

Not for Profit – Board Governance Presentation

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Foundations of First Nations Band Administration Conference

Agenda

- Introduction
- Governance Basics & Board
Members' Duties
- Board Composition
- Board Operations

Agenda

- Board Operations Continued
- The Executive Director
- Oversight
- Other topics
- Wrap up

Workshop Objectives

Objective One – Gain an understanding of organizational governance as it applies to not for profits

Objective Two – Understand the roles, responsibilities, and duties for not-for-profit Directors

Objective Three – Determine how NFP Boards contribute to the mission of their organizations

The Not for Profit (NFP) Sector (2017)

- Over 170,000 NFP (including Charitable) organizations in Canada
- 85,000 registered charities
- Economic activity totalled \$169.2 billion (8.5% of Canada's GDP, average 8.1% over 10 years)
- Over 2 million Canadians are employed in the sector
- Over 13 million Canadians volunteer (\$42 million value)

Statistics Canada 03/05/2019

The Not for Profit (NFP) Sector (2017)

- Government NFP's (e.g., hospitals, universities)
 - Independently constituted separate from government
 - Substantially under government control
 - 73% of NFP economic activity
- Community NFP's (e.g., social services, sports)
 - Provide goods/services to households
 - Free or low prices
 - 16.4% of NFP economic activity
- Business NFP's (e.g., chambers, business associations)
 - Operate like businesses selling goods/services
 - 10.4% of NFP economic activity

Imagine Canada

Governance Basics and Duties

Governance System

- A system independent from, and above, the operating system
- System ought to be run by different people than the operating system
- System that determines allocation of scarce resources to most effective uses

NFP vs For Profit Governance

“Governance is Governance”

- Duties, standards and potential liability not substantially different
- Expectations re diligence, integrity, performance, and accountability may be higher in NFP’s
- Board culture may be different due to volunteer presence
- Volunteers’ commitment not less than corporate Directors

