VOLUNTEER ACTION
ONTARIANS MAKING A DIFFERENCE

LEISURE INFORMATION NETWORK

APPENDIX I

A DISCUSSION PAPER ON BOARD ACCOUNTABILITY

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INTRODUCTION:

Until the 1980's Not-For-Profits had been viewed as being on the margin of the private sector and not closely scrutinized. As the organizations passed from "doing good" to being professional agencies, non-profit boards of directors faced many changes in their roles. Where once an appointment to a board was a social event or an opportunity to actualize personal values, now the role has serious accountability issues. One of my interviewees said that if people really understood everything they could be held accountable for, they would not be on a board. She said that a major problem faced by boards today is that "they are charged with doing the work of government without the stable funding of government. Often the people who have the best skills have no time to volunteer. Also, many people who are active in various parts of the community find themselves in conflict of interest situations." As well there are still some Board Members operating under the old mentality where risks of liability were not considered. In the course of the research for this paper, I heard many examples of Board Members who, in the course of "doing good", found themselves liable for actions of others or for their own conflict of interest. (Appendix A)

The purpose of this paper is to present for discussion data derived from a literature review and from interviews with board members, executive directors and experts in the field of board accountability. (The detailed methodology is presented in Appendix B) It is hoped that some of the ideas presented in this paper will engage conference participants both in considering how the non-profit sector can be more accountable and what steps need to be taken to assist the sector in being more accountable.

THE ROLE OF THE BOARD AND ACCOUNTABILITY:

All independent incorporated not-for-profit (NFPs) organizations and charities must be governed by boards under the laws of Ontario. Board members are called Directors and considered a fiduciary-one who accepts and holds a "public trust". Public trust is the obligation placed on Directors to maintain, preserve and further develop and expend resources and to ensure that the organization's activities remain in the public domain to benefit this and further generations. It refers to the obligation placed on Directors to provide governance and management of the organization and to implement programs and services for the benefit of the organization's public. In the case of incorporated NFPs, this trust is to their members and/or their donors to carry out the mission of the organization. The interests of a NFP which is not a charity are private.

In the case of charities, the public trust is to the public at large and is governed by specific laws and regulations. Directors of charities are accountable to the courts and to the Attorney General. Some organizations may think that they are not a charity as they are not tax registered. However, if the purposes of the organization are wholly and exclusively charitable in law, then they are a charity. The law defines a charitable purpose as: advancement of education, advancement of religion, relief of poverty or for the benefit of the public in general. There are also many unincorporated NFP associations whose Directors and members have fewer legal restrictions but a much higher degree of personal risk.

As all incorporated bodies are treated as a person, the Board of Directors is viewed, under the law, as acting for the corporation's person. Directors must safeguard the interests of the corporation. They are also, individually or jointly, held accountable for the actions of the corporation.

WHAT IS THE BOARD ACCOUNTABLE FOR?

The Board of Directors has a number of specific legal responsibilities for which it is held accountable. A thorough list of statutory duties and obligations of directors and trustees is not possible. Some organizations may have statutory obligations stemming from specific legislation under which they operate. Others may operate facilities and are required to meet zoning by-laws and building codes or to fulfil contractual obligations. The following list provides a general overview of the statutory duties and obligations of all NFPs.

1. <u>Fiduciary Responsibilities</u>:

- Directors are in a position of trust and must act honestly, in good faith and in the best interests of the organization.
- They have the obligation of loyalty and duty to uphold the integrity of the organization.

2. <u>Skill and Diligence</u>:

- A director must demonstrate the degree of skill and diligence that can reasonably be expected from someone of his or her knowledge and expertise.

3. <u>The Honest Exercise of Power</u>:

- Power cannot be passive. It must be exercised through regular attendance, diligent review of materials, active participation in decision making, asking for clarification regarding issues and impact of decisions and always balancing the objects of the organization against its ability to attain those objects. "The accountability of a director means that the organization not only achieves its objects but that it does so in a manner that does not unduly place the organization at risk." (Bourgeois, 1995 pp142)
- Directors must separate personal interest and the interests of those who elected them from the interests of the organization.
- They must put the interests of organization ahead in all cases.
- Directors also have the duty to exercise due diligence over other directors' exercising of power.

4. <u>The Exercise of Power for a Proper Purpose</u>:

- Directors are accountable for ensuring that operations undertaken by the corporation are at all times in accordance with the corporations objects (purpose of the organization as set out in incorporation documents)

- Fulfilment of objects must be carried out in a way that does not abuse the power conferred upon Directors.
- Directors must not take actions beyond the objects and powers of the corporation.

5. Duty of Loyalty:

- Directors must be careful to avoid actions that could be seen to taint their integrity or judgement in the discharge of their responsibilities to the corporation.

They must:

a. Disclose interests,

b. Avoid usurping opportunities learned of through their position, and

c. Avoid competing with the organization

6. Duty of Care:

- Directors are required to be informed about the state of the business and affairs of the organization and to ensure that it is properly managed and its property and assets are properly cared for.

7. Standard of Care:

- Directors are accountable for a standard of care as it applies to their fiduciary duty. In the NFP sector there is no codified standard of care. Therefore the common law standard is applied to directors of NFP entities.
- This standard is subjective and varies from person to person depending on circumstances and individual knowledge and skill. (In cases of unincorporated NFP associations, it is not clear how this standard is applied.) (Examples of recent cases in Appendix C)
- Directors of incorporated NFPs and Directors of Charities need not exhibit in the performance of their duties a greater degree of skill than may reasonably be expected from persons of their knowledge and experience.
- If Directors of these organizations act within their powers, if they act with such care as is reasonably to be expected of them, having regard to their knowledge and experience, and if they act honestly for the benefit of the organizations they represent, they discharge both their equitable as well as their legal duty to the organization.
- This common law has been and will continue to be reinterpreted by the courts to meet changing circumstances. Over the past few years, it has been continuously enforced with more rigor.
- For incorporated NFPs that are co-operatives, the standard of care is objective and is the same as For-Profits. In the exercise of their powers and duties they will "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". The actions of all directors are evaluated equally irrespective of their individual qualifications.

