



# Nonprofit Law Ontario

Rules and tools for organizations

## Legal Principles for Risk Management

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# Disclaimer

This presentation is:

- **general legal information** – it isn't legal advice tailored for your specific situation.
- **a high-level overview** – it isn't comprehensive.
- **about law not best practices**. Just because something is legal doesn't mean it's a good idea.

# You Must Take Risk

- You Need to Take Risks
- Different Kinds of Risk
- Different Stakeholders
- There are Always Trade-Offs

## Risk is Inevitable

“Directors cannot be expected to guarantee a perfect outcome. In business, you need to take risks because, without risk, there would be no reward. This may increase the risk of judgments being contested, but directors who make business judgments based on a sound factual foundation have nothing to fear.”

- Peter Dey, [Osler Fiduciary duties of directors](#)

# Different Kinds of Risk

Possibility of harm or loss.

<https://www.menti.com/al4mjp6xzq19>

# Different Kinds of Stakeholders

Anyone or anything who is either affected by your activities or has an interest in seeing you accomplish your mission.

<https://www.menti.com/al4mjp6xzq19>

# There are Always Trade-Offs

## What impacts are you required to consider?

- Directors are required to decide in “The best interests of the corporation”, this may include *(Peoples Dept. Store v. Wise, 2004)*:
  - employees,
  - clients,
  - creditors,
  - government, and
  - even the environment
- These stakeholders may have opposing interests, so that avoiding a risk to one imposes a risk on another.  
(Jeffrey MacIntosh, Designing an Efficient Fiduciary Law)

## Case: Inclement weather

You have sold out a large event including exhibitors who will only be in town that day. A day before you learn there may be seriously bad weather.





## Case: Ripple Effects Through Relationships

1. Who is affected by your decision?
2. How is each group affected?



# How Decisions Get Made

- The Law Trusts You to Decide
- Factors Affecting Adequate Process
- Hallmarks of Good Decision-Making
- Case

# The Law Trusts You to Decide

**Business judgment rule:** a rebuttable presumption where the courts will defer to the decisions of directors and officers taken (*Hadjor v Homes First Society, 2010*):

- in good faith,
- in the absence of conflicts of interest,
- provided that the directors/officers acted fairly in carrying out reasonable investigation and
- considered reasonable alternatives in making the decision.

The purpose of this rule is to encourage boards to take necessary risks (Lyman P.Q. Johnson Corporate Officers and the Business Judgment Rule)

# Factors Affecting Adequate Process

1. What does the organization stand to gain?
2. What could be lost?
3. How complicated is the decision?
4. What is the timeline?
5. Is this a one-off or repeat decision?
6. What is the cost of doing it “right”?
7. What is the size and sophistication of your org?
8. What is the broader context this decision is being made in?
9. Is there known controversy?
10. Are there any conflicts of interest?
11. Is your org a charity?

**Source:** , Bayless Manning, The Business Judgment Rule and the Director's Duty of Attention: Time for Reality

# Hallmarks of Good Decision-Making Process

- Decision-makers have the authority to make the decision
- Advance notice
- Quorum in attendance
- Length of time adequate for complexity
- Presence of needed information
- Outside advice if needed
- Consideration of different options
- Absence of anyone with a conflict of interest
- Rationale and process documented
- Corporate purposes close at hand
- Procedural expectations set in advance in policies and respected

## Case: Expensive Maintenance

The maintenance and other costs associated with your nonprofit owning its premises are too high and you have started dipping into reserve funds. You have been told that you likely will not be solvent within 5 years if things continue on this trajectory.



# Case: How Stringent Does the Process Need to Be?

Type of Factor	How demanding the process needs to be (Low, Med., High)
<b>Stakes:</b> potential gains and losses to org or others	
<b>Complexity:</b> Technical aspects (e.g. financial, legal, scientific, etc.)?	
<b>Timeline:</b> Urgent or long-term, one-off or regular decision?	
<b>Capacity:</b> How big and sophisticated is your organization? How expensive would decision-making process be?	
<b>Conflict:</b> Between stakeholders, conflicts of interest among decision-makers	
<b>Charity:</b>	

## Case: What Does the Process Look Like?

<p><b>Who decides:</b> Committee, board, members? Who needs to be in the room? Officially, unofficially? Does anyone have a conflict of interest and should <i>not</i> decide?</p>	<p><b>How demanding the process needs to be (Low, Med., High)</b></p>
<p><b>Notice:</b> How much advance notice must/should you give?</p>	
<p><b>Agenda:</b> How long should the meeting be? How much time assigned to this item? Multiple meetings?</p>	
<p><b>Info/Advice:</b> What information or outside advice are decision-makers going to need to be able to discuss?</p>	
<p><b>Competing views:</b> Are there many options to consider or only a few? Any strong opinions? Who must be heard out?</p>	
<p><b>Policy:</b> Do you have existing rules that dictate parts of the procedure? Are your corporate purposes close at hand?</p>	
<p><b>Documentation:</b> How will you document the rationale? Will it be in-camera? In what level of detail?</p>	



## Case: Expensive Maintenance

For each option, consider:

1. How could this advance our mission? What is likelihood it will?
2. What are the potential costs of this option?  
Who might bear these costs?
3. How can we mitigate these risks while minimally compromising the intended impact of these options?

# Open discussion

What issues are you facing in risk management that you think might have legal dimensions to them?

# Questions?

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