Agency Theory

Principals

Board/Governing Body

Agents

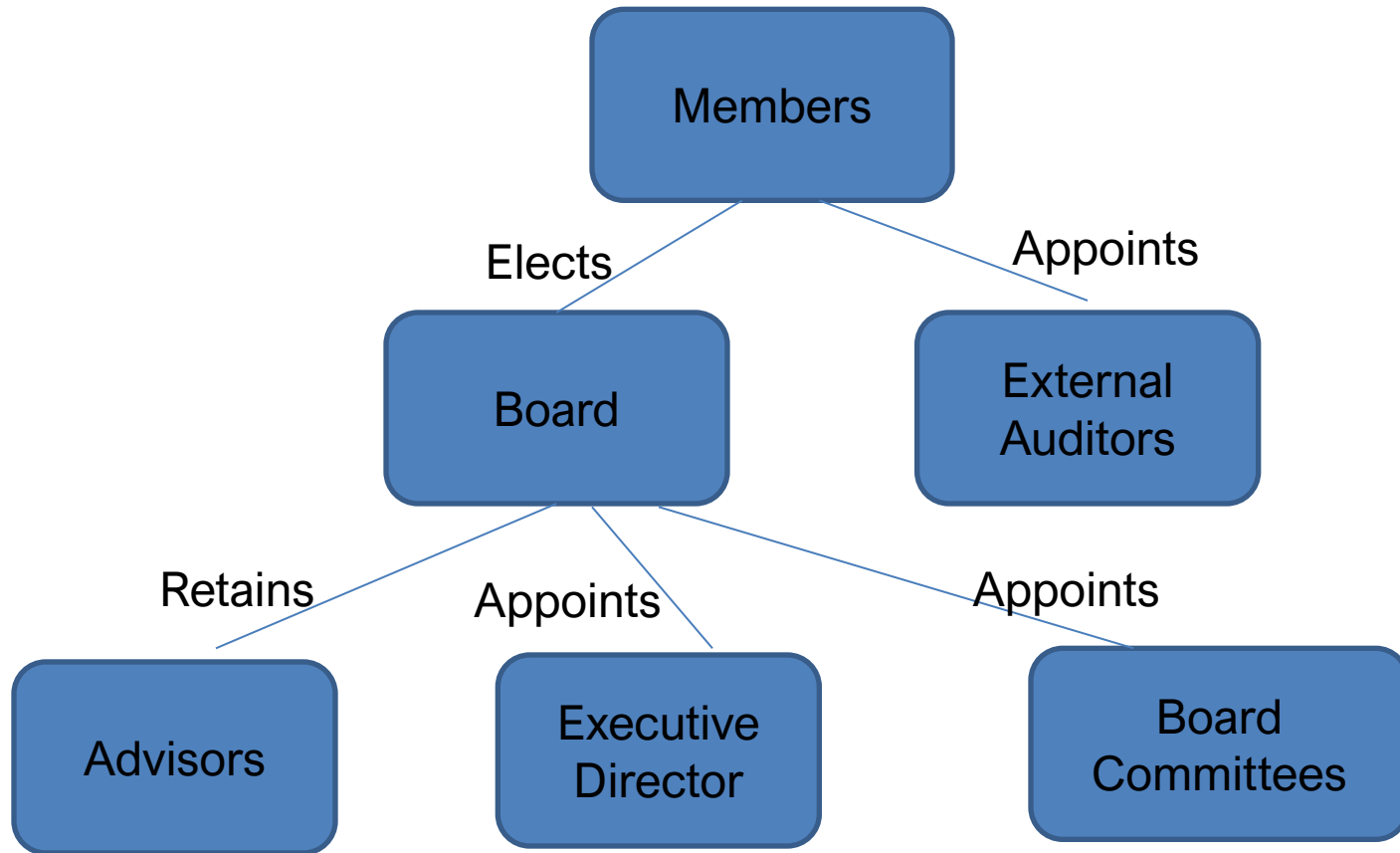
Principals and Agents

- Principals:
 - Members, donors, sponsors, grantors, contributors, etc.
 - Create the organization or believe in the mission
 - Establish the mission and role for the organization
- Agents
 - Operate the organization's activities
 - Deliver the principals' mission
 - Use resources/capital

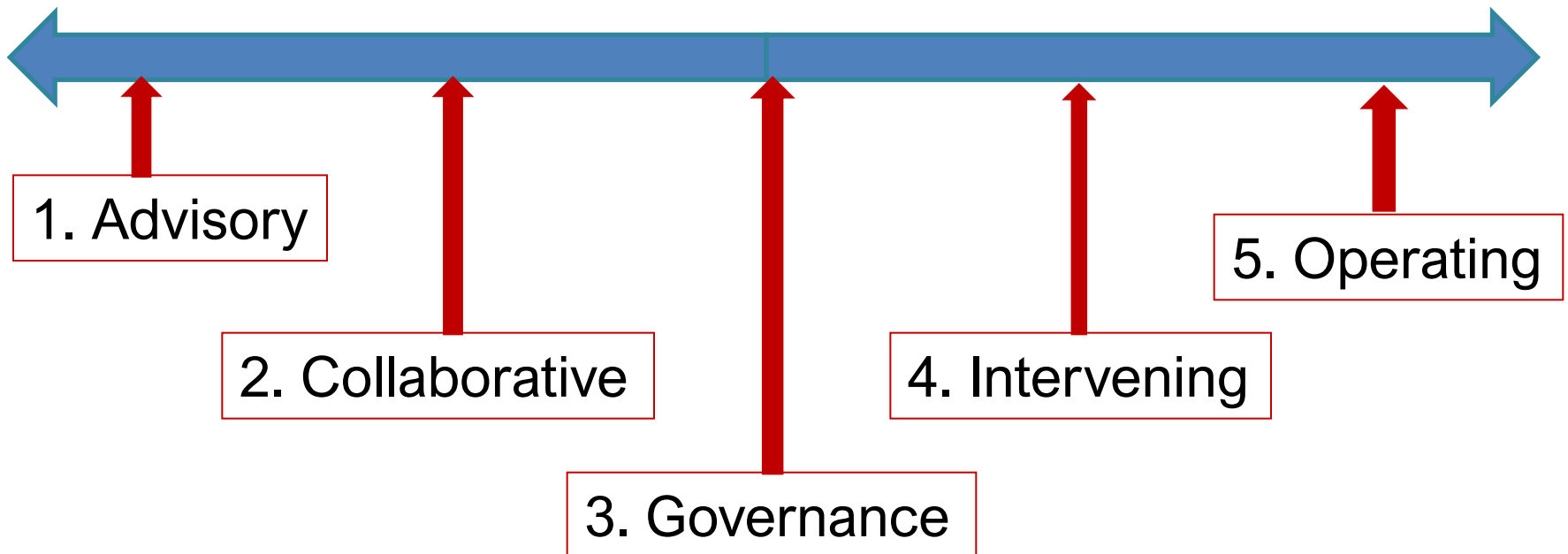
Principals and Agents

- Board/governing body are the:
 - Independent intermediary between the principals and agents
 - Voice of the principals to the agents and back
 - Ultimate authority and responsibility to act in the best interests of the organization

Not For Profit Governance Structure



Types of Boards



David A. Nadler, Harvard Business Review, May 2004.

