

Legal Roles & Responsibilities

“Ignorance is no defence”

– Legal maxim

Graham Boyce
Management Advisory Service

Agenda

- ▶ **Introduction & Background**
 - Purpose of workshop
 - Incorporation: the legal environment
 - NFP's v. Charities
 - Some definitions

The Board's Role

- Responsibilities of the Board
- Exploring governance - the Rules
- Exploring governance - the 5 M's
- The Board & the ED

The Director's Role

- Responsibilities of a Director
- Fulfilling expectations
- The trouble with titles
- Indemnities & insurance

Challenges with NFP's

- The top 3 problems

Introduction & Background

What is a “not-for-profit”?

“An organization organized and operated exclusively for social welfare, civic improvement, pleasure, sport, recreation, or any other purpose except profit (e.g. a club, society, or association). The organization will generally be exempt from tax if no part of its income is payable to, or available for, the personal benefit of a proprietor, member or shareholder.”

Source: Canada Revenue Agency

- ▶ Can run a business; can make a profit
- ▶ Lots of different legal structures: unincorporated, incorporated, co-operative, social club, national sports association...

Introduction & Background

Incorporation

The process of establishing a legal entity, separate from its members or shareholders

- ☑ Can provide legal protection, as it is the “corporation” that does things, not individual members, so it is the corporation that gets taken to court!
- ☑ Facilitates contracting – for financial services, for premises, for supplies etc. – as the corporation continues regardless of membership changes

Can be under federal legislation:

Canada Not-for-Profit Corporations Act (CNCA)

...or provincial legislation – for example:

Ontario – **Corporations Act (OCA)**

British Columbia – **Societies Act**

Introduction & Background

Incorporation

CNCA

Modern legislation (2009)

Single regulator for corporate changes

Electronic filing / retrieval

\$250K audit exemption limit

No ex-officio directors

Stable & known

OCA

Dated, adapted legislation (1990)

Public Guardian & Trustee also involved

Paper/microfiche filing / retrieval

\$100K audit exemption limit

Ex-officio directors allowed

Subject to replacement (“ONCA”)

Introduction & Background

Incorporation

Application of Part II provisions to Part III corporations

133 (1) Section 22, clauses 23 (1) (a) to (p) and (s) to (v), subsection 23 (2), sections 59 to 61, 67, 69 to 71, 80 to 82, 84, 93 and 94, subsection 95 (1), sections 96 and 96.1, clauses 97 (1) (a), (c) and (d), subsection 97 (3) and section 113 apply with necessary modifications to corporations to which this Part applies, and in so applying them the words “company” and “private company” mean “corporation” and the word “shareholder” means “member”. R.S.O. 1990, c. C.38, s. 133 (1); 1994, c. 27, s. 78 (7); 1998, c. 18, Sched. E, s. 69 (1).

Introduction & Background

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uncertain!

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Introduction & Background

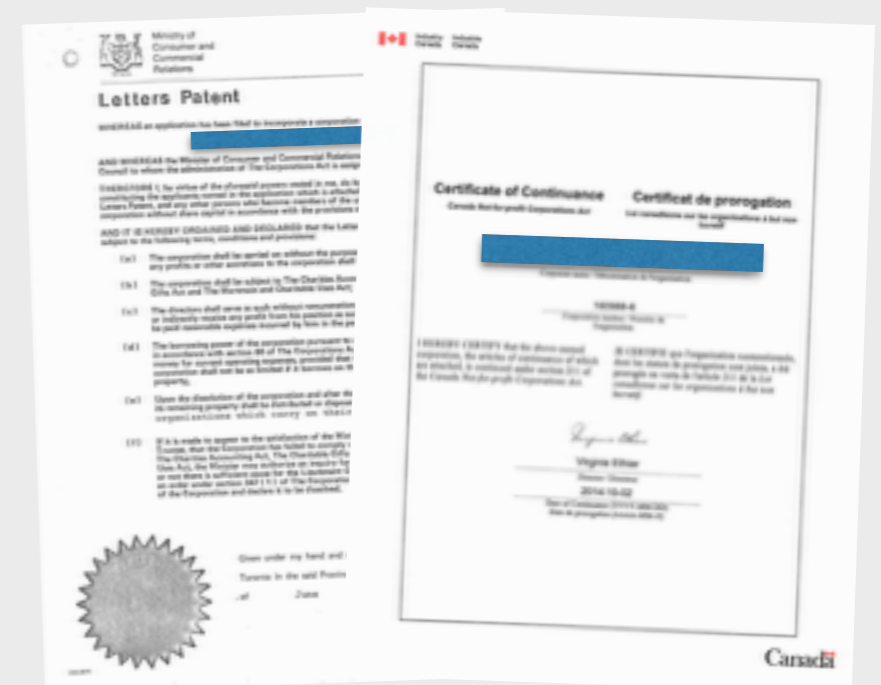
Incorporation

Letters Patent granted under the current provincial Corporations Act (OCA)

Certificate of Incorporation granted under the Canada Not for Profit Corporations Act (CNCA)

Certificate of Continuance granted under the Canada Not for Profit Corporations Act (CNCA) to organizations originally incorporated under the OCA

...annexed to which are the Articles



Introduction & Background

Incorporation

The corporation's Articles set out key information including:

- ▶ The classes of membership & their voting rights
- ▶ The number of directors or the minimum / maximum numbers
- ▶ The “purposes” (previously “objects”) of the corporation
- ▶ Any restrictions on its activities

The image shows two overlapping forms for incorporating a corporation in Canada. The forms are titled "Articles of Incorporation (English)" and "Articles of Incorporation (French)". They contain various fields for providing information about the corporation, such as the corporate name, address, and the purposes of the corporation. The forms are presented as if they are being viewed on a screen, with a "Next" button visible at the top right of each page.

