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**CANADIAN SOCIETY OF ASSOCIATION  
EXECUTIVES  
TRILLIUM CHAPTER**

**SUMMER SUMMIT 2015**

**July 9, 2015**

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**AVOIDING BOARD MEETING NIGHTMARES**

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**By Terrance S. Carter & Theresa L.M. Man**  
[tcarter@carters.ca](mailto:tcarter@carters.ca) [tman@carters.ca](mailto:tman@carters.ca)  
1-877-942-0001

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## CSAE – 10th Annual Trillium Chapter Summer Summit July 9, 2015

### Avoiding Board Meeting Nightmares

By Terrance S. Carter and Theresa L.M. Man

tcarter@carters.ca and tman@carters.ca  
1-877-942-0001

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#### SETTING THE STAGE

- How to avoid nightmares from board meetings?
- Important to hold meetings properly according to legal requirements, otherwise might affect the validity of the decisions made at the meetings



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- This presentation reviews issues regarding board meetings of not-for-profit organizations – what to do before and during meetings
- This presentation does not address members' meetings
- This presentation reviews legal issues, not governance issues, such as how to be an effective meeting chair, how to encourage meeting participants to voice their opinions, etc.
- Basic concepts and general rules are explained but not technical rules
- Lots of examples of nightmare questions/scenarios

## OVERVIEW OF TOPICS

- Why hold board meetings?
- Considerations before the meeting
- Issues that may arise during the meeting
- Minutes of meetings



## WHY HOLD BOARD MEETINGS?

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

## CONSIDERATIONS BEFORE THE MEETING

Where to find the rules for the meetings

Review of documents to understand the rules

Purpose and nature of meeting

Calling the meeting – notice

Where to hold the meeting

## 1. Where to Find the Rules for Meetings

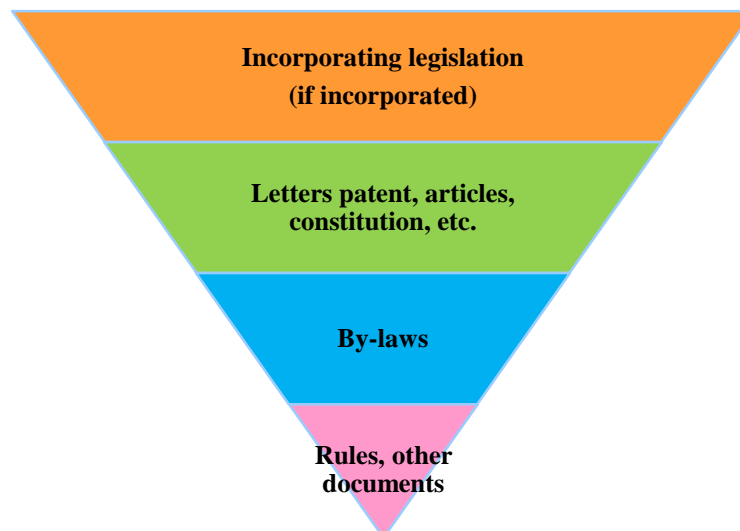
- Find copies of all relevant documents
- What documents are relevant varies, depending on the governance and structure of the organization, e.g.,
  - Incorporated or not incorporated
  - Part of a national or international structure, or denomination
- Ensure documents have been properly adopted by the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



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

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

## HIERARCHY OF AUTHORITY OF DOCUMENTS



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

## 2. Review Documents to Understand the Rules

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

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

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

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### 3. Calling the Meeting – Notice

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



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

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

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

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

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

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

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

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

#### 4. Where and How to hold the meeting

- CNCA/ONCA - board meetings can be held anywhere unless the articles or by-laws otherwise provide
- OCA, ONCA, CNCA – board meetings can be held electronically but have specific rules
- OCA – If all the directors of a corporation present at or participating in the meeting consent, a meeting of directors may be held by such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously (but bylaws can change these rules)

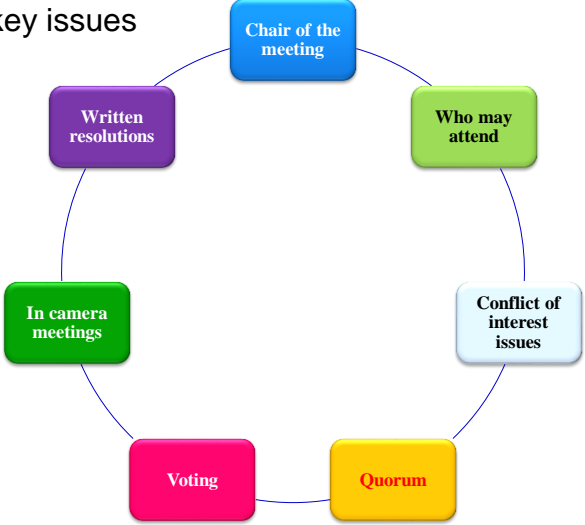
- ONCA – If all the directors of the corporation consent, a director may participate in a meeting of the directors by telephonic or electronic means that permits all participants to communicate adequately with each other during the meeting (but bylaws can change these rules)
- CNCA – same as ONCA but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

- Nightmare questions/scenarios
  - Can a board meeting be held by conference call?
  - Can a board meeting be held by Skype?
  - No one seems to know what is meant by “by telephonic or electronic means”?