Other duties for all Directors of NFPs include:

1. That they inform themselves diligently of the corporations activities,

2. That they ensure the proper records are kept,

3. That they ensure that steps are taken to ensure proper information on corporate affairs reaches the members,

4. That they ensure reports are filed with the proper authorities when due.

8. Avoiding Conflict of Interest:

- A director must not let personal interests or the interests of a third party conflict with the interests of the corporation.
- If a conflict arises the Director must not exploit his or her position.

9. Retaining Confidentiality:

- Directors are not permitted either during or after their term of office to use information deemed confidential by the organization.

10. Avoiding Self-serving Conduct:

- A director must not allow his or her conduct as a Director to serve personal ends.
- Directors of charities may not allow the property of the charity to be used for anything other than the charity's purpose or that which is ancillary or incidental to carrying out the purpose. This means that the board cannot purchase liability insurance without a court order giving them permission. This regulation is in the process of being amended.
- The director may not charge or receive professional or other fees from the charitable corporation. This also applies to all partners and employees of the director's firm.

11. Declaring Interests in Contracts or Arrangements:

- If a Director is directly or indirectly interested in a contract or arrangement with the organization, he/she must declare and refrain from any involvement in decisions around such contracts or arrangements.
- In addition to the responsibilities listed above, directors of charities are also charged with the following duties:

1. Not to delegate: While directors are entitled to delegate some of their responsibilities to committees, staff and volunteers, delegation alone will not automatically remove the director from the delegated responsibility.

2. Not to profit from the trust: This is a mandatory special provision in the Letters Patent.

3. Fair and Visible Decision Making

4. Avoid excessive administrative expenses

5. Act gratuitously, no payment may be made to directors, only the reimbursement of expenses.

6. Account for all property of the trust and for its use solely for charitable purposes.

7. Manage the assets of the organization. Directors may retain professional services for this duty and may delegate operational management to employees.

8. Avoid advocacy, ensure that the charity does not advocate in support of policies, nor seek to inform and educate on subjects and issues which do not conform with its corporate purposes. When the charity does address a legislative or policy change related to any issue, the issue must be clearly seen to be directly relevant to the charity's purpose.

The directors of all Not-For-Profits are also seen by society as having responsibilities. These are the accountabilities decided by the board and are the carriers of the spirit of the organization.

1. To serve the organization and to see it develop and grow

2. To believe in the importance and values of the organization

3. To endorse the mission, vision, and values of the organization

4. To care passionately about the work of the organization and commit the time, energy and expertise needed to ensure a positive future.

These responsibilities and their supporting behaviours are mainly applied to the following areas of accountability:

1. Employees and the workplace : The Directors must exercise due diligence to ensure the organization is in compliance with the:

- Employment standards Act
- Collective Agreements under the Labour Standards Act
- Occupational Health and Safety Act
- Pension Benefits act
- Pay Equity Act
- Employment Equity Act
- Human Rights Act

Directors are personally liable for up to 6 months wages and up to 12 months vacation pay if the corporation is sued for the debt and the debt is not satisfied due to bankruptcy or insolvency.

2. Taxation: Directors have an obligation to ensure that appropriate taxes are collected and remitted to the government. The applicable statutes allow for penalties to be assessed against negligent directors as well as payment of taxes owing.

3. Environmental protection: The Ontario Environmental Protection Act holds directors accountable for taking all reasonable care to ensure that the corporation does not discharge contaminants into the environment.

4. Business practices: The Canada Competition Act and the Ontario Business Practices Act hold directors responsible for ensuring that the corporation is fair and honest in its business dealings with other corporations. This is especially important if the organization is involved in the sale of goods and/or services.

This is a lengthy and scary list of potential liabilities for board members. There are seven major areas of direct responsibilities which, if met, will go a long way towards protecting the organization and the board members from most of the risk present in governing NFPs.

1. Attendance: Board members should be present in mind and body and participate fully.

2. Mission: Board members need to define the mission and ensure that the organization doesn't stray from the mission through periodic strategic planning to review purposes, programs, priorities, funding needs, and achievement targets.

3. Executive Director: Board members are responsible for selecting, compensating, evaluating and if necessary dismissing the E.D.

4. Finances: Board members must assure financial health of the organization through budget approval and monitoring. Contracting for an independent audit and controlling the investment policies and management of reserve funds are also a board responsibility.

5. Program oversight and support: The board members have a responsibility to oversee and evaluate all programs, support the staff and be an advocate for the organization in the community.

6. Fundraising: Board members are responsible for ensuring the fundraising process is ethical and effective.

7. Board effectiveness: Board members have a responsibility to ensure the fulfilment of all governance responsibilities in an effective and efficient manner.

TO WHOM ARE THE MEMBERS OF THE BOARD OF DIRECTORS ACCOUNTABLE?

In the For-Profit sector, Boards are accountable to the owners of the corporation. In the NFP sector, volunteer Boards have difficulty determining who their "owners" really are and then finding a way to hear them. In fact, NFPs have many "owners" and they are accountable to all of them. "They must worry about their public image, especially as it influences donors and volunteers. They have legal and historical obligations to their founding donors. They serve paying, part paying and non paying clients. They enjoy tax exemptions based on their public service missions and must adhere to various laws and regulations." (Young, 1996) The focus of this accountability may change over time and from program to program depending on the nature of the Board, the nature of the mission and the relationship with the "owners" and other stakeholders. The following is a general list of "owners" and other stakeholders to whom the Board of Directors is accountable.

