

O.P.S.B.A.
Public Education Symposium
“Top 10 Legal Pitfalls for Trustees”
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This session will offer a review some of the recent legislative and regulatory changes in education which have created specific legal obligations on Boards of Trustees.

The format will be to outline some of these developments, consider the implications for Trustees, and provide participants with the opportunity to develop their own checklist of questions to take back to their Board.

Introduction

Boards of Trustees are called ‘creatures of statute’, which means we only exist as a decision-making body because a statute, the *Education Act*, mandates that we should.

Our duties as a Trustee under the *Education Act* are described as “fiduciary” duties.

A fiduciary duty carries with it the highest possible standard of care, because the legal obligation of the fiduciary is ***to act in the best interest of another***.

The *Education Act* outlines some specific oversight and accountability functions which are part of our fiduciary duty, including responsibility for:

- Maintaining transparency and public accessibility
- ensuring sound organizational structures and policies
- Developing a multi-year plan
- Financial stewardship and accountability
- Hiring, monitoring and evaluating the Director
- Being a legal and ethical employer (eg. Safe and accessible workplace, free from harassment and discrimination, good faith bargaining)
- Delivering effective educational programs
- Promoting student achievement and well-being
- Protecting confidence in public education, and in our Boards

What follows is an examination of policies, regulations and legislation which codify elements of these responsibilities.

1. Board By-Laws

General Principles

Your By-Laws are your 'rules of the road', a public document describing the process by which you make what are binding decisions for your organization.

The law says you must have them, common sense says you should know how to use them, and good practice says your stakeholders should be able to understand how you are apply them.

For your Board's decisions to have legitimacy, the process by which you arrived at those decisions must be able to withstand the scrutiny of Trustees who may disagree with the outcome, of staff who have to implement what you've decided, and of the public.

The time to review the By-Laws is before you need them. Choose your procedural rules when the discussion is still about hypothetical scenarios and there is no particular interest at stake. When a specific challenge or issue is facing your Board, it gets much harder to reach an agreement about what is "fair".

Questions for Trustees

Are your By-Laws written in a way that is easy to navigate and understand?

When a procedural issue arises, does reference to your By-Laws provide a clear, unambiguous resolution to the issue?

Have your By-Laws been amended since 2009 (Bill 177) to reflect amendments to the Education Act (eg. duties of the Board chair, the need for an audit committee, a means to allow public input)?

Do your By-Laws reflect your practices, or is your Board honouring them "more in the breach than in the observance"?

Your By-Laws likely reflect the fundamental principles of procedural fairness. (for example, the right to notice of meetings, the right to receive the information that allows you participate in a meaningful way, the right to be heard at meetings before the vote is called). Can you think of a way to circumvent these protections using your own rules?

Pitfalls for Trustees

A decision of your Board may be challenged on the basis that the procedure used to reach it was out of order.

A procedural conflict arises, and the By-Laws contain statements which can be interpreted as equally supporting both views.

A rift develops on the Board because lack of clarity is mistaken for lack of good will.

2. Private vs. Public Session

General Principals

The *Education Act* (S.207) states all Board and committee meetings will be open to the public, except when any of 5 subjects are being discussed:

- (a) security of Board property;
- (b) buying or selling of land;
- (c) personal information regarding Trustee, staff or pupil;
- (d) union negotiations; or
- (e) litigation

If one of these exceptions does not apply, discussion must take place in an open public forum.

In private session, the Board meets as a 'Committee of the whole board' and as such is not constituted as a Board for purposes of passing motions.

All resolutions arising out of a private session meeting must be subsequently adopted by the Board of Trustees at a public session meeting.

Questions for Trustees

Does a meeting which goes into private session for one of the reasons allowed under the *Act* ever "creep" into a discussion which should be in public. For example, in receiving a report about the purchase or sale of a property, the conversation turns to school boundaries or programming distribution in a way that concerns the Trustees for the area.

Have you felt pressured to grant the request of a Trustee colleague who asks for the Board's indulgence in going into private session in order to have a discussion about a sensitive issue which, although not covered by S.207, would be uncomfortable for them to discuss in public.

Pitfall for Trustees

It is a breach of the public trust, and your fiduciary duty, to grant your Board this latitude.

Non-compliance is also contrary to the *Municipal Freedom of Information and Protection of Privacy Act*, and can lead to a complaint with the Information and Privacy Commissioner. An order against the Board carries a potential fine of up to \$5,000.00

3. Audit Committees

General Principles

The Education Act (S.169.1) specifies that Trustees are responsible for effective fiscal stewardship and financial accountability, and for managing the resources entrusted to it, in a way that upholds public confidence.

