# Primer for Executive Committee Members: Rights, Duties and Practices

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## Part I: Introduction

Unions are **not** covered by the *Canada Corporations Act*, but the rights, duties and procedural requirements applied to not-for-profit corporations under law are an excellent guide for establishing good practices for QUFA.

There are many parallels between not-for-profits and trade unions. Unions are similar to Mutual Benefit not-for-profit corporations because they carry out activities primarily for the benefit of their members and are typically supported by fees or dues paid by members. As such, directors (Executive Committee) are accountable to the membership for the proper management of member resources and are well-served by establishing clear procedures for the use of those resources.

What follows here is an adaptation of the *Primer for Directors of Not-for-Profit Corporations* published by Industry Canada (2002) available in full here:
http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Primer_en.pdf/$FILE/Primer_en.pdf.

## Part II: Governance

### Mandate

To be effective in their role, directors and prospective directors must know and understand why the organization exists and whom it serves. It is equally important for the board of directors to periodically re-visit this mandate to determine its ongoing relevance and the organization's commitment to it. Although there is much a well-governed organization can do to help a new board member become familiar with the organization and its mandate, inevitably most of the onus is on the member himself or herself to get up-to-speed.

The Drucker Foundation's Self-Assessment Tool identifies five key questions that can assist directors in sizing up their organization:

What is our mission?
Who are our members?
What do members value?
What are our results?
What is our plan?

It is also important for directors to understand the association's mandate so that they can determine whether their motivation for serving on the board is compatible with it.

## Corporate Governance Documents

In The Guide to Better Meetings for Directors of Non-Profit Organizations, Eli Mina describes three sets of governing documents that provide the framework for how not-for-profit entities (and unions) operate:

- Laws of the land: The statutes under which your organization operates.
- Bylaws (or Constitution and Bylaws).
- Meeting Procedures or Rules of Order.

The statutes (e.g., *Ontario Labour Relations Act*) take precedence. Where they are silent or provide for alternatives, the constitution and bylaws apply. Where both statutes and constitution are silent, the rules of order apply. One additional governance document often exists: a 'policy manual' that sets out appropriate practice in a general way. The order of precedence for this document is after constitution and bylaws.

Not infrequently, organizations will act in a way that is at odds with their governing documents – with consequent implications for liability. A statutory and bylaws review (also referred to as a compliance audit) can be invaluable in ensuring that responsibilities and requirements are being met. A key issue for many organizations is maintaining institutional memory. High turnover among members and staff can mean that an organization revisits a matter that has already been decided, or acts inconsistently over time. Revisiting a matter usually entails wasted effort, and acting inconsistently over time is apt to alienate members or staff. Any steps that can be taken to simplify or facilitate tracking of governance practice or decisions are worthwhile.

## Accountability

All elected representatives in the union are potentially accountable to someone or some entity, often to multiple parties. This accountability can take many forms: annual general meetings where members can vote to replace representatives they have lost confidence in or make changes to governance documents that affect the organization; administrative or judicial penalties imposed owing to regulatory non-compliance; and, court actions mounted by dissatisfied members. While directors often focus on their legal liabilities, they also need to be mindful of their obligations to stakeholders who might not have or take legal recourse. Very infrequently legal duties will be at cross purposes with stakeholder interest, and in these rare instances, legal responsibility must take precedence. In other cases, the most skillful directors will recognize and accommodate stakeholder needs whenever possible, and thus ensure the long term health of their organization.

## Elements of Good Governance

The Panel on Accountability and Governance in the Voluntary Sector, chaired by Ed Broadbent, identified eight tasks required of the directors to further develop effective governance:

- steering toward the mission and guiding strategic planning;
- being transparent (where possible) when communicating with members and making information available to them upon request;
- developing appropriate structures;

- ensuring directors understand their roles and avoid conflicts of interest;
- maintaining fiscal responsibility;
- ensuring that an effective management team is in place and overseeing its activities;
- implementing assessment and control systems; and,
- planning for the succession and diversity of the leadership.

