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# THE OTTAWA REGION CHARITY & NOT-FOR-PROFIT LAW SEMINAR

Ottawa – February 12, 2015

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**Holding Board and Members' Meetings: 101**

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**By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.**

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**SETTING THE STAGE**

- This presentation reviews issues regarding meetings of directors and meetings of members – what to do before and during 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, not technical rules
- 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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**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
- Drafting other documents and other preparation

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### 1. Where to Find the Rules for Meetings

- Find copies 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

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- If incorporated
  - Incorporating legislation – e.g.,
    - *Canada Corporations Act (CCA)* – should have been continued under the CNCA by October 17, 2014
    - *Canada Not-for-profit Corporations Act (CNCA)*
    - *Ontario Corporations Act (OCA)*
    - *Ontario Not-for-profit Corporations Act (ONCA)* (not yet proclaimed)
    - Special acts
  - 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

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- 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)

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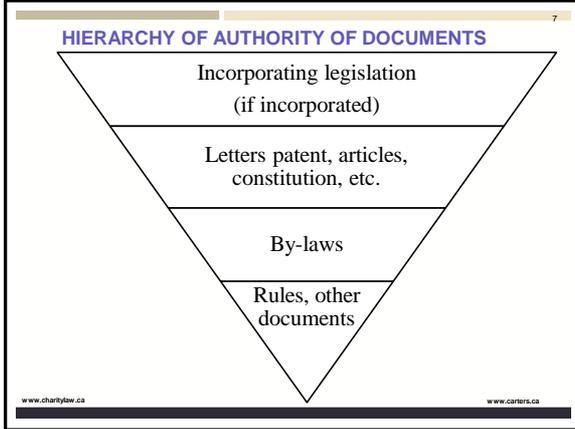
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**2. Review Documents to Understand the Rules**

- Understand how the rules works
- 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
- By-laws
- CNCA - unanimous member agreement for non-soliciting corporations

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### 3. Purpose and Nature of Meeting

- Determine what the nature of meeting is, e.g.,
  - Board meeting or members' meeting?
  - Annual meeting of members (AGMs) vs special meeting of members
  - General meeting of all members vs meeting certain classes of members
  - A meeting called by the organization vs requisitioned meeting vs meeting ordered by the courts
  - Information meeting
- Certain meetings must be held by certain time – e.g.,
  - CNCA requires an AGM must be held within 18 months after incorporation, then not later than 15 months after previous AGM, but not later than 6 months after the end of last financial year
  - ONCA – similar to CNCA, but no requirement to hold it within 6 months after the last financial year

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### 4. Calling the Meeting – Notice

- 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
- Needs 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

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- 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
  - For members' meetings where members have the right to exercise absentee votes (e.g., proxy, mailed in ballots, etc.) - allow members who cannot attend the meeting to decide whether and how to exercise their absentee votes

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- Essential elements in a notice of meeting - should be in writing
  - State date, time and place of the meeting
  - State purpose of the meeting
  - Give notice of special business to be transacted at the meeting
    - state nature of that business in sufficient detail to permit the recipients to form a reasoned judgment on the business
  - Comply with statutory requirements as to form and content (for corporations)
  - Be clear, honest, precise, unambiguous, comprehensive
  - Be issued on good authority
  - Be given in the required proper manner (e.g., personal, mail, email, etc.)
  - Be given within required length of time
  - Be sent to everyone entitled to receive notice

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

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- Who else are entitled to notice?
  - E.g., CNCA/ONCA – all directors and the public accountant (auditor) are entitled to notice of AGMs
  - Other persons – e.g., liaison representatives of related organizations or founders of the organization
- Who else does the organization also wants to give notice to?
  - CEO, senior staff, etc.
- How to give notice? – e.g., mail, courier, fax, email, phone call, etc.
- How long to give notice? E.g.,
  - OCA – 10 days
  - CNCA – very detailed rules in the Regulations depending on how notice is to be given
- Can notice be waived and how to waive notice?

