
**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**

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Offices / Bureaux

Ottawa (613) 235-4774

Mississauga (416) 675-3766

Orangeville (519) 942-0001

Toll Free: 1-877-942-0001

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INTRODUCTION

- Share capital corporations have share capital and shareholders who are entitled to participate in the profits of the company
- Non-share capital corporations do not have share capital and have members who act together for a common purpose
- Non-share capital corporations can be incorporated federally under Part II of the *Canada Corporations Act* (“CCA”), or provincially under the applicable provincial corporations statute, such as Part III of the *Corporations Act* (Ontario) (“OCA”)

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- Non-share capital corporations can also be incorporated under other statutes, e.g., *Co-Operative Corporations Act*, *Condominium Act*, special legislation
- This presentation will only focus on the requirements under the CCA and the OCA in holding board and members’ meetings
- There has been a movement toward revising and updating the CCA and the OCA, both of which are somewhat antiquated and require a more modern corporate governance framework

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BASIC COMPONENTS OF NON-SHARE CAPITAL CORPORATIONS

- Both the CCA and the OCA requires non-share capital corporations to have two basic components: directors and members
- Directors manage the affairs of the corporation by meeting together and often delegating certain responsibilities to officers of the corporation
- Members have a more minor role:
 - Members must meet at least once a year and the business transacted at these meetings is usually limited

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- 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
- Under the CCA and the OCA, members act together for a common purpose, e.g. religious, philanthropic, charitable, etc.
- The letters patent (“LP”) must state that the corporation must carry on its operations without any pecuniary gain to its members

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- Difference between the terms “non-profit corporations” vs. “non-profit organizations”
 - “Non-profit corporations” – for purposes of corporate statutes
 - “non-profit organizations” (“NPOs”) - for purposes of the *Income Tax Act* (Canada), it is one type of tax-exempt entities

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SOURCE DOCUMENTS CONTAINING RULES FOR MEETING PROCEDURES

- In order to ensure that the resolutions made at decision-making meetings are validly adopted, the applicable meeting procedures must be followed
- In the absence of *mala fides* or the corporation acting unlawfully, the courts generally will not interfere with the decision of its members acting in accordance with its by-laws and governing statute
- In some situations, non-profit corporations may not be required to adhere rigorously to the technical requirements of corporate procedure as long as their process is fair

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- Rules relating to meeting procedures may be found in:
 - Incorporating statute (*e.g.*, CCA or OCA)
 - Incorporation documents (*i.e.*, LP and supplementary letters patent (“SLP”))
 - By-laws
 - Rules of procedure
 - Other relevant documents of the corporation
- Where these documents are silent, recourse must be had to the common law

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1. Incorporating statute
 - Federally – Part II of the CCA
 - Ontario - Part III of the OCA
 - Some provisions of the incorporating statutes are mandatory; by-laws cannot circumvent them - *e.g.*, the OCA permits members to vote by proxy
 - Some provisions of the incorporating statutes provide a “default” mechanism for issues not dealt with in the by-law - *e.g.*, the OCA states that members have one vote unless the letters patent, supplementary letters patent or by-laws provide otherwise

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2. Other statutes

- A non-share capital corporation incorporated under the CCA or the OCA may also be subject to the provisions of other statutes that may override the provisions in the CCA or the OCA
 - e.g., public hospitals incorporated under the OCA are also subject to the provisions of the *Public Hospitals Act* (Ontario) – e.g., special rules regarding members voting rights and notice requirements
- Important to exercise due diligence in determining whether the provisions of any other statutes apply to the corporation in question

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3. Letters patent and supplementary letters patent

- Incorporation documents may contain provisions relevant to the conduct of board or members' meetings:
 - LP and SLP
 - LP of amalgamation
 - LP of continuation
- CCA - may include in the LP any provisions which could be contained in any by-law of the corporation

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- OCA - may include in the LP any matters that the incorporators desire, and any provisions which could be the subject of a by-law of the corporation, except for a provision regarding the election and retirement of directors
- The most reliable way of ensuring that *all* of the incorporation documents are available for review would be to obtain copies from the government's records, as the client's records may not be complete
- It is also important to ensure that all incorporation documents have been duly approved by the corporation

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4. By-laws and by-law amendments

- The general operating by-law of the corporation is the most relevant and informative document with respect to the conduct of board and members' meetings
- Both the OCA and the CCA permit non-share capital corporations to adopt by-laws that are not inconsistent with the statute
- It is important to note the provisions in the general operating by-law which override permissive provisions in the incorporating statute

