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**Imagine Canada:  
Legal Issues in NFP Governance  
October 29, 2015**

**Your Guide to Holding Meetings 101  
"Learning to Do It Right"**

**Board Meetings 101:  
Avoiding Directors' Tribulations**

**By Theresa L.M. Man**

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# WHAT IS THIS ABOUT?



- Important to hold meetings properly according to legal requirements, otherwise might affect the validity of the decisions made at the meetings
- This presentation addresses board meeting issues, not members' meetings - to be discussed at #3 of the series of Imagine Canada webinars on November 26, 2015, by Jacqueline Demczur
- 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 technical rules

## SERIES OF WEBINARS ON HOLDING MEETINGS

### Preparation for meetings

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

### Conduct of meetings

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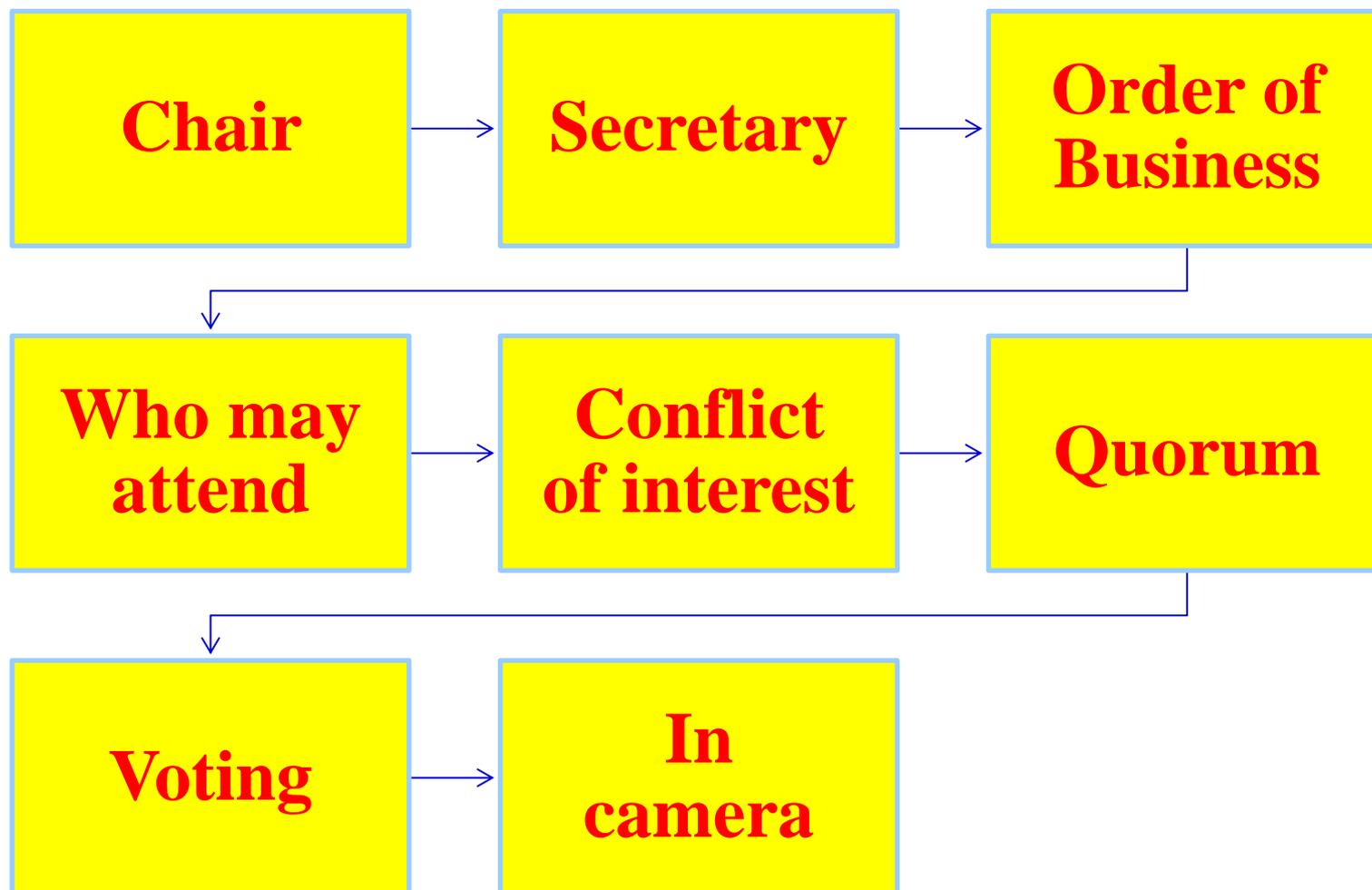
- Board meetings – today #2 of the series of Imagine Canada webinars
- Members' meetings - #3 of the series of Imagine Canada webinars on November 26, 2015, by Jacqueline Demczur

