Canada if all the members entitled to vote at the meeting agree.</td>
<td>Can provide otherwise.</td>
</tr>
</tbody>
</table>
The Board’s Role

Governance: What are the Rules?

- Externally imposed

Framework set by **Incorporating Act, Income Tax Act & other legislation** e.g. Ontario Corporations Act, CNCA, [ONCA], Charities Accounting Act…

- Typically regulate membership & powers, meeting notices, record keeping & audit requirements and Board composition. They also impose **duties & responsibilities** on directors
The Board’s Role

Governance: What are the Rules?

Not only... Canada Not-for-profit Corporations Act
Income Tax Act (Canada)
Charities Accounting Act

but also... Excise Tax Act
“Canada’s Anti-Spam Legislation”
Human Rights Code
Employment Standards Act
Occupational Health & Safety Act
Pay Equity Act
Ontario Labour Relations Act
Workplace Safety & Insurance Act
Privacy Legislation
...

canadiancharitylaw.ca
charitylaw.ca
The Board’s Role

Governance: What are the Rules?

Canada Not-for-profit Corporations Act
Income Tax Act (Canada)
Charities Accounting Act
Excise Tax Act
“Canada’s Anti-Spam Legislation”
Human Rights Code
Employment Standards Act
Occupational Health & Safety Act
Pay Equity Act
Ontario Labour Relations Act
Workplace Safety & Insurance Act
Privacy Legislation

Not only... but also...
The Board’s Role

Governance: What are the Rules?

- **Externally imposed** general knowledge
  - Framework set by *Incorporating Act, Income Tax Act & other legislation* e.g. Ontario Corporations Act, CNCA, [ONCA], Charities Accounting Act…
    - typically regulate membership & powers, meeting notices, record keeping & audit requirements and Board composition. They also impose duties & responsibilities on directors

- **Internally imposed** detailed knowledge
  - Further refined by *Articles* (Purposes / Objects) & *By-laws*
    - these specify limits and operating requirements & are drafted by the organization itself

2 sources; 3 levels
The Board’s Role

What are the responsibilities of a Board?

1. ✔ Following the Rules
2. Governance
The Board’s Role

Governance responsibilities: what’s the focus?
The Board’s Role

Governance responsibilities: what’s the focus?

The five essentials

To establish the organization's vision and direction and to plan and monitor performance in achieving the same
The Board’s Role

Governance responsibilities: what’s the focus?

The five essentials

- To establish the organization's vision and direction and to plan and monitor performance in achieving the same
- To ensure the financial health of the organization and to manage risk
The Board’s Role

Governance responsibilities: what’s the focus?

The five essentials

- To establish the organization's vision and direction and to plan and monitor performance in achieving the same
- To ensure the financial health of the organization and to manage risk
- To ensure the organization has sufficient and appropriate human, physical and technical resources
The Board’s Role

Governance responsibilities: what’s the focus?

The five essentials

- To establish the organization's vision and direction and to plan and monitor performance in achieving the same
- To ensure the financial health of the organization and to manage risk
- To ensure the organization has sufficient and appropriate human, physical and technical resources
- To formulate necessary policies & implement appropriate systems to direct and manage operations
Governance responsibilities: what’s the focus?

The five essentials

- To establish the organization's vision and direction and to plan and monitor performance in achieving the same
- To ensure the financial health of the organization and to manage risk
- To ensure the organization has sufficient and appropriate human, physical and technical resources
- To formulate necessary policies & implement appropriate systems to direct and manage operations
- To ensure effective stakeholder relations through transparency of action and open communications
The Board’s Role

Governance responsibilities: what’s the focus?

The five essentials

- To establish the organization's vision and direction and to plan and monitor performance in achieving the same “Management”
- To ensure the financial health of the organization and to manage risk “Money”
- To ensure the organization has sufficient and appropriate human, physical and technical resources “Means”
- To formulate necessary policies & implement appropriate systems to direct and manage operations “Methods”
- To ensure effective stakeholder relations through transparency of action and open communications “Manner”
The Board’s Role

Governance responsibilities: what’s the focus?

The five essentials

- “Management”
  - DIRECTION & PERFORMANCE

- “Money”
  - FUNDS & PROTECTION

- “Means”
  - CAPABILITY & MAINTENANCE

- “Methods”
  - EFFICIENCY & EFFECTIVENESS

- “Manner”
  - UNDERSTANDING & TRUST
The Board’s Role

Governance responsibilities: what’s the focus?

Board / ED relationship

- **Board**
  - Impractical nature
  - Micromanaging

- **E.D.**
  - Mushroom effect
  - Legal position

- **Board**
  - Focus on direction & policy

- **E.D.**
  - Focus on counsel & operations
The Board’s Role

Governance responsibilities: what’s the focus?

Board / ED relationship

**ED** Hiring a Volunteer Coordinator?

**Board** Changing the Corporate logo?

**Board** Accepting a special purpose bequest?

**ED** Designing a media campaign to support fund-raising?

**Board** Developing a Workplace Harassment Policy?

**ED** Granting a staff member a leave of absence?
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The Director’s Role
- Responsibilities of a Director
- Fulfilling expectations
- The trouble with titles
- Indemnities & insurance

Challenges with NFP’s
- The top 3 problems
Legal duties & responsibilities

Legislation imposes, among other things, a **duty of care** for individual Directors

- Historically, the OCA standard of care was **subjective** – what is reasonable given the knowledge & experience of the person concerned. Individual directors could be held to different standards depending on professional qualifications and experience.