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- If a corporation was incorporated without ever having passed a general operating by-law, it would be necessary for that corporation to adopt a new general operating by-law prior to calling a board or members' meeting to transact other issues
- It is necessary to ensure that the general operating by-law was duly enacted, *e.g.*:
 - Membership approval
 - Government approval for CCA corporations
 - Additional approval requirements - *e.g.* approval by a certain level of approval or its directors and sanctioned by a certain level of approval of its members; or approval by a third party (*e.g.* denominational head office)

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5. Rules of procedure and other documents

- Other documents that may be relevant to the conduct of board and members' meetings, *e.g.*:
 - Rules of order
 - Agreements with other entities
 - Operation manuals of international entities
- The incorporating statute, the incorporation documents and the by-laws have paramountcy over rules of order

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- A non-share capital corporation may have an agreement with another entity which imposes certain requirements in relation to board and members' meetings, *e.g.*:
 - Umbrella organization
 - Affiliate entities
 - Funding bodies
- Rules of procedure may be set out in a manual that governs, for example, a religious denomination. The manual may be incorporated by reference or referred to in the by-laws

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PREPARATION FOR BOARD AND MEMBERS' MEETINGS

- Non-share capital corporations are often run by volunteers who may not be familiar with corporate procedures or how to conduct meetings. Problems may result, *e.g.*:
 - Never adopted any general operating by-law
 - No record of whether the organization is incorporated
 - Incomplete record of incorporation or governing documents
 - Inaccurate membership list

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- Before calling a board or members' meeting, there are important issues to address first:
 - Whether the organization is a corporation
 - Review of governing and related documents
 - Issues concerning directors and members
 - Drafting documents and other preparation

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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
- 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

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2. Reviewing governing and related documents

- It is important to ensure that the by-laws were duly adopted by the corporation
- Corporate records, such as the corporate minute book, may not always be complete or they may be missing altogether
- May need to locate governing documents or reconstruct corporate records

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3. Directors and members

- The corporate documents must be reviewed in order to determine, e.g.:
 - The classes of members and directors, qualification requirements and admission requirements
 - The rights attached to each class of members and directors
 - The identity of the members and directors
 - Whether members were duly admitted
 - Whether the directors were duly elected or appointed

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- The CCA and the OCA have different statutory requirements of who can be incorporators, members and directors
- The corporation's members' register and directors' register may not be up to date
- See *Rexdale Singh Sabha Religious Centre v. Chattha*, a recent Ontario Court of Appeal decision which deals with provisions in the OCA which relate to corporate non-compliance, *e.g.*:
 - Never adopted any by-law after incorporation
 - Directors and members are the original incorporators

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- 4. Drafting documents and other preparation**
- Various types of documents for meetings need to be prepared in advance, *e.g.*:
 - Notice of meetings
 - Agendas
 - Proxies
 - Ballots
 - Detailed agenda for the chair (chair's script)
 - Scrutineers' reports

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- Other preparation, *e.g.*:
 - Sending notices of meetings
 - Instructing scrutineers and other personnel
 - Making physical arrangements for the venue
 - Preparing strategies to deal with proxy contests

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BOARD MEETINGS

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

- **CCA – By-laws must contain provisions concerning the time and place of directors’ meeting**
- **OCA - Silent on when board meetings are to be called, issue to be governed by the by-laws**
- **Both the OCA and the CCA are silent with regard to who has the right to duty to call board meetings, issue to be governed by the by-laws**

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2. Place of meetings

- **CCA - By-laws must contain provisions concerning the place of directors’ meeting**
- **OCA**
 - **Board and executive committee meetings are generally held where the head office of the corporation is located**
 - **But the by-laws may provide for meetings to be held at any place within or outside of Ontario**

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3. Notice of meetings

- **CCA**
 - **By-laws must either specify a reasonable amount of time for notice of directors’ meetings or indicate that reasonable notice of meetings will be given**
 - **Minimum of 14 days recommended by Corporations Canada if sent by mail**
 - **Notice may be sent by email or by fax**
- **OCA - Silent, issue is to be governed by the by-laws**

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4. Right to receive notice

- **Directors**
- **Possibly other individuals (review governing documents) e.g., senior management staff or liaison representatives from an umbrella organization of which the corporation is a member**

5. Quorum

- **Quorum is necessary in order to transact business at a board meeting.**
- **CCA - By-law must state the necessary quorum, which must be at least 2 directors**