1. Members:

- In NFPs that are not Charities, the members are the "owners".
- Directors are responsible to the members and have the obligation to render an account for a responsibility conferred.
- They also have the responsibility to operate within the mandate of the organization and to be accountable to the roots and history of the organization, while ensuring fiscal and legal accountability in all organizational matters.
- In NFPs that are Charities, members, while not actually "owners" are still important stakeholders.

2. Funders:

- Directors are accountable to the organization's funders to ensure that all funding is used according to the funding contract and that proper accounts are kept and proper information provided.

3. Donors:

- The Directors accountability to donors may be narrower than to the community at large.
- The Directors must ensure that donated monies are used in the ways that are consistent with the expectations of the individual donors.
- They are also accountable for having policies in place to ensure ethical fund raising.

4. Volunteers:

- Boards are accountable for ensuring that there are policies that govern the use and treatment of volunteers in the organization including the same employment policies, with the exception of compensation, that apply to staff.

5. Staff:

- Boards are accountable for the selection and evaluation of the Executive Director.
- They are also accountable for the establishment of policies and management systems to ensure that the organization is managed efficiently and effectively.
- Boards are accountable for the organization's compliance with Federal and Provincial workplace legislation.

6. Government:

- The Board of Directors of any NFP receiving public money is accountable to assess whether the organization is actually having the impact it intends on those it is trying to serve with the most efficient use of resources possible.

7. Community:

- The community is actually the "owners" of Charities. Therefore, Directors of Charities must ensure that the community has open access to the workings of the organization. However, a major question in determining this "ownership" is who is the community and how do Boards access it?
- For all NFPs, boards are accountable for boundary spanning which means the board represents the interests of the organization to its external public and ensures stakeholder interests are heard within the organization.

8. Clients:

- Boards are accountable to ensure the highest quality and most relevant service possible for clients.

9. The Private Sector:

- As more NFPs are forming partnerships with For-Profits, accountability to this sector must be considered.

10. The board as a whole and to the individual board members:

- The Board is accountable for self-management activities aimed at ensuring the board itself is as effective as it can be through member selection and training and evaluating board effectiveness.

11. To the Mission of the organization:

- The role of the Accountable Board is to deal with issues having to do with the mission of the organization: ensuring measurable goals and the ability to achieve them.
- Boards are accountable for setting the overall purpose of the organization including services, values and ethical guidelines.

HOW SHOULD BOARD ACCOUNTABILITY BE IMPLEMENTED?

Board accountability is implemented through its governance processes which include structure. relationships with stakeholders and monitoring systems. The voluntary sector is very diverse and there are big differences between organizations. While there seems to be no one best way to govern all NFPs, there are a number of governance models currently in use. (see Appendix D)

1. Structures

a. Contingency Governance: "The pattern or model that is best for any given organization must fit the needs created by that organization's history, culture, future plans, and the personalities of key board and staff members. The secret of success with boards is to find the unique pattern that fits a given set of circumstances and recognize when these circumstances change, thereby requiring a change in the board's mode of operation." (Murray, 1998)

b. Policy Governance Model: The Board and E.D. have clearly defined roles. The board’s role is one of stewardship on behalf of its stakeholders and in order to fulfil this role it focuses on the mission, vision, values and strategic priorities of the organization. It ensures a responsiveness to community stakeholders and empowers the E.D. to carry out the mission of the organization within specified limitations. It monitors and evaluates performance according to its policies in the following areas: ends, executive limitations, Board-E.D. relationship and the governing process. Although providing clear accountabilities and focus, this model is self-limiting in its ability to embrace change as it assumes one vision and it perpetuates the status quo through its policy framework. One of the duties of a Trustee is "not to delegate." Therefore, this model may not fit with the risks of being the Director of a Charity, who may need a more hands-on model or at least one that supports ongoing risk analysis. These governing boards are best suited to large complex institutions. They restrict themselves to dealing with strategic issues having to do with the end goals of the organization. This, however, is only possible when board members have a deep understanding of the organization and the sector in which it operates and are skilled in developing monitoring systems. Often, due to time constraints on the part of board members, the board becomes a rubber stamping board. "The secret of creating an effective Governing Board lies in developing a shared understanding of basic levels of policy, deciding which of them are strategic and devising information systems that supply valid data on past performance and future needs in ways that clearly relate to the basic strategic issues." (Murray, 1998)

c. The Representative Board Model: On this board, there is a clear link between the board and its constituents who have a say in policy decisions through their representative. This board is cumbersome and except for associations who elect their representatives, may only give the illusion of representation.

d. Corporate Model: Based on a business model of governance, this model has an emphasis on efficiency and effectiveness measures. There is a recognition of stakeholder self interest with clear rewards and a dominant culture. Long term plans are driven by a short time horizon and an immediacy of return. This is a problem with social changes that do not have a short time horizon.

e. The Charismatic Organization: In many small NFPs and ethnic groups, it is impossible to distinguish a board from the founders, managers or service providers. The sense of mission becomes the organization. One respondent described her experience working with ethnic groups who form around a charismatic leader and then when they get government funding they have to develop a board. However, this is just a token board and all decisions are still made by the leader. Often this style of decision making and respect for the holder of the vision is strongly embedded in the culture of the group.

f. Working Boards: This style of board governance works best when the organization is new, small, all or nearly all made up of volunteers and when its services are not numerous or complex. Board members who are knowledgeable and committed, cannot at this stage differentiate between operational and strategic, everything has the potential of being strategic. It is important to make sure everyone understands who is doing what and has a basic agreement about what things are most important.

g. Mixed Boards: This is an intermediate board style between working and governance suitable when conditions are unstable or the organization still needs board members for some functions despite paid staff. In this style certain board members or committees take responsibility for managing specific functions in the organization. This is a very confusing style, difficult to implement. In order to work it needs open communication about gaps and overlaps in authority and responsibility and a high tolerance for ambiguity. Also there is a need to train all board members on what is strategic and what is not. The leader must help the board to clarify what each level of policy means and what should be brought into the board at each level. There are at least four levels to clarify: mission, strategic priorities, operating policies and rules and procedures.