### Minutes of meetings

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- #4 of the series of Imagine Canada webinars on December 20, 2015, by Ryan Prendergast

## TOPICS FOR CONDUCT OF BOARD MEETINGS



# 1. PREPARATION ISSUES

- See #1 of the series of Imagine Canada webinars on October 1, 2015, by Terrance Carter
  - Legal issues in NFP governance
  - Why hold board meetings
  - Rules for board meetings
  - Review documents to understand the rules
  - Calling the meeting - notice
  - Where to hold board meetings
  - Means to hold board meetings
  - Making decisions without holding a board meeting

## 1A. WHY HOLD BOARD MEETINGS?

- Directors have the duty to manage or supervise the management of the activities and affairs of a corporation
- Board meetings provide directors the opportunity to express their views before coming to a collective decision
- Board resolutions constitute the authority for dealing with third parties and to direct the course of the corporation

## 1B. RULES FOR BOARD 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

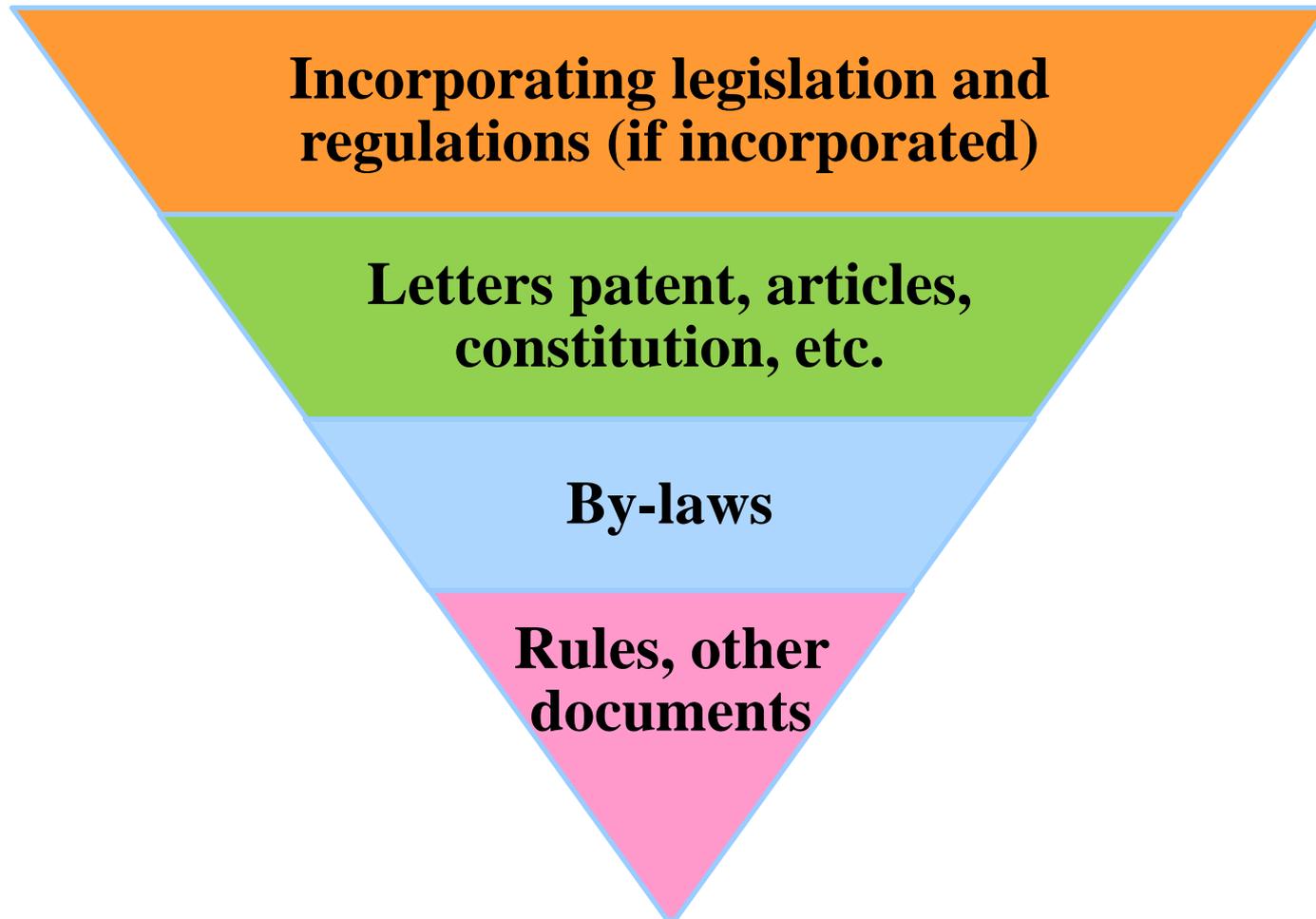


- If incorporated
  - Incorporating legislation - e.g.,
    - *Canada Corporations Act (CCA)* - should have continued under the CNCA by October 17, 2014
    - *Canada Not-for-profit Corporations Act (CNCA)*
    - *Ontario Corporations Act (OCA)*
    - *Ontario Not-for-Profit Corporations Act (ONCA)* (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
- Other applicable legislation - e.g.,
  - Public hospitals incorporated under the OCA are also subject to the Ontario *Public Hospitals Act*
  - Ontario *Charities Accounting Act* in Ontario and *Trustee Act* may impact what the governing board can and cannot do when dealing with charitable property and/or investments

- 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



- Questions/scenarios
  - We do not have a by-law. All we have are the letters patent and a constitution.
  - We do not have members, we only have directors.
  - We never hold AGMs or members meetings. We only have annual board meetings.
  - We had a fire and all records were burnt.
  - We have a former director who refused to return the records.

## 1C. 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 general framework and 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

- Questions/scenarios
  - Do we need a lawyer to help us understand the rules?
  - We have always done it this way in the past, so why should we follow the by-law today?
  - Let's ask board member and lawyer "Bob" for his opinion.

## 1D. CALLING THE MEETING – NOTICE

- Purpose of notice - why give 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
- An invalid notice may affect the validity of the decisions made at the meeting
- Need to give proper notice of a meeting - not just give an agenda

- 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?
- 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

- When to call board meetings?
  - CNCA/ONCA/OCA is silent
  - CNCA requires an “organization meeting” after incorporation to make by-laws, appoint officers, admit members, etc.
  - No legal requirements for any minimum or established number of board meetings per year - sometimes provided for in by-laws
- Who may call a board meeting?
  - CNCA/ONCA/OCA is silent
  - Depends on by-laws - e.g., the chair, at the request of x number of directors, etc.

- Essential elements in a notice of meeting
  - 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
