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Imagine Canada: Legal Issues in NFP Governance

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Members Meetings 101: Avoiding Members' Machinations

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PRELIMINARY COMMENTS

- Important to hold meetings properly according to legal requirements, otherwise might affect validity of the decisions made at the meetings
- This presentation addresses membership meeting issues, not board meetings which were reviewed in #2 of this Imagine Canada webinar series by Theresa Man on October 29, 2015
- 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 are explained but not the technical rules

SERIES OF WEBINARS ON HOLDING MEETINGS

Preparation for meetings

- #1 of the series of Imagine Canada webinars on October 1, 2015, by Terrance Carter

Conduct of meetings

- Board meetings –#2 of the series of Imagine Canada webinars on October 29, 2015 by Theresa Man
- Members' meetings – today #3 of the series of Imagine Canada

Minutes of meetings

- #4 of the series of Imagine Canada webinars on December 10, 2015, by Ryan Prendergast

OVERVIEW OF TOPICS

Preliminary

- Why hold members' meetings?
- Where to find rules for meetings?

Preparation

- Calling the meeting [notice]
- Where to hold meetings?
- Means to hold meetings
- Making decisions without meeting
- Other documents before meeting

Conduct

- Chair
- Secretary
- Order of business
- Quorum
- Voting

1. WHY HOLD MEMBERS' MEETINGS

- Members vs directors
 - In general, not-for-profit corporations and unincorporated associations have members, but members have no equity interest
 - Trusts do not have members
- Members' meetings are held to allow members to exercise control over the corporation and to call the board to account
- 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
- There are different types of members' meetings
- General meetings (all members are invited to attend) vs meetings of a particular class or section of the members

- Annual meetings (AGMs)
 - Must be held once a year
 - Purpose is to transact certain routine business, such as appoint auditors, elect directors, receive financial statements, etc.
 - Other special business may also be transacted if proper notice is given
- Special meetings
 - May be called from time to time as necessary
 - To transact business not usually dealt with at AGMs, e.g., adopt by-law amendments, remove directors, elect directors to make up quorum for the board, etc.
- Requisitioned meetings - Meetings called at the request of the members (legislation usually contains detailed rules on how to call these meetings)
- Court-called meetings - Meetings ordered by the courts
- Information meetings – Held for discussion only, no decisions will be made

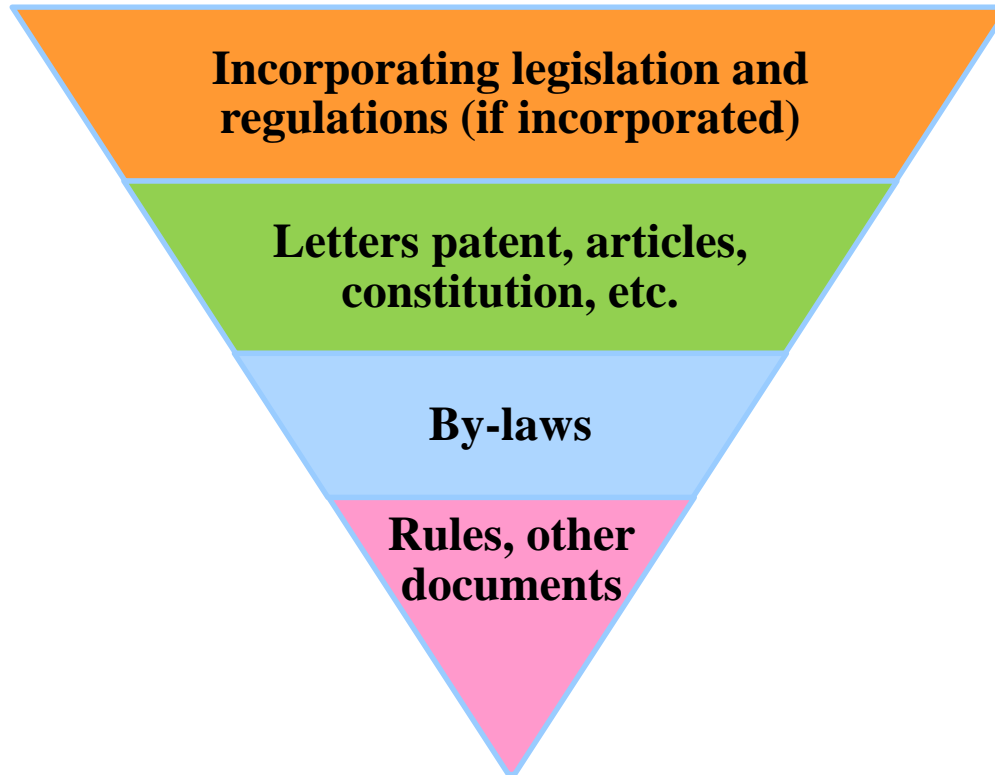
2. WHERE TO FIND THE RULES FOR MEETINGS

- Find copies of 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
- 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
 - Other governing legislation
 - 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



