

**2009 COLLEGES ONTARIO CONFERENCE  
GOVERNORS ORIENTATION PROGRAM**

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In the current economic crisis the world finds itself, there are so many critical issues that corporate governance is not necessarily top of mind. However, recent stories of alleged or arguable mismanagement by senior officials of corporations highlight the need for accountability and transparency, which may be expected to lead to scrutiny of governance protocols. In due course, one can expect that there will be a call for corporate accountability and that will, to some extent, lead to an examination of “what were the members of the various boards of directors thinking” when they allowed certain actions or transactions to occur on their watch.

A governor of a college, like any director of a not-for-profit corporation, must be mindful that he or she is in a fiduciary relationship with the college. As will be discussed further below, this fiduciary relationship means that the governor must act honestly and in good faith with a view to the best interests of the college. This obligation extends to assuring that the governor acts loyally to the college, and avoids any situation where the governor’s duty to the college conflicts with his or her self-interest.

These concepts of accountability are not new, as in his February 2005 report on strategies to improve higher education in Ontario, Bob Rae, then an advisor to the Premier and Minister of Training, Colleges and Universities had the following to say about the governance of Colleges of Applied Arts and Technology (“Colleges”):

The growing awareness of the fundamental role that postsecondary institutions play in the economic, social and cultural development of Ontario, combined with the increased costs of higher education, has resulted in an **increased profile of accountability and governance in the postsecondary sector**. ...When governments, colleges and universities make decisions or set policies, the wider world should be able to understand the reasoning behind the decisions and be satisfied that they are based on evidence and good judgment...the extension of the powers of the Auditor General to “follow the money” will lead to greater accountability about the reasonableness of financial practices in the broader public sector. (emphasis added)

Mr. Rae's comments identify a focus on corporate governance that has emerged in both the private and public sectors. The erosion of good corporate governance was the subject of a number of reports long before the corporate governance failures in the United States (Enron, ImClone, Tyco, Hollinger) and Canada (Bre-X, Livent, Nortel, Hydro One) that have become household names. The impact of lax or irresponsible governance and management, particularly in public companies, as well as the media attention given to the prosecution and conviction of a number of senior managers, have resulted in laws, directives and guidelines (Sarbanes-Oxley is probably the most recognized) that require greater disclosure and greater accountability of managers and governors through audit, reporting and proficiency requirements among other internal control mechanisms.

This review of corporate governance principles and practices is intended to provide governors of Colleges in Ontario an overview of the applicable law, their responsibilities and potential liabilities. This review is not comprehensive and is not intended to be taken as legal advice.

The law governing Colleges changed significantly about six years ago with the coming into effect of the *Ontario Colleges of Applied Arts and Technology Act, 2002* (the "Act"). A brief summary of the applicable law and of the structure and mandate of Colleges is provided as background to the discussion about corporate governance.

### **Incorporation and the Objects of a College**

Colleges are among a number of corporations that are established by regulation rather than through an application for incorporation. The regulation establishing Colleges is made under the Act (the "Regulation")<sup>1</sup>. Colleges are corporations without share capital and agents of the Crown. Colleges are governed by boards of governors, most of the members of which are appointed by a body known as the College Compensation and Appointments Council (the "Council") that is itself established under the Regulation. Although independent from government, Colleges are part of the public sector and, for reasons including that they receive public funds, Colleges are accountable to the Government and to the taxpayers of Ontario.

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<sup>1</sup> Ontario Regulation 34/03, made under the Ontario Colleges of Applied Arts and Technology Act, 2002.

Under the Act, Colleges are to:

“...offer a comprehensive program of career oriented, post secondary education and training to assist individuals in finding and keeping employment, to meet the needs of employers and the changing work environment and to support the economic and social development of their local and diverse communities.”

Colleges are entitled to undertake a range of educational and training-related activities in furtherance of their objects that may include entering into partnerships with business, industry and other educational institutions.