Types of Boards – Key Characteristics

1. Advisory:

- Hands-off, direction and control delegated to management
- Passive, “rubber stamp”

2. Collaborative:

- Management and Board become “one”
- Board role is to support and assist, not control management

3. Governance

- Separation of Board and management (Agency theory)
- Board provides direction and control
- Board hires Executive Director and empowers within limits

Types of Boards – Key Characteristics cont'd

4. Intervening:
 - Board hires staff, delegates some operations to management
 - Board typically has close relationship with owners/members
 - Common in public sector, cooperatives and member-based associations
5. Operating:
 - Board is actively involved in day-to-day operations
 - Board consists of people who want to get something done
 - No or minimal staff
 - Board is often large and meets frequently
 - Common for small or new not for profit organizations, sports/recreation organizations.

Why Join a Not-for-Profit Board?

- Passion for the “cause”
- Support the local community (“giving back”)
- Mission relates to personal values
- Share expertise (business, finance, law, strategic planning, etc)
- Personal growth and development (governance, oversight, teamwork, gain knowledge of a new cause, etc)

Not For Profit Board Members' Duties The Core Principle:

The Board is **ACCOUNTABLE** to the **MEMBERS**
but must act in the best interests of the
ORGANIZATION

Hierarchy of Governance Duties

1. Legislation, regulation, legal precedents
 - Federal (CBCA, NFP Act) or provincial, court decisions, etc.
 - Established by governments, courts
2. Bylaws
 - Governance rules for the organization
 - Definition of members, members' meetings, voting, etc.
 - Approved by members/owners
3. Board Policies
 - Board and committee charters
 - Delegation of authority, risk oversight, code of conduct, etc.
 - Approved by the Board

Fiduciary Duties

What is a “Fiduciary”?

- Acts primarily for another person’s benefit
 - Owes another person the duties of good faith, trust, confidence, candor
- Must exercise a high standard of care in managing another persons’ property
 - Legal and ethical protection for the vulnerable from those who have power over them

Expectations are increasing that NFP Directors must be diligent in protecting the interests of members, donors, etc. due to the trust placed in the Directors and the lack of control those stakeholders have.

Fiduciary Duties

- Duty of Care:
 - Exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable situation
 - Generally accepted that the duty of care is higher for Directors of a NFP than other organizations
- Duty of Loyalty:
 - Directors must act honestly and in good faith with a view to the best interests of the organization
 - Directors are not allowed to profit from his/her position and must avoid all situations where duties to the organization conflict with duties to others.

Duty of Care - Responsibilities

- **Duty to act honestly:**
 - Be honest with the organization
 - Ensure you have the capacity to serve
- **Duty of diligence:**
 - Directors must gain knowledge of organization, prepare and attend meetings
 - Vote based on best judgement
 - Obtain expert advice if required
- **Duty to exercise power:**
 - Pay attention and take action
 - Monitor and measure performance
 - Ensure funds received for specified purposes are used for that purpose
- **Duty of obedience**
 - Comply with laws and organization's governing documents

Duty of Loyalty - Responsibilities

- Directors must act in the best interests of the organization and not their own interests.
- Directors must avoid situations in which they have competing fiduciary duties.
- Directors must avoid both actual and the appearance of conflicts.

(more on conflicts of interest later in the workshop)

Standards of Care

- Objective Standard:
 - Director's performance of duties will be tested against those of a "reasonably prudent" person.
- Subjective Standard:
 - Director's performance of duties will be tested against what can be reasonably expected from a person of his or her knowledge and experience.

Fiduciary Duties

- Delegation
 - Directors can delegate the performance of responsibilities to committees or management
 - Delegation does not relieve the Director of the responsibility for the “Duty”.
- Directors may be personally liable if the organization suffers a loss attributable to actions or omissions of the Directors

Business Judgement Rule

- Court will not second-guess the judgement of the Board made honestly, prudently, in good faith and on reasonable grounds
- Decision can be wrong so long as the decision was the product of good, deliberate independent process
- Must be earned (not automatic)
- Decision must be made by disinterested and independent Directors (ie without conflicting interests)
- Appropriate time spent considering the decision

Fiduciary Duties

In an NFP, Directors have additional fiduciary responsibilities to take steps to ensure that:

- Funds are spent in accordance with donors or funders criteria
- Statutory obligations are fulfilled (e.g. payroll taxes)
- Internal controls are in place to avoid the occurrence of fraudulent transactions

The Three “C’s” of being a Great Director

- COMPETENCE
- CURIOSITY
- COURAGE

From: The Directors College Chartered Director Program

Board Composition

Board Composition – Discussion Questions

1. What should be the size of the Board?
2. Who gets on the Board?
3. How do you find the right people?
4. Are all Board members elected by the members?
5. How long should people stay on the Board?
6. What Board Committees should we have?
7. Should Board members be paid?

