

# GOVERNANCE/COMPLIANCE

## Understand scope, role before CEO search

By TOM BURSEY

As a corporate director, your first responsibility is to select the best available person to become chief executive officer and lead your organization.

Directors who have served on a board for two or three terms will have participated in, on average, at least one CEO transition process for that organization.

Some reasons for a leadership transition include: planned retirement; resignation to move to another opportunity; illness (personally or family member); and termination (due to poor performance, lack of alignment with the board, or a negative impact on the corporate brand).

Obviously, for sudden CEO transitions (those that are generally less than six to nine months, but can also be weeks or even days later) the best approach is to appoint an interim CEO (can also share responsibilities in tandem or as part of a triumvirate), who could be a member of the board or the executive leadership team.

### Leadership transition committee

Since this is a relatively infrequent occurrence, likely few (if any) members of the board will have experience on a "CEO search committee." Most boards will have a human resources and compensation committee (HRCC), which may deal with CEO succession either via the leadership development process to grow internal successors to the CEO or via the contingency plan for sudden or interim replacement of the CEO.

However, the HRCC may not always have the optimal representation of the board to lead the search process. In these cases, the board chair should consider turning to the governance committee for recommendations on who should be part of the "CEO search committee," or the more aptly named "leadership transition committee."

While "search committee" or "CEO search committee" are the most commonly used terms, it is preferable to establish a "leadership transition committee" for a couple reasons.

First, any internal candidates from the executive or board might ponder the purpose of succession and leadership development oversight by the board, particularly the immediate or perceived bias in searching elsewhere for a new CEO.

In addition, a new CEO, regardless of being promoted internally or recruited externally, will be involved in a variety of relationship transitions, including with the board chair and outgoing



CEO, direct reports, and external stakeholders.

Two primary scenarios exist with any leadership transition: a retiring CEO with a 9 to 18 month lead time, or a sudden CEO departure (voluntary or non-voluntary).

In either case, the first thing that should happen is to come to an agreement among board members to appoint a leadership transition committee, and in the case of sudden CEO departure, the board should appoint an interim CEO.

It is important for the leadership transition committee to fully understand the scope of its mandate because it will have a significant role in the CEO selection process. However, the final selection should be made by the entire board.

The scope could include recommending to the full board the most ideal candidate as determined by the committee, or it could be to present to the board the top two or three candidates.

The mandate could also include an opportunity for the top few candidates to separately present their vision for the organization at an in camera board meeting.

Regardless of the scope of the leadership transition committee's mandate, it is important to establish fairly firm guidelines upfront on the compensation and benefits package, because often there is pressure at the end of the process to enhance the package in pursuit of a particular candidate.

In establishing the leadership transition committee, the board should ensure that its chair is a board member with the competencies and time to carry out the committee's mandate.

If the board chair does not have full confidence in any fellow board member to lead this process, he or she should offer to chair the leadership transition committee with up to four other members.

This should allow for enough diversity (in geography, gender, and experience).

In addition, a senior member of management (the vice-president of human resources or corporate services, for instance) should be assigned to support the committee because one of the early steps in the process should be issuing a request for proposals and the selection of an executive search consultant to support the committee's mandate.



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### Launching process

Two steps should operate in parallel at this point: the leadership transition committee should review the existing role profile (job description) for the CEO and update it as necessary.

The committee should seek input from fellow board members when updating the role profile, focusing on essential (primary) versus desirable (secondary) competencies. Strategic stakeholders for the organization could also be asked for input into the CEO role profile by either the board chair or the committee chair since this will be the basis of the search selection

process. The final version of the CEO role profile, however, should be left for determination by the committee.

Some of the most important elements to consider when finalizing the role profile include: overview of duties, key relationships and major responsibilities; key selection criteria, such as ideal experience and competencies for success (e.g., intellectual breadth, relationship and diplomacy skills, inspiring communicator and proven organizational leadership skills); as well as other personal characteristics.

The leadership transition committee will work with the selected executive search consultant to update and finalize the position requirements based on the elements deemed most important for the organization.

Another step that should operate in parallel with the role profile update is the development of a request for proposals by management that will be sent to a maximum of three executive search consulting firms.

All board members should be surveyed for input into potential search consultants and invite them to submit a proposal.

