

ASSOCIATION OF COMMUNITY LEGAL CLINICS OF ONTARIO

MANAGEMENT TRAINING CONFERENCE

Legal Duties, Liabilities and Risk Management Strategies for Directors of Community Legal Clinics

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Oakham House, Ryerson University, 55 Gould Street, Toronto

Nick G. Pasquino
Partner
(416) 367-6253
npasquino@blg.com

BLG
Borden Ladner Gervais

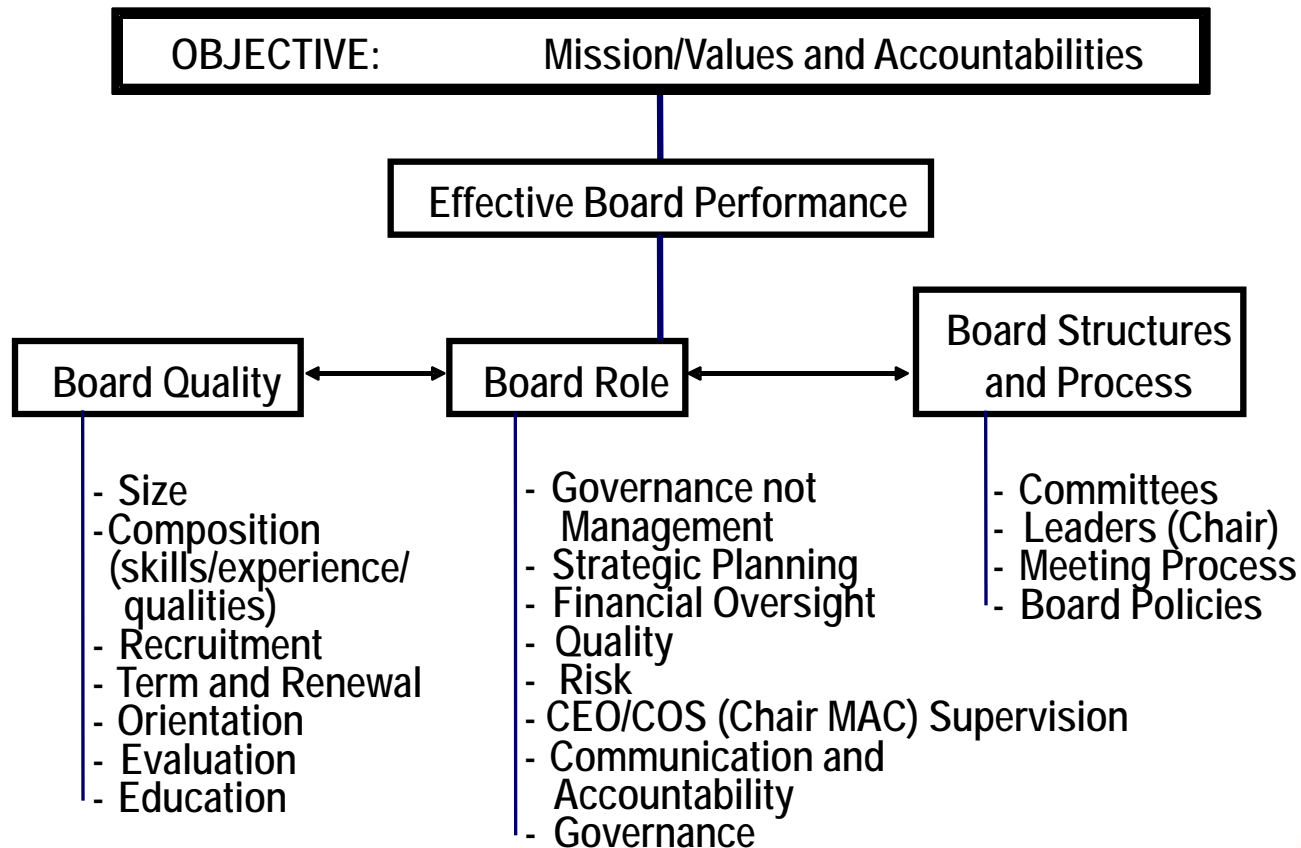
Overview

- **What is Governance?**
- **Fiduciary Duty**
- **Standard of Care**
- **Conflicts of Interest**
- **Understanding Director Personal Liability**
- **Director Due Diligence**

What is Governance?

