

2010 GOVERNOR ORIENTATION PROGRAM

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What is Corporate Governance?

- "Corporate governance is the **system** by which ... corporations are directed and controlled.
- The corporate governance structure specifies the **distribution of rights and responsibilities** among different participants in the corporation...and spells out the **rules and procedures** for making decisions on corporate affairs.

What is Corporate Governance?

- ...it also provides **the structure** through which the company objectives are set, and the means of **attaining** those **objectives** and **monitoring performance**".
 - OECD April 1999
- "Corporate governance is about promoting corporate **fairness, transparency** and **accountability**"
 - J. Wolfensohn, 1999

Agenda

1. Establishment of Colleges
2. General legal duties of governors (aka directors)
3. Specific legal duties
4. Personal liability for corporate acts & omissions
5. Risk management
6. Best practices

Legislative Framework - The Act

- The *Ontario Colleges of Applied Arts and Technology Act, 2002* (the “Act”) proclaimed in 2003
- regulations establish Colleges
- 24 Colleges established under the Act’s regulations
- requires boards of governors
- establishes authority of Minister of Training, Colleges & Universities (“Minister”)

Authority of Minister

- Minister may -
 - issue binding policy directives impacting how Colleges carry out their objects or conduct their affairs
 - intervene in the affairs of a College

Binding Policy Directives

- Governors should be familiar with directives, including
 - Strategic Plan
 - Business Plan
 - Governance and Accountability Framework
 - Conflict of Interest
 - Banking and Investments
 - Purchase, Sale or Encumbrance of College Property
 - Annual Report
 - Audited Financial Statements
 - Entrepreneurial Activities

Governance and Accountability Framework

“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.”

Governance and Accountability Framework

- “Good governance requires that **policies, processes, and structures** be put in place to promote effective operation of the organization and to allow a corporation to fulfill its mandate and meet its objectives.”

Governance and Accountability Framework

- At a minimum, role of the board is to –
 - establish **governance structures**
 - set **corporate goals**/strategic direction & monitor alignment of operations with such goals and directions
 - take **corrective action** as necessary
 - hire & **assess officer (e.g. CEO) performance**, delegate accountability to CEO and other officers where reasonable
 - **approve business plan, strategic plan, budget, annual report and overall decisions affecting the corporation**

Conflict of Interest

Governors are expected to -

- act honestly and uphold the highest ethical standards
- conduct themselves in a manner that will bear the closest public scrutiny
- try to arrange their private interests so as to avoid conflicts of interest (in other words, act in the best interests of the corporation, not themselves)

Conflict of Interest

- A Conflict of interest exists where a governor –
 - has personal interests that supersede, compete with or could influence the exercise of his or her responsibilities as a board member
 - is party to a proposed or actual contract with the College

Conflict of Interest

- Conflict of interest may be “real”, “potential” or “apparent”
- **Governors**
 - **must declare & explain nature of conflict at earliest opportunity**
 - **may or may not participate in discussion**
 - **should not participate in vote**

Other Applicable Legislation

- Under the Act, Colleges are agents of the Crown & subject to -
 - **Financial Administration Act**
 - **Freedom of Information and Protection of Privacy Act**
 - **Other acts applicable to public sector bodies and other not-for-profit organizations**

Financial Administration Act (Ontario)

- Prohibits Colleges from giving indemnity w/o prior permission of Minister if indemnity would increase indebtedness or contingent liabilities of Province
- Implications for contracts

Freedom of Information and Protection of Privacy Act (“FIPPA”) (Ontario)

- FIPPA governs collection, use & disclosure of “personal information” (recorded information about an identifiable individual)
- [*Personal Information Protection and Electronic Documents Act* (“PIPEDA”) not applicable except where College engages in “commercial activity”]

Corporations Act (Ontario)

- Colleges are non-share capital corporations subject to the *Corporations Act*
- Corporation distinct entity from directors & officers which gives governors some protection from personal liability for acts & omissions of College

Recent Developments

Not-for-Profit Corporations Act, 2010

- ***New Ontario Not-for-Profit Corporations Act***
 - *Bill 65, Not-for-Profit Corporations Act, 2010* was introduced in the Ontario Legislative Assembly on May 12, 2010
 - Received Royal Assent on October 25, 2010
 - *Bill 65* modernizes the corporate law and in many ways aligns it with the corporate statutes applicable to business corporations, therefore we will benefit from a better-defined body of law.