2. Relationships with stakeholders: The first step is to determine who are the stakeholders. This is a difficult task for many NFPs as they serve many diverse constituencies. The nature of the contracts between the NFP and its different stakeholders defines different types of accountability. For example, a not-for-profit organization set up to rehabilitate young chronic schizophrenics formed a "partnership" with a major drug company. The company decided to make the program a major recipient of its donation program. The company stipulated that all of its donations had to be used for treatment of clients, none could be used for administration or overhead. Furthermore, the board was aware that the program could not be, or be seen to be, influenced in the choice of treatment for individual clients by the donations. Thus the stakeholder relationship required at least two monitoring process to achieve accountability; to the donor regarding the use of the money and to the client regarding the choice of treatment. The board had to ensure proper internal accounting of the use of funds and a monitoring system that made visible the clinical decisions on the choice of treatment for individual clients.

Another example, also from the mental health field, involved an organization set up to provide both advocacy for ex-clients of the mental health system and opportunities to "bridge" into the community through work and recreational experiences. In this case the board and other volunteers were comprised of both clients and mental health professionals. There were only a few staff. There was a strong value within this organization that everyone was equal. The reality, however, was that some were more capable of dealing with this equality than others. The board members realized the importance of accountability to all their clients regardless of their levels of capability. They developed a code of conduct and provided training for all staff and volunteers. They also developed a feedback and monitoring system that gave all the stakeholders in the organization a way to express their concerns when they believed the code was violated and to resolve the issues before they became detrimental to the organization.

Boards are the main link between the organization and its stakeholders. As such, there needs to be time and opportunity for board members to interact with and hear what their stakeholders are saying. Volunteer Boards are a route for people to have a say in their communities. Therefore, as one interviewee cautioned "we must be careful that government, as it tries to assist boards in increasing accountability, doesn't erect barriers to community participation".

3. The organization as a whole, not just the board, is accountable for:

- The compliance with external standards set by government or other regulatory bodies,
- Demonstrating ethical behaviour in all aspects of interaction with stakeholders, and
- Carrying out the mission of the organization within an ethical framework.

The Board should develop policies and an ethical code of conduct that clearly stipulate expectations for each of these areas. The board must develop a framework that will allow the Directors to monitor and support the organization in adhering to the policies and to the code of conduct. Enforcement of accountability should be done through board process policies as well as the law. Accountability is by people to people. Therefore, accountability frameworks have behavioural implications. There must be consequences or an accountability framework will be seen as an administrative nuisance and not taken seriously.

4. Monitoring Systems: The measurement of accountability is difficult because conventional sources of

accountability used in the for-profit world don't work. However, monitoring information is essential to enable the board to assess whether its policies are being met. The information looks to the past and provides a specific survey of performance against criteria. A board information system should be established jointly between the board and staff. The board should determine:

- What information it needs to do its job,
- How often it wants this information, and
- In what form it needs the information.

The staff can then determine the content, format and frequency of information they will provide the board.

a. Internal operations should be monitored as well as the achievement of ends. Proper internal systems of accountability should be in place, with regular reports to the board on legal compliance as well as resource use. E.D. is often the monitoring link through his/her job description.

b. Board also needs to monitor its own performance. (Appendix E)

c. The Balanced Scorecard: This is an approach to conceptualizing and measuring performance in private commercial organizations where the maximization of long-run profit (long-run revenue minus long-run expenses) is the strategic objective as defined from the perspective of the shareholders interested in maximizing their equity. In order to achieve this object, governors of the organization must have access at any point in time to a cross section of information known as the Balanced Scorecard of performance attributes. (Appendix F)

d. Fiscal Accountability: To many boards, stewardship means setting and monitoring the budget. Line item budgeting and monitoring of the budget by comparison of budgeted to actuals is driven by two problems: competing for dollars and allocating money internally. To resolve these problems non-profit organizations need answers to questions as diverse as the comparison of administrative costs to program costs and whether it is worthwhile financially for the organization to supply a service which the government wishes to purchase. (Appendix G)

e. Evaluation: The board-staff relationship is built upon a paradox. On the one hand, the board is the "Boss". On the other hand, board members act to support and assist staff and volunteer-led work. Research shows that in many cases the competency of Boards to uniformly evaluate their E.D. is superficial or non-existent. "On the one hand a board can't interview staff about their opinions, but on the other hand, problems are created when a board obtains all its information from the person being evaluated." One solution is for the evaluation to be carried out by experienced people who are not part of the board but act as an advisory to it. As well, auditors and program evaluators should be selected by the board and report to the board or to the board audit committee.

HOW CAN BOARD MEMBERS PROTECT THEMSELVES?

1. Personal due diligence:

a. Before joining:

- Examine all governing documents including the Constitution and Letters Patent, which describe the purpose of the organization, and the By-Laws, which set out the framework for how the organization is to be governed. Ensure you understand exactly what the organization is responsible to do and the limits of its powers.
- Examine audited financial statements and ensure that the organization has the financial resources to carry out its responsibilities.

- Make sure the organization has Directors and Officers Liability Insurance and examine the policy to see what it covers and how the coverage fits with the organization's other insurance policies.

b. As a member of the board:

- At meetings, participate fully, take an active role in decision making, and ensure your position on the vote is reflected in the minutes.
- Carry out board duties with candour, honesty and integrity.
- Ensure that when you leave a board, your resignation is in writing.