There are currently 25 Colleges established under the Regulation,<sup>2</sup> which sets out matters such as the composition of the board of governors, the appointment process for governors, the qualifications required to be a governor, terms of office, the quorum and procedure for meetings of the board and the process for removing a board member. The Regulation permits a board of governors to approve travel and living expenses incurred by governors while on the business of the board, but prohibits any other remuneration of board members.

### **Transfer of Oversight**

With the coming into force of the Act in 2003, oversight of Colleges was transferred from the Management Board of Cabinet to the Minister of Training, Colleges and Universities (the “Minister”). Under the Act, the Minister has the authority to “issue policy directives in relation to the manner in which colleges carry out their objects or conduct their affairs” and to intervene in the affairs of a College. Under the Regulations, the Minister has the authority to require a College to enter into an “accountability agreement” relating to a particular aspect or aspects of a College’s operations.

Directives are binding on Colleges. A number of directives have been issued, including the “Governance and Accountability Framework”, which provides:

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<sup>2</sup> On September 16, 2008, the Ontario government announced that it intends to introduce legislation in the Spring of 2009 that, if passed, would implement a new College of Trades.

... 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. 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. This directive sets out the role of the board of governors, stated to include, at a minimum, requirements such as establishing governance structures, approving the annual business plan and budget, and taking corrective action as necessary.

This directive emphasizes the special responsibility of governors of Colleges (as a function of public funding) and establishes, as tenets of good governance, the creation of policies, processes and structures designed to facilitate the effective operation of a College. The responsibility to establish governance structures would include establishing committees, such as an audit (or finance) committee, risk management committee, governance committee, strategic planning committee, or program and quality committee.

The directive on “Conflict of Interest” requires governors to:

- act honestly and uphold the highest ethical standards;
- perform their official duties and conduct themselves in a manner that will bear the closest public scrutiny because colleges are part of the broader public sector and subject to more public scrutiny than private organizations;
- not have private interests, other than those permitted pursuant to this binding policy directive, laws or statutes, that would be affected particularly or significantly by college decisions or actions in which they participate;
- arrange their private interests to prevent conflicts of interest and if a conflict of interest does arise between the private interests of a governor and the official duties of that individual, the conflict shall be resolved in favour of the public interest; and
- recognize that he or she has a responsibility first and foremost to the welfare of the institution and must function primarily as a member of the board, not as a member of any particular constituency.

Other directives issued by the Minister include those on “Banking and Investments”, “Entrepreneurial Activities” and the “Purchase, Sale or Encumbrance of College

Property”. The Minister makes directives available through a secure website to which governors should ensure that they have access.

### **Other Applicable Legislation and Contractual Obligations**

In addition to the Act, there are a number of pieces of legislation that have an impact on the governance of Colleges, some of which are briefly described below.

Some sections of the **Corporations Act** (Ontario) apply to Colleges to grant them the power to sue (and the ability to be sued), to contract and to assume liabilities. The **Canada Corporations Act** may indirectly be applicable to certain Colleges (for example, if a subsidiary of a College is incorporated under the Canada Corporations Act). On December 3, 2008, one day before Parliament was prorogued, Bill C-4, An Act respecting not-for-profit corporations and certain other corporations, was introduced in the House of Commons and given first reading. The Bill provided for the establishment of a framework for the governance of Federal not-for-profit corporations and other corporations without share capital and for a phased repeal of the existing Canada Corporations Act. Once Parliament was prorogued, the Bill was declared dead and will need to be re-introduced when the House of Commons meets again.

The **Financial Administration Act** (Ontario) (“FAA”) sets out the rules in regard to monies owed to Ontario and monies paid out of Ontario’s Consolidated Revenue Fund. Under the FAA, no one may enter into a financial arrangement that would increase the indebtedness or contingent liabilities of the Province of Ontario without the approval of the Minister of Finance. In effect, if by virtue of giving an indemnification, a College could be increasing the contingent liability of the Province, the College is not permitted to provide the indemnity without permission. Organizations entering into contracts with a College may ask for proof of the College’s compliance with the FAA, or more likely, a College will have to explain that it cannot provide an indemnity until it has the approval of the Minister of Finance.