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## DURING THE MEETING

- Selection of key issues



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## 1. Chair of the Meeting



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

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



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

## 2. Who May Attend

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

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

- Nightmare questions/scenarios
  - Our by-law provides that directors who do not attend 3 consecutive board meetings are deemed to have resigned. A director who has not attended 4 meetings threatens to sue the organization if he is removed from the board.
  - We have an item on the agenda for an up-coming meeting that is a sensitive issue. One of the directors wants to bring his lawyer to a board meeting. Another director wants his lawyer to attend the board on his behalf. Can they do so?
  - Can a director record a meeting to seek advice from his lawyer who cannot attend or to share with a director who is absent?
  - I am the CEO of an organization. What is my role at board meetings?

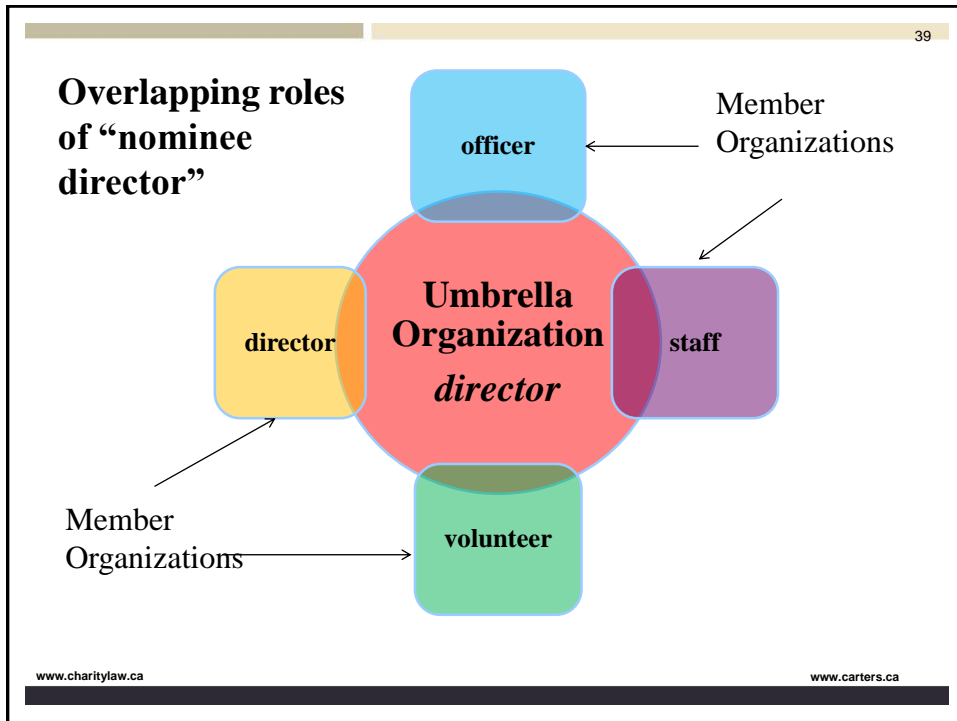
### 3. Conflict of interest issues

- OCA - directors must disclose conflict of interest in a proposed contract
- ONCA/CNCA - directors and officers must disclose conflict of interest in a material contract/transaction
- But directors also have fiduciary duties at common law to put the interest of the corporation ahead of his or her own interest
- Failure to fulfill duties can result in exposure to personal liability for the director

- Summary of general fiduciary duty in putting the best interest of the corporation ahead of their own
  - Duty to act in good faith, honesty, loyalty
    - A director's sole interest is to the corporation
    - A director's duty is to the corporation and not to the interest of those who the director may be representing on the board, e.g., where a director is an appointee from another organization
    - The interests of the director must not be placed in conflict with those of the corporation

- Duty to avoid conflict of interest
  - Directors must declare and avoid any conflicts of interest or anything that gives the appearance of a personal benefit
  - Where a conflict arises, it must be declared, and the director must not participate in any discussion or vote and, depending on the circumstances, the director may have to resign
  - If this procedure is not followed, directors may be made to account for profits they have made
  - ONCA/CNCA expands the provisions concerning conflict of interest by applying to both directors and officers and address transactions the corporation enters into on a more general basis as opposed to being limited to contracts

