PAVRO
Professional Association of Volunteer Leaders - Ontario
LEADING VOLUNTEER ENGAGEMENT

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Board Governance in the Not-for-Profit Sector – Tips and Tools to Help Your Board Govern Effectively and Fulfill its Legal Obligations.

PAVRO
LIVE CONFERENCE WORKSHOP

June 22, 2017

Anna C. Naud

Mason Bennett Johncox Professional Corporation

AGENDA

1. **What is a not-for-profit organization?**
    1. **NFP vs. Registered Canadian Charity**
    2. **Jurisdiction**
2. **Governance**
    1. **Rules binding the Corporation**
    2. **Rules binding the Directors and Officers**
    3. **Protection of Directors and Officers**
    4. **Role of Governance Board**

LET'S PLAY: WHAT AM I?

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DAY
CARE

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COMMON LAW DEFINITION OF "CHARITY"

1. The 1601 *Preamble* to the *Statute of Elizabeth*
2. The test set out in the reasons of Lord Macnaghten in the 1891 House of Lords decision in *Commissioner for Special Purposes of the Income Tax v. Pemsel*

STATUTE OF ELIZABETH'S DEFINITION

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… relief of aged, impotent and poor people … the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities … repair of bridges, ports, havens, causeways, churches, seabanks and highways … education and preferment of orphans … the relief, stock or maintenance for houses of correction … marriages of poor maids … supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed … relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.

PEMSEL: THE FOUR HEADS OF CHARITY

"Charity" in its legal sense comprises four principal divisions:

- trusts for the relief of poverty;
- trusts for the advancement of education;
- trusts for the advancement of religion; and
- trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

INCOME TAX ACT (CANADA): WHAT IS A CHARITY?

- Its purpose must fall under one of the Four Heads of Charity
- Must meet the public benefit test:
  - Its activities and purposes provide a tangible benefit to the public;
  - Those eligible for benefits are not a restricted group;
  - Its activities must be legal and not contrary to public policy.
- The organization has to be either incorporated or governed by a legal document called a trust or constitution. This document has to explain the organization's purpose and structure.
- Exempt from income under paragraph 149 (1) (f)

EXAMPLES OF REGISTERED CHARITIES

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- relief of poverty (food banks, soup kitchens, low-cost housing units)
- advancement of education (colleges, universities, research institutes)
- advancement of religion (places of worship, missionary organizations)
- purposes beneficial to the community (animal shelters, libraries, volunteer fire departments)

TYPES OF CHARITIES

1. Charitable Organization
2. Public Foundation
3. Private Foundation

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GOVERNING BODIES

- Canada Revenue Agency – federal
- Ontario Public Guardian and Trustee

•Don’t forget – there are other applicable pieces of legislation. And the funders often impose conditions re. activities as well.

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What if you don’t qualify to be a registered Canadian charity, but you still want to do good deeds (and be exempt from income tax)?

INCOME TAX ACT, PARAGRAPH 149(1)(l)

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The taxable income of an association is exempt from tax under Part I of the Act for a period throughout which the association complies with all of the following conditions:

(a) it is not a charity;

(b) it is organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit;

(c) it is in fact operated exclusively for the same purpose for which it was organized or for any of the other purposes mentioned in (b); and

(d) it does not distribute or otherwise make available for the personal benefit of a member any of its income unless the member is an association which has as its primary purpose and function the promotion of amateur athletics in Canada.

?????

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1. A NFP cannot operate exclusively for charitable purposes (aka the Four Heads).
2. Cannot be organized for *profit*.
3. Cannot be operated for *profit.*
4. Cannot confer a <u>private</u> benefit.

WHAT IS A NOT-FOR-PROFIT?

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- It does not distribute or otherwise make available, for the personal benefit of a member, any of its income unless the member is an association which has as its primary purpose and function the promotion of amateur athletics in Canada.
- An NPO is exempt from tax under Part I of the Act on all or part of its taxable income for a fiscal period if it meets all of the above requirements for that period.

