ONTARIO BAR ASSOCIATION
THE NUTS AND BOLTS OF COMPANY MEETINGS
BUSINESS LAW SECTION

Thursday, February 22, 2007

HOW TO CONDUCT BOARD AND MEMBERS' MEETINGS OF NON-SHARE CAPITAL CORPORATIONS

By Theresa L.M. Man, B.Sc., M.Mus., LL.B., and
Terrance S. Carter, B.A., LL.B., Trade-Mark Agent

© 2007 Carters Professional Corporation

HOW TO CONDUCT BOARD AND MEMBERS' MEETINGS OF NON-SHARE CAPITAL CORPORATIONS

February 22, 2007

By Theresa L.M. Man, B.Sc., M.Mus., LL.B., and
Terrance S. Carter, B.A., LL.B., Trade-Mark Agent

© 2007 Carters Professional Corporation

Table of Contents

A. Introduction 1
B. Basic components of non-share capital corporations 2
C. Source documents containing rules for meeting procedures 5
1. Incorporating statute 6
2. Other statutes 8
3. Letters patent and supplementary letters patent 8
4. By-laws and by-law amendments 10
5. Rules of procedures and other documents 14
D. Preparation for board and members' meetings 15
1. Is it a corporation? 15
2. Reviewing governing and related documents 17
3. Directors and members 19
4. Drafting documents and other preparation 23
E. Board meetings 23
1. When to call board meetings and who may call board meetings 23
2. Place of meetings 24
3. Notice of meetings 24
4. Right to receive notice 24
5. Quorum 25
6. Chair 25
7. Who may attend and participate at board meetings 26
8. Business to be conducted 26
9. Voting 26
10. Meetings by electronic procedure 28
11. Resolutions or mail ballots in lieu of meetings 29
F. Members' meetings 29
1. When to call members' meetings and who may call meetings 29
a) Annual meetings 29
b) Special meetings 31
2. Place of meetings 34
3. Notice of meetings 35
a) Notice period 35

b) Form 36
c) Contents of notice 36
d) Method of giving notice.... 38
e) Right to receive notice.... 40
4. Quorum.... 41
5. Chair 42
6. Who may attend and participate at members' meetings 43
7. Business to be conducted 43
8. Voting and proxies 46
9. Meetings by electronic procedure 48
10. Resolutions or mail ballots in lieu of meetings.... 49
G. Conclusion 50

HOW TO CONDUCT BOARD AND MEMBERS' MEETINGS OF NON-SHARE CAPITAL CORPORATIONS

February 22, 2007

By Theresa L.M. Man, B.Sc., M.Mus., LL.B, and
Terrance S. Carter, B.A., LL.B., Trade-Mark Agent[*]

© 2007 Carters Professional Corporation

A. INTRODUCTION

Non-share capital corporations are, as suggested by the words "non-share capital," those corporations that do not have share capital. One of the key differences between share capital corporations and non-share capital corporations is that instead of having shareholders, non-share capital corporations have members. While shareholders are entitled to participate in the profits of the company, members act together for a common purpose.

Non-share capital corporations can be incorporated federally under Part II of the *Canada Corporations Act* (the "CCA"),[1] or provincially under the applicable provincial corporations statute, *e.g.*, Part III of the *Corporations Act* (Ontario) (the "OCA")[2] in Ontario. Both the CCA and the OCA are somewhat antiquated statutes, in that they do not contain many of the provisions included in more modern corporate statutes. Therefore, there has been a movement towards revising and updating the CCA and the OCA. In 2004, the federal government introduced Bill C-21, *An Act Respecting Not-for-profit Corporations and Other Corporations Without Share Capital*,[3] designed to replace Parts II and III of the CCA. Its purpose was to provide a "modern corporate governance framework" for the

---

[*] The authors would like to thank Paula J. Thomas, student-at-law, for assisting in the preparation of this paper. Any errors are solely those of the authors.

[1] R.S. 1970, c. C-32.

[2] R.S.O. 1990, c. C.38. By way of background, prior to 1971, both share capital and non-share capital corporations were incorporated under the OCA. On January 1, 1971, a new *Business Corporations Act, 1970* (Ontario) came into force, which statute was later amended in 1983. All corporations that were incorporated under the OCA came under the jurisdiction of the new *Business Corporations Act, 1970* (Ontario) ("OBCA") in 1971, save and except the specific exceptions set out in subsection 2(2)(a) of that statute, which provides that the statute does not apply to "a company within the meaning of the *Corporations Act* and has objects in whole or in part of a social nature." This provision is the predecessor to the subsection 2(3)(a) of the current *Business Corporations Act*, R.S.O. 1990, c. B.16. As a result, all non-share capital corporations and social clubs continued to be under the jurisdiction of the OCA after the enactment of the OBCA in 1971.

[3] Bill C-21, *An Act respecting not-for-profit corporations and other corporations without share capital*, 1st Session, 38th Parliament, 2004, (1st reading in the House of Commons November 15, 2004).

federal regulation of charitable and not-for-profit corporations. The bill received first reading on November 15, 2004 and was referred to committee on November 23, 2004. The bill subsequently died on the Order Paper on November 29, 2005, following the dissolution of Parliament for the general election. To date, the bill has not been re-introduced by the new Conservative federal government and it is not clear whether the bill would be re-introduced. Similarly, there has been a recent initiative by the Ontario government to modernize and revise the OCA. At this time, draft legislation has not been released.

Non-share capital corporations may also be incorporated under other statutes, such as the *Co-operative Corporations Act* (Ontario)[4] or the *Condominium Act, 1998* (Ontario).[5] In addition, non-share capital corporations may also be incorporated by special statutes enacted by either the provincial or federal parliament.[6]

This paper will only discuss the requirements under the CCA and the OCA involved in holding board and members' meetings of non-share capital corporations incorporated under those statutes. A review of issues that are not specifically addressed in these statutes is beyond the scope of this paper, *e.g*, how to deal with proxy contests, how to deal with contested meetings, conflict of interest issues, rights and remedies arising out of board and/or members' meetings, etc.[7]

B. BASIC COMPONENTS OF NON-SHARE CAPITAL CORPORATIONS

A non-share capital corporation has two basic components, namely directors and members. In this regard, both the CCA and the OCA require non-share capital corporations to have both directors and members.[8]

---

[4] R.S.O. 1990, c. C.35.

[5] S.O. 1998, c.19.

[6] For example, *An Act to Incorporate The Canadian Red Cross Society*, S.C. 1909, c. 68; *An Act to Incorporate the Canadian Council of the Girl Guides Association*, 7 & 8 George V. Chap. 77; *An Act to Incorporate the Ontario Society for the Prevention of Cruelty to Animals,* S.O. 1990, Chapter O.36.

[7] Helpful references for those issues include Hartley R. Nathan and Mihkel E. Voore, *Corporate Meetings Law and Practice* (Toronto: Thomson Canada Limited, 1995) (looseleaf); Hartley R. Nathan and J. Glyde Hone, ed., *Wainberg's Society Meetings including Rules of Order*, 2nd ed. (Toronto: CCH Canadian Limited, 2001); Nathan and Hone, *supra* note 20; Hartley R. Nathan, *Nathan's Company Meetings including Rules of Order*, 6th ed. (Toronto: CCH Canadian Limited, 2005).

[8] This is in contrast to some corporate statutes in other jurisdictions, *e.g.*, the State of Virginia in the U.S., where non-stock companies do not need to have members. The corporations in those situations are governed by a self-perpetuating board of directors.

Directors are given the responsibility to manage the affairs of the corporation. In order to do this, they meet together as often as necessary and may delegate certain responsibilities to specified officers so that routine matters can be taken care of in the intervals between their meetings. Members usually have relatively minor roles in managing and controlling the corporation's affairs. While members must meet at least once a year, the business to be transacted at such meetings is usually limited, including receiving the board's report, reviewing and receiving the audited financial statements, and appointing an auditor for the coming year. Certain actions of the board must be confirmed by the members, *e.g.*, amendment of the letters patent. In many corporations, the members have the power to re-elect directors on a regular basis and to remove existing directors, if necessary, in order that the management of the corporation reflects the wishes of the members.[9] Although members have the power to elect directors and to confirm certain actions of the board, the right of members to initiate corporate acts is usually rather limited.[10]

Under the CCA, members of a non-share capital corporation are required to act together for a common purpose. Their common purpose is not to make money for themselves but rather to carry on some activity of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like.[11] They are prohibited from receiving any pecuniary gain. In this regard, it is necessary to include a statement in the letters patent that the corporation is to carry on its operations without pecuniary gain to its members.[12]

The OCA requires non-share corporations incorporated under Part III of the OCA to be carried on without the purpose of gain for its members and any profits or other accretions to the corporations

---

[9] Industry Canada, *Information Kit on the Creation and Amendment of Not-for-Profit Corporations*, Policy Statement 13.1, September 19, 1997.

[10] Maria Elena Hoffstein, "Meetings of Members of Non-Profit Corporations," (Paper presented to the Ontario Bar Association, "Company Meetings: Meetings of Public, Private and Non-Profit Corporations" on October 19, 1989 at H-2.)

[11] Subsection 154(1) of the CCA and Industry Canada, *Information Kit on the Creation and Amendment of Not-for-Profit Corporations*, Policy Statement 13.1, September 19, 1997.

[12] Policy Summary, item 9. The Policy Summary further explains that "pecuniary gain to members is prohibited, and loans to members or directors are also prohibited," but, that the following transfers to members and directors during the life of the corporation are not considered to be pecuniary gain:

a. a transfer to a member for the purpose of carrying on activities as an agent of the corporation;

b. a transfer to a member charity to carry out the objectives of the corporation;

c. a transfer by a corporation that is a registered charity to a member who is a legitimate beneficiary under the corporation's purposes; and

d. a transfer to a member or director for services rendered to the corporation.

shall be used in promoting their objects.[13] It is also necessary to include a statement in their letters patent in this regard.[14] Part III of the OCA permits a corporation that has objects that are within the jurisdiction of the Province of Ontario of a corporation to which Part V of the OCA applies (*e.g.*, insurance companies and fraternal societies).[15]

Non-share capital corporations are often also referred to as "corporations without share capital," "without share capital corporations," "not-for-profit corporations" or "non-profit corporations." It is important to distinguish between the terms "not-for-profit corporations" and "non-profit corporations" for purposes of corporate statues and "non-profit organizations" for purpose of the *Income Tax Act* (Canada). For purposes of corporate statutes, the terms "not-for-profit corporations" or "non-profit corporations" are often used synonymously with "non-share capital corporations" to indicate that these corporations do not have a share capital corporate structure and, therefore are not normally utilized to carry on for-profit enterprises.

While most "not-for-profit corporations" are usually exempt from income tax, they may qualify for different tax-exempt status under the *Income Tax Act* (Canada) for income tax purposes, including non-profit organizations,[16] registered charities,[17] municipalities,[18] labour organizations,[19] etc., among others. For purposes of the *Income Tax Act* (Canada), the term "non-profit organizations" specifically refers to those entities that are exempt from income tax under paragraph 149(1)(l) of the *Income Tax*

[13] Subsection 126(1) of the OCA. In addition, the *Not-For-Profit Incorporator's Handbook* explains that there are five types of not-for-profit corporations:

A. General type - this would include such corporations as ratepayers associations, business or trade associations, community organizations, etc.;

B. Sporting and athletic organizations;

C. Social clubs - these are corporations with objects in whole or in part of a social nature;

D. Service clubs such as Rotary, Lions, Kiwanis and Optimist;

E. Charities - these would include religious organizations and organizations that are engaged in carrying out certain good works that are of benefit to society.

See Companies and Personal Property Security Branch of the Ministry of Government Services and the Office of the Public Guardian and Trustee for Ontario, Charitable Property Division, *Not-For-Profit Incorporator's Handbook*, Section 1.4 (online: http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/nfpinc/default.asp).

[14] *Ibid*.

