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## *POLICY STRUCTURED BY-LAWS*

DON BOURGEOIS  
KITCHENER, ON

MAY 2006 – TORONTO

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**CANADIAN BAR ASSOCIATION/ ONTARIO BAR ASSOCIATION  
4<sup>TH</sup> NATIONAL SYMPOSIUM ON CHARITY LAW**

**Toronto - May 11, 2006**

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**OVERVIEW OF TOPICS**

- **Introduction**
- **What is Governance?**
- **Duty(ies) of Directors and Officers**
- **What is Policy?**
- **Policy Process**
- **Selected Policy Documents**
- **By-laws versus Policy Statements(?)**

## **INTRODUCTION**

- **Organizations are legal artifices – used for practical purposes to structure internal relationships and external dealings**
- **Directors are any organization’s primary asset**
- **Directors ensure organization (i) relates to others in accordance with law, (ii) acts in a fiscally prudent manner, and (iii) is efficient and effective in achieving its purposes**

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## **WHAT IS GOVERNANCE?**

- **“Governance” is a combination of both overall processes and the structures that are used in directing and managing the organization’s operations and activities**
- **“Stewardship” is the responsibility of the board of directors and involves the active oversight by the board of the organization’s governance**

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- **Assessing when individuals have acted properly – and not negligently – is dependent on understanding of common law and statutory obligations and tests, and expectations of directors**
- **Good governance is not “perfection” – rather good governance is intended to minimize risks of things going wrong, identifying what may go wrong and trying to prevent it, and addressing problems when things go wrong in an ethical and legal manner**

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- **Two conceptual approaches to “governance” and “stewardship”**
  1. **Administrative Governance Model**
    - **“traditional approach”**
    - **Board makes most substantive decisions based on materials and discussion at the board meeting**

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## **2. Policy Governance Model**

- Board has an “oversight” role rather than active role in managing the affairs of the organization**
- Approach relies more on development of operational policies implemented by staff and officers**
- Board retains legal responsibilities**

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- Carver “Policy Governance”**

- Variation or different type of governance model?**
- Assumes board of directors represents “interests of the owners” – difficult concept to implement, especially in charitable sector**
- Ends/Means distinction**
  - If the board has established Ends and has determined through monitoring that these Ends are actually accomplished, it can be argued that the staff Means have worked**

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- **Categories of “Carver” Policy**
  - **Ends**
  - **Executive Limitations**
  - **Governance Policy**
  - **Board/Staff Linkages**

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### **Reality**

- **Most organizations will – and should – operate on the basis of a mixture of the “administrative” and “policy” models**
- **Spectrum between “administrative governance” and “policy governance” based on several factors**
- **Any organization may, depending upon its needs, move along that spectrum**

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**Factors in determining location along spectrum:**

- **Legal authority of directors, officers and organization itself**
- **Statutory or common law obligations and restrictions**
- **Contractual obligations and restrictions**
- **Constating documents**
- **Culture of organization**

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- **Views and perspectives of key stakeholders**
- **Skills, competence and training of staff and volunteers**
- **Resources**
- **Size and type of operation**
- **Activities carried out by organization**
- **Due diligence requirements of the directors and officers**

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### **DUTY(IES) OF DIRECTORS AND OFFICERS**

- **Duty to manage the affairs of the organization – statutory and common law**
- **No clear articulation of what is meant by “manage the affairs” – but must be more than just monitoring**
- **No clear “standard of care” or single standard of care that is applicable in all circumstances**

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### **Standard of Care – Objective or Subjective?**

- ***Re City Equitable Fire Insurance Co.* - early 20<sup>th</sup> century – subjective standard of care**
- ***Canada v. Corsano* – late 20<sup>th</sup> century – subjective colouring to objective standard of care**
- ***Re Public Trustee and Toronto Humane Society et al.* - late 20<sup>th</sup> century cry for change**

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**Panel on Accountability and Governance**

- **Mission and strategic planning**
- **Transparency and communication**
- **Organizational structure**
- **Fiscal responsibility**
- **Oversight of human resources – staff and volunteers**
- **Assessment and control systems**
- **Planning for succession and diversity**

**N.B. – Not dependent on model**

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**Typical Issues**

- **Employees and workplace**
- **Taxation and other imposts**
- **Environmental**
- **Business practices**
- **Competition**
- **Information and personal privacy**
- **Intellectual property**
- **Vulnerable clients**

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**Descriptions of Directors’ “Duties”**

- **Fiduciary relationship – corporate law**
  - **To act with reasonable degree of prudence**
  - **To be diligent**
  - **To act in good faith**
  - **To avoid conflicts of interest**

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- **Trustee or “akin to trustee” – charitable law**
  - **To exercise vigilance, prudence and sagacity**
  - **To act in good faith**
  - **Not to delegate**
  - **Not to have a conflict of interest**

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- **Public Guardian and Trustee**
  - **To be reasonable, prudent and judicious**
  - **To carry out charitable purposes**
  - **To avoid conflicts of interest**
  - **To act gratuitously**
  - **To account**
  - **To manage the charity's assets**

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### **Boards and Directors**