The list is offered merely as a starting point to indicate the issues that directors need to consider. Each organization should look at its own circumstances to determine the particular areas it should focus on, and what, if any, additional elements need to be added to the list for their purposes.

## Questions for Executive Members to Ask

1) Am I committed to the mission of the organization?
2) Can I contribute the time necessary to be an effective director?
3) Can I place the organization's purposes and interests above my own professional and personal interests when making decisions as a director?
4) What legislation covers the operation of the organization?
5) What is the mission of the organization and when was it last reviewed?
6) To whom are we, as directors, accountable?

# Part III Duties of Executive Members

The Executive Committee is responsible for the management of the association. In general terms, this means that the Committee is responsible for supervising staff, providing strategic planning, and developing and implementing policy. Committee members must be (or at least must become) knowledgeable about the business and financial affairs of the association.

## Fiduciary Duty

Directors of Mutual Benefit not-for-profits are required to exercise their power with competence (or skill) and diligence in the best interests of the association. They owe what is called a "fiduciary duty" to the association. The duty is a "fiduciary" duty because the obligation to act in the best interests of the association, at its core, is an obligation of loyalty, honesty and good faith. Directors' fiduciary duties can be divided into two main branches:

a) the duty of care; and,
b) the duty of loyalty.

The duty of care imposes on directors a duty of competence or skill – i.e., a requirement to act with a certain level of skill; and a duty of diligence. The duty of skill and diligence must be performed to a certain "standard of care".

The duty of loyalty requires that a director act honestly and in good faith in the best interests of the association. The duty of loyalty is a personal duty and cannot be delegated. Among other implications, it means that a director must avoid all situations in which his or her duty to the association conflicts with his or her interests (see Ellickson 2004 for how this works in bargaining).

## 1. THE DUTY OF CARE

### *(A) The Duty of Skill or Competence*

In carrying out their obligations, directors must use an appropriate degree of skill. There are both "subjective" and "objective" standards for the duty of care. The subjective standard requires that directors exercise such degree of skill and diligence as would amount to the reasonable care that an ordinary person might be expected to take in the circumstances on his or her own behalf, but he or she need not exhibit in the performance of his or her duties a greater degree of skill than may be expected from a person of his or her knowledge and experience. In contrast, under an objective standard of care all board members – regardless of background or experience – are assessed against the same benchmark. The most commonly used objective standard is the conduct that might be expected of a reasonably prudent person. This means that a director without the skills required to meet the standard is obliged to acquire them, or some of them.

However, there are reasonable limitations on what can be expected of directors:

- a director is not liable for mere errors in business judgement (e.g., considered decisions to pursue a particular commercial course made after honest and good faith evaluation);
- directors are justified in entrusting certain matters of business to officers of the association; and,
- directors are justified, in the absence of grounds for suspicion, in trusting that officers of the association will perform their duties honestly.

In practical terms, the following applies:

- Directors should make decisions affecting the association based on full consideration of all appropriate material and on the advice of professionals where required.
- Directors should oversee all aspects of the association's operations.
- Directors may delegate certain functions to key senior management, but must maintain a supervisory role.

The board of directors (Executive) is responsible for regularly reviewing the performance of senior staff to whom they are entrusting the implementation of the association's mandate on a daily basis.

### *(B) The Duty of Diligence*

The duty of diligence requires a director to attend meetings and to become as fully informed as possible regarding all aspects of the association, including any issues that affect the association. The duty of diligence requires active and concerted effort on the part of directors to be ready to make informed decisions affecting the association.