Introduction & Background

Charities are a sub-set of Not-for-Profits

Not-for-profit:

“An organization organized and operated exclusively for social welfare, civic improvement, pleasure, sport, recreation, or any other purpose except profit (e.g. a club, society, or association). The organization will generally be exempt from tax if no part of its income is payable to, or available for, the personal benefit of a proprietor, member or shareholder.”

Charity:

“An organization established & operated for charitable purposes that devotes its resources to charitable activities. Its purposes must fall within one or more of the following categories:

- the relief of poverty; ✓
- the advancement of education; ✓
- the advancement of religion; ✓
- certain other purposes that benefit the community in a way ✓
the courts have said is charitable.

It must be resident in Canada and cannot use its income to benefit its members.”

Introduction & Background

Charities are a sub-set of Not-for-Profits

Charity:

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- the relief of poverty;
- the advancement of education;
- the advancement of religion;
- **certain other purposes that benefit the community** in a way the courts have said is charitable. It must be resident in Canada and cannot use its income to benefit its members.”

Model purposes

- Promotion of health**
- Addressing and preventing specific problems faced by:**
 - children or youth
 - families
- Relieving conditions attributable to being aged**
- Relieving conditions associated with disability**
- Providing public amenities**

Introduction & Background

Charities are a sub-set of Not-for-Profits

*“Immigrants” not a defined charitable group
c.f. “the poor”*

The objects of the Society are:

- (a) To provide educational forums, classes, workshops and seminars to immigrant women in order that they may be able to find or obtain employment or self-employment.**
- (b) To carry on political activities provided such activities are incidental and ancillary to the above purposes and provided such activities do not include direct or indirect support of, or opposition to, any political party or candidate for public office.**
- (c) To raise funds in order to carry out the above purposes by means of solicitation of funds from governments, corporations and individuals.**
- (d) To provide services and to do all such things that are incidental or conducive to the attainment of the above stated objects, including the seeking of funds from governments and/or other sources for the implementation of the aforementioned objectives.**

Introduction & Background

Charities are a sub-set of Not-for-Profits

What are the advantages of being a registered charity?

The primary advantages of being a registered charity are:

- Registration allows an organization to issue official receipts for gifts it receives. This reduces the individual donor's income tax payable, and reduces the taxable income of a corporate donor.
- Once the organization is registered, it is exempt from paying income tax under Part I of the *Act*.
- Eligible to receive gifts from other registered charities, such as foundations.
- Increased credibility in the community, as registered charities must follow rules and guidelines.



Added cost...

Source: Canada Revenue Agency

◀ What % of revenue?

◀ Same for N-F-P

◀ Do you apply?

▶ More demanding bookkeeping

▶ More reporting

▶ Required spending

Introduction & Background

Four different legal environments

CNCA NFP	CNCA Charity
OCA NFP	OCA Charity

Introduction & Background

Definitions








“Board” of Directors:

“A group of people comprising the governing body of a corporation.”

Introduction & Background

Definitions

Board of
Directors

“Advisory”	= expert panel; never exists by itself	
“Executive”	= a true board, likely involved in operating	
“Governance”	= a true board but with no hands on involvement	
“Main”	= a true board usually with an advisory one	
“Managing”	= a true board; operational involvement uncertain	
“Policy”	= a true board but with no hands on involvement	
“Working”	= a true board but involved in hands on operations	

“ ... ”

▶ Beyond “Advisory”, descriptor makes no difference to legal status

Introduction & Background

Definitions

Governance
model

“Advisory”

“Working”

“Working”

“Executive”

“Main”

“Management”

“Managing”

“Policy”

“Policy”

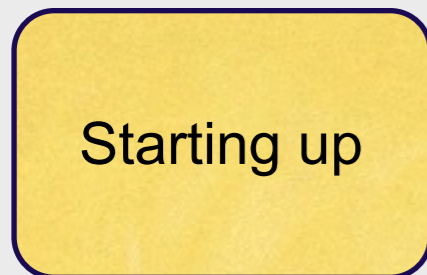
“Governance”

Introduction & Background

Evolutionary/Maturity State

...where are you?