[15] Section 118 of the OCA. Previously, this section provided that the objects of a non-profit corporation would include those of a "patriotic, religious, non-profit, charitable, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting or athletic nature or that are of any other useful nature." However, this section was amended in 1994. Re-en. 1994, c. 27, s. 78(5).

[16] Paragraph 149(1)(l) of the *Income Tax Act* (Canada).

[17] Paragraph 149(1)(f) of the *Income Tax Act* (Canada).

[18] Paragraph 149(1)(c) of the *Income Tax Act* (Canada).

[19] Paragraph 149(1)(k) of the *Income Tax Act* (Canada).

Act (Canada). "Non-profit organizations" are required under the *Income Tax Act* (Canada) to be established for non-profit purposes, but they are not registered charities because their objects are not charitable in nature and they cannot issue official donation receipts for donations received. Although many "non-profit organizations" are structured as non-share capital corporations, they may also be organized as unincorporated associations, private share capital corporations, or sometimes even as share capital public companies under the *Corporations Act* (Ontario), as in the case of a number of social and recreational clubs in Ontario.[20]

C. SOURCE DOCUMENTS CONTAINING RULES FOR MEETING PROCEDURES

There are two purposes in holding meetings: (1) for decision-making; and (2) for information.[21] Decision-making meetings must be conduced in a formal manner and must comply with the law and the adopted rules or order of the corporation. Information meetings, however, are held to convey information to the attendees or to seek information from them. Since no resolutions are adopted at these meetings, they may be conducted in an informal manner.[22] The focus of this paper deals with decision-making meetings.

In order to ensure that the resolutions made at decision-making meetings are validly adopted, the applicable meeting procedures must be followed.[23] In general, in the absence of evidence of *mala fides* or the corporation acting unlawfully, the court will not interfere with the internal decision of its

---

[20] For a discussion of the implications of the operations of social clubs in Ontario as share capital public companies under the OCA, see Terrance S. Carter and Theresa L.M. Man, "Share Capital Social Clubs as NPOs: Issues to Consider" (Paper presented to the Ontario Bar Association, Apples, Oranges or Lemons? Legal Issues Arising in the Form, Function and Fundraising of Charitable and Not-for-Profit Organizations on October 27, 2004 (online: www.charitylaw.ca).

[21] Hartley R. Nathan and J. Glyde Hone, ed., *Wainberg's Society Meetings including Rules of Order*, 2nd ed. (Toronto: CCH Canadian Limited, 2001) at 65.

[22] *Ibid*.

[23] For example, in *Burlington Association for the Mentally Retarded (Re),* [1981] O.J. No. 289 (High Court), the court held that directors are to be elected in accordance with the by-laws of the corporation, which impose mandatory rules upon the conduct of the election. The procedure laid down must be strictly followed. The court found that the election of the directors at a members' meeting did not comply with the corporation's by-law and was therefore invalid. As such, the corporation did not have a properly constituted board, the board could not function, even to call another meeting of members. The court rejected the respondents' argument that any irregularities in the election did not invalidate the election and that the board was regularly constituted.

In the recent case of *Rexdale Singh Sabha Religious Centre v. Chattha*, *infra* note 62, the Ontario court of appeal found that "no proper procedure was ever taken to change the members of these corporations in accordance with the [Ontario Corporations] Act" and "there was a total failure to comply with the Act. The court of appeal held that the "proper directors and members" of the three corporations were the applicants for the letters patent of each corporation, instead of the individuals purported to have been elected or the members admitted. See *infra* page 19 for more details.

members acting in accordance with its by-laws and governing statute.[24] In some situations, the courts have alluded to the fact that non-profit corporations are not required to adhere rigorously to the technical requirements of corporate procedure as long as their basic process is fair.[25]

Before calling a board meeting or a members' meeting, it is necessary to be aware of what documents would govern the necessary procedures for such meetings. The rules relating to the conduct of meetings of non-share capital corporations may be found in a number of documents, including the incorporating statutes, the incorporation document (*i.e.*, letters patent and supplementary letters patent), by-laws, rules of procedures and other relevant documents of the corporation. Where these documents are silent, recourse must be had to the common law. The following is a review of these types of documents, which would contain rules relating to the conduct of board and members' meetings.

1. <u>Incorporating statute</u>

Many rules relating to the conduct of board and members' meeting are found in the incorporating statute, *i.e.*, the OCA or the CCA.

For non-share capital corporations incorporated under Part III of the OCA, Parts I, III, VI, VII and certain provisions of Part II of the OCA[26] are applicable to them.

For non-share capital corporations incorporated under Part II of the CCA, Parts II, VI, and certain provisions of Part I[27] are applicable to them. As well, certain provisions of the *Canada*

---

[24] In *Adno v. Ontario Physiotherapy Association* (1991) 6 O.R. (3d) 209, the association's proposed special general meeting and special resolution were held to be lawful. The court held that in the absence of evidence of *mala fides* or that the corporation is acting in unlawfully, the court will not interfere with the internal decision of its members acting in accordance with its by-laws and governing statute.

[25] See *Lee v. Lee's Benevolent Association of Ontario* [2005] O.J. No. 194 (C.A.), affm'g [2004] Court file no. 03-CV-253761CM1. The court held that the applicant failed to show that the irregularities led to the infringement of the rights or privileges of any party. In this case, the court distinguished the *Burlington* case, *supra* note 23, by finding that the applicants in this case failed to show that the irregularities led to the infringement of the rights or privileges of any party.

[26] Subsection 133(1) of the OCA provides that section 22, clauses 23 (1) (a) to (p) and (s) to (v), subsection 23 (2), sections 59 to 61, 67, 69 to 71, 80 to 82, 84, 93 and 94, subsection 95 (1), sections 96 and 96.1, clauses 97 (1) (a), (c) and (d), subsection 97 (3) and section 113 apply with necessary modifications to non-share capital corporations incorporated under Part III of the OCA, and in so applying them the words "company" and "private company" mean "corporation" and the word "shareholder" means "member."

[27] Subsection 157(1) of the CCA provides that the following provisions of Part I apply to corporations incorporated under Part II of the CCA:
(a) sections 3 and 4, section 5.6, section 6, sections 9 to 12 and section 15;

Business Corporations Act[28] apply to non-share capital corporations incorporated under Part II of the CCA.[29] Furthermore, Industry Canada's *Not-for-profit Policy Summary* (the "Policy Summary"),[30] June 29, 2004, sets out its understanding of the law that applies to non-share capital corporations. It describes the process of application for incorporation, the framework for by-laws of a non-share capital corporation, and requirements concerning corporate changes, such as the application for supplementary letters patent, by-law amendments, the relocation of the head office, etc. The Policy Summary states that while it discusses certain by-law provisions that are not specifically dealt with (neither explicitly permitted nor prohibited) in Part II of the CCA, Corporations Canada gives no assurance that a court would find those particular provisions to be valid under the CCA.

It is important to note that some of the provisions contained in the incorporating statutes are mandatory provisions, making it impermissible for non-share capital corporations to pass by-laws to circumvent them. For example, the OCA permits members of non-share capital corporations to vote by proxy;[31] it is therefore not permissible for a non-share capital corporation to pass a by-law requiring all members to vote in person. In other situations, the statutes provide "default" mechanisms to deal with issues not addressed in the general operating by-law, which may contain a provision which overrides the default statutory mechanism. For example, the OCA states that each member of a non-share capital corporation has one vote, "unless the letters patent, supplementary letters patent or by-laws of the corporation provide that each such member has more than one vote or has no vote."[32]

(b) section 16 (except paragraph (1)(r) thereof) and subsections 20(1), (3), (4) and (5);
(c) sections 21 to 24, subsection 25(2), paragraph 25(3)(b), sections 27 to 33, section 43, sections 65 to 73, sections 93, 98, 99, 102 and 106;
(d) paragraphs 109(1)(a) to (d); and
(e) sections 111.1, 112 to 117, sections 130 to 133 and sections 138 to 152.
Furthermore, subsection 157(3) of the CCA provides that in construing the sections of Part I made applicable to corporations under Part II, "shareholder" means a member of such corporation; and "the company" or "a company" means a corporation to which Part II applies.

[28] R.S., 1985, c. C-44.

[29] Subsection 157.1(1) of the CCA provides that sections 222 to 227 [229 to 234], 229 to 233 [236 to 240] and 235 [242] of the *Canada Business Corporations Act* apply, with such modifications as the circumstances require, in respect of corporations to which Part II of the CCA applies.

[30] Industry Canada, *Not-for-profit Policy Summary*, June 29, 2004 (online: http://strategis.ic.gc.ca/epic/site/cd-dgc.nsf/en/cs00011e.html).

[31] Subsection 84(1) of the OCA.

[32] Section 125 of the OCA.

Therefore, when reviewing the statutory requirements contained in the incorporating statutes, it is important to be aware of which provisions are mandatory in nature and therefore cannot be overridden by the corporation's governing documents, and which provisions are permissive in nature and can be overridden by the corporation's governing documents. In the latter scenario, it would then be necessary to review the corporation's governing documents to determine whether the statutory provisions have been overridden.

2. <u>Other statutes</u>

Under certain situations, other statutes may also be applicable to non-share capital corporations incorporated under the OCA or the CCA. For example, public hospitals incorporated under the OCA are also subject to the provisions contained in the *Public Hospitals Act* (Ontario)[33] and regulations under that statute. For examples, despite the right of members of non-share capital corporations under the OCA to vote by proxy, the *Public Hospitals Act* (Ontario) provides that members of public hospitals do not have the right to vote by proxy.[34] The *Public Hospitals Act* (Ontario) also provides that despite the OCA, it is not necessary to send written notice of any general or special meeting of the members of the hospital corporation to each member of the hospital corporation. Rather, it is sufficient to give notice of members' meetings of hospital corporations by publication at least once a week for two successive weeks next preceding the meeting in a newspaper or newspapers circulated in the municipality or municipalities in which members of the hospital corporation reside as shown by their addresses on the records of the hospital.[35]

Therefore, it is important to exercise due diligence in determining whether any other statutes would apply to the corporation in question, and review the applicable provisions contained in that statute in detail.

3. <u>Letters patent and supplementary letters patent</u>

The incorporation documents of non-share capital corporations may sometimes contain provisions relevant to the conduct of board or members' meetings. This would include the

[33] R.S.O. 1990, c. P.40.
[34] Section 16 of the *Public Hospitals Act* (Ontario).
[35] Section 17 of the *Public Hospitals Act* (Ontario).

letters patent incorporating the corporation, letters patent of amalgamation, letters patent of continuation, and all subsequent supplementary letters patent amending provisions contained in the letters patent. This is because for CCA non-share capital corporations, it is possible for applicants of incorporation to request that the letters patent include any provision which could be contained in any by-law of the corporation.[36] For OCA non-share capital corporations, it is permissible for letters patent to include any matters that the applicants desire to have embodied therein.[37] As well, the applicants may also ask to have embodied in the letters patent any provisions that may be made the subject of a by-law of the corporation, save and except a provision providing for the election and retirement of directors.[38]

It is necessary to ensure that *all* of the incorporation documents have been reviewed. Reviewing what is contained in the client's records may not be reliable because documents may have been lost, or the personnel with whom the lawyer is dealing may not have knowledge of supplementary letters patent that were issued in the past before he/she became involved with the corporation, etc. It is also important to review copies of the issued documents rather than relying on a consolidated version of the incorporation documents prepared by the corporation itself. This would avoid errors that may have been made in the consolidated version at the time that it was prepared. As such, the most reliable way of ensuring that all of the incorporation documents are available for review would be to obtain copies of these documents from the government's database. Please see section D2 below in relation to conducting these document searches.

It is also important to ensure that all letters patent (such as letters patent of amalgamation, letters patent of continuation) and supplementary letters patent have been duly approved by the corporation. Failing that, the validity of the documents may be brought into question, notwithstanding that they have been issued by the government.

