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**Imagine Canada:
Legal Issues in NFP Governance
October 1, 2015**

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

**Getting Ready 101: Considerations Before
Calling a Board or Members' Meeting**

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OVERVIEW OF TOPICS

- Legal Issues in NFP Governance
- Why Hold Meetings?
- Where to find the Rules to Hold Meetings
- Considerations in Preparing for Meetings
- Issues in Calling Board Meetings
- Issues in Calling Members' Meetings
- Concluding Comments

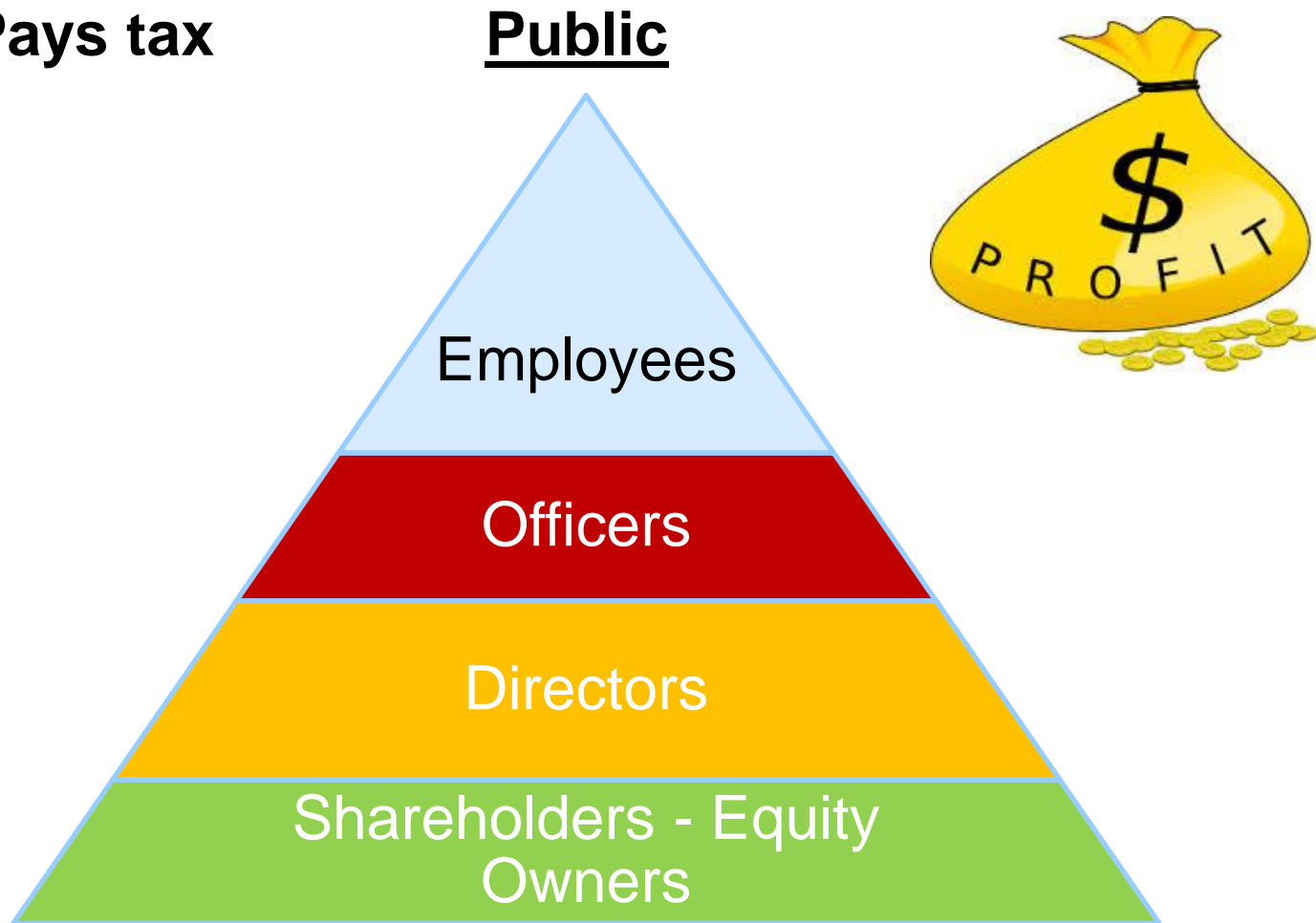


A. LEGAL ISSUES IN NFP GOVERNANCE

