

GOVERNOR ORIENTATION PROGRAM
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Steven Iczkovitz, Partner

Borden Ladner Gervais, LLP

(416) 367-6214

siczkovitz@blg.com

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Corporate governance is not necessarily top of mind given the current economic and social challenges Canada and Canadian Colleges are facing. Nevertheless, the continued mismanagement of corporations by senior officials in the past several years, and the highly publicized alleged misdeeds of politicians continue to highlight the need for accountability and transparency. These instances of mismanagement and alleged misconduct lead to increased scrutiny of governance protocols, calls for greater corporate accountability, and an examination of “what were the members of the various boards of directors thinking” when they allowed certain actions or transactions to occur on their watch. In some instances, be it the infamous MFP fiasco in Toronto, or the more recent adventures with Mayor McCallion in Mississauga, there can be a public inquiry, with long lasting after affects, and considerable embarrassment to those caught in the web.

A governor of a college, like any director of a for-profit or not-for-profit corporation, must be mindful that he or she is in a fiduciary relationship with the college. This fiduciary relationship means that the governor must act honestly and in good faith with a view to the best interests of the college. This obligation extends to assuring that the governor acts loyally to the college, and avoids any situation where the governor’s duty to the college conflicts with his or her self-interest.

These concepts of accountability are not new. In his February 2005 report on strategies to improve higher education in Ontario, Bob Rae, then an advisor to the Premier and Minister of Training, Colleges and Universities, had the following to say about the governance of Colleges of Applied Arts and Technology (“Colleges”):

The growing awareness of the fundamental role that postsecondary institutions play in the economic, social and cultural development of Ontario, combined with the increased costs of higher education, has resulted in an **increased profile of accountability and governance in the postsecondary sector**. ...When governments, colleges and universities make decisions or set policies, the wider world should be able to understand the reasoning behind the decisions and be satisfied that they are based on evidence and

good judgment...the extension of the powers of the Auditor General to “follow the money” will lead to greater accountability about the reasonableness of financial practices in the broader public sector. (emphasis added)

Mr. Rae’s comments identify a focus on corporate governance that has emerged in both the private and public sectors. The erosion of good corporate governance was the subject of a number of reports long before the corporate governance failures in the United States (Enron, ImClone, Tyco, Hollinger) and Canada (E-Health Ontario, Toronto Humane Society, Bre-X, Livent, Nortel, Hydro One) that have become household names. The impact of lax or irresponsible governance and management, particularly in public companies, as well as the media attention given to the prosecution and conviction of a number of senior managers, have resulted in laws, directives and guidelines (Sarbanes-Oxley in the U.S. is probably the most recognized) that require greater disclosure and greater accountability of managers and governors through audit, reporting and proficiency requirements among other internal control mechanisms. In the high tech world we live in events like the City of Mississauga public inquiry have their own website, and one can watch the sessions live on an iPad or other similar device.

This review of corporate governance principles and practices is intended to provide governors of Colleges in Ontario an overview of the applicable law, their responsibilities, and their potential liabilities. This review is not comprehensive and is not intended to be taken as legal advice.

The law governing Colleges changed significantly about eight years ago with the coming into effect of the *Ontario Colleges of Applied Arts and Technology Act, 2002*¹ (the “Act”). A brief summary of the applicable law and of the structure and mandate of Colleges is provided as background to the discussion about corporate governance.

Incorporation and the Objects of a College

Colleges are among a number of corporations that are established by regulation rather than through an application for incorporation. The regulation establishing Colleges is

¹ *Ontario Colleges of Applied Arts and Technology Act, 2002*, SO 2002, c 8, Sch F.

made under the Act (the “Regulation”)². Colleges are corporations without share capital and are agents of the Crown. Colleges are governed by boards of governors. Recent amendments³ to the Regulations which came into force on October 1, 2010 now require approximately one third of the members of the various Colleges’ board of governors to be appointed by the Lieutenant Governor in Council. The remaining members of the board are appointed by the members of the board holding office at the time of the appointment.⁴ Although independent from government, Colleges are part of the public sector and, for many reasons, including the fact that Colleges are recipients of public funds, Colleges are accountable to the Government and to the taxpayers of Ontario.