- **What, Who and How**
 - **What a Board does – Role/Approach**
 - **Who is in the Boardroom – skills, experience, qualities**
 - **How a Board does it – Processes and Structures (Committees and Meetings)**
- **Governance is a team sport**
 - **Board needs to use governance elements effectively**

Governance Best Practices Summary



“Right people”

“Right work”

“Right tools”

Fiduciary Duty – What does it mean?

- **Directors are fiduciaries – highest standard of conduct**
- **Relationship of trust**
- **Duty is owed to the corporation**
- **All directors owe the same duty**

Fiduciary Duty

- **Two parts:**
 - **Standard of Care**
 - **Rules of Fiduciary Conduct**

Standard of Care

Directors must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

Rules of Fiduciary Conduct

- **Loyalty**
- **Honesty**
- **Good faith**
- **Best interest of corporation (next slide)**
- **Obedience – Board Solidarity**
- **Confidentiality**
- **Avoid conflicts of interest and duty**

Understanding “Best Interest of the Corporation”



1. Note: based on a preliminary review of the CRA charity database, some community legal clinics appear to be registered charities (Durham, Hamilton, etc.) while others are not-for-profit organizations, both must comply with applicable CRA rules.

Conflicts

- **Definition**
 - Arises where relationship, interest or other duty impedes ability to act in best interests of corporation
- **General Rule**
 - Cannot have a conflict of interest and duty
- **Examples**
 - Transactions between the director and the corporation
 - Misuse of confidential information
 - Duty to disclose information of value to the corporation
 - Appropriating corporate opportunities
 - Conflicts of Duty: Competing directorships (not prohibited)

Process to Follow When Conflict Arises

- *Corporations Act*
- **By-laws**
- **Policy adopted by the Board**

Directors Transacting with the Corporation

- ***Corporations Act* Provisions – safe harbour**
 - Applies where director is directly or indirectly interested in a contract with corporation
 - Director must declare interest at first meeting when contract is discussed or when director first becomes interested in contract
 - Refrain from voting
 - Where director declares interest and refrains from voting – contract will not be voidable and director will not be personally liable for profits
 - General notice may be given

Directors Transacting with the Corporation (cont'd)

- **Board approved conflict of interest policy may also apply:**
 - **Expands Scope: actual to perceived conflicts**
 - **Enhances Active Steps: Absence from room / no attempt to influence (not just no-vote)**
- **Sometimes policy also includes a conflict resolution process – board decision**

Understanding Director Liability

- **General Rule – Limited Liability**
- **Exceptions to Limited Liability**
 - **Breach of fiduciary duty**
 - **Statutory liability**

Requirements to Meet Fiduciary Duty

Business Judgment Rule:

• Directors will not be held by a Court to a standard of perfection (not liable for errors of judgment) if:

- Follow proper process
- Decision reasonable
- Reliance on others

• Consider all relevant factors

• Apply, in good faith, your skill and judgment

• Properly document decisions (minutes)

Statutory Liability

Three broad categories:

- 1. Unpaid wages (six months); accrued vacation pay (twelve months) – no defence – limitation period – while a director or within six months of ceasing to be a director (so keep a reserve)**
- 2. Withhold, deduct, remit statutes – income tax, EI, CPP, etc. – due diligence defence**
- 3. Non-compliance statutes – Environment Protection, Occupational Health and Safety, Employment Standards (etc.) – usually a due diligence defence**

Legal Protections from Personal Liability

- Insurance
- Indemnity
- Due diligence defence = good governance practices

Elements of Board Due Diligence

- Take “all reasonable care”
- Question of fact – depends on context and director involvement
- Ensure that management has established and maintains system. Key elements of a system usually include:
 - Delegation and reliance on management/advisors
 - Knowledge of compliance requirements
 - Set goals and/or industry standards to achieve compliance
 - Reporting system for compliance and non-compliance
 - React to problems – process to respond
 - Supervision/oversight
- Board’s role to ensure system is in place and maintained, but must rely on management for compliance
- Board must monitor and exercise oversight

Note: What is sufficient due diligence will depend on context of Board, the particular organization and director involvement

How do Boards Exercise Oversight and Monitor Compliance?