In meeting this responsibility, the *Act* specifies that by Jan. 2011 every Board will have constituted an Audit Committee (S.253.1(1)).

Committee composition is determined by a formula, depending on the size of the Board. For example, a Board with 8 to 14 Trustees will have an audit committee of:

5 members, 3 of whom must be Trustees, and 2 external members who must have an accounting or financial management background.

The Chair of the Audit Committee must be a Trustee.

Audit Committees have very specific and weighty duties (see Reg. 361/10), including:

- reviewing the financial statements of the Board and the external audit;
- ensuring the effectiveness of the Board's internal controls;
- monitoring the Board's legislative and regulatory compliance; and
- providing oversight of the Board's risk management policies.

Questions for Trustees

Are you receiving regular reports from your Audit committee, regarding not just financial matters, but also legislative and regulatory compliance generally, as well as risk management strategies?

Pitfalls for Trustees

A liability could get missed. "We thought they were doing that".

If the Audit Committee is not in a regular reporting relationship with the Board, the benefit and security of the checks and balances it provides can be lost.

Under S.230, the Minister can direct an investigation of a board's affairs, following which there is the statutory authority to take "control and charge over the administration of the affairs of the board".

4. The Multi-Year Strategic Plan

General Principles

The *Education Act* (S.169.1) now requires that every board shall develop a multi-year plan,

- covering three or more years;
- containing specific and measureable goals;
- brought to the attention of stakeholders;
- reviewed annually with the Director
- used in evaluating the Director's performance

Trustee Questions

Has the process of developing a multi-year plan been a useful tool in strengthening your governance role?

Would your stakeholders say that the plan has resulted in increased community engagement and accountability?

5. Director Performance Review

General Principles

We often hear that the Director is the only employee of the Board, which isn't quite true. The Director is the only employee who reports directly to the Board, and who the Board directly supervises, but the Board of Trustees are the employers of all employees of the Board.

S. 169.1 requires Boards of Trustees to monitor and evaluate the performance of the Director of Education in meeting his/her duties under the *Act* (and any policy, guideline or regulation made under the *Act*); the goals of the multi-year plan; and any other duties or policy directions assigned by the Board.

Questions for Trustees

Is your Performance Review:

- Outlined in a policy which has been approved by the Board of Trustees, and which contains a clearly defined format and timelines
- Based on a written job description
- Tied to the measurable outcomes defined by the multi-year plan

- Include Director input and a self-evaluation
- Reference goals for the coming year

Optional: tied to a parallel annual governance self-evaluation

Pitfalls for Trustees

It is a challenge to do this well when the Director’s employer is a group of equals with multiple opinions.

Flaws in the process can have an impact on key relationships at your Board.

The process of developing the review process, as well as undertaking the review itself, both offer the opportunity to either strengthen or undermine the Board/Director relationship.

The cost of any negative outcomes is much higher than what you will spend on consulting services, if this is something that your Board does not have the expertise to handle alone.

6. Procurement

General Principles

Most Boards have historically had purchasing policies, and a policy and/or Code of Ethics which deals with avoiding conflict of interest in procuring goods and services. In general, it will specify that employees of the board and their immediate families can’t sell goods or services to the board, or benefit financially from a business relationship with the board.

In addition to any internal policy, Boards are governed by S. 217(1) of the **Education Act** which prohibits any employee of the Board from selling “any book or other teaching or learning materials, equipment, furniture, stationery or other article to any board, provincial school or teachers’ college, or to any pupil enrolled therein.”

As of April 1, 2011 all boards are also now governed by the **Broader Public Sector Procurement Directive**, which states that its goal is “to ensure that the process by which all goods and services are purchased is open, fair and transparent”.

The Procurement Directive outlines 5 Key Principles: Accountability, Transparency, Value for Money, Quality Service Delivery, Process Standardization.

Under the Directive, all school boards are required to have the following:

- (a) **Supply Chain Code of Ethics**, which must
 - (a) be *adopted by the Board* in accordance with its regular governance procedures; and

(b) be made easily available and visible to all members of the organization, suppliers and other stakeholders involved with Supply Chain Activities.

(b) **Procurement Policies and Procedures**, which must incorporate *25 mandatory requirements*, for example:

S. 7.2.2.1 An organization must have a **Board approved** “Approval Authority Schedule”, outlining who is authorized to approve procurements for different dollar thresholds. No more than two roles (of requisitioning, budgeting, commitment, receipt and payment) can be performed by the same department.

