

IS IT TIME TO UPDATE YOUR CONSTITUTION & BYLAWS?

SCSBC BUSINESS AND DEVELOPMENT CONFERENCE

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INTRODUCTION

- Incorporation
- Constitutions
- Bylaws
- Disputes
- Legal Amendment Procedure
- What is the best way for our organization to tackle a bylaw review and revision process?

INCORPORATED NON PROFIT ORGANIZATIONS

- A non profit organization and or charity can be:
 - Unincorporated
 - Established as a Trust
 - Incorporated provincially (*Society Act* in BC)
 - Note pending new Act in BC
 - Incorporated federally (*Canada Not-for-profit Corporation Act* in Canada)
 - Note that all CCA (Federal) corporations must be “continued” into new Act by October 2014

INCORPORATED NON PROFIT ORGANIZATIONS

- Incorporated non profit organizations are legal “persons” and can therefore enter into contracts, hold title to property, sue or be sued etc.
- Incorporated non profit organizations are commonly used to limit the legal liability of members and directors/trustees

INCORPORATED NON PROFIT ORGANIZATIONS – LEGAL NATURE

- The relationship between a non profit organization and its members is contractual in nature
- Charitable non profit organizations also have a trust nature. Because all the property of such an organization must be used *exclusively for charitable purposes*, the property is impressed with a charitable trust under the common law.
- The trust property cannot be used for any purpose or activity other than those set out in the constitution, letters patent or articles of incorporation

CONSTATING DOCUMENTS

- Incorporated non profit organizations are put into place by preparing *constating documents* and filing them with provincial or federal authorities
- *Blacks Law Dictionary* defines “constate” as “to establish, constitute or ordain”
- *Constating documents* are therefore the foundational documents that establish a non profit organization

WHAT IS A CONSTITUTION?

- *Blacks Law Dictionary* defines “constitution” as “the organic and fundamental law of a nation or state ... establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers”

WHAT IS A CONSTITUTION?

- The constitution essentially sets out the “who”, “where” and “what” of the organization
- A constitution of a non-profit organization must contain
 - the Name of the organization
 - a Statement of the Objects or Purposes of the organization
- A constitution of a charitable organization must contain:
 - exclusively non-profit/charitable language

WHAT IS A CONSTITUTION?

- For a BC society:
 - clauses other than name and purposes must include a statement of whether or not the clauses may be altered. If a clause is stated to be unalterable ***it cannot be changed***
- A constitution should also address other important matters:
 - Statement of Faith or other Foundational Statements or Core Beliefs
 - Core Values and Principles
 - Wind up provisions (what will happen with the assets of the organization on windup)

OBJECTS OR PURPOSES

- The objects or purposes of a non profit organization define the fundamental objectives and the arena(s) of activity of the organization
- The objects or purposes of a *charitable* non profit organization must be
 - the relief of poverty
 - the advancement of education
 - the advancement of religion; and/or
 - any other purpose beneficial to the community that is charitable at law

CHARITY – STATEMENT OF ACTIVITIES

- A non profit organization applying to CRA for registration as a charity must provide a statement of *activities* to CRA which sets out in detail the particular activities that the organization will carry out
- The charitable activities must flow out of the objects or purposes of the organization and must also be charitable at law

ACTING OUTSIDE OF OBJECTS – “ULTRA VIRES”

- Unlike a typical incorporated for-profit company, a non profit organization has legal power to engage in activities that are within its objects or purposes
- Activities of the organization that are outside of its objects or purposes are considered to be “ultra vires”
- An “ultra vires” activity is unlawful

ACTING OUTSIDE OF OBJECTS CRA SANCTIONS

- CRA will register a non profit organization as a charity where the proposed objects or purposes and activities of the organization are charitable at law
- If a registered charity engages in activities that fall outside of its objects or purposes, it may risk CRA sanction including loss of its charitable status
- Such action may also constitute a breach of trust
 - Members
 - Donors
- List all of your current activities and create check list against current purpose language

WHAT ARE BYLAWS?