The style and competencies of individual search consultants can also vary within firms. Obviously, having a pre-existing, proven working relationship with a good search consultant(s) makes the selection of the consultant that much easier.

Since a considerable amount of effort is required for a search consultant to prepare and present a search proposal, only the top search consultants with a real chance to be given the mandate should be invited into this process.

Typical headings for request for proposals could include:

- General instructions (invitation, timing and key dates, submission date and time, contract authority and proposal delivery)

- Background (overview and current situation)

- Scope of services required

- Proposal submission requirements (contractor qualifications, qualifications of the search consultant(s) proposed, understanding of the project, approach, professional fees and guarantees)

- Mandatory requirements (e.g., the contractor will be required to make an oral presentation of the proposal to the leadership transition committee)

- Evaluation process (proposal content and commitment to the pre-selection meeting)

- Contract

The request for proposal should also include the CEO role profile as an annex. It is important to note that all of above is at the cost of the search consultant.

Using a search consultant for a CEO position is a good practice for several reasons. First, it is the job of the paid search consultant to assist the committee in meeting its schedule of activities.

The search consultant also wants to ensure the best possible selection by the committee and board because their reputation depends on it. But the greatest value of having a good search consultant is to find passive job seekers that may not be actively looking for a new role and invite them to consider the process (senior-level candidates prefer to be approached about an opportunity).

The search consultant can also help facilitate the discussion among the committee to reach a common understanding of the primary and secondary competencies that top candidates should have. The search consultant is also entrusted with the responsibility to maintain confidentiality through the process.

### The importance of fit

With a short list of candidates prepared, the next challenge for the committee is to determine who among them would be the best fit for the organization.

Is there a desire to change the culture or to maintain the existing culture? One of the most important aspects when assessing the final candidates is their 'fit-to-role.' The committee should be looking for behavioural fit to the duties and culture of the current staff, with the assistance of the executive search consultant.

Together, they will identify the most qualified candidates with the requisite knowledge, skills, and abilities outlined in the CEO role profile, while ensuring a proper fit

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# GOVERNANCE/COMPLIANCE

## Not-for-profits face many legal issues

By **TERRANCE S. CARTER**  
and **THERESA L.M. MAN**

**G**overnance of not-for-profit organizations (NFPs), whether as registered charities or non-profit organizations, and its relationship with the law is so intrinsically intertwined that it is impossible to address one without the other.

Some of the legal issues involving the governance of NFPs run the gamut from corporate law and organizational structures; trust law and fiduciary duties for the governing board; charitable law and the correlation between charitable purposes and charitable property; employment law and the interrelationship between the governing board and management; operational issues, such as privacy law, anti-spam and fundraising; as well as tax law in maintaining the tax status as either a registered charity or a non-profit organization, to name a few.

Having an effective governance strategy will require an NFP to be familiar with all these legal considerations. Best governance practice can only occur when there is knowledge of and compliance with applicable laws.

### Context of legal governance

In looking at the importance of legal issues in the governance of NFPs, it is important to understand the difference between for-profit and not-for-profit entities.

Within a for-profit context, there are shareholders who own the corporation and have the power to elect the board of directors. As equity owners, shareholders are the accountability base for the corporation's quest for profit.

An NFP, on the other hand, has no shareholders. Instead, it has members who have no equity interest in the corporation. Members are the accountability base for the corporation and generally have the power to elect directors.

Similar to a for-profit corporation, directors of an NFP have the fiduciary duty to manage or supervise the management, and to achieve the not-for-profit purposes



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of the organization as opposed to earning a profit.

Governance of an NFP in general terms means establishing, implementing and monitoring appropriate rules and policies by the NFP's governing body in order to achieve its not-for-profit purposes. Effective governance involves a variety of considerations.

First and foremost, the NFP must identify the purposes for which it was incorporated and how decisions are to be made by its governing body. Understanding these aspects will ensure that decisions are made through proper channels of authority and for the proper reasons. It is ultimately the responsibility of the NFP's governing board to focus on achieving the purposes of the organization.

In establishing a proper governance regime, it is also important for NFPs to ensure that appropriate structural and operational due diligence is followed. This means that the board must have a good understanding of the structure of the organization and how decisions by the board and members are made.

