

CHC Board Governance: The Legal Basics (and some Tips and Tools)

Shift the Conversation
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Disclosure of Commercial Support

Presenter: Nick G. Pasquino

Relationships with Commercial Interests:

Grants: Nil

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Other: Nil

Objective of Session

**Understand Legal Role and
Responsibilities of
CHC Boards of Directors**



What should my Board be doing?



What should I be doing?



How do I do it?

Agenda

- **Community Health Centres in the Legal Context**
- **Understanding Accountability Relationships**
- **Director Duties and Liabilities**
 - Standard of Care
 - Rules of Fiduciary Conduct
 - Strategies to Manage Personal Liability
- **Ingredients for Effective Board Governance**
 - Board Role
 - Board Quality and Stability
 - Understanding Board Structures and Processes
- **Tips for Effective Board Meetings**
 - Consent Agendas
 - Proper use of In Camera Meetings
 - Committee Do's and Don'ts
 - Consensus Decision-making

Community Health Centres in the Legal Context

- **What is a Community Health Centre at law?**
 - Typically corporations without share capital incorporated under the *Corporations Act*
 - No shareholders
 - Mission-driven charitable organization: incorporated for “purposes” (not profits)
 - Limited liability (directors / members generally not liable for corporate obligations)
 - Vicarious liability for employees
 - Direct liability for equipment, facilities, safe operation of CHC systems and processes (coordination; policies; protocols), protection of patients/users, staff selection and termination, monitoring professional competence
 - Not a Crown agent (by virtue of independent, autonomous boards)

Constating Documents and Governance Policies

- **Letters Patent/Articles (or Special Act)**
- **By-laws**
- **Special Resolutions**
- **Ordinary Resolutions**
- **Governance Policies**
- **Rules of Order**

Community Health Centre as Charitable Corporation

- **Income Tax Implications**

- Objects are charitable
- Registered charitable organization under *Income Tax Act*
- Tax exempt on income
- Subject to disbursement quota
- May issue charitable receipts
- Constituted and operated exclusively for charitable purposes
- No part of income can benefit members
- Restrictions on “business” and “political” activities that may be carried on

- **Other Implications:**

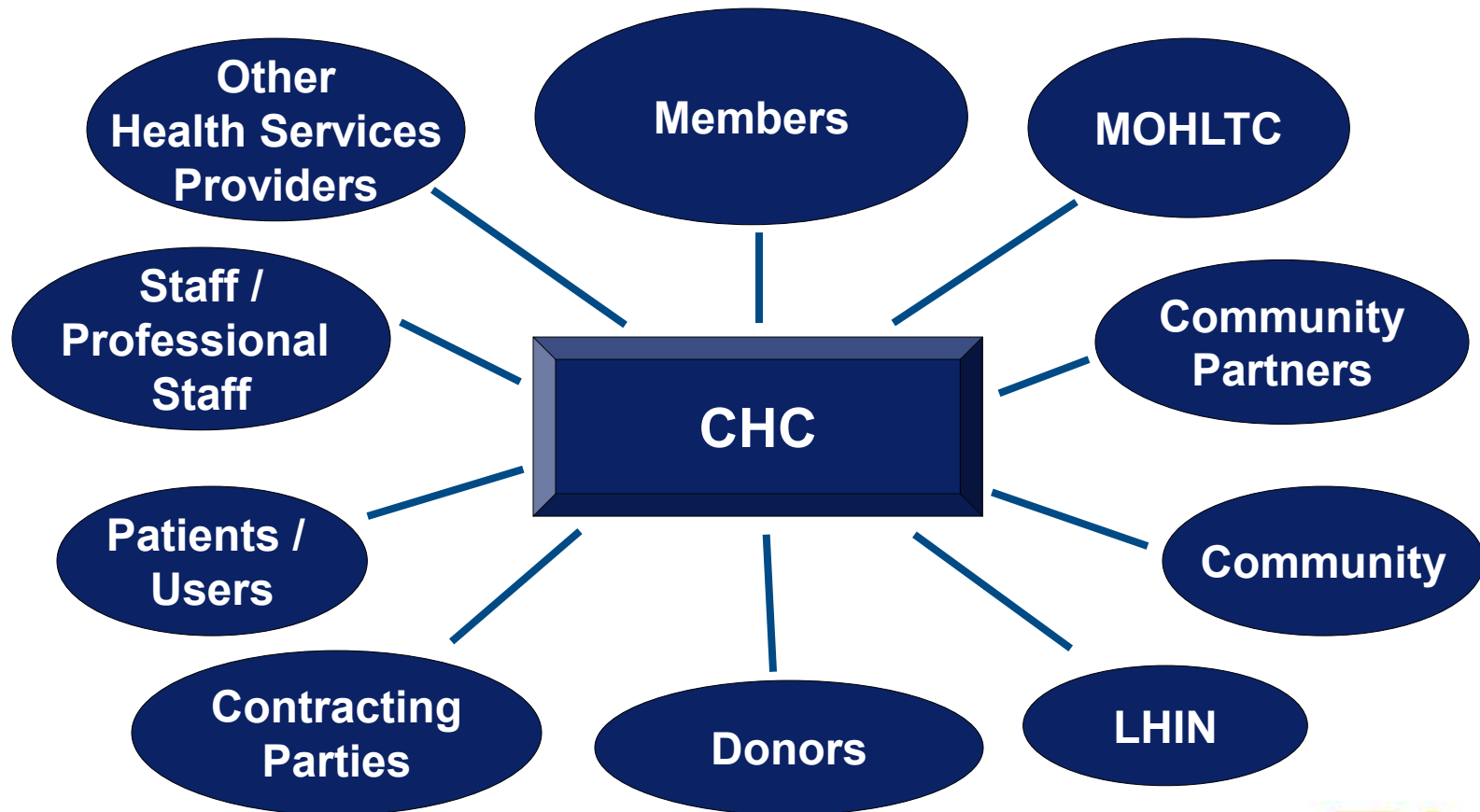
- Public Guardian and Trustee may assert jurisdiction
- *Charities Accounting Act* applies

