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IMAGINE CANADA WEBINAR

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Holding Board Meetings: 101

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SETTING THE STAGE

- This presentation reviews issues regarding board meetings of not-for-profit organizations – what to do before and during meetings



- This presentation does not address members' meetings
- This presentation reviews legal issues, not governance issues such as how to be an effective meeting chair, how to encourage meeting participants to voice their opinions, etc.
- Basic concepts and general rules, not technical rules
- Important to hold meetings properly according to legal requirements, otherwise might affect the validity of the decisions made at the meetings

OVERVIEW

- Preliminary comments
- Considerations before the meeting
- Issues that may arise during the meeting
- Minutes of meetings

BEFORE THE MEETING

Where to find the rules for the meetings

Review of documents to understand the rules

Purpose and nature of meeting

Calling the meeting – notice

Where to hold the meeting

1. Where to Find the Rules for Meetings

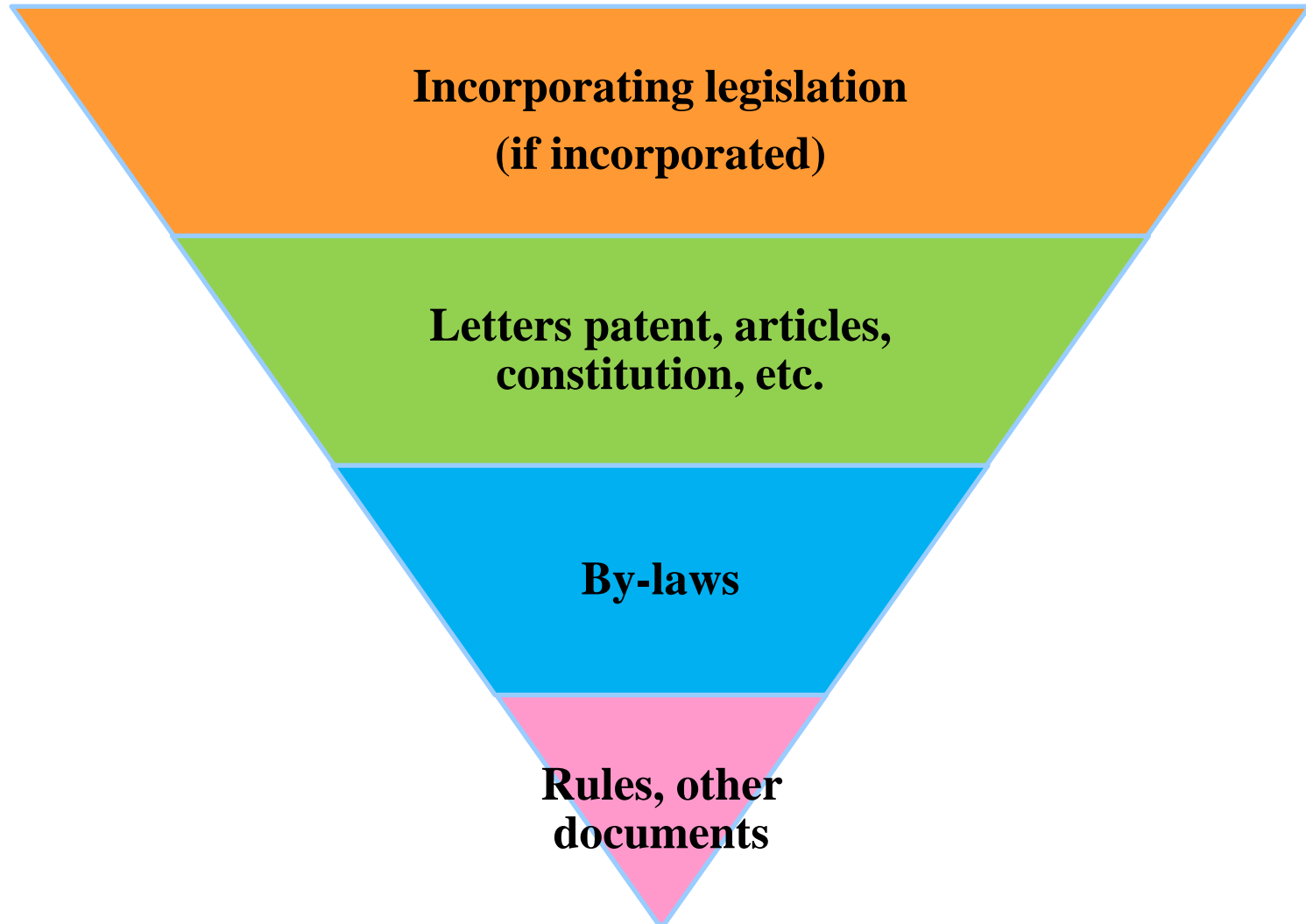
- Find copies all relevant documents
- What documents are relevant varies, depending on the governance and structure of the organization, e.g.,
 - Incorporated or not incorporated
 - Part of a national or international structure, or denomination
- Ensure documents have been properly adopted by the organization – for CCA corporations, they must also be approved by Industry Canada
- Ensure documents are up-to-date