2. Effective Board Process:

a. The function of the board is to manage the affairs of the organization by providing direction and ensuring the organization meets its legal obligations.

b. The board will function best with job descriptions setting out clear roles and accountabilities among the directors. (Appendix H) Meetings should be effective yet pleasant.

d. Plans are clearly set out, implemented and evaluated, relationships both internal and external are well managed.

e. Board members are motivated, resources are used wisely and skill training is provided to volunteers as well as staff.

f. Effective board functioning can avoid the problems of "leaky accountability and diffusion of authority. (Appendix I)

g. Orientation of Boards Members to accountability consists of written materials, binders, meeting with board officers and a board buddy system which pairs old and new board members. Board Manuals are critical and should include:

- General information about the information including the current strategic plan,
- Information about the board including board members’ and committees' job descriptions,
- Information about finances and fundraising including a list of donors for the previous two years, and
- Other information such as press releases, promotional material and annual reports.

3. Indemnification and Insurance:

a. Incorporation statutes provide for directors (except those of charities) to be indemnified by the corporation and for the purchase of directors' liability insurance.

b. This protection covers all costs, charges and expenses that the directors sustain or incur as a result of a law suit or other legal proceedings arising out of execution of their duties.

c. This does not apply in cases of wilful neglect or default and the protection is only as good as the financial position of the organization.

NEXT STEPS TO ENHANCE BOARD ACCOUNTABILITY:

MORE RESEARCH IS NEEDED ON:

1. The relevance of current laws

a. The laws are out of date and their compliance requires too much volunteer time. People no longer have the time and money to give freely to govern organizations and board process becomes arduous and slows the operations of the organization. We need a working system where everyone can play their parts. Nothing can move forward until the legal status quo is changed.

b. The laws need to assist boards. Given the amount of work and effort required of board members, reward and compensation is deemed by some to be inadequate. In addition, board members need to be protected from liabilities. It is becoming easier and easier to go after a charity for damages. Common law for charities is going the same route as the private sector without the supports of the private sector.

c. In a case involving sexual assault of children in a non-profit institution, courts found that wrongful acts of employees' duty are the responsibility of the employer--the employer is vicariously liable where it puts the employee in a position to commit wrongful acts. In this case the acts were committed during normal work hours and while carrying out normal work duties. The employer (the Board) was held accountable for the standard of care. Many issues stem from this and other cases:

- Is a non-profit organization the proper one to hold accountable?
- Can NFPs bear the cost of wrongful employee action? Insurers will not ensure this peril in the future.
- The doctrine of vicarious liability may be extended to the actions of past employees, before the time of current boards.
- Can the application of vicarious liability be extended to the actions of volunteers?
- How can NFPs do what they are set up to do and still protect themselves?

d. Legislation is needed to limit the liability for directors of Volunteer Boards.

2. <u>The relevance of current models of governance</u>.

a. The known models of governance and accountability are based on experience within the WASP culture. A hierarchical accountability structure doesn't fit with charismatic organizations from some cultures. In these organizations there are different channels of communication and conflicts of interest are viewed differently. What are the other models? How is accountability played out in other cultures?

b. The models for governance are archaic. There is no formalized representation of the community, no formalized way to gather information from the community. One person who looks like a member of the community cannot be expected to represent the entire community.

3. <u>The relevance of accountability processes to the missions of organizations</u>

a. What is the effect of the funder's culture, in terms of accountability, on the organization fulfilling its mission? In the environment of pushes to cost savings, rationalization of service, efficiency, integration and amalgamation, the role of accountability to the mission is lost.

b. The environment is forcing changes in structures which interfere with governance and make accountability all the more precarious. In an era of forced change, stable standardized procedures no longer work. We need new flexible procedures of monitoring progress towards fulfilment of the mission.

4. <u>Processes to ensure accountability to community stakeholders</u>:

a. Boards are accountable to many diverse stakeholder groups in their community. How does the board bring the concerns of constituencies, stakeholders and the general community into important discussions on strategy? The very structure of the board can prevent this.

b. Representation of stakeholder groups on the board is not often successful. Sometimes, as representatives, members put the needs of their constituencies ahead of the interests of the organization as a whole. As well communities and subject areas are so diverse that one person cannot begin to provide representation.

5. The impact of technology on the implementation of accountability frameworks is an area for study. Through technology, monitoring and feedback systems can be greatly enhanced. What some of the uses and the results of the uses of these monitoring systems? What is the impact of technology on confidentiality?

POTENTIAL POLICY AGENDA FOR GOVERNMENT

1. Charity Properties Act:

a. An issue for charities is the use of the property of charities to carry out the purpose of the charity. This is an area where Directors unwittingly fall into conflict of interest through investments and other uses not deemed ancillary or incidental by the courts. Directors can be charged with not carrying out their fiduciary duties. A realistic system is needed to ensure accountable use of charitable property.

2. Obligations placed on volunteers at the board level:

a. The expectations are much too high.

b. Many volunteer board members don't know what is really expected of them and others can't give the time and dedication needed. Therefore, all the standards are lowered, and the accountability of board members really doesn't work but everyone goes on pretending that everything is O.K.

c. In charities, board members are held to the high standards of trustees but are not afforded the compensation opportunities of other kinds of trustees.

3. The subjective Standard of Care

a. This standard is applied in Ontario without legislative modification as in some other provinces.

b. This standard results in a situation where the highly skilled volunteers, sought after for board membership on the basis of their skills and experience, are subject to a higher standard of care than other board members.

c. The common law standard of care seems to make it even more difficult for NFPs and Charities to obtain the voluntary services of persons for the very reasons they should be on boards. The skills that will assist the organization in meeting its objects and carrying out its activities are the grounds on which these volunteers will be judged. "We can't afford to have people refusing to join boards because of liability. This will grind the social fabric of the community to a halt."

