

## Management Responsibilities of Directors:

A Board of Directors shall manage the business of the Livestock Markets Association of Canada. The Directors shall exercise all of the powers and perform all the acts and duties within the approved LMAC By-Laws and Constitution.

The Board of Directors may also delegate certain powers to committees. While delegation is permitted, the ultimate legal responsibility for management decisions remains with the directors.

Directors, therefore, are subject to the same basic duty of “stewardship” imposed on directors of business corporations - a duty that involves responsibility for strategic planning, risk management, the appointment, and monitoring of management, internal board and membership communication.

## General Duties of Directors

1. Duty of Knowledge;
2. Duty of Care;
3. Duty of Skill and Prudence;
4. Duty of Diligence;
5. Duty to Manage; and
6. Fiduciary Duty.

## Duty of Knowledge

Directors have a duty to be knowledgeable about the organization and the activities in which it is engaged. In the case of LMAC, this would involve a basic understanding of regulations pertaining to the marketing of livestock, payment regulations, animal movement, animal health and welfare, traceability requirements, the Health of Animals Act, the Health of Animals Regulations, employee welfare and safety. The Directors should have knowledge of LMAC’s participation and representation on industry

committees.

### Duty of Care

The duty of care of directors of LMAC is governed by the by-laws of the Association. Duty of Care requires that a director of the association exercise the skills and expertise that he, in fact, possesses. A director's actions will be assessed based on what may be reasonably expected from a person of the director's own knowledge, skill and experience.

Board of Directors members are required to:

- 1.attend to their duties diligently;
- 2.inform themselves concerning the association's affairs and issues facing the industry;
- 3.attend board meetings regularly;
- 4.participate in decisions concerning the association's activities;
- 5.understand the objectives of the association ;
- 6.exercise their judgment in ways that advance the objectives of the association without compromising the industry's ability to conduct commerce in a market neutral environment;
- 7.oversee the management of the association.
- 8.be willing to represent LMAC on committees or attend industry meetings on behalf of LMAC.
9. report information back to their provincial organizations when required in a timely fashion.

The Board of Directors must ensure:

- 1.the adoption of by-laws for the governing of the particular organization in

conformity with all governing statutes;

2.that structure of the organization, including the Board, provides the essential mechanisms for fulfilling the functions necessary to discharge the responsibilities of the board; and

3.that it is receiving accurate information and balanced opinion on presentations made to it.

### Duty of Skill and Prudence

The duty of skill requires that a director must apply whatever level of skill and experience he or she has when carrying out his or her duties and responsibilities. If a director has special qualifications he or she must ensure that the Board and the organization are the beneficiary of those skills and experience.

The duty of prudence requires that the director act with practicality and caution, while anticipating the potential consequences of any actions taken by the organization; perfect results are not required of directors. What is required, however, is that directors must act reasonably and prudently, with the expectation that the membership will not second-guess their decisions.

Directors should consider implementing the following five-point process with regards to meetings:

1. Ensure that adequate information is available with respect to issues and items on the agenda.
2. Prior to each meeting, ensure that he/she receive and review agendas and background documents.
3. Ensure that he/she attend meetings, and that appropriate, independent questions are asked and answers given.
4. Make independent notes and document his/her participation.

5. Support the establishment of committees, where appropriate, to ensure that certain matters receive in-depth and expert examination that would be difficult for the entire board to conduct.

### Duty of Diligence

Directors are required to have a complete understanding of the objectives, policies and affairs of the Association. With this understanding, a director will be able to make decisions that maintain the character, reputation and integrity of the organization. In carrying out their duty of diligence, directors must know when to obtain outside professional assistance, counsel and expertise.

Directors will not be held liable if appropriate care is taken in making a decision, which means that the director must ensure that he or she had timely, adequate and appropriate information on which to base his or her decision. Directors must understand, in detail, the risks an organization faces, and ensure that satisfactory preventative measures are in place.

### Duty to Manage

Although, as noted above, the Board of Directors is responsible for the management of the LMAC's work, business and affairs, there is no requirement that the directors themselves get involved in the day-to-day management of the organization.

The duty to manage places the obligation on a director to engage in "top-level" management, which relates to making sure the organization is operating within the approved by-laws. The board of directors generally exercises this duty by appointing officers and senior staff, establishing policies and other methods of guidance, ensuring compliance with legal requirements, monitoring policies, acquiring an adequate knowledge of the organization's ongoing affairs and operations, proposing candidates for election to the board and enacting appropriate internal by-laws to assist the organization in the management of its affairs.

There is a distinction, and it should be clearly delineated, between the duties and obligations of the directors and those of the staff. In very broad and general terms, directors are responsible for establishing policies, management for implementing them, and directors for measuring management's implementation of those policies.

A recommendation on the guideline for effective board governance, which reads as follows:

The board of directors of every organization should explicitly assume responsibility for the stewardship of the organization and, as part of the overall stewardship responsibility, should assume responsibility for the following matters:

- . (i) adoption of a strategic planning process;
- . (ii) the identification of the principal risks of the corporation's business and ensuring the implementation of appropriate systems to manage these risks;
- . (iii) succession planning, including appointing, training and monitoring senior management;
- . (iv) a communications policy for the corporation; and
- . (v) the integrity of the corporation's internal control and management information systems.