1. What is the Difference between For-Profit and Not-For-Profit Corporations?

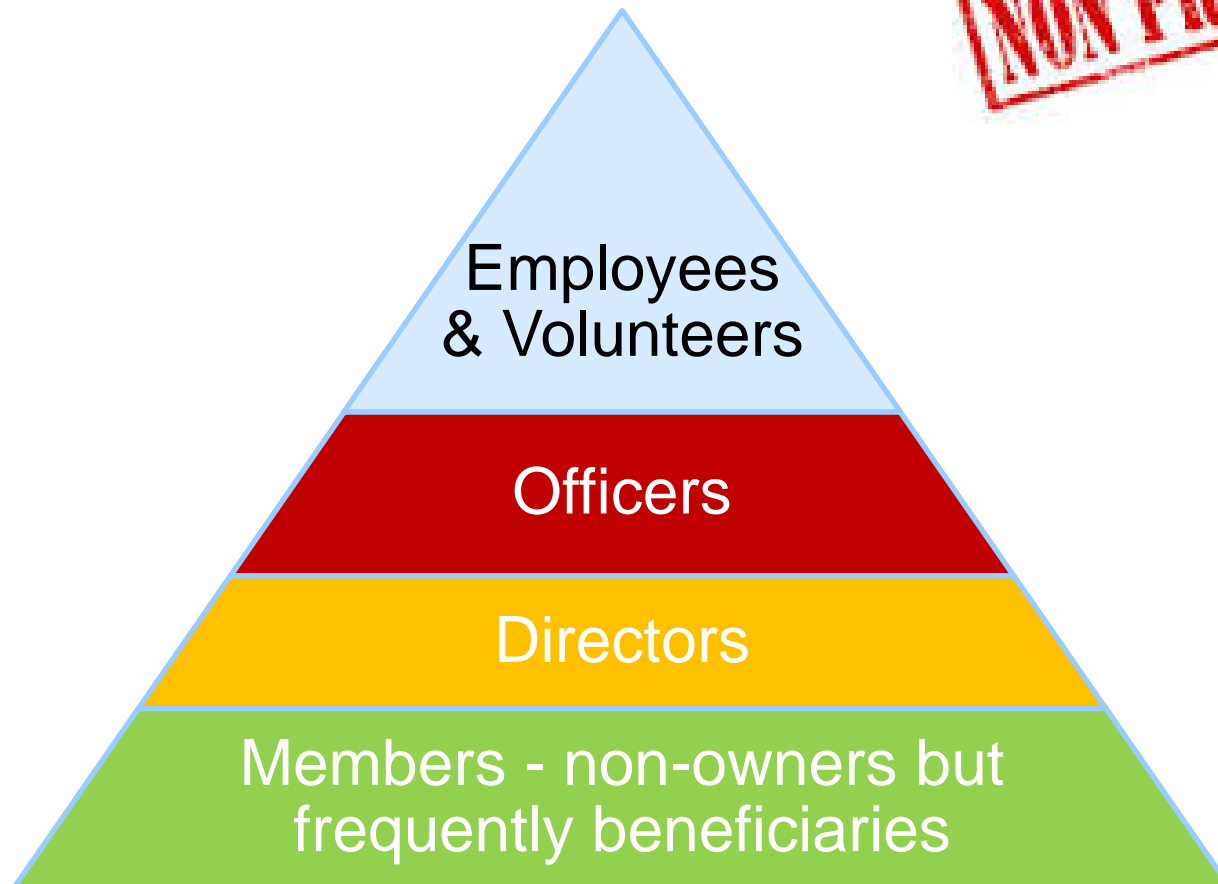
- With a for-profit corporation, there are shareholders who own the corporation and have the power to elect the board of directors
- As the equity owners, shareholders are the accountability base for the corporations' quest for profit
- A not-for-profit corporation (NFP), on the other hand, has no shareholders, instead only members who have no equity interest in the corporation
- While members elect the board of directors, directors have a fiduciary duty to manage or supervise the management of the NFP corporation to achieve its purposes

