THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

2012 National Charity Law Symposium

Procedural Issues and Strategies Under the Canada Not-For-Profit Corporations Act

Hartley R. Nathan, Q.C.
Certified Specialist, Corporate and Commercial Law
Minden Gross LLP

Friday, May 4, 2012

Ontario Bar Association
A Branch of the Canadian Bar Association
Continuing Legal Education

TABLE OF CONTENTS

THE CANADIAN BAR ASSOCIATION

2012 NATIONAL CHARITY LAW SYMPOSIUM

May 4, 2012

PROCEDURAL ISSUES AND STRATEGIES UNDER THE CANADA-NOT-FOR-PROFIT CORPORATIONS ACT

By: Hartley R. Nathan, Q.C.,*

I. INTRODUCTION

I was asked to talk about procedural issues and strategies under the *Canada-Not-For-Profit Corporations Act* that may arise in board and members' meetings.

Let me make some preliminary comments:

(a) The *Canada Not-For-Profit Corporations Act* ("CNCA") received Royal assent on June 23, 2009 and most of its provisions came into force on October 17, 2011. **I am sure you are all aware of the sweeping changes brought about by the new Act. As such, my intention today is to talk about some procedural issues that should be considered and some strategies to be employed.** In substance, "what you should do differently now that the Act is law?"

(b) In this presentation **I will give the words "procedural issues" a wide birth**.

(c) To make some of my talk more meaningful you may find the comparison of some of the provisions of the CNCA with the *Canada Corporations Act* ("CCA"). A chart is annexed to this paper as Appendix "A".

*The writer is a senior partner in Minden Gross LLP. He wishes to thank Wayne Gray of McMillan LLP, Clifford S. Goldfarb of Gardiner Roberts LLP, Terence Carter of Carters LLP and Robert S. Parker student-at-law at Minden Gross LLP for valuable advice and assistance in connection with the preparation of this paper.

I have provided a comparison of the *Canada Corporations Act* and CNCA in Appendix "A".

I will also be making references to Corporations Canada Transition Guide to which is attached Model By-law No. 1 (the "Model By-law").

The website for the Transition Guide with Model By-law attached is: https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs04953.html.

(d) As you are aware, the CNCA provides a comprehensive, modern framework for the governance of federal not-for-profit corporations. It is closely modeled on the *Canada Business Corporations Act* ("CBCA"). As such, much of the extensive body of case law under the CBCA (and the *Ontario Business Corporations Act* ("OBCA")) can be referred to while considering issues arising under the CNCA or interpreting its provisions.

(e) As a general rule, **the form of By-law will vary depending on the nature of the corporation. As you know, a CCA corporation's By-law and any amendments have had to be approved by Industry Canada.**

(f) As you are aware, **a corporation's form of By-law for a CNCA corporation is no longer required to be approved by Industry Canada though it must be filed with Industry Canada within 12 months of its enactment. The provisions in the Model By-law are "fallback" or "default" provisions that will apply if the corporation fails to pass a By-law. This can be a potential minefield if the Model By-law is adopted without careful consideration.**

<u>Strategy Tip #1</u>

Do not rely on the Model By-law or use it as the form of By-law for the sake of expediency. As noted in the Transitions Guide:

"If these default rules do not meet the needs of your corporation, you may wish to create By-laws that would override them."

While the Articles could contain provisions relating to the calling and conduct of board and members' meetings, in practice this is rarely used. Accordingly, the importance of making sure there are protective provisions in the By-law cannot be overemphasized.

(g) Meetings of directors and members are governed by the same democratic principles which apply to parliamentary bodies. These principles embody fairness, reasonableness, and good faith towards all who are entitled to take part. Rules of order are framed towards this end. It is the obligation of the directors to insist that meetings of directors and members are conducted in an organized and efficient manner in adherence to the principles of rules of order. It is duty of the Chair and the members to ensure that such principles are enforced.

(h) **Difficulties arise for corporations which lack a formal process governing the calling and conduct of board and members' meetings. By-laws should (but rarely do) provide that all meetings be governed by specific Rules of Order such as Robert's *Rules of Order*[1] or Nathan's *Company Meetings Including Rules of Order*.**[2] A group of individuals who, for some reason, wish to discredit a non-share capital corporation, can, if the corporate records are in disarray, easily challenge the board, the officers and the senior managers. They can allege that the board was not duly constituted by duly qualified people at a meeting of the members properly called with a quorum present, or that the officers were not duly appointed by a validly elected board at a properly called board meeting.

(i) The solution is a raised level of importance given to the sometimes boring legal technicalities, the retaining of duly-qualified professional legal

[1] 11th Ed) (Reading, Mass: Addison-Wesley, 2011) ("*Robert's*). People have told me that *Roberts* is not particularly helpful for incorporated organizations. It is somewhat complex and often ambiguous.
[2] (9th Ed by H. R. Nathan (Don Mills, Ont.: CCH Canadian Ltd., 2011) ("*Nathan's*).

assistance and a dogged determination to keep the corporate records current.

II. INTERNAL GOVERNANCE DISPUTES

There have been numerous cases where the courts have made decisions concerning internal governance disputes within not-for-profit corporations. Some of these decisions such as *Lee v. Lee's Benevolent Association of Ontario*[3] suggest non-profit organizations should not be required to adhere vigorously to technical requirements of corporate procedure. The case involved an appeal by Lee from the dismissal of its application for relief under s.297 of the *Ontario Corporations Act* pursuant to which the court may direct the method of holding meetings. The trial judge found that a general meeting was held and that notice of the meeting was adequate. He found that although there was an irregularity, it was not established that an unjust result occurred.

This is what Mr. Justice Nordheimer said in the case:

> **Non-profit organizations such as the Association should not be required to adhere rigorously to all of the technical requirements of corporate procedure for their meetings as long as the basic process is fair.** Nor should the court be too quick to grant relief in such circumstances that may only serve to encourage a disgruntled member of such an organization to seek such relief. Absent some demonstrated evidence that any irregularities went to the heart of the electoral process or lead to a result which does not reflect the wishes of the majority, the court should be loathe to interfere in the internal workings of such groups.

The appeal was dismissed with the Divisional Court[4] stating that Lee failed to show that the irregularity led to the infringement of rights or privileges of any part. It upheld the lower court's decision, quoting from it as follows:

> "Absent some demonstrated evidence that any irregularities went to the heart of the electoral process or lead to a result which does not reflect the wishes of the majority, the court should be loathe to interfere in the internal workings of such group."

---

[3] [2004] O.J. No. 6232, (Ont. S.C.J.).
[4] [2005] O.J. No. 194 (Ont. Div. Ct.).

The quotation was cited with approval at trial in *Deol et al v. Grewal et al*[5]. **In *Rexdale Singh Sabha Religious Centre v. Chattha*[6] the judge exercised the court's remedial power to confirm the board of directors' admission of new members notwithstanding procedural irregularities;** fixed the membership of each of the corporations as requested by the respondents and required a meeting of the three corporations in including the Sikh Centre, to be held within 30 days. **However, the Court of Appeal overturned that decision on the grounds that in admitting the members in issue, there had been a complete** failure to comply with the *Corporations Act* and the internal rules of the Institution.[7] There are several other cases dealing with internal disputes mostly relating to election of directors where the decisions turned on whether the irregularities could be described "as going to the heart of the election."[8]

> **Strategy Tip #2**
>
> **The strategy is not to count on the Court to come to the aid of litigants seeking relief where there has been a complete disregard for the Act and the internal rules of the organization.**

There is no certainty the courts will continue to be benevolent now that the "stricter" rules apply under the CNCA given no such latitude exists in cases under the CBCA or OBCA.

My intention today is to spend more time on board procedural issues due to importance of the board in overall corporate governance.

---

[5] [2008] OJ. No. 3355 (Ont. S.C.J.).
[6] [2006] O.J. No. 328 (Ont. S.C.J.).
[7] [2006] O.J. No. 4698 (Ont. C.A.).
[8] This sentiment was affirmed in *Bala v. Scarborough Muslim Assn.* 2010 ONSC 6834, 2010 CarswellOnt 9577 (Ont. S.C.J.); See also *Scharafanowicz v. Hamilton Region and Indian Centre* 2011 ONSC 6953, *Branch 43 of Polish Alliance of Canada v. Polish Alliance of Canada*, 2009 CarswellOnt 3990, 61 B.L.R. (4th) 118 (Ont. S.C.J. where Thornburn J. commented that where internal dispute resolution mechanism is provided by the organization, that mechanism should be exhausted before court proceedings are commenced). A complete compendium of these cases is beyond the scope of this paper.

III. CALLING MEETINGS OF THE BOARD

1. Statutory and By-law requirements

S.136(1) of the CNCA provides:

> Unless the articles or by-laws otherwise provide, the directors may meet at any place and on any notice that the by-laws require.

2. Who to send notice to?

Sometimes boards forget to give formal notice of meetings or to obtain waivers from absent directors and often quorum requirements are not satisfied. This is a common problem for non-share capital corporations, the directors of which are invariably volunteers. **Very often an officer or director of a corporate member is appointed to the board. The person leaves the corporate member's employ but the corporate member does not notify the board or the departing person does not hand in his or her resignation. This could affect the quorum requirements.**

The CNCA (S. 21) requires corporations to keep up-to-date registers for members, directors and officers. The corporations are also required to keep filings current with the government under which they are incorporated with respect to head office, directors and officers.

The secretary when sending the notice should go by the register to determine to whom to send notice.

What if a director or directors are not validly elected or appointed?

S. 139 of the CNCA[9] reads as follows:

> **The act of a director or of an officer is valid despite any irregularity in their election or an effect in their qualification. The same wording is contained in section 292 of the *Ontario Corporations Act*.**

In the *Sikh Spiritual Centre* case Pattillo J. stated in reference to section 292:

[9] Note that there is no equivalent section in the CCA.

> In my view, the purpose of S. 292 of the [Corporations] Act is to protect third parties from situations where a corporation raises internal procedural defects to avoid liability to third parties. It does not apply in circumstances such as the present where there is an internal dispute between the members of the corporation concerning whether a director has been validly appointed or not.[10]

3. Length of Notice

While directors are permitted to pass By-laws with respect to the time, place and notice to be given for board meetings, as noted above, the CNCA does not set out any minimum requirements.