Under the Act, Colleges are to:

“...offer a comprehensive program of career oriented, post secondary education and training to assist individuals in finding and keeping employment, to meet the needs of employers and the changing work environment and to support the economic and social development of their local and diverse communities.”

Colleges are entitled to undertake a range of educational and training-related activities in furtherance of their objects that may include entering into partnerships with business, industry and other educational institutions.

There are currently 24 Colleges established under the Regulation.⁵ The Regulation in conjunction with the Protocol for Board Nominations and Appointments developed by the Ministry⁶, set out matters such as the composition of the board of governors, the appointment process for governors, the qualifications required to be a governor, terms of office, the quorum and procedure for meetings of the board and the process for removing

² *Ontario Regulation 34/03*, made under the *Ontario Colleges of Applied Arts and Technology Act*, 2002.

³ O Reg 169/10.

⁴ O Reg 34/03, s 4(2)(1)(a)(2).

⁵ The college known as Collège d’arts appliqués et de technologie des Grands Lacs was wound-up, effective August 31, 2010 reducing the total number of colleges under the Regulation from from 25 to 24.

⁶ [NTD: We do not have this document, but it is referenced in Policy Directives Governance and Accountability Framework]

a board member. The Regulation permits a board of governors to approve travel and living expenses incurred by governors while on the business of the board⁷, but prohibits any other remuneration of board members.

Transfer of Oversight

With the coming into force of the Act in 2003, oversight of Colleges was transferred from the Management Board of Cabinet to the Minister of Training, Colleges and Universities (the “Minister”). Under the Act, the Minister has the authority to “issue policy directives in relation to the manner in which colleges carry out their objects or conduct their affairs” and to intervene in the affairs of a College. Under the Regulation, the Minister has the authority to require a College to enter into an “accountability agreement” relating to a particular aspect or aspects of a College’s operations.⁸

Minister’s Policy Directives are binding on Colleges. A number of directives have been issued, including the “Governance and Accountability Framework”, which provides:

... the board of governors of a college is to govern effectively and is accountable to the citizens of Ontario for the successful achievement of this mandate in view of the financial support provided by the province. Good governance requires that policies, processes and structures be put in place to promote effective operation of the college and to allow it to fulfill its mandate and meet its objectives.

This directive sets out the role of the board of governors, stated to include, at a minimum, requirements such as establishing governance structures, approving the annual business plan, strategic plan, and budget, and taking corrective action as necessary.

⁷ Pursuant to the recent amendments of the Ministry Policy Directives Governance and Accountability Framework (Revised: September 2010) which now required Colleges’ board of governors to establish policies and procedures that adhere to, or exceed, the policies and procedures in the Management Board of Cabinet Directives regarding procurement, travel and hospitality expenses.

⁸ O Reg 34/03, s 8(4).

This directive emphasizes the special responsibility of governors of Colleges (as a function of public funding) and establishes, as tenets of good governance, the creation of policies, processes and structures designed to facilitate the effective operation of a College. The responsibility to establish governance structures would include establishing committees, such as an audit (or finance) committee, risk management committee, governance committee, strategic planning committee, or program and quality committee.

The directive on “Conflict of Interest” requires governors to:

- act honestly and uphold the highest ethical standards;
- perform their official duties and conduct themselves in a manner that will bear the closest public scrutiny because colleges are part of the broader public sector and subject to more public scrutiny than private organizations;
- not have private interests, other than those permitted pursuant to this binding policy directive, laws or statutes, that would be affected particularly or significantly by college decisions or actions in which they participate;
- arrange their private interests to prevent conflicts of interest and if a conflict of interest does arise between the private interests of a governor and the official duties of that individual, the conflict shall be resolved in favour of the public interest; and
- recognize that he or she has a responsibility first and foremost to the welfare of the institution and must function primarily as a member of the board, not as a member of any particular constituency.

Other directives issued by the Minister include those on planning and reporting, accounting and auditing, investments, entrepreneurial activities, and dealing with college property. The Minister makes directives available through a secure website to which governors should ensure that they have access.