- Review documents to 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 in the Act

3. CALLING THE MEETING – NOTICE

- A meeting is called by giving “notice” of the 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 of meeting
 - Ensures persons who are entitled to attend a meeting are aware of the meeting
 - Allows persons to plan to attend and prepare for the meeting
 - Allows persons to make an informed decision whether to attend the meeting
 - For members' meetings where members have the right to exercise absentee votes (e.g., proxy, mailed in ballots, etc.), allows members who cannot attend the meeting to decide whether and how to exercise their absentee votes

- Essential elements in a notice of meeting - should be in writing
 - State date, time and place of the meeting
 - State purpose of the meeting
 - Give notice of special business to be transacted at the meeting - state nature of that 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)
 - 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

- **When** to call members' meetings?
 - Different rules when to call AGMs, special meetings, requisitioned meetings
 - AGM - corporate legislation has rules when to call an AGM
 - CNCA - AGM must be held within 18 months after incorporation, then not later than 15 months after previous AGM, but not later than 6 months after the end of last financial year
 - ONCA - similar to CNCA, but no requirement to hold it within 6 months after the last financial year

- **Who may call** members' meeting?
 - CNCA/ONCA/OCA - in general, directors may call a special meeting at any time
 - CNCA/ONCA/OCA - also provide specific procedures for members to requisition a members' meeting be held - need to refer to the incorporating legislation for specific requirements in order to requisition meeting
 - CNCA/ONCA/OCA - directors and voting members may apply to court to order that a meeting be called
 - e.g., where it is not practicable to call the meeting within the time or in the manner in which it is otherwise to be called

- **Who to send notice to?**
 - Members - but who are they?
 - Membership lists may not be up to date or accurate
 - Were members properly admitted?
 - Commonly occurs in situations involving churches or large membership-based charities
 - By-laws may unintentionally create members, e.g., automatic membership given to volunteers or for donors over X\$
 - *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 as subsequent directors and members never properly elected or admitted

- Other persons
 - Under CNCA/ONCA/OCA, directors, and the public accountant/auditor are entitled to receive notice
 - Others as set out in the by-laws or with the consent of the meeting - e.g., liaison representatives of related organizations, founders of the organization, CEO, senior staff, etc.
- CNCA/ONCA allows the board to fix a “record date” for various purposes, including determining members entitled to receive notice of a meeting of members

- **How** to give notice? - e.g., mail, courier, fax, email, phone call, etc.
 - OCA - regular mail or personal notice, no email notice
- **How long** to give notice? E.g.,
 - CNCA - various time frames for notice depending on the method of service of the notice, need to refer to Regulations
 - ONCA - 10 to 50 days of notice, but does not specify method of notice
 - OCA - minimum 10 days notice, but charitable corporations may give notice by publication at least once a week for two consecutive weeks next preceding the meeting in a local newspaper
- **Can notice be waived** and how to waive notice?
 - Waiver should be in writing
 - Should still give notice to a member who had verbally indicated that he/she cannot attend the meeting

4. WHERE TO HOLD MEMBERS' MEETINGS

- CNCA [ONCA]
 - Held in Canada [Ontario] at the place provided for in the by-laws, or at a place determined by the directors if the by-law is silent
 - Can be held outside of Canada [Ontario] if the place is specified in the articles or all members entitled to vote at the meeting agree to meet at that place
- OCA
 - Held at the head office in Ontario, but the by-laws or letters patent may allow meetings to be held anywhere in Ontario
 - Can be held outside of Ontario if the place is specified in the letters patent

5. MEANS TO HOLD MEMBERS' MEETINGS

- OCA - must be held in person, members cannot participate by teleconference or other electronic means
- CNCA and ONCA
 - Can be held in person
 - Members may participate at members' meeting by telephonic, electronic or other communication facility if the corporation makes it available, unless the by-law disallows electronic participation
 - By-laws may permit an entire members' meeting be held electronically
 - Electronic method used must permit corporation to confirm identity of each voter, but present the vote anonymously without revealing how individuals voted
- Need to ensure that teleconference system or electronic platform complies with these requirements