“One Size Does Not Fit All”

Board Size

- By-laws should state the minimum and maximum Board size (Legislation requires minimum of 3 with a majority being independent)
- Consider the breadth of skills required (more later)
- Determine if “representation” is required (e.g. chapters to a national Board)
- Consider location (i.e. travel), cost, logistics
- Typically less mature NFP’s have larger Boards that shrink over time
- Keep the Board as small as possible (6-9) but allow flexibility to increase if needed

Who should be on the Board?

- Determine the desired attributes
- Assess the current Directors' skills and experience (eg using a "Skills Matrix or gap analysis")
- Ascertain if any current Directors will be leaving the Board in the near future (within the next year) including term expirees
- Determine any "gaps" and the timing desired for new Directors
- Majority must be "independent" (recommend no or minimal related Directors to avoid potential conflicts of interest)

Qualifications

Legislation requires the following qualifications:

- At least 18 years old
- Not have been declared incapable under the laws of a Canadian province or territory
- Be an individual (not a corporation)
- Not be in bankrupt status

Attributes - Technical

Match the desired attributes with the organization's MISSION balancing the need to respond to fiduciary duties.

Examples:

1. A business development organization should have someone with entrepreneur or business development expertise
2. An engineering association should include professional engineers
3. A child-serving charity should include those with experience helping children

AND.....

Attributes - Technical

A balance of broader skills to support fiduciary duties, for example some or all of:

- Financial expertise/literacy
- Legal
- Business/operations
- Information Technology
- Marketing
- Risk
- Leadership
- And/or other relevant skills

Attributes – Personal (samples)

- Trustworthy
- Objective
- Diligent
- Curious
- Courageous
- Tactful
- Persistent
- Persuasive
- Strategic
- Credible
- Genuine Interest
- Ethical

Board Diversity

Research indicates that diversity on Boards results in overall performance improvement and more educated risk-taking. Public pressure is increasing for Boards to demonstrate a commitment to diversity.

NFP Boards need to address these:

- Gender
- Ethnic
- Indigenous
- Age
- Other

Recruiting Board Members

- Constitution/Bylaws may require certain representatives from other organizations.
- Nominating Committee – composed of Board members, ED, and others
- Establish a disciplined process:
 - Establish criteria for selection
 - Passion for the “issue” and knowledge of the organization
 - Knowledge of governance and the Board’s role
 - Specific skills/experience
 - Avoidance of conflicts of interest
 - Diversity
 - Interviews – Board chair, Nominating Committee chair, ED
 - Personal fit
 - Criminal record checks, Child Abuse Registry, etc

Recruiting Board Members

- Caution:
 - Current/prior interaction with the organization as a “client”
 - Past employment with the organization
 - Personal relationships with other Board members, senior management, owners
 - “High-profile” Directors
 - Resume-padders
 - Political involvement

Recruiting Board Members

Options:

- Existing contacts, friends, family, co-workers
 - Majority of NFP Board members are recruited this way
 - Typically results in “collegial” Board but risks lack of independent thought/insight
 - Consider other sources in order to achieve higher skills/experience and avoid conflicts
- Existing non-Board committee members
- Professional associations
- “Directors Registers” (Professional associations’ services)
- Recruiting Firms (may be cost-prohibitive)

Electing Board Members

The general rule in the (Federal) NFP Act is that Directors are elected by a majority of the votes cast at an annual meeting of the members.

Two exceptions:

1. If bylaws permit, the Board can appoint additional Directors between annual meetings of the members for a term to expire on or before the next annual meeting as long as the total number of appointed Directors does not exceed 1/3 of the number of Directors elected at the previous annual meeting.
2. The Board may fill a vacancy on the Board for a term to expire on or before the next annual meeting.

“Ex Officio” Directors (persons who hold a Board position without being elected) are not permitted as all Directors must be elected by the members.

“Non-voting” Directors are not permitted. All Board members must be entitled to vote.

Electing Board Members - Democratic

Some NFP's hold open nominations and elections that all members participate in (eg credit unions, community organizations). In those situations, the Nominating Committee and selection process may be superseded by the membership's preferences.