An NPO cannot issue tax receipts for donations.

EXAMPLES OF NFPS

- social, recreational or hobby groups (bridge clubs, curling clubs, golf clubs)
- certain amateur sports organizations (hockey associations, baseball leagues, soccer leagues)
- certain festival organizations (parades, seasonal celebrations)

NICKNAMES

NFP

NPO

NGO

Not-for-Profit

Non-Profit

Non-share capital corporation

CANADA NOT-FOR-PROFIT CORPORATIONS ACT (CNCA)

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- Transition was required by October 17, 2014 for not-for-profits incorporated federally under the *Canada Corporations Act*
- Provides a new clear set of rules to govern the internal affairs of federal not-for-profit corporations
- Introduces concept of soliciting (>$10,000 in public source income) vs non-soliciting
- NFPs incorporated under the *Corporations Act* (Ontario) can transition to the CNCA or wait until ONCA is proclaimed in force

ONTARIO CORPORATIONS ACT / ONTARIO NOT-FOR-PROFIT CORPORATIONS ACT, 2010 (ONCA)

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- **Ontario - *Corporations Act* (Ontario)**
  - 1907
  - Updated 1953 and 1998

- **New Act: *Not-for-profit Corporations Act, 2010* (Ontario)**
  - Passed on October 19, 2010 – Royal Assent October 25, 2010
  - Awaiting Regulations
  - Not yet in force: 24 months notice to be given

THE BASIC GOVERNANCE STRUCTURE

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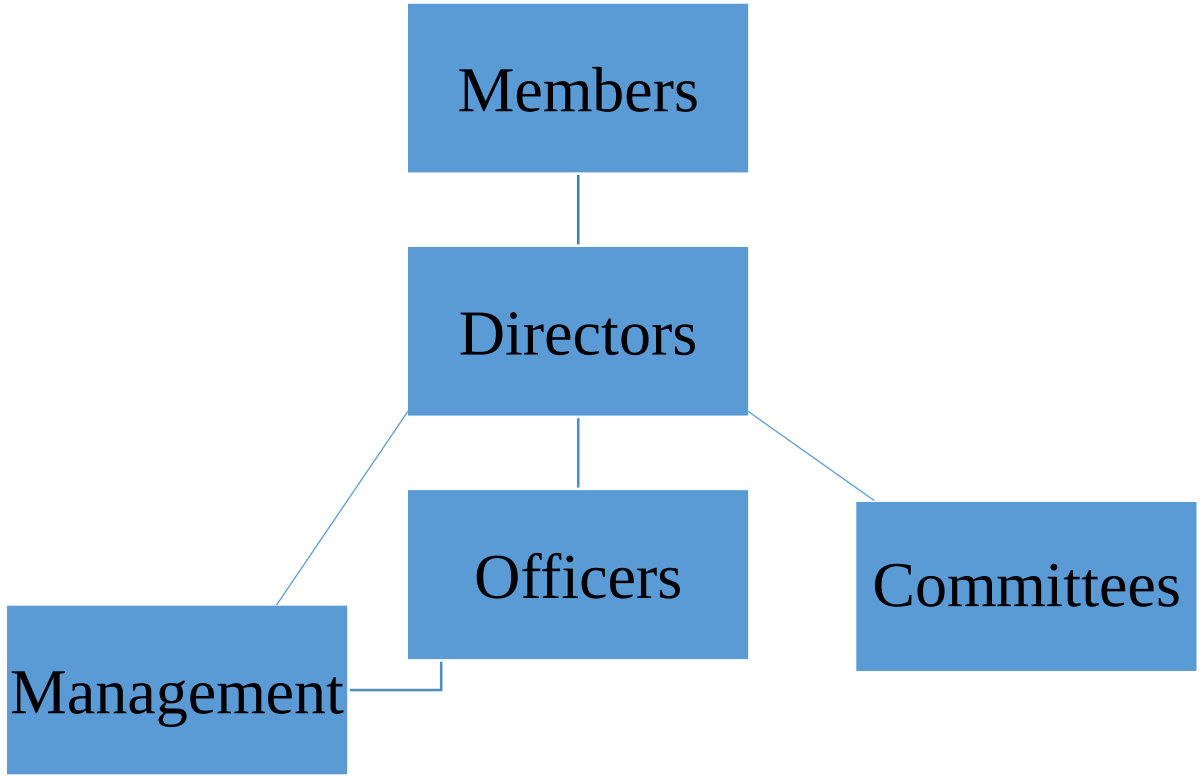