Therefore, it is important to review the provisions contained in the incorporation documents of the non-share capital corporation in question to ensure compliance with the provisions contained therein which may affect the conduct of board and members' meetings. As indicated

[36] Subsection 155(3) of the CCA.
[37] Subsection 119(1)6 of the OCA.
[38] Subsections 119(2) and (3) of the OCA.

above, the provisions contained in the incorporation documents may provide an alternative mechanism to override the permissive statutory provisions contained in the corporation's incorporating statute.

4. By-laws and by-law amendments

The most relevant and informative document containing provisions relating to the conduct of board and members' meetings is the general operating by-law of the non-share capital corporation.

Both the OCA and the CCA permit non-share capital corporations to adopt by-laws that are not inconsistent with the statutes.

Specifically, the CCA requires non-share corporations to adopt by-laws to address the following matters:[39]

> (a) conditions of membership, including societies or companies becoming members of the corporation;
> (b) mode of holding meetings, provision for quorum, rights of voting and of enacting by-laws;
> (c) mode of repealing or amending by-laws with special provision that the repeal or amendment of by-laws not embodied in the letters patent shall not be enforced or acted upon until the approval of the Minister has been obtained;
> (d) appointment and removal of directors, trustees, committees and officers, and their respective powers and remuneration;
> (e) audit of accounts and appointment of auditors;
> (f) whether or how members may withdraw from the corporation; and
> (g) custody of the corporate seal and certifying of documents issued by the corporation.

The OCA states that a non-share capital corporation may pass by-laws that are not contrary to the OCA, the letters patent or the supplementary letters patents in order to regulate its affairs as follows:[40]

> (a) the admission of persons and unincorporated associations as members and as members by virtue of their office and the qualification of and the conditions of membership;
> (b) the fees and dues of members;

[39] Subsection 155(2) of the CCA.
[40] Subsection 129(1) of the OCA.

> (c) the issue of membership cards and certificates;
> (d) the suspension and termination of memberships by the corporation and by the member;
> (e) the transfer of memberships;
> (f) the qualification of and the remuneration of the directors and the directors by virtue of their office, if any;
> (g) the time for and the manner of election of directors;
> (h) the appointment, remuneration, functions, duties and removal of agents, officers and employees of the corporation and the security, if any, to be given by them to it;
> (i) the time and place and the notice to be given for the holding of meetings of the members and of the board of directors, the quorum at meetings of members, the requirement as to proxies, and the procedure in all things at members' meetings and at meetings of the board of directors;
> (j) the conduct in all other particulars of the affairs of the corporation.

As explained above, it is important to note which provisions in the general operating by-law have the effect of over-riding permissive provisions contained in the incorporating statute. As such, the corporation would be required to comply with those provisions contained in its by-law, rather than the statutory provisions.

In reviewing the general operating by-law of the corporation, it is necessary to ensure that it was properly adopted. The first issue is whether the adoption of the by-law complies with the applicable statutory requirements. If a by-law that the corporation relies on was not duly adopted by the corporation, it may bring into question the validity of the proceedings undertaken in accordance with that by-law.[41]

The OCA provides that a by-law passed by the directors of a non-share capital corporation, as well as a repeal, amendment or re-enactment of an existing by-law, is effective only until the next annual meeting of the members unless it is confirmed at a general meeting of the members duly called for that purpose or confirmed at the said annual meeting of the members.[42] The OCA further provides that in default of a confirmation at a members' meeting, the by-laws cease to have effect at and from that time, and in that case no new by-law of the same or like substance has any effect until confirmed at a general meeting of the

[41] See *Horton v. St. Thomas Elgin General Hospital* (1982), 39 O.R. (2d) 247. The court held that once a by-law is passed to suppress the voting of members, the by-law will only be successfully challenged upon evidence of oppression or the denial of natural justice leading to a breach of fiduciary duty.
[42] Subsection 129(2) of the OCA.

members.[43] However, the by-laws of the corporation may contain a provision to require that the enactment, repeal or amendment of a by-law is not effective until it has been approved by the members.

Under the CCA, certain by-laws must be adopted by members, such as a by-law authorizing the application for supplementary letters patent,[44] authoring the relocation of its head office[45] or changing its corporate name,[46] or the adoption of a borrowing by-law.[47]

A key difference between the CCA and the OCA is that, under the CCA, the repeal or amendment of by-laws, or the enactment of new by-laws relating to matters required to be addressed under subsection 155(2) of the CCA, cannot be enforced or acted upon until the approval of the Minister has been obtained.[48] By-laws that relate to the requirements of subsection 155(2) deal with corporate governance issues, such as how the corporation is structured and how meetings are to be conducted. By-laws that do not relate to the requirements of subsection 155(2) (*e.g.*, a by-law concerning the activities of the corporation) do not require ministerial approval. For example, a by-law of an association for figure skaters defining what skating jumps are, or for professions prescribing the ethics of that profession, would not require ministerial approval.

Since both the CCA and the OCA permit corporations to impose additional requirements in relation to the enactment, repeal or amendment of their by-laws, it is also necessary to review a corporation's by-laws to determine whether there are additional requirements in this regard, and to determine whether there is compliance with such requirements. For example, a corporation's by-law may require that amendments to its by-laws must be approved by a certain level of approval of its directors and sanctioned by a certain level of approval of its members. It may also require a particular quorum at a board or members' meeting at which such by-laws are considered, and a longer notice period (*e.g.*, 30 days' notice instead of its usual notice period). In some situations, a corporation may sometimes require that by-law

[43] *Ibid*.
[44] Subsections 20(1), (4) and (5) of the CCA.
[45] Subsection 24(3) of the CCA..
[46] Subsection 29(1) of the CCA..
[47] Subsection 65(1) of the CCA..
[48] Policy Summary, para. I.2, and subsection 155(2) of the CCA.

amendments be approved by a third party, as in the case of many local churches which by-laws are required to be approved by the denominational office, or in the case of a parallel foundation which by-laws are required to be approved by the operating charity which the foundation supports.[49]

In the case of a non-share capital corporation incorporated under the CCA that cannot locate a copy of its general operating by-law, Corporations Canada may be contacted in order to obtain a copy that is on file. The by-laws of OCA non-share capital corporations, however, are not required to be filed with the Ministry of Government Services.

It is also not uncommon for non-share capital corporations, especially smaller corporations, to be incorporated without ever having adopted a general operating by-law.[50] This may arise in situations where individuals completed the incorporation process themselves or with the assistance of other individuals (such as a consultant or an accountant), but not with the assistance of a lawyer. There are situations where lawyers were involved in the incorporation process, yet a by-law was never prepared. In those situations, it would be necessary for the corporation to adopt a new general operating by-law first before calling a board or members' meeting to transact other issues.

When reviewing the general operating by-laws of non-share capital corporations, it is also not uncommon to find that they contain provisions that are inconsistent with the requirements of the incorporating statute. As indicated earlier, the OCA permits members of non-share capital corporations to vote by proxy.[51] With many corporations, such as churches or smaller non-profits or charities, it is not uncommon to find that their by-laws prohibit members from

---

[49] For example, see *Montreal and Canadian Diocese of the Russian Orthodox Church Outside of Russia Inc. v. Protection of the Holy Virgin Russian Orthodox Church (Outside of Russia) in Ottawa, Inc.* [2002] O.J. No. 4698 (C.A.) appeal allowed in part. The by-laws of the church provided for the operation of the church and for the approval of the by-laws by the Diocesan Bishop and the ratification by the Synod of Bishops. The court found that the approval requirement of the by-law must be complied with and found that a motion passed by the church member amending the by-laws was not valid because approval and ratification required by the by-laws were not obtained. The court of appeal held that the Ontario *Corporations Act* provided minimum requirements for the amendment of a corporation's by-laws and nothing in the statute prevented the corporation from imposing additional approval requirements. The court further held that it is inappropriate for a court to make a determination in relation to matters of church doctrine.

[50] See *Rexdale Singh Sabha Religious Centre v. Chattha*, *infra* note 62. In that case, a by-law was never adopted after incorporation.

[51] Subsection 84(1) of the OCA.

voting by proxy. When an inconsistency is recognized, it would be necessary to review the applicable law to determine whether such provisions in the by-law would be valid.

5. <u>Rules of procedures and other documents</u>

There may be other documents that may be relevant to the conduct of the board and members' meetings of non-share capital corporations, depending on the nature of the corporation, including rules of order, agreements with other entities, operation manuals of international charities or non-profit entities, etc.

It has been noted that meetings are governed by the same democratic principles which apply to parliamentary bodies.[52] These principles "embody fairness, reasonableness, and good faith towards all who are entitled to take part."[53] As such, rules of orders are framed in this regard. Rules of order may become especially important in situations where there is a membership dispute.[54] However, it is important to recognize that the incorporating statute, the incorporation documents and the by-laws of the corporation have paramountcy over rules of order.[55]

The most common form for corporations to adopt rules of order is to include in its by-law a provision prescribing that the current edition of a specified and generally accepted manual of parliamentary authority shall be the corporations' parliamentary authority, and then later adopt such special rules of order as necessary to supplement or modify rules contained in that manual.[56] If a corporation's by-law does not designate a parliamentary authority, the corporation may pass a resolution to designate the same.[57]

In other situations, the particular corporation may have entered into an agreement with another entity that may impose certain requirements in relation to the conduct of board or

---

[52] Hartley R. Nathan, *Nathan's Company Meetings Including Rules of Order*, 6th ed. (Toronto: CCH Canadian Limited, 2005) at 1.
[53] *Ibid*.
[54] R. Jane Burke-Robertson and Arthur B.C. Drache, *Non-share Capital Corporations* (Toronto, Thomson Canada Limited, 2002) (looseleaf) at 3-27.
[55] Burke-Robertson and Drache, *supra* note 54 at 3-28.
[56] Henry M. Roberts III and others, *Robert's Rules of Order Newly Revised*, 10th ed. (Cambridge, Mass.: Perseus Publishing, 2000) at p. 15, 1. 17-27.
[57] *Ibid*.

members' meetings. For example, this may arise in the case of a local chapter of an international charity that has entered into an affiliation agreement with its international umbrella organization, requiring that notice of all members' meetings of the local chapter also be given to the CEO of the international organization. Another example may involve a corporation, which is receiving funding from a third party entity, being required under the funding agreement to allow certain representatives of the funding body to attend members' meetings of the corporation. Therefore, it would be important to inquire of the corporation whether such an agreement is in place and to review the agreement to ensure compliance with any applicable requirements.

In situations involving, for example, churches and religious organizations, some of the rules of procedure may have been set out in a manual that governs the denomination. The manuals may sometimes be incorporated by reference or referred to in the general operating by-laws of the churches. However, this may not always be the case.

Issues may arise where there are conflicts among the provisions of the incorporating statute, the by-laws, the agreements mentioned above, and the manuals. In that situation, a careful review of the applicable law would be required in order to determine which provision would prevail under the particular circumstances at hand.

D. PREPARATION FOR BOARD AND MEMBERS' MEETINGS

Since non-share capital corporations are often volunteer organizations run by persons who may not be familiar with corporate procedures or how to conduct meetings, it is not uncommon that some of the most fundamental issues with respect to share capital corporations may become major problems for non-share capital corporations. For example, there may not be a general operating by-law to govern the corporation's affairs, or the client may not know whether the organization is incorporated, be able to locate its incorporation documents, or have an accurate membership list. The following are some of the preliminary questions that must be addressed before calling a board or members' meeting.

1. Is it a corporation?

Before calling a board or members' meeting, the first issue to examine is whether the organization is a corporate entity, a trust or an unincorporated association. One would

assume that this question would easily be answered by asking the client. However, on many occasions in our practice, clients do not even know whether or not the organization is incorporated.