This situation, while transparent and democratic, could create challenges for Board composition.

Recommendations:

- Nominating Committee include membership representation
- Propose a "slate" of candidates for members to vote on
- Publish to the members the selection process and criteria desired
- Disclose a thorough bio of the candidates, including links to the criteria
- Prohibit nominations "from the floor" (no opportunity to research qualifications)

Electing Board Members - Representative

The Boards of some NFP's are composed (partially or fully) by individuals representing other (related or not) organizations (eg Charities or Associations with “chapters”, Issue-related organizations composed of other similar issue-related members).

Representatives appointed by other organizations could create challenges for Board composition.

Recommendations:

- Ongoing communication with “chapters” about board governance, roles, desired qualifications
- Publish to the “chapters” the criteria desired
- Ensure by-laws and/or policies allow a certain number of “at large” directors (non-representative) to be nominated/elected based on skills/experience

Board Member Terms

- Terms (i.e. duration of appointment) must be defined in the by-laws
- Federal legislation limits terms to maximum of four years
- No legislative limits on number of terms that can be served
- Board member terms should be staggered to ensure continuity
- By-laws must state number of terms a Director may serve
- Many NFP's limit Directors to two or three terms, often with a limit on the total number of years (e.g., 10 years)
- Other NFP's have no limit to the number of terms
- Term limits create opportunities for fresh ideas and energy, appear more transparent, and allow for gentle termination of non-performers.
- Some NFP's that are highly complex may permit unlimited terms due to the need for the knowledge of the business, risks, and issues.

Board Operations

Board Operations

The Board needs to determine how it can best contribute value to the organization's achievement of its mission.

Why do Boards of Directors meet?

- Compliance matters
- Oversight of finances and risk
- Strategic planning (annually or less frequently)
- Monitor execution of the strategy
- Decision-making
- Provide advice to the Executive Director

Meeting Frequency

Many NFP's meet monthly, others quarterly or less frequently. Frequency should not be a default decision.

- Balance the need for oversight with the burden for management (e.g., financial statements should be reviewed at least quarterly but is there value in a monthly review?)
- Determine when/if there are Board-level decisions to be made
- Meeting schedule needs to promote maximum attendance, including quorum at a minimum
- Recommend establishing a rolling 12-month schedule with “fixed” meeting dates

Meeting Agenda

The Agenda is key to a successful meeting.

- Three components (they do not have to be sequenced in this order):

Level One: Items that require Board approval but do not require any presentation nor discussion – use “Consent Agenda”.

Level Two: Items that require individual Board approval after brief presentation and minimal discussion – “For Approval”

Level Three: Items that require presentation and discussion by the Board, possibly leading to a decision – “For Consensus”

The majority of Board meeting time should be focused on Level Three

Note: Robert’s Rules apply to Levels One and Two only

Adapted from: The Great Chair by Brian Hayward (2020)

Board Meeting Materials

- The Board and Management need to resolve on the information desired, format, complexity, and volume
- Materials must be aligned with the Agenda
- Use “Executive Summaries” but include enough detail for Board members to understand the issue/topic
- Avoid massive powerpoint presentations
- Include additional “information” not on the agenda for interest/knowledge (eg relevant articles)
- Suggest a “web portal” be used to distribute and save board materials.

Meeting materials must be available to the Board sufficiently in advance to provide time for preparation

Board Minutes

Minutes (Record of Proceedings) must be documented to demonstrate achievement of fiduciary (and other) duties

- Essential for demonstrating Board diligence
- Brief record of discussion and questions responded to by Management
- Record of all decisions and how they were made (vote, consensus)
- Record all items for follow-up (eg information requested by the Board that Management commits to subsequent delivery)
- Action Items recorded and tracked

In Camera/Executive Sessions (Three types)

1. In Camera
 - Some members of Management leave, some stay (eg ED)
 - Public excluded if Board meeting is public
 - No minutes, no notes
2. Executive Session
 - Everyone leaves the meeting except the Board members
 - Minutes may be recorded
3. Combination of In Camera and Executive Session
 - Everyone leaves the meeting except the Board members
 - No minutes, no notes

Decisions made In Camera need to be recorded in the Board Meeting minutes.

Board Committees

Establishing Board Committees depends on the size and complexity of the NFP.

At a minimum, NFP Boards should appoint a Finance and Audit Committee to oversee financial operations, internal controls, and the external auditor.

Many NFP Boards also appoint:

- Executive Committee – provide leadership for the Board
- Governance and Nominating Committee – to oversee Board policies, practices, composition and to identify potential Board members.