4. The role of the Board of Directors of Charities is that of a Trustee

a. Are Directors of Charities trustees as in the trustee of an estate or are they really directors of a corporation?

b. Should corporate or trust principles be applied in determining liability of the directors of a charity?

c. Although Ontario's position is still unclear, directors are viewed as being in a fiduciary relationship with the charitable corporation rather than in an explicit trust relationship. The relationship is, however, similar in nature to that of a trustee. The rules that apply to trustees regarding how they carry out their duties would appear to apply to directors of a charitable corporation. For a trustee, as opposed to a director, to be held liable for losses, there must be evidence of wrongdoing or failure to exercise duties properly. This differs from common law. The Director's skills are not relevant rather the test is what a prudent person of business under the same circumstances would do. There is power to excuse a trustee if that person is inexperienced or doesn't have the skills of an ordinary prudent person of business. To which standard will directors of charities be held?

5. Accountability to Government Agendas

a. For organizations primarily funded by government, are they accountable to government's agenda if the agenda is in conflict with their mission? In their accountability to the government, there are many different voices to listen to. The pull to the government is clear but the voices vary which results in confusion and inability to respond on the part of many boards.

OTHER SUPPORTS TO BOARD DIRECTORS

1. Training

a. There is a need for training material that doesn't scare people and that would work for all kinds of boards. Always a risk when doing something for others and we need to know the best ways to assess risk and mitigate it.

b. Board members need training on conflict of interest "some just don't get it." For example "some boards have different codes regarding conflict of interest and accountability. Therefore, you can't represent legally another organization on a board except on an association where your organization is a member of that association."

c. Training for Board Chairs would be helpful. The skill of the board chair can ensure that all opinions are heard and that consensus is reached. This person needs to be highly skilled in consensus decision making at the strategic level to ensure that the wellbeing of the organization and its long term goals in service of its mission are always used as a touch stone while the organization navigates through dilemmas.

d. In small ethnic groups, others from the community "take over" when money becomes available. They then demand "expenses" from the board. This becomes a major headache for the funder and may destroy the organization. Even when this doesn't happen, there are often no audited statements and the leader of the organization has the attitude that "this is my money." What are the resources that could help these boards avoid these problems?

e. There is a lack of understanding of what financial information is important for accountability as well as an organizational cultural resistance to thinking in terms of the cost information needed for strategic financial accountability.

f. Training in technology would be an asset to many boards.

2. Accreditation of Boards:

a. There is no need for accreditation of board members.

b. People bring their own motivations to boards and this is part of the richness of thinking.

c. There is a fear that accreditation would lead to professional board members.

3. Insurance:

a. There is a need to make liability insurance universally available and affordable.

CONCLUSION

The issue of accountability is about ensuring that non-profit organizations succeed. In order for this to happen, the board is accountable for ensuring that "certain functions are performed well: money must be allocated, good relations must be maintained with both internal and external stakeholders, optimum amounts of relevant information on how well the organization is performing must be obtained, and thorough and insightful planning for future change must take place." (Murray, 1992) As well, process needs to be in place to ensure compliance with all legal requirements. However, research shows that there is no one pattern of accountability that fits all boards. Each Board of Directors must develop its own unique model based on the organization's environment, history, set of personalities and culture.

Appendix A

The following stories may help to illustrate some accountability issues faced by board members. While these stories are based on true situations, the facts have been changed to protect those involved.

1. A small board is formed by a charismatic leader to develop housing in a closely-knit ethnic community. Donations are received from companies in the housing field and from the local government. The board is deeply committed to the project and everything goes along well until it comes to light that improper use of funds have been made by the Board Chair. The whole board is held accountable even though the other board members had no idea what was going on.

2. It is evident that the Board has made a mistake in hiring the Executive Director of a community service project. He is rarely on site and there are complaints from both clients and staff that he is not doing his job. The chair of the board talks to the Executive Director several times to try and sort things out. Nothing changes and the Board lets him go. He sues and is successful. The Board did not clearly specify his role and there was no documentation of warnings and remedial actions taken.

3. An organization is formed to provide environmental education to industry and government. Over time, more of the staff are opposed to co-operating with those they see as the enemy of the environment and the work of the organization shifts from education to advocacy. The majority of the board agrees with the staff and so turns a blind eye to the growing discrepancy between the actual work of the organization and the organization's mandate. The board as a whole is held accountable by the government for violating the Letters Patent.

Appendix B

METHODOLOGY

The methodology utilized in this paper is qualitative and informal. It includes a review of books and articles on board governance and accountability and 30 interviews (eight Executive Directors, eighteen board members, and four expert theoreticians/consultants whose direct knowledge bases cover a total of 52 boards in the non-profit sectors of the arts, health, education, recreation, social services, legal services, religion, children services, housing and mental health. As well, I have drawn upon my own experience of study and consulting to numerous boards in the past eight years.

Chronologically, this project has progressed through the often iterative process of:

1. Conducting a literature search by hand and electronically and reviewing the books and articles to develop insight and understanding into the generic issues around board governance and accountability.

2. Analyzing this material and developing the key questions around which the interviews were conducted.

3. Conducting interviews, lasting between 30-60 minutes, in person and by phone. Some of the interviewees

brought Board materials to show me how their board copes with accountability issues. All spoke freely when they were assured confidentiality, that their names and the names of their organizations would not be linked with any specific statements. Many referred me to others to interview.

4. The initial analysis has been done using the framework initially set out in the terms of reference for this project. The data was divided into four categories: Board role in accountability, issues around accountability of boards, models of accountability from the literature and practices described in the interviews. Within each of these categories, I looked for the diversity, range and conflicts of opinions and integrative ideas and themes.