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- **OCA - Unless the LP, SLP or a special resolution provides otherwise, a majority of the board constitutes quorum, and quorum shall not be less than two-fifths of the board**
- **If insufficient quorum of directors on the board**
 - **CCA – Silent**
 - **OCA – Remaining directors must forthwith call a general meeting of members to fill the vacancies, failing which, any member may call the meeting**

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6. Chair

- **Both the OCA and the CCA are silent – issue to be governed by the by-laws**

7. Who may attend and participate at board meetings

- **Both the OCA and the CCA are silent – issue to be governed by the by-laws**
- **Directors**
- **Possibly other individuals (review governing documents) e.g., senior management staff or liaison representatives from an umbrella organization of which the corporation is a member**

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8. Business to be conducted

- Both the OCA and the CCA are silent – issue to be governed by the by-laws

9. Voting

- OCA – Silent, issue to be governed by the by-laws
- CCA:
 - Voting rights must be equal for all directors
 - Proxy voting is not acceptable
 - By-laws may provide that directors’ decisions are to be made by consensus, and if so, consensus must be defined

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10. Meetings by electronic procedure

- CCA - By-laws may provide for directors’ meetings to be held by teleconference or other electronic means which permit directors to communicate adequately with each other (By-laws must specify how security issues will be handled and the procedure for establishing issues such as quorum and recording votes)
- OCA - Unless the by-laws otherwise provide, with the consent of all directors participating, a meeting may be held by telephone or other electronic means which permit all persons to communicate with each other simultaneously and instantaneously

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11. Resolutions or mail ballots in lieu of meetings

- CCA - Not permissible for directors to sign written resolutions or to have mail ballots in lieu of holding board meetings
- OCA - By-laws and resolutions may be signed by all directors, in lieu of meetings

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MEMBERS' MEETINGS

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

- **In general, there are two types of members' meetings:**
 - **Meetings of a particular class or section of the corporation**
 - **General meetings - two types: annual meetings and special meetings**

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a) Annual meetings ("AGMs")

- **Both the CCA and the OCA - An AGM must be held not later than 18 months after incorporation, and subsequently once at least every calendar year and not more than 15 months after the holding of the last preceding AGM**
- **CCA - If directors do not call an AGM, a member may apply to the court in the province in which the head office is situated to call an AGM**
- **OCA - If directors do not call an AGM, members may apply to court to call an AGM because it is impractical to call an AGM or because the member is aggrieved**

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b) Special meetings

- **Special members' meetings may be called as necessary**
- **CCA**
 - **By-laws may provide a certain number of members may requisition a special meeting (Policy Summary recommends at least 5%)**
 - **The court in the province in which the head office is situated may also call a meeting where it is impractical to call one**

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- **OCA:**
 - Directors may call a general members' meeting at any time and the notice of the meeting must state the general nature of the business to be transacted
 - At least 1/10 the voting members may requisition to call a members' meeting - If the directors do not call and hold the meeting within 21 days, the requisitionists may call such meeting within 60 days of the requisition
 - Members may request to circulate notice of resolutions or statements prior to a members' meeting

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- Any voting director or member may apply to court to call a members' meeting where it is impractical for the corporation to call one
- Any aggrieved member may apply to court to call a members' meeting

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- 2. Place of meetings**
- **CCA** - Time and place of members' meeting may be stated in the by-law in general terms
 - **OCA** - In general, members' meetings must be held at the place where the head office of the corporation is located, unless:
 - the by-laws contain a provision for the meetings to be held at any location in Ontario, or
 - the LP or SLP allow for the meetings to be held at one or more places outside of Ontario

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3. Notice of meetings

a) Notice period

- **CCA - A reasonable period of notice of members' meetings is required and a minimum of 14 days is recommended for notices sent by mail**
- **OCA:**
 - **By-laws cannot provide for fewer than 10 days' notice and shall not provide that notice may be given otherwise than individually**

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- **For corporations with exclusively charitable objects, notice may be given by publication at least once a week for 2 consecutive weeks preceding the meeting in a newspaper circulated in the municipality in which a majority of the members of the corporation reside**

b) Form of notice

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

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c) Contents of notice

- **Notice of a members' meeting is important because it sets the limit on the business to be transacted at the meeting**
- **If notice does not comply with the applicable requirements, the proxies, resolutions or the whole meeting may be invalidated**
- **Neither the CCA nor the OCA specifies in detail the type of information to be included in notice of members' meeting**