Board Committees

- Committees serve at the pleasure of the Board to support the Board
- Each committee should have a terms of reference or charter
- Often NFP Committees include non-Board members (pros and cons)
- Committees do not assume Board responsibilities and approvals unless formally delegated by the Board
- Example: The Finance/Audit Committee reviews and recommends that the Board accept/approve the entity's financial statements.

Board Remuneration

Remuneration for charity Board members is prohibited under federal and some provincial legislation.

Certain provincial legislation permits Board members to be compensated for any “work” they do for the organization.

Boards need to be very cautious about permitting Directors to provide services for remuneration due to the potential for real or perceived conflicts of interest to arise.

Board Member Protections

- Meeting attendance and participation
- Diligence demonstrated to fiduciary duties
- Prudent, reasonable behaviour
- Reliance on professional reports
- Independent advice
- Certifications from Management on key compliance items
- Meeting Minutes up to date and approved
- Directors & Officers insurance

ASK QUESTIONS! EXPECT ANSWERS!

The Executive Director

The Board's Dilemma

Should the Executive Director be:

- An expert in the field that the NFP serves?
- A professional NFP or Association Manager?

For discussion - Your Experience? Advice?

Consider:

- Maturity of the organization
- Strength of operational management below the ED
- Financial health of the organization
- Extent of public exposure and/or interaction with clients expected of the ED

Recruiting

Appointing an Executive Director is (one of) the most important responsibilities of the Board of Directors.

- Establish a Board Committee (or assign to the Governance Committee) to lead the process on behalf of the Board
- Establish criteria that align with the Mission and Strategy
- Consider if existing management could be promoted
- External posting
- Recruiting Firms (may be cost prohibitive)

Performance Management

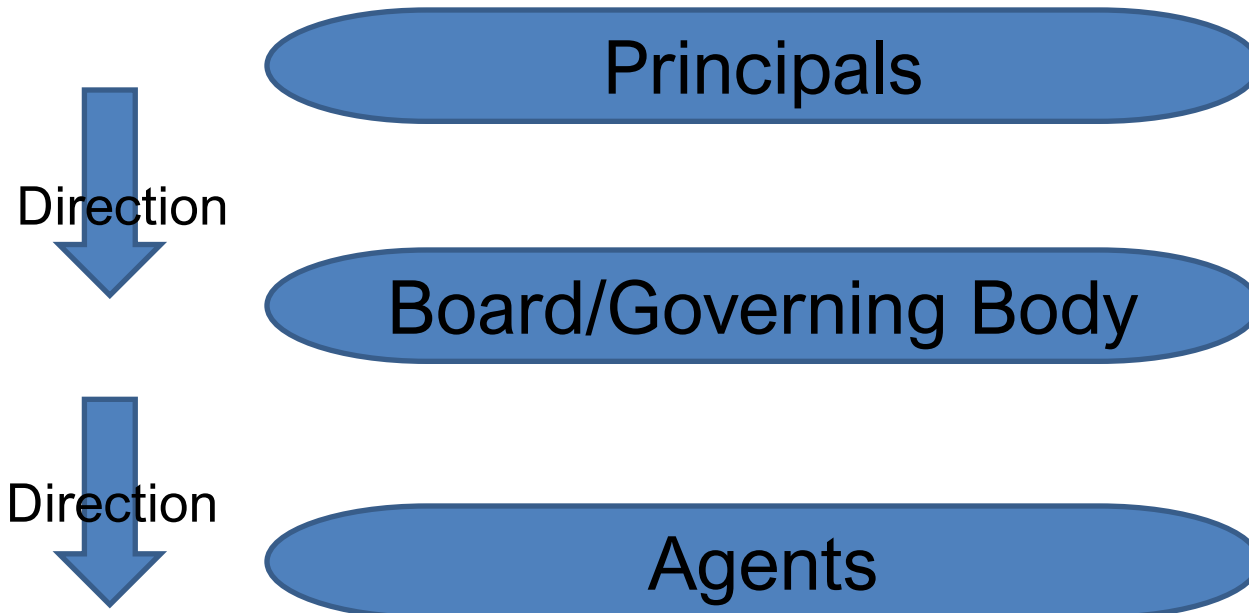
The Board must own the monitoring of ED performance. The performance objectives and evaluations must be documented (demonstrating diligence).