THE HIERARCHY

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- Members elect directors
- Directors oversee the activities of the corporation
- Directors accept members
  - In many organizations, Members = Directors
- Directors appoint officers
- Directors appoint committees and hire the ED/CEO
- Most responsibilities of the Board may be delegated to a committee
- Committees deal with specific topics and make recommendations to the Board
- ED/CEO, through management and staff, implements actions based on strategic plans set by the Board (in consultation with the ED/CEO)
- **Board sets the ends / ED implements the means**

THE BOARD OF DIRECTORS

- Directors are in control of the business and affairs of the corporation.
- Set out policies, oversee governance, etc.
- Elected by the members (and sometimes by the Board – ONCA/CNCA)
- Ex-officio directors permitted under OCA and ONCA; not under CNCA
- Usually unpaid.
- On record with the Ministry of Government Services / Industry Canada
- May be chosen based on:
  - Expertise
  - Location / Part of Certain Sector
  - Willingness

DIRECTORS' DECISION MAKING AUTHORITY

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- Directors have the general authority to manage or supervise the management of activities and affairs of corporation
- Can delegate powers to a committee of directors.
- CNCA/ONCA: Powers that must be exercised by full Board (cannot be delegated):
  - Submitting questions/matters for member approval
  - Filling board vacancies/auditor vacancies
  - Appointing additional directors
  - Issuing debt obligations (except as specifically authorized by directors)
  - Approving financial statements
  - Adopt, amend and repeal by-laws
  - Establishing members dues/contributions

BOARD SIZE & COMPOSITION

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1. Under CNCA/ONCA: Minimum and maximum number of directors permitted (e.g.: 10-18) and members 'fix' size of board within range from time to time
2. Number or range of directors must be in Articles (CNCA)
3. Under OCA: Number must be set in Letters Patent. Can be increased or decreased by Special Resolution.
4. OCA – Directors must be members.

ONCA & CNCA: BOARD ELECTION & NOMINATION

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1. Members have a right to nominate directors (5% of group or class entitled to vote)
2. Directors may appoint other directors to the Board (so long as appointments not exceeding 1/3 of the total number of directors elected by members at the last AGM). Appointed directors hold office until the next AGM
3. Maximum term is four years (no limit on re-elections) [currently 5 years under OCA and at least 3 must retire each year]
4. Directors may be removed by members by ordinary resolution (simple majority) [currently 2/3rds under OCA]

BOARD MEETINGS

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- No minimum notice or specified form unless by-laws so provide
- Can participate electronically or telephonically if all directors consent
- No requirement to state purpose unless non-delegable business
- Quorum – majority of directors unless otherwise provided in articles/by-laws (no minimum quorum)
- Written resolutions (unanimous) permitted for Board meetings
- Director deemed to consent unless dissent submitted or recorded (even if director not at the meeting)

DIRECTOR MEETINGS – AGENDAS, NOTICES

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- Agendas of Board Meetings
  - Responsibility of the Chair but usually prepared by the Secretary with input from the Chair and CEO
    - Practice Tip: Allot a time for each item to be used as a guide by the Chair.
    - Practice Tip: Add declaration of conflict of interest item, so no one forgets!
    - Practice Tip: Formally approve the agenda – gives chance to make changes.
- Proxies are NOT allowed.
- Notices of Board Meetings
  - Must be given in accordance with the by-laws
  - No formalities in the legislation with respect to form, content, or manner of delivery

  Practice Tip: Provide the agenda, together with reports and information, sufficiently in advance of the meeting to allow the directors to come to the meeting prepared for discussion.