- If incorporated
 - Incorporating legislation – e.g.,
 - *Canada Corporations Act (CCA)* – should have been continued under the CNCA by October 17, 2014
 - *Canada Not-for-profit Corporations Act (CNCA)*
 - *Ontario Corporations Act (OCA)*
 - *Ontario Not-for-profit Corporations Act (ONCA)* (not yet proclaimed)
 - Special acts
 - Letters patent, supplementary letters patent
 - Articles of incorporation, articles of continuance, articles of amendment
 - By-laws and by-law amendments – e.g., amending by-laws or resolutions in minutes of meetings

- If not incorporated
 - Constitution
 - Declaration of Trust
 - By-laws and by-law amendments
- Rules of procedure – e.g., Robert's Rules, Bourinot's Rules, Nathan's Rules
- Other relevant documents of the organization – e.g.,
 - Policy on meetings
 - Operation manuals of international entities or denominations
 - Agreements with other entities
- Common law (case law)

HIERARCHY OF AUTHORITY OF DOCUMENTS



2. Review Documents to Understand the Rules

- Understand how the rules work
- Understand which rules in which documents trump which rules
- Follow hierarchy of documents referred to above
- For example - CNCA/ONCA provides both a general framework and sets of rules for corporations to operate
 - Three types of rules in CNCA/ONCA
 - Mandatory Rules - Cannot be overridden by the articles or by-laws
 - Default Rules - By-laws or articles can override
 - Alternate Rules - Articles/ by-laws can include certain optional rules provided the Act

- CNCA - lots of details in the regulations - “prescribed” vs “regulations”
- ONCA - less details in the regulations
- Need to refer back and forth between the Act and the Regulations
- Articles
- By-laws
- CNCA - unanimous member agreement for non-soliciting corporations

3. Purpose and Nature of Meeting



- Determine what the nature of meeting is, e.g.,
 - Regular board meeting vs special meeting to discuss certain issues?
 - An urgent board meeting to discuss urgent issues?

4. Calling the Meeting – Notice



- Who may call a meeting?
- Calling of a meeting must be bona fide – e.g., the meeting cannot be deliberately scheduled at such time and date that is intentionally to be convenient for some but not others who are entitled to attend the meeting
- Need to give proper notice of a meeting - not just give an agenda
- An invalid notice may affect the validity of the decisions made at the meeting

- Purpose of a notice
 - Ensure persons who are entitled to attend a meeting are aware of the meeting
 - Allow persons to plan to attend and prepare for the meeting
 - Allow persons to make an informed decision whether to attend the meeting

- Essential elements in a notice of meeting - should be in writing
 - State date, time and place of the meeting
 - State purpose of the meeting
 - State nature of the business in sufficient detail to permit the recipients to form a reasoned judgment on the business
 - Comply with statutory requirements as to form and content (for corporations)
 - Check by-laws to see if anything else is required to be contained

- Be clear, honest, precise, unambiguous, comprehensive
- Be issued on good authority
- Be given in the required proper manner (e.g., personal, mail, email, etc.)
- Be given within required length of time
- Be sent to everyone entitled to receive notice