6. MAKING DECISIONS WITHOUT HOLDING A MEETING

- Members generally make decisions at meetings
- Incorporating legislation may permit written resolutions be adopted in lieu of holding meetings
- OCA/CNCA/ONCA - members may adopt written resolutions provided that they are signed by all members entitled to vote
- This means unanimous approval
- Unanimous approval is required since the members do not have an opportunity to discuss the matter at a meeting

7. DRAFTING OTHER DOCUMENTS BEFORE THE MEETING

- Various types of documents for members' meetings need to be prepared in advance, *e.g.*,
 - Agenda
 - Proxies (refer to governing statute for requirements)
 - Ballots, if applicable
 - Detailed agenda for the chair (chair's script)
 - Scrutineers' reports

- Other preparation - for example
 - Tracking absentee votes
 - Instructing scrutineers and other personnel
 - Making physical arrangements for the venue
 - Preparing strategies to deal with proxy contests
 - Planning for other issues that may come up at the meeting

8. 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, acts 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
 - Settles 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, or as set out in the by-laws
 - What if they have conflict or not available?
 - Can directors move to replace the chair of the 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.,
 - Does not allow questions to be put or allow questions to be answered
 - Does not follow proper meeting procedure
- Sometimes it may be necessary to appoint an independent person to chair members' meetings
- Sometimes, a draft script (or a checklist) may be prepared for the chair for routine meetings or business, e.g., AGMs

9. SECRETARY OF THE MEETING

- Duties of the secretary at a members' meeting
 - Confirm proper notice was given
 - Take complete notes of the meeting and prepare minutes
 - Have the minutes of last meeting available as a resource
- Generally minute taking is the duty of the corporate secretary, but can be delegated to staff
- If the corporate secretary is not at the meeting, someone else can be appointed as the recording secretary

- Duties of the secretary after the meeting
 - Clear the room of confidential materials accidentally left behind by the attendees
 - Implement items delegated to the secretary
 - Communicate the decisions to relevant persons, as directed by the members
 - Prepare draft minutes

10. ORDER OF BUSINESS

- Usually established by the board, unless the by-laws requires certain items be included or excluded
- Matters set out in the notice of meeting should be included
- Heading “other business” should only deal with non-substantive or informal matters

- Sample order of business for an AGM
 - Call to order by the chair
 - Announcement of quorum being present, notice having been provided (or waived - table waiver or consents)
 - Approve minutes of previous meeting
 - Receipt of reports from A, B, C
 - Receipt of financial statements and auditor's report
 - Appoint auditors and fix auditor's remuneration
 - Elect directors
 - Special business A
 - Special business B
 - Other (new) business
 - Terminate meeting

11. 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
 - Members' meetings - a majority of the members entitled to vote at the meeting
 - At common law, majority of the persons entitled to attend and vote at the meeting
- Is the presence of certain persons required, e.g., founder?

- When deciding what is a suitable quorum, consider
 - Not too high so that it is achievable
 - Not too low so that the meeting would represent a reasonable number of those entitled to vote at the meeting and not be hijacked by a small group
 - Should absentee votes be included in the quorum count for members' meetings?
- Losing quorum?
 - Members' meetings - CNCA - if a quorum is present at the opening of a meeting of members, the members present may, unless the by-laws otherwise provide, proceed with the business of the meeting, even if a quorum is not present throughout the meeting

12. VOTING

- Number of votes of each person - depends on governing document
- Approval level
 - Should be set out in the by-laws
 - 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

- Are absentee votes permitted?
 - CNCA - must be specifically permitted in the by-law, and limited to proxy, mailed in ballots, electronic ballots as set out in the Regulations
 - OCA - members have the right to vote by proxy
 - ONCA - members have the right to vote by proxy; but if the by-laws allow for voting by mail or by telephonic or other electronic means, then proxy is optional

- 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
- What if someone did not attend a meeting?
 - In general, not being present would not necessarily mean a “no” vote unless the by-laws requires a majority of the persons entitled to vote to approve a motion
- What if someone abstains from voting?
 - In general, not being present or an abstention would not necessarily mean a “no” vote unless the by-laws:
 - requires a majority of the votes cast to approve
 - requires a majority of the persons entitled to vote to approve

- 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

- Voting methods
 - Complex rules, depends on the applicable rules and governing documents
 - For example
 - Voice vote
 - Show of hands
 - Ballots
 - Other variations
- Decision by consensus
 - CNCA - need to define what “consensus” means and what to do if no consensus is reached (e.g. go to a vote if no consensus)
 - ONCA - silent

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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