As noted above, Section 136 (1) of the CNCA provides for notice of meetings to be given as set out in the By-laws.

What, if nothing is said in the By-laws with respect to length of notice or if the organizational By-law was never properly enacted?

Section 6.02 of the Model By-law provides for not less than 7 days notice for a board meeting.

For an active corporation, this may prove to be too long. The norm is 48 hours, though the board members can waive notice if they are "friendly" to the corporation. The provisions of s.136(1) MAY give a corporation the authority to call "emergency meetings" on short notice.

Strategy Tip #3

The actions of directors in calling the meeting should be *bona fide* and to the exclusion of any selfish interests in doing so.[9A] Directors must ensure they are acting in the best interests of the corporation.

---

[10] See *also Deol et al v. Grewal et al*, *Supra*, footnote 5 and other cases cited in this decision; and *Sikh Cultural Society of Metropolitan Windsor v. Kooner* (2012), 108 O.R. (3d) 490 (Ont. S.C.J.). See also Wayne Gray: *The Annotated Canada Business Corporation Act, 2nd Ed.*, (Toronto: Thomson Carswell (loose leaf), 2002) for numerous cases on this point.

[9A] In *Glace Bay Printing Co. v. Harrington* (1910), 45 N.S.R. 268 (T.D.) the court intervened where the actions of a bare majority of directors in purposely calling directors' meetings at times advantageous to themselves, to the exclusion of the other board members and company shareholders, resulted in shares being held to have been improperly issued to themselves through such actions.

4. Authority to Call Meetings

The provisions relating to the calling of meetings of directors are normally contained in the By-laws. It is unusual to see any provision of this nature in the Articles.

5. **Form of Notice**

Subject only to the By-laws or any statutory provisions, it is not necessary for a notice of a meeting of directors to set out with any particularity the matters to be discussed at a meeting of the directors.

Strategy Tip #4

If one is assisting a client in preparing a notice for a meeting of directors, it is essential to review the By-laws to determine whether any matters must be specified in the notice.

If there is such a requirement for notice, it is likely that the degree of disclosure in the notice will be subject to the same standards as members' notices, namely to ensure that the person receiving the notice is able to form a reasoned judgment relative to the matters to be discussed.[11]

The failure to give proper notice, subject to any waiver, could invalidate the business transacted at the meeting. In *Wills v. Murray*[12], the company's Charter provided that special notice was to be given for any extraordinary meeting of the board and the notice was to specify the purpose for calling the meeting. The Exchequer Court considered inadequate a notice stating the meeting was to be held to consider "special business" where it was intended to make a call on shareholders. The Court invalidated the call.[13]

Strategy: Tip #5

An agenda should be circulated along with the notice to advise directors of the matters to be dealt with at the meeting. Whether or not it is required to

[11] *Jenashare Pty Ltd v. Heven Holdings Pty Ltd*. (1993) 11 A.C.L.C. 738 (S.C. N.S.W.).
[12] (1850) 4 Exch.853.
[13] There are more recent cases on this point. *Can-Ohio Motor Car Co v. Cochrane* (1915), 89 O.W.N. 242 (C.A.): Re: *Homer District Consolidated Gold Mines*, (1888) 39 Ch. D. 456; *OA of Motion v NZ Sero-Vaccines Ltd.* [1935] N.Z.L.R. 856; *Societa Caruso v Tosolini* (2006), 7 B.L.R. (4th) 222 (Ont. S.C.J.). See also H. R. Nathan and M.E. Voore, *Corporate Meetings Law and Practice*, looseleaf (Scarborough Ont: Thomson Carswell, 1995) ("*Nathan and Voore*") at 13-8.

specify matters to be discussed at the meeting, it is imperative that there be no surprises at a meeting of directors.

6. Failure to Comply with Notice Requirements

One should be careful about relying upon old law which held that a court will not interfere where the irregularity complained of could be rectified[14] or, where the directors were abroad and out of reach of notices, a meeting was not invalidated.[15] Modern communication facilities would make the director reachable almost anywhere in the world. It has been held that notice must still be given to a director who has indicated verbally that he or she cannot attend a meeting on the basis that he or she may change his or her mind.[16]

There is some relief where the failure to give notice is accidental. I refer to this later in this paper (see V 4. below).

7. **Term of Office**

Sections 128(3) and (4) of the Act provides as follows:

> (3) Members shall, by ordinary resolution at each annual meeting at which an election of directors is required, elect directors to hold office for term expiring within the prescribed period.
>
> (4) It is not necessary that all directors elected at a meeting of members hold office for the same term.

8. Staggered Term of Directors

There are some interesting cases in the courts.

---

[14] See *Southern Counties Deposit Bank Ltd. v. Rider & Kirkwood* (1895) 11 T.L.R. 563.
[15] *Halifax Sugar Co. v. Francklyn* (1890), 62 L.T. 563 at 564; *Windsor v Windsor* (1912), 3 D.L.R. 456 (B.C.C.A.). With modern communication facilities, cases of this type are of questionable authority today.
[16] *Re*: *Portuguese Consolidated Copper Mines Ltd*., (1889), 42 Ch. D. 160 at 168 (C.A.), per Lord Esher M.R.

As noted, all directors elected at a member's meeting do not have to hold office for the same term. This contemplates the possibility of staggered terms and some interesting procedural issues.

Typically, in the case of a staggered board, one third of the directors are elected for one year, another third for two years and the remaining third for three years. Thereafter, one third of the seats will stand for re-election every third annual meeting. A director appointed or elected to fill a vacancy holds office for the unexpired term of his or her predecessor.

The Delaware case of *Airgas, Inc. v. Air Products and Chemicals,*[17] involved the interpretation of a by-law amendment that changed the scheduling of an annual meeting in such a way as to diminish the impact of a staggered board elected for three years.

Chancellor Chandler stated:

> **The word "annual", however, is not defined in Airgas's Charter. Neither is "year". Nor does the locution "full term" specify a 36-month term, an approximately three-year term, or any other more or less precise length of time for which a director must hold office. A "full term" on the Airgas board is only defined in the charter as expiring "at the annual meeting of stockholders held *in the third year* following the year of their election".**

The result of the Chancellor's decision was to move up the Airgas 2011 annual meeting to January 2011 (which was only four months after the Airgas September 2010 annual meeting) and thus shorten the terms of one-third of the directors of the nine-member classified Airgas board. The decision was reversed by the Delaware Supreme Court C.A. No. 5817. While the Court agreed the By-law language was ambiguous, however, based on external evidence, a term of three years was intended. Because it materially shortened the directors' full three-year term call for by the Charter, the By-law was invalid. The Court stated:

> **In this specific case, we may safely conclude that under any construction of "annual" within the intended meaning of the Airgas Charter . . . the *Delaware Code*, four months does not qualify.** In substance, the January Bylaw

[17] C.A. No. 5817-CC (Del. Ch. Oct. 8, 2010).

> so extremely truncates the directors term as to constitute a *de facto* removal that is inconsistent with the Airgas Charter . . . Accordingly, the January Bylaw is invalid not only because it impermissibly shortens the directors' three year staggered terms as provided by . . . Airgas Charter, but also because it amounted to a *de facto* removal without cause of those directors without the affirmative vote of 67% of the voting power of all shares entitled to vote, as . . . the Charter required.
>
> The Goggin case is similar.

In *Goggin v. Vermmillion, Inc.*[18], the Delaware Court of Chancery denied a motion for preliminary injunction that sought to prevent an annual meeting of shareholders within six months of the last annual meeting, because the terms of the staggered board members would only be shortened by a few days.

The Ontario Superior Court decision in *The Economic Insurance Company v. William Andrus,*[19] also deals with the possible truncation of a director's term of office. A Notice of Proposal was brought by policyholders pursuant to section 147 of the *Insurance Companies Act* S.C. 1991, c.47 as amended (the "ICA"). On December 30, 2010 VC & Co. delivered to Economical a Notice of Proposal respecting certain matters including:

> To approve a resolution removing from office, effective immediately, all directors of Economical Mutual Insurance Company whose term in office would otherwise continue following completion of the meeting of policyholders.

One issue considered by the judge was whether directors could be removed by a proposal, given subsection 181(1) of the ICA giving the policyholders "the right to remove directors" only by a resolution of the policyholders at a meeting of policyholders.

As to the issue of truncating a director's term of office, By-law Number A.1 provides for a board of nine and as to tenure, Cavarzan J. stated as follows:

> By-law Number A.1 of Economical provides that there shall be nine members of the board. Paragraph 2.03 concerning Election and Tenure provided that:

[18] C.A. No. 6455-VCN, 2011 Del. Ch. LEXIS 80 (June 3, 2011).
[19] 2011 ONSC 2184.

75. Directors of the company shall be elected and shall retire in rotation. At each annual meeting, commencing with the annual meeting to be held during 1997, a number of directors equal to the number of directors retiring in each year shall be elected for a term of three years, which shall expire at the close of the third annual meeting or adjournment thereof after such election.

76. This is consistent with s.174(3) of the ICA which provides that a director elected for a term of three years hold office until the close of the third annual meeting of policyholders following the election of the director. Accordingly, a director elected at the 2010 annual meeting has the expectation that his or her term will end at the close of the 2013 annual meeting, i.e., vested interest.

77. The issue is whether or not the second proposal intended to amend section 2.03 can operate, if adopted, to truncate a director's term of office effectively remove the director from office. In my view, it would constitute retrospective legislation interfering unjustifiably with vested rights.

IV. CALLING MEETINGS OF MEMBERS

Many provisions are what we are used to in the CCA.

1. Statutory and By-law provisions

Section 160 of the CNCA and Regulation Section 61(1)(2) states that an annual meeting of the shareholders of a corporation shall be held at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year and not more than fifteen months after the holding of the last preceding annual meeting.

2. Who to send notice to?

Section 162 of the CNCA provides for the notice to be given to voting members, directors and public accountants.

3. Length of Notice

Various time frames are prescribed for notice depending on the method of service of the notice (Regulation S.63). You should note the minimum period prescribed is 21 days which can be an issue for some corporations.