The **Freedom of Information and Protection of Privacy Act** (Ontario) is the public sector access and privacy legislation. It governs the collection, use and disclosure of personal information (recorded information about an identifiable individual) by Colleges and other public sector “institutions”. More specifically, FIPPA requires Colleges to provide certain information to individuals whose personal information they collect.

Where a College is registered as a charity, the **Charities Gift Act** and **Charities Accounting Act** and other legislation applicable to charitable institutions may apply. These acts create a number of specific duties and contingent liabilities and governors of Colleges that are registered as charities should ensure that they are informed of applicable requirements.

There are also College-specific acts which regulate specific aspects of a College’s operations. For example, the **Colleges Collective Bargaining Act** (Ontario), which was passed on October 1, 2008, gives part-time and sessional college workers the right to bargain collectively.

In addition to legislation, Colleges are subject to obligations created under agreements, such as that signed between the Colleges and the Ontario Public Service Employees Union that establishes and sets out the terms of the College of Applied Arts and Technology Pension Plan.

### **General Duties of Directors**

Boards are often referred to as the “stewards” of a corporation because their role is to manage or supervise the management of the affairs of the corporation by:

- establishing and overseeing the implementation of a strategic direction for the corporation;
- supervising the performance of the CEO and other senior managers and officers of the corporation;
- monitoring the performance of the corporation (through audit and reporting requirements), including ensuring that it meets its financial and other goals; and

- evaluating risks and ensuring there are risk management mechanisms in place. Boards are increasingly being held responsible for establishing ethical standards for their organization, by for example, establishing performance measures and codes of conduct. By complying with the rules they approve, directors set the “tone at the top”.

There are general duties imposed under the common law on governors as directors as well as specific duties established in the Act and Regulation and other legislation.

Every director has two basic duties: a fiduciary duty and a duty of care. More detailed information about each duty is provided in Appendix I, but the following briefly outlines their nature.

The fiduciary duty of directors (and governors) is not found in the *Corporations Act*, but has been established and refined in case law. A director’s fiduciary duty has three components: a director must act honestly, in good faith, and with a view to the best interests of the corporation. The fiduciary duty of directors is considered so fundamental to the relationship between directors and the corporation they serve that corporations are generally not entitled to insure or indemnify directors for liability attributable to a breach of their fiduciary duty. A director’s fiduciary duty “belongs” to the director; in other words, it is incumbent upon a director to discharge the duty, regardless of the actions (or inaction) of other members of the board.

Defining the standard of care a director is expected to meet is less straight-forward than defining a director’s fiduciary duty. Most, if not all, statutory definitions of the duty of care involve an objective standard that is expressed as a requirement that a director exercise **the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances**. A director discharges the duty of care by making an informed decision pursuant to a reasonable and reasoned process.

Unlike the law governing business corporations, the *Corporations Act* does not specify the standard of care to be exercised by directors and, accordingly, the common law

standard applies. The common law standard is a subjective standard that has been expressed as the duty of a director to **exercise the care, diligence and skill that may be reasonably expected of a person with the knowledge and experience of that director.**<sup>3</sup> Under the common law, the standard of care varies with the training and experience of the director and, accordingly, could be more onerous than the standard applicable to directors of business corporations. The uncertainty under the law, in relation to the standard that a court will apply in a particular case, is even greater in connection with the standard of care applicable to directors of corporations that are registered as charities. There is a line of cases that considers whether a director of a charity is acting in the capacity of a trustee or simply exercising his or her fiduciary duty to the corporation when managing charitable assets. Given the lack of clarity, governors of Colleges that are registered as charities are well-advised to seek advice before making any decision about the distribution of charitable assets.

### **Obligations of the Board**

The Regulation sets out a number of specific obligations of the board of a College. These obligations include submitting a strategic plan, a business plan, and an annual report (or any combination thereof that the Minister directs) to the Minister and making them available to the public. The board must also: "...compile key performance indicators as identified by the Minister", "provide such indicators to the Minister", and "publish such indicators as may be required by the Minister". The board is required to ensure that the College balances its budget every year and, where it appears that the budget will not be balanced and the College will have an accumulated deficit, the board is required to seek the Minister's approval and provide the Minister with a recovery plan.

