

Ottawa Workshop “Transitioning to the ONCA”

Friday, October 4, 2013

“TRANSITIONING TO THE ONTARIO *NOT-FOR-PROFIT* *CORPORATIONS ACT (ONCA)*”

WELCOME

Welcome to the Ottawa Workshop – Transitioning to the ONCA, which is designed to assist not-for-profit corporations currently incorporated under the Ontario *Not-for-Profit Corporations Act* (“ONCA”) expected to be proclaimed sometime in 2014. The ONCA will have a significant impact on how these corporations will operate once it is in effect.

CHECK-IN

If you have REGISTERED AND PAID the registration fee, please obtain your name tag and handout package at the registration table in the foyer of the Centurion Conference Center on the main floor. Proceed to the breakfast buffet provided in the Empress Ballroom, and take a seat.

If you NEED TO PAY the registration fee or have NOT YET REGISTERED, please proceed to the registration table in the foyer and speak with our registrar. The registration fee can be paid by cash or cheque payable to *Carters Professional Corporation*. Please obtain a handout package from one of our greeters for more information.

BREAKFAST

Please help yourself to the buffet breakfast and then take a seat in the Empress Ballroom. If at all possible, please move to the seating near the front of the ballroom to allow room for late-comers at the back of the room.

RESOURCE MATERIALS

Included in this handout package are copies of today's presentation materials. Further articles, seminar materials, and newsletters of interest to charities and not-for-profits, including back issues of *Charity Law Bulletins*, *Church Law Bulletins*, and *Charity Law Updates* are available free of charge at our websites of www.charitylaw.ca, www.churchlaw.ca, www.antiterrorismlaw.ca and www.carters.ca. A few copies of our most recent *Charity Law Update* are on display at the Carters table in the foyer.

CHARITY LAW UPDATE

If you did not include your email address with your registration form and would like to be added to our free e-mail distribution list of the monthly newsletter “Charity Law Update”, please complete an e-mail subscription form available at the Carters booth.

QUESTION PERIOD

Written questions are encouraged and will be answered during a round-table question period at the end of the workshop for those who wish to remain.

RECEIPTS

For your records, a receipt will be tucked inside the back of your name tag.

AGENDA

8:00 a.m.	Registration and Breakfast	
8:45 a.m.	Opening Remarks	Terrance S. Carter
8:50 a.m.	Transitioning to the Ontario <i>Not-For-Profit Corporations Act</i> (ONCA)	Jennifer M. Leddy and Karen J. Cooper
10:05 a.m.	Coffee Break	
10:20 a.m.	Transitioning to the Ontario <i>Not-For-Profit Corporations Act</i> (ONCA)	Karen J. Cooper, Tanya L. Carlton and Terrance S. Carter
	Question Period Round Table	
11:45 a.m.	Program Ends	

Carters Professional Corporation

Ottawa (613) 235-4774 Mississauga (905) 306-2791 Toronto (416) 675-3766 Orangeville (519) 942-0001
www.carters.ca Toll Free / Sans frais: 1-877-942-0001 www.charitylaw.ca

BIOGRAPHIES



Tanya L. Carlton – Called to the Ontario Bar in 2013, Ms. Carlton joined Carters to practice charity and not-for-profit law. A graduate from the University of Ottawa, Faculty of Law in 2012, Tanya also earned a B.Sc. (Hons.) in Biochemistry from Bishops University and a B.Ed. from the University of Western Ontario prior to attending law school. Ms. Carlton taught high school math and chemistry for several years, and also served as an elected Municipal Councillor. Ms. Carlton gained legal experience articling with Carters, as well as during the summers as a research assistant for several Ottawa-based teaching lawyers while at law school. Email: tcarlton@carters.ca



Terrance S. Carter, B.A., LL.B, TEP, Trade-mark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, is counsel to Fasken Martineau LLP on charitable matters, a past member of the Technical Issues Group of Canada Revenue Agency's (CRA) Charities Directorate, Past Chair of the CBA National and OBA Charities and Not-for-Profit Sections, and is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*. He is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* to be published by Carswell in 2013, a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2013), and editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorism.ca, and a past co-chair of the CBA National Charity Law Symposium. Email: tcarter@carters.ca



Karen J. Cooper – A partner with the firm, Ms. Cooper is recognized as a leading expert by *Lexpert* and *Best Lawyers* practicing charity and not-for-profit law with an emphasis on tax issues at Carters' Ottawa office, having formerly been a Senior Rulings Officer with the Income Tax Rulings Directorate of Canada Revenue Agency, as well as former counsel for the Department of Justice in tax litigation. Ms. Cooper also has considerable teaching experience, including as part-time professor at the University of Ottawa, Faculty of Common Law, and is a contributing author to *The Management of Charitable and Not-for-Profit Organizations in Canada* (LexisNexis Butterworths). Email: kcooper@carters.ca