Community Health Centre Accountability Relationships

Board and Management Accountability

- **Board: Responsibility based on Fiduciary Duty owed to corporation**
 - Duty to act honestly, in good faith, and in the best interests of the CHC
- **Management: Accountable to Board**
- **Board governs, management manages**
- **Key Questions to consider:**
 - What is “best interest of corporation”?
 - To whom is the CHC accountable?
 - To whom does the board of directors owe its duties?

Community Health Centre Accountability Relationships



Duties of Directors – Common Law Standard

- **Directors are fiduciaries**
- **Relationship of trust (highest standard imposed by law)**
- **Duty is owed to the Corporation (not to any one group or interest)**
- **All directors and officers (EDs) owe the same duty**
- **Two parts to the duty**
 - Standard of Care
 - Rules of Fiduciary Conduct

Standard of Care – Common Law Standard

- Directors must exercise the care, diligence and skill that may reasonably be expected of a person with their knowledge and skill

(Common law standard)

- But note: *Not-for-Profit Corporations Act, 2010* (ONCA) standard of care moves standard to a “reasonably prudent person” standard

[ONCA not expected to come into force until 2016 at the earliest]

Rules of Fiduciary Conduct

- **Honesty**
- **Good faith**
- **Best interest of Corporation**
- **Obedience/Loyalty – Board solidarity**
- **Confidentiality**
- **Avoid conflicts of interest and duty**

Conflicts of Interest and Duty

- **General Rule**
 - Cannot have a conflict of personal interest or conflict of duty
- **Examples**
 - Transactions between the Director and the Corporation
 - Acting for an improper purpose
 - Misuse of confidential information
 - Duty to disclose information of value to the Corporation
 - Appropriating corporate opportunities
 - Competing directorships (not prohibited)

Conflicts of Interest and Duty (continued)

- ***Corporations Act – Safe Harbour***
 - Applies where director/officer is directly or indirectly interested (financially) in a contract with organization
 - If director does not declare interest at first meeting when contract is discussed or when Director first becomes interested in contract, and refrain from voting, contract is “voidable” and director may be liable for profits
- **General Notice (of continuing effect) may be given**
- **Public sector / mission driven charitable corporation context – Conflict of Interest Policy likely broader in approach:**
 - Includes perceived conflicts
 - Absence from room / no attempt to influence (not just refrain from voting)
 - Mechanism to address disputes over conflict process
 - Board decision