Other Applicable Legislation and Contractual Obligations

In addition to the Act, there are a number of pieces of legislation that have an impact on the governance of Colleges, some of which are briefly described below.

Some sections of the *Corporations Act* (Ontario) apply to Colleges to grant them the power to sue (and the ability to be sued), to contract, and to assume liabilities. The *Canada Corporations Act* may indirectly be applicable to certain Colleges (for example, if a subsidiary of a College is incorporated under the *Canada Corporations Act*). The *Canada Not-for-profit Corporations Act*, which received Royal Assent on June 23, 2009, will replace the *Canada Corporations Act* when it is eventually called into force (estimated to be in mid-2010 or early 2011). This new Act will replace the common law duties of care and loyalty of directors and officers with statutory duties. The new Act will also, among other things, codify (a) the liability of directors for, as an example, unpaid employee wages, (b) defences and indemnity rights available to directors and officers, and (c) the ability for corporations to obtain directors and officers insurance and to advance defence costs to directors and officers.

On May 12, 2010, Bill 65, *Not-for-Profit Corporations Act, 2010* was introduced in the Ontario Legislative Assembly and will replace the *Corporations Act* (Ontario) when called into force. The bill passed Second Reading, was considered by the Standing Committee on Social Policy, and is now on its way to Third Reading. This bill proposes to bring Ontario non-share capital corporations under an updated and modernized corporate law similar to the new federal not-for-profit corporate law.

The *Financial Administration Act* (Ontario) ("*FAA*") sets out the rules in regard to monies owed to Ontario and monies paid out of Ontario's Consolidated Revenue Fund. Under the *FAA*, no one may enter into a financial arrangement that would increase the indebtedness or contingent liabilities of the Province of Ontario without the approval of the Minister of Finance. In effect, if by virtue of giving an indemnification, a College could be increasing the contingent liability of the Province, the College is not permitted to provide the indemnity without permission. Organizations entering into contracts with

a College may ask for proof of the College's compliance with the *FAA*, or more likely, a College will have to explain that it cannot provide an indemnity until it has the approval of the Minister of Finance.

The *Freedom of Information and Protection of Privacy Act* (Ontario) ("*FIPPA*") is the public sector access and privacy legislation. It governs the collection, use and disclosure of personal information (recorded information about an identifiable individual) by Colleges and other public sector "institutions". More specifically, *FIPPA* requires Colleges to provide certain information to individuals whose personal information they collect.

Where a College is registered as a charity, legislation applicable to charitable institutions may apply which create a number of specific duties and contingent liabilities for governors to consider, for example, fundraising, reporting and restrictions of operations to a college's charitable objects. Governors of Colleges that are registered as charities should ensure that they are informed of applicable requirements.

There are also College-specific acts which regulate Colleges' operations. For example, the *Colleges Collective Bargaining Act, 2008* (Ontario) gives part-time and sessional college workers the right to bargain collectively.

In addition to legislation, Colleges are subject to obligations created under agreements, such as that signed between the Colleges and the Ontario Public Service Employees Union that establishes and sets out the terms of the College of Applied Arts and Technology Pension Plan.

Governor's Obligations

There are general duties imposed under the common law on governors as directors as well as specific duties established in the Act and Regulation and other legislation.

Boards are often referred to as the “stewards” of a corporation because their role is to manage or supervise the management of the affairs of the corporation by:

- establishing and overseeing the implementation of a strategic direction for the corporation;
- supervising the performance of the CEO and other senior managers and officers of the corporation;
- monitoring the performance of the corporation (through audit and reporting requirements⁹), including ensuring that it meets its financial and other goals; and
- evaluating risks and ensuring there are risk management mechanisms in place.

Boards are increasingly being held responsible for establishing ethical standards for their organizations by, for example, establishing performance measures and codes of conduct. By complying with the rules they approve, directors set the “tone at the top”.

Fiduciary Duty and Duty of Care

Every director has two basic duties: a fiduciary duty and a duty of care. More detailed information about each duty is provided in Appendix I, but the following briefly outlines their nature.