The duty of diligence has a number of practical implications. Directors should:

- ensure that the Executive Committee meets regularly;
- attend meetings of the Executive whenever reasonably possible;
- be thoroughly informed about any decisions the Executive has to make and ensure that they are provided in a timely manner before the board meeting with all relevant documents including

agreements, financial reports and information, legal opinions and other information necessary to make knowledgeable and informed decisions at the meeting;
- exercise independent judgement when voting in all corporate decisions, and not simply vote with the majority for no well-informed reason;
- ensure that minutes of meetings of the association accurately reflect any comments or votes in opposition to matters acted upon;
- carefully review all reports relating to the association's financial affairs, including interim and year-end financial statements;
- with the assistance of senior staff, carefully review and participate in formulating the annual budget and strategic plan;
- understand and comply with the stated purposes of the association as provided for in the constitution;
- understand and carry out their obligations under the association's constitution and bylaws, including the requirement to call an annual general meeting and to provide information to the members at that meeting;
- require senior management to provide them with any ongoing operational and program information;
- monitor and supervise the chief staff person and regularly assess his or her performance;
- be aware of all internal policies affecting the organization and ensure that certain key policies are in place (such as an investment policy and conflict of interest policy); and,
- be aware of the laws affecting the association and obtain necessary legal and accounting advice.

## 2. THE DUTY OF LOYALTY

Directors must act with honesty and in good faith in what they reasonably believe to be the best interests of the association. A director is considered to be acting for the association's benefit and on its behalf, and must subordinate his or her personal interests to the best interests of the association.

This duty of loyalty involves good faith, trust and special confidence, and requires the avoidance of conflicts of interest (but see Ellickson 2004 on how this works in bargaining).

The duty of honesty and good faith has various practical implications. Directors must:
- have full allegiance to the association's mission and further its cause;
- resign as a director where the director has any personal prejudices or beliefs that are inconsistent with the association's mission and that might interfere with the duties owed to the association;
- place the interests of the association above personal self-interest in all dealings with the association and actively avoid all potential conflicts of interest;
- fulfill all of the association's reporting obligations with honesty and good faith, and accurately represent the association's financial or other position to the members;
- maintain adequate and accurate books of account, records and minutes of the association;
- ensure that all corporate decisions are implemented in accordance with applicable resolutions;

- not disclose any information acquired in connection with their position as directors that might be harmful to the interests of the association and that is not already available to the public; and,
- fulfill the terms and restrictions of any special purpose trust fund (e.g., Strike Fund) maintained by the association, honestly and in good faith.

A director must not delegate his or her general responsibility for governing the association. In certain circumstances, it is permissible to delegate particular tasks related to management of the association, provided there is proper supervision of the party to which the task is delegated. However, the line between governance and operational matters is often unclear. As a general rule, it is best to limit delegation of core functions to board committees authorized by the constitution. Other matters may be delegated by way of Executive resolution.

## Duties Toward Members

Directors have certain duties to the members of the association. They must ensure that the association and its directors abide by the terms of the constitution and bylaws. Directors must also treat all members fairly and without bias or arbitrariness (see Ellickson 2004 and Pooni 2013 in the kit).

## Questions for Executive Members to Ask

1) Does the Executive Committee meet regularly? How often does it meet?
2) What notice and preparation (e.g., agendas, reports, etc.) does the association give to directors in advance of meetings?
3) Does the association have written policies such as a conflict of interest policy, an investment policy or a charitable donation policy?
4) Does the association maintain proper books of account, records and minutes of meetings?
5) Does the association provide Executive members with ongoing operational and program information?
6) How does the Executive monitor and supervise staff? Does it do annual performance appraisals?
7) Do I understand the duties of a member of the Executive Committee?
8) Do I attend meetings regularly? Do I prepare adequately for them? Do I read materials and consider them carefully?
9) Do I exercise independent judgment when voting on association matters?
10) Am I alert to any potential conflicts of interest or appearance of personal gain?
11) Have I read and do I understand the association’s policies on matters such as donations and conflict of interest?

# Part IV Rights of Executive Committee Members

## Management Access

The board of directors is responsible for the effective management of the affairs of the association. The power to manage the association involves:

- ensuring that the objects of the association are properly carried out;
- setting long-range objectives and strategic plans for the association;
- being responsible for all aspects of the association's operations;
- ensuring the association's financial stability and overall performance; and,
- supervising staff.

Each individual director is also responsible for his or her own acts and omissions while in office. The directors must, therefore, have unimpaired access to all the resources of the association as necessary in order to effectively perform their duties.