Director (Personal) Liability

- **General Rule – Limited Liability**
- **Exceptions to the Rule:**
 - Breach of fiduciary duty
 - Statutory liability (3 broad categories)
 1. Failure to pay wages
 2. Failure to deduct, withhold, remit taxes (income taxes, employment insurance premiums, Canada Pension Plan contributions, HST, Employer Health Tax etc.)
 3. Non-compliance with various legislation
 - *Pension Benefits Act*
 - *Occupational Health and Safety Act*
 - Employment Standards legislation
 - Environmental legislation
 - Other

Avoidance of Liability

- Due Diligence (will be reviewed over next slides)
 - Insurance
 - Indemnity
-
- Note: consider *Charities Accounting Act* requirements when approving purchase of insurance or entry into of contract of indemnity

Discharging Directors' Duties

(i.e. what to do to reduce risk of personal liability!)

- **Business Judgment Rule – courts will not hold directors liable for errors of judgment where proper process is followed (i.e. directors have conducted due diligence in support of their decision)**
- **Reliance on others allowed – may rely on management and third party experts (auditors, lawyers, etc.)**
- **Ensure that all reasonable steps were taken to prevent occurrence of the offence**
- **Due Diligence = Good Governance**

Elements of Board Due Diligence

- **Question of Fact – depends on context and Director involvement: take “all reasonable care”**
- **Ensure that management establishes and maintains systems. Key elements usually include:**
 - Delegation and reliance on management/advisors
 - Director knowledge of compliance requirements
 - Set goals and/or industry standards to achieve compliance
 - Reporting system for compliance and non-compliance
 - React to problems – process to respond
 - Continuing supervision/oversight of management
- **Board’s role: to ensure system is in place and maintained, but must rely on management for compliance**
- **Board must monitor and exercise oversight**

10 Ways Boards Exercise Oversight and Monitor Compliance

1. **CEO/ED supervision – make requirement for compliance part of CEO/ED's role**
2. **Board should have a general knowledge of areas of risk from a compliance perspective**
3. **Board should understand how the organization maintains and monitors compliance, stays abreast of new requirements and reacts to circumstances of non-compliance**
4. **The Board and/or Board Committees may review indicators that confirm compliance (example, sentinel events such as unusual workplace injuries)**

10 Ways Boards Exercise Oversight and Monitor Compliance (continued)

5. Periodic compliance certificates from management, for example that remittances and required reporting or filings are made
6. Annual audit and external accreditation process (where applicable) may be used to verify some aspects of compliance
7. Review with management (periodically and usually through Committees) key areas of risk and how compliance in key areas is managed (environmental, financial, building code, occupational health and safety, procurement, employment law and withholdings and remittances are usual key areas in an operating organization)

10 Ways Boards Exercise Oversight and Monitor Compliance (continued)

8. Ensure organization has a whistleblower policy
9. Ensure organization has business conduct policies that set a culture of compliance
10. Consider external audit of select risk areas (i.e.: environmental compliance, audit where appropriate in context of organization's activities)

Note: What is sufficient due diligence will depend on context of Board, the particular organization and Director involvement

Ingredients for Effective Board Governance

- Board Role and Relation to Management
- Board Quality and Stability

Good Governance is...

- **Good governance fundamentally means that boards carry out their trust or fiduciary responsibility. That fiduciary role means the Board should act to ensure that the corporation it governs is successful in serving its objects (fulfilling its mission), and is sustaining to continue to serve those objects by maintaining its tangible and intangible assets and financial viability, and that it does so while adhering to its core values and discharging its accountabilities.**

Conditions for Good Governance

Conditions for Good Governance

Board Role

- Board Role & Functions
- Duties of Individual Directors
- Governance / Management Relationship