OFFICERS

- Appointed by the directors.
- OCA: Requires President and Secretary
- ONCA: Requires Chair
- CNCA: No requirements
- Usually are directors, but not all positions have to be.
- Have different roles to perform; set by the Board.
- Usually unpaid.
- On record with the Ministry of Government Services / Industry Canada

OFFICER DEFINITIONS – BROADER THAN YOU THINK!

- OCA: president, chair of the board of directors, vice-president, secretary, assistant secretary, treasurer, assistant treasurer, manager, or any other person designated an officer by by-law of the corporation

- ONCA: an officer of the corporation appointed by the directors, including:

  (a)the chair of the board of directors and a vice-chair of the board of directors;

  (b) the president, vice-president, secretary, assistant secretary, treasurer, an assistant treasurer, and the general manager of the corporation; and

  (c) any other individual who performs functions for the corporation similar to those normally performed by an individual listed in (a) or (b).

- CNCA: ``officer" means an individual appointed as an officer under section 142, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager or a managing director of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices.

MANAGEMENT

- ED/CEO hired by the Board.
- Employees hired by the ED/CEO.
- ED/CEO tasked with dealing with day-to-day issues and delegating appropriately.
- ED/CEO oversees volunteers and other employees.
- Often non-existent

RUNNING A NFP/CHARITY

Your organization must meet its legal obligations under:

1. Its Letters Patent/Articles (remember the objects)
2. By-Laws
3. Policies, Codes, etc.
4. Agreements with Funders, Donors, Partners, etc.
5. Applicable Legislation
6. Directives/Guidelines of Applicable Ministries, Canada Revenue Agency, Public Guardian and Trustee (Ontario)

WHAT ARE BY-LAWS?

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By-Laws usually, at a minimum, set out the following information:

1. Head Office Location
2. Fiscal Year End
3. Members
4. Directors
5. Officers
6. Meetings
7. Protection of Directors and Officers
8. Conflict of Interest

LEGISLATIVE REPORTING REQUIREMENTS

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OCA

- File Corporations Annual Information Act Annual Return for Ontario Corporations (S546)
- Provide updated Head Office and contact information including any changes to Officers and Directors (15 days)

CNCA

- File an Annual Return
- Provide updated Head Office and contact information including any changes to Officers and Directors (15 days)
- File By-Laws with Industry Canada
- File financial statements if a soliciting corporation

LEGISLATIVE RECORD-KEEPING REQUIREMENTS

- Letters Patent, Articles of Incorporation, etc.
- By-Laws and Special Resolutions
- Minutes of Board, Members', and Executive Committee meetings
  - The Members do NOT have the right to access the Board and Exec. Committee minutes***
- Debt obligations register, if any
- Directors, Officers, and Members registers
  - A Member must formally make a request, and file of Affidavit, before receiving a list of Members.***
- Accounting records and tax returns
- OCA: Records of land ownership in Ontario (identify each property, show the date the corporation acquired/disposed of the property, keep copy of any deed/transfer documents) [effective date –December 10, 2018]

REGISTERS

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- Directors
  - Since incorporation
  - Names and addresses
  - Dates on which each became or ceased to be a director
  - Consents – ONCA (not the CNCA) requires consents to be kept
- Members
  - Last 10 years
  - Names alphabetically arranged
  - Address of every person

- Practice Tip: Keep a register of officers too – it'll be worthwhile, I promise! (Will be required under the ONCA and the CNCA.)

BOOKS OF ACCOUNT

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- A corporation shall keep proper books of account and accounting records, including records of:
  - All sums of money received and disbursed by the corporation and the matters with respect to which receipt and disbursement took place
  - All sales and purchases of the corporation
  - The assets and liabilities of the corporation
  - All transactions affecting the financial position of the corporation

MINUTE BOOK

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Where should the records be kept?

