

# MIND YOUR BY-LAWS

By Dana Young

## COLUMN COMMENTARY:

Is there anybody out there? With this line I am reminded of the Pink Floyd song from The Wall album. The album came out in 1979. I was 13 at the time, living in Santiago, Chile but I digress... Since starting this column last September I have yet to hear from anybody, notwithstanding my opening indication that I would love to hear from you and that I was looking forward to both passing along my thoughts and knowledge and learning from you. If you have any thoughts, commentary or questions about any of my posts, please feel free to pass them along. I really would love to hear from you.

## POST: MINDING YOUR BY-LAWS

With every post I have been trying to write something original. There are lots of information sites out there and I have not wanted to write yet the umpteenth article on some topic that has been covered off by numerous other writers. While almost every organization has by-laws and while those involved with an organization tend to be aware of the by-laws and refer to them particularly in times of controversy, it is surprising how few articles and materials exist focussing on by-laws. For this reason I have made by-laws the topic of my post this month.

In William Pashby's paper<sup>1</sup>, "Corporate Law Nightmares for Not-For-Profits" he states, that "some suggest that a "corporate record" nightmare exists in over 50% of non-share capital corporations." In my experience the percentage is at least 50% with the primary source of nightmarish fodder involving the by-laws in some way. Unfortunately many non-profit organizations are unaware that their by-laws are deficient until a controversy arises and then it is often too late.

With that said, I offer the following tips when considering by-laws:

- **Consider the Context.** The by-laws of an organization are one part of its policy framework.<sup>2</sup> In order to properly consider by-laws it is important to do so having regard to the context. The by-laws are subordinate to the law of the land and to the organization's constitution or charter. At the same time, the by-laws prevail over board and operational policy. Accordingly, as part of considering by-laws it is necessary to consider if they comply with higher level policy and what policy might best be kept out of the by-laws and reserved for board or operational policy.
- **Be Rigid About Clarity.** Directors are duty bound to ensure compliance with an organization's by-laws. It is difficult to ensure compliance if the by-laws lack clarity. I suggest taking a rigid approach to clarity. Every provision should be

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<sup>1</sup> Published by Ontario Bar Association Continuing In Legal Education Materials, "A Danger to Dabble – Charity Law Hot Spots" (2005).

<sup>2</sup> Please see my post on "Quirks & Quorum" for a complete outline of an organization's policy framework.

reviewed on the basis of whether or not compliance can be clearly monitored. If it cannot be monitored for compliance, the policy in my opinion does not belong in the by-laws. It may however be appropriate as board policy. My personal pet peeve is vaguely worded board composition policies in the by-laws. For example it is not uncommon to see by-law provisions calling for a board composition which is reflective of the diversity of the community. It sounds great but what does it mean? Is the diversity in terms of race, gender, sexual orientation or some other aspect? Are there reliable community diversity statistics available? On closer analysis it is clear that such a provision is unworkable in any real sense.

- **Focus on Membership Provisions.** By-laws typically include policy outlining who can become members of an organization. Members, through their ability to requisition meetings to decide any matter and to appoint and remove directors, have the ultimate decision-making power. Moreover, the approval of members is required for such things as amendments to the constitution or charter and by-laws. Thus, there is great peril in not having appropriate membership policies in the by-laws as illustrated by the following:
  - Some of the parents of children at an independent school accused the principal of stealing money. Another group of parents sided with the principal. The by-laws of the school said that anybody who paid an annual \$10.00 membership fee could become a member. Over the years the membership fee had been forgotten with nobody having paid any money. The parents who sided with the principal all quickly paid \$10.00 and started making decisions. At the same time the other contingent held their own meetings, making different decisions. Suffice it to say that a difficult situation was made that much more difficult by failing to articulate workable membership policies in the by-laws.
  - Hospital boards in the 1980s were charged with appointing abortion committees which in turn had certain powers over the abortions performed by hospital doctors. Many hospitals had open membership policies where anybody could join as a member upon payment of a nominal fee. In a number of cases, individuals involved with abortion interest groups sought membership in order to obtain the power to appoint the board and in turn control the abortion committee and thereby abortions in the community. In this way these special interest groups created havoc for community hospitals.
- **Focus on Board Provisions.** By-laws also typically include policy about directors. While the members of an organization arguably have the ultimate decision making power through their ability to elect and remove directors, the directors are generally the most important corporate operatives since they are statutorily charged with the management of the affairs of the corporation or in other words - governance. Policy which is important in the context of directors includes policies detailing the number of directors, qualifications, removal of directors and how vacancies are filled. Care should be taken to ensure appropriate directors' policies in the by-laws.

- **Review and Monitor.** Given the significance of by-laws, it is important for organizations to review their by-laws on a regular basis and to take steps to ensure ongoing compliance with them.

Note: This post is provided as information only. Readers are cautioned not to act on information provided without seeking specific legal advice with respect to their unique circumstances.