Board Quality

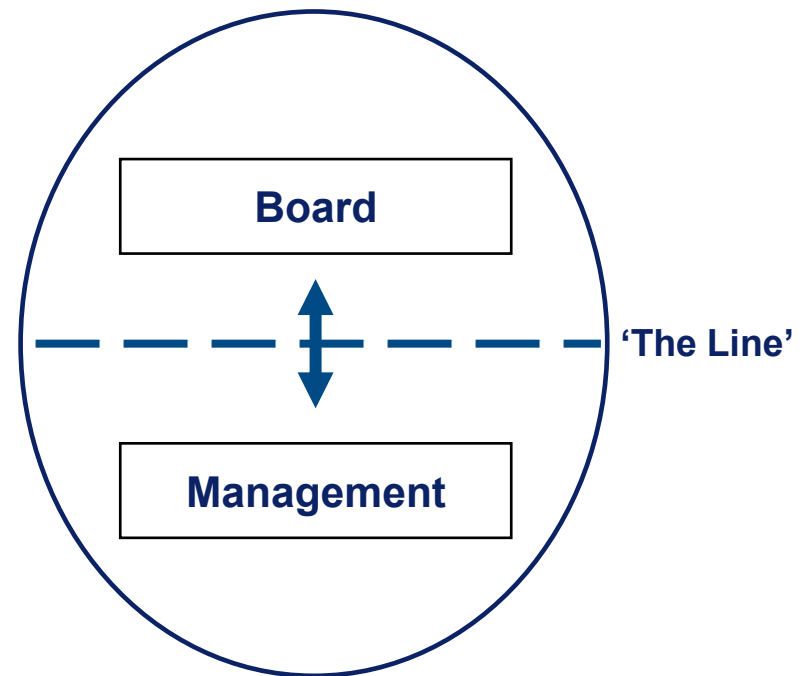
- Size
- Composition (Skills / Experience / Qualities)
- Independence
- Recruitment
- Term and Renewal
- Orientation / Education
- Feedback & Evaluation

Board Structure and Process

- Board Leadership – Chair & Officers
- Committees – Roles & Relationships
- Meeting Process
- Relationships – Culture

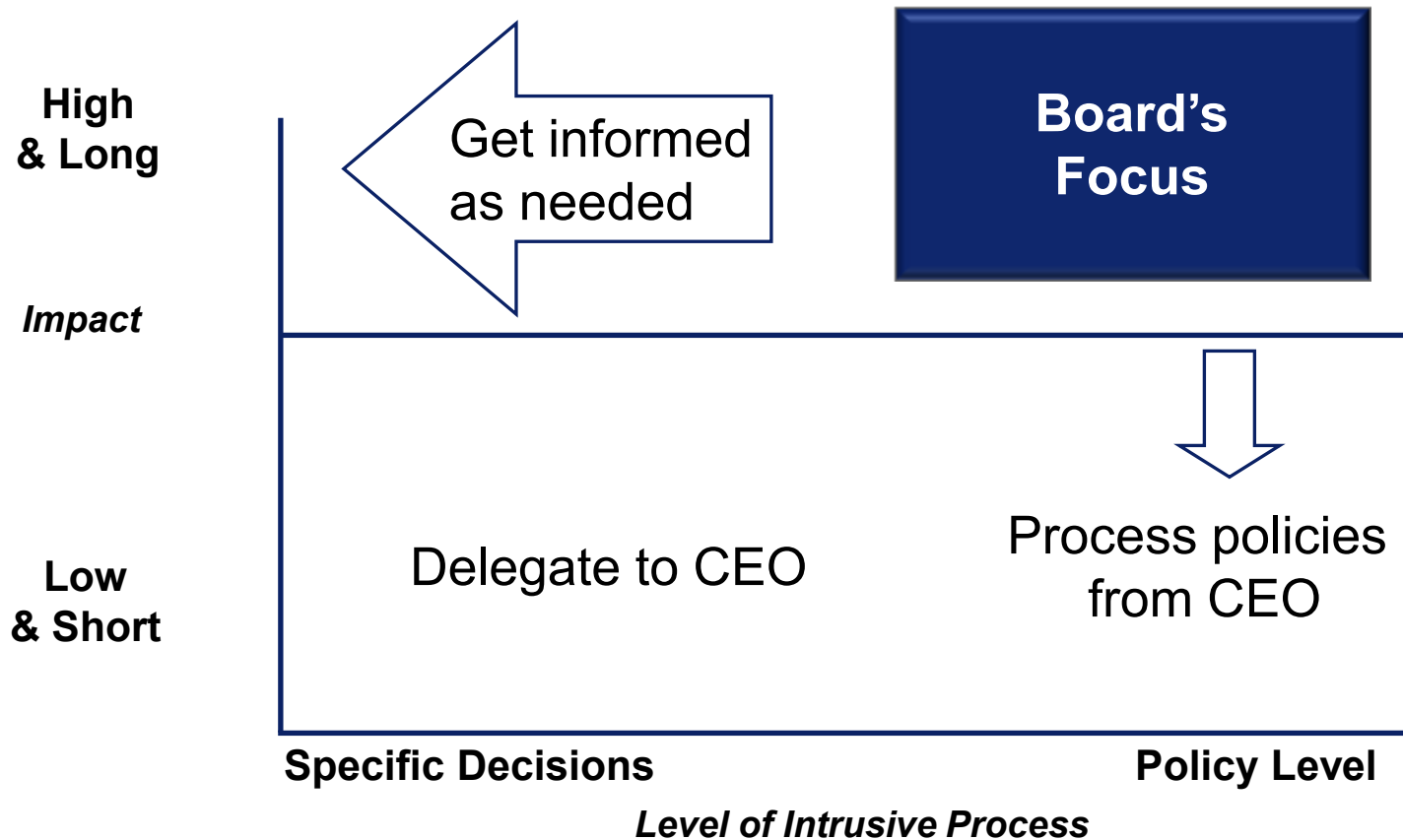
Balancing Delegation with Fiduciary Duty and Feasibility