- **Share Capital Corporations**
 - **Business purpose is to make a profit**
 - **Pays tax**



- **Not-for-Profit Corporations**
 - Non profit purpose
 - Tax exempt as NPOs Public

NON PROFIT



- **Charitable Corporations**
 - **Charitable purpose akin to a public trust**



2. What does Governance mean in the NFP Context?

- Governance, in an NFP context generally means the establishment of rules and policies along with their proper implementation and monitoring by the governing body of the NFP in order to achieve its stated purposes
- Governance in this context generally involves the following:
 - Identifying what is the governing board of the NFP
 - Focusing on the purpose of the NFP, not the person
 - Understanding the fiduciary duty of the governing board in putting the best interests of the NFP ahead of their own interests



- Establishing clear rules and policies at both a relational and operational level
- Determining when to delegate in order to implement rules and policies
- When delegation occurs, establishing effective lines of accountability to ensure effective monitoring and supervision
- Ensuring appropriate structural and operational due diligence
- Providing stability for the governing board, as well as effective succession planning
- Ensuring a regular review and revision, as may be necessary, of the governance process of the NFP



3. What is the Legal Context of NFP Governance?

- Governance in general, and governance of NFPs in particular, is intrinsically intertwined with the law, so much so that it is impossible to address one without the other
- Some of the legal context upon which governance of NFP organizations is based includes the following:
 - Corporate laws and organizational structures
 - Trust law and fiduciary duties for the governing board
 - Charitable law and the correlation of charitable purposes and charitable property
 - Employment law and the interrelationship of the governing board and management

- Human rights law and its impact upon employees and volunteers
- Risk management in governance and operations
- Insurance law and transfer of risks
- Operational issues in governance due diligence, such as privacy law, anti-spam and fundraising
- Tax law and maintaining status as a registered charity or a non-profit status, as applicable
- In order to develop and implement an effective governance program, an organization must become and stay familiar with applicable legal considerations
- “Best practice” in governance can only occur once there is knowledge of and compliance with applicable law

B. WHY HOLD MEETINGS?

1. Director Meetings

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



2. Member Meetings

- In general, there are two types of meetings for members for an NFP corporation as the accountability base:
 - General Meetings (where all members of the corporations are invited to attend) and
 - Meetings of a particular class or section of the members of the corporation
- Different purposes and results can occur with regards to both general and class meetings of members
- There are two types of general meetings of members:
 - Annual Meetings
 - Special Meetings



a) Annual Meetings

- NFP Corporations are required to hold annual meetings of members
- Annual meetings are held once a year in order to transact certain routine business, such as 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
- An annual meeting is the pivotal opportunity for members to exercise control over the corporation and to call the board to account
- The terms for calling and holding an annual meeting are set out in applicable legislation and by-laws of the corporation

b) Special Meetings

- Special meetings may be called from time to time as necessary in order to transact the business of the NFP corporation that is not dealt with at an annual meeting
- This may include adoption of by-laws or supplementary letters patent, removal of directors, special resolutions, the winding up of the corporation, etc.
- Different notice requirements may apply compared to annual meetings of members
- Need to refer to applicable legislation and by-laws for details