- The bylaws of a non profit organization essentially set out the “how” of the organization. Bylaws are the rules by which the organization operates
- Society bylaws must contain:
 - rules for the admission and termination of members
 - member rights and obligations
 - the appointment and removal of directors and officers
 - director and officer powers, responsibilities and remuneration
 - procedures for calling member meetings
 - voting rights at member meetings
 - exercise of borrowing powers
 - the preparation and custody of the minutes of member and directors meetings

WHAT ARE BYLAWS?

- Bylaws should also address other important matters:
 - Modernized methods for providing *notice* of meetings and for *holding* meetings
 - Realistic quorum provisions (consider fixed number)
 - Offices and roles of Officers
 - Executive, Standing and Other Committees

WHAT ARE BYLAWS?

- Senior Management Positions and functions (as set apart from Board and Officer functions)
- Director Remuneration
- Indemnification of Directors
- Dispute resolution provisions
- Restrictions on inspection of documents
- Classes of Membership
- Advisory Board

MEMBERS AND DIRECTORS

- The members of a non profit organization are analogous to shareholders of a for-profit company. They “control” the organization. They do not however “own” anything
- Although an incorporated non profit organization is a legal “person” it does not have eyes, ears, a mouth, hands and feet. The directors are the “eyes”, “ears”, “mouth”, “hands” and “feet” of such a corporation

CLOSELY AND WIDELY HELD NON PROFIT ORGANIZATIONS

- A closely held non profit organization is one where the members and directors are the same individuals (they all “wear 2 hats”)
- The double hatted members/directors elect their own successors
- *Closely held* organizations are generally used where it is desirable to have the control of the organization maintained with a small number of people who understand and will protect foundational values and principles

CLOSELY AND WIDELY HELD NON PROFIT ORGANIZATIONS

- A *widely held* non profit organization is one where there are multiple members
- The board of a widely held organization is generally elected from among the wider membership.
- Widely held organizations are used where broader ownership/control of the organization is desired

CLOSELY AND WIDELY HELD NON PROFIT ORGANIZATIONS

- Hybrid organizations that effectively fall somewhere between widely and closely held can be created with careful drafting (some examples):
 - Limiting the total number of members
 - Limiting qualifications for membership
 - Limiting qualifications for directors
 - Specifying terms and maximum terms for members and directors
 - Eliminating floor nominations
 - Controlling the nomination process

PARALLEL NON PROFIT ORGANIZATIONS

- A parallel non profit organization is one that is connected in some way to another non profit organization where there is some degree of influence or control by one organization over the other
- There is typically overlap at the membership or board level in parallel organizations.
- The degree of control and connectedness must be balanced with liability protection objectives

PARALLEL NON PROFIT ORGANIZATIONS

- A common parallel structure that we use:
 - The *directors* of Society A constitute all of the *members* of Society B
 - As *members* of Society B the directors of Society A elect a Board for Society B
 - If the elected Board of Society B consists of the same persons who serve on the Board of Society A that is a “Mirror Board”
 - The elected Board of Society B could be entirely different persons but the directors of Society A retain the power of director appointment and removal

Membership Issues

- Membership Issues
 - Do you know who your members are?
 - Do you have any of these?
 - Honorary Members
 - Life Members
 - Inactive members
 - Members not in good standing
 - Membership fees
 - Annual declarations
 - Voting and Non-Voting members
 - Note Society Act restriction
 - **Update and have your Board approve your Membership list annually!**

FAILURE TO COMPLY WITH BYLAWS

- There can be significant consequences for the failure to comply with bylaw requirements
- As a general rule non profit organizations must seek to resolve their problems internally before asking the Courts to intervene
- Internal solutions may involve re-calling meetings, re-electing members and directors, passing remedial resolutions, amending bylaws etc.
- Remedial resolutions seek to retroactively “repair” defective acts or omissions by members and directors
- Internal measures may not be possible where there is serious conflict within the organization

RESOLUTION OF PROBLEMS COURT INTERVENTION

- Historically the courts have been reluctant to become involved in disputes within non profit organizations
- In *Lakeside Colony of Hutterian Brethern v. Hofer* (1992) the Supreme Court of Canada affirmed this reluctance and went on to say that if court intervention is required, it will not be to protect one faction from another but to set down rules to govern the relationship between the parties

