

# **Governance Under The *Societies Act* – What You Don't Know Can Hurt You!**

**Margaret H. Mason, Q.C.**  
January 25, 2022



# Overview of the Day

- governance and the *Societies Act*
- how to conduct an AGM

# Section 1 – Overview

- what is corporate governance?
- why is it important?
- governance components
  - *Societies Act*
  - other

# What is corporate governance?

- compliance with constitution, bylaws, relevant legislation
- systems and policies, record keeping

# Why is corporate governance important?

- professionalism (member/funder confidence)
- accountability
- administrative efficiency

# The Constitution

- what is it?
- what do *intra vires* and *ultra vires* mean?
- are you in compliance?
- updating and monitoring

# What is a Constitution?

- name
- purposes
  - **not** mechanics by which purpose to be achieved

# Bylaws

- what are they?
- are you in compliance?
- updating and monitoring
- bylaw “audits”



# What are Bylaws?

- framework for governance
- fundamental structure for organizational success

# Typical Bylaw problems

- lack of clarity concerning membership
  - appointment
  - dues
  - different classes
  - expiry
  - expulsion

# Typical Bylaw problems (cont'd)

- lack of clarity concerning directors
  - appointment mechanism
  - conduct of elections
  - maximum/minimum
  - quorum
  - term limits
  - staggered terms
  - expulsion
  - tie breakers

# Typical Bylaw problems (cont'd)

- Rules of Order
- investment powers
- borrowing powers
- proxy voting

# Useful Bylaw provisions

- virtual meetings
- indemnification of directors and officers
- power to purchase D & O insurance

# Qualifications for Directors

- best practices now codified
- 18 years or older
  - exceptions by regulation – e.g. student societies
- not:
  - found incapable by a court
  - undischarged bankrupt
  - convicted of certain criminal offences in past 5 years without a pardon
- can set out additional qualifications in bylaws
- director who ceases to be qualified must resign!

# Consents to Act

- standard for corporate legislation
- directors must confirm they consent to act as a director
- 2 ways
  - be present at meeting where elected and not refuse the office
  - sign a written Consent to Act form

# Conflict of Interest

- review sections 56 - 58 of *Societies Act*
- *Report on Conflicts of Interest: Directors and Societies* (1995 Report no. 144 Law Reform commission of British Columbia [www.bcli.org](http://www.bcli.org))
- elements
  - identification of conflict
  - disclosure of conflict
  - non-participation in decision
  - quorum/voting issues



# Conflict of interest

- expanded rules
- directors with direct or indirect material interest in a contract or transaction with society, or a matter for consideration by the board, must:
  - fully disclose the nature and extent of the interest
  - abstain from voting on resolution
  - leave board meeting when discussed, unless asked to provide information
  - leave board meeting when vote occurs
  - not influence the vote

# Senior manager

- one or more individuals appointed by the directors to exercise the directors' authority to manage the activities or internal affairs of the society as a whole or in respect of a principal unit of the society
- key is appointment by the directors
  - not hired by CEO/management
- could be an employee or a volunteer

## Senior manager (cont'd)

- appointing a senior manager does not create contractual rights or affect existing rights
- same qualifications as for directors
- fiduciary duties imposed on senior manager
  - overlap with employment duties (if employee)
- disclosure of conflicting interests in contracts or transactions
  - same process as directors
- access to indemnification provisions, due diligence defence, etc.

# Director remuneration and employment

- a society must not pay remuneration to directors for serving as director unless its bylaws permit
- subject to bylaws, society can reimburse directors for reasonable expenses incurred in the course of duties
- regulations may limit or place conditions on remuneration or reimbursement
- directors may be employees or provide services under contract, provided that a majority of the board must not be employed or under contract for services
  - NOT a good governance standard to have directors as employees

# Reporting on remuneration

- new since 2019
- note to annual financial statements that sets out:
  - remuneration paid to directors, if any; and
  - remuneration paid to employees or contractors over a prescribed amount (\$75,000)
- if more than 10 above the threshold, report top 10
- member funded societies exempt
- note does not have to identify payees by name

# Inspection of records

- directors have access to all records
- unless bylaws provide otherwise, members have access to all listed records (including Board minutes, resolutions and detailed accounting records)
- bylaws may restrict member access to certain documents
- concerns arise:
  - privacy
  - employment issues
  - solicitor-client privilege

# Register of Members

- members have access to Register of Members
- directors can restrict access by directors' resolution if consider that disclosure may be harmful
- even so members can gain access if they apply for access for legitimate purposes
  - requires requesting member to provide statement
- board can set notice period and inspection times

# Member complaints

- member can commence action if society operated in manner oppressive or unfairly prejudicial to the member
- court can order or prohibit actions by society



# Member meeting requisition

- members can requisition a special general meeting for a specific purpose
  - requires signatures 10% of voting members
  - requisition must state required business in 500 words or less
  - must be sent to each director listed
- if board receives valid requisition
  - within 21 days of receipt board must issue call for meeting
  - meeting to be held within 60 days
  - or members can call the meeting themselves
- society must reimburse requisitionists for costs unless meeting resolves otherwise.