4. **Failure to comply with notice requirements**

Section 8.03 of the Model By-law provides as follows:

The accidental omission to give any notice to any member, director, officer, member of a committee of the board or public accountant, or the non-receipt of any notice by any such person where the Corporation has provided notice in accordance with the By-laws or any error in any notice not affecting its substance shall not invalidate any action taken at any meeting to which the notice pertained or otherwise founded on such notice.

Most standard form By-laws will have a similar provision.

Strategy Tip #6

IF A DIRECTOR OR MEMBER ADVISES THE SECRETARY HE OR SHE CANNOT MAKE IT TO A MEETING, THE CORPORATION SHOULD STILL SEND A NOTICE.

V. CONDUCT OF A DIRECTORS' MEETING

1. Chair - who is entitled to chair meetings?

Every meeting must have a presiding officer, the Chair, to ensure that proceedings are conducted in an orderly fashion and in accordance with statutory requirements, requirements set out in the corporation's constating documents and generally in accordance with common law. The Chair acts as facilitator and keeps the meeting going.

Section 142(a) provides that the directors may designate the officers of the corporation. The chair is appointed that way and normally the By-laws prescribe his or her duties.

Section 7.01 of the Model By-law prescribes the duties of the chair. One duty is to "preside at all meetings of the board of directors, and of the members."

The Chair of the board, if present and willing, shall preside at meetings of the board. In the absence or refusal of the Chair to preside, or to continue presiding, the president shall preside, unless the constitution provides otherwise. If the Chair is disqualified from voting or disqualifies himself or herself by his or her actions, a remaining quorum of the board may elect a new Chair from among the directors.[20]

2. Can members move to replace the Chair of the meeting?

If the By-laws are silent as to who is to serve as the Chair for members' meetings and the Chair is appointed by the meeting, that individual CAN be replaced by the meeting. If the By-law provides who is to chair, a resolution cannot be passed to remove that person and appoint another as Chair.

A court may set aside a meeting for the failure of a Chair to preside at the meeting in a proper manner and allow questions to be put or to allow questions to be answered, but such conduct must be such as to affect the outcome of the meeting itself. [21]

3. Role of the Chair

Issues can arise regarding the role of the Chair.

The Chair is expected to preserve order, conduct proceedings regularly and take care that the sense of the meeting is properly ascertained with regard to any question before it. He or she is also responsible for the manner of conducting votes, and granting adjournments. That said, a Chair cannot stop or adjourn any meeting at his or her own will, but may do so in circumstances described below. **The Chair must act impartially in good faith, and with a view to the orderly conduct of the meeting.**[22] In doing so, the Chair must act in accordance with the will of the members.[23]

As the presiding officer of the board, the Chair is authorized to decide in the first instance on questions arising at the meeting. The Chair has the power to disallow certain comments as well as disallow certain votes. The Chair is also allowed, by virtue of his or

[20] *Nathan's* Rule 35.
[21] See *Re: Canadian Pacific Ltd.* (1997), 30 B.L.R. (2d) 297 (Ont. Ct. Gen. Div.).
[22] *National Dwelling Society v. Sykes* [1894] 3 Ch. D. 159 at 162.
[23] *American Aberdeen-Angus Breeders Association v. Fullerton* (1927), 156 N.E. 314 at 316 (Ill. Sup. Ct.).

her office, to determine who is entitled to vote and whether any resolutions are conclusive or not.

In *Ontario Korean Businessmen's Association v Oh,*[24] a member tried to hijack the meeting the court stated at paragraph 46:

> **It is obvious that an election, in compliance with the Act and By-laws, must be held as soon as practicable, <u>presided over by a corporate lawyer to ensure utmost compliance</u>**. It is further obvious that, in the meantime, the status quo Board and executive (i.e. our clients) ought to maintain authority over the day-to-day operations of the OKBA – operating in the normal course of business. This course of action is the course that best protects the interests of the OKBA membership. (my emphasis)
>
> The Chair has the duty to settle points of contention: The Chair decides who is entitled to attend and vote at the meeting; declines to submit motions that infringe upon the rules of procedure; and gives a second or casting vote where authorized to do so. [25]

4. <u>Who is entitled to attend?</u>

Unless the By-laws otherwise provide, only directors and other persons admitted with the consent of the meeting may attend. The presence of persons not entitled to attend, if objected to, may render the proceedings invalid.[26] In fact, section 135 of the Act provides:

> **A director is entitled to attend and be heard at every meeting of members.**

The question is whether this means "members of the board" or "members of the corporation". If the latter, it is already covered by s.162 of the Act. If the former, it is a codification of existing law.[27] WHAT IS ALSO CLEAR IS THAT A

---

[24] 2011 ONSC 6991.
[25] H. N. Nathan and M. E. Voore. *The Law of Corporate Meetings in Canada* (Toronto, Thomson Carswell (loose leaf 1992) at 2-7. ("*Nathan and Voore*") If problems are anticipated, it is a good idea to anticipate them, get legal advice on specific By-law or statutory provisions that may come into play or even arrange for the board's legal counsel to be present. See discussions of casting vote in Section V 9 below.
[26] *Nathan's* Rule 10.
[27] *Ibid*, Rule 23.

DIRECTOR CANNOT PROXY ANOTHER PERSON TO ATTEND A MEETING OF DIRECTORS IN HIS OR HER PLACE.[28]

Suppose there are factions in the organization as there often appear to be in religious organizations?

Strategy #7

Consider an independent Chair, and/or consider counsel for each faction being present to help calm tensions. This should be by agreement of the disputing parties, if possible.

5. Quorum Issues

If a quorum is not present at a board meeting, the meeting cannot transact business. Section 136(2) of the CNCA provides:

> A majority of directors in office, from time to time, but not less than two directors, shall constitute a quorum for meetings of the board of directors. Any meeting of the board of directors at which a quorum is present shall be competent to exercise all or any of the authorities, powers and discretions by or under the by-laws of the Corporation.

WHAT IF A DIRECTOR(S) REFUSES TO ATTEND A MEETING AND THIS PREVENTS THE FORMATION OF A QUORUM?

A concerted plan by a director to absent himself or herself from meetings may be improper under some circumstances, but a court will not easily issue a mandatory injunction to compel attendance by directors. In a Delaware case, *Campbell v. Lowe's Inc.*.[29] a shareholder sought a mandatory injunction to compel individual directors to attend directors' meetings on the grounds that they were unlawfully attempting to prevent the board from exercising its power by ensuring that no quorum could be obtained. The court held that the directors' action was not such a breach of fiduciary duty as to require an injunction. One court has stated:

---

[28] See s.126(3) of the Act. See *David Greenberg v. Harrison* (1956), 124 Atl. Rep (2nd 216 (Conn.) and *McGuire & Forester Ltd. v. Cadzow* [1933] 1 D.L.R., 192 (Alb. C.A.) See: H. R. Nathan: "Voting by Proxy is Not For Directors' Meetings" in CCH Directors' Briefing, September 2009, issue No. 44.

[29] (1957), 134 A. 2d 852 (Del. Ch.).

> There is no legal process by which a director of a private business corporation can be forced to attend a meeting, and he cannot lawfully be compelled by physical force to attend, nor can he be trapped into attendance against his will.[30]

IN CANADA, WHEN DIRECTORS REFUSE TO ATTEND MEETINGS AND THEREBY FRUSTRATE A QUORUM, THE AVAILABLE REMEDIES ARE LIMITED.

(a) A special meeting of members could be convened to remove the "dissident" directors by an ordinary resolution and to replace them with more compatible ones under S.130(1) of the CNCA.

This is dealt with again a little later in this paper.

(b) Where appropriate, proceedings might be brought by the corporation, claiming damages occasioned by the director's absence and any resultant breach of fiduciary duty.[31]

THESE CAN BE COSTLY AND TIME CONSUMING REMEDIES.

<u>STRATEGY TIP #8</u>

PROVIDE IN THE BY-LAWS THAT IF A PERSON FAILS TO ATTEND TWO (OR WHATEVER IS THE APPROPRIATE NUMBER) OF BOARD MEETINGS WITHOUT A REASONABLE EXCUSE, HE OR SHE WILL BE DEEMED TO HAVE RESIGNED AND THE VACANCY MAY BE FILLED.

WHAT IF SUCH NUMBER OF BOARD MEMBERS LEAVE THE MEETING WITH THE RESULT THAT THERE IS NO LONGER A QUORUM?

<u>STRATEGY TIP #9</u>

THE BY-LAWS MIGHT PROVIDE THAT IF THE QUORUM IS LOST, THE MEETING ADJOURNS AND WHEN IT RECONVENES, EITHER A LESSER NUMBER OF DIRECTORS, OR SIMPLY WHOEVER TURNS UP AT THAT MEETING WILL CONSTITUTE A QUORUM.

---

[30] *Trendley v. Illinois Traction Co*. (1912), 145 S.W. 1, (Mo.Sup.Ct.) at 6-7. See also *Nathan and Voore* at 11-15.

[31] *Gearing v. Kelly* (1962), 182 N.E. 2d 391 (N.Y. Ct. App.) and see Comment on *Bearing v. Kelly* in (1962) 62 Col. L. Rev. 1518).

6. Voting By Directors

An attempt is usually made at directors' meetings to obtain a consensus rather than to press matters to a vote. Section 137(1) of the Act codifies the practice.

Now, if you choose to have a provision for a consensus vote in the By-laws, you need to have a definition of consensus and one is provided for in the definition section of the Model By-law. Otherwise it cannot use this method. Failing to reach consensus at a board meeting means only that there is a return to a show of hands and the right to vote against and thereby dissent to a motion.[32] The need for a consensus vote would likely be more useful at members' meetings.

Once there is a quorum established, in the absence of provision to the contrary in the By-laws, an act or motion must be approved by a majority of those voting on the matter.[33]

7. Resolutions in writing

The CNCA now allows written resolutions of directors and members.

Section 140 provides as follows:

> (1) A resolution in writing, signed by all the directors entitled to vote on that resolution at a meeting of directors or of a committee of directors, is as valid as if it had been passed at a meeting of directors or committee of directors [my emphasis].