RESOLUTION OF PROBLEMS – COURT INTERVENTION – COMMON LAW

- The courts have jurisdiction to intervene in the affairs of a non profit organization where the organization acts in bad faith, fails to comply with the rules of natural justice:
 - giving proper notice of allegation
 - providing a fair opportunity to respond; and
 - having an unbiased decision makeror has breached its own stated rules and procedures
- The courts also have jurisdiction to oversee charitable trusts. The Attorney General also has jurisdiction over the charitable trust as *parens patriae* or “guardian of the public trust”

RESOLUTION OF PROBLEMS – COURT INTERVENTION – S. 85 SOCIETY ACT

- Where it is not possible to resolve problems internally, a society may ask the court to intervene under section 85 of the *Society Act of B.C.*
- The jurisdiction of the court to intervene under section 85 is limited
- Court relief may only be sought where an “omission, defect, error or irregularity” occurs in the conduct of the affairs of the society that results in:
 - a breach of the *Society Act*
 - a default in compliance with the constitution or bylaws of the society or
 - proceedings at a member’s or director’s meeting that are rendered ineffective

RESOLUTION OF PROBLEMS -COURT INTERVENTION – S. 85 SOCIETY ACT

- The court has broad authority and discretion under section 85. The court may “rectify, negate, modify, or validate any admissions, defects, errors or irregularities”
- On a section 85 application the parties will ask the court for the relief that they desire. Section 85 is unique as it gives the court the power to Order relief not sought by either party to the dispute where the court considers that the relief sought by the parties is not the best solution for the society as a whole
- On occasion the courts have Ordered counsel for the disputing parties to propose a solution to the problem
- The courts will not interfere in the affairs of the society unless the defects, errors or irregularities are substantial or significant
- The courts will not amend or “re-write” the bylaws under section 85

AMENDMENT OF CONSTATING DOCUMENTS

- Charitable non profit organizations must exercise considerable care in changing objects and activities to ensure they remain charitable at law. Such organizations must also take care to ensure that a change does not constitute a breach of trust
- In general there is a greater scope for amending bylaws than there is for amending constitutions

AMENDMENT OF CONSTATING DOCUMENTS – SOCIETY

- A society may change its name by a “special resolution” of its members. A “special resolution” requires 75% approval of:
 - the members of a society present (in person or by proxy)
 - and who vote
 - at a duly constituted meeting (proper notice)

AMENDMENT OF CONSTATING DOCUMENTS – SOCIETY

- A society may by “special resolution” change its purposes to include a new purpose “that may conveniently be combined with the existing purposes of the society” or to “restrict or abandon” an existing purpose.
- A charitable society is however prohibited from “abandoning” a charitable purpose
- In the case of a charitable society CRA must be notified of amendments to both purposes and activities.
- A society may change its bylaws by a “special resolution” of its members
- “Special resolutions” must be filed with the Registrar to take legal effect

RECOMMENDED PROCESS FOR REVIEW AND REVISION OF CONSTATING DOCUMENTS

- Select/appoint a *small* constitution and bylaw review team
- List all current and anticipated activities of the organization and check list activities against the current objects and purposes. Note any apparent deficiencies
- Review current constitution and bylaws and note any deficiencies or language that is confusing or inconsistent with how the organization actually operates
- Spend time considering the “model member” and requirements for membership
- Spend time considering the “model director” and requirements for membership

RECOMMENDED PROCESS FOR REVIEW AND REVISION OF CONSTATING DOCUMENTS

- Take the ‘noted up’ current constitution and bylaws, your “wish list” and all of your questions to a lawyer familiar with not-for-profit constating documents
- Ask the lawyer to provide you with a new draft and his or her estimated fees for review, drafting and implementation.
- Develop simple communication strategy for membership with generous time and opportunity for feedback

RECOMMENDED PROCESS FOR REVIEW AND REVISION OF CONSTATING DOCUMENTS

- ***Resist temptation to:***
 - “fix” isolated sections of constating documents with patchwork amendments
 - Cut and Paste from the constating documents of other organizations
 - Change or add to purposes without advice and in some cases advanced approval from the Charities Directorate
 - Walk through the new constating documents in the membership meeting where adoption is intended

Thanks for Attending!

Your Questions Welcomed

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