- At the head office of the corporation OR at another place (e.g. lawyer's office) if the records are available for inspection during regular office hours at the head office by means of a computer terminal or other electronic technology.

ACCESS TO RECORDS

- **Who can see the records?**
  - A **director** can inspect any of the records and shall have access during normal business hours of the corporation

  - A **member** or a **creditor** (or his agent or legal representative) can inspect the minutes of any members' meeting, the constating documents, the registers of members and directors and shall have access during normal business hours of the corporation. They can make copies of any of these documents.

THE ROLE OF A DIRECTOR

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- Who is ultimately responsible for ensuring that all rules governing the organization are met?...

THE BOARD OF DIRECTORS

DIRECTORS = FIDUCIARIES

What is a fiduciary?

- Legal term defined in statute and by common law
- Refers to a person who, because of the position he/she holds, has a responsibility to act primarily for another's benefit
- For directors, they are fiduciaries in relation to their corporation
- Two main fiduciary duties: Duty of Care and Duty of Loyalty

FIRST BRANCH OF FIDUCIARY DUTY: DUTY OF CARE

(1)The duty to act honestly

(2)The duty to exercise power

(3) The duty of obedience

(4) The duty to act with a certain level of skill

(5) The duty of diligence

DUTY TO BE **HONEST** / DUTY TO **EXERCISE POWER**

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- Act **Honestly** – With the corporation, the directors, the stakeholders, and yourself
- **Exercise Power** –
  - Abstentions are not permitted under the CNCA/ONCA.
  - Section 147(1) CNCA: A director who is present at a meeting of directors or of a committee of directors is deemed to have consented to any resolution passed or action taken at the meeting unless

    (a) the director requests a dissent to be entered in the minutes of the meeting;

    (b) the director sends a written dissent to the secretary of the meeting before the meeting is adjourned; or

    (c) the director sends a dissent by registered mail or delivers it to the registered office of the corporation immediately after the meeting is adjourned.
  - (3) A director who was not present at a meeting at which a resolution was passed or action taken is deemed to have consented to the resolution or action unless, within the prescribed period after becoming aware of the resolution or action, the director

    (a) causes a dissent to be placed with the minutes of the meeting; or

    (b) sends a dissent by registered mail or delivers it to the registered office of the corporation.

DUTY OF **OBEDIENCE** / DUTY TO **COMPLY**

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- Directors and officers are required to comply themselves with the Act and its regulations, the Articles/Letters Patent, and the by-laws
- Directors are required to ensure that the corporation, its staff, and committees comply with the Act and its regulations, the Articles/Letters Patent, the by-laws, and any internal rules
- Directors ensure that governing documents remain current and accurate, and oversee the process used to amend and update governing documents
- Directors have a duty to obey external laws imposed on the corporation and to ensure that processes and procedures are in place to ensure that the corporation complies with these laws (e.g. employment legislation)

DUTY OF CARE: SKILL
HOW MUCH SKILL IS ENOUGH SKILL?

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- Be informed
  - Directors are required to remain informed about the corporation's activities and to ensure the lawfulness of the Articles/Letters Patent and the purpose/objects of the corporation
- Act with competence
  - Business Judgment Rule – decision must be reasonable, not perfect
- Obliged to foresee potential risks inherent in a situation and to take reasonable steps to manage those risks.
- Act in accordance with a particular standard of care:

  Exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances. (CNCA/ONCA)

  Exercise the care, diligence, and skill that may reasonably be expected of a person with his or her particular knowledge and experience (OCA)

  Exercise the degree of skill and prudence comparable to a reasonable and prudent person in the management of his/her own affairs.

DUTY OF CARE: DILIGENCE
WHAT DOES IT MEAN TO BE DILIGENT?

