The Legal Responsibilities of Board Members in Ontario's Community Legal Clinics

Adapted from ACLCO Board Training
May 13-14, 2004
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The Legal Framework Surrounding Non-Profits

Quiz Question # 1: The number of statutes that regulate the actions of our Board is:
- two
- four
- seven
- greater than seven
- none of the above
The Legal Framework Surrounding Non-Profits

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The Legal Framework Surrounding Non-Profits

All legal clinics in Ontario are subject to (this is not an exhaustive list):

- Corporations Act
- Corporations Information Act
- Employment Standards Act
- Human Rights Code
- Occupational Health and Safety Act
- Employer Heath Tax Act
- Public Sector Salary Disclosure Act
- Wages Act
- Workplace Safety and Insurance Act
- Employment Insurance Act
- Canada Pension Plan Act
- Income Tax Act
You seem tense.
The Legal Framework Surrounding Non-Profits

Although the laws regulating non-profits may be numerous and complicated, don’t panic!

If you keep a few simple rules in mind, along with a few key concepts, everything should be fine.

The rules and concepts can be divided up into categories: the organisation itself; Directors; members; and employees.
Remember that there is a hierarchy in laws and instruments. What this means is that any rules higher up in the list trump those below. Contradictory rules contained in things lower in the list are invalid. In the case of non-profits, the hierarchy goes like this:

1. The Ontario *Human Rights Code*;
2. The Ontario *Corporations Act*;
3. The Letters Patent;
4. Your By-laws; and
5. Your policies.
The Structure of Non-Profits
Quiz Question # 2: Individual members of a non-profit might be legally liable if something has gone wrong and the Board resigns en masse.

☐ True
☐ False
The Organisation Itself- Structural Matters

Quiz Question # 2: Individual members of a non-profit might be legally liable if something has gone wrong and the Board resigns en masse.

☐ True

☐ False
The Organisation Itself - Structural Matters

- When you incorporate a non-profit (a non-share capital corporation, or “not for profit”) you create an artificial person.
- The primary purpose for creating this separate entity is to protect the members who make up the corporation from legal liability.
The Organisation Itself—Structural Matters

Section 122 of the Corporations Act states:

A member shall not, as such, be held answerable or responsible for any act, default, obligation or liability of the corporation or for any engagement, claim, payment, loss, injury, transaction, matter or thing relating to or connected with the corporation.
The Organisation Itself - Structural Matters

In exchange for this protection from liability, the members of the organisation give up some freedom in how they run the organisation.
The Organisation Itself - Structural Matters

Quiz Question # 3: Our by-law states that there can be up to ten board members but we have operated with six for a while now. That's okay right?

☐ True
☐ False
The Organisation Itself - Structural Matters

Quiz Question # 3: Our by-law states that there can be up to ten board members but we have operated with six for a while now. That's okay right?

☐ True
☑ False
The number of board members cannot be "up to" any number in your by-law. Subsection 283(2) of the Corporations Act states:
- 283 (2) The board of directors of a corporation shall consist of a fixed number of directors not fewer than three.
The Organisation Itself—Structural Matters

So if you have a by-law that says your board shall consist of "up to ten" members, that phrase is in contravention of the statute and invalid.
Quiz Question # 4: The by-law states that we’re supposed to have ten Board members but we’ve only had six for a while. The by-law says nothing about what quorum is. Recently, a bunch of board members resigned and there were only three left. So, they found some volunteers and appointed three more to the board and we're back up to six. That's okay right?

☐ True
☐ False
Quiz Question # 4: The by-law states that we’re supposed to have ten Board members but we’ve only had six for a while. The by-law says nothing about what quorum is. Recently, a bunch of board members resigned and there were only three left. So, they found some volunteers and appointed three more to the board and we’re back up to six. That’s okay right?

☐ True

☒ False
The Corporations Act states:

288. (1) Unless the letters patent, supplementary letters patent or a special resolution otherwise provides, a majority of the board of directors constitutes a quorum, but in no case shall a quorum be less than two-fifths of the board of directors.
The Organisation Itself—Structural Matters

If the Board is supposed to have ten members, quorum will be six which is a simple majority. In our scenario quorum can never be less than four because section 288(1) says it can never be less than two-fifths. So when the members resigned leaving three behind, the three remaining members did not have quorum, no matter what the by-law might have said about quorum. Therefore, they did not have the authority to appoint the three new ones and those people are not properly board members.
Board Responsibilities
The Legal Responsibilities of Board Members as Directors

Quiz Question # 5: The Board can delegate responsibility for the management of the agency to its Executive Director

☐ True
☐ False
The Legal Responsibilities of Board Members as Directors

TRICK Quiz Question #5: The Board can delegate responsibility for the management of the agency to its Executive Director.