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APPENDIX C

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In a case involving the Scientology Church, it was decided that criminal liability could be assigned a non profit corporation only where the Board of Directors either authorized the illegal activity or failed to exercise the diligence to prevent it. The judgement went on to state that "liability based on acts or omissions of the board would encourage the board to adopt policies to ensure clear line of accountability and that it received adequate information of corporate activity. The wrongdoing of the agents of a corporation is not done in a vacuum." Other cases have found that corporate wrongdoing is attributable to the phenomena of institutional loyalty of their agents to the goals of the organization, to the protection of the organization and its reputation. (Quik Law 1995)

In a case involving the Hamilton Philharmonic Society's board of directors, the society ceased operation in January 1996 and the directors were sued for some $411,000 in unpaid musicians' wages and pension contributions. This is an example of the accountability of directors to ensure that the organization pays its bills and keeps expenses under control. Non-profit directors may be held liable for mismanagement of funds, wrongful terminations or breaches of contract. (Edur, 1997)

APPENDIX D

What do the definitions of accountability mean to the average board member? How can they implement them? Cutt (1998) lists a number of questions which if answered may help an organization implement accountability.

a. When is the Board accountable?

b. In what form is the Board accountable?

c. Who on the Board is accountable and to whom is accountability due?

d. What is the purpose of accountability?

e. What kinds of information are needed to ensure accountability?

f. How is this information produced, communicated and validated?

g. How is accountability used? Are there real consequences of any kind from the discharge of the obligation to be accountable?

h. How can an accountability framework (designed by answering questions a-g) be practically applied?

APPENDIX E

MONITORING BOARD EFFECTIVENESS

Periodically, boards need to assess their own functioning. One way of doing this is to establish what they need to put in place for optimal effectiveness and then to regularly monitor themselves against this criteria.

Leighton, in his book Making Boards Work describes six links in a boards "Value Chain":

1. Board Leadership: The chair requires vision, foresight, creativity and inspiration. Are the meetings well run? Does everyone feel heard? Are decisions made?

2. Board Management: The tasks, functions and processes of the board need to be well managed. Are meetings frequent enough? Do board members get needed information in a timely way? Are all board members clear on their roles?

3. Legitimacy and Power: Do all members understand the mission and the source and scope of their authority and responsibility?

4. Job Description: Does the Board have a clear statement of its functions and tasks? Does the board have its own goals? Is it monitoring its progress on those goals?

5. Competence: Has the board assessed what specific skills it needs to govern the organization? Is there the right balance of qualifications, knowledge, skills, experience and attitudes on the board?

6. Board culture: Is there an awareness of the board culture and do members share their beliefs, norms, attitudes, values and expectations for the organization and for their role as a board member?

APPENDIX F

THE BALANCED SCORE CARD

This scorecard consists of four categories of information:

a. Financial results indicating short and intermediate progress towards the strategic object,

b. The customer perspective measured by indicators such as customer satisfaction, customer retention and market share,

c. The internal business perspective measured by operating costs, product quality and product innovation, and

d. The learning and growth perspective measured by employee satisfaction, training and productivity and information system availability.

Cutt describes the Balanced Scorecard as "a logic model, a dynamic, chronologically and causally integrated, model of organizational performance, which can therefore serve as a basis of strategic management, of governance and management control focused on the attainment of the long-run objective." p.27 He goes on to say that "strategy is the translation through budgeting and resource allocation of a set of hypotheses about cause and effect into objectives and outcomes in a set of integrated variables (the components of the scorecard) all of which are focused on a single long-run objective. The strategic objective of long-run profit maximization is translated into a set of objectives, strategies and associated outcomes in the four components of the Balanced Scorecard. The chronological and causal integration of these objectives, strategies and intermediate performance outcomes serves the unifying strategic outcome of long-run profit." p28 (figure 1)

In his adaptation of the Balanced Scorecard from the private sector to the non-profit sector, where the reality is cost effectiveness rather than profit or its equivalent, Cutt (1998) notes as the major benefit that this model provides focus and integration within a comprehensiveness. Its usefulness is predicated on the concept that defining performance in non-profits serves as a basis for governance and management control. This adaptation substitutes long-run profit maximization with long-run service effectiveness maximization for a given revenue (budget) constraint. "Governance control sets the context for management control.

Intermediate evidence on service effectiveness performance (as distinct from short-run profit) is provided as part of the set of information needed for Board decision making." (Cutt p37) As well as the component of intermediate evidence on service effectiveness performance, this score card includes five other components. The first three are the same as seen on the scorecard for the private sector, customer (client), internal business processes and innovation and learning. The fifth component, financial results is defined separately from financial revenue constraint results in order to ensure careful attention to resource utilization. This model also allows for other constraints on achievement of the long-term outcome to be specified. (Figure 2)

Cutt has also developed another model to assist boards in getting the information they need to be accountable, an alternative Balanced Scorecard using the CCAF/FCVI attributes, which were developed as a Canadian approach to multiple-component performance reporting. This approach is presented by G. LeClerc, et al, in Accountability, Performance, reporting and Comprehensive Audit: An Integrated Perspective (Ottawa:CCAF/FCVI, 1996) Cutt(1998) lists the following 12 attributes of broad scope performance of a non-profit organization.

a. MANAGEMENT DIRECTION: defined as the translation of the mission into a single strategic service effectiveness objective which is to be maximized subject to the long-run revenue constraint, is the extent to which programmatic objectives are clearly stated and understood;

b. RELEVANCE: defined as the mission statement, is the extent to which the program continues to make sense with respect to the problems or conditions to which it was intended to respond;

c. APPROPRIATENESS: the extent to which the design of the program and the level of effort are logical in relation to programmatic objectives;

d. ACHIEVEMENT OF INTENDED RESULTS: the extent to which the goals and objectives of the program have been achieved; this is further defined as evidence of intermediate-run achievement of the long-run service effectiveness objective.