Section 7.2.3 For goods valued at greater than \$10,000.00, a competitive process is recommended. For goods valued at more than \$100,000, and consulting services of any value, a competitive procurement process is required.

Other requirements:

- a Board’s procurement process must use an evaluation methodology which is publicly available, and which gives the highest justifiable rating to cost/pricing.
- The evaluation methodology must include an evaluation matrix by which to rate submissions, with highest scoring bid necessarily getting the contract.
- Contracts awarded must have a termination clause.
- A Board must upon request debrief with unsuccessful suppliers

Questions for Trustees

Has your Board approved a “Supply Chain Code of Ethics”, an “Approval Authority Schedule” and an amended “Procurement Policy”?

Could a prospective vendor find these documents on your website?

Pitfalls for Trustees

Procurement practices do not normally come to the Board as a governance issue, and yet could become a Trustee issue if an unsuccessful vendor challenged your Board for awarding a contract to a competitor, on the basis that the process followed, or your Board’s policies, did not meet the requirements of the Directive.

The perception of an unfair or outdated process could affect public confidence in your Board.

7. Accessibility for Ontarians with Disabilities Act (A.O.D.A.)

General Principals

The AODA became law in 2005, with phased in implementation to proceed over the next 20 years

Its stated purpose: to identify, remove and prevent barriers for persons with disabilities in five key areas of day to day living:

1. Customer Service,
2. Information and Communication,
3. Employment,
4. Transportation, and
5. Built Environment.

Accessibility Standards for **Customer Service (Reg.429/07)** was the first standard to become law.

Starting Jan. 1, 2010 schools boards were required to have accessibility policies, practices and procedures on providing goods and services to people with disabilities (including responses to assistive devices, means of communication, support persons, service animals), and provide training.

Information and Communications, Employment, and Transportation have been combined under one regulation, the **Integrated Accessibility Standards (Reg.191/11)**, which became law on July 1, 2011, with phased in requirements between now and 2025.

School Boards are required to comply with Reg. 191/11 as follows:

By Jan. 1, 2011:

- provide integrated accessible school transportation services, or a suitable alternative.

By Jan. 1, 2012:

- emergency procedures and public safety information must be available in an accessible format.

By Jan. 1, 2013:

- Boards must have a “multi-year accessibility plan”.
- Educational materials, student records and information on programs must be available in an accessible format upon request
- Training for educators on accessibility awareness related to program delivery and instruction must have been provided.

By Jan. 1, 2014:

- Boards must have provided training to all employees and volunteers
- New internet websites and new web content must conform to World Wide Web Consortium Web Content Accessibility Guidelines (WCAG) 2.0 Level A, (and all content by Jan. 1, 2021)
- Boards must have ‘Individual Transportation Plans’ for each student with a disability

By Jan. 1, 2015:

- Communications shall be made to all members of public in an accessible format, at no extra cost to a disabled user;
- upon request, school libraries shall “provide, procure or acquire” accessible or conversion ready print resources, (and multi-media and digital resources by Jan. 1, 2020)

Jan. 1, 2016:

- Boards must have ‘Individual Accommodation Plans’ for their employees

Built Environment standards (buildings and outdoor spaces) is in development and not yet law.

Question for Trustees

Does your Board have a Customer Service Policy in place, and is it in an accessible format?

Have your Board staff been trained?

Could you direct a disabled constituent, student or parent who wanted to comment on the kind of service they received to your Board’s required feedback mechanism?

Are you budgeting for the forthcoming changes?

Pitfalls for Trustees

Inspectors can investigate non-compliance. The Act sets out fines up to \$100,00.00 per day for a corporation, and \$50,000.00 per day for an officer or director.

8. Communication Strategy for Collective Bargaining

General Principles:

It is not yet clear what the legal framework is going to look like for 2012, but we can predict there that limited resources will be part of the landscape.

In a non-bargaining environment, lots of informal relationships develop, with trust and a sometimes unguarded exchange of information in the advancement of common goals.

As a Trustee, you are the Employer, and therefore a party, with trained representatives acting on your behalf. You cannot serve as a consensus builder, a mediator, or a deal broker. You cannot help your bargaining team get to an agreement, but your actions could potentially make it more difficult.

Avail yourselves of the protection offered by S.207(2), which allows all “decisions in respect of negotiations with employees of the board” to be discussed in private session.

Questions for Trustees

Does your Board have a communications strategy in place?

Should you consider providing your Board or your Chair some specific labour relations and/or media training?

Pitfalls for Trustees

Journalists’ code: “if you say it, we can print it”.