  - Should be in writing

- 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 the 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 were 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

- Questions/scenarios
  - Can we send notice of board meetings by email?
  - Our staff sends written materials in a board package before a board meeting. The materials often include confidential information. How do we keep the information confidential?
  - Can directors send their own notices about topics they wish to discuss?

- Questions/scenarios
  - Two of the directors never review any materials sent to them in the board package in advance of the board meetings. At the meetings, they ask a lot of questions that have already been addressed in the board package. What can we do to keep the meeting going without wasting time to address the questions from these two directors?
  - Our by-law requires 10 days notice be given to call a board meeting. We have an urgent matter that needs to be decided right away. What can we do?
  - We are going to be discussing a matter that a board member has a conflict about. Do we have to give that board member notice?

## 1E. WHERE TO HOLD BOARD MEETINGS

- CNCA/ONCA - board meetings can be held anywhere unless the articles or by-laws otherwise provide
- OCA - generally held at the place where the head office of the corporation is located, but by-laws may allow meetings be held anywhere

## 1F. MEANS TO HOLD BOARD MEETINGS

- In person meeting is always an option
- OCA, ONCA, CNCA - board meetings can be held electronically but have specific rules
- OCA - If *all the directors of a corporation present at or participating* in the meeting consent, a meeting of directors may be held by such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously (but by-laws can change these rules)

- ONCA - If *all the directors of the corporation consent*, a director may participate in a meeting of the directors by telephonic or electronic means that permits all participants to communicate adequately with each other during the meeting (but by-laws can change these rules)
- CNCA - same as ONCA but refers to “by means of a telephonic, an electronic or other communication facility”

- Questions/scenarios
  - Can a board meeting be held by conference call?
  - Can a board meeting be held by Skype?
  - No one seems to know what is meant by “by telephonic or electronic means”?
  - Our board makes decisions electronically by circulating a question by email and asking directors to respond by email of their vote.

## 1G. MAKING DECISIONS WITHOUT HOLDING A BOARD MEETING

- 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
  - This means unanimous approval
  - *Unanimous* approval is required since the directors do not have an opportunity to discuss the matter at a meeting

## 2. 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
  - 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 proper meeting procedure
- Sometimes, a draft script (or a checklist) may be prepared for the chair for routine meetings or business

- Questions/scenarios
  - If the board chair is not able to attend and we have a few vice board chairs, who decides which vice board chair would chair the meeting?
  - There is a contentious issue that the board needs to decide on. Would it be appropriate to invite an independent third party to chair our board meeting?
  - I think that the board chair is biased. How do I challenge the decisions of the chair and when can I do so?

