

# **How To Be a Good Board Member (with everything else you do)**

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by Sze-Mei Yeung, B.Sc., LLB.**

# Directors

- Board of Directors is responsible to manage or supervise the management of the business and affairs of the Company
- Supervising and overseeing the Company, providing advice to management and approving financial objectives and strategic directions

# Role of the Board

- Determine and monitor the execution and implementation of strategic objectives
- Allocation of resources to meet the strategic objectives:
  - operational issues
  - appoint and oversee officers, management and committees
  - monitor progress of meeting objectives
  - reporting to shareholders or members
  - all legal/regulatory compliance
  - making all required disclosure

# Not-For-Profit Boards

- Less tangible purposes compared to for-profit company
- Try to be closely attuned to interests of members
- Operate the society in accordance with objectives

# What are Directors' Obligations and Duties

- **Constituting documents (Articles or Bylaws)**
- **Common Law**
- **Statutory:**
  - **British Columbia**
  - **Canada**
  - **Foreign Jurisdiction (if applicable)**

# Duty of Loyalty (Fiduciary Duty)

- Acting honestly, in good faith, and in the best interests of the Company
- Prohibits secret profits or non-approved conflicts of interest
- Personal, cannot be delegated

# Duty of Care

- Care
- Diligence
- Skill
- “Comparable Circumstances Test” – will relate to the particular skill of a director

# Duties for Charitable Non-Profit Directors

- Ensure the society maintains a charitable purpose and does not lose charitable status
- Ensure that no income to the society flows as a personal benefit to the members
- Avoid gifting to organizations that are not qualified donees
- Avoid operating the society with the intent to earn a profit



# Conflict of Interest

- Cannot profit at the expense of the corporation:
  - business opportunities
  - benefits cannot be received
- There must be disclosure of conflict of interest by a Director
- Adhere to university policies

# To Whom are the Duties Owed?

- Shareholders
- Creditors
- Employees
- Third Parties

# Shareholders

- Shareholders can hold directors liable through an oppression remedy
- A Director or Shareholder can bring an action on behalf of the company known as a “derivative action”

# Creditors

- Generally, no fiduciary obligation owed to creditors
- Courts “lift corporate veil” if creditors are victims of unscrupulous conduct
- Directors may be held liable for funds administered by the Company which have trust conditions

# Employees

- Directors may be liable for unpaid employee wages and salaries
  - *B.C. Employment Standards Act* (2 months)
  - Federally incorporated corporations and societies (6 months wages)
  - No liability for unpaid directors of BC societies
- There may be liability for injuries to employees caused by unsafe work environments under occupational health laws

# Third Parties

- Directors may owe an obligation to the public, for example, through insider trading laws and offences committed by the company under environmental laws
- Directors may be liable for failure to remit federal taxes, GST
- May be personal liability for torts (e.g. inducing breach of contract, breach of fiduciary duty or negligence)

# Ways For Directors To Minimize Their Risk

- Before accepting the position:
  - Investigate the company
    - Review financial statements
    - Review securities documents and press releases
  - Investigate the principals of the company
    - Conduct preliminary court, bankruptcy and SEDAR searches

# Ways to Minimize Liability

- Act as a reasonably prudent person – exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances
- Maintain all information as confidential
- Avoid conflicts of interest
- If a conflict arises, make a disclosure, record it in the minutes and abstain from voting
- Dissent – dissent from a board of directors decision you believe to be wrong and document your vote in the minutes



# Diligence/Reliance

- Attend meetings
- Duty of diligence involves making the inquiries a person in that position should reasonably make
- A director's liability is limited where they rely in good faith upon:
  - a. an officers' representation of financial statements or statement of facts; or
  - b. written reports of professional advisors (auditors, lawyers, engineers, or other professionals)
- Relying on outside experts (Not expected to be an expert in all areas)
- In summary, make sure adequate information is available, get documents before the meeting, ask questions, make notes and establish committees if appropriate

# Indemnity

- Contract with the Company to protect a director personally from any loss or claims
- Must comply with relevant corporate legislation and articles
- Some statutory limitations (e.g. director must have voted honestly, in good faith and in the best interests of the company)

# Liability Insurance

- Obtain directors and officers liability insurance
  - Check the coverage carefully (most things that matter are not covered)
  - Relatively expensive
- CURIE insurance for universities

# Why do some universities not indemnify their own board of governors?

- Universities rely on insurance coverage (educational errors and omissions) to cover claims against the board of governors. In B.C., Section 69 of the University Act also includes a statutory limitation of liability for board members of a university:

*69 (1) An action or proceeding must not be brought against a **member of a board, senate or faculties**, or against an officer or employee of a university, in respect of an act or omission of a **member of a board, senate or faculties, or officer or employee, of the university** done or omitted **in good faith in the course of the execution of the person's duties on behalf of the university.***