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- Where to hold the meeting? E.g.,
  - CNCA/ONCA - board meetings – anywhere unless the articles or by-laws otherwise provide
  - CNCA/ONCA – physical members' meetings
    - Must be held in Canada (Ontario) at the place provided for in the by-laws or, if there is no by-law provision, at a place the directors determine
    - Can be held outside of Canada (Ontario) if the place is specified in the articles or all members entitled to vote at the meeting agree to hold the meeting at that place.
- Can the meeting be held electronically?

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### 5. Drafting other Documents and Other Preparation

- Various types of documents for meetings need to be prepared in advance, e.g.,
  - Agenda
  - Proxies
  - Ballots
  - Detailed agenda for the chair (chair's script)
  - Scrutineers' reports

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- Other preparation – mostly for members' meetings, e.g.,
  - Tracking absentee votes
  - Instructing scrutineers and other personnel
  - Making physical arrangements for the venue
  - Preparing strategies to deal with proxy contests
  - Planning for other issues that may come up at the meeting

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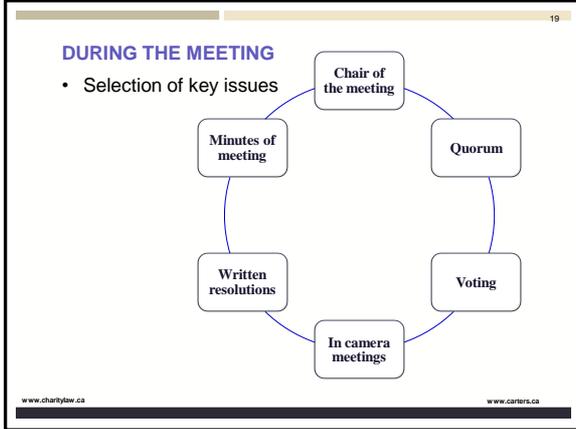
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**1. Chair of the Meeting**

- Role of chair of meeting
  - Ensures the meeting proceeds in an orderly manner and in accordance with the applicable rules
  - Acts impartially in good faith, with a view of the ordering conduct of the meeting, act 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
  - Settle points of contentions – 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.

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- Who may chair the meeting?
  - Usually the board chair or vice chair
  - What if they have conflict or not available?
  - Sometimes, it may be necessary to appoint an independent person to chair members' meetings
  - Can directors/members move to replace the chair of the board/members' meeting? – Depends

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### 2. 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
  - Board meetings - 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
  - Members' meetings - a majority of the members entitled to vote at the meeting
  - At common law, majority of the persons entitled to attend and vote at the meeting
- Is the presence of certain persons required, e.g., founder?

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

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- What if a director refuses to attend a board meeting so that it does not have quorum to transact business?
  - No legal right to compel a director to attend board meetings
  - Possible remedies that sometimes may be available – remove that director from the board or sue the director for breach of fiduciary duty

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### 3. Voting

- Number of votes of each person?
  - Board meetings – one vote per person
  - Members' meetings – depends on governing document
- Approval level
  - Should be set out in the by-laws
  - Based on
    - Number of votes cast
    - number of persons attended meeting
    - number of persons entitled to vote
  - 50% plus 1 is not necessarily the same as simple majority

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- 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
- Is absentee votes permitted?
  - Not for board meetings
  - Members' meetings – depends on the applicable rules, e.g.,
    - CNCA – must be specifically permitted in the by-law, and limited to proxy, mailed in ballots, electronic ballots as set out in the Regulations
    - ONCA - Mandatory that members have the right to vote by proxy; but if the by-laws allow for voting by mail or by telephonic or other electronic means, then proxy is optional

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- Can the chair have a casting vote?
  - At common law, chair does not have the right to have a casting vote
  - By-law may provide the chair with a casting vote
- What if someone did not attend a meeting?
  - 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

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- What if someone abstains?
  - 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

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#### 4. 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.

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#### 5. Written resolutions

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

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### 6. 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

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- 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

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- 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
- Who takes minutes at meetings?
- Who and how to maintain minutes?
- Minutes of in camera meetings/sessions
  - Still need to keep minutes
  - Record decisions made at in camera session in the main
  - Have a policy on how to keep and maintain minutes

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- 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
- 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 it is accurate
  - Good practice for the chair and secretary to sign minutes once approved, although not legally required

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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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