For example, on more than one occasions, we have come across churches that are not aware that they have been incorporated. Often, a church that was operating as an unincorporated entity for a number of years later decided to be incorporated upon the advice of its real estate lawyer on the eve of the church acquiring real property for the purpose of holding title to the land. However, upon incorporation of the "church corporation," other than registering the title to the church's property and mortgage in the name of the church corporation, often no steps were taken to organize the corporation, to transfer the operations and the members of the unincorporated church into the corporation, or even to adopt a general operating by-law for the corporation. This brings into question whether the church is a corporate entity, or whether it has continued to be operated as an unincorporated church, with the church corporation acting as an asset-holding corporation. If it is the latter scenario, then the incorporation documents and the corporate statute would not have any application to the conduct of the board and members' meeting of the church itself.

In other situations, a client may not know whether the church is an internal operating division of its denomination, or if it is an unincorporated association. If it is the former scenario, and the church denomination is a corporate entity, then the incorporation documents and the corporate statute governing the denomination *may* have application to the local church's board and members' meetings.

If the client is not sure whether it is an incorporated entity, it would be necessary to conduct a corporate file search with the Ontario government's database or with Corporations Canada of Industry Canada. In addition to obtaining a corporate profile report from the Ontario database system for Ontario corporations, or obtaining online information from Corporations Canada for federal corporations, it is also possible to obtain copies of incorporation documents from these government offices. Details of these corporate searches are reviewed in the section below under the heading "governing documents."

2. Reviewing governing and related documents

Once it has been decided that the organization in question is a corporation, the next question to ask is under what statute the corporation was incorporated. Presumably, this question would have been answered when determining whether the entity in question is a corporation. However, this is not always the case. For example, in one situation, a church was incorporated under the OCA in the 1970s. However, the church later adopted a constitution containing a draft application to incorporate the church under the CCA and approved a general operating by-law prepared pursuant to the CCA. Since the adoption of the constitution, the church operated pursuant to its constitution, including the by-law that was prepared in accordance with the CCA. Since the by-law was prepared in accordance with the CCA, it contained provisions that did not comply with the requirements of the OCA and therefore past corporate proceedings of the church may not have complied with the requirements of the OCA. It brings into question the validity of the by-law that was prepared in accordance with the CCA, as well as the validity of the corporate proceedings undertaken by the church pursuant to that by-law.

It is important for legal counsel to review and be familiar with the governing documents of the client. Presumably, the governing documents of the client would be contained in its corporate minute book. However, since non-share capital corporations are run by volunteers with a high turn-over rate, its corporate records may not always be complete. A client may sometimes not be able to locate any corporate records, including the incorporation documents or past minutes.

Highlighted in a previous section of this paper is the importance of ensuring that the by-laws in question have been duly adopted in accordance with the applicable requirements. If a by-law that the corporation relies on was not duly adopted by the corporation, it may bring into question the validity of the proceedings undertaken in accordance with that by-law.

If a corporation's governing documents are incomplete, it may be possible to locate some of those documents through government searches. Some of the corporate filings may also be of assistance in reconstructing missing corporate records.

For CCA corporations, it is possible to contact Corporations Canada of Industry Canada and request copies of all documents in relation to a particular corporation they have on file. These documents would include copies of the corporation's letters patent, supplementary letters patent, by-laws and annual summaries. In relation to the by-laws, only those that require ministerial approval would be filed with Corporations Canada as explained above. As such, Corporations Canada would not have copies of by-laws that do not address the matters set out in subsection 155(2) of the CCA, *i.e.*, those which do not require ministerial approval. In addition, non-share capital corporations are required to file an annual summary with Corporations Canada on or before June 1st of each year, containing information relating to the year ending March 31st . Information required to be filed includes, among other items, the names of the directors and the date and place of the last annual meeting of members held prior to March 31.[58] This information could be used to re-construct the corporation's past corporate records.

For OCA corporations, it is possible to conduct a microfiche search of the documents filed with the Companies and Personal Property Security Branch of the Ministry of Government Services. Copies of documents available include the corporation's letters patent, supplementary letters patent, and other forms that have been filed with them. In this regard, OCA non-share capital corporations are required to file an annual return within 60 days of the anniversary of incorporation or amalgamation, an initial return (Form 1 - Initial Return/Notice of Change) within 60 days after the date of incorporation, amalgamation or continuation, and a Notice of Change within 15 days after any change takes place (*e.g.*, when a corporation changes its address, directors or officers).[59] Information required to be filed includes, among other items, the names of the directors and offices. This information could be used to re-construct the corporation's past corporate records. By-laws of OCA non-share capital corporations, however, are not required to be filed with the Ministry of Government Services.

Non-share capital corporations that are registered charities are required to file their governing documents with the Charities Directors of Canada Revenue Agency. Copies of these documents may be obtained by way of a request under the *Access to Information Act*

---

[58] Section 133 of the CCA.
[59] Sections 1 and 4 of the *Corporations Information Act*, R.S.O. 1990, c. C.39.

(Canada).[60] In addition, registered charities are required to file an annual Registered Charity Information Return (T3010A) within six months after their fiscal year end. The names of the directors are also required to be included on the return.

3. Directors and members

In order to call a board or members' meeting, it is necessary to address a number of issues in relation to the directors and members of the corporation in question. This would involve reviewing the by-laws and corporate records (*e.g.*, the members' register and the directors' register) to determine the classes of members and directors, the rights attached to each class of members and directors, the identity of the members and directors, whether the members were duly admitted, and whether the directors were duly elected or appointed, etc.

Presumably, this would be a simple question for most share capital corporations. However, this may not be the case for non-profit corporations. For example, a church's membership list may not be up-to-date or may contain many absentee members who have not attended the church for a long period of time. Or, a corporation may not have taken steps in the past to formally admit members, which therefore brings into question who their members are. In other cases, the by-laws of a corporation may require the admission of members or the election of directors to be approved by a third party, and it would be important to ensure that the necessary approval has been obtained. This commonly arises in situations involving churches or related operating charities,[61] such as a hospital and a parallel hospital foundation.

For example, in a recent case of *Rexdale Singh Sabha Religious Centre v. Chattha*,[62] the Ontario court of appeal found that "no proper procedure was ever taken to change the members of these corporations in accordance with the [Ontario Corporations] Act" and "there was a total failure to comply with the Act."[63] The non-compliance included the following:[64]

---

[60] See sections 6 to 11 of the *Access to Information Act* (Canada), R.S., 1985, c. A-1.
[61] See *St. George Orthodox Church of Toronto v. Thevarkattil*, [2002] O.J. No. 2844 (Sup. C.J.), where the church's by-laws required that its members be approved by the vicar and that only members could vote.
[62] [2006] O.J. No. 4698 (C.A.) ["Rexdale CA"], rev'g [2006] O.J. No. 328 (Ont. Sup. Ct. of Justice) ["Rexdale SCJ"].
[63] Rexdale CA, *ibid.* at para. 4.
[64] Rexdale SCJ, *supra* note 62 at 15.

- None of the corporations had ever held a meeting of its members whether to elect directors or to do anything else;
- The vast majority of directors listed in the various corporation profile reports had never been elected at a meeting of the members;
- None of the first directors of any of the corporations had resigned and they thus remained in office;
- The number of the directors of one of the corporations involved had never legally been changed from the number of directors set out in its letters patent;
- None of the corporations' directors or members had ever properly passed any by-laws; and
- One of the corporations involved had never operated as a corporation. There was no evidence that its board of directors had ever met.

The court of appeal noted that under the OCA, each applicant for incorporation becomes a director and member of the corporation upon incorporation, and persons may be admitted to members thereafter by resolutions of the board. The court of appeal held that the "proper directors and members" of the three corporations were the applicants for the letters patent of each corporation, instead of the individuals purported to have been elected or members admitted.

This case underscores the importance of ensuring that the members and directors shown on the corporation's records have been properly admitted as members and elected as directors respectively, in accordance with the requirements of the incorporating statute and incorporation document (*i.e.*, letters patent). If the admission or election of these individuals were purported to have been conducted in accordance with the corporation's by-law, then it is necessary to ensure that the by-laws have been properly adopted by the corporation.

Under the CCA, applicants for incorporation must be natural persons and they need not be members of the corporation.[65] If there are more than three applicants, at least three of them must become first directors.[66] Members need not be individuals.[67] The by-laws of a corporation may provide the conditions to become members, how members are accepted into membership, the number of class of membership and the rights attached to each class.[68] The

[65] Policy Summary, item 3.
[66] Policy Summary, items 3 and 4.
[67] Policy Summary, para. A.1.
[68] Policy Summary, para. A.1.

by-laws may provide for the maximum and/or minimum number of members, but the minimum number of members must be one.[69]

In relation to directors, under the CCA they need not be members of the corporation.[70] There must always be a minimum of three directors.[71] The by-laws may provide for either a fixed number of directors or specify how the number of directors on the board is to be established (for example, by formula, by directors or members or both) and, if applicable, how that number can be changed. If a formula is used to determine the number, this formula must be set out in the by-laws. Directors need not to be elected at a meeting, and may be appointed in any manner specified in the by-laws.[72] The by-laws of the corporation may specify whether membership is transferable or non-transferable.[73]

Under the OCA, applicants for incorporation must be natural persons, and they automatically become the first members[74] and directors[75] of the corporation. After incorporation, natural persons, unincorporated associations and corporations may be admitted to membership by resolution of the board of directors, but the letters patent, supplementary letters patent or by-laws may provide that such resolution is not effective until it has been confirmed by the members in general meeting.[76] The letters patent, supplementary letters patent or by-laws may also provide for the admission of members by virtue of their office.[77]

The letters patent, supplementary letters patent or by-laws of a corporation may provide for more than one class of membership and in that case shall set forth the designation of and the terms and conditions attaching to each class.[78] In addition, the by-laws of a corporation may

[69] Policy Summary, para. A.1.
[70] Policy Summary, para. C.1.
[71] Policy Summary, para. C.2.
[72] Policy Summary, para. C.1.
[73] Policy Summary, para. A.1.
[74] Section 121 of the OCA.
[75] Section 284 of the OCA.
[76] Subsection 124(1) of the OCA. Although subsection 124(1) provides that "a person or unincorporated association may be admitted to membership," a "person" is defined in subsection 29(1) of the *Interpretation Act*, R.S.O. 1990, chapter I.11 to include a corporation.
[77] Subsection 124(2) of the OCA.
[78] Section 120 of the OCA.

include provisions to regulate issues regarding membership, including qualifications, method of admission, termination, etc.[79]

There is no limit on the number of members, unless the letters patent, supplementary letters patent or by-laws of a corporation provide otherwise.[80] However, there must be at least three members.[81] Unless the letters patent or supplementary letters patent otherwise provide, the interest of a member in a corporation is not transferable, and it lapses and ceases to exist upon the member's death or when the member ceases to be a member by resignation or otherwise in accordance with the by-laws of the corporation.[82] Where the letters patent or supplementary letters patent provide that the interest of a member in the corporation is transferable, the by-laws cannot restrict the transfer of such interest. However, the corporation may pass by-laws to regulate the transfer of memberships.[83]

Ontario corporations may also pass by-laws respecting delegates, including the division of its members into groups that are composed of territorial groups, common interest groups or both territorial and common interest groups; the election of some or all of its directors by such groups; election of delegates to represent such groups on the basis of the number of members in each group; the number and method of electing delegates; the holding of meetings of delegates; the authority of delegates at meetings; and the holding of meetings of members or delegates territorially or on the basis of common interest.[84]

In relation to directors, they must be members of the corporation.[85] The by-law may provide the size of the board to consist of a fixed number of directors not fewer than three.[86] After incorporation, the directors shall be elected by members at a general meeting.[87] Unless the by-