- Under the CNCA and now the OCA, the standard of care is **objective** – what is reasonable given the nature of the organization. Individual directors are held to the same standard.
The Director’s Role

Legal duties & responsibilities

Legislation imposes, among other things, a duty of care for individual Directors:

Duties of directors and officers

148. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
(a) act honestly and in good faith with a view to the best interests of the corporation; and
(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
The Director’s Role

Legal duties & responsibilities

Management: Vision, Strategic Plan, Operating Plan & Budget

Vision

Assumptions, Beliefs & Values
Operating principles

Goals
Strategies

Next 5 years:
Goal 1
Goal 2
Goal 3
Goal 4
Goal 5
Goal 6
Goal 7
Goal 8
Goal 9

Next 12 months

Next 24 months

Next 24 months

Board Meetings

Operating Plan & Budget

Ability to articulate where the organization is going and how it plans to get there
The Director’s Role

Legal duties & responsibilities

A collective Board responsibility

An individual accountability

“Ignorance is no defence”
- Legal maxim
The Director’s Role

Legal duties & responsibilities

**Confidentiality - as a Board**

Established policy required

- Topics & circumstances
- Minutes

Strictly limited applications

- Personal matters
- Personnel matters
- Financial matters
- Legal matters

**Confidentiality - as an individual**

Respect Board policy & decisions

(What if it was you that was being talked about?)
The Director’s Role

Legal duties & responsibilities

Avoiding conflict of interest

141. (1) A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of committees of directors, the nature and extent of any interest that the director or officer has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer

1. (a) is a party to the contract or transaction;
2. (b) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or
3. (c) has a material interest in a party to the contract or transaction.

Canada Not-for-profit Corporations Act
The Director’s Role

Fulfilling expectations

1. Know your stuff
The Director’s Role

Know your stuff

✔ Read your Board Manual

✔ Be familiar with the “Rules” (especially Purposes & By-laws)

✔ Meet with – and become knowledgeable about – key staff members

✔ Review the Policies Manual
The Director’s Role

Fulfilling expectations

✓ 1. Know your stuff

2. Do the work
The Director’s Role

Do the work

Read, learn, enquire, think...

75% 25%
The Director’s Role

Fulfilling expectations

✔ 1. Know your stuff

✔ 2. Do the work

  3. Participate fully
The Director’s Role

Participate fully

Board

Committees

Events

Task forces
The Director’s Role

Fulfilling expectations

✔ 1. Know your stuff
✔ 2. Do the work
✔ 3. Participate fully
✔ 4. Behave appropriately
The Director’s Role

Behave appropriately

- Preparation: attendance is not enough ✓
- Timeliness: be there and be ready ✓
- Fitting in: this is “business” ✓
- Communication differences: pay attention! ✓
- Politeness: expectations may differ ✓
## The Director’s Role

### The trouble with titles

<table>
<thead>
<tr>
<th>Ability to foretell?</th>
<th>Exclusivity?</th>
</tr>
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<tbody>
<tr>
<td>President/Chair</td>
<td>Programs</td>
</tr>
<tr>
<td>Vice President</td>
<td>Fund Raising</td>
</tr>
<tr>
<td>2nd Vice President</td>
<td>Social</td>
</tr>
<tr>
<td>3rd Vice President</td>
<td>Communications</td>
</tr>
<tr>
<td>Secretary</td>
<td>Prov. Assoc. Liaison</td>
</tr>
<tr>
<td>Treasurer</td>
<td>Shop</td>
</tr>
<tr>
<td>Membership</td>
<td></td>
</tr>
<tr>
<td>Constitution/By-laws</td>
<td></td>
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</tbody>
</table>
The Director’s Role

Titles & responsibilities

Directors v. Officers

Elected by members  Appointed by Board

Direct the corporation  Facilitate management of the corporation

Responsible for governance  May also be a director

Must be unpaid if a charity
The Director’s Role

Titles & responsibilities

“President” - represents the organization externally; runs meetings

“Secretary” - records the meetings

“Treasurer” - takes the lead on financial matters

Collective responsibility is the key for a Board; individual directors may have liaison responsibilities but avoid the focus on implied representation through titles
The Director’s Role

Legal duties & responsibilities

Legislation imposes, among other things, a **duty of care** for individual Directors:

**Duties of directors and officers**

148. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
(a) act honestly and in good faith with a view to the best interests of the corporation; and
(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Canada Not-for-Profit Corporations Act
c.f. s. 127.1 (1) *Ontario* Corporations Act
The Director’s Role

Indemnities & insurance

Can avoid “duty of care” liability through showing:

(i) proper diligence and

(ii) good faith reliance on...

“(a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the public accountant of the corporation fairly to reflect the financial condition of the corporation; or
(b) a report of a person whose profession lends credibility to a statement made by that person.”
The Director’s Role

Indemnities & insurance

1. There is no protection from wilful negligence!

2. For Ontario based Charities, insurance purchase is subject to provisions of the Charities Accounting Act. The following must be considered:

1. The degree of risk to which the executor, trustee, director or officer is or may be exposed.
2. Whether, in practice, the risk cannot be eliminated or significantly reduced by means other than the indemnity or insurance.
3. Whether the amount or cost of the insurance is reasonable in relation to the risk.
4. Whether the cost of the insurance is reasonable in relation to the revenue available to the executor or trustee.
5. Whether it advances the administration and management of the property to give the indemnity or purchase the insurance.

Charities Accounting Act
O. Reg. 4/01 s.2(5)
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Challenges with NFP’s
- The top 3 problems
The Top Three Reasons directors get into trouble

At #1 – Failure to comply

Ignorance of the “Rules”
Mission drift
Lack of due process

At #2 – Lack of understanding

Misplaced reliance on others
Misplaced belief they could avoid responsibility
Misplaced trust in people

At #3 – Poor recruitment practices

Personal agendas
Lack of commitment
Lack of necessary competences
Absent succession planning
Agenda

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“The honour is to serve”

Worf, Star Trek, T.N.G.