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d) Method of giving notice

- **CCA – Notice may be sent by various means, e.g., by mail, email, fax, publication in a newspaper, posting written notice in a place where members congregate, etc.**
- **OCA:**
 - **By sending the notice by mail at least 10 days before the meeting, unless the by-law provide otherwise**
 - **Charitable corporations - by publication at least once a week for 2 consecutive weeks preceding the meeting in a newspaper circulated in the municipality in which a majority of the members of the corporation reside**

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e) Right to receive notice

- **Needs to determine whether there are any exceptions so that certain members are not entitled to receive notice, e.g.: member’s membership fees are in arrears, member is not in good standing**
- **Other individuals may be entitled to receive notice, e.g., senior management staff, liaison representatives of related organizations or founders of the corporation**
- **OCA - Specifically provides that the auditor is entitled to notice of any members’ meetings and to be heard at such meeting**

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4. Quorum

- **In order to transact business at a members’ meeting, there must be a quorum of members at the meeting**
- **CCA – By-laws must state what the necessary quorum is, which must be fixed either by a fixed number, a percentage or a determinable formula, with a minimum of 2 members present**
- **OCA – Silent, issue to be governed by the by-laws**
- **If the by-law is silent on the issue of quorum, at common law, it is the majority of the members entitled to attend and vote at the meeting**

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5. Chair

- **CCA – Silent, issue to be governed by the by-laws**
- **OCA:**
 - **Unless the by-laws state otherwise, the president is to chair a meeting, and in his or her absence, the vice president**
 - **If there is no president or vice president, or if they are both absent after 15 minutes the appointed time for the meeting, the members present must choose a person to be the chair**

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6. Who may attend and participate at members' meetings

- **Both the CCA and OCA are silent – issue to be governed by the by-laws, except that the OCA specifically provides that the auditor is entitled to attend and participate at members' meetings**
- **Other individuals may be entitled to attend and participate at members' meetings, e.g., senior management staff, liaison representatives of related organizations or founders of the corporation**

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7. Business to be conducted

- **Matters commonly transacted at AGMs:**
 - **A presentation of the financial statements by the directors and a report of the auditors**
 - **Authorizing the signing of the balance sheet by the directors**
 - **Appointing an auditor and fixing the auditor's remuneration**
 - **Electing directors and confirming ex officio directors**
 - **Confirming past acts of directors and officers**

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- **CCA:**
 - Does not set out a list of items that must be transacted at AGMs, except that members must appoint an auditor at AGMs
 - Does not permit waiver of audit
- **OCA:**
 - Information that must be laid before AGMs - financial statements, report of the auditor, and such further information respecting the financial position as required by the LP, SLP or the by-laws
 - Limited audit exemption – recent amendment (Bill 152)

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8. Voting and proxies

- **CCA:**
 - By-laws may specify the voting rights of members
 - By-law may allow proxy voting – if so, they must specify the relevant details such as notice and form
 - By-laws may provide that members’ decisions be made by consensus unless the CCA provides otherwise -- if so, by-laws must define the word “consensus” and the describe the process to be taken in the event that consensus is not reached

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- **OCA:**
 - Each member of each class of members has one vote, unless the LP, SLP or by-laws provide otherwise
 - All decisions to be determined by the majority of the votes cast
 - The presiding chair has a second or casting vote in case of equality of votes
 - Every member is entitled vote by proxy

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9. Meetings by electronic procedure

- **CCA – By-laws may provide for members to hold meetings by teleconference or other electronic means as long as the members are able to adequately communicate with each other**
- **The OCA is silent –unclear whether this would mean that the issue may be governed by the corporation’s by-laws or whether holding members’ meetings electronically is not permissible**

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10. Resolutions or mail ballots in lieu of meetings

- **CCA:**
 - **By-laws may permit the use of written resolutions or mail ballots, including email ballots, as long as the CCA does not specify that the matter must be dealt with at a meeting which may include appointment of the auditor, adoption of a borrowing by-law**
 - **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 special provisions with respect to voting**

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- **OCA :**
 - **Resolutions may be signed by all members, in lieu of meetings**
 - **It is permissible for directors to sign a written resolution to adopt a by-law, 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**

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CONCLUSION

- As is evident from this presentation, there are unique statutory rules that apply to non-share capital corporations in relation to conducting board and members' meetings
- The meeting procedures are significantly different, depending on whether the corporation was incorporated under the CCA or the OCA

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- As well, the courts have indicated that they are prepared to intervene where the procedures followed do not reflect compliance with the incorporating statute, incorporation documents or the by-laws of the corporation
- It is therefore important for lawyers who advise non-share capital corporations concerning the holding of board and members' meetings to ensure that they are familiar with the vast array of rules and procedures that apply to these entities

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