[79] Paragraph 129(1)(a) to (e). See also *supra* note 40.
[80] Section 123 of the OCA.
[81] This is because subsection 286(1) of the OCA requires that all directors must be members, while subsection 283(2) of the OCA requires that there must be at least three directors at all times.
[82] Subsection 128(1) of the OCA.
[83] Subsection 129(1) of the OCA.
[84] Subsection 130(1) of the OCA. Furthermore, subsection 130(3) of the OCA provides that delegates have only one vote and shall not vote by proxy. Subsection 139(4) further provides that no person shall be elected a delegate who is not a member of the corporation. In addition, subsection 130(5) provides that no such by-law shall prohibit members from attending meetings of delegates and participating in the discussions at such meetings.
[85] Subsection 286(1) of the OCA.
[86] Subsection 283(2) of the OCA.
[87] Subsection 287(1) of the OCA.

laws otherwise provide, the election of directors is required to take place yearly and all the directors then in office must retire, but, if qualified, are eligible for re-election.[88] However, if an election is not held at the proper time, the directors continue in office until their successors are elected.[89] The by-laws may provide for the election and retirement of directors in rotation, but in that case no director may be elected for a term of more than five years and at least three directors shall retire from office in each year.[90] In addition, the letters patent, supplementary letters patent or by-laws of a corporation may provide for persons becoming directors by virtue of their office, in lieu of election.[91]

4. Drafting documents and other preparation

Various types of documents for meetings will need to be prepared, including the notice of meetings, resolutions, information and materials to accompany notice of meetings, agendas, proxies, ballots, detailed agendas for the chair (chair's script), scrutineers' reports, etc. In addition, other preparation for the meetings will need to be made, such as sending notices of meetings, instructing scrutineers and other personnel assisting at the meetings, making physical arrangements for the meeting venues, preparing strategies to deal with proxy contests, etc. A detailed review of these issues is beyond the scope of this paper.[92]

E. BOARD MEETINGS

1. When to call board meetings and who may call board meetings

The by-laws of federal corporations are required to include provisions regarding the time and place of directors' meetings.[93] The OCA is silent on the issue of when board meetings are to be called. As such, this issue would be governed by the corporation's by-laws.

Both the OCA and the CCA are silent on the issue of who has the right or duty to call board meetings. As such, this issue would be governed by the corporation's by-laws. It is usually the

[88] Subsection 287(2) of the OCA.
[89] Subsection 287(4) of the OCA.
[90] Subsection 287(5) of the OCA.
[91] Section 127 of the OCA.
[92] On those issues, see reference in *supra* note 7.
[93] Policy Summary, para. D.1.

duty of the chair of the board to call board meetings. Some by-laws may allow board meetings to be called at the request of a certain number of directors.

2. Place of meetings

The by-laws of federal corporations are required to contain a provision regarding the time and place of directors' meetings.[94]

The OCA states that in general, meetings of the board and of the executive committee must be held at the place where the head office of the corporation is located.[95] However, the by-law may contain a provision to allow meetings of the board and of the executive committee to be held at any place in or outside Ontario.[96]

3. Notice of meetings

The by-laws of federal corporations are required to specify an amount of time that is reasonable for notice of directors' meetings or indicate that reasonable notice will be given. Where the notice period is specified, a minimum of 14 days is recommended by Corporations Canada for notices sent by mail. The by-laws may state that notice can be waived by directors who attend the meeting. Notices sent by electronic means such as e-mail or facsimile are also permitted.[97]

The OCA, however, is silent on the issue of the length, form, content and method of giving notice for board meetings. As such, these issues would be governed by the corporation's by-laws.

4. Right to receive notice

It is necessary to determine who has the right to receive notice of board meetings. Other than directors, it would be subject to the provisions of the by-laws of the corporation in relation to this issue, *e.g.*, senior management staff, liaison representatives from an umbrella organization of which the corporation is a member, etc.

---

[94] *Ibid.*
[95] Subsection 82(1) of the OCA.

5. Quorum

In order to transact business at a board meeting, there must be a quorum of directors at the meeting.

Federally, the by-law must state what the necessary quorum is, which must be fixed either by number or by percentage. However, the quorum must be a minimum of two directors.[98] Neither the CCA nor the Policy Summary addresses what would happen in the event that there is not a quorum of directors in office. Presumably, this issue would be dealt with by the corporation's by-law.

For Ontario corporations, the OCA provides that no business of a corporation shall be transacted by its directors except at a meeting of directors at which a quorum of the board is present.[99] Further, unless the letters patent, supplementary letters patent or a special resolution otherwise provides, a majority of the board of directors constitutes a quorum, but in no case shall a quorum be less than two-fifths of the board of directors.[100] In addition, as long as there is a quorum of directors in office, any vacancy occurring in the board of directors may be filled for the remainder of the term by the directors then in office.[101] However, whenever there is not a quorum of directors in office, the director or directors then in office are required to forthwith call a general meeting of the members to fill the vacancies, and, if in default or if there are no directors then in office, the meeting may be called by any member.[102]

6. Chair

Each meeting must have a person to preside as chair in order to ensure that proceedings are properly and fairly conducted,[103] in accordance with the applicable law and rules of order.

---

[96] Subsection 82(2) of the OCA.
[97] Policy Summary, para. D.2.
[98] Policy Summary, para. D.3.
[99] Subsection 283(3) of the OCA.
[100] Subsection 288(1) of the OCA.
[101] Subsection 288(2) of the OCA.
[102] Subsection 288(3) of the OCA.
[103] Nathan and Hone, *supra* note 21 at 55.

His/her main function is to "keep the meeting going and to obtain the 'sense of the meeting' in a legal and democratic manner."[104]

Both the OCA and the CCA are silent on the issue of who has the right or duty to chair board meetings. As such, this issue would be governed by the corporation's by-laws.

7. Who may attend and participate at board meetings

Both the OCA and the CCA are silent on the issue of who may attend and participate at board meetings. As such, this issue would be governed by the corporation's by-laws. Other than directors, other persons, such as senior management staff (*e.g.*, the executive director) and liaison representatives from an umbrella organization of which the corporation is a member, may also be permitted under the corporation's by-laws to have the right to attend board meetings.

8. Business to be conducted

Both the CCA and the OCA are silent on the issue of the type of business to be transacted at board meetings. As such, this issue would be governed by the corporation's by-laws.

9. Voting

For federal corporations, "all directors, with the exception of *ex officio* and honorary directors, have a right to vote."[105] Notwithstanding this statement, Corporations Canada does accept by-laws that provide voting rights to *ex officio* directors and honorary directors. Although it is not uncommon to see by-laws of non-share capital corporations to provide for non-voting *ex officio* and non-voting honorary directors, the Ontario Public Guardian and Trustee, the branch of the Ontario government that has the jurisdiction to oversee charitable property, has pointed out that the position of "non-voting *ex officio* director" does not exist in law. In this regard, to be a director means being responsible for the effective operation of the corporation and being actively involved in the decision-making process. Directors are entrusted with a fiduciary duty to act in the best interests of the corporation, exercising their

[104] *Ibid*.
[105] Policy Summary, para. D.4.

best care, skill and judgment for the benefit of the corporation. [106] If directors do not have the power to vote on matters that affect the corporation, they cannot effectively act as a director.

The Policy Summary further indicates that if the by-laws mention voting rights, they must be equal for all directors.[107] Proxy voting at board meetings is not acceptable.[108]

Furthermore, the Policy Summary permits by-laws to provide that directors' decisions are to be made by consensus, unless the CCA provides otherwise. If so, the by-laws must define the word "consensus" and describe the means of referring any matter to a vote if consensus is not reached.[109] The Policy Summary explains that decisions by consensus generally work best when corporations have ten or fewer directors.[110]

Under the Policy Summary, mail ballots are not acceptable to replace director's meetings.[111] However, the by-laws may provide that, in limited cases, where attendance in person or by teleconference or other electronic means is not possible, a director may be allowed to vote at a directors' meeting by means of a detailed voting ballot.[112] The by-laws must provide that the vote in the ballot can be counted only if the motion that is on the floor at the meeting is identical to that contained in the mail ballot. All background material made available to directors at the meeting must also have been made available in advance to directors exercising their vote by mail ballot. In addition, a mail ballot cannot replace a director for the purposes of establishing quorum. Corporations Canada recommends that the by-laws specify how far in advance of a meeting the ballot must be received and by which officer of the corporation, as well as contain rules specifying how directors who are not attending the meeting will comply

[106] For examples of the duties of directors, see Donald J. Bourgeois, *The Law of Charitable and Not-For-Profit Organizations*, 3rd ed. (Markham: LexisNexis® Butterworths, 2002) at 247 – 248. See also Jane Burke-Robertson, "Duties of Directors" (Ch. 2) in Primer for Directors of Not-For-Profit Corporations (Rights, Duties and Practices), (Industry Canada, 2002), online: http://strategis.ic.gc.ca/epic/site/cilp-pdci.nsf/en/h_cl00688e.html.
[107] *Supra* note 104.
[108] Policy Summary, para. D.1.
[109] Policy Summary, para. D.1.
[110] *Ibid*.
[111] *Ibid*.
[112] *Ibid*.

with subsection 98(4) of the CCA concerning declaration of a conflict of interest, if they have not already done so at an earlier meeting.[113]

The OCA is silent on the issue of voting rights at board meetings. As such, this issue would be governed by the corporation's by-laws.

10. Meetings by electronic procedure

For federal corporations, the by-laws may provide that directors may hold meetings by teleconference or by other electronic means which permit directors to communicate adequately with each other. With respect to meetings by other electronic means, the by-laws are required to set out the minimum percentage of directors needed to approve the holding of such meetings. The by-laws are also required to specify how security issues are to be handled and should address the mechanics of holding such a meeting, *e.g.*, the procedures for establishing quorum and recording votes. Each director is required to have equal access to the technology to be used and should consent in advance to the specific means of communication to be used.[114]

In relation to Ontario corporations, the OCA provides that unless the by-laws otherwise provide, if all the directors of a corporation present at or participating in the meeting consent, a meeting of directors or of a committee 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, and a director participating in the meeting by those means is deemed for the purposes of this Act to be present at the meeting.[115]

In other words, it is permissible for Ontario corporations to hold board meetings electronically in the manner set out in the OCA, whereas it is permissible for federal corporation to hold board meetings electronically only where permitted by their by-laws.

[113] *Ibid*.
[114] *Ibid.*
[115] Subsection 283(3.1) of the OCA.

11. Resolutions or mail ballots in lieu of meetings

For federal corporations, it is not permissible for directors to sign written resolutions or to have mail ballots in lieu of holding board meetings.[116] However, for Ontario corporations, any by-law or resolution signed by all directors of the corporation is as valid and effective as if it had been passed at a meeting of the directors duly called, constituted and held for that purpose.[117]

F. MEMBERS' MEETINGS

1. When to call members' meetings and who may call meetings

In general, there are two types of meetings, namely general meetings (where all members of the corporations are invited to attend) and meetings of a particular class or section of the corporation (*e.g.*, where a corporation has two classes of members, class A members of the corporation may not be invited to attend a meeting of class B members).

In relation to general meetings, there are two types, namely, annual meetings and special meetings, which are explained below.

a) Annual meetings

Both federal corporations and Ontario corporations are required to hold annual meetings of members. Annual meetings are held once a year to transact certain routine business, such the appointment of auditors, the election of directors, etc. Other special business may also be transacted at annual meetings, provided that proper notice is given. The opportunity for members to meet at least once a year is also important, because it allows them to consider and discuss the direction of the corporation in order to achieve the purposes of the corporation. Depending on the rights given to the members in the by-law of the corporation, the annual meeting can also be an

[116] Policy Summary, para. D.1. It was previously permissible for all directors to sign written resolutions in lieu of meetings, but the Policy Summary was revised in 1998 not to permit this practice, as it was decided that the CCA did not permit directors to pass resolutions in lieu of meetings. It was also felt that since board meetings could be held electronically and directors may use detailed voting ballot procedure in some cases, this was sufficient to provide needed flexibility for board meeting.