Where a director or directors are conflicted, a written form of resolution, signed by the conflicted directors with a caveat that the purpose of signing was only to make the resolutions effective will not suffice.[34] In *Axton Industries Limited v. Bobbiduncan Holdings Limited, Pawelek et al,*[35] Boyd J. stated the following:

> Hume himself signed the document, so as to comply with s.125 of the *Company Act* but he did not signify his "vote" in favour of the transaction, since he was

[32] See discussion by Clifford S. Goldfarb: "Dual Loyalties on Non-Profit Boards"; serving two Masters; CBA-OBA National Symposium on Charity Law, May 6, 2011.
[33] *Mayor, Constables & Co. of Merchants of the Staple of England v. Governor & Co. of Bank of England* (1888), 21 Q.B.D. 160 at 165 (C.A.).
[34] See *Western Canadian Coal Corp. v. Fawcett.* [2006] B.C.J. No. 643, 2006 BCSC 463.
[35] 2006 BCSC 1204 (CanLII).

required to abstain from voting. Of significance in his endorsement are the following words extracted from the statutory requirements of the *Company Act:*

> The undersigned, Duncan Hume, having abstained from voting in respect of these consent resolutions, hereby endorse [*sic*] these consent resolutions as evidenced by my signature affixed hereto for the sole purpose of complying with s.125 of the *Company Act* which requires that all written resolutions must be consented to all of the directors of the company in writing.

This decision may not apply to corporations incorporated under the CNCA in view of the underlined words in S.140(1) of the Act:

Section 140 reads as follows:

> **A resolution in writing, signed by all the directors entitled to vote on that resolution at a meeting of directors or of a committee of directors, is as valid as if it had been passed at a meeting of directors or committee of directors.**

The argument can be made that the conflicted directors are not entitled to vote on the resolution at a meeting and therefore a resolution signed only by the non-conflicted directors would be valid.

8. ***Ex-Officio* Directors**

Subsection 128(3) of the CNCA states as follows:

> Members shall, by ordinary resolution at each annual meeting in which an election of directors is required, elect directors to hold office for a term expiring within the prescribed period.

On the face of it, S.128(3) appears to rule out *ex-officio* directors. If a corporation feels the need to have an *ex-officio* director, the generic solution is to create a separate membership class for each *ex-officio* position. The class can only vote on election of directors, but not other matters. The member of the class is the person who holds a specific position such as Past President, as there is nothing in the CNCA

that prevents *ex-officio* members. The only problem with this is if the matter before the members is one on which non-voting members can vote as a separate class. These would be rare situations, but there may be a need to protect the organization against the possibility of a single rogue director being able to stop a corporate action. That is the real drafting issue. I suppose that you could also provide outside of the articles and By-laws that the member of the class has to sign an open resignation which the board can accept at any time.

Strategy Tip #10

Consider very carefully if having an *ex-officio* director is worth the effort. If so, consider an undated resignation of the "*ex-officio*" director that can be utilized if the board feels it is appropriate.[36]

9. **Casting Vote**

At common law, the Chair did not have a casting vote if directors were equally divided on a question[37]. Section 6.04 of the Model By-law provides:

In case of an equality of votes, the Chair of the meeting in addition to an original vote shall have a second or casting vote.

IF THIS IS NOT INTENDED, THE BY-LAW MUST PROVIDE OTHERWISE.

If there is provision for the Chair to have a casting vote it is meant to be used to remedy occasional tie votes,[38] not to deal with a continuous and settled deadlock condition.[39]

As to whether the Chair is required to cast a vote at board or members' meeting (apart from any proxies given to him or her at a members' meeting), a Chair's role as noted

---

[36] A provision in the Articles or By-laws allowing the board to remove a director would probably be ineffective. See discussion *infra* V 13.
[37] *Nell v. Longbottom*, [1894] 1 Q.B. 767 (Q.B.D.). *Nathan's* Rule 36.
[38] Re: *Citizen's Coal v. Forwarding Co.*, [1927] 4 D.L.R. 275 (Ont. Co. Ct.).
[39] Re: *Daniels and Fielder* (1988), 65. O.R. (2d) 629 (Ont. H.C.).

above is to attempt to achieve consensus on an issue, failing which if put to a vote he or she may abstain from voting as any other director or member may do. Where the Chair has a casting vote on a tie vote, as with any other director on a vote, he or she may not be compelled to cast it. A Chair must act in good faith in casting a tie-breaking vote.

10. **Method of Voting – Secret Ballot**

There are no provisions in the CNCA as to how votes are to be conducted at directors' meetings. Generally, voting is carried out by show of hands and each director has one vote.

If the matter is a sensitive one, there is a question of whether there can be a secret ballot at a meeting of directors, so that one director would not be aware of how other directors have voted. Only the Chair who counts the ballots would know, assuming directors' names were on the ballots.

I have been unable to find any jurisprudence on whether voting by way of a secret ballot would be permissible at a directors' meeting. In Ontario, and in most other provinces, the corporation's By-laws set out the procedural matters that govern the conduct of meetings. A corporation's By-laws do not normally include any reference to a secret ballot at directors' meetings. The UK equivalent of our standard form By-law, namely Table A, does not make mention of it either.

It is my view that one could make specific provisions for voting by secret ballot in a corporation's By-Laws.

STRATEGY TIP #11

UNLESS THERE IS SOME ESTABLISHED PRACTICE IN A CORPORATION FOR SECRET BALLOTS, OR THERE IS A PROVISION IN THE BY-LAW WHICH PRESCRIBES THAT ONLY THE CHAIR KNOWS HOW A DIRECTOR VOTED, IT WOULD BE BETTER TO STAY AWAY FROM SECRET BALLOTS.

It could be argued that the call for a secret ballot is within the discretion of the Chair.

A secret ballot could give rise to some problems. For example, a director of a corporation may have the right to dissent from certain proposed actions to avoid potential liabilities.[40]

How does one dissent in a secret ballot so that the dissent can be reflected in the minutes of the meeting? A person who has dissented could insist that his or her dissent be recorded in the minutes.

In addition, ballots in a members' meeting are open to inspection by members, and by analogy, secret ballots at a directors' meeting could be open to inspection by other directors. This desire for secrecy would not be accomplished.

11. Right to Dissent

Section 147(1)(a) of the CNCA gives a director the right to dissent to any resolution passed or action taken at a meeting.

I AM OFTEN ASKED WHETHER A DIRECTOR MUST STATE THE GROUNDS OF HIS OR HER JUDGMENT FOR OR AGAINST A PROPOSED ACTION. I DO NOT BELIEVE SO.[41] The board of a corporation may state reasons for a recommendation if it so chooses; however, if this is done, the statement of those reasons must not be misleading. It may, of course, help in establishing that the board has satisfied the business judgment rule discussed below.

12. Business Judgment Rule

The Supreme Court of Canada in *Peoples Department Stores Inc. et al. v. Wise*[42] quoted Weiler J.A. in *Maple Leaf Foods Inc. v. Schneider Corp.*[43] gave the following explanation of the rule:

> **The court looks to see that the directors made a reasonable decision not a perfect decision.** Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though the

[40] For example, members may decide to sue directors for breach of their fiduciary duties.
[41] See *Newman v. Warren* (1996), 684 A.2d 1239 (Del. Ch.).
[42] [2004] 3 S.C.R. 461, (2004), 244 D.L.R. (4th) 564, 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215.
[43] (1998), 42 O.R. (3d) 177, 44 B.L.R. (2d) 115 (ON. C.A.).

> subsequent events may have cast doubt on the board's determination . . . . The fact that alternative transaction were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction . . . .

The business judgment rule was applied to a not-for-profit corporation in *Hadjor v. Homes First Society*[44]. In *Hadjor*, a consultant was appointed by the City of Toronto to determine whether there were inefficiencies in the governance of the charity. The consultant Berkeley found that resident members could control the board which could result in a loss of charitable status and a subsequent loss of funding. The board of directors amended the corporation's by-laws to remove residents from the membership of the corporation. The court found that the decision was made because the board felt that it was in the best interest of the corporation.

The judge stated:

> 47. Mr. Hadjor's concern here is the various votes and decisions implementing the Berkeley Report were in violation of the "Business Judgment Rule." He also submits that when the vote was taken at the AGM, the resident members did not know what they were voting for. I do not agree.
>
> After referring to a statement of the rule he concluded:
>
> 51 At all times, the Board proceeded in what is deemed to be the best interests of the Society. Berkeley specifically told Board in a meeting in 2007 that at would recommend that the City and other not provide any further funding for the society to acquire additional housing until the residents' control problem was solved. The Board acted in good faith in recommending to the members changes which it deemed necessary to continue the charitable status of the Society, and to ensure its future funding and growth.
>
> 52 There is a therefore no basis for Mr. Hadjor's submission that there were breaches of fiduciary duty, or more specifically, a violation of the "Business Judgment Rule."

Note that others have suggested that it is possible that the Business Judgment Rule may not have application to a charity where misapplication of charitable property is involved. In such a case, a higher standard of trust law would be applied.[45]

---

[44] (2010) 79 B.L.R. (4th) 101 (Ont. S.C.J.). See discussion by Clifford S. Goldfarb: *Supra*, footnote 32 at page 18 ff.

[45] See Terrence S. Carter and Ryan M. Prendergast, "Duties and Liabilities of Directors and Officers of Charities and Non-Profit Organizations" in the Law Society of Upper Canada: Emerging Issues in Directors' and Officers' Liability, March 29, 2011.

13. Removal of a director

Section 130(1) of the CNCA provides as follows:

> **The members of a corporation may by ordinary resolution at a special meeting remove any director or directors from office.**

Can a director be removed by the board of directors?

SOME CASES HAVE CONSIDERED THIS.

In the Delaware Case of *Bruck v. National Guarantee Credit Corp.*[46], the court considered whether the board had the authority to remove another director. The court held the directors could not remove another director but only the shareholders could do so. Likewise, in the British Columbia case of *Re: Lajoie Lake Holdings Ltd.*[47] it was held that a board of directors does not have the authority to remove a director under the *British Columbia Company Act.*

There is one interesting case to consider:

In the *Sikh Spiritual Centre* case[48], the board of the Sikh Spiritual Centre purported to remove a director. The court referred to an article in the Sikh Centre's By-law which provided that a director "can only be removed at a meeting of members after notice and at which two-thirds of the members are present." The court rejected the argument that the board meeting where the removal took place was a members' meeting, even though it was agreed that the board constituted the entire membership of the corporation.