### **Personal Liability of Directors**

Colleges, like other corporations, have a separate legal existence from their members and directors and generally (but not always), directors are not personally liable for negligence or the contractual obligations of the corporation.

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<sup>3</sup> *Re City Equitable Fire Insurance Company Limited*, [1925] 40 Ch. D. 41.

Directors can be held personally liable for the acts and omissions of the corporation under a statute or as the result of a breach of the director's fiduciary duty, a failure to meet the standard of care, or a misrepresentation made by the director in his or her capacity as a representative of the corporation. As an example, directors may be held personally liable if they neglect to take action to address unsafe working conditions or workplace harassment of which they have been informed or fail to carefully scrutinize a proposal involving a significant investment.

### **Risk Management**

Some statutory provisions imposing personal liability on directors provide for a "due diligence" defense that, if accepted, excuses directors from liability where they are found to have taken reasonable measures to comply with the legislation.

Under a doctrine known as the "business judgment rule", directors may be excused from liability for an error of judgment if the directors' decision was informed and made pursuant to a sound process.

The test for the application of the due diligence defense and the business judgment rule underline the importance to directors of implementing sound corporate governance practices. The risk of personal liability being imposed on directors is also managed by directors and officers liability insurance and, in some cases, by an indemnification of directors and officers by the corporation for damages incurred as a result of performing their duties to the corporation.

The Corporations Act permits a College to indemnify a governor. A College may, at its option, indemnify a governor for any expense reasonably incurred in settling, defending, or meeting liabilities relating to the College where the College is not the claimant, if the governor: (a) acted honestly and in good faith with a view to the best interests of the College; and (b) was not guilty of "wilful neglect or default".

It is expected that most Colleges will have taken steps to indemnify their governors, and prospective governors should obtain information on the directors' and officers' insurance coverage in place at a College, including the exclusions and the reporting requirements. Each governor should be insured throughout the period during which liability may be incurred (which may last for several years after a governor has left the board). It is advisable to have a resolution approving the purchase of such liability insurance confirmed by the board.

Until recently, charitable organizations incorporated in Ontario or operating in Ontario were prohibited from purchasing liability insurance for their directors without a court order. However, in 2001, legislation was passed to allow charitable organizations to provide indemnities to their directors and to purchase liability insurance provided that the corporation first considers a number of specified factors.<sup>4</sup> If the board considers all the factors and determines that it is appropriate to provide indemnities and/or to purchase insurance, the governors should pass a resolution (annually) to that effect.

More information on statutes under which governors may be held personally liable for acts and omissions of the College is included in Appendix II.

### **Powers of Government, Minister, Council**

The board of governors is not the only body with authority to direct the operations of a College.

The **Government of Ontario** has the authority under the Act to make regulations that could have a significant impact on the operations of one, several, or all Colleges. More specifically, by way of regulation, the Government may vary or expand the objects or responsibilities of any College, prescribe any matter related to the manner in which a College may carry out its affairs, amalgamate or close Colleges, and direct that instruction be given in a specific language or languages including authorizing specified

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<sup>4</sup> The *Red Tape Reduction Act 2000* R.S.O. 2000, c. 26 – Bill 119 passed on December 6, 2000 amended the *Corporations Act*, s. 133(2.2).

Colleges to offer any or all of their programs in French and prohibiting others from doing so.

For example, as a response to a lawsuit for \$200 million filed by two college students in December 2007 against their respective colleges, on September 26, 2008, the Ontario government announced that it will be implementing an updated college student fee policy clarifying what fees can be charged by colleges and student associations. This policy will come into effect in the 2009/2010 academic year.

As mentioned, the **Minister** has broad powers under the Act to intervene in the affairs of a College where, for example, a College has failed to comply with a policy directive or the Minister believes that intervention is in the public interest.