- **Decisions are made by the *Board* of directors and not by individual directors or groups of directors**
- **Decisions are articulated through resolutions or similar documents**
- **Once decisions are made, the “corporation” has spoken through the *Board***
- **Boards and directors are accountable – especially to the membership but also regulators and stakeholders**

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- **Procedures (by-laws, board policies, rules of order, etc.) are the processes by which decisions of the Board are made**
- **Important to follow and comply with the procedures that are in place to ensure full and proper discussion and decision-making**
- **Important that the procedures make sense for that organization and board – overly complex will not be followed and/or lead to confusion**

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### **WHAT IS POLICY?**

- **Policy is a governing principle – allows the board to delegate to others (staff, volunteers, officers, and agents) the authority to act on behalf of the organization**
- **Board control over the development and implementation of policy is essential**
- **Policy allows staff, volunteers, officers, and agents to know what the board wants and expects and why**

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**Policy is intended:**

- **To bring a reasoned approach to a particular matter or issue**
- **To provide for consistency and overall fairness and predictability of decisions**
- **To encourage full consideration of all relevant factors before a decision is made on the merits of a particular matter**
- **To carve out areas of specific responsibility and accountability where the expertise lays**

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**POLICY PROCESS**

- **Identification of need for a policy – experience, legal requirements (*OHSA, Trustee Act*), sector industry practice**
- **Terms of reference for policy development, format and research**
- **Review of legal requirements and standards that are applicable, including recommendations by associations, regulators, insurers**

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- **Drafting a policy**
- **Discussion of draft policy and preparation of final version**
- **Approval by the board**
- **Development of implementation plan**
- **Approval of implementation plan, which may require resource allocations**
- **Evaluation of policy and its effectiveness**
- **Revision of policy**

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### **SELECTED POLICY DOCUMENTS**

- **Governance Policies**
  - **Letters patent, memorandum of association, trust deed or similar constating document**
  - **By-laws**
  - **Rules of procedure or rules of order**
  - **Conflict of interest policy**
  - **Code of conduct**

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- **Internal control and audit**
- **Risk management – officers and directors insurance N.B. compliance with *Charities Accounting Act***
- **Regulatory compliance**
- **Protection of intellectual property – own and prevent misuse or abuse of IP owned by others**
- **Program review – Effective? Efficient? Risk?**
- **Investment policy – N.B. compliance with *Trustee Act***

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- **Strategic Planning**
  - **Mission statement**
  - **Statement of goals and objectives**
  - **Business plans**
  - **Budgets and resource allocations**
  - **Longer term plans**
  - **Communications policy**

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- **Operational Policies**
  - **Personal information and privacy**
  - **Human resources and workplace (employees and volunteers) – occupational health and safety, harassment and discrimination, hiring, retention, promotion, remuneration, conflict of interest**

**N.B. collective bargaining unit or non-unionized workplace**

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- **Financial management (cash management, internal controls, banking arrangements, audit)**
- **Program management**
- **Program policies**
- **Risk management (including “asset protection” through insurance and indemnification, loss prevention policies)**

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- **Code of Conduct for Board**
  - **Job description**
  - **Information about organization, programs, strategic plans**
  - **Expectations that the board has of all directors**
  - **Attendance and participation requirements**
  - **Lines of accountability**

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- **Information on essential policies (i.e., harassment, risk management)**
- **Criteria for evaluation of directors and process**
- **Behavioral guidelines**
- **Agreement to comply with Code of Conduct and with the policies of the organization and the board**

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**BY-LAWS VERSUS POLICY STATEMENT (?)**

- **Most organizations will have “policies” in place that are used by the board and/or staff to guide decision-making**
- **The degree to which policies are required will vary depending upon type of organization, its size and operations, its resources, statutory and common law obligations, and its approach to governance**
- **Board of directors, regardless, must “manage the affairs” of the organization – and be seen to do so – and cannot simply delegate to others**

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- **Where should the “policies” be?**
- **Answer to this question involves the factors noted earlier and the overall approach to “governance”**
- **Who should be involved? Who should develop? Who should decide or approve?**
- **Answer to these questions focuses on the roles of the board and members, the culture of the organization, and the type of policy, i.e., human resource management versus code of conduct for directors**

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- **Code of Conduct**
  - Deals essentially with how directors relate to organization and its employees/volunteers, and with each other
  - By-law approach (i) fully in by-law, (ii) some elements in by-law, e.g., attendance, or (iii) reference, e.g., eligibility to be director includes “compliance with the Code of Conduct for Directors established by the board”

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- **By-laws could be silent on who develops and approves “policies”**
- **By-laws could identify who develops and approves certain types of “policies”, i.e., “the Board shall put in place a risk management policy”**
- **By-laws could authorize board to put in place policies (i) for matters that could be included in the by-laws, or (ii) for matters that relate to the management of the affairs of the organization**

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- **Consultation?**
- **With whom?**
- **Why?**
- **Binding or advisory?**
- **Consultation policy?**

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- **Nobody is perfect**
- **Policies assist in identifying and focusing on risks, how to prevent them, and how to correct problems when they occur**
- **Directors must make an honest and good faith effort to meet their legal and moral obligations – policies help to do so**
- **Evidence of good faith goes a long way to satisfy a court, regulators, members, donors, other stakeholders and the public**

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