- Other duties - diligence/duty to act in good faith, exercise power, obedience, confidence, continue
- Fiduciary duty is owed to the corporation, not to its members
- Directors also have certain duties to the members, although it is not specifically a fiduciary relationship
  - Directors must ensure that the corporation abides by the terms of its letter patent, articles, and by-laws
  - Case law affirms that relationship between corporation and members is an implicit contractual obligation to comply with the constating documents and by-laws



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- Nightmare questions/scenarios
    - When the topic of a board meeting will put a nominee board member in conflict, do we have to give notice?
    - We are an umbrella organization with member organizations in different geographical regions. What are the implications of a member organization appointing some one from their board to sit on the board of the umbrella organization? What if the appointee is the CEO, an officer, or a volunteer? Are there any workarounds?
    - If the same board sit as directors of both corporations, and there is a conflict between the two corporations, what do you do?
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## 4. Quorum

- Quorum is the minimum number of persons present at the meeting in order to transact business
- Should be set out in the by-laws or constitution, etc.
- If by-law is silent, are there rules elsewhere? E.g., default rules in CNCA/ONCA
  - A majority of the number of directors or a majority of the minimum number of directors required by the articles constitutes a quorum at any meeting of directors
  - At common law, majority of the persons entitled to attend and vote at the meeting
- Must maintain quorum throughout the meeting

- Nightmare questions/scenarios
  - What if a director refuses to attend a board meeting so that it does not have quorum to transact business?
  - What if there was quorum at the beginning of the board meeting and some directors have to leave in the middle of the meeting and quorum is lost?
  - The bylaw requires a majority of the directors to constitute quorum. The bylaw provides that the board consists of 10 directors. We now have 7 directors with 3 vacancies. What is the required quorum?
  - What if the by-law provides that there must be a minimum of 6 directors and a maximum of 10, and the members adopted a resolution fixing quorum at 8?

## 5. Voting

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

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

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

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



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

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- Method of voting
  - Complex rules, depends on the applicable rules and governing documents
  - For example
    - Voice vote
    - Show of hands
    - Ballots
    - Other variations
- Decision by consensus
  - CNCA - need to define what “consensus” means and what to do if no consensus is reached
  - ONCA - silent

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- Nightmare questions/scenarios
  - The bylaw provides that if there is a tie, the chair may cast a second or casting vote. Can the chair refuse to cast that vote?
  - Can the chair of the meeting move or second a motion?
  - Do motions always need a mover and seconder?
  - Does a motion to adjourn a meeting require a mover or seconder?
  - Our bylaw provides that directors are to make decisions by consensus. What does this mean?
  - We had an urgent decision that needs to be made and we asked the directors to vote by sending the board chair an email. Is the result valid?

- I am on the board. Is there any personal liability if I abstain from voting?
- What if I stepped out of the meeting for 10 minutes for a personal call and I missed the voting of a few items on the agenda?
- If I strongly disagree with a motion and voted no, should I also request that my no vote be recorded in the minutes? Any down side if I don't?
- Do I have any personal liability exposure if I stay on the board after I record my negative vote?
- Our board makes decisions by consensus. However, the chair dominates all discussions and would not allow us to voice our opinion and refuses to take the matter to a vote.
- Can we have vote by secret ballot at our board meetings?

## 6. In Camera Meetings

- Sometimes, a board meeting may need to be held in camera
- For sensitive or confidential meetings
- Only directors may attend, no staff, etc.
- Have a policy of who should attend, how to keep discussions confidential, etc.
- In camera does not mean no minutes



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

## 7. Written resolutions

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

## MINUTES OF MEETINGS

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

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

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



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

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

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

- Nightmare questions/scenarios
  - We cannot agree on how long to keep the minutes
  - Where should minutes be kept?
  - Our staff feels that they are entitled to see minutes of board meetings. Is this correct?
  - Our members feel that they are entitled to see minutes of board meetings. Is this correct?
  - What do we do with in camera meeting minutes? Who should keep them? Where should we keep them? How do we keep them confidential? Who is entitled to look at them?
  - A director is arguing that his notes are more accurate than our minutes for the last meeting. He wants to attach his notes to the minutes. Should we do that?

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- Can board members make their own notes of a board meeting, and if so, should they eventually be destroyed?
- Our board had a fight at the last meeting. The secretary recorded who said what during the meeting. Some of the directors want those records deleted from the minutes, some want more details. What is the balance? What is the downside of having too much detail in the minutes?

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## CONCLUSION

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



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