The **Council** has the authority to establish, in consultation with boards of governors, the terms and conditions of insured benefit plans for College staff members, whether or not they are members of bargaining units under the Colleges Collective Bargaining Act (Ontario).

### **Summary: Governance Best Practices**

Although not technically applicable to Colleges, some of the guidelines that have been established to assist directors of public corporations may be useful for boards of governors looking to implement sound corporate governance practices. What follows are points taken from guidelines applicable to public corporations.

Boards of Governors seeking to establish and continue good governance practices should consider:

1. Written Mandate
  - setting out the board's role and responsibilities in writing, including the board's responsibility for overseeing major expenditures and any change in programming or strategic direction and for establishing committees

## 2. Code of Conduct

- establishing a written code of conduct/ethics and acceptable organizational behaviour that applies throughout the College and addresses issues such as conflicts of interest and reporting of breaches of the code

## 3. Policies

- establishing a procedure for creating, approving and periodically reviewing policies of the College. This practice has been highlighted in the past several years by the Auditor General of Ontario, who completed an audit of the expenditure and procurement policies of four colleges of applied arts and technology in May 2006. In its 2008 Annual Report, released on December 8, 2008, the Auditor General provided an update on the progress of the four Colleges in implementing the Auditor General's recommendations set out in its 2006 Annual Report:

- Recommendation #1(a): To help ensure that the prices paid for major purchases are competitive, as well as to give all potential suppliers a fair opportunity to obtain college business, colleges should limit the number of years they use the same supplier without re-tendering.
- Recommendation #1(b): To help ensure that purchases comply with college policies, colleges should require that purchasing departments oversee major purchases made by other departments at the college.

Current Status: All four Colleges have implemented this recommendation (i.e. by limiting the number of years the same supplier could be used without re-tendering and by ensuring that the purchasing department oversaw and were involved in major purchases made by other departments.)

- Recommendation #2: To help ensure that objectives are achieved at the lowest cost, colleges should specifically identify and define their needs before making significant purchases.

Current Status: All four Colleges have implemented this recommendation in their revised policies.

- Recommendation #3: To help ensure that the best proposals are selected when major purchases are planned, colleges should:

- develop procedures for evaluation committees, including a requirement that they identify the criteria to be used to evaluate the non-monetary aspects of proposals; and
- require that the price summary be checked by someone other than the person who prepared it.

Current Status: All four Colleges require that the criteria to be used in evaluating the non-monetary aspects of proposals be developed before the start of the request-for-proposal (RFP) or tender process. The criteria used varies between Colleges and are weighed according to their relative importance.

- Recommendation #4: To help ensure that college funds are used appropriately and to the benefit of colleges and their students, colleges should implement clear policies for gifts, donations, and meal and hospitality expenses.

Current Status: One College has recently implemented a new policy covering travel and other eligible business expenses, including gifts, donations, and hospitality expenses, while the other three Colleges are currently implementing similar policies.

All of the Colleges have agreed to create new policies or revise existing policies that implement the above recommendations.

#### 4. Committees

- creating committees with responsibility specific matters in which committee members have expertise (and should respect and not interfere with the work of such committees)

#### 5. Proficiency of Governors

- providing orientation for new directors and providing a program of continuing education for directors
- establishing criteria for committee membership
- addressing issues of continuity and succession

## 6. Assessment

- establishing criteria for assessing the effectiveness of the board and its committees
- developing/approving qualifications & performance measures for senior managers
- verifying that on-going training is provided to staff

## 7. Reporting

- creating reporting requirements for senior management
- requiring College officials and other professional experts to report regularly on the implementation and review of College policies and systems

On a more practical level, Governors of Colleges will be able to more effectively assume their roles and responsibilities if they:

- have a basic understanding of the College's business;
- are familiar with the terms of reference of committees to which they are assigned, review materials produced by or for the committees, and attend committee meetings;
- are familiar with the responsibilities of members of the senior staff and the protocol for consulting with senior staff;
- ensure they have access to and familiarize themselves with Ministry policies applicable to Colleges;
- familiarize themselves with the by-laws of the College and its policies;
- review the most recent financial audit and the auditor's report;
- review any special reports or analyses prepared for or about the College and its programs or operations; and

- review information updating the board or College community about programs or projects.