In order for effective decisions to be made, a meeting must be held by those charged with making the decisions in question. However, directors and officers of NFPs are often not familiar with the applicable rules that apply to holding a meeting of the board or the mem-

bers. Some of the key issues to consider when holding a meeting are outlined below.

### Before calling meetings

How and when meetings are to be held will be based on a variety of considerations. For instance, before calling a meeting, it is important to determine the legislation under which the NFP was incorporated because different incorporating statutes may create different requirements for the NFP. The statute may also contain rules on how meetings must be held.

It is also necessary to look at organizational documents, such as letters patent or articles of incorporation. These documents sometimes contain provisions that are relevant to the conduct of meetings. Generally, however, the most relevant and informative document for meetings is the general operating bylaw of the NFP. It is necessary to ensure that the by-law was properly adopted and it is compliant with applicable legislation.

It is also important that proper notice is provided since invalid notice may affect the validity of meeting decisions. Notice must be provided in order to ensure that persons who are entitled to attend a meeting are aware of the meeting. Notice must also be provided in a manner which is bona fide and clear. In general, who is entitled to receive notice will depend on whether it is a meeting of the directors or the members of the organization.

### Board meetings

Directors, as the governing body, have the duty to manage or supervise the management of the activities and affairs of a corporation as codified in both the *Canada Not-for-profit Corporations Act* and the yet to be proclaimed Ontario's *Not-for-Profit Corporations Act*.

Board meetings provide directors with the opportunity to express their views before coming to a collective decision. Resulting board resolutions constitute the authority for dealing with third parties and to direct the course of the corporation.



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### Members' meetings

In contrast to board meetings, members' meetings are held to allow members to call the board to account. Who qualifies as a member will vary depending on an NFP's incorporating documents. However, even if members and directors consist of the same group of individuals, separate board meetings and members' meetings must be held to transact business as required.

In general, there are two types of meetings for members: general meetings (for which all members of the corporation are invited to attend) and meetings of a particular class or section of the members.

Different purposes and results can occur with regard to both general and class meetings of members. As well, there are two types of general meetings of members: annual meetings (which must be held once per year in order to transact certain transactions and elect directors) and special meetings (which are called from time to time as required.)

### Recording minutes

Given the importance of the business that is transacted at meetings, NFPs must develop and implement careful methods to record decisions of the board and members. This is done by preparing and keeping proper meeting minutes

Incorporated NFPs are generally required to maintain minutes of meetings by the corporate statutes under which they are incorporated. In addition, other statutes may also have books and records requirements that include maintaining minutes (e.g., the *Income Tax Act*).

The purpose of recording minutes is to provide a concise record of decisions and deliberations. In the absence of evidence to the contrary, minutes of meetings are records of proof concerning what transpired at the meeting.

As such, minutes also serve to inform directors, members and agents of the NFP of such decisions. Minutes also provide a means of informing the courts of decisions made by the organization with regard to future litigation or a regulator, such as the Canada Revenue Agency in the event of a tax audit.

### A complex exercise

Exercising appropriate legal governance of an NFP is a complex exercise that requires appropriate due diligence and consideration across a variety of areas of law.

It involves careful balancing of director responsibility and the board's fiduciary duty to the purposes for which the NFP was incorporated. Governance involves compliance with legislation, letters patent/articles, by-laws and an array of other areas of the law. Governance is not achieved unless compliance with the law is accomplished.

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## Behavioural fit an important consideration

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with the organization's culture.

To ensure a proper fit and to support the committee's deliberations, a statistically validated behavioural profile should be sought from the qualified candidates to better understand and appreciate how their individual

traits will translate into day-to-day leadership, both internally to the organization as well as to the external communities in which the organization operates.

In order to fairly consider candidates' suitability to the CEO role, the committee should establish a range of desirable behavioural benchmarks that reflect the board's

view of the leadership style required for success in the role, with the assistance of an expert advisor in assessment services.

### A word on costs

Assume the cost will be \$100,000. While this is just an estimate (it can cost much more or slightly less), it is a good

starting point which includes: search consultant fees (most firms will offer fixed fees, not a percentage of compensation); travel for candidates, for committee members and for the search consultant; any advertising; and fees for assessment services to help ensure the selected candidate is the best fit.

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