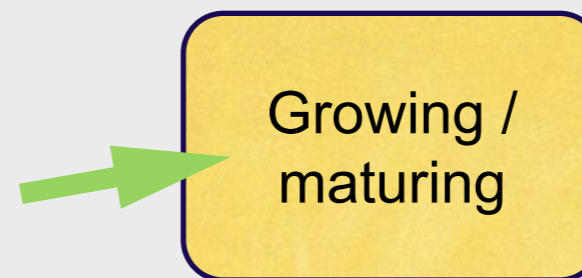
Corporate-like Board
Professional management
Strategic alliances



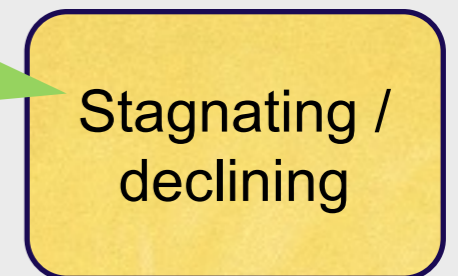
Board = everyone
High energy
Maximum involvement
Managing
No ED



Board = elected
Lower energy
Start of burn out
Managing / policy making
Vision/mission
ED



Board = recruited
Committees
Renewed commitment
Fundraising emphasis
Managing & policy making split
ED & staff



Declining interest
Board / staff disconnect
Operational / funding challenges

Introduction & Background

Definitions

Governance
model

Board of
Directors

“Advisory”



“Working”



“Working”

“Executive”



“Main”



“Management”

“Managing”



“Policy”



“Policy”

“Governance”



▶ Model descriptor makes no difference to legal status or accountability

Introduction & Background

Definitions

Board of Directors:

“A group of people comprising the governing [?]body of a corporation.”

Introduction & Background

Definitions

Governance =

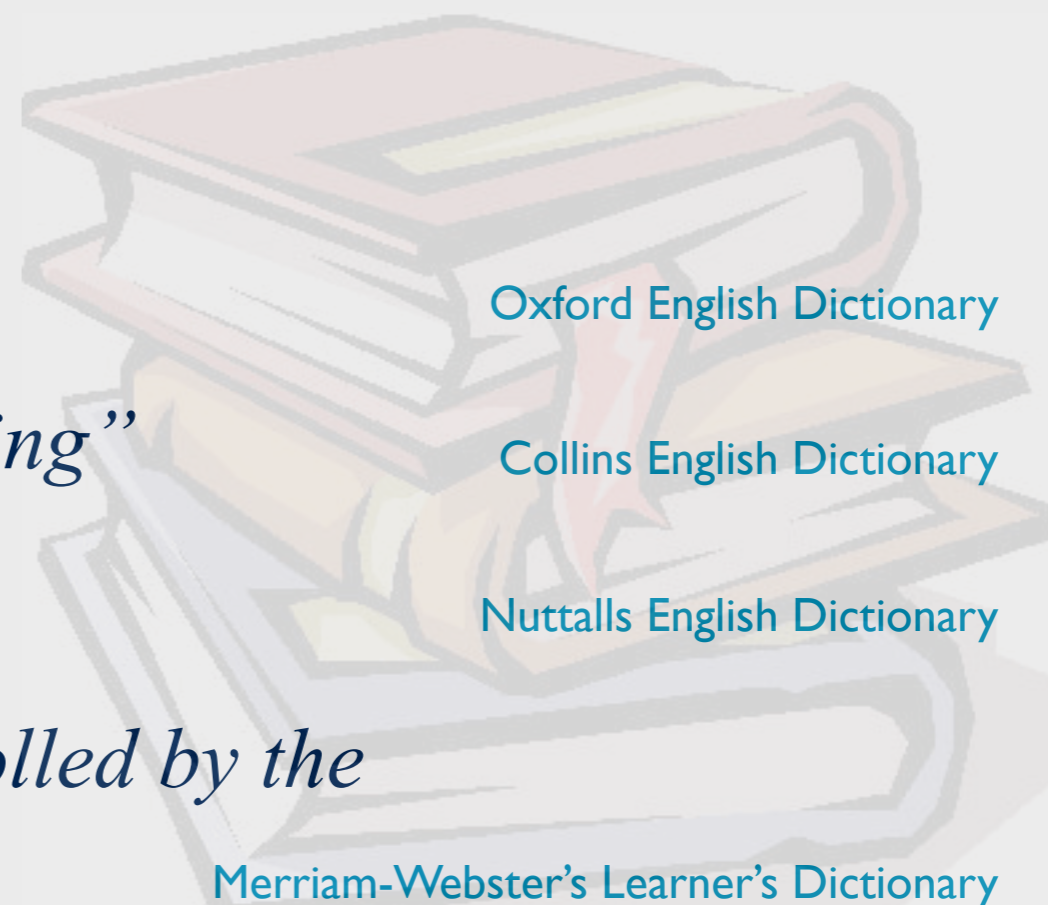
“The act, manner, function of governing”

“The action, manner or system of governing”

▶ ***“Direction; control; management”***

“The way that [an organization] is controlled by the people who run it”

“The process of decision-making and the process by which decisions are implemented (or not implemented)”



Introduction & Background

Definitions

Board of Directors:

“A group of people comprising the governing body of a corporation.”

Directors and Officers

Duty to manage or supervise management

124 Subject to this Act, the articles and any unanimous member agreement, the directors shall manage or supervise the management of the activities and affairs of a corporation.

Canada Not-for-Profit Corporations Act

Directors

283 (1) The affairs of every corporation shall be managed by a board of directors howsoever designated. R.S.O. 1990, c. C.38, s. 283 (1).