Fiduciary Duty

The fiduciary duty of directors (and governors) is not found in the *Corporations Act*, but has been established and refined in case law. A director’s fiduciary duty has three components:

⁹ For example, The Canadian Institute of Chartered Accountants (CICA) has recently indicated that it will be issuing a number of new accounting standards by which not-for-profit organizations will have to abide. Proposed accounting standards were presented in draft form in March of 2010 to the not-for-profit sector for comment, and these comments are now being considered and incorporated into the new accounting standards.

1. a director must act honestly,
2. in good faith, and
3. with a view to the best interests of the corporation.

The fiduciary duty of directors is considered so fundamental to the relationship between directors and the corporations they serve that corporations are generally not entitled to insure or indemnify directors for liability attributable to a breach of their fiduciary duty. A director's fiduciary duty "belongs" to the director; in other words, it is incumbent upon a director to discharge the duty, regardless of the actions (or inaction) of other members of the board.

Standard of Care

Defining the standard of care a director is expected to meet is less straight-forward than defining a director's fiduciary duty. Most, if not all, statutory definitions of the standard of care involve an objective standard: directors must exercise **the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances**. A director meets this standard of care by making an informed decision pursuant to a reasonable and reasoned process.

Unlike the law governing business corporations which specify the standard of care to be exercised by directors,¹⁰ non-share capital corporations organized under the *Corporations Act* do not specify the standard of care to be exercised by directors. Accordingly, the common law standard applies to all non-share capital corporations including colleges established under the *Ontario Colleges of Applied Arts and Technology Act*.

The common law standard is a subjective standard that has been expressed as the duty of a director to **exercise the care, diligence and skill that may be reasonably expected of**

¹⁰ See *Business Corporations Act*, RSO 1990, s 134; *Canada Business Corporations Act*, RSC 1985, c C-44, s 122.

a person with the knowledge and experience of that director.¹¹ Under the common law, the standard of care varies with the training and experience of the director and, accordingly, could be more onerous than the standard applicable to directors of business corporations. There is even greater uncertainty around the specific standard of care a court will apply to directors of corporations that are also registered charities. For example, there is a line of cases that considers whether a director of a registered charity is acting in the capacity of a trustee or simply exercising his or her fiduciary duty to the corporation when managing charitable assets. Given the lack of clarity, governors of Colleges that are registered as charities are well-advised to seek advice before making any decision about the distribution of charitable assets.

Obligations of the Board

The Regulation sets out a number of specific obligations of the board of a College. These obligations include submitting a strategic plan, a business plan, and an annual report, (or any combination thereof that the Minister directs) to the Minister and making them available to the public. The board must also: “...compile key performance indicators as identified by the Minister”, “provide such indicators to the Minister”, and “publish such indicators as may be required by the Minister.” The board is also required to ensure that the College balances its budget every year and, where it appears that the budget will not be balanced and the College will have an accumulated deficit, the board is required to seek the Minister’s approval and provide the Minister with a recovery plan.

Personal Liability of Directors

Colleges, like other corporations, have a separate legal existence from their members and directors. Generally (but not always) directors are not personally liable for the negligent acts or contractual obligations of the corporation.

¹¹ *Re City Equitable Fire Insurance Company Limited*, [1925] 40 Ch D 41.

Directors can be held personally liable under statute for the acts and omissions of the corporation; or, as the result of a breach of the director's fiduciary duty, a failure to meet the applicable standard of care; or a misrepresentation made by the director in his or her capacity as a representative of the corporation. As an example, directors may be held personally liable if they neglect to take action to address unsafe working conditions or workplace harassment of which they have been informed, or fail to carefully scrutinize a proposal involving a significant investment.

Risk Management

Some statutory provisions imposing personal liability on directors provide for a "due diligence" defense. Simply put, directors may be excused from liability if they are found to have taken reasonable measures to comply with the legislation.

Under a doctrine known as the "business judgment rule", directors may also be excused from liability for an error of judgment if the directors' decision was informed and made pursuant to a sound process.