- Choose the ‘right’ work to align with governance model and role of the Board
- Define ‘the line’ with Management – need a statement of principles
- Need to manage ‘the line’ with Management – dynamic and flexible
- The ‘right’ work (and role) can change over time



Policy Governance to Focus Board's Role

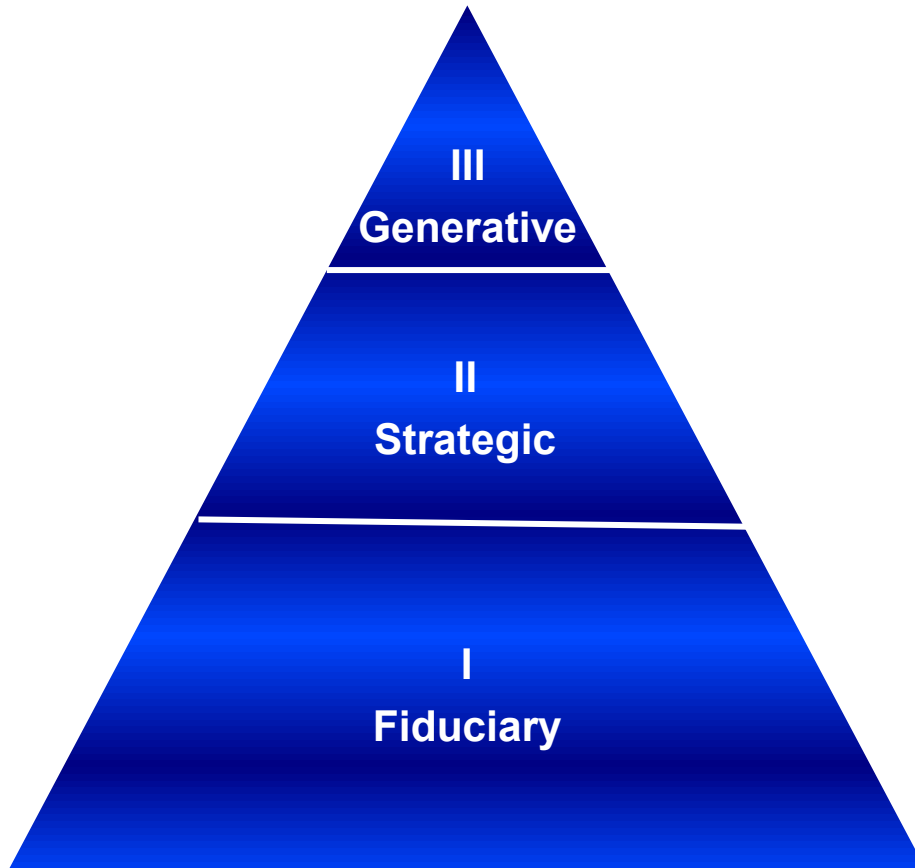
Board 'can' do almost anything, but should it?



Typical Functions of the Board

- 1. Strategic Direction Setting**
- 2. Performance Oversight**
- 3. Quality Oversight**
- 4. Financial Oversight**
- 5. Risk Management**
- 6. Supervise Leadership**
- 7. Stakeholder Relations Oversight**
- 8. Governance**

Higher Impact Governance Modes*



- What ifs, contingencies out of the box
 - Questions and ideas, not firm plans
 - Resource to, dialogue with, Management
-
- Strategic directions and future
 - Clarity of plans
 - Partner with Management
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- Stewardship & Compliance
 - Budget, Audit, Plans
 - Oversee Management

*Concept based on Governance as Leadership by Chait R., Ryan W., Taylor B.