Ontario Corporations Act

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- ▶ **The Board's Role**
 - Responsibilities of the Board
 - Exploring governance - the Rules
 - Exploring governance - the 5 M's
 - The Board & the ED

- The Director's Role**
 - Responsibilities of a Director
 - Fulfilling expectations
 - The trouble with titles
 - Indemnities & insurance

- Challenges with NFP's**
 - The top 3 problems

The Board's Role

What are the responsibilities of a Board?

1. Following the Rules

Duty to comply

(2) Every director and officer of a corporation shall comply with

(a) this Act and the regulations; and

(b) the articles, the by-laws and any unanimous member agreement.

s. 148 (2) Canada Not-for-Profit Corporations Act

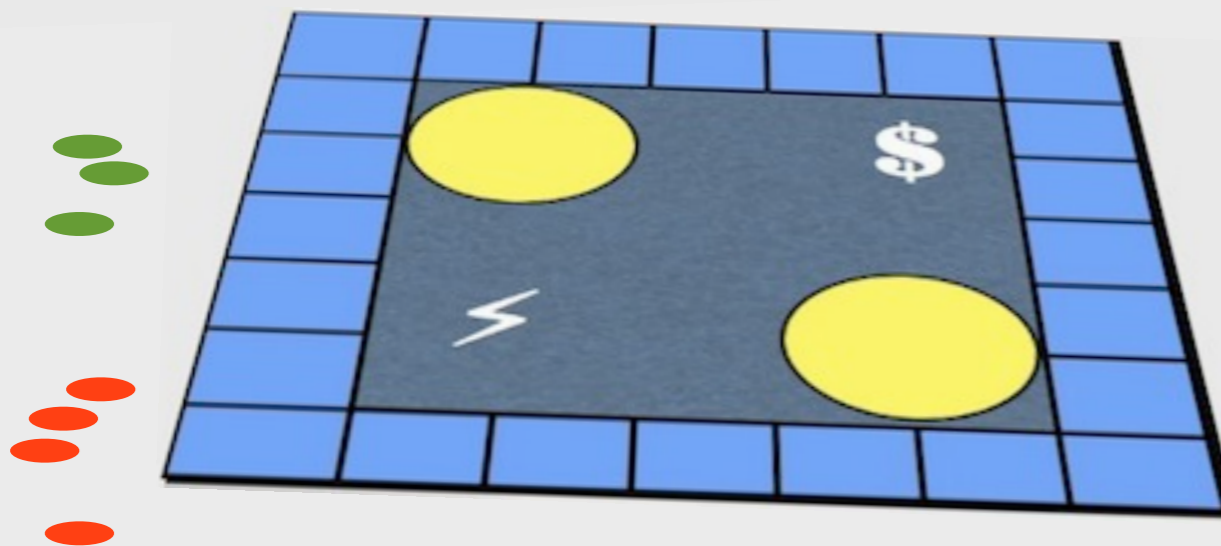
The Board's Role

Governance: What are the Rules?



1. The laws of the land, including the relevant act covering incorporation

2. "Constituting documents"
(i) Articles (ii) By-laws



The Board's Role

Governance: What are the Rules?

Externally imposed

Framework set by **Incorporating Act, Income Tax Act & other legislation** e.g. Ontario Corporations Act, CNCA, Charities Accounting Act...

- typically regulate membership & powers, meeting notices, record keeping & audit requirements and Board composition. They also impose duties & responsibilities on directors

Internally imposed

Further refined by **Articles** (Purposes / Objects) & **By-laws**

- these specify limits and operating requirements & are drafted by the organization itself



2 sources; 3 levels

The Board's Role

Governance: What are the Rules?

3 levels:

1. Incorporating Act etc. - overall framework

2. Articles - purposes / objectives

Charitable status - specific, limited & CRA approved

3. By-laws - rules of operation

The Board's Role

Governance: What are the Rules?

OCA

- overall framework

Number

(2) The board of directors of a corporation shall consist of a fixed number of directors not fewer than three.



“...shall consist of a fixed number of directors not fewer than three”

The Board's Role

Governance: What are the Rules?

3 levels:

1. Incorporating Act etc. - overall framework

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Charitable status - specific, limited & CRA approved

3. By-laws - rules of operation

The Board's Role

Governance: What are the Rules?

Articles - specific, limited & approved purposes / objects

4. The objects for which the corporation is incorporated are:
Objets pour lesquels la personne morale est constituée:

To relieve poverty by providing food and other basic supplies to persons of low income, by establishing, operating and maintaining shelters for the homeless, and by providing counselling and other similar programs to relieve poverty.

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The Board's Role

Governance: What are the Rules?

3 levels:

1. Incorporating Act etc. - overall framework

2. Articles - purposes / objectives

Charitable status - specific, limited & CRA approved

3. By-laws - rules of operation

The Board's Role

Governance: What are the Rules?

By-laws

- rules of operation

Section 3 The affairs of the Association shall be managed by a Board of ten (10) Directors, each of whom at the time of their election or within ten (10) days thereafter and throughout the term of office shall be an Active Member of the Association.

6.01 Time and Place of Meetings

The Board shall meet at least four (4) times in each fiscal year, and no more than one hundred and twenty (120) days shall elapse between meetings.