### 3. SECRETARY OF THE MEETING

- Duties of the secretary at a board 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 is the duty of the corporate secretary, but the minute taking 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 board's decisions to relevant persons, as directed by the board
  - Prepare draft minutes
- Minutes - will be discussed at #4 of the series of Imagine Canada webinars on December 20, 2015, by Ryan Prendergast

## 4. 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



- Usual order of business for a board meeting
  - 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
  - [Declaration of conflict of interest]
  - Matters arising from minutes of previous meeting
  - Reports from officers, committees, directors, staff, etc.
  - Consider business x
  - Consider business y
  - Other (new) business
  - Terminate meeting

## 5. 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



Yes, I will attend!

- 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 result in the director being deemed to have resigned

- Questions/scenarios
  - We have an item on the agenda for an up-coming meeting that is a sensitive issue. One of the directors wants to bring his lawyer to a board meeting. Another director wants his lawyer to attend the board meeting on his behalf. Can they do so?
  - Can a director record a meeting to seek advice from his lawyer who cannot attend or to share with a director who is absent?
  - I am the CEO of an organization. What is my role at board meetings?

## 6. CONFLICT OF INTEREST

- Directors have fiduciary duties at common law to put the interest of the corporation ahead of his or her own interest
- Failure to fulfill duties can result in exposure to personal liability for the director
- OCA - directors must disclose conflict of interest in a proposed contract
- ONCA/CNCA - directors and officers must disclose conflict of interest in a material contract/transaction, and there are statutory specific requirements regarding the timing of disclosure and continuing disclosure

- CNCA - following disclosure, the director cannot vote, with a few exceptions
- ONCA - following disclosure, the director *shall not attend* any part of a meeting of the directors during which the contract or transaction is discussed *and shall not vote* on any resolution to approve the contract or transaction, with a few exceptions
- ONCA - where no quorum because a director is conflicted out, the remaining directors are deemed to constitute quorum for the purpose of voting on that resolution - CNCA does not have a similar rule since conflicted directors are not required to recuse the meeting

- However, for charities, if the proposed contract or transaction was approved by the board, the director will have to resign from the board or obtain court approval
  - Because directors of charities cannot be paid directly or indirectly by the charity which the person serves on the board

- Questions/scenarios
  - We are going to be discussing a matter that a board member has a conflict about. Can we prevent that director from attending the entire meeting?

## 7. 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

- Questions/scenarios
  - What if a director refuses to attend a board meeting so that there is no quorum to transact business?
  - The by-law requires a majority of the directors to constitute quorum. The by-law provides that the board consists of 10 directors. We now have 7 directors with 3 vacancies. What is the required quorum?
  - What if the by-law provides that there must be a minimum of 6 directors and a maximum of 10, and the members adopted a resolution fixing the number of directors at 8, how many is required to form quorum?

## 8. 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
  - Because a director's fiduciary duty can only be fulfilled by the person acting himself, cannot be acted by a representative

- 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 a director 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 a director 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

- General 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 - silent in CNCA/ONCA/OCA
  - Generally by voice vote or show of hands
  - Secret ballots - not clear if this is permitted, presumably the by-law may provide for this
- A board resolution may be rescinded by another board resolution, if the resolution in question has not been acted upon
- Decision by consensus
  - CNCA - need to define what “consensus” means and what to do if no consensus is reached (such as go to a vote if no consensus)
  - ONCA - silent

- Questions/scenarios
  - Our by-law provides that if there is a tie, the chair may cast a second or casting vote. Can the chair refuse to cast that vote?
  - Can the chair of the meeting move or second a motion?
  - Do motions always need a mover and seconder?
  - What if I stepped out of the meeting for 10 minutes for a personal call and I missed the voting of a few items on the agenda?
  - Our board makes decisions by consensus. However, the chair dominates all discussions and would not allow us to voice our opinion and refuses to take the matter to a vote.
  - If I strongly disagree with a motion and voted no, should I also request that my no vote be recorded in the minutes?

## 9. 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.
- In camera does not mean no minutes - minutes should still be kept and a policy adopted to address how to keep the minutes confidential



- Questions/scenarios
  - What topics are appropriate for in camera sessions and what topics are not?
  - Who may attend an in camera session?
  - How do you go in and out of an in camera meeting?
  - How do we keep matters discussed at in camera meetings confidential?
  - Does the CEO have the right to attend in camera session or read the minutes?

## CONCLUSION

- Important to hold board 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 membership based organizations
- The rules are complex, and the rules that apply to one organization may not apply to another
- Courts can 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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