☐ True
☑️ False
The Legal Responsibilities of Board Members as Directors

Although management tasks can be delegated, responsibility cannot. Section 283(1) of the Corporations Act states:

The affairs of every corporation shall be managed by a board of directors howsoever designated.

In other words, the buck stops with the Board, regardless of whether or not they were actively involved in any particular management decision.
The Legal Responsibilities of Board Members as Directors

- In the real world in which we work, there are practical limits to the abilities of Boards to manage clinics.
- It is physically impossible for Boards to make all decisions that are required on a day-to-day basis. A Board that tried to do so would arguably be negligent because decisions would not be made by the most competent person, or in a timely manner, and staff talents would be wasted.
The Legal Responsibilities of Board Members as Directors

Therefore the content of the legal obligation to “manage” the organisation depends on things like the size of the organisation and the skills and training of staff.
Quiz Question # 6: In performing your duties as a Board member, you must meet a certain standard, usually referred to as the “standard of care”. In Ontario, the standard of care:

- varies according to the individual Board member’s strengths and knowledge
- is the same for every Board member except for members of the Executive Committee
- is the same for every Board member
- none of the above
The Legal Responsibilities of Board Members as Directors

Quiz Question # 6: In performing your duties as a Board member, you must meet a certain standard, usually referred to as the “standard of care”. In Ontario, the standard of care:

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- is the same for every Board member
- none of the above
The Legal Responsibilities of Board Members as Directors

The standard of care for Directors in Ontario is found in the “common law” or judge made law. In *Re City Equitable Fire Insurance Co.* the court concluded that the degree of skill required by a Director is what “may reasonably be expected from a person of his knowledge and experience”.

The Legal Responsibilities of Board Members as Directors

A lawyer, for example, will be required to meet a higher standard of care than another Director on the same Board doing the same work without legal training.
The Legal Responsibilities of Board Members as Directors

This does not mean Board members should let one knowledgeable person on the Board run everything and make all the decisions. That would be a mistake. All Board members must exercise independent judgement when making decisions and are responsible for decisions they participated in.

Rather what it means is that you will be expected to do your best in making decisions - no more and no less.
“Come on guys, work with me....
Damned if I can remember, but
I'm sure there's something that
we're supposed never to do..."
Board Liabilities

Quiz Question # 7: We were served with a statement of claim naming our clinic. If we should lose this case, the Board Members could be on the hook for our deductible, couldn’t we?

☐ Yes
☐ No
Quiz Question #7: We were served with a statement of claim naming our clinic. If we should lose this case, the Board Members could be on the hook for our deductible, couldn’t we?

☐ Yes

☐ No
Board Liabilities

In this scenario, no Board members were named so only the clinic is responsible for paying the deductible. Even if Board members were named personally, they should be indemnified by the clinic’s by-laws.
Board Liabilities

The blanket protection for Board members is called the "corporate veil". There are limited circumstances where this veil may be pierced:

1. Where the Board member has committed a tort personally, or has breached his/her duty of loyalty or care.
2. Where a breach of a particular statutory obligation has occurred.
Q. What does the “duty of loyalty” mean?

A. The Supreme Court of Canada stated in CANAERO v. O’Malley that it means acting “in good faith and avoidance of a conflict of duty and self-interest”.
SEE MY SNOWMAN?

HE'S ENJOYING A SNOW CONE! THERE'S NOTHING HE LIKES BETTER!

AND THE SNOWMAN WITH THE ICE CREAM SCOOP IN HIS BACK?

IT'S A SORDID STORY.
Quiz Question # 8: We found out recently that our bookkeeper miscalculated payroll for the past two years, underpaid staff, and failed to make remittances for EI and CPP deductions. Can our Board members be held personally liable for these mistakes?

☐ Yes
☐ No
Quiz Question # 8: We found out recently that our bookkeeper miscalculated payroll for the past two years, underpaid staff, and failed to make remittances for EI and CPP deductions. Can our Board members be held personally liable for these mistakes?

☐ Yes
☐ No
Board Liabilities

Board members can be held liable personally for up to 6 months of unpaid wages or vacation pay. But in practice, the indemnification clause in your clinic’s by-law will protect you from this mistake.

Board members are jointly liable with the corporation for failure to remit CPP and EI deductions. But there is a “due diligence” defense in the statutes that would probably protect you.
Board Liabilities

The lesson to learn from this is that personal Board liability is extremely rare and easily avoided by:

- avoiding conflicts of interest
- attending meetings regularly, paying attention so that you are informed about the decisions being made, and participating actively
- keeping accurate minutes of all meetings
- and by asking questions about financial statements so you are satisfied they are correct.