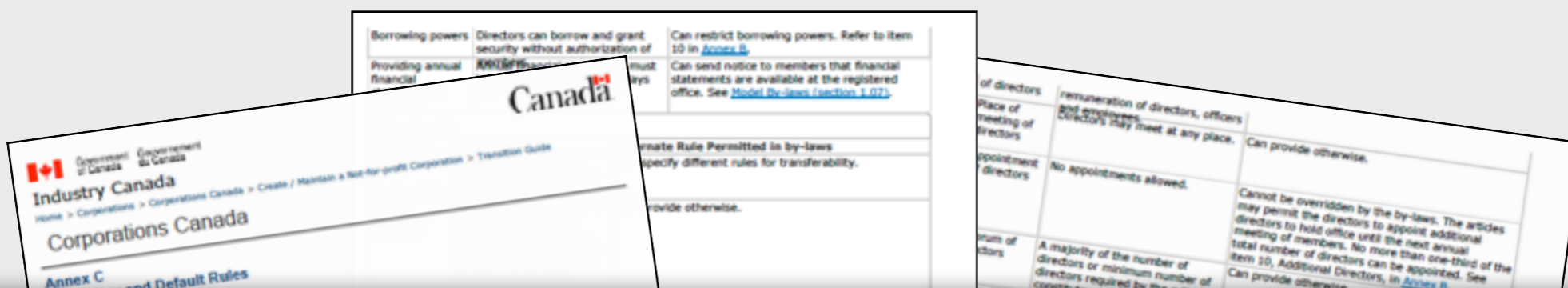
Directors' meetings may be called at any time by any two Directors.

The Board's Role

Governance: What are the Rules?

By-laws

- rules of operation



2. Membership		
Provision	Default Rule	Alternate Rule Permitted in by-laws
Transferability of membership ¹	Membership can only be transferred back to the not-forprofit corporation.	Can specify different rules for transferability.
Place of meeting of members	The meeting of members is to be held at a place in Canada that the directors determine or a place outside Canada if all the members entitled to vote at the meeting agree.	Can provide otherwise.

The Board's Role

Governance: What are the Rules?

Externally imposed



general knowledge

Framework set by **Incorporating Act, Income Tax Act & other legislation** e.g. Ontario Corporations Act, CNCA, [ONCA], Charities Accounting Act...

- typically regulate membership & powers, meeting notices, record keeping & audit requirements and Board composition. They also impose duties & responsibilities on directors

The Board's Role

canadiancharitylaw.ca

charitylaw.ca

Governance: What are the Rules?

Not only...

Canada Not-for-profit Corporations Act
Income Tax Act (Canada)
Charities Accounting Act

but also...

Excise Tax Act
"Canada's Anti-Spam Legislation"
Human Rights Code
Employment Standards Act
Occupational Health & Safety Act
Pay Equity Act
Ontario Labour Relations Act
Workplace Safety & Insurance Act
Privacy Legislation

...

The Board's Role

canadiancharitylaw.ca

charitylaw.ca

Governance: What are the Rules?

The image shows a screenshot of the Canadian Charity Law website (canadiancharitylaw.ca) with a book titled "Duties and Responsibilities of Directors of Not-for-Profit Organizations" (Fourth Edition) by Watson, CSAE, and SCDA overlaid on it. The website content includes several articles with questions and answers:

- Are Canadian charities allowed to conduct political activities?** Yes, within certain limits. [Election and Campaigning](#) want to review my...
- Are there Residency Requirements for the Directors of a Canadian Charity?** The short answer is... To answer this question... Charities Directorate of...
- Can a Canadian charity do any social activities?** Here is what the CRA has... "Social activities" As a rule, social activities are established for exclusively... social activities as long as:
 - the activities are held to raise funds to be considered as a primary purpose
 - the activities are incidental to the charity should not devote more than 10% of its property to social activities.
- Can Canadian Charities Operate Outside of Canada?** Absolutely yes. And many thousands... The Income Tax Act (Canada) allows giving money or assets to another "organization" their "own activities" (at home or abroad cannot just transfer or grant money to another organization. This notion applies to operations within Canada. Can you transfer funds to another Canadian organization registered charity).

The book cover also features the logos for CSAE (Canadian Society of Association Executives) and SCDA (Society of Canadian Directors of Associations), and the publisher's name, WATSON.

The Board's Role

Governance: What are the Rules?

Externally imposed

 **general knowledge**

Framework set by **Incorporating Act, Income Tax Act & other legislation** e.g. Ontario Corporations Act, CNCA, [ONCA], Charities Accounting Act...