The test for the application of the due diligence defense and the business judgment rule underline the importance to directors of implementing sound corporate governance practices. The risk of personal liability being imposed on directors is also managed by directors and officers liability insurance and, in some cases, by an indemnification of directors and officers by the corporation for damages incurred as a result of performing their duties to the corporation.

The *Corporations Act* permits a College to indemnify a governor. A College may, at its option, indemnify a governor for any expense reasonably incurred in settling, defending, or meeting liabilities relating to the College where the College is not the claimant, if the governor: (a) acted honestly and in good faith with a view to the best interests of the College; and (b) was not guilty of "wilful neglect or default".

It is expected that most Colleges will have taken steps to indemnify their governors. Governors should also obtain information on the directors' and officers' insurance coverage in place at a College, including the exclusions and the reporting requirements. Each governor should be insured throughout the period during which liability may be incurred (which may last for several years after a governor has left the board). It is advisable to have a resolution approving the purchase of such liability insurance confirmed by the board.

In the past, charitable organizations incorporated in Ontario or operating in Ontario were prohibited from purchasing liability insurance for their directors without a court order. However, in 2001, legislation was passed¹² to allow charitable organizations to provide indemnities to their directors and to purchase liability insurance provided that the board of directors first consider a number of specified factors including:

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.

¹² The *Red Tape Reduction Act 2000* RSO 2000, c 26 – Bill 119, passed on December 6, 2000, amended the *Corporations Act*, s 133(2.2).

5. Whether it advances the administration and management of the property to give the indemnity or purchase the insurance.¹³

If the board considers all the factors and determines that it is appropriate to provide indemnities and/or to purchase insurance, the governors should pass a resolution (annually) to that effect.

More information on statutes under which governors may be held personally liable for acts and omissions of the College is included in Appendix II.

Powers of Government, Minister, Council

The board of governors is not the only body with authority to direct the operations of a College.

The **Government of Ontario** has the authority under the Act to make regulations that could have a significant impact on the operations of one, several, or all Colleges. More specifically, by way of regulation, the Government may vary or expand the objects or responsibilities of any College, prescribe any matter related to the manner in which a College may carry out its affairs, amalgamate or close Colleges, and direct that instruction be given in a specific language or languages including authorizing specified Colleges to offer any or all of their programs in French and prohibiting others from doing so.

For example, as a response to a lawsuit for \$200 million filed by two college students in December 2007 against their respective colleges,¹⁴ the Ontario government implemented

¹³ *Corporations Act* (Ontario) s 133(2.2) authorizes director indemnification if the corporation complies with the *Charities Accounting Act*, and the regulations made under that Act. The *Charities Accounting Act* s 5.1(1)(a) permits the making of regulations for acts or omissions that would otherwise require the approval of the Superior Court of Justice. The regulation known as *Approved Acts of Executors and Trustees*, O Reg 4/01, s 2, made under the *Charities Accounting Act*, specifies the factors a corporation's directors must consider before giving an indemnity or purchasing insurance.

¹⁴ *Hassum v Conestoga College Institute of Technology and Advanced Learning*, [2008] OJ No 1141.

an updated college student fee policy which came into effect in the 2009/2010 academic year clarifying what fees can be charged by colleges and student associations.

As mentioned, the **Minister** has broad powers under the Act to intervene in the affairs of a College where, for example, a College has failed to comply with a policy directive or the Minister believes that intervention is in the public interest.

The Council has the authority to establish, in consultation with boards of governors, the terms and conditions of insured benefit plans for College staff members, whether or not they are members of bargaining units under the *Colleges Collective Bargaining Act* (Ontario).

Summary: Governance Best Practices

Although not technically applicable to Colleges, some of the guidelines that have been established to assist directors of public corporations may be useful for boards of governors looking to implement sound corporate governance practices. What follows are points taken from guidelines applicable to public corporations.