[117] Subsection 298(1) of the OCA. Previously, this subsection of the OCA only permitted directors to do so during the first year of incorporation. However, this subsection was amended by the *Red Tape Reduction Act*, S.O. 1998, c.18 which was proclaimed into force on March 1, 1999.

important opportunity for the members to exercise control over the corporation, especially where the corporation has a large membership. However, in situations where the members and the directors are one and the same persons, the annual meetings would only be a matter of administrative formality.[118]

For federal corporations, an annual meeting of the members must be held at some date not later than eighteen months after the incorporation of the corporation, and subsequently once at least in every calendar year and not more than fifteen months after the holding of the last preceding annual meeting.[119] The by-laws of a federal corporation must state that members' meetings be held annually.[120]Where there is default in holding an annual meeting as provided above, the court in the province in which the head office of the corporation is situated may, on the application of any member of the corporation, call or direct the calling of an annual meeting of the members.[121]

The Policy Summary indicates that for federal corporations, the time and place of members' meetings may be stated in the by-laws in general terms, *e.g.*, "The annual … meeting of the members shall be held … on such day as the said directors shall appoint. …"[122]

Similarly, an Ontario corporation must hold an annual members' meeting not later than eighteen months after incorporation and subsequently not more than fifteen months after the holding of the last preceding annual meeting.[123] Whereas the CCA permits a member to apply to call or direct the calling of an annual meeting of the members if there is default in holding one,[124] the OCA does not provide such a relief for members of a non-share capital corporation. In such a situation, the members would have to apply to the court to request that an annual members' meeting be

[118] Burke-Robertson and Drache, *supra* note 54, at 9-2.
[119] Subsection 102(1) of the CCA.
[120] Policy Summary, para. B.1.
[121] Subsection 102(2) of the CCA.
[122] Policy Summary, para. B.2.
[123] Section 293 of the OCA.
[124] Subsection 102(2) of the CCA. See *supra* note 121.

called either because it is impracticable to call a members' meeting,[125] or because the member is aggrieved by the failure of the corporation to call an annual members' meeting.[126]

b) Special meetings

Other than annual members' meetings, special members' meetings may be called from time to time as necessary to transact the business of the corporation that is not dealt with at annual meetings. This may include the adoption of a by-law, the removal of a director, the winding up of the corporation, etc.

The Policy Summary indicates that for federal corporations, the time and place of members' meetings may be stated in the by-laws in general terms, for example, "… any other general meeting of the members shall be held … on such day as the said directors shall appoint. …"[127]

The by-laws of a federal corporation may provide that a certain number of members may have the right to requisition a special meeting of members. The Policy Summary provides that in order to spare the corporation the great expense of holding a special meeting solely at the request of an inordinately small number of voting members, it is recommended that the by-laws state, for example, that a minimum of five percent of the voting members are needed to requisition the directors to call a special meeting.[128]

The CCA provides that where it is impracticable to call a meeting of members in any manner in which meetings of members may be called, or to conduct the meeting in the manner prescribed by the letters patent, supplementary letters patent, the by-laws or the CCA, the court in the province in which the head office of the corporation is situated, may, either of its own motion, or on the application of any director or any member who would be entitled to vote at the meeting, order a meeting to be called,

[125] Section 297 of the OCA. See *infra* note 141.
[126] Subsection 332 of the OCA.
[127] Policy Summary, para. B.2.
[128] Policy Summary, para. B.7.

held and conducted in such manner as the court thinks fit.[129] The court may also give such ancillary or consequential directions as it thinks expedient.[130] Any meeting called, held and conducted in accordance with any such order are deemed to be a meeting of members of the corporation duly called, held and conducted.[131]

The OCA provides that the directors may, at any time, call a general meeting of the members for the transaction of any business, the general nature of which is specified in the notice calling the meeting.[132]

Other than the directors, members also have a statutory right to requisition a members' meeting. Not less than one-tenth of the members of a corporation without share capital entitled to vote at the meeting proposed to be held may request the directors to call a general meeting of the members for any purpose connected with the affairs of the corporation that is not inconsistent with the OCA.[133] Where the directors do not, within twenty-one days from the date of the deposit of the requisition call and hold such meeting, any of the requisitionists may call such meeting which shall be held within sixty days from the date of the deposit of the requisition.[134] Detailed procedures regarding the requisition, the calling of the special meeting, etc. are set out in the OCA, such as the nature of business to be transacted at the meeting, the reimbursement of reasonable expenses incurred by the requisitionists by reason of the failure of the directors to call such meeting, etc.[135]

Other than requisitioning a special members' meeting, members also have the right under the OCA to circulate a members' resolution or a statement. Specifically, upon the requisition in writing of not less than one-twentieth of the members of a corporation without share capital entitled to vote at the meeting to which the

---

[129] Section 106 of the CCA. See *Athabasca Holdings Ltd. v. ENA Datasystems Inc. et. al* (1980), 30 O.R. (2d) 527; 116 D.L.R. (3d) 318. In Re *Commonwealth International Leverage Fund Limited & Commonwealth International Corporation Limited v. Zimmerman* (1966), 58 D.L.R. (2d) 160, the court refused to grant such an order.
[130] Section 106 of the CCA.
[131] *Ibid*.
[132] Section 294 of the OCA.
[133] Subsection 295(1) of the OCA.
[134] Subsection 295(4).
[135] See subsections 295(2) to (6) of the OCA.

requisition relates, the directors shall: (1) give to the members entitled to notice of the next meeting of members notice of any resolution that may properly be moved and is intended to be moved at that meeting; or (2) circulate to the members entitled to vote at the next meeting of members a statement of not more than 1,000 words with respect to the matter referred to in any proposed resolution or with respect to the business to be dealt with at that meeting.[136]

However, the directors are not bound to give notice of any resolution or to circulate any statement unless:

- (a) the requisition, signed by the requisitionists, is deposited at the head office of the corporation, (i) in the case of a requisition requiring notice of a resolution to be given, not less than ten days before the meeting, (ii) in the case of a requisition requiring a statement to be circulated, not less than seven days before the meeting; and
- (b) there is deposited with the requisition a sum reasonably sufficient to meet the corporation's expenses in giving effect thereto.[137]

Further, the directors are not bound to circulate any statement if, on the application of the corporation or any other person who claims to be aggrieved, a court is satisfied that the rights conferred on the members to requisition the circulation of a resolution or statement are being abused to secure needless publicity for defamatory matter.[138] On such an application, the court may order the costs of the corporation to be paid in whole or in part by the requisitionists even though they are not parties to the application.[139] Other provisions dealing with the detailed procedures concerning the circulation of the resolution or statement are set out in the OCA.[140]

If for any reason it is impracticable to call a members' meeting of a corporation in any manner in which a members' meeting may be called, or to conduct the meeting in the manner prescribed by the OCA, the letters patent, supplementary letters patent or by-laws, the court may, on the application of a director or a member who would be

---

[136] Subsection 296(1) of the OCA.
[137] Subsection 296(4) of the OCA.
[138] Subsection 296(5) of the OCA.
[139] *Ibid*.
[140] See subsections 296(2) to (9) of the OCA.

entitled to vote at the meeting, order a meeting to be called, held and conducted in such manner as the court thinks fit, and any meeting called, held and conducted in accordance with such an order shall for all purposes be deemed to be a meeting of members of the corporation duly called, held and conducted.[141]

Lastly, where a member or creditor of a corporation is aggrieved by the failure of the corporation or a director, officer or employee of the corporation to perform any duty imposed by the OCA (such as calling a members' meeting in situations that one should have been called), the member or creditor (despite the imposition of any penalty and in addition to any other rights that he, she or it may have) may apply to the court for an order directing the corporation, director, officer or employee, as the case may be, to perform such duty, and the court may make such order or such other order as the court thinks fit.[142]

In situations involving *charitable* non-share capital corporations, the courts may intervene and control the conduct of members' meetings to be held in accordance with other statutes instead of the OCA. As well, the court may be more prepared to exercise wider powers in connection with these corporations.[143] For example, in *Re Public Trustee and Toronto Humane Society et al.*,[144] the court held that the application was validly made by one of the directors of the society on any of the following basis: (1) pursuant to the *Trustee Act* (Ontario) as a result of the status of the applicant being a director of the society, (2) pursuant to paragraph 6(d)(1) of the *Charities Accounting Act* (Ontario); or (3) the inherent equitable jurisdiction of the court in charitable matters.

2. Place of meetings

The Policy Summary indicates that for federal corporations, the time and place may be stated in the by-laws in general terms, for example, "The annual or any other general meeting of the

[141] Section 297 of the OCA. The case of *Croatian Peasant Party of Ontario, Canada v. Zorkin et al.* (1981), 38 O.R. (2d) 659 (H.C.) illustrates the circumstances under which a court will order a meeting pursuant to section 297 of the OCA. See also Rexdale CA, *supra* note 62, and *Burlington Association for the Mentally Retarded (Re), supra* note 23.
[142] Subsection 332 of the OCA.
[143] Hoffstein, *supra* note 10 at H-17.
[144] (1987), 60 O.R. (2d) 236.

members shall be held at the head office of the corporation or at any place in Canada as the board may determine and on such day as the said directors shall appoint. The members may resolve that a particular meeting of members may be held outside of Canada."[145]

The OCA states that in general, members' meetings must be held at the place where the head office of the corporation is located.[146] However, the by-law may contain a provision to allow members' meetings to be held at any place in Ontario.[147] Further, the letters patent or supplementary letters patent of the corporation may allow the members' meetings to be held at one or more places outside Ontario designated therein.[148]

3. <u>Notice of meetings</u>

a) Notice period

For federal corporations, the Policy Summary indicates that a reasonable period of notice of members' meetings is required and a minimum of 14 days is recommended for notices sent by mail.[149]

In Ontario, the OCA provides that the by-laws of a corporation cannot provide for fewer than ten days' notice of members' meetings and shall not provide that notice may be given otherwise than individually.[150] However, in the case of a non-share capital corporation with objects that are exclusively charitable, it is sufficient notice of any members' meeting if notice is given by publication at least once a week for two consecutive weeks next preceding the meeting in a newspaper or newspapers circulated in the municipality or municipalities in which the majority of the members of the corporation reside as shown by their addresses on the books of the corporation.[151]

[145] Policy Summary, para. B.2.
[146] Subsection 82(1) of the OCA.
[147] Subsection 82(2) of the OCA.
[148] Subsection 83(3) of the OCA.
[149] Policy Summary, para. B.4.
[150] Subsection 93(2) of the OCA.
[151] Subsection 133(2) of the OCA.

However, where the directors call a special meeting that has been requisitioned by the members, such meeting is required to be called "as nearly as possible in the same manner as meetings of members are called under the by-laws, but, if the by-laws provide for more than twenty-one days' notice of meetings, twenty-one days notice is sufficient for the calling of such meeting."[152]

b) Form

Neither the OCA nor the CCA require notice of members' meetings to be in any particular form or format.

c) Contents of notice

The notice of a members' meeting is very important because it sets the limit on the business to be transacted at a meeting. If the notice does not comply with the applicable requirements, the "proxies, the resolutions, or the whole meeting may be invalidated."[153] The following are some of the essential provisions to be included in a notice of meeting in the absence of special provisions in the relevant documents that governs a corporation:[154]

- Date, time and place of meeting;
- In the case of members' meetings, "the nature of all the business to be transacted at the meeting, either in full or in sufficient detail for the members to be able to determine whether to attend the meeting or appoint proxies (where proxies are authorized), and what preparation to make";[155]
- Name and office of the person(s) calling the meeting.

However, a notice may be defective if it contains invalid provisions and the invalid provisions are not severable from the balance of the notice.[156] Invalid provisions may include invalid items of business or invalid procedures.[157]

---

[152] Subsection 295(5) of the OCA.
[153] Nathan and Hone, *supra* note 21 at 73.
[154] Nathan and Hone, *supra* note 21 at 75.
[155] *Ibid*.
[156] *Ibid.*
[157] *Ibid*.

Neither the CCA nor the OCA specify in detail the type of information to be included in notice of members' meetings.