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Internally imposed

 **detailed knowledge**

Further refined by **Articles** (Purposes / Objects) & **By-laws**

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 2 sources; 3 levels

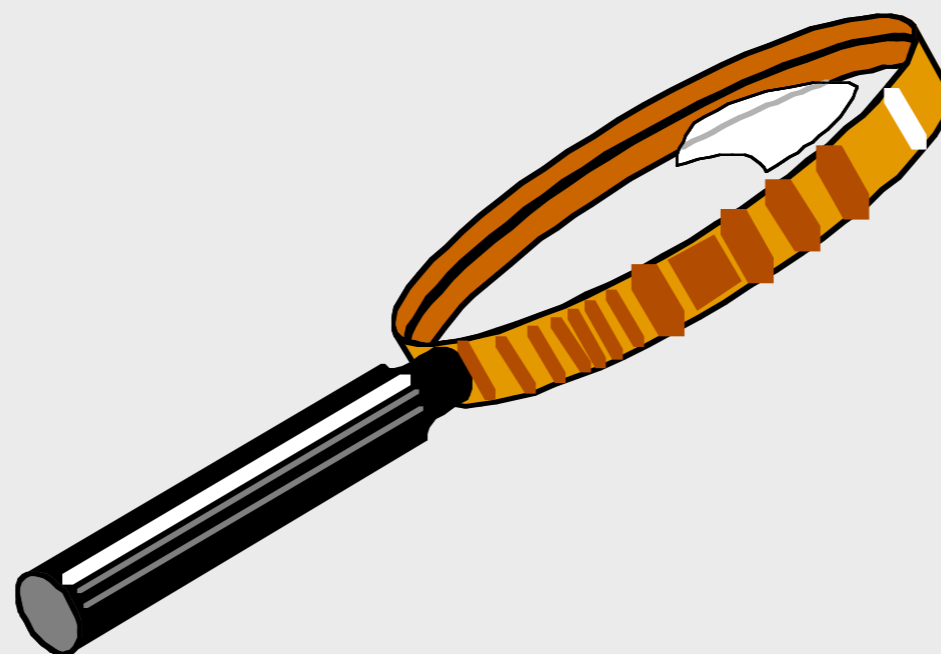
The Board's Role

What are the responsibilities of a Board?

- ✓ 1. Following the Rules
2. Governance

The Board's Role

Governance responsibilities: what's the focus?



The Board's Role

Governance responsibilities: what's the focus?

The five essentials

- ▶ *To establish the organization's vision and direction and to plan and monitor performance in achieving the same*

The Board's Role

Governance responsibilities: what's the focus?

The five essentials

- ▶ *To establish the organization's vision and direction and to plan and monitor performance in achieving the same*
- ▶ *To ensure the financial health of the organization and to manage risk*

The Board's Role

Governance responsibilities: what's the focus?

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- ▶ *To establish the organization's vision and direction and to plan and monitor performance in achieving the same*
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- ▶ *To ensure the organization has sufficient and appropriate human, physical and technical resources*

The Board's Role

Governance responsibilities: what's the focus?

The five essentials

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- ▶ *To formulate necessary policies & implement appropriate systems to direct and manage operations*

The Board's Role

Governance responsibilities: what's the focus?

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- ▶ *To formulate necessary policies & implement appropriate systems to direct and manage operations*
- ▶ *To ensure effective stakeholder relations through transparency of action and open communications*

The Board's Role

Governance responsibilities: what's the focus?

The five essentials

- ▶ *To establish the organization's vision and direction and to plan and monitor performance in achieving the same* **“Management”**
- ▶ *To ensure the financial health of the organization and to manage risk* **“Money”**
- ▶ *To ensure the organization has sufficient and appropriate human, physical and technical resources* **“Means”**
- ▶ *To formulate necessary policies & implement appropriate systems to direct and manage operations* **“Methods”**
- ▶ *To ensure effective stakeholder relations through transparency of action and open communications* **“Manner”**

The Board's Role

Governance responsibilities: what's the focus?

The five essentials

▶ **“Management”**

DIRECTION & PERFORMANCE

▶ **“Money”**

FUNDS & PROTECTION

▶ **“Means”**

CAPABILITY & MAINTENANCE

▶ **“Methods”**

EFFICIENCY & EFFECTIVENESS

▶ **“Manner”**

UNDERSTANDING & TRUST

The Board's Role

Governance responsibilities: what's the focus?

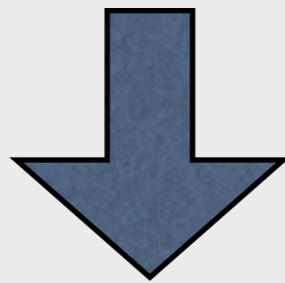
Board / ED relationship

Board

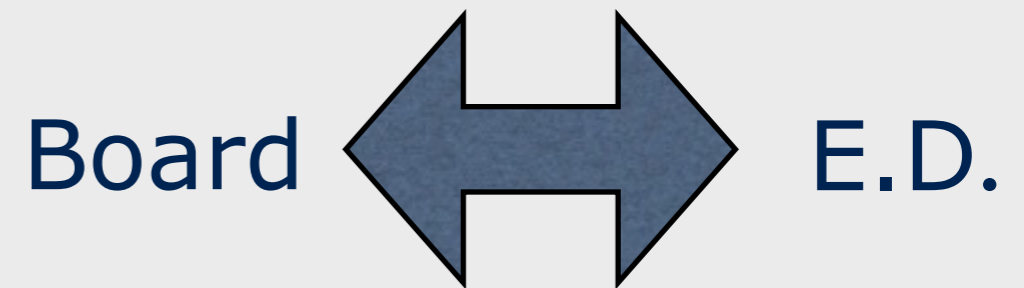


E.D.