Boards of Governors seeking to establish and continue good governance practices should consider:

- 1. *Written Mandate.*** Setting out the board's role and responsibilities in writing, including the board's responsibility for overseeing major expenditures and any change in programming or strategic direction and for establishing committees.
- 2. *Code of Conduct.*** Establishing a written code of conduct/ethics and acceptable organizational behaviour that applies throughout the College and addresses issues such as conflicts of interest and reporting of breaches of the code.
- 3. *Policies.*** Establishing a procedure for creating, approving and periodically reviewing policies of the College. This practice has been highlighted in the past several years by the Auditor General of Ontario who completed an audit of the expenditure and procurement policies of four colleges of applied arts and technology in May 2006. In its 2008 Annual Report, the Auditor General provided an update on the progress of the four

Colleges in implementing the Auditor General's recommendations set out in its 2006 Annual Report:

Recommendation #1(a): To help ensure that the prices paid for major purchases are competitive, as well as to give all potential suppliers a fair opportunity to obtain college business, colleges should limit the number of years they use the same supplier without re-tendering.

Recommendation #1(b): To help ensure that purchases comply with college policies, colleges should require that purchasing departments oversee major purchases made by other departments at the college.

Current Status: All four Colleges have implemented this recommendation (i.e. by limiting the number of years the same supplier could be used without re-tendering and by ensuring that the purchasing department oversaw and were involved in major purchases made by other departments.)

Recommendation #2: To help ensure that objectives are achieved at the lowest cost, colleges should specifically identify and define their needs before making significant purchases.

Current Status: All four Colleges have implemented this recommendation in their revised policies.

Recommendation #3: To help ensure that the best proposals are selected when major purchases are planned, colleges should:

develop procedures for evaluation committees, including a requirement that they identify the criteria to be used to evaluate the non-monetary aspects of proposals; and

require that the price summary be checked by someone other than the person who prepared it.

Current Status: All four Colleges require that the criteria to be used in evaluating the non-monetary aspects of proposals be developed before the start of the request-for-proposal (RFP) or tender process. The criteria used varies between Colleges and are weighed according to their relative importance.

Recommendation #4: To help ensure that college funds are used appropriately and to the benefit of colleges and their students, colleges should implement clear policies for gifts, donations, and meal and hospitality expenses.

Current Status: Amendments made to the Minister's Binding Policy Directive Governance and Accountability Framework on September 2010 now require that a college board of governors shall, at a minimum, establish policies and procedures that adhere to, or exceed, the policies and procedures in the Management Board of Cabinet Directives regarding procurement, travel and hospital expenses.

4. **Committees.** Creating committees with responsibility specific matters in which committee members have expertise (and should respect and not interfere with the work of such committees). For example, the Minister's Binding Policy Directive Governance and Accountability Framework requires that the board of governors establish an advisory college council and that a report from this advisory council is included in the college's annual report.

5. **Proficiency of Governors.** Establishing criteria for committee membership, addressing issues of continuity and succession, and providing orientation and continuing education for directors to ensure they:

- (a) have a basic understanding of the College's business;
- (b) are familiar with the terms of reference of committees to which they are assigned, review materials produced by or for the committees, and attend committee meetings;
- (c) are familiar with the responsibilities of members of the senior staff and the protocol for consulting with senior staff;
- (d) ensure they have access to and familiarize themselves with Ministry policies applicable to Colleges;
- (e) familiarize themselves with the by-laws of the College and its policies;
- (f) review the most recent financial audit and the auditor's report;
- (g) review any special reports or analyses prepared for or about the College and its programs or operations; and

- (h) review information updating the board or College community about programs or projects.

6. *Assessment.* Establishing criteria for assessing the effectiveness of the board and its committees, developing/approving qualifications & performance measures for senior managers, verifying that on-going training is provided to staff.

7. *Reporting.* Creating reporting requirements for senior management, requiring College officials and other professional experts to report regularly on the implementation and review of College policies and systems.