# Member proposals

- distinct from meeting requisition
- members can make proposal for consideration at a general meeting
  - requires signatures of 5% of voting members, and not less than 2 voting members
  - proposal expressed in 500 words or less
  - received at least 7 days before notice of meeting is sent
- if valid proposal received, board must add to agenda
  - unless same proposal was considered in either of previous 2 calendar years before current
  - no liability for publishing a proposal
- query whether proposal binding even if adopted by meeting

# Continuation into British Columbia

- current legislation does not allow continuation in or out
- new Act permits organizations incorporated in other jurisdictions to move to BC
- does not permit BC societies to continue out to another jurisdiction
  - inconsistent with corporate law internationally

# Member funded societies

- receive funds primarily from members
- exempts such societies from a number of the public “accountability” provisions
- cannot qualify if:
  - registered charity/qualified donee/charitable purpose
  - solicits or receives public donations over a set threshold
  - receives government funding over set threshold (\$10,000)
  - student society

## Member funded societies (cont'd)

- if cease to qualify, must alter constitution
- once out, can't re-enter without court approval
- can convert to a business corporation
- amalgamation/continuation restricted

# Governance components

- board
- management
- program
- finance
- record keeping

# The Board

- board's philosophy
- is there dead wood?
- composition – reflective of community it serves?
- effectiveness in setting policy directions
- strategic vision
- integration of mission to strategic vision

# Director responsibilities

- leadership
- engagement
- personal liability



# Board meetings

- not a formality – fundamental component of governance
- detailed information packages circulated prior to meeting
- detailed review of package prior to meeting

# Minutes of meetings

- official and legal record of business conducted by the organization
- concise: issue, decision, action item
- notation of attendance and departures; confirmation of quorum
- prompt circulation and review
- signed by chair and secretary
- filed in minute book

# Management

- philosophy of CEO/senior managers
- able to participate in creation of strategic vision and connect it to operations?
- corporate culture, or lack thereof?
- appropriate systems and monitoring thereof?

# Finance

- all filings up to date?
- financial statements prepared in a timely fashion and compliant with any applicable accounting standards?
- ability to extract financial data for strategic planning and monitoring
- is there an annual audit?
- is there an annual budget?
  - NPO tax exemption issues
- development and adherence to investment policy and guidelines

# Record keeping

- most significant CRA audit related issue
- *Income Tax Act*
  - obligation to keep adequate books and records
  - at organization's address
- in Canada
- minute book
  - checklist

# Filings - Registrar of Companies

- Annual Report (Form 4) to be filed within 30 days of the annual general meeting
- financial statements presented at AGM must be approved by the Board and signed by at least one director
- it is an offence (section 38) to distribute financial statements if they have not been approved by the Board and signed

# Filings – Registrar of Companies (cont'd)

- change in constitution/bylaws
- change in address
- change in directors
- change of name
- consequences of non-compliance

# Common filing problems

- form not completed in entirety
- document not originally signed
- post office box numbers given for directors or address of society
- no fees or incorrect fees



# Filings - CRA

- T3010 Registered Charity Information Return
- T2 Corporate Return for NPOs
  - must file to claim tax exemption
- T1044 Non-Profit Organization Information Return
  - once in always in
- use the guides and get advice
- financial statements must be attached

## Filings – CRA (cont'd)

- consequences of non-compliance
  - 3000 – 4000 registered charities annually lose registration for non-filing

# Governance policies

- conflict of interest policy
- board conduct policy
- investment policy
- privacy policy
- employment/harassment policies

# Conduct Policy

- useful precedent available in *Report on Conflicts of Interest*
- definition of conflict, conduct required
- gift acceptance policy (for directors)
- use of society property and information
- confidentiality

# Investment Policy

- important particularly when assets need to be invested for long term (e.g. endowment) – ensures long range stability
- sets restrictions on types of investments
- discuss asset allocation model
- sets targets to be achieved by managers