# Signing On Behalf Of The Company

- Ensure it is clear that you are signing on behalf of the Company so you are not held personally responsible
- Ensure you have signing authority (under Articles or directors resolution)

# Resignation

- Resignation will not absolve a director of liability or from wrongful acts incurred
- May prevent further liability
- Proper written notice must be provided to the Company

# Nominee Directors

- Cannot act in the interests of the party who appointed them (e.g. university)
- Does not relieve them of the obligations to act in the best interests of the Corporation
- Must be very careful about confidential information which they receive
- For example, use of “specific confidential information” can make a director liable to anyone who suffers a loss
  - s. 192(2) BCA

# Observer Status

- Generally unknown at law
- May, however, be a "de facto director"
- Should treat all information as confidential
- What are the risks and benefits (because you may not have defences available to directors)





**richards buell sutton** LLP  
Barristers and Solicitors

**Questions?**

**Sze-Mei Yeung**  
**604-661-9247**  
**[syeung@rbs.ca](mailto:syeung@rbs.ca)**

700 – 401 West Georgia Street  
Vancouver, BC Canada V6B 5A1  
[www.rbs.ca](http://www.rbs.ca)

# Fact Situation: Employee or Director

- You are the director of your technology transfer office, and as part of your role is to sit on the board of directors of your University's start-up companies. As a part of your normal process, you share directors materials with the University's senior management team.
- Consider the following scenarios:

- Eco-Granit Operations Inc. (EGO Inc.) sends out a notice of an upcoming board with a list of resolutions to be discussed, including a draft resolution regarding obtaining alternate larger space for the corporation. The University has significant shareholdings in EGO Inc., and objects to the corporation moving on two grounds. First, EGO Inc. is currently renting space from the University and is therefore a small source of revenue. Second and more importantly, the University believes that the start-up doesn't need to move for operational reasons, and instead that the primary motivation for the move is related to the egos of the senior management team and a desire for shiny new facilities. The university instructs you to vote against the board motion to obtain alternate space, and expects you to comply as a term of your employment. What do you do?

- Bad Idea Corporation (BIC) finds it very hard to sell the product they've taken 10 years to finally get to market, and they cannot find further sources of funding to keep operations going. They start missing payments to employees, consultants, and even the Canada Revenue Agency. BIC is found liable for a host of debts, including unpaid wages (after some unpleasant law suits) and missing CRA source deductions. Unfortunately, BIC is out of money, overdrawn on its line of credit, and out of time. Employees and CRA start to look at you and the other directors personally to foot the bill. You are sitting on the board because you were instructed to by the University. Are you personally liable? If so, what can you do, or should you have done, to protect against this?

- Share The Wealth Ltd. (STW) decides to set up a stock-option plan for its directors, officers, and employees. You as a director are eligible to participate. Do you?

- The executive committee of It's A Secret Inc. (IASI) has locked you out of the information flow. At board meetings, you request information, but are told by the executive that you are not eligible to have access to that information due to your position with the University. You let your VP(Research) know about the issue, and indicate that you wish to resign from the board as you are unable to appropriately exercise due diligence. The VPR denies your request, as it would be a bad political move for the University to not be involved. Your VPR tells you to grin and bear it, and do your best. What do you do?

# Situation Two: Multiple Boards

- You are chosen as a staff representative to sit on the board of governors of the University. The University set up a foundation, and has the ability of appointing three representatives of the University to the foundation board. You are picked by the Board of Governors to sit on that board.
- The Foundation board creates a business plan, and submits a request to the Governors for funding. How do you conduct yourself during the Governor's meeting that considers the Foundation funding request?

# TRIVIA QUESTIONS

**Who do directors owe duties towards?**

- Shareholders
- Creditors
- Employees
- Third parties



# What is CURIE?

- CURIE is a reciprocal insurance exchange whose 58 member universities across Canada share losses arising from their operating risks. If a person has acted honestly, in good faith and with a view to the best interests of the company, and the person has sat on the Board in execution of the person's employment responsibilities or duties on behalf of the university, then depending on the policies of the specific university, the CURIE insurance (under educational errors and omissions) may cover costs of any actions brought against a person who has sat on a board of directors at the request or instruction of the university.

# What are the fiduciary duties of a director?

- Honesty
- Good Faith
- Best Interests of the Company / Society

# **Does a director have liability for doing nothing?**

**Yes. A director must actively dissent within 7 days of learning of prohibited acts taken by the other directors, or he/she will be deemed to have consented to such acts.**

# What are some ways to minimize liability?

- Due diligence
- Indemnification
- Insurance
- Court relief

# What does corporate governance mean?

- Transparency
- Disclosure
- Compliance
- Building systems of accountability