Governors should also:

- attend meetings of the Board as often as possible;
- not hesitate to ask questions of other directors, College administrators and outside experts and keep written records of all inquiries made and responses received;
- vote against an action or motion with which he or she disagrees and ensure that his or her dissent is recorded in the minutes of the board meeting;
- review the minutes of any meeting which he or she was unable to attend and register a dissent, if necessary, with respect to any action taken at the meeting;
- review the minutes of board and committee meetings and verify that views (including any dissenting views) and votes are accurately reflected;
- ensure that proper professional expertise is made available to the College and the board and ask for written opinions from external consultants such as accountants and engineers on whose advice the board will act;
- be cognizant of issues raised by College stakeholders and third parties (such as the media);
- ensure that any contract that they are asked to execute on behalf of the College makes it clear that they are executing the contract as a signing officer of the College and not in their personal capacity; and
- be prepared to resign from the Board or a committee if they are unable to attend meetings or otherwise participate in the work of the board regularly or have irreconcilable concerns about the direction being taken by the board or decisions made by board.

## **Appendix I Fiduciary Duty and the Duty of Care**

### **Examples of the Exercise of a Director's Fiduciary Duty**

Some examples of how directors exercise their fiduciary duty to a corporation are set out below.

(a) *Maintaining Confidentiality*

Information a governor acquires about the affairs of the College should remain confidential. A governor should not, as a general rule, discuss confidential information of the College with persons outside the board unless acting in the course of his or her duties as a governor, where the disclosure is required to conduct business on behalf of the College, or where the disclosure is pursuant to a legal requirement. Ideally, the board will have established policies concerning the disclosure of confidential information and will identify a designated spokesperson to whom inquiries about specific matters, or more generally about the operations of the College, can be referred.

Governors may feel that they are on the board to represent a “community” or “constituency” of the College, but cannot take a position, regardless of how strongly it is advocated by the governor’s constituency, that is not in the best interests of the College. Acting in the best interests of the College and the duty to maintain confidentiality may, in some circumstances, prevent governors from reporting to constituents on decisions of the board.

(b) *Avoiding/Declaring Conflicts of Interest*

Although there is nothing inherently wrong with having a conflict of interest, governors must not place their own interests ahead of their duty to act in the best interests of the College. An example of a conflict of interest is a situation where a governor is a party to a material contract or proposed material contract with the College. Under the Corporations Act, governors who have any interest in a proposed contract or a contract

with the College must declare their interest at a meeting of the board. The Corporations Act sets out a procedure for the disclosure by directors of personal interests in contracts or proposed contracts with a College. If a director follows the procedure of disclosing his or her interest in a contract or a proposed contract at a meeting of the Board at the earliest opportunity and then refrains from voting on the issue, the Corporations Act provides that he or she will not be accountable to the College or its creditors for any profit realized from the contract and the contract is not voidable by reason only of the director holding that office or of the existence of the fiduciary relationship. Given the conditions established in the Corporations Act, it would be prudent for governors to declare their conflict of interest in regard to a contract and to leave the meeting before any discussion and vote is held on the matter.

Conflict of interest is not defined in the Act or in the Corporations Act, but the Ministry has characterized and defined conflict of interest as follows:

- (i) real – a real conflict of interest exists when a private interest exists that is known to an individual and that has a sufficient connection with his or her responsibilities that is sufficient to influence the exercise of those responsibilities;
- (ii) potential – a potential conflict of interest exists when the existence of some private economic interest could influence the exercise of an individual’s public duties or responsibilities; and
- (iii) apparent – an apparent conflict of interest exists if an informed individual viewing the matter realistically and practically would have concluded that a conflict exists.

Most College boards have updated their by-laws or policies to reflect the Corporations Act provisions and guidelines on conflict of interest. As mentioned, conflict of interest is the subject of a directive of the Minister.