- Hold meetings regularly
- Attend meetings regularly
- Carefully and regularly review all documents relating to the corporation's financial affairs
- Review and participate in formulating budgets and strategic plans
- Develop a sound knowledge of all aspects of the corporation
- Create procedures to mitigate risk (example: fraud)
- Enlist the advice of professionals when required
    - Can rely on financial statements prepared by accountant

DILIGENCE = DELEGATION

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- Delegation is specifically permitted by statute:
  - “The directors shall manage or supervise the management of the activities and affairs of a corporation.”
- Delegate appropriately by

  (i) ensuring that management has established and maintains systems appropriate to achieve goals, meet industry standards, respond to risk management concerns, and achieve compliance,

  (ii) receiving and reviewing regular and useful reports, and

  (iii) taking actions towards improvement when necessary.

Fiduciary Duty: Second Branch - Duty of Loyalty

1. Know the Order of Priority – The corporation comes first! A director must ALWAYS act in the best interests of the corporation.

2. Avoid conflicts of interest – real, potential, or perceived. Loyal directors will avoid putting themselves in situations of a conflict of interest.

3. Keep confidential matters private – this is an indefinite obligation.

4. Act as one entity. Loyal directors support the decisions of the Board, even if they might not personally agree with them and might not have voted to support the ultimate decision. The Board acts as a collective unit – it is not, to the outside world, a group of i*ndividual voices.*

THE STAKEHOLDERS

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LIABILITY

Failure to fulfill fiduciary duties may result in liability for directors.

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Liability arises in three general situations:

1. Statutory Breach
2. Contractual Breach
3. Tort – When an act, or failure to act, whether intentionally or unintentionally, causes injury or damage to another person.

STATUTORY BREACH

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Three broad categories:

1. Unpaid wages (six (6) months) – liable when a director and for two years afterwards (s. 146)
2. Withhold, deduct, remit statutes – income tax, UI, CPP, etc. – For example, under the *Income Tax Act*, directors are jointly and severally liable to pay employee income tax deductions that the corporation fails to remit for two years following ceasing to be a director
3. Non-compliance with statutes – Environment Protection, Occupational Health and Safety, Employment Standards (etc.)
   - Under the *Canadian Environmental Protection Act, 1999* (CEPA),directors are required to take reasonable care to ensure that the corporation complies with the provisions of the CEPA dealing with air and water pollution, as well as with those involving proper storage and disposal of toxic substances.
   - Under the CNCA, a director who votes for or consents to a resolution authorizing any of the following is liable to repay the corporation any money or other property so paid or distributed:
     - a payment or distribution to a member, a director or an officer contrary to the CNCA, or
     - a payment of an indemnity, that is, an obligation to pay for any loss or damage that has been or might be incurred by another individual, contrary to the CNCA (s. 145).

CONTRACTUAL BREACH

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- Directors are responsible for ensuring that the corporation's contractual obligations are fulfilled. Delegate this responsibility to the ED/CEO – and ask for regular reporting.

TORT

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- Directors are responsible for ensuring that they, as well as staff, do not behave negligently. Directors and staff are, at all times, expected to act in a reasonably diligent and safety-conscious manner so that others affected by such individuals' actions are not faced with an unreasonable risk of harm.

WHAT ACTIONS CAN BE TAKEN AGAINST A DIRECTOR?

1. By Members
    - Apply to the court for a compliance order to make officers and directors comply with the legislation and constating documents; apply for an investigation; apply for Court-order liquidation and dissolution
2. Crown
3. Competition Bureau
4. Canada Revenue Agency
5. Current or former staff
6. Third parties (e.g. funders, partners, vendors)
7. Fellow directors
8. General public

EXAMPLES OF MOST COMMON LAWSUITS

- Corporation acting beyond scope of authority
- Director’s breach of fiduciary duties
- Board authorized excessive spending
- Board failed to supervise employees or affairs properly

WHEN WILL A DIRECTOR BE FOUND PERSONALLY LIABLE?