Components of Board Quality

1. **Size**
2. **Term and Renewal**
3. **Composition**
4. **Recruitment and Election Processes**
5. **Education and Orientation**
6. **Evaluation and Feedback (continuous improvement)**

Ensuring a skills based independent Board:

- Board should be skills based and independent of interests of any one group
- Director nomination processes should be open and transparent
- Election processes should eliminate risk of single-issue candidates

Board Structures and Processes

Effective Use of Board Structures and Processes

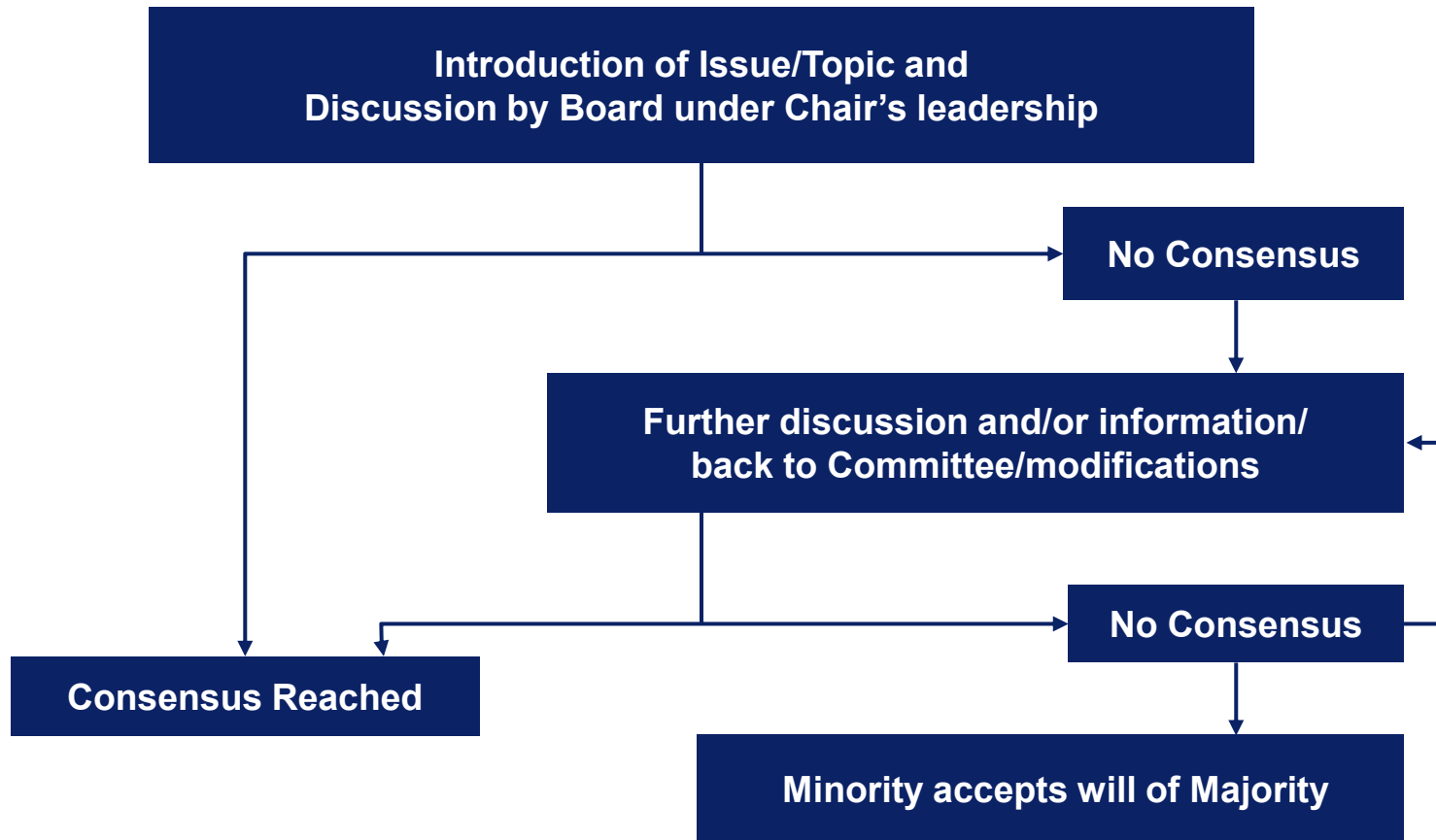
- Board Leadership – The Role of the Chair
- Consensus Decision-making
- Committee Do's and Don'ts
- Board Meeting Tips and Tools:
 - In Camera Meetings
 - Consent Agendas