8. *Individual Procedural Duties.*

- (a) attending meetings of the Board as often as possible;
- (b) asking questions of other directors, College administrators and outside experts and keeping written records of all inquiries made and responses received;
- (c) voting against an action or motion with which he or she disagrees and ensuring that his or her dissent is recorded in the minutes of the board meeting;
- (d) reviewing the minutes of any meeting which he or she was unable to attend and registering a dissent, if necessary, with respect to any action taken at the meeting;
- (e) reviewing the minutes of board and committee meetings and verifying that views (including any dissenting views) and votes are accurately reflected;
- (f) ensuring that proper professional expertise is made available to the College and the board and asking for written opinions from external consultants such as accountants and engineers on whose advice the board will act;
- (g) being cognizant of issues raised by College stakeholders and third parties (such as the media);

- (h) ensuring that any contract that they are asked to execute on behalf of the College makes it clear that they are executing the contract as a signing officer of the College and not in their personal capacity; and
- (i) being prepared to resign from the Board or a committee if they are unable to attend meetings or otherwise participate in the work of the board regularly or have irreconcilable concerns about the direction being taken by the board or decisions made by board.

Appendix I Fiduciary Duty and the Duty of Care

Examples of the Exercise of a Director's Fiduciary Duty

Some examples of how directors exercise their fiduciary duty to a corporation are set out below.

(a) ***Maintaining Confidentiality***

Information a governor acquires about the affairs of the College should remain confidential. A governor should not, as a general rule, discuss confidential information of the College with persons outside the board unless acting in the course of his or her duties as a governor, where the disclosure is required to conduct business on behalf of the College, or where the disclosure is pursuant to a legal requirement. Ideally, the board will have established policies concerning the disclosure of confidential information and will identify a designated spokesperson to whom inquiries about specific matters, or more generally about the operations of the College, can be referred.

Governors may feel that they are on the board to represent a “community” or “constituency” of the College, but cannot take a position, regardless of how strongly it is advocated by the governor’s constituency, that is not in the best interests of the College. Acting in the best interests of the College and the duty to maintain confidentiality may, in some circumstances, prevent governors from reporting to constituents on decisions of the board.

(b) ***Avoiding/Declaring Conflicts of Interest***

Although there is nothing inherently wrong with having a conflict of interest, governors must not place their own interests ahead of their duty to act in the best interests of the College. An example of a conflict of interest is a situation where a governor is a party to a material contract or proposed material contract with the College. Under the *Corporations Act*, governors who have any interest in a proposed contract or a contract

with the College must declare their interest at a meeting of the board. The *Corporations Act* sets out a procedure for the disclosure by directors of personal interests in contracts or proposed contracts with a College. If a director follows the procedure of disclosing his or her interest in a contract or a proposed contract at a meeting of the Board at the earliest opportunity and then refrains from voting on the issue, the *Corporations Act* provides that he or she will not be accountable to the College or its creditors for any profit realized from the contract and the contract is not voidable by reason only of the director holding that office or of the existence of the fiduciary relationship. Given the conditions established in the *Corporations Act*, it would be prudent for governors to declare their conflict of interest in regard to a contract and to leave the meeting before any discussion and vote is held on the matter.

Conflict of interest is not defined in the Act or in the *Corporations Act*, but the Ministry has characterized and defined conflict of interest as follows:

- (i) real – a real conflict of interest exists when a private interest exists that is known to an individual and that has a sufficient connection with his or her responsibilities that is sufficient to influence the exercise of those responsibilities;
- (ii) potential – a potential conflict of interest exists when the existence of some private economic interest could influence the exercise of an individual’s public duties or responsibilities; and
- (iii) apparent – an apparent conflict of interest exists if an informed individual viewing the matter realistically and practically would have concluded that a conflict exists.

Most College boards have updated their by-laws or policies to reflect the *Corporations Act* provisions and guidelines on conflict of interest. As mentioned, conflict of interest is the subject of a directive of the Minister.

(c) ***Other Situations Giving Rise to a Conflict of Interest***

There are other less obvious situations where governors may find themselves in a conflict of interest (or may be perceived as having a conflict of interest). One example would be where a faculty representative is a member of the board and the subject under review is the representative's program at the College. Where a governor's role includes bringing the perspective of a constituency to the board (faculty and student representatives, for example), the governor must declare any conflict, but may subsequently, with board approval, participate in the discussion (to afford the board the benefit of hearing his or her views) but abstain from voting.

How does a Governor Meet the Standard of Care?