- Who to send notice to?
 - Who are directors?
 - Directors qualification requirements?
 - Who are the directors?
 - Whether the directors were duly elected or appointed?
 - *Rexdale Singh Sabha Religious Centre v. Chattha*, Ontario Court of Appeal decision which deals with non-compliance with the OCA, e.g.:
 - Never adopted any by-law after incorporation
 - Directors and members are the original incorporators

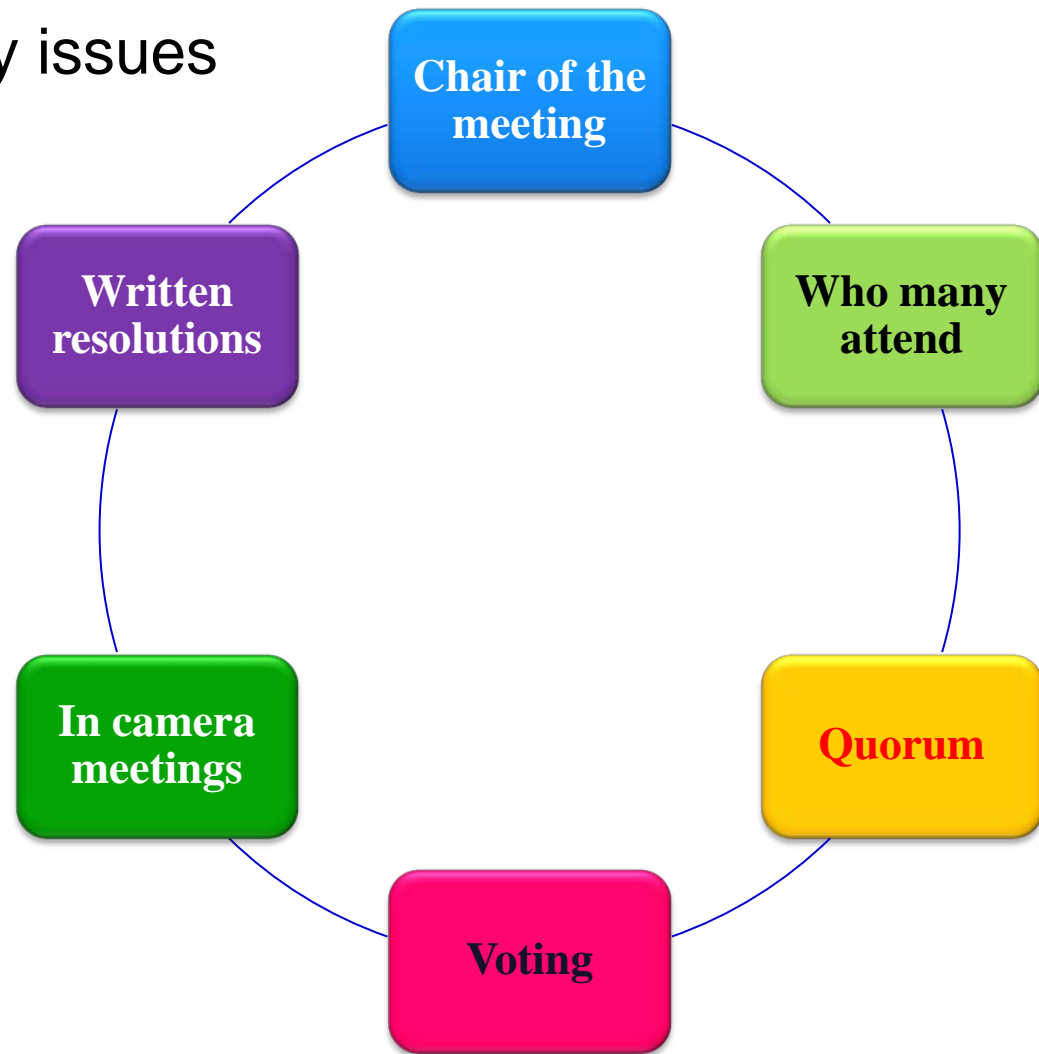
- Who else is entitled to notice?
 - For example - liaison representatives of related organizations or founders of the organization
- Who else does the organization also want to give notice to?
 - CEO, senior staff, etc.
 - Auditor – when the board reviews draft financial statements
- Can notice be waived and how to waive notice?
 - Waiver should be in writing
 - Should still give notice to a director who had verbally indicated that he/she cannot attend the meeting
- Failure to give proper notice
 - May invalidate the business transacted at the meeting