For federal corporations, the Policy Summary provides that where special business is to be conducted (*i.e.*, other than business that is required to be dealt with at the annual meeting, such as the appointment of auditors and the auditors' report on the financial statements), the notice must contain sufficient information to allow the members to form a reasoned judgment.[158] In other words, it would appear this policy would imply that notice for annual meetings would not need to provide notice for the business that is required to be dealt with at the annual meeting, such as the appointment of auditors and the auditors' report on the financial statements.

The OCA only provides that in the absence of other provisions in the by-laws of the corporation, unless all the members entitled to notice of the meeting have waived in writing the notice, notice of the time and place for holding a members' meeting must be given to the members.[159] The OCA is silent concerning what other information is required to be included in notice of members' meetings.

The case of *Trow v. Toronto Humane Society*[160] illustrates the importance of providing sufficient notice of annual members' meetings where special business is intended to be transacted. In that case, the board decided to request that the members adopt a by-law at the annual meeting of members which would have the effect of reclassifying the members as either active or sustaining and providing that only active members would be entitled to vote at meetings of members. At the meeting, the by-law was adopted. Following the annual members' meeting, the board met and confirmed twelve individuals as active members and resolved that approximately 1,000 other members be non-voting sustaining members. Although notice of the annual members' meeting and the proposed by-law were sent to members, there was no reference in the notice of meeting in relation to the reclassification of members with the ensuing loss of vote by the society's members. The court held that "a member

---

[158] Policy Summary, para. B.5.
[159] Paragraph 93(1)(a) of the OCA.
[160] [2001] O.J. No. 3640, 16 B.L.R. (3d) 298 (Ont. S.C.J.).

of a corporation is entitled to receive not only notice of the meeting, but it is each member's right to receive with such a notice, sufficient information to permit him to come to a reasoned decision as to whether or not he should support the proposal under consideration."[161] As a result, the court held that the notice to the members was insufficient and the resulting by-law could not stand.

The OCA provides that the directors may at any time call a general meeting of the members for the transaction of any business, the general nature of which is specified in the notice calling the meeting.[162] Where a special meeting is requisitioned to be called by the members as reviewed above,[163] the directors shall have the duty to call a special meeting for the transaction of the business stated in the requisition.[164] As such, the notice calling the special meetings would be required to state the business to be transacted at the meeting.

Where a members' resolution is requisitioned to be circulated as reviewed above,[165] the notice or the statement or both, as the case may be, must be given or circulated by sending a copy thereof to each member entitled to receiving notice of the meeting in the same manner and at the same time as that prescribed by the OCA for the sending of notice of meetings of members.[166] However, where it is not practicable to send the notice or statement or both at the same time as the notice of the meeting is sent, the notice or statement or both must be sent as soon as practicable thereafter.[167]

d) Method of giving notice

For federal corporations, the Policy Summary indicates that there are various acceptable ways of giving notice, including the following:[168]

a. by mail to individual members;

---

[161] *Ibid.*, at para. 15.
[162] Section 294 of the OCA.
[163] Subsection 295(1) of the OCA.
[164] Subsections 295(2) and (3) of the OCA.
[165] Subsection 296(1) of the OCA.
[166] Subsection 296(2) of the OCA.
[167] Subsection 296(3) of the OCA.
[168] Policy Summary, para. B.3.

b. by notice published in a regular newsletter sent to all members individually;
c. where the corporation has more than 100 members, by notice published in a local newspaper circulating in a community where the majority of members reside;
d. where the corporation has a place where members normally congregate, by written notice posted in that location;
e. where the corporation has a place where members normally congregate, verbally, followed by written notice posted in that location or published in a special bulletin or regular newsletter sent to all members individually;
f. by electronic means such as e-mail or facsimile.

However, notice to members' delegates only is not sufficient.[169]

The CCA further provides that in the absence of any other provision in the CCA or in the by-laws, notices to be served by a corporation upon its members may be served either personally or by sending the notices through the post, by registered mail, addressed to the members at their places of abode as they appear on the books of the corporation.[170] A notice or other document served by post by a corporation on a member is deemed to be served at the time when the registered letter containing it would be delivered in the ordinary course of post.[171] Furthermore, proof that any letter properly addressed containing any notice or other document permitted by the CCA to be served by post was properly addressed and was put into a post office with postage prepaid, and of the time when it was so put in, and of the time requisite for its delivery in the ordinary course of post, is sufficient evidence of the fact.[172]

The OCA provides that, in the absence of other provisions in the by-laws of the corporation, unless all the members entitled to notice of the meeting have waived in writing the notice, notice of the time and place for holding a member's meeting must be given by sending it to each member entitled to notice of the meeting by prepaid mail ten days or more before the date of the meeting to the member's last address as

[169] *Ibid*.
[170] Section 145 of the CCA.
[171] Section 146 of the CCA.
[172] Section 139 of the CCA.

shown on the books of the corporation.[173] Subject to the letters patent, supplementary letters patent or by-laws, a notice or demand to be served or made by a corporation upon a member may be served or made personally or sent by registered letter addressed to the member at the person's last address as shown on the books of the corporation.[174] Further, subject to the letters patent, supplementary letters patent or by-laws, a notice or other document served by mail by a corporation on a member is deemed to be served at the time when it would be delivered in the ordinary course of mail.[175]

However, as indicated above, in the case of a non-share capital corporation under the OCA the objects of which are exclusively charitable, it is sufficient notice of any members' meeting if notice is given by publication at least once a week for two consecutive weeks next preceding the meeting in a newspaper or newspapers circulated in the municipality or municipalities in which the majority of the members of the corporation reside as shown by their addresses on the books of the corporation.[176]

e) Right to receive notice

It is necessary to determine who has the right to receive notice of members' meetings. Presumably, the members would have the right to receive notice of members' meeting. However, it is necessary to determine whether there are any exceptions in this regard, *e.g.,* a member who is in arrears of membership fees, a member who is not in good standing, a member who is being disciplined by the corporation, etc. Other than members, it is necessary to determine whether any other persons have the right

[173] Paragraph 93(1)(a) of the OCA. In *Caribbean Cultural Committee v. Hill* [2001] O.J. No. 4480 (Sup. C.J.), the constitution of the organization stated that the members may requisition a special meeting by depositing with the organization a requisition signed by 1/10 of the members setting out the business to be transacted. Thereafter, the board must call a meeting within 21 days, failing which the requisitioning members may call such a meeting within 42 days. The constitution further required that notice be delivered to the last listed address of each member. The board did not call the special meeting within the required time after receiving the requisition letter. The requisitioning members called a meeting, but did not use a current list of members when they gave notice of the meeting. The court held that the election of directors held at the meeting called was invalid because the special meeting was not properly convened. Failure to give notice to the members at their last listed address was fatal.

[174] Subsection 324(1) of the OCA.

[175] Subsection 324(2) of the OCA.

[176] Subsection 133(2) of the OCA.

to receive notice of members' meetings. It is not uncommon for by-laws of non-share capital corporations to allow for other persons to receive notice of members' meetings, such as senior management staff, liaison representatives of related organizations (*e.g.*, a liaison person from an umbrella organization in which the corporation in question is a member), founders of the corporation, etc.

As indicated below, the auditors of both federal and Ontario corporations have the duty to represent his/her report to the members at annual members' meetings. This would imply that they need to attend the meeting in order to do so. In the case of Ontario corporations, the OCA specifically provides that the auditor is "entitled to attend any meeting of [members] of the [corporation] and to receive all notices and other communications relating to any such meeting that a [member] is entitled to receive and to be heard at any such meeting that the auditor attends on any part of the business of the meeting that concerns the auditor as auditor."[177]

4. Quorum

In order to transact business at a members' meeting, there must be a quorum of members at the meeting.

For federal corporations, the by-laws must state what the necessary quorum is, which must be fixed either by a fixed number, a percentage or a determinable formula. However, at least two members must be present.[178]

The OCA is silent on the issue of who is to chair members' meetings. As such, this issue would be governed by the corporation's by-laws. If the by-laws are silent in the issue of quorum, at common law, it is a majority of the members entitled to attend and vote at the meeting.[179]

---

[177] Subsection 96(6) of the OCA.
[178] Policy Summary, para. B.6.
[179] Nathan and Hone, *supra* note 21 at 89. See also *Montreal Trust Co. v. Oxford Pipe Line Co.,* [1942] 2 D.L.R. 703 (Ont. H.C.); aff'd [1942] 3 D.L.R. 619 (C.A.); *R. v. Bellringer* (1792), 100 E.R. 1315 (K.B.D.).

In situations where members have the right to vote by proxy, it is necessary to determine whether proxies would be counted towards establishing quorum. It is also necessary to determine whether a minimum number of persons attending the meeting in person are required in order to establish quorum.

5. Chair

As in the case of board meetings, each members' meeting must have a person to preside as chair in order to ensure that proceedings are properly and fairly conducted,[180] in accordance with the applicable law and rules of order. The main function of the chair is to "keep the meeting going and to obtain the 'sense of the meeting' in a legal and democratic manner."[181]

The OCA provides that in the absence of other provisions in the by-laws of the corporation, the president or, in his or her absence, a vice-president who is a director shall preside as chair at a members' meeting.[182] However, if there is no president or such a vice-president, or if at a meeting neither of them is present within fifteen minutes after the time appointed for the holding of the meeting, the members present are required choose a person from their number to be the chair.[183]

If a poll is demanded, it is required to be taken in such manner as the by-laws prescribe, and, if the by-laws make no provision for this, then as the chair directs.[184] Moreover, in the absence of other provisions in the by-laws of the corporation, the chair presiding at a meeting of members may, with the consent of the meeting and subject to such conditions as the meeting decides, adjourn the meeting from time to time and from place to place.[185]

The CCA is silent on the issue of quorum of members' meetings. As such, this issue would be governed by the corporation's by-laws. However, the OCA states that the chair presiding at

[180] Nathan and Hone, *supra* note 21 at 55.
[181] *Ibid*.
[182] Paragraph 93(1)(e) of the OCA.
[183] *Ibid*.
[184] Subsection 93(3) of the OCA.
[185] Paragraph 93(1)(d) of the OCA.

the meeting has a second or casting vote in case of an equality of votes by the members at a members' meeting.[186]

6. Who may attend and participate at members' meetings

Both the CCA and the OCA are silent on the issue of who may attend and participate at members' meeting. As such, this issue would be governed by the corporation's by-laws.

Other than members, it is necessary to determine whether any other person has the right to attend and/or participate at members' meetings. Usually, the by-laws would provide that members and senior management staff (*e.g.*, the executive director, the chief financial officer, etc.) may attend at members' meetings. Sometimes, other persons, such as liaison representatives of related organizations (*e.g.*, liaison person from an umbrella organization of which the corporation in question is a member), founders of the corporation, etc., may also attend such meetings.

As indicated above, the auditors of both federal and Ontario corporations have the duty to represent his/her report to the members. This would imply that they need to attend the meeting in order to do so. In the case of Ontario corporations, the OCA specifically provides that the auditor is "entitled to attend any meeting of [members] of the [corporation] … and to be heard at any such meeting that the auditor attends on any part of the business of the meeting that concerns the auditor as auditor."[187]

7. Business to be conducted

Neither the CCA nor the Policy Summary specially set out a list of the business items that must be transacted at annual members' meetings of federal corporations. However, the following matters are commonly transacted at annual members' meetings of non-share capital corporations:[188]

> (1) the directors present the members with the financial statements and the report of the auditors (where auditors are required to be appointed);

[186] Paragraph 93(1)(c) of the OCA.
[187] Subsection 96(6) of the OCA.
[188] Burke-Robertson and Drache, *supra* note 54, at 9-3.