e. ACCEPTANCE: the extent to which the stakeholders for whom the program is designed judge it to be satisfactory;

f. SECONDARY IMPACTS: the extent to which significant consequences, either intended or unintended and either positive or negative, have occurred;

g. COSTS AND PRODUCTIVITY: the relationship between costs inputs and outputs;

h. RESPONSIVENESS: the capacity of the program organization to adapt to changes in such factors as markets, competition, available funding, and technology;

i. FINANCIAL RESULTS: accounting for revenues and expenditures and assets and liabilities;

j. WORKING ENVIRONMENT: the extent to which the program organization provides an appropriate work environment for its staff (and volunteers) and they have the information, capacities and disposition to serve organizational objectives;

k. PROTECTION OF ASSETS: the extent to which the various assets entrusted to the program organization (physical, technological, financial and human) are safeguarded; and

l. MONITORING AND REPORTING: the extent to which key matters pertaining to performance and program organizational strength are identified, reported and monitored. This is further defined as the management system through which intermediate and long-run performance is monitored and reported.

APPENDIX G

A recent survey in B.C. showed that most boards cannot answer the strategic questions because they are preoccupied with living within a tight budget and they see this preoccupation as being financially accountable. They believe that living within their budget means they are getting the most for their limited resources. However, for full accountability the Boards need to know:

a. costs of internal support services;

b. full costs of their client service programs; and

c. the average costs of units of direct service.

Many board members considered this information a low priority, some even said "it was unnecessary and inappropriate for non-profits to create. They felt it would focus too much attention on cost rather than service." (Cutt et al, 1998) Other respondents agreed that because they weren't selling a product, line item budgeting was all they needed. The one group in the survey that didn't take this stance was the group of organizations who were reimbursed from government contracts based on units of service.

The B.C. survey revealed both philosophical and political arguments for these positions. There was a concern that calculating total and unit costs of programs and administrative support might be politically embarrassing both within the organization and between the organization and its donors and funders. Also, some respondents were afraid that by tying their declared priorities to actual resource allocation, they might reveal the gap between what they said they were doing and what they were really doing. Philosophically, respondents saw cost information as vulgar, as showing a willingness to apply crass, materialistic interests to the organizations' deep underlying values. They stated that "doing as well as possible with limited resources" somehow lessened their organizations which they saw as founded on the principle of "doing good as long as there is good to be done." (Cutt et al, 1998)

Yet, part of governance accountability is ensuring that services are delivered at the least cost consistent with a standard of quality. Boards need program cost information as bench marks for tracking the organization's performance against strategic objectives. Also, many funders are now requiring outcome evaluations as part of the fiscal accountability.

APPENDIX H

JOB DESCRIPTIONS FOR BOARD MEMBERS

A job description for Board Members should contain the following information:

1. Position/job title

2. A statement of the authority vested in the position

3. A statement of who the person in the position is accountable to and what they are accountable for.

4. Specifics about the term of the board member, how they are elected, for how long and how they leave the board.

5. A list of the duties expected by the person in the position.

6. A description of how the board members' effectiveness will be assessed.

7. A date to review the job description.

8. The last approval date of the job description.

In the recruitment of board members, three additional pieces of information will be helpful:

1. Specialized and/or practical skills needed for the position

2. Benefits to the board member in the position

3. Time and financial requirements of the position

APPENDIX I

PROBLEMS WITH ACCOUNTABILITY

"Leaky accountability and diffuse authority" may have devastating results far beyond the organization's cause:

1. NFPs start with a vision: focus is on the practical with governance and management entwined in a hands on action oriented process.

2. Growth leads to staff and professional managers where authority is delegated to the E.D. who is directly accountable to the board.

3. More growth and change causes complexity to increase. Committees reporting to the Board oversee operations of the organization. New initiatives and problems are discussed at the board where, as a by product of this discussion, accountability, authority and monitoring are also brought to the attention of the board. The board's approach to accountability is passive.

4. The staff organization and volunteers now work together and experience different categories of accountability:

a. Activities for which volunteers are accountable with no staff support,

b. Activities for whose outcomes staff are responsible but have significant staff support,

c. Activities for which professional staff members are accountable with volunteers acting as advisors or workers, and

d. Activities for which staff are wholly accountable with no input from volunteers other than board policy.

5. Conflict of interests are in part determined by organizational law. The Ontario Law Reform Commission has stated that the duty of loyalty should cover avenues of redress by stakeholders.

Representation of stakeholders on the board: Clients work well on boards because they are not representing groups but rather themselves.

7. Recruitment for boards is done through friends and through networks of non-profit organizations. Recruitment is also done in other organizations through advertisements, competitions and careful screening of new board members.

8. The most standard practice of board governance involves board members elected by members of the

organization but from a slate chosen by the incumbent board to fill the gaps. The board members come with specific skills and fill expert or chair roles on committees. They wear a multitude of hats: advising on committees, developing the strategic plan, fundraising and overseeing operations.

All this results in a governance style that is dysfunctional, restricts staff's authority to make decisions and act, which leads to lack of accountability and diffuse authority. Holes may be plugged with a clear job description for the E.D. and clear terms of reference for all committees. Problems in actualizing this include: board dynamics, wide responsibilities, infrequent meetings and busy people. (Waitzer, Edward, 1996)

This problem has been expressed as "the Board having trouble shifting from doing to direction. Volunteers may like to be in charge but it is hard to hold them accountable and staff must often act in ways that preserve the fiction of control."