SPECIAL EDITION

C. WHERE TO FIND THE RULES FOR HOLDING A MEETING?

1. Problems with Locating Rules:

- Corporate by-laws and records may be missing
- Corporate records that do exist are in draft form only or are only “photocopies of photocopies”
- The version of the by-laws in use may not be the most current version of the by-laws
- The procedures set out in the by-laws are not followed by the corporation
- The procedure that is followed may never have been adopted as a by-law and may also not reflect applicable legislation

2. Is the Organization a Corporation?

- Before calling a meeting, it is important to examine whether the organization is a corporation, a trust, or an unincorporated association
 - Some organizations may not know if they have been incorporated
 - e.g., the organization may be an internal division of an incorporated national charity or it may be an unincorporated association operating as if it was a corporation
- Need to conduct corporate file searches to determine if the organization is a corporation and whether it is still in existence



3. Incorporating Legislation

- **General Legislation**

- *Canada Corporations Act (CCA)* - should have continued under the CNCA by October 17, 2014
- *Canada Not-for-profit Corporations Act (CNCA)* and the Regulations
- *Ontario Corporations Act (OCA)* (currently in place in Ontario)
- *Ontario Not-for-Profit Corporations Act (ONCA)* (At least 24 months notice will be given prior to proclamation)
- Other Provincial or Territorial legislation
- For the purposes of this presentation, the CNCA, the ONCA and the OCA are used as examples

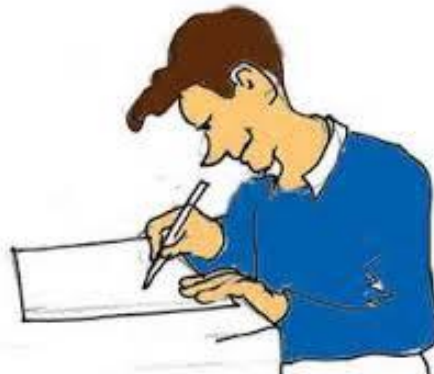
- **Special Legislation**

- Some NFP corporations have been created by special legislation
- e.g. a corporations sole, such as a Diocese, or a national or provincial organization, such as the Boy Scouts of Canada
- Where there is a conflict between general and special legislation, the special legislation will normally prevail



- **Other Legislation**

- In some situations, other legislation may apply
- e.g., public hospitals incorporated under the OCA are also subject to the *Public Hospitals Act* (Ontario)
- As well, both the *Charities Accounting Act* in Ontario and the *Trustee Act* can impact what the governing board can and cannot do when dealing with charitable property and/or investments



4. Letters Patent and Articles of Incorporation

- The Incorporation documents of NFP corporations may sometimes contain provisions relevant to the conduct of board or members' meetings
- These may include:
 - Letters patent of incorporation
 - Letters patent of amalgamation
 - Letters patent or articles of continuation
 - All subsequent supplementary letters patent or articles of amendment
- Important to review ALL incorporation documents, not just what is in the corporation's records
- Also important to review copies of the issued documents rather than relying on a consolidated version of the incorporation documents



5. By-Laws and By-law Amendments

- The most relevant and informative document containing provisions relating to the conduct of board and member's meetings is the general operating by-law of the corporation
- Necessary to ensure that it was properly adopted
 - Does it comply with applicable legislative requirements?
 - If a by-law was not duly adopted, it may bring the validity of past proceedings into question
- OCA permits corporations to impose additional requirements in relation to the enactment, repeal or amendment of their by-laws
 - e.g., Third party approval of a head body