E.D.



Board



- ✗ Impractical nature
- ✗ Micromanaging

- ✗ Mushroom effect
- ✗ Legal position

- ✓ Focus on direction & policy

- ✓ Focus on counsel & operations

The Board's Role

Governance responsibilities: what's the focus?

Board / ED relationship

ED Hiring a Volunteer Coordinator?

Board Changing the Corporate Logo?

Board Accepting a special purpose bequest?

ED Designing a media campaign to support fund-raising?

Board Developing a Workplace Harassment Policy?

ED Granting a staff member a leave of absence?



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- ✓ The Board's Role
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- ▶ The Director's Role
 - Responsibilities of a Director
 - Fulfilling expectations
 - The trouble with titles
 - Indemnities & insurance

- Challenges with NFP's
 - The top 3 problems

The Director's Role

Legal duties & responsibilities

Legislation imposes, among other things, a **duty of care** for individual Directors

- * Historically, the OCA standard of care was **subjective** – what is reasonable given the knowledge & experience of the person concerned. Individual directors could be held to different standards depending on professional qualifications and experience
- * Under the CNCA and now the OCA, the standard of care is **objective** – what is reasonable given the nature of the organization. Individual directors are held to the same standard.

The Director's Role

Legal duties & responsibilities

Legislation imposes, among other things, a **duty of care** for individual Directors:

Duties of directors and officers

148. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Canada Not-for-Profit Corporations Act
c.f. s. 127.1 (1) *Ontario* Corporations Act

The Director's Role

Legal duties & responsibilities



Ability to articulate where the organization is going and how it plans to get there

The Director's Role

Legal duties & responsibilities

A collective Board responsibility

An individual accountability

“Ignorance is no defence”

- Legal maxim



The Director's Role

Legal duties & responsibilities

Confidentiality - *as a Board*

Established policy required

- Topics & circumstances
- Minutes

Strictly limited applications

- Personal matters
- Personnel matters
- Financial matters
- Legal matters



Confidentiality - *as an individual*

Respect Board policy & decisions

(What if it was you that was being talked about?)

The Director's Role

Legal duties & responsibilities

Avoiding **conflict of interest**

141. (1) A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of committees of directors, the nature and extent of any interest that the director or officer has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer

1. (a) is a party to the contract or transaction;
2. (b) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or
3. (c) has a material interest in a party to the contract or transaction.

Canada Not-for-profit Corporations Act



The Director's Role

Fulfilling expectations

1. Know your stuff

The Director's Role

Know your stuff

- ✓ Read your Board Manual
- ✓ Be familiar with the “Rules” (especially Purposes & By-laws)
- ✓ Meet with – and become knowledgeable about – key staff members
- ✓ Review the Policies Manual