## Books and Records

A director has the right at any reasonable time to inspect and copy all the books, records, and documents (not only those that are publicly available) and to inspect the physical property owned or used by the association. This allows directors to exercise their managerial and administrative powers, make informed decisions about the affairs of the association, confirm that the association is in compliance with all applicable laws, and ensure that any funds collected by the association are used only for the designated purposes.

## Notice of Meetings

Meetings of the Executive are an essential way for directors to exercise their power to manage and administer the affairs of the association. Therefore, each director has a right to receive proper advance notice of all Executive Committee meetings. Generally, the constitution or bylaws must establish either a specific amount of time that is reasonable for notice of meetings or must indicate that reasonable notice will be given and outline acceptable means by which notice is given. If a director is not able to attend a meeting, he or she has the right to review the minutes of such a meeting and any financial statements presented, and may voice an objection to any information these contain pursuant to the Rules of Order.

The right to attend meetings is subject to directors' fiduciary duty to avoid any conflict of interest. In some circumstances, conflict of interest issues will preclude the director from being present for discussions and votes on particular matters; occasionally, where curing the conflict requires that the director resign, the right to attend meetings will be lost. In such situations, other directors need to be wary of the former director's continuing presence at meetings even as a guest, as this may give rise to an opportunity to improperly influence decisions. Where a director is absent temporarily, owing to a conflict of interest issue, this absence should be carefully recorded in the minutes.

## Right to Vote

The constitution and bylaws outline who has the right to vote in Executive and sub-committee decisions. Voting rights must be equal for all voting participants. This means that such directors may not be given either votes that are weighted differently than other votes (for instance, double or half votes) or the right to vote only on certain specified matters (for instance, giving an honourary treasurer a vote only on financial matters). While the right to vote is a basic right, it is subject to directors' fiduciary duty to avoid any conflict of interest in any contract or proposed contract of the association.

## Minutes

A union must keep minutes of all meetings of its members, the Executive Committee and Council. Directors have the right to vote on the approval of the minutes of all previous meetings of the Executive and to voice any objections to them. Directors also have a right to inspect the minutes of all meetings as part of their right to access and inspect the association's books and records. If the association has established committees, the directors have the right to receive copies of the minutes of each committee's meetings. This allows directors to fulfill their responsibility to exercise overall management of the association.

## Questions for Executive Members to Ask

1) Do I understand all the rights and responsibilities associated with the office I hold?

2) Am I aware of and exercising the full range of my rights?

3) Should I be seeking any logistical assistance from the organization to facilitate the exercise of my rights and powers (e.g., better access to books, records, etc.)?

4) Should I be seeking any procedural assistance from the officers to facilitate the exercise of my rights and powers (e.g., more meeting notice)?

# Part V Committees

Committees are an essential tool for the effective and efficient functioning of a association's Executive. An appropriate committee structure allows a board to focus expertise where it can best be used, and manage the flow of information so directors are not burdened with unnecessary material that can hinder rather than facilitate good decision making. Solid committee work – i.e., thoughtful assessment of information that results in well-focused recommendations or options – is a lynchpin of prudent and informed Executive decisions.

## Types of Committees

### 1. AD HOC COMMITTEES

These are short-term committees struck to deal with, or make recommendations on, a specific governance or organizational issue. The mandate of a special committee is determined by the resolution that establishes it. The resolution should also cover the size of the committee, either as an absolute number or as a permissible range; the selection procedure; and the scope of any power delegated to the committee.

**2. STANDING COMMITTEES**
These are permanent committees stuck to deal with, or make recommendations on, on-going governance or organizational issues. Members of a standing committee do not have to be members of the Executive. The mandate of a standing committee may be determined either through a provision in the organization's constitution or in the Executive or Council resolution that establishes it. Standing committees differ from ad hoc committees in that their decisions or actions are an integral part of the Executive's work. As such, it is advisable to set out in the constitution how these committees are constituted.