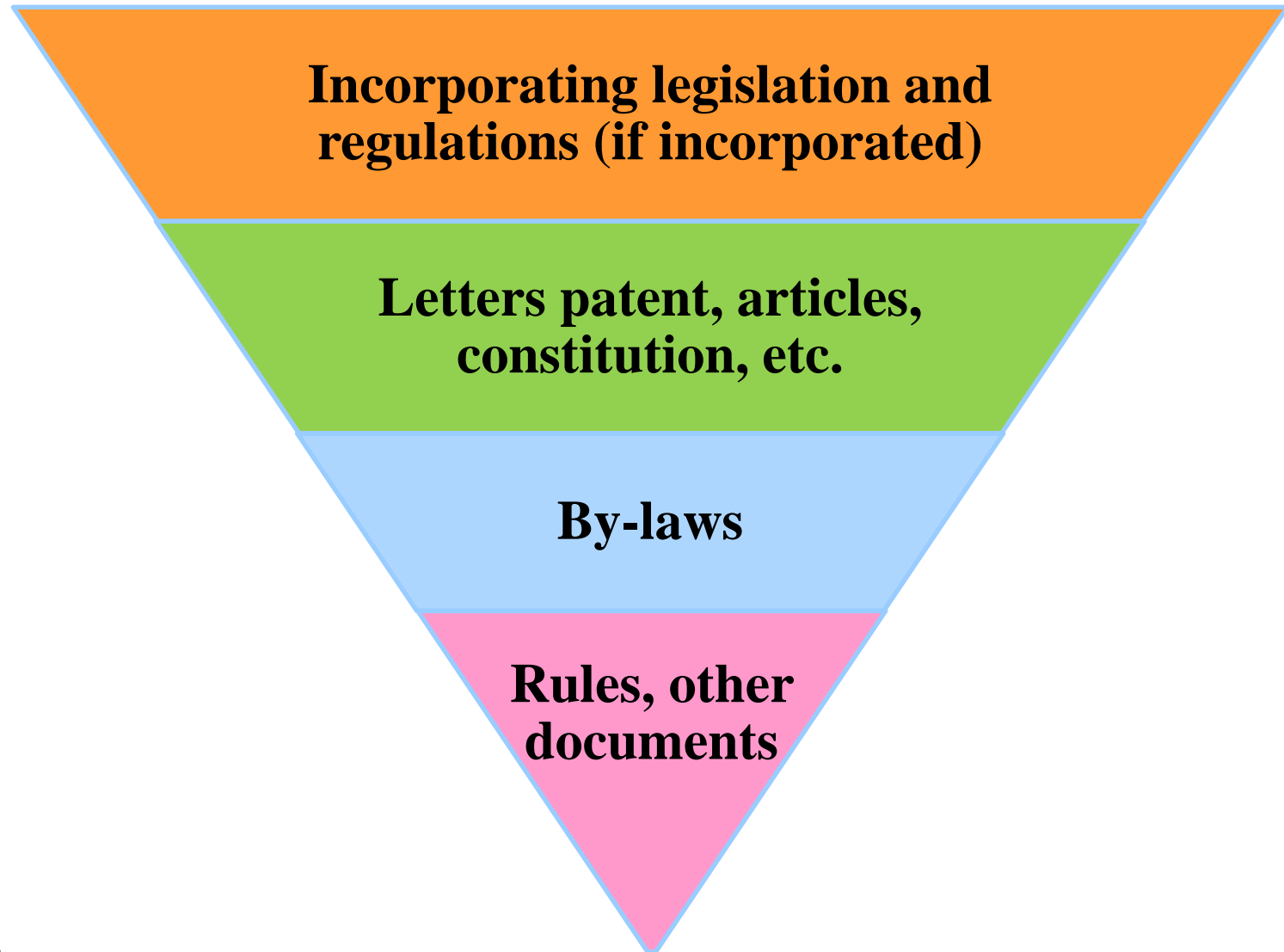
- It is not uncommon for NFPs under the OCA to be incorporated without ever adopting a general operating by-law
- It may be necessary to adopt a new or amended by-law before calling a board or members' meeting in order to properly transact business
- It is important to ensure that the by-law provisions are not inconsistent with the corporations corporate objects or with general legislation as applicable