Consider frameworks (e.g., Balanced Scorecard, “Five Dimensions”)

- Clear measurable objectives for the ED and the organization
- Ongoing interaction with the Chair
- Quality of reporting to the Board (e.g., Strategy-based)
- Financial results
- Healthy work environment
- Quality of internal controls (e.g., via external auditor reports)

Oversight

Agency Theory Revisited



Direction

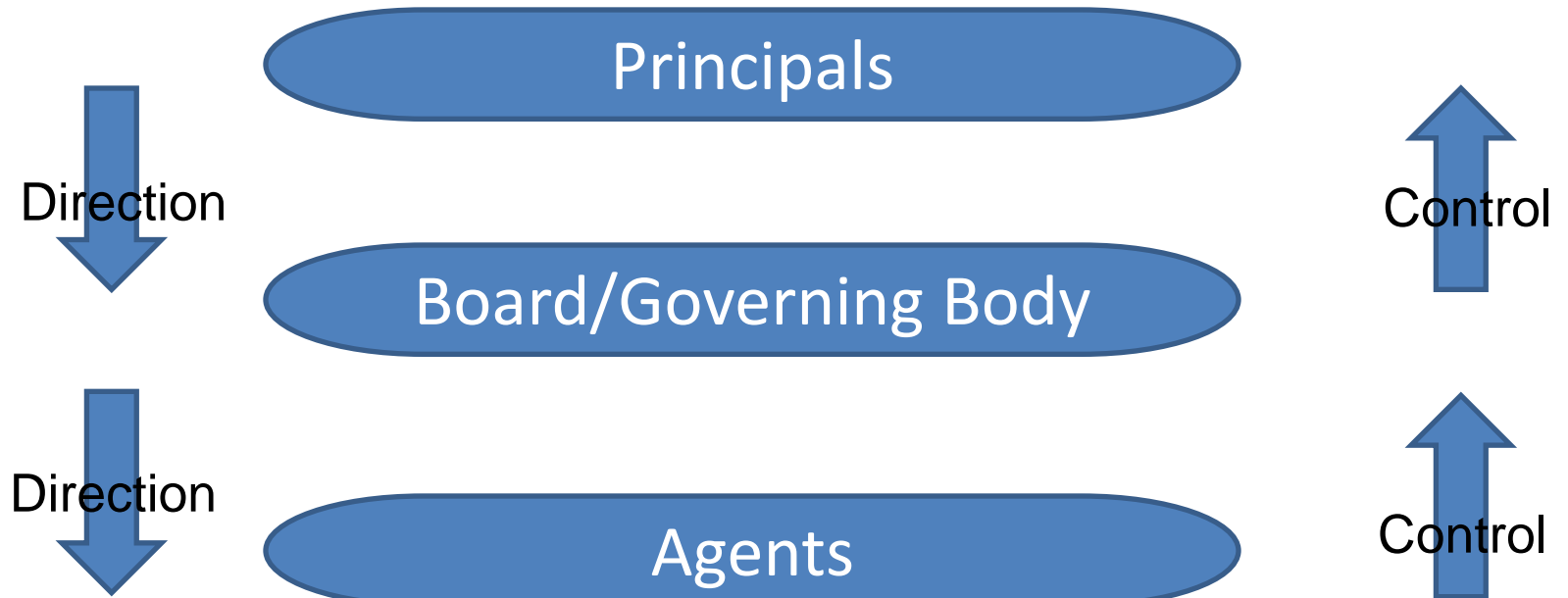
- Mission
- Legislation, regulation, legal requirements
- Strategic Plan
- Policies, charters, delegation of authorities, codes of conduct
- Budget
- Risk tolerances and appetite

Strategic Planning

Formal Strategic Planning is often overlooked or superficial in NFP organizations. Yet, it is critical to ensure the mission is achieved and the organization thrives.

- Ideally, Management develops a Plan with input from the Board.
- In smaller organizations and periodically in larger organizations, the full Board participates in Plan development.
- Client and stakeholder input is valuable
- Environmental scan is essential
- Consider current and future funding models
- Risk assessment should be included

Agency Theory Revisited



Control

- Monitor execution of the strategic plan
- Executive Director reports/updates
- Year-end Financial statements, external audit reports
- Monthly/quarterly financial statements, other periodic information
- Annual Report, reports to contributors
- Chief Financial Officer certifications
- Performance Measurements, KPI's, etc
- Executive Director evaluations
- Independent assurance providers

Monitoring the Strategic Plan

- Management must report to the Board regularly on the implementation and execution of the Plan

The majority of organizations fail, not from a bad strategic plan, but due to poor execution of the strategic plan

- Ongoing ED updates to the Board should be organized around the strategic priorities and their metrics
- External reporting on the status of the Plan increases accountability and transparency