Recent Developments

Broader Public Sector Accountability Act, 2010

- **Bill 122: New *Broader Public Sector Accountability Act***
 - Introduced in Ontario Legislative Assembly on Oct 20, 2010
 - Currently at second reading
 - Implements measures concerning financial accountability in the broader public sector
 - Targets LHINs and Hospitals, but also applies to other broader public sector entities such as Ontario Colleges
 - Prohibits using public funds to engage Lobbyists
 - Lieutenant Governor may make regulations for reporting on use of consultants, posting expenses, and requiring the filing of attestations of compliance with the *Act*
 - Management Board of Cabinet may issue directives establishing expense rules and governing the procurement of goods and services
 - Every broader public sector organization to which the Management Board of Cabinet directives apply **shall** comply with the directives



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Legislative Authority to Manage Affairs of Colleges

- **Government** may make regulations amending objects, amalgamating or closing and directing programs
- **Minister** has powers noted above
- **College Compensation and Appointment Council** revoked by amendment to Regulation 34/03 on October 1, 2010.
- **New Appointment Process:** approximate 1/3 of all governors to be appointed by the Lieutenant Governor of Ontario in Council (provincial Cabinet)
- Those governors appointed by the Province shall appoint the remaining members of each College board

General Legal Duties - Duty of Care

- Governors must meet a minimum standard of care in discharging duties
- Governor must exercise the care, diligence & skill that may be **reasonably expected of a person with the knowledge and experience of governor** (subjective test - standard may vary)

General Legal Duties - Fiduciary Duty

- Encompasses conflict of interest
- Requires a governor to act **loyally, honestly, in good faith, without personal profit & in the best interests of College**
- Owed by each governor to College
- College's interest must supersede self-interest

Specific Duties

(under Regulations made under Act)

- Governors to –
 - draft, submit to Minister & make available to public: **strategic plan; business plan; annual report; key performance indicators** identified by Minister
 - **balance College's budget**
 - if deficit, seek Minister's approval & submit recovery plan

Personal Liability for Acts & Omissions of College

- Examples:
 - Failure to deduct & remit taxes
 - Contravention of occupational health & safety laws, employment standards, building code, environmental standards, accessibility and disability law
 - Misrepresenting authority, failure to discharge standard of care

Risk Management - Indemnification & Insurance

- Establishment of & adherence to sound corporate governance practices
 - due diligence defense
 - business judgment rule
- Indemnification and Insurance coverage by College permitted by *Corporations Act* (Ontario)
- Each College can purchase director and officer liability policy as added protection for governors

Best Practices

- Be familiar with College operations & responsibilities of key senior staff
- Attend board meetings when possible
- **Thoroughly review** financial statements, minutes, reports, etc.
- **Ask questions**
- **Vote only when comfortable with issue and your decision**

Best Practices

- Test credibility of advice
- Exercise prudence & common sense - keep corporate information confidential & avoid/declare conflicts of interest
- Ensure College has D&O insurance & review coverage annually - investigate indemnification rights and whether indemnification agreement in place

Sound Corporate Governance

- **Governors should establish –**
 - a written **mandate** for board
 - a **code of conduct** of acceptable organizational behavior
 - **policies** (& procedure for making them) & review/update them periodically
 - **committees & reporting requirements**
 - **performance measures & implement performance reviews**
 - **ongoing training** (for governors and officers) to ensure **proficiency**

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