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POLICY STRUCTURED BY-LAWS

Don Bourgeois Kitchener, ON

May 2006 – Toronto

CANADIAN BAR ASSOCIATION/ ONTARIO BAR ASSOCIATION 4TH NATIONAL SYMPOSIUM ON CHARITY LAW

Toronto - May 11, 2006

POLICY STRUCTURED BY-LAWS

By Donald J. Bourgeois, B.A., LL.B. (Counsel)

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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

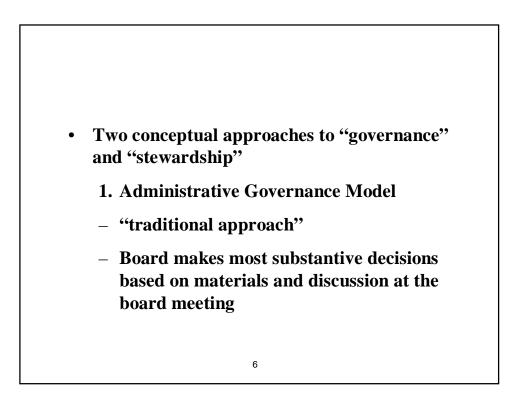
- Organizations are legal artifices used for practical purposes to structure internal relationships and external dealings
- Directors are any organization's primary asset
- Directors ensure organization (i) relates to others in accordance with law, (ii) acts in a fiscally prudent manner, and (iii) is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

- 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



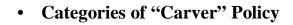
2. Policy Governance Model

- 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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- Ends

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- Executive Limitations
- Governance Policy
- Board/Staff Linkages

Reality

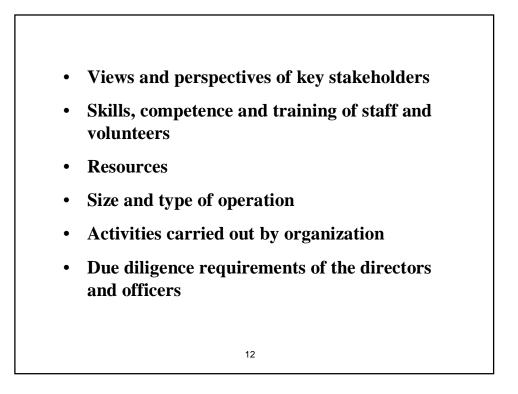
 Most organizations will – and should – operate on the basis of a mixture of the "administrative" and "policy" models

- Spectrum between "administrative governance" and "policy governance" based on several factors
- Any organization may, depending upon its needs, move along that spectrum

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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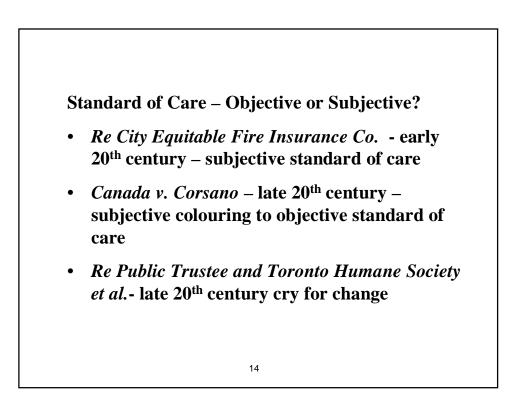


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DUTY(IES) OF DIRECTORS AND OFFICERS
Duty to manage the affairs of the organization
– statutory and common law
No clear articulation of what is meant by
"manage the affairs" – but must be more than
just monitoring
No clear "standard of care" or single standard
of care that is applicable in all circumstances

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Panel on Accountability and Governance