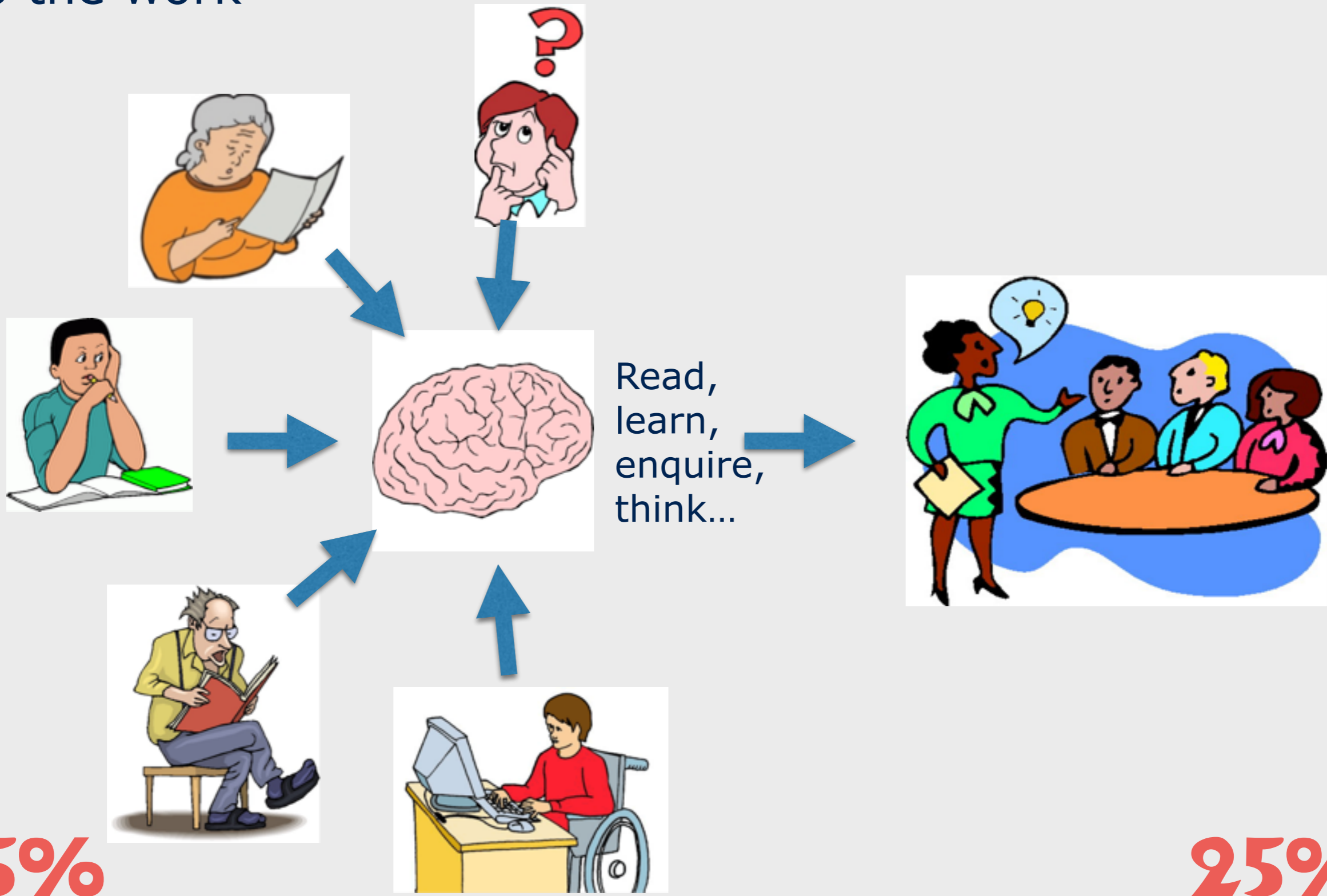
The Director's Role

Fulfilling expectations

- ✓ 1. Know your stuff
- 2. Do the work

The Director's Role

Do the work



The Director's Role

Fulfilling expectations

- ✓ 1. Know your stuff
- ✓ 2. Do the work
- 3. Participate fully

The Director's Role

Participate fully

Board



Committees



Events



Task forces



The Director's Role

Fulfilling expectations

- ✓ 1. Know your stuff
- ✓ 2. Do the work
- ✓ 3. Participate fully
- 4. Behave appropriately

The Director's Role

Behave appropriately

Preparation: attendance is not enough



Timeliness: be there and be ready



Fitting in: this is “business”



Communication differences: pay attention!



Politeness: expectations may differ



The Director's Role

The trouble with titles

Exclusivity?

*Ability
to
foretell?*

President/Chair
~~Vice President~~
~~2nd Vice President~~
~~3rd Vice President~~
Secretary
Treasurer
~~Membership~~
~~Constitution/By-laws~~

~~Programs~~
~~Fund Raising~~
~~Social~~
~~Communications~~
~~Prov. Assoc. Liaison~~
~~Shop~~

Collective responsibility?

The Director's Role

Titles & responsibilities

Directors v. Officers

Elected by members

Appointed by Board

Direct the corporation

Facilitate management of the corporation

Responsible for governance

May also be a director

Must be unpaid if a charity

The Director's Role

Titles & responsibilities

“President” - represents the organization externally;
runs meetings

“Secretary” - records the meetings

“Treasurer” - takes the lead on financial matters



“Officers”

- ▶ Collective responsibility is the key for a Board; individual directors may have liaison responsibilities but avoid the focus on implied representation through titles

The Director's Role

Legal duties & responsibilities

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Canada Not-for-Profit Corporations Act
c.f. s. 127.1 (1) *Ontario* Corporations Act

The Director's Role

Indemnities & insurance

Can avoid “duty of care” liability through showing:

- (i) proper diligence and
- (ii) good faith reliance on...

“(a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the public accountant of the corporation fairly to reflect the financial condition of the corporation; or
(b) a report of a person whose profession lends credibility to a statement made by that person.”

The Director's Role

Indemnities & insurance

1. There is no protection from wilful negligence!
2. For Ontario based Charities, insurance purchase is subject to provisions of the Charities Accounting Act.
The following must be considered:

1. The degree of risk to which the executor, trustee, director or officer is or may be exposed.
2. Whether, in practice, the risk cannot be eliminated or significantly reduced by means other than the indemnity or insurance.
3. Whether the amount or cost of the insurance is reasonable in relation to the risk.
4. Whether the cost of the insurance is reasonable in relation to the revenue available to the executor or trustee.
5. Whether it advances the administration and management of the property to give the indemnity or purchase the insurance.

Agenda

- ✓ **Introduction & Background**
 - Purpose of workshop
 - Incorporation: the legal environment
 - NFP's v. Charities
 - Some definitions

- ✓ **The Board's Role**
 - Responsibilities of the Board
 - Exploring governance - the Rules
 - Exploring governance - the 5 M's
 - The Board & the ED

- ✓ **The Director's Role**
 - Responsibilities of a Director
 - Fulfilling expectations
 - The trouble with titles
 - Indemnities & insurance

- ▶ **Challenges with NFP's**
 - The top 3 problems

The Top Three Reasons directors get into trouble

At #1 – Failure to comply

Ignorance of the “Rules”

Mission drift

Lack of due process

At #2 – Lack of understanding

Misplaced reliance on others

Misplaced belief they could avoid responsibility

Misplaced trust in people

At #3 – Poor recruitment practices

Personal agendas

Lack of commitment

Lack of necessary competences

Absent succession planning

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“The honour is to serve”

Worf, Star Trek, T.N.G.