Examples:

- 1.CEO Supervision - make requirement for compliance part of CEO's role**
- 2.Board Education - Board should have a general knowledge of areas of risk from a compliance perspective**
- 3.Compliance Processes - Board should understand how the organization maintains and monitors compliance, stays abreast of new requirements and reacts to circumstance of non-compliance**
- 4.Indicators and Metrics - The board and/or board committees may review indicators that confirm compliance**
- 5.Management Certificates - Periodic compliance certificates from management; for example, that remittances and required reporting or filings are made**

How do Boards Exercise Oversight and Monitor Compliance? (cont'd)

- 6. Accreditation and Audits - External accreditation process (where applicable) may be used to verify some aspects of compliance**
- 7. Deep Dives - Review with management (periodically and usually through committees) key areas of risk and how compliance in key areas is managed (environmental, building code, occupational health and safety, employment law and withholdings and remittances are usual key areas in an operating organization)**
- 8. Whistleblower Policy - Ensure organization has a whistleblower policy**
- 9. Set Culture of Compliance - Ensure organization has business conduct policies that set a culture of compliance**
- 10. Third Party Review - Consider external audit of select risk areas (i.e., environmental compliance, audit where appropriate in context of organization's activities)**

Note: What is sufficient due diligence depends on the content!

Due Diligence: Four Cornerstones

Knowledge	Behaviour and Participation
Respect Roles, Structures and Processes	Continuous Improvement

Due Diligence from an Individual Director's Perspective - Knowledge

- **A director should be knowledgeable about:**
 - **Role and duties (objective of governance)**
 - **General legal framework**
 - **Board's governance structures, processes and policies**
 - **Sector generally (funding issues, integration, etc.)**

Due Diligence from an Individual Director's Perspective - Behaviour and Participation

- **Behaviour**
 - **Adhere to Rules of Fiduciary Conduct**
 - **Confidentiality**
 - **Conflicts**
 - **Loyalty/best interests**
- **Participation**
 - **Importance of meetings**
 - **Prepare, attend, participate**
 - **Minutes**

Governance Challenges

- **Conflict of interest and conflict of duty**
 - ***Corporations Act* safe harbour: disclose and do not vote**
 - **Conflict of Interest Policy:**
 - **Actual and perceived conflicts**
 - **Leave the room / do not attempt to influence outcome**
 - **Resolution process**
- **Wearing “two hats”**
- **Confidentiality – Board spokesperson**

Board Behaviour and Participation: Effective Meetings

Board is only a Board when it meets

Board Meetings

- Only directors are entitled to attend a Board meeting
- Directors have a right (and duty) to attend
- Minutes are required
- All directors are entitled to see minutes
- Meetings open to the public are not required
- No minimum number of meetings are required

Tips to use Board Time Effectively

- **Understand governance role and management role**
- **Understand Directors' duties and role of the Chair as meeting manager**
- **Annual work plan**
- **Efficient performance oversight tools**
- **Structured agendas – Consent Agendas**
- **Delegate to committees and efficient reporting from committees**

Due Diligence from an Individual Director's Perspective - Respect Roles, Structures and Processes

- **Respect Roles, Structures and Processes**
 - **Role of Chair**
 - **Board governance role vs management role**
 - **Committee structures**
 - **Consensus decision process**