**3. EXECUTIVE COMMITTEE**
This committee is on-going. It oversees the organization generally, and particularly direction of staff, between full Council and Member meetings, and normally has the capacity to bind the association. Because of the power an executive committee has, it must be constituted through the consitution.

Where the bylaws provide for an Executive Committee, they should also provide:
1) The procedures for holding meetings.
2) The quorum for meetings.
3) A reasonable period of notice of meetings, or indication that reasonable notice will be given.
4) The manner of appointment or election of Executive Committee members.
5) The manner in which members are removed from the Committee.
6) The responsibilities or duties of Committee members.
7) The remuneration of Committee members.

## Procedures
The procedural formality used in committees can vary enormously. A key advantage of committees is that they have fewer participants and more flexibility in their proceedings. This allows for more efficient processing of information and quicker decision-making.

Directors should be aware, however, that delegating responsibility to a committee does not necessarily protect them from liability arising from committee decisions or actions. In practice, directors should always ensure that they have access to committee minutes and records. They are legally entitled to any such material.

The legitimacy of committee meetings, like other meetings, can be challenged if its members have not been afforded procedural fairness. Even where the committee operates very informally, there should be provision for:
- notice of meetings;
- adherence to quorum requirements;
- certainty as to the subject matter under consideration (an agenda);
- availability of minutes and records for review; and,
- opportunity to record dissent.

## Questions for Executive Members to Ask
1) What is the committee structure of the association?
2) What standing committees are contemplated in the association's bylaws?
3) What is the mandate and role of each of the standing and special committees of the association?

4) Any there any committees I should keep informed about the decisions or activities of, even though I don't serve on them?
5) Am I satisfied that the procedures of the committees I serve on are appropriate given their mandate and composition?

# Part VI Orientation & Development

Orientation and training are key to developing a committed and effective Executive. Formal orientation should be provided to new and current directors. Two important tools can assist in these initiatives – the manual and the retreat.

## Tools

### 1. EXECUTIVE MANUAL

The Executive manual is crucial to the orientation and training of new and current directors. Manuals should be well-planned, well-organized and well-used. Initially, the manual serves as an important orientation tool. It provides new and returning Executive members with useful information about the association, the Executive Committee and the staff.

Some of the items that should be included in a manual are:

- names of Executive members, terms of office and a statement of their responsibilities;
- a list of committees and task forces, with their terms of reference, time frames and membership;
- a brief written history of the association and/or a fact sheet about the association;
- constitution and bylaws;
- mission and vision statements;
- strategic framework or plan, and the current annual operating plan;
- minutes from recent meetings;
- policies (e.g., conflict of interest, insurance coverage, expense reimbursement);
- the prior year's annual report and audit report;
- current annual budget and latest financial statement;
- organizational chart and staff information;
- annual calendar; and,
- promotional material and Web site information.

To be effective, the manual must be current and easy to use. It must allow for materials to be added and removed. Materials included in the manual should have dates on them to make the manual easy to update. A copy of the manual should be available for reference during meetings.

### 2. EXECUTIVE RETREAT

Retreats help to solidify an Executive Committee and enhance its effectiveness by giving members time to get to know each other and to do long-range or strategic planning for the organization. With their packed agendas and the time pressures typically faced by volunteer directors, regular meetings often do not afford opportunity for lengthy discussion and creative thinking. The value of retreats is they remove the board from outside distractions for a sufficient length of time to enable it to contemplate strategic and governance matters, including the Executive's own development. They may also be an opportunity to draw on outside expertise to help deal with complex governance or corporate issues.

In many organizations having annual retreats is routine; however, the notion of a retreat in a union frequently resonates poorly with the members. Often a retreat is seen as an extravagant expenditure. Such concerns should alert directors to the need to be able to justify the merit and cost of a retreat if a member questions how worthwhile the event is.

## Evaluation

There should be periodic evaluations of committee meeting effectiveness and procedures with a mind to improving future meetings. Committees should also conduct an extensive annual self-evaluation of their own performance and that of the Chair. The performance of individual directors should also be evaluated (usually by the Chair), and feedback provided to them.