Financial Statement Review

- Variances from prior year and budget (YTD vs Monthly)
- Net Surplus/Deficit
- Accumulated Surplus (at least 3 months cover)
- Restricted Funds used for designated purposes only
- Working Capital
- Investments (low-risk?)
- Administration Costs as a percentage of total
- Loans, mortgages, lines of credit outstanding
- Cash Flow from Operations
- Trends
- Internal Control issues and Adjusted/Unadjusted items identified during the audit of the financial statements

Board Responsibility for Risk

- Boards are responsible for ensuring the principal risks to the organization are adequately managed.
- Establish tone at the top
- Approve risk policies
- Ensure risk assessment is considered in major decisions
- Include in oversight of activities

Risk Oversight

One of the most challenging areas for Boards,
especially NFP's (i.e. do your best!)

- Include risk discussions in strategic planning – look forward
- Determine risk tolerance and appetite related to strategy (as best you can)
- Monitor effectiveness of management's risk management process
- Gain reasonable assurance that the major risks are adequately mitigated/controlled (“internal controls”) within tolerance (from internal auditors, external auditors, compliance units, etc.)

Internal Controls - example of medium sized NFP

- Clearly delegated authority to management
- Codes of ethics and conduct
- Segregation of duties where required
- Annual Budgets linked to strategic plan
- Budgets updated twice during the year (“Latest Estimates”)
- External Audit of financial statements and program statements

Internal Controls - example of medium sized NFP cont'd

- Audit & Finance Committee – external audit relationship, oversee financial controls, budgets, estimates, insurance/risk programs.
- Detailed Finance and Administration Manual
- Board Treasurer meets CFO/finance staff regularly
- CFO provides monthly certification regarding tax remittances and other compliance matters

Risk Areas for Attention

The Board needs to be attentive to certain risks that could severely impact the organization's results and/or reputation.

Director Conduct

- NFP Directors tend to be much more visible to staff and members than in the private sector
- Directors' behaviour will be scrutinized and sometimes mimicked
- Board culture and individual style will impact the organization
- Consider the tone and language used when speaking in meetings or with management/staff and stakeholders

Conflicts of Interest

Reality is that NFP Board members frequently have relationships that could be conflicts of interest.

Failure to deal with these situations appropriately could have devastating effects on the organization overall, specific individuals, and related transactions/contracts.

- Board Policy must be clear and documented (due diligence)
- Consider a standing agenda item at the beginning of every Board meeting asking for declarations of any potential conflicts related to any agenda items

Conflicts of Interest

- Board members have an obligation to declare their own conflicts and those involving other Board members if they are not declared
- Outside interests should be reported at the time of joining a Board (in writing)
- Annual updates should be required (in writing)
- Board members with a potential conflict of interest must be excluded from any discussions
- If conflicts are ongoing, Board member should resign.

Codes of Conduct and Ethics

- Boards should establish a “Code” for themselves as part of the Board Policy Manual
- Every organization should have a Code of Conduct and/or Ethics for all employees as well as volunteers
- Board must have assurance that the Code(s) are distributed to staff, read, and understood.
- Management must report any incidents of ethics breaches (including fraud/theft) to the Board

Other Topics

Transparency

In this era, maximum transparency by NFP's is expected.

Transparency strategies need to include each of these groups:

1. Members
2. Donors/Contributors/Funders
3. Other Stakeholders (clients, community, governments, etc)

Vehicles should include:

- Written communication (Annual reports, Newsletters, etc)
- In-person sessions (AGM's, Town Halls, individual meetings)
- Websites (Bylaws, policies, board bios, various reports, etc)
- Social Media

Board Evaluations

- Worthwhile exercise every year or two
- Options:
 - Anonymous surveys completed by each Director of Board performance
 - One on one interviews with each Director by the Chair or an external party
 - Anonymous assessments of each Director by the other Directors
- Input should be obtained from the ED
- Results must be discussed by the Board while in camera, usually included the Executive Director.

Fund Raising

Should Directors be expected to donate to the organization they serve?

Yes, very common, demonstrates commitment (“skin in the game”)

Should Directors be prohibited from any material donations to the organization they serve?

Yes, as it may be perceived as a conflict of interest (“buying a Board seat”)

Insurance Arrangements

- Review coverages in key areas
 - Property & casualty
 - Liability
 - Business interruption
 - Fidelity
 - Directors & Officers
 - Cyber
- Meet periodically with the organization's broker
 - Any recommendations for enhancements?
 - New forms of coverage (e.g., cyber)
- Many organizations maintain indemnity coverage to support Directors defending themselves

Questions? Comments? Discussion



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Thank you

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