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Answer: When a director breaches his/her fiduciary duty and

the breach results in a loss that can be traced back to the individual director.

→Liability will depend on the particular facts and circumstances.

→Courts will ask questions such as:

- →Was the decision/action taken in the best interests of the corporation?
- →Did the director discharge his/her duties with skill and diligence?
- →Was the director loyal, honest, and acting in good faith?
- →Were responsibilities delegated properly?
- →Was there a conflict of interest?

WHAT PROTECTIONS ARE AVAILABLE TO DIRECTORS?

- Incorporation
- Indemnification
- Insurance
- Advances

But, none of these shields matter unless each individual director ensures that he/she meets the relevant standard of care, exercises due diligence, and has the minutes of every meeting accurately reflect the votes and set out any objections.

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SO, NOW YOU KNOW WHAT AN INDIVIDUAL DIRECTOR IS SUPPOSED TO DO.

BUT WHAT IS THE BOARD SUPPOSED TO DO AS A COLLECTIVE UNIT?

BOARD'S ROLE CHANGES WITH AGE & STAGE

Management Competence (___)

Operational/Working Board

Board Involvement (---)

Governance/Policy Board

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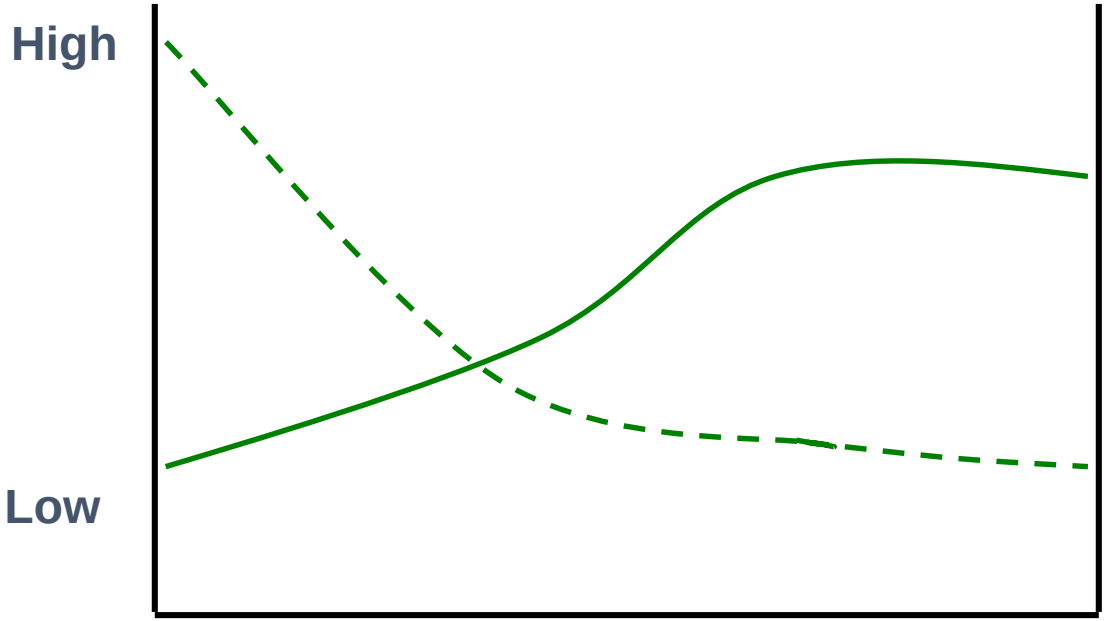
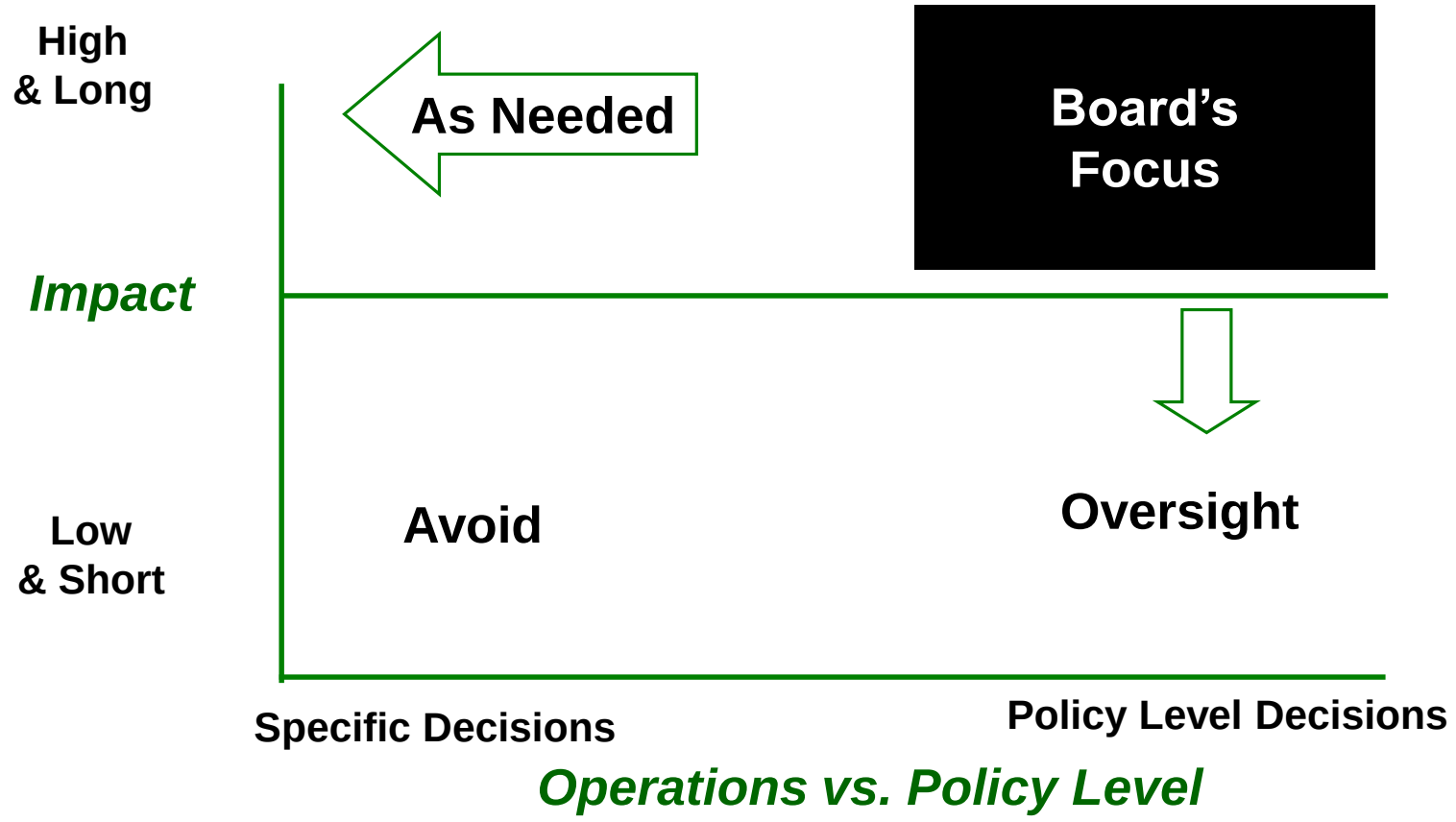


POLICY GOVERNANCE MODEL TO FOCUS BOARD'S ROLE

- Boards 'can' do almost anything, but should…



SO WHAT DO I DO NOW?

- Find and review your organization’s Letters Patent/Articles and By-Laws
- Determine if changes are necessary or desired
- Make changes now; don`t wait for the ONCA!

Any Questions?

Thank you!

Anna C. Naud
Mason Bennett Johncox
Professional Corporation
905.620.4499 ext. 244
anaud@whitbylawyers.com

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