# Privacy policy

- *Personal Information Protection Act*
- must name a privacy officer
- must have a policy regarding collection and use of personal information
- must obtain consent when collecting, advise of the purpose for which collecting
- must allow review of information

# Employment policies

- recommended even for the smallest of organizations
- problems typically arise when lack of formality in the work place, lack of direction regarding appropriate conduct
- bullying and harassment policy legally required
- protection for organization

# Overview – How to Conduct an AGM

- *Societies Act* provisions regarding AGMs
- review of bylaws
- the “normal” process and timelines
- special situations



# *Societies Act*

- section 71(1)
- AGM must be held once each calendar year
- AGM must be held in BC
- possible to hold it virtually
- tenerally should be within 6 months of FYE

## *Societies Act (cont'd)*

- section 77
  - not less than 14 days' written notice to members
  - unless unanimous waiver *in writing*
  - “clear” days
  - special requirements for societies with 250+ members

## *Societies Act (cont'd)*

- section 35
  - the financial statements (and report of the auditor, if any) *must* be placed before the meeting<sub>t</sub>

# *Societies Act (cont'd)*

- section 35 (2)
  - financial statements *must*:
    - cover the entire year
    - be comparative to prior year
    - end not more than 6 months before the AGM
    - should contain a statement of receipts and disbursements for the period
    - should contain a statement of income and expenditure and surplus for the period
    - should contain a balance sheet as of the end of the period

## *Societies Act (cont'd)*

- section 73
  - a society must file its Annual Report with the Registrar within 30 days of each AGM

# Bylaws

- must be reviewed as part of AGM preparation
- consider updates
- may contain non-standard provisions which must be complied with
  - longer notice period
  - procedures for nomination of candidates for election

# AGM Process

- three separate meetings
  - pre-AGM Board meeting
  - AGM
  - post-AGM Board meeting

# Pre-AGM Board meeting

- prior to scheduling this meeting
  - financial statements **must** be finalized
  - determine if any name, constitutional or bylaw changes need to be considered
  - AGM location booked and time confirmed



## Pre-AGM Board meeting (cont'd)

- business to be conducted
  - approval of financial statements
  - approval of AGM notice
  - approval of AGM date
  - approval of any materials to be presented to the members
  - approval of text of any proposed name, constitutional or bylaw changes

# Giving Notice of AGM

- determine method of giving notice
- packages should go out immediately after pre-AGM Board meeting
- 14 clear days' written notice required

# Who are your members?

- review Bylaws
- Register of Members – properly maintained and updated?
- who is entitled to vote and receive notice?
- problems created by improper management of dues based membership

# AGM

- confirm quorum exists
- confirm number of voting members
- presentation of Board Report
- presentation of financial statements
- elections (if any)
- appointment of auditor (if any)
- special resolution to approve changes to constitution/bylaws (if any)
- other business

# Post AGM Board meeting

- usually held immediately after AGM (or business dealt with at first Board meeting after AGM)
- business to be conducted:
  - appointment of officers

# Special issues

- location of AGM
- extension of time to hold AGM
- election “machinery”
- members and directors the same
- contested meetings and Registered Parliamentarians

# Location of AGM

- May hold meeting outside of BC if specified in the Bylaws or all voting members agreed prior to the meeting
- queries: where is a virtual meeting held; can an AGM be conducted virtually?

# Extension of time to hold AGM

- section 71(3) - Registrar may extend time within which AGM must be held (within certain limitations)
- a reason must be provided



# Election “machinery”

- do bylaws include procedures for:
  - procedures and timelines for nomination of candidates
  - requirement for scrutineer
  - method of casting and counting ballots
  - are you compliant?

## Members also Directors

- AGM is still required
- two separate and distinct roles
- cannot hold the AGM as a board meeting
- can simply sign consent resolutions in writing to conduct all required AGM business as the AGM is *pro forma*

# Contested meetings – Registered Parliamentarians

- if meeting/election will be contested or “angry” – preparation required
- Rules of Order required
- Registered Parliamentarian strongly recommended





*Law around the world*

[nortonrosefulbright.com](http://nortonrosefulbright.com)

Norton Rose Fulbright US LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright Canada LLP and Norton Rose Fulbright South Africa Inc are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to 'Norton Rose Fulbright', 'the law firm' and 'legal practice' are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together 'Norton Rose Fulbright entity/entities'). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a 'partner') accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.