It is not unusual in not-for-profit corporations to blur the distinction between directors and members especially where it is an industry-type of corporation and each member appoints a director.

---

[46] (1922), 116 A. 738 (Del. Ch.).
[47] (1991), 24 A.C.W.S. (3rd) 1332 (B.C.S.C. IN Chambers). The judge did not cite any authority. See also C. Hansell, *Directors and Officers in Canada: Law and Practice* (Toronto: Thomson Carswell, 1999) looseleaf, 2 volumes at 5-33, where this case is cited.
[48] *Supra,* footnote 7.

There is one interesting case to consider. In *Lee v. Chou Wen Hsien*,[49] the articles of association of a Hong Kong company provided that the office of a director was to be vacated if he was requested in writing by his co-directors to resign. The co-directors gave written notice to a director to resign and the Privy Council upheld the expulsion.

STRATEGY TIP #12

CONSIDER WHETHER A PROVISION IN A CORPORATION'S BY-LAWS PROVIDING FOR REMOVAL OF A DIRECTOR BY THE OTHER DIRECTORS WOULD BE VALID IN LIGHT OF THE ABOVE, OR POSSIBLY A PROVISION IN THE CONSENT TO ACT AGREEING TO RESIGN IF REQUIRED BY THE BOARD.

14. Removal of a director by the court

Removing and appointing directors to a board is an extreme form of judicial intervention. Primarily under S.297 of Ontario's *Corporations Act,* a court will become involved in overturning meetings and ordering that new ones be held, including how they are to be conducted, but the courts have shown reluctance to remove and appoint the directors themselves, deferring to the membership at the newly ordered meetings to sort those issues out.

15. **Minutes of Board Meetings**

There is no hard and fast rule as to how minutes should be prepared.

The following is an extract from *Nathan's* Rule 44 and Comment at page 45:

> Minutes should contain date, time and place of meeting, persons present, names of chairman and secretary, resolutions passed, appointments made and business conducted and should be signed by the chairman of the meeting , or by the chairman of the next meeting at which they are verified.
>
> > Comment: Minutes should succinctly and accurately reflect the material aspects of the board's deliberations. The formal record should be a self-serving record of discussions and decisions on material issues. It has been

[49] [1984] 1 W.L.R. 1202 (P.C.).

> said that minutes are the record of resolutions and matters ancillary thereto and not a complete transcript of every word used in the course of a meeting.

Do minutes actually need to be signed to be valid?

IT IS GOOD PRACTICE TO HAVE THE MINUTES OF DIRECTORS' MEETINGS SIGNED BY THE CHAIR [AND SECRETARY] OF A MEETING. FAILURE TO SIGN THE MINUTES DOES NOT INVALIDATE THEM *TEISER V. SWIRSKY* (1931) 2 P 2nd 920 OREGAN S. CT.; HOWEVER, SIGNING OF THE MINUTES STRENGTHENS THE EVIDENCE AS TO WHAT WAS SAID AT THE MEETING IN CASE OF A LATER DISPUTE. NOR DOES THERE APPEAR TO BE ANY LEGAL REQUIREMENT TO APPROVE MINUTES OF A MEETING AT A SUBSEQUENT ONE.

There does not appear to be any obligation to have minutes signed to be valid.[50]

Disputes have often arisen over wording in minutes, accusations are levied as to the secretary not being impartial. In my experience, many organizations prefer to keep a record of the discussions. Directors themselves often wish to ensure that all relevant matters have been considered, again in case there is an allegation of breach of fiduciary duties or to satisfy the business judgment rule..

In one early case the judge stated[51]:

> Directors ought to place on record, either in formal minutes or otherwise, the purpose and effect of the deliberations and conclusions. If they do this insufficiently or inaccurately they cannot reasonably complain if false inferences are drawn from their reports.

THE JAMES HARDIE CASE

The *James Hardie* decision in Australia[52] serves as a stark warning against the failure to keep complete and accurate minutes of meetings. James Hardie Industries Limited

---

[50] See *Nathan and Voore* at 4-11.
[51] *Re: Liverpool Household Stores Ass'n* (1890), 59 L.J. Ch. 616 per Kekewich J., p. 619.
[52] *ASIC v Macdonald* (No. 11) 2009 NSWSC 287, reversed in part by the New South Wales Court of Appeal as *Morley & Ors v. ASIC* [2010] NSWCA 331.

("JHIL") was in the business of manufacturing and producing asbestos products through two wholly owned subsidiaries. In early 2001, the board of directors created the Medical Research and Compensation Foundation. The purpose of this Foundation was to manage and pay out for asbestos claims against the James Hardie Group. Subsequent to the creation of this Foundation, a draft announcement was sent to the Australian Stock Exchange ("ASX") setting out the assets of the James Hardie Group and stating the Foundation had sufficient funds to meet all legitimate asbestos claims. Similar announcements and press releases were made by certain officers of JHIL. The Australian Securities & Investments Commissions ("ASIC') initiated civil proceedings against JHIL and its directors alleging that these statements were false and misleading. One of the major issues in these proceeding was whether the members of the board had approved the release of the ASX Announcement, and would therefore be jointly and severally liable. The facts relating to the board proceedings were as follows. On February 15, 2001 a board meeting was held by the directors of JHIL. The minutes of the board meeting were signed as a correct record by the chairman at the next meeting of the board on April 4, 2001. The minutes contained the following entry:

"**ASX Announcement**

The Chairman tabled an announcement to the ASX whereby the Company explains the effect of the resolutions passed at this meeting and the terms of the Foundation (ASX Announcement) as follows:

> Resolved that: (a) The company approves the ASX announcement; and (b) The ASX announcement be executed by the Company and sent to the ASX."

At trial, neither of the witnesses had an actual recollection of what had actually occurred in the meeting. Nonetheless the trial judge was satisfied, given the senior vice-president's usual practice, that a draft of the news release was taken to the meeting and distributed among the members of the board. **The trial judge also found that the draft news release must have been approved by the board** given the strong correlation between the draft news release and key messages that were likely to have been stated by management. On appeal, the **Court of Appeal held that ASIC had not discharged its burden in proving that the Board tabled and passed a resolution approving the ASX**

announcement. While the Court agreed with the trial judge that the evidence showed the draft ASX announcement was brought to the meeting, and there was a discussion regarding the draft, the Court could not conclude that the discussion was anything more than a work in progress, with management to finalize and approve at a later date. With respect to the entry in the minutes regarding the ASX Announcement, the Court found their reliability was very much open to question. **Evidence was led that the minutes were substantially prepared in advance of the meeting by the solicitor on the basis of what the solicitor thought ahead of time would be appropriate to discuss.** Furthermore the minutes contained substantial inaccuracies in other respects. Finally, the board members testified that they were unaware of the ASX Announcement entry in the minutes, and had either only superficially reviewed the minutes or not all. In the result, the non-executive directors were eventually relieved of liability. (my emphasis)

The importance of setting out in the minutes all material discussions by the directors cannot be understated. Simply stating that a resolution has been passed will not explain the basis of the decision and on what material the decision has been premised on. Had the minutes of the meeting been more thorough, it would have been readily apparent whether the draft ASX announcement had been tabled and approved.

If the directors of JHIL had reviewed the minutes, they would have noticed the ASX Announcement entry, and could have amended the minutes before approving them, thereby avoiding the entire litigation.

Strategy Tip #13

Several lessons can be learned from the decision.

- **Minutes should be critically and carefully reviewed by directors before being approved;**
- **Directors should be more inclined to ensure that the bases of their decisions at board meetings on crucial matters are understood and noted in the minutes;**

- **Management should be clear as to whether it is seeking the directors' approval or providing documents for information where no immediate action is required;**

The case also confirms that the fact of an event being recorded in minutes of a board meeting will be of no evidentiary value where, on the whole of the evidence, the opposite is found to be true.

Section 275(1) of the Act allows a certificate as to any facts set out in any minutes of meetings of directors or members to be signed by any director of officer. Subsection (2) provides that in the "absence of evidence to the contrary", a certificate so signed is proof of its contents. (My emphasis).

Another reason why a duty of care should not be imposed on Mr. Nathan is because he never held himself out of Gordelli as possessing special skill, knowledge or competence in the financial sphere. Mr. Nathan was only the Secretary of Werner Dahnz with duties limited to general administration associated with meetings, the preparation of minutes and other administrative tasks and it was neither his profession nor his occupation to make financial reports or statements on which other people would rely in the ordinary course of business.

> **Reasons for Vote - I am often asked the question.**
>
> **Individual directors are not required to state the grounds of their judgment for or against a proposed action. The board of a corporation may state reasons for a recommendation if it so chooses: however, if this is done, the statement of those reasons must not be misleading.[53]**
>
> **Let me also refer to protection of directors**
>
> **DISSENT RIGHTS OF DIRECTORS**

Section 147 of the CNCA is similar to s.123 of the CBCA and s.123 OBCA. Directors who do not agree with a proposed action by the board should register his or her dissent at the meeting and make sure it is reflected in the minutes.

---

[53] See *Newman v. Warren* (1966), 684 A. 2d 1239 (Del. Ch.).

Likewise, the absent director on receipt of the minutes should register his or her dissent if appropriate.

16. Notes of Meetings

A question which typically arises with respect to minutes of meetings is whether directors should keep their own notes. Directors may be inclined to do so to ensure they may assess the draft minutes, especially where there may be a concern the secretary is not acting impartially. However directors' notes may contradict or undermine the minutes of meetings. As one prominent writer states:[54]

> Notes can be a double-edged sword. It is often prudent for there to be only one record of the deliberations of the board of directors – the minutes which are approved by the board and inserted with the company's corporate records. It may create problems if the official record is subsequently challenged by conflicting notes kept by individual directors. Accordingly, the company's corporate secretary will often suggest that the directors keep their own notes, if they wish, until the minutes have been approved and then destroy them.
>
> On the other hand, directors should remember that while action is taken by the board as a whole, directors may incur liability on an individual basis. Accordingly, it may be important for individual directors to be able to prove that they raised certain objections or were unaware of a particular course of conduct being proposed by the company's management or by its controlling shareholders. Directors who do not have their own record of critical situations may find themselves unable to establish their due diligence defence.

