

2009 COLLEGES ONTARIO CONFERENCE

GOVERNORS' 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
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
- requires board of governors
- establishes authority of Minister of Training, Colleges & Universities (“Minister”)
- establishes The College Compensation and Appointments Council

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



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Binding Policy Directives

Governors should be familiar with directives, including -

- Governance and Accountability Framework
- Conflict of Interest
- Banking and Investments
- Purchase, Sale or Encumbrance of College Property

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
- take **corrective action** as necessary
- hire & **assess CEO performance**, delegate accountability to CEO
- **approve business plan, budget, annual report**

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

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

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

Legislative Authority to Manage Affairs of Colleges

- **Government** may make regulations amending objects, amalgamating or closing and directing programs
- **Minister** has powers noted above
- **Council** (established under regulations under Act), appoints governors, establishes benefit plan for College staff



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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



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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



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Personal Liability for Acts & Omissions of College

- Failure to deduct & remit taxes
- Contravention of occupational health & safety laws, employment standards, building code, environmental standards
- 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 by College (permitted by *Corporations Act* (Ontario))
- Insurance coverage by College (D&O liability insurance)

Best Practices

- Be familiar with College operations & responsibilities of key senior staff
- Attend board meetings where possible
- **Thoroughly review** financial statements, minutes, reports, etc.
- **Ask questions**

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



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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** to ensure **proficiency**

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