(c) *Other Situations Giving Rise to a Conflict of Interest*

There are other less obvious situations where governors may find themselves in a conflict of interest (or may be perceived as having a conflict of interest). One example would be where a faculty representative is a member of the board and the subject under review is the representative's program at the College. Where a governor's role includes bringing the perspective of a constituency to the board (faculty and student representatives, for example), the governor must declare any conflict, but may subsequently, with board approval, participate in the discussion (to afford the board the benefit of hearing his or her views) but abstain from voting.

**How does a Governor Meet the Standard of Care?**

Despite the confusion over the applicable standard of care, governors are advised to take some simple precautions:

(b) *Attend Board Meetings*

Governors should attend all board meetings to the extent possible (a governor cannot avoid responsibility by staying away from a board meeting).

(c) *Review Information Provided with a "Critical Eye"*

When provided with information or a report, a governor should consider whether a reasonable person would accept the information provided in the circumstances or whether further inquiry would be required. For example, if a report to the board contains inconsistencies, a governor should ask questions to resolve the inconsistencies.

(d) *Reliance on Experts*

A governor may rely on experts if there is no reason to doubt their reliability.

(e) *Oversee fundraising and investment activities*

Governors of Colleges must ensure that funds under their control are expended for proper purposes in accordance with the Colleges' objects.<sup>5</sup>

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<sup>5</sup> *Bloorview Children's Hospital Foundation v. Bloorview MacMillan Centre* (2002), 22 D.L.R. (3d) 182 (Ont. Sup. Ct. Jus.); *Ontario (Public Guardian and Trustee) v. National Society for Abused Women and Children*, [2002] O.J. No. 607 (Ont. Sup. Ct. Jus.).

## **Appendix II**

### **Examples of Sources of Potential Personal Liability for Governors**

In addition to governors' fiduciary duties and the duty of care which they must observe, governors may be held personally liable under statutory provisions for errors, omissions and wrongful acts committed by the College. Some of these contingent liabilities created by statute may continue for up to six years after a governor ceases to be a governor. Personal liability may be imposed on governors where a College:

- fails to deduct, withhold, collect or remit amounts for federal and provincial income tax<sup>6</sup>, unemployment insurance, the Canada Pension Plan, retail sales tax, or the goods and services tax;
- fails to pay the Ontario Employer Health Tax;
- contravenes provincial employment standards legislation; or
- contravenes federal or provincial environmental standards.

#### Other Examples

Under the **Corporations Act**, a governor could be held liable for up to six months' unpaid wages owed to employees and for up to twelve months of vacation pay. Directors may want to require a report at least semi-annually (preferably from an independent auditor) certifying that employees' wages have been paid in full, income and other taxes have been properly withheld and remitted to the federal and provincial governments, and vacation pay has been properly accrued.

The **Environmental Protection Act** (Ontario)<sup>7</sup> imposes a duty on directors of a corporation that engages in an activity that may result in the discharge of a contaminant

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<sup>6</sup> See *Wheeliker v. Canada* (1999), 172 D.L.R. (4<sup>th</sup>) 708.

<sup>7</sup> R.S.O. 1990, c. E.19.

into the natural environment to take all reasonable care to prevent the corporation from causing or permitting the discharge.

The **Occupational Health and Safety Act** (Ontario)<sup>8</sup> imposes a duty on directors to take reasonable care to ensure that the corporation complies with the Act, including any orders or requirements issued by an inspector or by the Minister of Labour.

#### Statutory Provisions on Personal Liability of Directors

The following are some of the statutes that hold directors personally liable for the acts and omissions of the corporation in specified circumstances. What follows is not a complete list.

Building Code Act, 1992, S.O. 1992, c. 23

Canada Pension Plan, R.S., c. C-5, s. 1.

Construction Lien Act, R.S.O. 1990, c. C. 30

Dangerous Goods Transportation Act, R.S.O. 1990, c. D.1

Employer Health Tax Act, R.S.O. 1990, c. E. 11

Employment Standards Act, 2000, S.O. 2000, c. E. 41

Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

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<sup>8</sup> R.S.O. 1990, c. O.1.