However, notwithstanding the value to individual directors of their own notes to support their version of a particular set of events, directors should recognize that if litigation arises it is unlikely these notes will remain private and you would likely be cross examined on them. The informality of these notes can potentially be damaging, such as if one director's notes contains a doodle in the margins suggesting distraction or superficial discussion. Similarly, directors should exercise caution with respect to making negative written comments regarding other members of the board. Do not be critical of a director asking a question and not following up if a further follow up question should have been

[54] Carol Hansell: *Corporate Governance* (Toronto: Carswell, 2003) at 86-7.

asked. I can hear counsel in cross examination saying: "Why didn't you ask the follow up question?" The notes have to be produced if litigation ensues.

Here is an interesting statement

The Corporate Director's Guidebook states[55]:

> **Directors are not obligated to take notes.** Those who do take notes to help them participate should consider whether to retain them. Notes are not subject to a careful process of drafting, review, and approval, and may contain statements or notations that may be misinterpreted, taken out of context, or in fact, be incorrect, particularly if produced in litigation. For example, notes often capture only part of a discussion or fail to distinguish between words spoken and the note taker's thoughts. Similarly, notes and drafts of the secretary of the meeting should normally not be retained after approval of the official minutes.

For a recent case where notes taken at a board meeting come under scrutiny, see *Harris v. Leikin Group Inc*. (2011), 88 B.L.R. (4th) 1 (S.C.J.)

Issue was whether shares were repurchased knowing a deal in the wings.

Grant Jameson made handwritten notes of the meeting which recorded a presentation by **???**

Lawyer

[58] Although Mr. Jameson deposed that at the meeting David Katz presented the "concept that the Leikin Group and First Capital might enter into a co-ownership agreement in respect of the College Square property", he acknowledged on cross-examination that there was no specific reference to College Square in his notes of the meeting.[FN24] He gave the following explanation for the statement in his affidavit:

> **Well, that was my recollection. That was what I remembered, and this is encompassed in – the notes, now that you have taken me back through them – because these are quick notes, things are happening fast, and I am not a shorthand reporter…[FN25]**
>
> **When I think back about that meeting and David's presentation at the meeting, I recollect some discussion of College Square…No, it didn't find its way into my notes.[FN26]**
>
> **<u>Strategy Tip #14</u>**

[55] 6th edition reproduced in (2011) 66 The Business Lawyer 1007.

In any event, it is good practice to put into place a policy or guideline on managing notes and working files relating to meetings that is clear on the destruction of notes of meetings. Generally written notes are destroyed following approval of the minutes at the next meeting. If directors do decide to keep written notes to protect themselves, the notes should follow the same rules as minutes, and be clear, concise and complete.[56]

Strategy Tip #15

A corporation should:

1. **Keep proper financial records;**
2. **Hold annual meetings when required;**
3. **Provide financial statements to members;**
4. **Ensure to the extent possible that the chair and directors do not act to frustrate the wishes of the members;**
5. **Ensure creditors are not faced with the depletion or stripping of assets and rendering the corporation asset-free to meet creditor's claims.**

17. **Oppression Remedy**

When we talk of possible litigation against directors, it is most likely to arise by way of the oppression remedy.

Section 253 provides for the oppression remedy.

We are all familiar with the oppression remedy from the CBCA and OBCA

The leading case is that of *BCE Inc. v. 1976 Debenture Holders et al*[57], in the Supreme Court of Canada. It reaffirms the test for oppression relating to the test of reasonable expectation of the complainant. The oppression remedy arose in relation to business corporations. Certain of these cases will be looked to for precedents of what constitutes "oppressive" conduct in not-for-profit corporations.

[56]For a recent case where notes taken at a board meeting come under scrutiny, see *Harris v. Leikin Group Inc*. (2011), 88 B.L.R. (4th) 1 (S.C.J.).
[57] [2008] 3 S.C.R. 560.

VI. CONDUCT OF A MEETING OF MEMBERS

Many of the matters referred to in Part V relating to board meetings are applicable to meetings of members.

1. The Chair is in Charge of the Conduct of the Meeting.

The provisions relating to who is to chair directors' meetings applies equally here. The conduct of a meeting is largely in the hands of the Chair, who derives his authority from the meeting.

Issues may arise by reason of the actions of the Chair.

The Chair must not act to frustrate the expression of the wishes of the meeting by leaving the Chair, refusing to put proper motions to a vote, acting in an oppressive manner to end discussion or refusing to have votes counted. **In *American Aberdeen-Angus Breeders' Ass'n v. Fullerton* [58], it was stated:**

> The right of the majority of the members to control the action of the meeting cannot be questioned. **A presiding officer cannot arbitrarily defeat the will of the majority by refusing to entertain or put motions, by wrongfully declaring the result of a vote or by refusing to permit the expression by the majority of its will.** He is the representative of the body over which he presides. His will is not binding on it, but its will, legally expressed by a majority of its members is binding.
>
> The Chair is not authorized to obstruct the meeting by refusing to call it to order….in other words, it is a power directed towards enabling him to carry on the meeting for the purpose for which it is convened.

Because the Chair failed in his duty, the resolutions were not properly carried.

The Delaware decision in *Portnoy v Cryo-Cell International, Inc.* [59]is an example where the Court ordered a new election with a new chair at the expense of the management due to the improper behavior of the Chair in trying to maintain control of the board. The CEO, Mercedes Walton and the management groups devised a plan to buy up stock and bolster their position in a proxy contest. Going into the annual meeting at 10:00 a.m. the CEO sensed defeat and did not want to close the polls and

---

[58] *Supra*, footnote 22.
[59] (2008), 940 A.2d 43 (Del.Ch.) – See *Nathan & Voore* at 2-15 for a full discussion of the case.

count the vote when the scheduled presentations at the meeting were over. So she had members of her management team make long, unscheduled presentations to give her side more time to gather votes and endure that they had locked in two key blocs. She overruled motions to close the polls. Even after the filibusters, Walton still harbored doubt that the Management Slate would prevail if the vote was counted and the meeting was concluded. So, at around 2:00 p.m. Walter declared a very late lunch break, supposedly in response to a request made much earlier.

In fact, Walton desired the break, so that she would have more time to seek votes and so that she could confirm that the major blockholders had switched their votes to favour the Management Slate. Only after confirming the switches did Walton resume the meeting at approximately 4:45 p.m., declare the polls closed, and have the vote counted.

The judge had harsh words to say about the Chair's behavior in finding a serious breach of fiduciary duty which tainted the election of directors.

The above business corporation cases would be applicable to non-share capital.

2. Visitors

I have been to meetings of NP Corporations where there appear to be more visitors than members. People have asked me about visitors attending meetings.

The practice of corporations with respect to visitors varies. **At a non-contested meeting of a public company, there generally appears to be little reason for excluding persons. This is demonstrated by the keeping of a guest book at the entrance.** If there is a contested meeting, those responsible for maintaining order must ensure that the meeting proceeds as smoothly as possible. One commentator has noted:

> **While in the past corporations have admitted guests of shareholders and have welcomed students and others having an educational interest to their meetings, corporations now tend to restrict admittance to shareholders, their spouses, proxyholders, and members of the press.**[60]

A basic security procedure is to limit attendance at the meeting to those who have the right to be present.

---

[60] J. Mooallem, *"Conducting a Fair and Informative Stockholders Meeting"* (1971), 36 Bus. Q. 47, at 47.

It is customary today to request members to sign a register upon their coming to a meeting for the purpose of confirming their right to attend.

Strategy Tip #16

If there is a need to control admission the By-law might provide for admission of members who become members up to X number of days before the meeting. There should be a provision for verification that the person has become a member as often the records are not up to date.

What if there is an overflow crowd expected?

Byng v. London Life Ass'n Ltd.[61] **is a case that demonstrates the consequences of poor planning.** Here, notice was given of an extraordinary general meeting of a corporation to be held at a specified location on a specified date. At the time of the meeting, the location proved to be too small to accommodate all the members who wished to be present. **Many of the members had to go to overflow rooms and the foyer. The court held that, in situations where the original location proves to be inadequate in accommodating all those wishing to attend, general meetings of a corporation can be validly conducted using overflow rooms provided, first, that all due steps are taken to direct to the overflow rooms those unable to enter the original location and, second, that there are adequate audio-visual links available to enable those in all the rooms to see and hear what is going on in the other rooms.** Since the audio-visual links did not work, those members in the overflow rooms and foyer were excluded, and the meeting in the original main location was incapable of transacting any business. Accordingly, the Court ordered a new meeting to be held.

Strategy Tip #17

Corporations expecting an unusually large attendance or difficulties may find it advisable to make arrangements for proper physical premises for the meeting.

[61] Supra, footnote 42.

3. Quorum Issues

SECTION 164(1) OF THE ACT PROVIDES FOR THE QUORUM AT MEMBERS' MEETINGS BEING SET BY BY-LAW. IF THERE IS NO SUCH PROVISION SUBSECTION (2) PROVIDES THAT A QUORUM IS A MAJORITY OF MEMBERS. THIS CAN BE A SERIOUS ISSUE.

This seems to conflict with s.4.03 of the Model By-law which states the quorum should be 10% of the members entitled to vote at the meeting.

What is useful is the concluding sentence of S.4.03:

> **If a quorum is present at the opening of a meeting of members, the members present may proceed with the business of the meeting even if a quorum is not present throughout the meeting. (Most standard form of By-laws would have this provision.)**

4. **Voting By Members**

As with directors, S.137(1) of the Act also provides for consensus voting at a meeting of members. Note in the definition of "Voting" in the Model By-law, "consensus decision-making is only appropriate at meetings of members" when the size of the membership is small.[62]

> **Strategy Tip #18**
>
> **Section 137(1) precludes use of consensus vote for any decision taken by a special resolution.**

Again, it is to be noted that the Model By-law in S.4.04 provides the chair with a casting vote. The same principle set out above in V 9 "Casting Vote" as regards directors' meetings would apply here.

5. **Proxies**

Section 171(1) of the CNCA allows for discretion in the By-laws for proxies in contrast of the CCA where you will not find any reference to the word "proxy".