Board Leadership – The Role of the Chair

- **Role of the Chair – essential to ensure sense of meeting is properly ascertained**
 - Facilitate and forward meetings
 - Plan agendas
 - Ensure relevant information is made available
 - Allow debate
 - Procedural rulings and director behaviour discipline
 - Public and internal board spokesperson (loyalty / solidarity)
 - Obtain consensus – democratic nature of Board decisions:

“We may not all agree, but we can all live with the decision”

The Classic Consensus Process



Committees

- **Principle: committees are creatures of the Board, created by Board to do Board work**
- **Purpose:**
 - Do work the Board does not have time to do
 - Do Board work (pre-work for Board)
 - Allow contribution of special skills (non-directors)
- **Don't:**
 - Do committee work without bringing forward a recommendation to the Board
 - Allow the Board to redo committee work

Board Meetings – Open / In Camera

The Basics

- No requirement for “open” meetings
- Directors have a duty and right to attend (no exclusions except if By-Law/policy so provide for conflicts)
- All attendees (other than Board) are guests of the Board
- Board may make its own rules – best interest test
- Different rules and practices for members’ meetings (AGM)

Types of Meetings

- **Open**
 - All directors and some or all of
 - Management
 - Public
 - Invited Guests
- **In-Camera/Closed**
 - Only Board and specially invited guests
 - Management stays only if on Board or invited
 - Typically an “in camera” policy is adopted to it is clear when / when not to go in camera

Scope of “In Camera” Meetings

- **Matters where personal information about an individual will or may be revealed:**
 - Patient or client-specific issues
 - Matters relating to an individual board member or a prospective board member (nomination report?)
 - Individual employee matters
 - Donor specific issues
- **Labour relations and matters pertaining to collective bargaining or terms of employment including negotiations or potential negotiations**
- **Litigation or potential litigation including administrative tribunal matters**
- **Advice that is subject to solicitor-client privilege including communications necessary for that purpose**

Scope of “In Camera” Meetings (continued)

- Security of property of the corporation
- Contract negotiations or disputes
- Acquisition, disposition, lease, exchange or expropriation of, or improvements to real or personal property, if the board considers that disclosure might reasonably be expected to harm the interest of the corporation
- Board self evaluation
- Other matters that, in the opinion of the majority of directors, the disclosure of which might be prejudicial to an individual or to the best interests of the corporation
- Consideration of whether an item is to be discussed *in camera*

Note: If in camera format utilized – be sure to keep separate sets of minutes!

Effective Board Meetings: Consent Agendas

- Purpose – to improve efficiency of Board meetings
- Allows for expedited approval of routine matters or motions where no debate is anticipated
- Agenda should clearly indicate which matters are to be approved on “consent” – usually a segregated portion of the agenda
- Supporting materials for items on the consent agenda should be clearly marked as related to the consent agenda
- Typical consent agenda matters are routine or recurring in nature where no debate is anticipated
- Typical process allows any director to request an item be removed from consent agenda prior to or at the meeting
- No motion is required to remove an item
- Chair decides where removed item is placed on the regular agenda

Consent Agendas (continued)

- **Either: one motion to approve entire agenda or motion relating specifically to consent agenda business or Chair declares matters approved on consent**
- **Critical for Board to read materials in advance of meeting**
- **Minutes set out, in full, motions approved on “consent”**
- **It is a good practice to adopt a consent agenda policy**

Some Parting Thoughts

- **Director Education - a Core Feature of Good Governance**
- **Discharging your Fiduciary Duties in difficult circumstances – appropriate to consult with and rely on experts**
- **Health Sector Integrations – (only if we have time!)**
 - LHIN's role
 - Voluntary or Mandatory
 - Board has a key role
 - Spectrum of Integration
(shared management to amalgamation)

Questions?
Thank you!