6. Rules of Procedure and Other Documents

- There may be other documents that are relevant to the conduct of meetings, including:
 - Governance policies, e.g., conflict of interest policy
 - Rules of order, such as Robert's Rules of Order
 - Agreements with third parties, e.g., head bodies
 - Operation manuals
- Need to be governed by democratic principles
- By-laws often designate a current edition of a specified and generally accepted manual of parliamentary authority
- Can be important where there is a membership dispute
- Remember that incorporation documents and by-laws have paramountcy over rules of order

7. Hierarchy Of Authority Of Documents



D. Considerations in Preparing for Meetings

1. Reviewing Governing Documents

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

- CNCA - lots of details in the regulations
- For CNCA, often need to refer back and forth between the act and the regulations
- ONCA - less details in the regulations
- OCA - few statutory rules, largely dependent upon what is written in the by-laws for operational procedures for meetings
- Articles of Incorporation or Continuance for CNCA/ONCA or Letters Patent or Supplementary Letters Patent for OCA - are like the DNA of a corporation
- By-laws - are like the bone structure of a corporation

2. Considerations in Calling a Meeting

- Purpose and Nature of Meeting
 - Determine what the nature of meeting is, e.g.,
 - Annual meeting vs special meeting of members to discuss certain issues?
 - An urgent board meeting to discuss urgent issues faced by the directors?



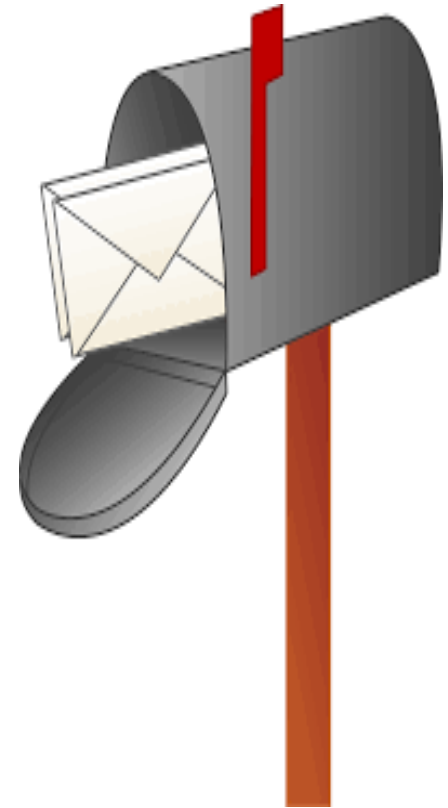


- Notice of Meetings
 - Need to give proper notice of a meeting - not just give an agenda
 - An invalid notice may affect the validity of the decisions made at the meeting
 - Calling of a meeting must be bona fide - e.g., the meeting cannot be deliberately scheduled at such time and date that is intentionally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

- 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 or, 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
 - Note: Absentee voting is not permitted for directors meetings

- Essential elements for 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
 - *ex. Trow v. Toronto Humane Society* - board sent notice of a by-law change to members but did not mention that the membership was changing so that most members would no longer have a vote
 - Must comply with statutory requirements as to form and content (see next section)
 - Check by-laws to see if anything else is required

- Other considerations for notice
 - 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
- Generally, notice can be waived in writing or by showing up at a meeting, except to object to the notice



- Who to send notice to?
 - Who are the directors and who are the members?
 - Review statute or by-laws to determine classes of members, qualification requirements and admission requirements
 - Were the directors validly elected or appointed?
 - Were the members validly admitted?
 - CNCA/ONCA/OCA - public accountant/auditor are entitled to notice of all meetings of members
 - Who else does the organization also want to give notice to?
 - CEO, senior staff, etc.
 - liaison representatives of related organizations or founders of the organization

3. Considerations in Determining who are the Directors

- Directors are responsible to manage or supervise the management of the activities and affairs of the corporation
 - This duty is codified in both the CNCA/ONCA
- Review the by-laws and corporate records to determine:
 - Were directors validly elected or appointed?
 - The number and classes of directors
 - e.g., CNCA/ONCA permit directors to be elected by a class of members that has the exclusive right to elect or remove that director
 - Are there *ex officio* directors and, if so, who are they?

