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## Governance Matters Bulletin

### Ten Tips For Better By-Laws

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Many not-for-profit organizations do not often spend time thinking about what makes for good by-laws. At least not until a problem arises. At that point, organizations often discover what makes for bad ones. Often the by-laws currently in effect are either unclear, inconsistent, not practical or all of these things at the same time. So, before a problem arises, you may wish to examine your organization's by-laws and consider the following tips:

#### **Tip #1: Legally Aligned**

By-laws, while extremely important, are not the only thing governing an organization. Prevailing over by-laws, are the law of the land, including

incorporating legislation such as the Ontario Corporations Act or the federal Canada Not-for-Profit Corporations Act and the incorporating documents (letters patent or articles, depending on incorporating jurisdiction). Contractual commitments, such as might be contained in funding agreements, may also be a consideration. It is important to ensure that whatever is in the by-laws is in alignment with these items. Careful consideration should be given to the above points prior to commencing work on your organization's by-laws.

### **Tip #2: Clarity**

Given the importance of by-laws within an organization, the value of having clear, unambiguous, and easy to understand language cannot be overstated. Directors of an organization are legally compelled to abide by the by-laws, so compliance should be easy to assess. Provisions in the by-laws that are vague or aspirational in nature should be avoided eg. the board composition should reflect the community.

### **Tip #3: Understand the Differences Between Program Participants, Members, Directors, Officers and Staff**

Every not-for-profit corporation is legally required to have members, directors and certain officers. Members usually meet only once a year at the annual general meeting to elect directors and appoint auditors. Directors collectively form the board, with the board being responsible for overall governance of the organization. The board generally appoints officers, typically including a president, secretary and treasurer, to help facilitate the board's work. In addition to members, directors and officers, organizations will also typically have program participants and staff. Program participants are the people who the organization serves eg. patients in the case of a hospital. Staff are the people, whether as paid employees or volunteers, who carry out the work of the organization vis a vis the program participants. Individuals may wear many hats at the same time. For example, the president of an organization may also be a director (this is legally required under the Ontario Corporations Act), a member and at the same time work as a volunteer in operations. It is always important to consider what "hat" the individual is wearing at the material time to avoid role confusion. By-laws should describe the members, the directors and the officers. Generally, program participants and staff should be addressed outside the by-laws.

#### **Tip #4: Focus on What is Most Important**

The most important provisions in by-laws are those that define the membership. Members, by virtue of their ability to elect and remove directors, hold the seeds of control and destruction. Moreover, the approval of the membership is required for fundamental corporate changes. Accordingly, by-laws should clearly define how someone becomes a member and how membership is terminated, so that who is or is not a member is very clear.

#### **Tip #5: Content Appropriate**

Although there is a wide range of appropriate by-law provisions, by-laws are not an appropriate place to prescribe policies that are better off as board or operational policies. To test content for by-law appropriateness, ask two questions: 1) does this speak to an operational issue eg. the scheduling of staff? 2) if it is not operational, is it aspirational or anticipated that it may be adjusted frequently as learning is captured? If the answer to either of the above questions is yes, the content is probably not appropriate for the by-laws, but rather something that should be included in operational or board policies, respectively.

#### **Tip #6: User-Friendly**

By-laws are often perceived as long, boring and complicated. There are number of things that can be done to make them user friendly, such as: adding a section number for each provision to make identification easier; ensuring that the graphical layout is well organized and visually appealing; removing complicated legalese; and where the by-laws are provided electronically, providing hyperlinks to other related documents.

#### **Tip #7: Naming System that Makes Sense**

There is no legal requirement for how by-laws are to be named. The most common convention is to use sequential numbering, beginning with "By-law No. 1". In our experience, this has occasionally resulted in some organization's having multiple by-laws with the same name, resulting in unnecessary confusion. As an alternative, consider including a description, date, or both within the by-law name. eg. "By-law: March, 2018" or "By-law: Borrowing" or "By-law: Borrowing, March 2018". This approach may help to provide further clarity and avoid the issue of duplicative by-law names.

### **Tip #8: Footnoted**

Gaining in popularity, footnotes can offer an immense amount of value to future directors and members who may be tasked with revising or updating an organization's by-laws at a later date. Footnotes are an excellent way of providing either context and/or legal authority for why a certain provision has been adopted.

### **Tip #9: Customized**

Adopting or revising by-laws can be a daunting process for many organizations. Although it may be tempting to purchase a generic template or borrow existing by-laws from another entity, both of these options fail to take into account the specific needs of your organization. Effective by-laws are rarely "one-size-fits-all", and in many cases, require significant customization to make them relevant to the specific needs of your organization.

### **Tip #10: Regularly Reviewed**

By-laws must be reviewed regularly to ensure that they remain compliant with applicable law and reflect the needs of the organization. With the recent amendments to the Ontario Corporations Act that came into force in November 2017 and January 2018, this is an ideal time for many organizations to revisit their existing by-laws and plan for a periodic review.

Although there is no absolute recipe for perfect bylaws, we trust that the above tips will be helpful to any organization when drafting or revising their current by-laws.

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