Despite the confusion over the applicable standard of care, governors are advised to take some simple precautions:

(a) ***Attend Board Meetings***

Governors should attend all board meetings to the extent possible (a governor cannot avoid responsibility by staying away from a board meeting).

(b) ***Review Information Provided with a "Critical Eye"***

When provided with information or a report, a governor should consider whether a reasonable person would accept the information provided in the circumstances or whether further inquiry would be required. For example, if a report to the board contains inconsistencies, a governor should ask questions to resolve the inconsistencies.

(c) ***Reliance on Experts***

A governor may rely on experts if there is no reason to doubt their reliability.

(d) ***Oversee fundraising and investment activities***

Governors of Colleges must ensure that funds under their control are expended for proper purposes in accordance with the Colleges' objects.¹⁵

¹⁵ *Bloorview Children's Hospital Foundation v Bloorview MacMillan Centre* (2002), 22 DLR (3d) 182 (Ont Sup Ct Jus); *Ontario (Public Guardian and Trustee) v National Society for Abused Women and Children*, [2002] OJ No 607 (Ont Sup Ct Jus).

Appendix II

Examples of Sources of Potential Personal Liability for Governors

In addition to governors' fiduciary duties and the duty of care which they must observe, governors may be held personally liable under statutory provisions for errors, omissions and wrongful acts committed by the College. Some of these contingent liabilities created by statute may continue for up to six years after a governor ceases to be a governor. Personal liability may be imposed on governors where a College:

- fails to deduct, withhold, collect or remit amounts for federal and provincial income tax¹⁶, unemployment insurance, the Canada Pension Plan, retail sales tax, or the goods and services tax;
- fails to pay the Ontario Employer Health Tax;
- contravenes provincial employment standards legislation; or
- contravenes federal or provincial environmental standards.

Other Examples

Under various corporate statutes¹⁷, a governor could be held liable for up to six months' unpaid wages owed to employees and for up to twelve months of vacation pay. Directors may want to require a report at least semi-annually (preferably from an independent auditor) certifying that employees' wages have been paid in full, income and other taxes have been properly withheld and remitted to the federal and provincial governments, and vacation pay has been properly accrued.

¹⁶ *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 227.1; See *Wheeler v Canada* (1999), 172 DLR (4th) 708; *Rancourt c Canada*, 2008 TCC 285.

¹⁷ *Canada Not-for-Profit Corporations Act*, SC 2009, c 23, s 146; *Canada Corporations Act*, RSC 1970, c C-32, s 99; *Corporations Act*, RSO 1990, c C38, s 81; and *Bill 65, Not-for-profit Corporations Act, 2010* (Ontario).

The *Environmental Protection Act (Ontario)*¹⁸ imposes a duty on directors of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment to take all reasonable care to prevent the corporation from causing or permitting the discharge.

The *Occupational Health and Safety Act (Ontario)*¹⁹ imposes a duty on directors to take reasonable care to ensure that the corporation complies with the Act, including any orders or requirements issued by an inspector or by the Minister of Labour.

Statutory Provisions on Personal Liability of Directors

The following are some of the other statutes which hold directors personally liable for the acts and omissions of the corporation in specified circumstances. What follows is not a complete list.

1. *Accessibility for Ontarians with Disabilities Act, SO 2005, c 11.*
2. *Building Code Act, SO 1992, c 23.*
3. *Canada Pension Plan, 1985, RSC 1985, c C-8.*
4. *Construction Lien Act, RSO 1990, c C30.*
5. *Dangerous Goods Transportation Act, RSO 1990, c D1.*
6. *Employer Health Tax Act, RSO 1990, c E11*
7. *Employment Standards Act, 2000, SO 2000, c E41.*
8. *Fire Protection and Prevention Act, 1997, SO 1997, c 4.*
9. *Income Tax Act, RSC 1985, c 1 (5th Supp).*
10. *Ontario Water Resources Act, RSO 1990, c O40.*
11. *Pesticides Act, RSO 1990, c P11.*

¹⁸ *Environmental Protection Act*, RSO 1990, c E19, s 194.

¹⁹ *Occupational Health and Safety Act*, RSO 1990, c O1.