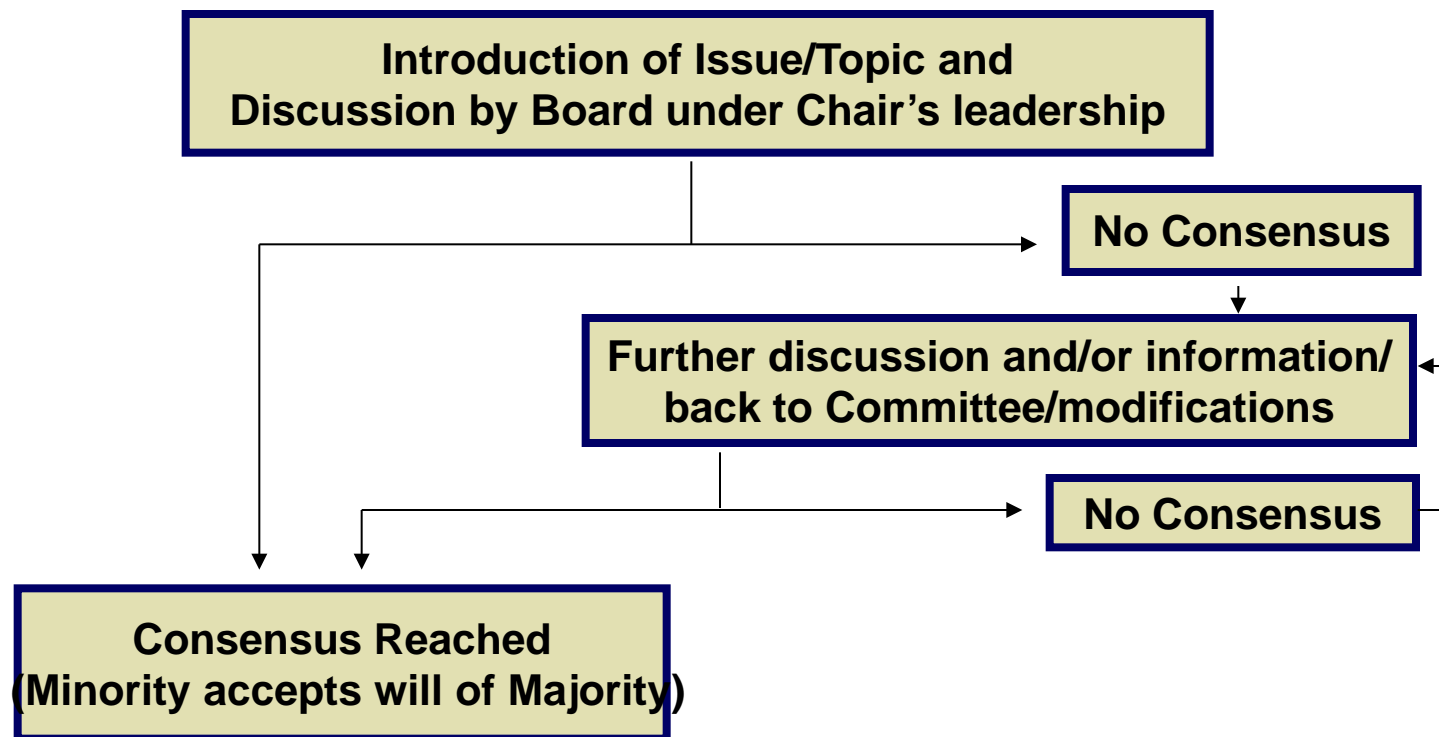
Role of the Board Chair and Meeting Effectiveness

- **Board leader**
- **Ensures integrity and effectiveness of Board governance role and processes**
- **Presiding officer at Board and member meetings**
- **Represents Board within corporation**
- **Represents corporation/organization to community**
- **Builds relationships with Board members, management, stakeholders**

Role of Chair as Meeting Manager

- **Role of the Chair – ensure sense of meeting is properly ascertained**
 - **Facilitate and forward meeting**
 - **Set agendas**
 - **Ensure relevant information is made available**
 - **Allow debate: maintain order and discipline**
 - **Ensure that the sense of the meeting is properly ascertained**
 - **Ensure meeting is properly conducted – all procedural rules are followed**
 - **Obtain consensus – democratic nature of Board decisions**

The Classic Consensus Process



Governance Principles Applicable to Committees

- **Created by Board to assist Board with board workload**
- **Creature of the Board**
- **No inherent right or role – all powers are derived from Board**
- **Board must define Board work (annual work plan helps) and committee work (terms of reference, etc.)**

Governance Principles Applicable to Committees (cont'd.)

- **Purpose:**
 - **Provides training ground for future Board leaders**
 - **Assist with Board (not staff) workload**
 - **Permits greater discussion and more in-depth analysis**
 - **Opportunity for Board members to contribute expertise**
 - **Opportunity to build trust with management**

Committee Best Practices

- **Evaluation:** Periodically evaluate committees with a view to the work of the Board
- **Composition:** Have a defined process for selection of committee chairs and committee members
- **Orientation:** Provide orientation to a committee – clear role leads to clear outcomes (and annually review terms of reference)
- **Committee work product:**
 - Do not use committee minutes to report to the board
 - Use a Decision Support Document to bring all decisions to the board including clear committee recommendations
- **Awareness:** Ensure directors understand the purpose and role of committees and recognize that some committee issues may become “whole board work” from time to time

Due Diligence from an Individual Director's Perspective - Continuous Improvement

- **Commit to Continuous Improvement**
 - **Self and collective improvement**
 - **Monitor**
 - **Evaluate**
 - **Improve and adapt**

Virtuous Cycle: The Importance and Impact of Good Governance!



QUESTIONS?

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