

Governance and regulatory issues

There are myriad statutes, regulations, rules, policies, and documents which govern the day-to-day activities of individuals, businesses, institutions, and other organizations operating throughout Canada and abroad. These sample questions may interest a variety of practitioners, and highlight the need to consider all relevant documentation, local laws, and laws of your home jurisdiction.



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- 1** At your friend's request, you attend the annual meeting of an incorporated cottage association (of which she is a member but you are not) carrying her proxy. When you attempt to exercise the proxy you are prevented from doing so by the meeting's secretary because you are "not a member." Is the secretary correct?

 - (a) Yes
 - (b) No
 - (c) It depends
- 2** You have just been elected to the board of a business corporation and you attend your first meeting. When the first vote is taken, two of the directors are identified as "non-voting directors." Should you say anything?

 - (a) Yes
 - (b) No
- 3** You are a director of a junior mining company that is conducting exploration in central Africa. Your company employs several Canadians overseas who require work visas to be issued from the country where exploration is being conducted. As part of the visa application process, your company regularly pays the local officials a small extra fee which, while not part of the visa process itself, ensures the expeditious process of the applications. Is your company allowed to make these payments under Canadian law?

 - (a) Yes
 - (b) No
 - (c) Yes, for now
- 4** You are the director of a company that operates retail stores across Canada. The company is considering implementing a program whereby customers will be required to provide their driver's licence at the point of sale which is then scanned to record the customer's personal information including their licence number, name, gender, address, and date of birth. The stated goal of the program is to identify customers and deter the fraudulent use of credit cards. What concerns might you have about implementing this program?

 - (a) None at all, the program is fine
 - (b) It is a criminal act to collect personal information
 - (c) It is not necessary to collect licence information to identify customers or deter fraud
 - (d) Without the consent of customers, the program runs afoul of privacy law

1 (c) It depends. It will be important to consider the legislation under which the cottage association was incorporated. Assuming the cottage association is a non-share capital corporation, if the association was federally incorporated, it could currently be governed by the older Canada Corporations Act or it could have continued as a corporation under the new Canada Not-for-Profit Corporations Act. If the association was incorporated under the older statute, there are no statutory rules regarding proxies (although Industry Canada's Model By-Law prepared by Corporations Canada provides that "a proxyholder must be a member of the corporation"). So, for guidance, reference should be had to the association's letters patent, bylaws, and relevant rules and regulations, as well as relevant directors' resolutions, the notice of the meeting, the form of proxy, and case law. If the association has been incorporated or continued under the newer statute (the CNCA), there are statutory rules regarding proxies which provide that a proxyholder is not required to be a member. If the association was provincially incorporated, the relevant provincial legislation may be determinative, but once again it may also be necessary to consider the documents mentioned above, and case law. In Ontario, assuming the meeting occurred before January 1, 2014 (when the new Ontario Not-for-Profit Corporations Act is expected to come into force), the existing Ontario Corporations Act provides that a proxyholder need not be a member; after Jan. 1, 2014, the ONCA also provides the same.

2 (a) Yes. In general, you should say something — presumably after doing due diligence regarding local law and at a time and to an audience you consider appropriate. Subject to exceptions based on statute or case law, the concept of a non-voting director is anathema to corporate governance norms. Every director should generally have all rights and responsibilities of other directors. In particular, a director has certain potential personal liability — under a wide variety of statutes or based on case law — so to burden an individual with liability and negate generally his or her ability to vote at all is counter to the general rules that all directors have the right to vote (subject to conflict of interest situations which may be governed by statute, bylaw, policy, or case law), that each director's vote is weighted equally (subject to the practice — often embedded in by-laws — on some boards of giving the chair a second or casting vote, and to conflict of interest situations), and that a director's vote must be exercised by the director and cannot be exercised by anyone else on behalf of the director.

3 (c) Yes, for now... The Corruption of Foreign Public Officials Act makes it an indictable criminal offence to obtain or retain a business advantage by offering a loan, reward, benefit, or advantage of any kind to a foreign public official. In other words, it is illegal to bribe a foreign public official to obtain any business benefit. A person who is found in contravention of the CFPOA is liable to imprisonment for a term not exceeding 14 years. At present, the CFPOA provides an exception for "facilitation payments," being small payments made to government officials to secure or expedite the

performance of an act of a routine nature such as the processing of official documents such as visas and work permits, as well as issuing a licence or permit to qualify a person to do business. Facilitation payments are commonly made and often expected in certain countries and are currently permitted under Canadian law so long as the payments are not made to induce a decision to award or continue business. On June 19, 2013, Bill S-14 came into force, amending the CFPOA, and indicating that the facilitation payments exception will be repealed, eventually, on a day to be fixed by order of the Governor in Council. The delay was provided so that companies companies adjust their practices and procedures. So, for now time being, facilitation payments are permitted under Canadian law, though companies who regularly make use of these payments should consider phasing them out to ensure compliance once the narrow exception is eliminated. Of course, while facilitation payments may currently be legal under Canadian law, the host country's laws should also be reviewed.

4 (c) & (d) The Privacy Commissioner of Canada, as well as privacy commissioners in Alberta, British Columbia, and Quebec, oversee legislative acts within their jurisdiction that govern the collection of personal information by retailers. In general, the laws require that retailers explain to customers why personal information is being collected and then collect the least amount of information that is reasonably necessary to satisfy the stated objective. For example, the federal privacy statute, the Personal Information Protection and Electronic Documents Act, requires knowledge and consent for the collection, use, or disclosure of personal information (subject only to specific exceptions). Those requirements are enumerated in Schedule 1 to PIPEDA which also requires, under Principle 2, that an "identifying purpose" for the collection of personal information be enumerated by the retailer to the customer in the normal course before being able to satisfy the "knowledge and consent" criteria. The various laws additionally require that the collection and use of personal information be only for appropriate or reasonable purposes, and that the collection be limited to what is reasonable and necessary to meet those purposes. Various privacy commissioners have considered what is reasonable and necessary to both identify customers and deter fraud and have concluded that, in general, it is unnecessary to record driver's licence information in order to satisfy either purpose. By way of example, a retailer who wants to confirm that a credit card belongs to the person who seeks to use it need only inspect a driver's licence for that purpose; there is no further need to record any information to achieve the stated purpose.

YOUR RANKING?

- **One or less correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three correct:** *very well done, but not perfect*
- **Four correct:** *excellent*

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