These guidelines were considered in the Voluntary Sector Task Force's Report, where eight key tasks were identified for effective board stewardship, as follows:

- steering toward the mission and guiding strategic policy;
- being transparent, including communicating to members, stakeholders, industry partners and the public, and making information available upon request;
- developing appropriate structures;
- ensuring the board understands its role and avoids conflict of interest;

- maintaining fiscal responsibility;
- ensuring that an effective management team is in place and overseeing its activities;
- implementing assessment and control systems;
- planning for the succession and diversity of the board.

### Director's Fiduciary Obligations

Every director of the association, in exercising his powers and discharging his duties, shall act honestly and in good faith with a view to the best interests of the association and industry.

Directors of the LMAC, in their dealings with and on behalf of the association, will be held to strict standards of honesty and loyalty and will be required to avoid situations involving a conflict of interest between their personal interests and those of the organization.

Fiduciary duties of director's serves to address those situations that invariably arise in which the personal interests of directors do not coincide with the interests of the organization. In such circumstances, board governance requires that the personal interest of the director be subordinated to that of the corporation. For directors who are appointed to the Board by a member organization such as the Provincial Associations, this duty also requires the interests of the member organization also be subordinated to that of the organization.

The obligation to act "with a view to the best interests of the corporation" requires directors of LMAC to:

1. place the association's interest above their personal interest and the interests of the member organization that appointed them to the Board; and
2. act in the interest of the association as a whole, rather than in the interest of any member or group of members.

The best interests of the “association as a whole” means the best interests of all of the members, no one member’s interest being permitted to prevail over the others. The Directors of the LMAC board recognizes that the best interests of the organization will not always accord with that of some the members, with the association’s actions affecting different members differently.

The requirement that directors act in the best interest of the association rather than those of a particular member or group of members will cause difficulties for directors that are appointed to the Board by members of the organization. This situation is similar to nominee directors of business corporations. As noted in one Ontario case “the corporate life of a nominee director who fulfills his duty to the corporation in contravention of the wishes of the appointing party may be neither happy nor long.”

The director must act in the way he or she believes, after a conscientious review, is in the interests of the organization as a whole, even if this conflicts with the interests of a member or member organization. Where a director is bound by an agreement to act in accordance with the interests of his or her appointing association to the detriment of LMAC, the director is in an untenable position of conflict of interest that can be resolved by the director abstaining from the vote and having this recorded in the meeting minutes.

#### Nature of Fiduciary Duties

There are a number of fiduciary obligations imposed on directors. This document will only address the obligation not to allow a conflict to arise between duty and interest. The duty to act in the best interest of the corporation is an expression of the conflict of interest and duty rule.

Directors can be found to have breached their fiduciary obligation to avoid a conflict of interest and duty if they act for an improper purpose. Directors who, in exercising their powers, are motivated by self-interest or some other “improper” or “collateral” purpose, such as a desire to benefit a particular person or group, will be considered to be in breach of their fiduciary obligations.

The LMAC board of directors will therefore look closely at the directors’

motivation and will require independent corroboration of that motivation. If the board is satisfied that the directors' primary motivation - that is, what the directors "had uppermost in their minds" - was to serve the corporation's best interests, the exercise of the power will not be considered improper simply because the directors also benefitted thereby.

Directors may sit on more than one industry's board of directors. However, such a position demands that the director act within the scope of authority and not favour any non-profit corporation to the detriment of another and not act in such a case.

### Nominee Directors

The requirement that directors act in the best interest of the corporation rather than those of a particular member or group of members can potentially cause difficulties for LMAC directors since five members are appointed to the Board by their Provincial organizations who are members of LMAC.

Directors cannot give special consideration to the member organization that elected them to the Board of Directors.

### Liability of Directors

LMAC will maintain Liability Insurance for Non-Profit Companies for all of the directors and staff. This will cover liability incurred by an eligible person in his/her capacity as director and officer except where the liability relates to a failure to act honestly and in good faith with a view to the best interests of the company. Therefore, a breach of a director's primary duty (acting in good faith with a view to the best interests of the company) is uninsurable.

### Business Judgment Rule

With respect to liability arising out of the common law duties, directors are protected by what is known as the "business judgment rule." Courts will not interfere with business decisions, so long as they do not involve fraud or self-dealing and are made on an informed basis and in what the director honestly believes to be in the best interests of the corporation. Directors are not liable for errors of judgment.



## Corporate Governance Practices

It has been noted in recent cases that directors can be protected from liability by developing and following good corporate governance practices.

### Record keeping

As noted in Chapter 13 of the text, *Directors Duties in Canada*, to establish the due diligence defense, it is important to keep a proper record of Board deliberations, decisions and actions taken.

Such a record includes the maintenance of a thoughtful collection of board and committee minutes. This does not mean a comprehensive transcript (which will inevitably be unreliable) should be kept; rather, meeting minutes should indicate the major topics of discussion and the important factors that were considered in reaching decisions. Board materials, correspondence, presentations and similar evidence of the process involved in reaching a decision should also (generally) be maintained.

A broader issue of record keeping is inconsistencies. Partial minutes or partial notes that are kept individually by directors can do more harm than good where the notes disagree or conflict and reflect only a portion of a debate and do not adequately illustrate the conclusion and resolution of the matter. Directors can certainly keep notes during the course of a meeting - it will assist them in approving the minutes of the meeting that are kept on record. However, the general focus of the board should be on ensuring that the minutes reflect the issue raised, the substantive aspect of the discussion, and the questions, along with the resolutions and the reasons for the decision. The very heart of a director's fiduciary duty is to act on an informed and reasonable basis. The minutes should reflect both the information behind and the reason for a director's action. When the minutes have been finalized and approved, it would be appropriate for directors to dispose of their notes.