---

[62] For a fuller discussion of "consensus voting", See Clifford S. Goldfarb, *Supra* footnote 32 at page 18 ff.

By providing for proxies one must follow the provisions of S.74 of the Regulations which are quite broad.

There will be issues to consider. For example, a member will only have one proxy Query the ability of a member to split his or her vote to have that person's solicitor at the meeting if his or her attendance is not consented to by the meeting.

Nothing, of course, prevents a member from getting proxies from friends not intending to attend a members' meeting.

An issue could arise that there is no requirement to deposit the proxy before the start of a meeting.

This could result in an ambush when it comes to the election of directors when a group puts forward its candidates for election from the floor.

Section 74(2)(b) provides for revocation of a proxy by depositing an instrument in writing as provided for in this section.

> **Strategy Tip #19**
>
> **Require in the By-law that proxies be deposited so many days before the start of a meeting. The By-laws could also limit the number of proxies any one member may hold.**

Does this override the common law position that a member has the right to revoke his or her proxy at any time and to abstain from voting if the member chooses to do so?

In *Wells v Melnyk*[63]. Wilton-Siegel J. stated:

> **The law is clear that, as a general rule, a shareholder has a right to revoke his or her proxy at any time and to abstain from voting if the shareholder so chooses. As a result, as a general rule, a shareholder cannot be compelled to attend a shareholder meeting, even where the shareholder's absence prevents the possibility of a quorum.**

[63] (2008), 46 B.L.R. (4th) 112 (Ont. S.C.J.).

Revocation of proxies could lead to problems. For example, in the *Wells* case, prior to the annual shareholders' meeting of Biovail Corporation, Melnyk, a major shareholder revoked his proxies reducing the number of shares represented at the meeting to less than 51%, the amount necessary to form a quorum. In response, the Board convened at approximately 10:00 a.m. on that day, immediately prior to the meeting of shareholders. At the Board meeting, the Board passed a resolution amending Biovail's By-laws to reduce the quorum for a meeting of shareholders to two shareholders holding at least 25% of the outstanding Biovail shares.

As to the amendment to the By-law reducing the quorum to 25%, the judge quoted S.103 of the CBCA as follows:

> 103.(1) By-laws – Unless the articles, By-laws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend, or repeal any by-laws that regulate the business or affairs of the corporation.
>
> (2) Shareholder approval --- the directors shall submit a by-law, or an amendment or a repeal of a by-law, made under subsection (1) to the shareholders at the next meeting of shareholders, and the shareholders may, by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal.
>
> (3) Effective date – A by-law, or an amendment or a repeal of a by-law, is effective from the date of the resolution of the directors under subsection (1) until it is confirmed, confirmed as amended or rejected by the shareholders under subsection (2) or until it ceases to be effective under subsection (4) and, where the by-law is confirmed or confirmed as amended, it continues in effect in the form in which it was so confirmed.
>
> (4) Idem – If a By-law, an amendment or a repeal is rejected by the shareholders, or if the directors do not submit a by-law, an amendment or a repeal to the shareholders as required under subsection (2), the by-law, amendment or repeal ceases to be effective and no subsequent resolution of the directors to make, amend or repeal a by-law having substantially the same purpose or effect is effective until it is confirmed or confirmed as amended by the shareholders.

He held no notice of this matter was given to the shareholders so the proposed amendment was not validly passed.

When reference was made to S. 144 of the CBCA where the court can order a meeting of shareholders where it would otherwise be impractical to call a meeting Wilton-Siegel J. stated:[64]

> This provision has been used to order that a meeting of shareholders take place under varied quorum requirements to prevent the non-attendance of minority shareholders from frustrating the ability of the meeting to transact business: see : *El Sombrero Ltd., Re, [1958]* 1 Ch. 900 (Eng. Ch. Div.), *Paul (H.R.) & Son Ltd., In re* (1973) 118 S.J. 166, *Opera Photographic Ltd, Re,* [1989] 1 W.L.R. 634 (Eng. Ch. Div.) and *B. Love Ltd. v. Bulk Steel & Salvage Ltd.* (1982), 40 O.R. (2d) 1 (Ont. H.C.). However these decisions all involved private corporations in which a minority shareholder prevented the legitimate exercise of majority shareholder rights.

This reasoning could apply to CNCA corporations given that the provisions of S. 168(1)(a) of the CNCA are in substance the same as S.144 of the CBCA.

6. The Difficult Member

One significant difference between business corporations incorporated under the CBCA and other provincial equivalents is that a provision may be made in a CNCA corporation's articles or by-laws to discipline or terminate a member's membership. Section 158 of the CNCA provides as follows:

> **The articles or by-laws may provide that the directors, the members of any committee of directors or members of a corporation have power to discipline a member or to terminate their membership. If the articles or by-laws provide for such a power, they shall set out the circumstances and the manner in which that power may be exercised. (my emphasis)**

A membership could carry with it significant benefits, such as equity ownership, medical or pension plans, free golf games etc. There are some interesting cases dealing with removal of members.

In *Sol Sante Club v. Grenier*[65] decided in the Supreme Court of British Columbia, the plaintiff's probational membership was terminated by the Board. There were no provisions specifically with a separate process to be followed when expelling a

[64] *Ibid* at paragraph 36.
[65] [2006] B.C.S.C. 1804.

probationary member. According to the By-law, the process to be followed was that there had to be a special resolution of the members.

Mr. Grenier was denied the right to a hearing before the Board and the Board simply terminated his membership. The judge reviewed the law and concluded that while directors could exercise all the powers that the society could exercise, there had to be strict compliance with a provision in the By-law expelling a member. The Court pointed out that there had to be a good degree of procedural fairness and this was denied Mr. Grenier. Accordingly, the termination of his probationary membership was contrary to the by-law and the expulsion was set aside.[66]

In the case of *Schaer v. Barrie Yacht Club*[67], the Court considered whether to issue an injunction prohibiting Mr. Schaer from being on or near the Club premises, and for a declaration that he was properly expelled from the Club and no longer a member. The central issue was whether the termination of Schaer's membership was valid. The Court held that it was not appropriate for it to review the decision made by the executive committee of the Club, but it was appropriate to examine the circumstances in which it was made, and whether those circumstances revealed a failure to deal with the issue in accordance with principles of natural justice. It is only in the instance of such a failure that the Court should interfere with the decision made. The Court in this case declined to interfere and granted a permanent injunction.

There have been other cases that have upheld these principles. A recent decision of the British Columbia Supreme Court in ***Struchen v. Burrard Yacht Club***[68] will serve as a further example. Here, three members of a yacht club challenged their suspension or expulsion from the club. One of them lost his membership, which meant he lost the right to moor his boat at the marina, an important element of his social and family life. The

---

[66] This case and others dealing with the expulsion of members was dealt with in a comprehensive paper by Jane Burke-Robertson: "Natural Justice, Members and the Not-For Profit Organization: Fair Play in Action". It was presented at the Canadian Bar Association National Symposium on Charity Law, Toronto on May 10, 2007. See also *Lee v. Lee's Benevolent Association of Canada* (2007) , 30 B.L.R. (4th) 71 (B.C.S.C.), where the British Columbia Supreme Court carefully reviewed the cases dealing with expulsion of members.

[67] (2006), 34 B.L.R. (4th) 36 (Ont. S.C.J.).

[68] (2008) 46 B.L.R. (4th) 228 (B.C.C.A.).

Court held these members were improperly disciplined. **There was a failure to comply with the basic requirements for a fair process.**

The question of prejudging a matter is an aspect of the general principle that a body should not proceed where there is a reasonable apprehension of bias.

The Court stated as follows:[69]

> The rationale for affording a person an opportunity to be heard is the idea that people will listen with an open mind to that which is said and reach a considered decision. **It cannot be presumed that a future time a member will be deprived of membership where, as here, it is established that not all the allegations were soundly made.** In any case, any new meeting will be held without the shadow of predetermination such as was present on May 17, 2005. I would not presume to say that the degree of acrimony on the part of Mr. McLachlan, found so offensive by the Board on the earlier occasion, will be present in the event of a fresh discipline meeting, or that on reflection the significant penalties already experienced by Mr. McLachlan will not be considered adequate retribution for any offensive conduct on his part.

Strategy Tip #20

This is a very good reason why slavishly following the Model By-law is not a good idea. A carefully crafted process for disciplinary measures in respect of members should be set out keeping in mind the principles articulated in the case.

VII. CONCLUSIONS:

There will always be procedural issues arising at board and members' meetings. Carefully drafted By-laws and the adoption of some of the Strategy Tips outlined in the paper will hopefully resolve or reduce the number of them.

[69] *Ibid* at page 241.

Appendix "A" - Comparison Chart between the Canada Corporations Act and the Canada Not-For-Profit Corporations Act

The *Canada Not-for-Profit Corporations Act* (the "CNCA") received royal assent on June 23, 2009 and most of its provisions came into force on October 17, 2011[70].

As of October 17, 2014 the CNCA will govern all federally incorporated non-share capital corporations which have complied with transition procedures for continuance under the new act. Corporations which fail to transition by October 17, 2014 will be dissolved. The *Canada Corporations Act* (the "CCA") which has not been substantially amended since 1917 applies to corporations until they obtain a certificate of continuance under the CNCA. Most corporations incorporated by special act are exempt from transition requirements and became subject to the CNCA on October 17, 2011.

The provisions of the CNCA permit non-share capital corporations to take advantage of practices that have been available to federal business corporations for years under the *Canada Business Corporations Act* ("CBCA") including electronic and interactive means of communication between directors and members, written resolutions, unrestricted activities, electronic filing and limited exemption from audit for both soliciting and non-soliciting corporations. The CNCA represents the first attempt to harmonize federal laws and, accordingly, many of its provisions mirror counterpart provisions of the CBCA.

Among the greatest benefits of the CNCA is the codification of an objective standard of care for directors and officers of non-share capital corporations. Under ss. 148(1)(a) and (b) of the CNCA, directors and officers of a corporation must act honestly and in good faith with a view to the best interests of the corporation and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The CCA was silent in this regard and, accordingly, a common law subjective standard applied in assessing liability of directors.