“Off the record” is a request for trust, but is not a legally binding agreement.

Be wary of actions which could lead to an accusation of **bad faith bargaining**, ie. calling into question your Board’s commitment to reach a deal through the collective bargaining process. For example, creating inconsistent messaging, facilitating conversations between non-negotiators, or communicating that there might be a re-opening something the union thought was done.

Also be wary of actions which are more simply **bad bargaining practice**, for example making an offhand comment which unwittingly undermines the Board’s negotiating team, interferes with their strategy, or affects the long term relationship between the parties.

9. School Fees

General Principles

The *Education Act* states that “every student has the right to attend a school without payment of a fee” (S.32(1)).

Because actual practice around the province varies widely, the Ministry released a policy on school fees called “**Fees for Learning Materials and Activities Guideline**” (March 2011).

The Policy articulates 3 general principles:

1. Successful completion of a required course or grade cannot be dependent on the payment of any course fee.
2. No student should be excluded from any activity or event based on an inability to pay.

3. Where a student is not able to pay, their financial limits must be handled with privacy and in a way that maintains their dignity.

Examples of fees which cannot be charged:

- A registration or administrative fee for regular day program
- A course fee
- A textbook fee or deposit
- Any learning materials which are required for completion of the curriculum (eg. Workbooks, musical instruments, science supplies, lab materials, safety goggles)
- Funds for 'discretionary accounts'
- Fee for guest speaker, visiting teacher, or in-class field trip where material covered is a mandatory element of the subject or course.
- Anything which is provided for in a school budget, (textbooks, staff development and training)

Things for which a fees can be charged on a **voluntary** basis (and subject to 3 general principles above):

- Optional programs (eg. International Baccalaureate Diplomas, Advanced Placement courses, hockey skills)
- Extra-curricular trips and events not required for completion of a grade or credit;
- An activity which is part of the curriculum, as long as a no cost option of obtaining the same evaluation is provided.
- Upgrades in materials already being provided
- Student Activity Fees (for student awards, extracurricular dances, theme days, student council)
- Agendas and yearbooks

Ministry guidelines suggests that each Board develop its own policy on student fees to ensure consistency and compliance with the Ministry Guidelines.

Questions for Trustees

Has your Board discussed these Guidelines and/or developed a policy?

Do your practices Board-wide reflect the three general principles of 'no charge for the curriculum, no exclusion based on inability to pay, and sensitivity around students' financial limitations'?

Pitfalls for Trustees

A student's right to be successful, and your obligation to promote student achievement, could be undermined by their lack of means.

'User fees' can result in social exclusion.

The burden of challenging the appropriateness of a fee could fall to a student who cannot afford to pay.

10. Fundraising

General Principals

The Ministry of Education is in the process of drafting guidelines for fundraising activities in school, to come into effect September, 2012.

People for Education's "Report on Ontario's Publicly Funded Schools 2011" found:

the most frequently raised concern of school councils is enhancing communication with parents,

but

the thing they spend the most time on is fundraising.

School Councils across Ontario raise over half a billion dollars a year in "school generated funds", from things like school fundraisers, corporate donations, fees-for-service, vending machines, cafeterias, extra-curricular activity fees and social justice activities.

By far the largest source of 'school generated funds' is parents

A draft of the proposed Ministry Guidelines recommends that in consultation with stakeholders, Boards develop their own fundraising policy, to include the following requirements:

- A limit to the number of fundraisers per school per year;
- That there be full accountability and transparency, including annual reports available on the website;
- That fundraising activities not distract from learning time;
- That all participation be voluntary;
- schools cannot raise funds for anything for which are included in their school budgets eg. text books, work books and other learning materials, professional development, administrative expenses, and capital projects which increase student capacity or operating or capital costs.

Questions for Trustees

Are your Councils spending the bulk of their time and effort on fundraising, at the expense of developing experience and expertise in their "parent advisory" role?

Do schools/councils raise funds "for the school" as opposed to for a stated purpose?

Does the pressure to meet a fundraising goal or win a prize sometimes impact how "voluntary" your school fundraisers may feel for kids?

Pitfalls for Trustees

Public concerns have been expressed around disparity between schools, and is now extending to Board practices.

Many Boards have an arm's length relationship with Foundations. They are separate legal entities, with their own Board of Directors, and although publicly appear to be in a partnership in that they raise funds in the name of a Board, are not accountable to that Board of Education for how they raise funds or spend them.

Conclusion

I would be pleased to hear from any Trustee who would like to discuss an issue that has been a challenge for their Board which has not been included in this 'Top 10' survey.

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