5. Where and How to hold the meeting

- Where to hold the meeting?
 - CNCA/ONCA - board meetings – anywhere unless the articles or by-laws otherwise provide
- Can the meeting be held electronically?

DURING THE MEETING

- Selection of key issues



1. Chair of the Meeting



- Role of chair of meeting
 - Ensures the meeting proceeds in an orderly manner and in accordance with the applicable rules
 - Acts impartially in good faith, with a view of the ordering conduct of the meeting, act in accordance with the will of those entitled to vote at the meeting, must not act in an oppressive manner
 - Acts as facilitator and keeps the meeting going
 - Responsible for the manner of conducting votes, granting adjournments
 - Settle points of contention – e.g., who is entitled to attend the meeting, who is entitled to vote at the meeting, declines to submit motions that infringe upon the rules of procedure, etc.

- Who may chair the meeting?
 - Usually the board chair or vice chair
 - What if they have conflict or not available?
 - Can directors move to replace the chair of the board meeting? – Depends on the by-laws
- Court may set aside a meeting if the chair fails to preside the meeting in proper manner , e.g.,
 - Not allow questions be put or allow questions be answered
 - Not follow property meeting procedure

2. Who May Attend

- Usually only directors are entitled to attend
- Persons entitled to receive notice does not necessarily mean the right to attend
- Who else is entitled to attend vs who else is invited to attend? For example
 - Liaison representatives of related organizations or founders of the organization
 - CEO, senior staff
 - Founder

- What if a director refuses to attend a board meeting?
 - No legal right to compel a director to attend board meetings
 - Possible remedies that sometimes may be available – for example
 - remove that director from the board or sue the director for breach of fiduciary duty
 - Provide in the by-law that the failure of a director to attend x number of meetings would be deemed to have resigned

3. Quorum

- Quorum is the minimum number of persons present at the meeting in order to transact business
- Should be set out in the by-laws or constitution, etc.
- If by-law is silent, are there rules elsewhere? E.g., default rules in CNCA/ONCA
 - A majority of the number of directors or a majority of the minimum number of directors required by the articles constitutes a quorum at any meeting of directors
 - At common law, majority of the persons entitled to attend and vote at the meeting
- Must maintain quorum throughout the meeting
- What if a director refuses to attend a board meeting so that it does not have quorum to transact business?

4. Voting

- One vote per person
- Approval level
 - Should be set out in the by-laws – e.g., simple majority, 2/3, etc.
 - Based on
 - Number of votes cast
 - number of persons attended meeting
 - number of persons entitled to vote
 - 50% plus 1 is not necessarily the same as simple majority

- When deciding what is a suitable approval level, consider
 - Not too high so that it is achievable
 - Not too low so that the decision would represent a reasonable number of those entitled to vote at the meeting and not be hijacked by a small group
- No absentee votes permitted for board meetings – no proxy votes

- Can the chair have a casting vote?
 - At common law, chair does not have the right to have a casting vote
 - By-law may provide the chair with a casting vote
 - Intended to remedy tie votes
- What if someone did not attend a meeting?
 - Should not affect the voting results
 - CNCA/ONCA - a director who did not attend a board meeting is deemed to have consented to any resolution passed or action taken at the meeting unless the director dissents within 7 days after becoming aware of the resolution or action

- What if someone abstains from voting?
 - How an abstention affects the voting results will depend on how the by-laws are drafted
 - In general, an abstention would not necessarily mean a “no” vote unless the by-laws otherwise provide – for example:
 - If a motion requires unanimous vote to approve, then an abstention would in practice be a no vote
 - If a motion requires a majority of the votes cast to approve, then an abstention would not affect the voting results
 - CNCA/ONCA - a director who was present at a board meeting (and abstained) is deemed to have consented to any resolution passed or action taken at the meeting unless the director dissents