Remedies under the CNCA have been considerably expanded from those which were available under the CCA. A derivative action, an action which was previously indirectly available under the CCA, is now directly incorporated into the CNCA.[71] The CNCA also now allows an oppression remedy, a most powerful tool for members.[72] Both the derivative action and oppression remedy are modified by allowing for a faith-based

---

[70] Subject to ss. 297(2), the provisions of the CNCA other than ss. 297(2)-297(4), 297(6) and 297(7) and s. 341-360 come into force on a day or days to be fixed by order of the Governor in Council. Ss. 297(2)-297(4), 297(6) and 297(7) and s. 341-360 in force on assent June 23, 2009; s. 300-302, 304 and 310, ss. 311(1), 311(3) and 311(4), the portion of s. 313 before paragraph (*a*), paragraphs 313(*c*), (*e*), (*g*), (*i*), (*k*), (*m*), (*o*), (*q*), (*t*), (*v*), (*x*), (*z*), (*z.02*), (*z.04*), (*z.1*), (*z.5*) and (*z.8*) and s. 361-371 in force March 12, 2010, *see* SI/2010-25; s. 1-296, ss. 297(1) and 297(5), s. 298, 299, 303, 305-307 and 309, ss. 311(2) and 311(5), s. 312, paragraphs 313(*z.4*) and (*z.6*), s. 314-316 and s. 318-340 in force October 17, 2011, *see* SI/2011-87. Ss. 317(1) and 317(2) come into force, in accordance with ss. 114(4) of the *Canada Pension Plan*, on days to be fixed by order of the Governor in Council. Ss. 317(1) in force October 17, 2011, *see* SI/2011-87.

[71] See s. 251 of the CNCA.
[72] See s. 253 of the CNCA.

defense for religious corporations and by allowing for debt obligation holders to apply for leave to seek such remedies.[73] Similar to the CBCA, under s. 141(7) of the CNCA, members of a corporation may examine the portions of any minutes of meetings of directors or of committees of directors that contain a disclosure of a conflict of interest by a director or an officer of a corporation. Other available remedies include: application for a court-ordered liquidation[74], application for a court directed investigation[75], application to the court to rectify records[76], and an application for a compliance or restraining order[77].

CCA corporations must complete certain steps prior to filing articles of continuance. Arrears in annual filings must be brought up-to-date; however, corporations with filing deficiencies are required to file three annual summaries only regardless of the number of years in arrears. Until the date of filing of articles of continuance, each CCA corporation remains subject to the CCA requirement to submit by-laws enacted by the board of directors and confirmed by the members to the Minister of Industry for approval before they can become effective.

The CNCA now differentiates between two main types of not-for-profit corporations, namely, soliciting and non-soliciting corporations.

The definition of a "soliciting corporation" under the CNCA is based on whether a corporation received in excess of $10,000 in public money during its last financial year, directly or indirectly, from (i) public donors other than those basically "related" to the corporation; (ii) governments or government agencies (whether federal, provincial or municipal); and/or (iii) other entities that have themselves received in excess of $10,000 in the previous financial year from public donors or from government.

Non-soliciting corporations are a residual category so that if a corporation does not meet the definition of a soliciting corporation, then it is considered to be a non-soliciting corporation.

The comparative chart below illustrates some principal differences between the CNCA and the CCA but does not purport to be a complete analysis.

TOPIC	*CANADA CORPORATIONS ACT*	*CANADA NOT-FOR-PROFIT CORPORATIONS ACT*
Incorporating Document	An application for incorporation is submitted in paper format with supporting documents, resulting in issuance of Letters Patent at the discretion of the examiner who	Articles of incorporation are submitted in paper or electronic format, resulting in issuance of a certificate of incorporation. An examiner does not review the content of the articles or have

[73] Under 251(a), a "complainant" includes a debt obligation holder of a corporation or any of its affiliates. Under 251(3) and 253(2), the court may not make an order if the court is satisfied that the corporation is a religious corporation and the failure of the director's to take action on behalf of the corporation or the act or omission, conduct, or exercise of powers was based on a tenet of faith held by the members of the corporation and it was reasonable to base the decision on a tenet of faith, having regard to the activities of the corporation.
[74] See s. 224 of the CNCA.
[75] See s. 242 of the CNCA.
[76] See s. 255 of the CNCA.
[77] See s. 259 of the CNCA.

TOPIC	*CANADA CORPORATIONS ACT*	*CANADA NOT-FOR-PROFIT CORPORATIONS ACT*
	reads the application for incorporation.	discretion to reject articles of incorporation which conform to the law. Paper and e-filings are possible although e-filing is not yet available.
Purpose (Objects)	A beneficial aim, with no pecuniary gain to members. Revenues and profits used to further the objects set forth in the constating documents. The objects define and restrict the activities. Corporations which propose to apply for charitable registration are not required to disclose the pending application for charitable registration in the Letters Patent although it is advisable to seek guidance on objects from the Canada Revenue Agency prior to incorporation.	A corporation has the powers and capacities of a natural person. There are no restrictions on activities unless a corporation elects to limit its activities in its articles. It is recommended that charitable and other non-profit corporations restrict their activities and that the articles state the corporation's (proposed) charitable or other non-profit purposes.
Corporate Name	French-English names only. No prescribed format.	Number name is permitted. English and French versions should be in Paragraph 1 of the articles of incorporation. A corporate name can be English, French, English and French or combined. Another language form of name may be used outside of Canada.
Incorporators	At least 3 incorporators who are natural persons – at least 3 first directors	No more than 1 incorporator is required even for soliciting corporations with a minimum of 3 directors. Only 1 director is required until the corporation becomes a soliciting corporation.
Directors	First directors are not required to become members. Minimum of 3 directors. Quorum for meeting must be at least 2. No Canadian residency requirement. (By-law allows virtual meetings).	May be a fixed number or minimum-maximum. *Ex-officio* and substitute directors not allowed. Soliciting corporations must have at least 3 directors of whom at least 2 are independent. Non-soliciting corporations may have 1 director or more. Statutory quorum is a majority, but this can be varied in the articles or by-laws. No Canadian residency requirement. Directors can increase board by up to 1/3 if provided in articles.
By-laws	General by-law filed with application for letters patent and is subject to ministerial approval. By-laws are amended by by-law. CCA does not provide for statutory division of powers and by-laws must be enacted to empower the directors to borrow money, to pledge the corporation's assets as security for debt obligations, to form committees, *etc.*	No longer filed with application for incorporation. General by-law must be filed with Corporations Canada within one year of incorporation or continuance. New by-laws or amended by-laws must be filed with Corporations Canada within one year of confirmation by members, but ministerial approval not required. Failure to file does not affect their validity. Statutory division of powers under the CNCA confers powers on directors (*e.g.*, power to borrow); therefore, no requirement to enact by-laws to empower directors.
Conduct of Meetings	Meetings of directors required. Written resolutions permitted only for certain actions of members. Electronic communications acceptable under ministry guidelines only (e.g., notice of meetings), but not permitted by statute	Written resolutions of directors and members permitted with an exception for removal of a director. Meetings of directors and members may be held by telephonic or electronic means. Notice of meetings may be given by electronic means. Voting by electronic means permitted. Consent required for electronic communications.
Director Liability Subjective	Standard of care not codified - common law subjective standard applies. Limitation on liability insurance for directors and officers. Consider other applicable laws to assess	Standard of care for directors codified in act. Joint and several liability. Corporation may purchase D&O liability insurance. Consider other applicable laws to assess duties of a director as

TOPIC	*CANADA CORPORATIONS ACT*	*CANADA NOT-FOR-PROFIT CORPORATIONS ACT*
	duties of a director as being akin to those of a trustee charitable *Charities Accounting Act* (Ontario).	being akin to those of a trustee charitable *Charities Accounting Act* (Ontario).
Officers	Officers are not required to be directors. Appointment of President and Secretary mandatory.	No mandatory appointments. Soliciting corporations: 2 of 3 must be independent (cannot be directors). Officers' register must be maintained setting out name, residential address, date first associated with corporation, relationship with corporation. Standard of care for officers is codified in CNCA.
Members	Minimum of 1, no limit on maximum. Minimum and maximum may be set out in a by-law. Members not required to be natural persons. Quorum for meetings must be fixed at at least 2. Proxy rights may be inserted in general by-law.	No minimum or maximum number. Classes of members in articles. Quorum for meetings may be fixed number, percentage or number calculated based on formula – set out in by-law. By-laws can specify for absentee voting such as by proxy or mail-in ballot. Proxy rights less flexible than under CCA.
Charitable Registration	Canada Revenue Agency (CRA) must approve objects post-incorporation. No pre-approval required by Public Trustee if head office is in Ontario, but must comply with Public Trustee's office requirements after incorporation. Charter must include clause restricting conveyance of assets to qualified donees to obtain charitable registration number.	CRA must approve purposes post-incorporation. Corporation can ask for pre-approval or use pre-approved objects under both CCA and CNCA. Articles must refer to charitable purpose and should provide that directors are not to be remunerated. Registered charities must insert provision for conveyance of assets to qualified donees (within the meaning of the Income Tax Act (Canada)) in the articles of incorporation to qualify as a charity. Copy of filed articles must be delivered to CRA after incorporation.
Head Office	Location set out in Letters Patent and changed by by-law.	Province of registered office set out in articles and address in notice filed with articles. Changed by resolution and notice of change filing.
Auditor	Appointment required. No exemption permitted. Auditor not requited to be professionally qualified.	Appointment of public accountant who qualifies under provincial requirements (CA, CMA, CGA) required for soliciting corporations with revenues of $50,000 or more from public sources. Financial statements must be filed by soliciting corporations. The limit can be increased for soliciting corporations with 100% members' approval.
Dissolution	Surrender of charter occurs 120 days after publication of notice of dissolution in local newspaper and Canada Gazette. Statutory declaration attesting to distribution of assets to members or organizations with similar objects or, in the case of a registered charity, to qualified donees (within the meaning of the Income Tax Act (Canada)) must be filed with application. Revival not possible. Cancellation by administrative order rarely occurred for lack of a mechanism for revival, resulting in high rate of non-compliance.	Articles of dissolution are filed after authorization by members and conveyance of assets in accordance with CNCA and constating documents. Revival is possible for corporations cancelled by administrative order or by filing articles of revival.