> (2) the members authorize the signing of the balance sheet by two of the directors;
> (3) the members appoint an auditor or accountant (subject to the legislative requirements of the incorporating jurisdiction) for the upcoming year and may authorize the directors to fix the remuneration of the auditor or accountant;
> (4) the members elect the directors (and officers where the by-laws so provide);
> (5) *ex officio* directors and officers may be confirmed, depending upon the requirement of the by-laws; and
> (6) where appropriate, past acts of the directors and officers may be confirmed.

The exact business to be transacted at the annual members' meeting would depend on the requirements of the incorporating statute, the incorporation documents, the by-laws, and other relevant documents of the corporation in question.

The CCA provides that the members of a non-share capital corporation must appoint one or more auditors to hold office until the close of the next annual meeting, and, if the members fail to do so, the directors shall forthwith make such appointment or appointments.[189] Thereafter, the members at each annual members' meeting are required to appoint one or more auditors to hold office until the close of the next annual meeting, and, if an appointment is not so made, the auditor in office continues in office until a successor is appointed.[190] In that regard, the by-laws of federal corporations must indicate that the members will appoint an auditor at each annual meeting.[191] The Policy Summary further states that the by-laws must indicate that the auditor will audit the accounts of the corporation and make a report to the members at the annual meeting.[192] The Policy Summary also indicates that an auditor must audit the annual financial statements of the corporation and report to the members at the annual general meeting on whether these financial statements are fairly presented in accordance with generally accepted accounting principles. The CCA does not permit a waiver of audit.

The Policy Summary provides that where special business is to be conducted (*i.e.*, other than the business that is required to be transacted at the annual meeting, such as the appointment

[189] Subsection 130(1) of the CCA.
[190] Subsection 130(2) of the CCA.
[191] Policy Summary, para. J.1.
[192] Policy Summary, para. J.2.

of auditors and the auditors' report on the financial statements), the notice must contain sufficient information to allow the members to form a reasoned judgment.[193] In other words, it would appear this policy implies that notice for annual meetings would not need to provide notice for business that is always required to be dealt with at the annual meeting, such as the appointment of auditors and the auditors' report on the financial statements.

The OCA requires the following information be laid before annual members' meetings:[194]

> (a) A financial statement for the period that commenced on the date of incorporation and ended not more than six months before such annual meeting or, if the company has completed a financial year, that commenced immediately after the end of the last completed financial year and ended not more than six months before such annual meeting, as the case may be, made up of,
>
> (i) a statement of profit and loss for such period,
> (ii) a statement of surplus for such period, and
> (iii) a balance sheet as at the end of such period;
>
> …
>
> (c) the report of the auditor to the shareholders;
> (d) such further information respecting the financial position of the company as the letters patent, supplementary letters patent or by-laws of the company require.

The OCA further requires that the report of the auditor to the members be read at the annual meeting and shall be open to inspection by any member.[195]

The audit exemption provisions contained in the OCA have recently been amended to allow a broader application of the audit exemption for non-share capital corporations. Prior to the amendment, a non-share capital corporation was exempt from the audit requirement if its annual income was less than $10,000 and all of the members consented, in writing, to the exemption in respect of the year.[196] However, the audit exemption did not apply to charitable corporations.[197] On December 20, 2006, Bill 152, *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006* (Business Modernization Bill) received Royal Assent. Bill 152 will raise the threshold from $10,000 to $100,000 and the

---

[193] Policy Summary, para. B.5.
[194] Paragraphs 97(1)(a), (c) and (d) of the OCA.
[195] Subsection 97(3) of the OCA.
[196] Section 96.1 of the OCA.
[197] Subsection 133(2.1) of the OCA.

exception from audit exemption will be repealed so that charitable corporations will also benefit from the audit exemption provision. However, at the time of writing this paper,[198] Bill 152 has not yet been proclaimed in force by the Lieutenant Governor.

However, it is also possible to transact special business at annual meetings, provided that notice of the special business is clearly provided to the members and the notice contains sufficient information to allow the members to form a reasoned judgment.[199]

8. Voting and proxies

The by-laws of federal corporations may specify the voting rights of the members.[200] In addition, the voting rights of membership classes may be unequal as long as these are specified in the by-laws.[201] For example, a by-law may provide that there are two classes of members, namely voting members and non-voting members. Where there is more than one class of members, at least one class must be voting members.[202]

Furthermore, the Policy Summary also provides for the following:[203]

- The by-laws may provide that members' decisions are to be made by consensus unless the CCA provides otherwise. The by-laws must define the word "consensus" and describe the means of referring any matter to a vote if consensus is not reached. (Decisions by consensus generally work best when corporations have ten or fewer members.)

- Proxy voting by members at members' meetings is optional. Where the by-laws indicate that a member may vote by proxy at a members' meeting, they must also specify who may be a proxyholder, that proxies are to be in written form and that either a form of proxy or a reminder of right to use a proxy will be attached to the notice of meeting going to all voting members.

[198] As of February 7, 2007.
[199] For example, para. B.5 of the Policy Summary provides that where special business is to be conducted (that is, other than business that is required to be dealt with at the annual meeting such as the appointment of auditors and the auditors' report on the financial statements), the notice must contain sufficient information to allow the members to form a reasoned judgment.
[200] Paragraph 155(2)(b) of the CCA.
[201] Policy Summary, para. A.1.
[202] Burke-Robertson and Drache, *supra* note 54 at 3-20.
[203] Policy Summary, para. B.1.

- Where the by-laws state that a majority vote determines questions in meetings, the statement must be qualified by "unless the Act or these by-laws otherwise provide."

- Where the by-laws provide that a subdivision of members will vote through a representative or delegate at a specified meetings of members, they should explain how that representative or delegate is selected.

- Where the members' permanent delegate to the members' meetings is also the individual who represents them on the board of directors, the by-laws must make clear that:

  - in a vote at a meeting that members have requisitioned the directors to call (*i.e.*, a requisitioned vote), the voting members themselves have the right to vote, and the members' delegates cannot vote on behalf of the voting members, and
  - in other types of votes, the voting members themselves have the right to attend all meetings of members, even though their vote is exercised by their delegate.

In Ontario, the OCA provides that each member of each class of members of a corporation has one vote, unless the letters patent, supplementary letters patent or by-laws of the corporation provide that each such member has more than one vote or has no vote.[204] In addition, in the absence of other provisions in the by-laws of the corporation, no member in arrears in respect of any call is entitled to vote at a meeting.[205] The OCA further states that all questions proposed for the consideration of the members at a members' meeting shall be determined by the majority of the votes cast and the chair presiding at the meeting has a second or casting vote in case of an equality of votes.[206]

The OCA provides every member, including a member that is a corporation, entitled to vote at a meeting of members may by means of a proxy appoint a person as the member's nominee to attend and act at the meeting in the manner, to the extent and with the power conferred by

[204] Section 125 of the OCA. See *Horton v. St. Thomas Elgin General Hospital* (1982), *supra* note 41. The court held that (1) theoretically, a by-law could be passed suppressing the right of certain members to vote as long as the wording is clear; (2) once the by-law is passed, they will only be successfully challenged on evidence of oppression or denial of natural justice leading to a breach of fiduciary duty, and (3) a senseless suppression of the right to vote will bring in considerations of both *mala fides* and natural justice in both share capital corporations and non-share capital corporations.
[205] Paragraph 93(1)(b) of the OCA.
[206] Paragraph 93(1)(c) of the OCA.

the proxy.[207] It further provides that the person appointed to hold the proxy need not be a member of the corporation.[208] The OCA also contains detailed requirements in relation to the execution and termination of proxies, contents of proxies, revocation of proxies, and the time limit for members to deposit proxies with the corporation or its agent.[209]

Furthermore, the OCA states that in the absence of other provisions in the by-laws of the corporation, unless a poll is demanded, an entry in the minutes of a meeting of members to the effect that the chair declared a motion to be carried, is admissible in evidence as proof of the fact, in the absence of evidence to the contrary, without proof of the number or proportion of votes recorded in favour of or against the motion.[210] If a poll is demanded, it is required to be taken in such manner as the by-laws prescribe, and if the by-laws make no provision therefor, then as the chair directs.[211]

9. Meetings by electronic procedure

By-laws of federal corporations may provide that members may hold meetings by teleconference or by other electronic means that permit members to communicate adequately with each other.[212] The Policy Summary further indicates that the by-laws are required to set out the minimum percentage of members needed to approve the holding of such meetings.[213] With respect to a meeting held by other electronic means, the by-laws are required to specify how security issues will be handled and should address the mechanics of holding such a meeting, *e.g.*, the procedures for establishing quorum and recording votes. Each member is required to have equal access to the technology and should consent in advance to the specific means of communication to be used. The Policy Summary indicates that teleconference meetings generally work best for corporations with a small numbers of members.

The OCA is silent on the issue of holding members' meetings electronically. It is unclear whether this would mean that this issue would be governed by the corporation's by-laws and

---

[207] Subsection 84(1) of the OCA.
[208] *Ibid*.
[209] Subsections 84(2) to (5) of the OCA.
[210] Paragraph 93(1)(f) of the OCA.
[211] Subsection 93(3) of the OCA.
[212] Policy Summary, para. B.1.
[213] *Ibid*.

the corporation is free to include any provisions in the by-law in this regard, or whether holding members' meetings electronically is not permissible.

10. Resolutions or mail ballots in lieu of meetings

For federal corporations, their by-laws may permit the use of written resolutions or mail ballots (including e-mail ballots), provided that matters that are to be dealt with as such are not matters required by the CCA to be dealt with at a meeting.[214] Examples of these matters would include, for example, the election of directors, the appointment of an auditor,[215] the adoption of a by-law authorizing the application for supplementary letters patent,[216] authoring the relocation of its head office[217] or changing its corporate name,[218] or the adoption of a borrowing by-law.[219]

Where the use of written resolutions and/or mail ballots is permissible, the by-laws should clarify what would constitute the equivalent of a quorum, and any special provisions respecting rights of voting and the percentage of votes required for approval.[220] However, there is no requirement that written resolutions must be approved by unanimous consent.[221]

For Ontario corporations, any resolution signed by all members of the corporation is as valid and effective as if it had been passed at a meeting of the members duly called, constituted and held for that purpose.[222] It is permissible for directors to sign a written resolution to adopt a

[214] Policy Summary para. B.1. It was previously permissible for all directors to sign written resolutions in lieu of meetings, but the Policy Summary was revised in 1998 not to permit this practice.
[215] Subsection 130(2) of the CCA.
[216] Subsections 20(1), (4) and (5) of the CCA. See *supra* note 44.
[217] Subsection 24(3) of the CCA. See *supra* note 45.
[218] Subsection 29(1) of the CCA. See *supra* note 46.
[219] Subsection 65(1) of the CCA. See *supra* note 47.
[220] Policy Summary para. B.1.
[221] *Ibid*.
[222] Subsection 298(2) of the OCA. Previously, this subsection of the OCA only permitted members to do so during the first year of incorporation. However, this subsection was amended by the *Red Tape Reduction Act*, S.O. 1998, c.18 which was proclaimed into force on March 1, 1999.

by-law,[223] and such by-law may, in lieu of confirmation at a general meeting of the members, be confirmed in writing by all the members entitled to vote at such meeting.[224]

G. CONCLUSION

As is evident from the above review, there are unique statutory rules that apply to non-share capital corporations in relation to conducting board and members' meetings. In addition, the meeting procedures for corporations incorporated federally under the CCA and corporations incorporated provincially under the OCA are significantly different. As well, the courts have also indicated that they are prepared to intervene where the procedures followed do not reflect compliance with the incorporating statute, the incorporation documents or the by-laws of the corporation in question. It is therefore important for lawyers who advise non-share capital corporations concerning the holding of board and/or members' meetings to ensure that they are familiar with the vast array of rules and procedures that apply to these entities.

---

[223] Subsection 298(1) of the OCA. See *supra* note 117.
[224] Subsection 298(3) of the OCA provides that any by-law passed at any time during a corporation's existence may, in lieu of confirmation at a general meeting, be confirmed in writing by all the members entitled to vote at such meeting.