- Procedure for motions
 - Complex procedures, depends on the applicable rules and governing documents
 - General process
 - Someone moves a motion
 - Someone seconds a motion
 - Open the motion to discussion
 - Close the discussion and call a vote
 - If a motion is amended, in general
 - Someone moves the amendment (state exactly how the motion is to be amended), then someone seconds the amendment
 - Then the amendment is discussed and voted
 - If the meeting voted to approve the amendment, then the amended motion would then be discussed and voted

- Method of voting
 - Complex rules, depends on the applicable rules and governing documents
 - For example
 - Voice vote
 - Show of hands
 - Ballots
 - Other variations
- Decision by consensus – needs to define what it means and what to do if no consensus is reached

5. In Camera Meetings

- Sometimes, a board meeting may need to be held in camera
- For sensitive or confidential meetings
- Only directors may attend, no staff, etc.
- Have a policy of who should attend, how to keep discussions confidential, etc.



6. Written resolutions

- Directors generally make decisions at meetings
- Incorporating legislation may permit written resolutions be adopted in lieu of holding meetings
- OCA/CNCA/ONCA – directors may adopt written resolutions provided that they are signed by all directors entitled to vote, i.e., in practice a unanimous consent

MINUTES OF MEETINGS

- Clear minutes must be kept for all board meetings and members' meetings
- Purpose of minutes
 - Provide a concise record of deliberations and decisions
 - Inform directors, members and agents of the organization
 - Inform the courts of decisions made by the organization in future litigation
- Who are entitled to minutes?
 - Rules in the incorporating legislation

- What goes into minutes?
 - Date, time, place of meeting
 - Nature of meeting
 - Who attended the meeting – include guests, when a person departed, etc.
 - Procedural formalities – e.g., call to order, quorum, etc.
 - Order of agenda or topics
 - Mover, seconder, presenter
 - Summary of key points of discussion
 - Decisions made, any dissents recorded, any conflicts declared
 - Termination of meeting

- What should not be included in minutes?
 - Personal or emotional views
 - Excessive details
 - Verbatim transcription of the meeting
 - Who said what
 - Privileged and/or confidential information
- Who takes minutes at meetings?



- Approval of minutes?
 - At common law, minutes do not need to be approved
 - But lack of approval may lessen the value of the minutes as evidence in future litigation
 - Helpful for minutes to be reviewed and approved to ensure it is accurate – therefore minutes should be carefully reviewed by directors before approving them
 - Directors should ensure that the basis for decisions on important matters are accurately noted in the minutes
 - Directors who dissented at a meeting should ensure that the dissent is noted in the minutes

- Signing of minutes
 - Not legally required, but good practice for the chair and secretary to sign minutes once approved
- Have a policy on who and how to keep and maintain minutes
- Minutes of in camera meetings/sessions
 - Still need to keep minutes
 - Record decisions made at in camera session in the main
- How long to keep minutes?
 - Rules in the incorporating legislation
 - Rules in the *Income Tax Act* - Must be kept for as long as the charity is registered and for at least 2 years after revocation of the charity or, in the case of a corporation, for 2 years after dissolution

- Should directors keep their notes of meetings?
 - Advantages
 - To remind the director what were transacted at the meeting
 - To assess whether the draft minutes are accurate
 - To evidence due diligence of the director
 - Disadvantages
 - The notes may be used in litigation and therefore will no longer be private
 - Can only support the views of the director who took notes, may not be accurate
 - Consider whether to adopt a policy to have all notes destroyed once the minutes have been approved

CONCLUSION

- Important to hold meetings properly according to legal requirements, otherwise might affect the validity of the decisions made at the meetings
- There are unique rules that apply to non-share capital corporations
- Courts have indicated that they are prepared to intervene where the procedures followed do not reflect compliance with the incorporating statute, incorporation documents or the by-laws of the corporation



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