4. Considerations in Determining who are the Members

- Membership lists may not be up to date or accurate
 - Commonly occurs in situations involving churches or large membership-based charities
- By-laws may unintentionally create members, e.g., automatic membership given to volunteers or for donors over X\$
- *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 as subsequent directors and members were never properly elected or admitted

5. Documents to Prepare for Meetings and Other Preparation

- Various types of documents for meetings will need to be prepared, including:
 - Notice of Meetings
 - Agendas
 - Proxies (refer to governing statute for requirements)
 - Ballots, if applicable
- Also need to:
 - Ensure notices are sent
 - Instruct scrutineers or other personnel
 - Make venue arrangements



E. Considerations in Calling Board Meetings

1. When to Call Board Meetings

- CNCA/ONCA/OCA is silent on the issue of when board meetings are to be called
 - CNCA requires an “organization meeting” after incorporation to make by-laws, appoint officers, admit members, etc.
- There are no requirements for any minimum or established number of board meetings per year but boards will tend to meet more often when something that is unexpected occurs



2. Who may call Board Meetings?

- CNCA/ONCA/OCA silent on issue of who has the right or duty to call board meetings
- This issue is governed by the corporations by-laws
 - Sometimes they provide that it is the duty of the chair to call board meetings
 - Some allow meetings to be called at the request of a certain number of directors

3. Location of Board Meetings

- CNCA/ONCA - board meetings can be held anywhere unless the articles or by-laws otherwise provide
- OCA - by-laws may permit board meetings to be held at any place in or outside of Ontario

4. Means of Meeting

- In-person meeting is always an option
- Meeting by teleconference or other electronic means
 - CNCA/ONCA/OCA - permit directors to participate in meetings by telephone or electronic means
 - Need to review governing legislation for authority and specific requirements for such meetings
 - Common problems with directors meetings by teleconference or other electronic means
 - Non-compliance with governing statute, i.e., requirement that directors must have consented to this means of meeting e.g., “e-mail” meetings
- Unanimous written resolution of board is an option under CNCA/ONCA/OCA

5. Length of Notice, Form and Content of Notice

- CNCA/ONCA/OCA - generally silent on the issue of the length, form, content and method of giving notice for board meetings
- CNCA/ONCA - while generally not necessary for a notice of a meeting to set out specifically the matters to be discussed at a meeting of the directors, certain matters must be specified, e.g.,
 - Filling vacancies in the board or auditor/public accountant
 - Approving financial statements
 - Adopting, amending, or repealing by-laws
 - Determining membership dues/contributions
- Review by-laws to determine any additional notice requirements



6. Method of Giving Notice

- CNCA/ONCA/OCA - do not generally specify
 - Refer to by-laws for to determine method of giving notice

7. Who is entitled to receive notice of meetings of the board?

- CNCA/ONCA appear to codify that directors are entitled to attend and be heard at all meetings of the board
- CNCA/ONCA both prohibit any person from attending for or acting for an absent director
 - No right of proxy at meetings of directors, i.e., no director can vote for another
 - This is generally a codification of the common law, which would also be applicable to the OCA

F. CONSIDERATIONS IN CALLING MEMBERS' MEETINGS

1. Types of Members' Meetings



- Annual meetings
 - Must be held in accordance with the timelines set out in the governing statute
 - CNCA/ONCA - generally held to consider financial statements, public accountant's report, election of directors and re-appointment of the incumbent public accountant
 - OCA - also requires consideration of financial statements, together with the report of the auditor
- Special Meetings
 - May be held for other purposes, e.g., removal of directors, amendment of by-laws, etc.