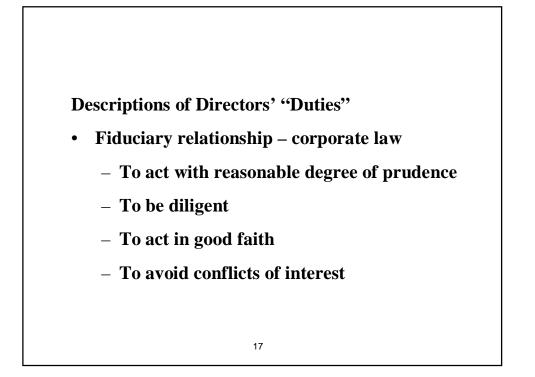
- Mission and strategic planning
- Transparency and communication
- Organizational structure
- Fiscal responsibility
- Oversight of human resources staff and volunteers
- Assessment and control systems
- Planning for succession and diversity
- N.B. Not dependent on model

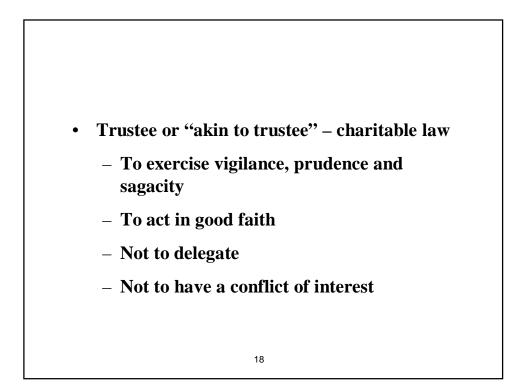
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Typical Issues

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

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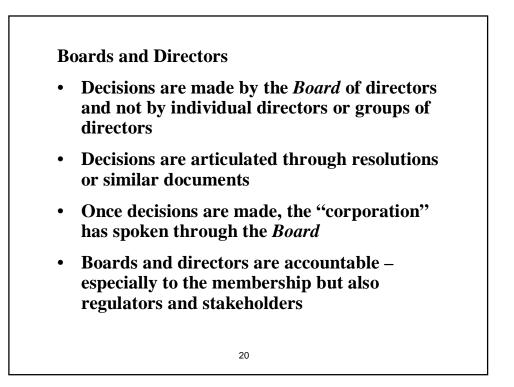
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Public Guardian and Trustee

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- 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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- 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

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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- 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

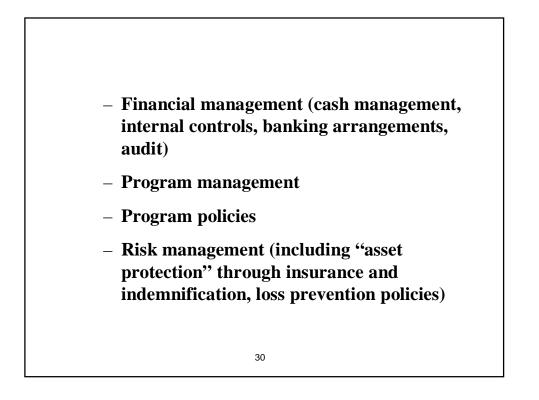
- Internal control and audit
- Risk management officers and directors insurance N.B. compliance with *Charities Accounting Act*
- Regulatory compliance
- Protection of intellectual property own and prevent misuse or abuse of IP owned by others
- Program review Effective? Efficient? Risk?
- Investment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



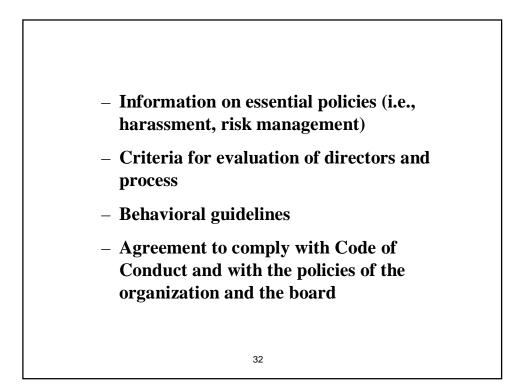
- Operational Policies
 - Personal information and privacy
 - Human resources and workplace

 (employees and volunteers) occupational
 health and safety, harassment and
 discrimination, hiring, retention,
 promotion, remuneration, conflict of
 interest

N.B. collective bargaining unit or nonunionized workplace



- 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



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



- Consultation?
- With whom?
- Why?

- Binding or advisory?
- Consultation policy?

- 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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