2. Timing of Members' Meetings

- CNCA/ONCA/OCA - First annual meeting **MUST** be held within 18 months of incorporation
- ONCA/OCA - subsequently require annual meetings not more than fifteen months after the holding of the last preceding annual meeting
- CNCA - practically requires annual meetings to be held not later than six months after the end of the corporation's preceding financial year



3. Who may call Members' Meetings?

- Generally, CNCA/ONCA/OCA provide the directors with the ability to call a special meeting at any time
- CNCA/ONCA/OCA also provide specific procedures for members to be able to requisition that a meeting of the members be held
 - Need to refer to the incorporating legislation for specific requirements in order to requisition meeting
- CNCA/ONCA/OCA also provide for directors or voting members to be able to apply to court to order that a meeting be called
 - e.g., where it is not practicable to call the meeting within the time or in the manner in which it is otherwise to be called

4. Location of Members' Meetings

- CNCA states meetings are to be held in Canada at the location provided for in the by-laws, or where the directors determine
- ONCA requires meetings to be held within Ontario at the location provided for in the by-laws, or where the directors determine
 - Meetings may be held outside Ontario if the location is specified in articles or all the members agree
- OCA require meetings to be held at the “head office” of the corporation in Ontario
 - By-Laws, or letters patent, may allow meetings to be held anywhere in Ontario



5. Who is entitled to receive Notice of Members' Meetings?

- CNCA/ONCA/OCA - members, directors, and the public accountant/auditor are entitled to receive notice
- As noted above, notice may also be extended to others as set out in the by-laws or with the consent of the meeting
- CNCA/ONCA provide for the ability of the board to fix a “record date” for various purposes, including determining members entitled to receive notice of a meeting of members
 - No authority under the OCA to set a record date, therefore, important to review incorporating statute

6. Method and Length of Notice

- CNCA provides various time frames for notice depending on the method of service of the notice, need to refer to regulations
- ONCA provides for a notice period of 10 to 50 days, but does not specify method of notice
- OCA provides for minimum of 10 days notice
 - Also permits charitable corporations to give notice by publication at least once a week for two consecutive weeks next preceding the meeting in a local newspaper

7. Content of Notice for Members' Meetings

- Important because it sets the limit on the business to be transacted



- CNCA/ONCA - notice of any meeting at which “special business” is to:
 - “state the nature of that business in sufficient detail to permit a member to form a reasoned judgment on the business”
 - Contain the text of any special resolutions to be passed
- OCA provides no requirements concerning the content of the notice
- CNCA/ONCA - notice may also be required to contain a membership proposal concerning any matter that the member proposes to raise at the meeting, unless there is an exception available under the incorporating statute
- OCA also permits circulation of members’ resolutions

8. Absentee Voting at Meetings of Members

- OCA - mandates that proxy voting be permitted
 - Notice should include a statement reminding the member that he/she has the right to vote by proxy if unable to attend the meeting
- ONCA - proxy voting is no longer mandatory, and a corporation may provide in its by-laws for voting by mail or by telephonic or electronic means, in addition to or instead of voting by proxy
- CNCA – absentee voting is permitted using the methods provided in the regulations, including proxy, mail-in ballot, or by a telephonic, electronic or other communication facility

9. Considerations in Holding Meetings by Teleconference or Other Electronic Means

- OCA does not permit members to meet by teleconference or other electronic means
- CNCA/ONCA do permit these methods
 - Need to refer to specific governing legislation to determine requirements of meeting electronically
 - CNCA/ONCA require that electronic method used permits corporation to confirm identity of each voter, but present the vote anonymously without revealing how individuals voted
 - Need to ensure that teleconference system or electronic platform complies with these requirements



CONCLUDING COMMENTS

- 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 NFP corporations
- Courts have indicated that they are prepared to intervene where the procedures followed do not reflect compliance with the incorporating legislation, incorporation documents or the by-laws of the corporation



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