Jennifer Leddy – Ms. Leddy joined Carters' Ottawa office in March 2009 to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCC). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed "Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose." Email: jleddy@carters.ca

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RESOURCES

The following is a list of ONCA Practice Tips available for you to download free of charge from our website at www.charitylaw.ca and www.carters.ca:

- Charity Law Update - September 2013 - Ontario's Not-for-Profit Corporations Act, 2010 Update – by Theresa L.M. Man. – see article on page 9 - <http://www.carters.ca/pub/update/charity/13/sep13.pdf>
- Bill 85 to Amend Ontario Not-For-Profit Corporations Act, 2010 by Theresa L.M Man. Charity Law Bulletin No. 315, June 26, 2013 - <http://www.carters.ca/pub/bulletin/charity/2013/chylb315.pdf>
- The Changing Landscape for Not-for-Profit in Canada was a panel discussion that included Terrance S. Carter at the Institute of Corporate Directors (ICD) - Southwestern Ontario Chapter in Kitchener, Ontario, on April 25, 2013 - <http://www.carters.ca/pub/seminar/charity/2013/tsc0425.pdf>
- Transitioning Under the New Ontario Not-For-Profit Corporations Act, 2010: Practical Considerations by Theresa L.M. Man. Charity Law Bulletin No. 299, January 30, 2013 - <http://www.carters.ca/pub/bulletin/charity/2013/chylb299.pdf>
- What's New in the Governance of Not-for-Profit Corporations? (CNCA/ONCA) was presented by Terrance Carter at The Law Society of Upper Canada's Six-Minute Business Lawyer in Toronto, Ontario, on June 7, 2012 - <http://www.carters.ca/pub/article/charity/2012/tsc0607.pdf>
- Directors' and Officers' Duties and Liabilities under the CNCA and the ONCA was presented by Terrance S. Carter at Emerging Issues in Directors' and Officers' Liability 2012, a continuing professional development program hosted by the Law Society of Upper Canada in Toronto, Ontario, on March 1, 2012 - <http://www.carters.ca/pub/seminar/charity/2012/tsc0301.pdf> and <http://www.carters.ca/pub/article/charity/2012/tsc0301.pdf> for the paper
- Overview of Continuing Under the CNCA and ONCA presented by Theresa L.M. Man at the 18th Annual Church & Charity Law Seminar - <http://www.carters.ca/pub/seminar/chrchlaw/2011/tlm1110.pdf>
- The Nuts And Bolts of the Ontario Not-For-Profit Corporations Act, 2010 by Terrance S. Carter and Theresa L.M. Man. Charity Law Bulletin No. 262, September 30, 2011 - <http://www.carters.ca/pub/bulletin/charity/2011/chylb262.pdf>

SEMINAR HOSTS

Carters Professional Corporation is a law firm with expertise in the area of church, charity and not-for-profit law and is committed to assisting clients in avoiding legal problems before they occur through effective legal risk management advice, including assistance with:

- Anti-terrorism Policy Statements
- Charity Legal Audits
- Charitable Organizations & Foundations
- Charitable Incorporation & Registration
- Charitable Trusts
- Church Discipline Procedures
- Church Incorporation
- Continuance Under CNCA
- Corporate Record Maintenance
- Director and Officer Liability
- Dissolution and Wind-Up
- Domain Name Management
- Ecological Gifts
- Employment Issues
- Endowment Agreements
- Foreign Charities Commencing Operations in Canada
- Fundraising and Gift Planning
- Gift Acceptance Policies
- Human Rights Litigation
- Incorporation and Organization
- Insurance Issues
- Interim Sanctions
- International Trade-mark Licensing
- Investment Policies
- Legal Risk Management Assessments
- Litigation and Mediation Counsel
- National and International Structures
- Privacy Policies and Audits
- Religious Denominational Structures
- Sexual Abuse Policies
- Special Incorporating Legislation
- Tax Compliance
- Tax Opinions and Appeals
- Trade-mark and Copyright Protection
- Transition to ONCA

	ONCA WORKSHOP Ottawa - October 4, 2013
Transitioning to the Ontario <i>Not-for-Profit Corporations Act, 2010</i>	
By: Terrance S. Carter - tcarter@carters.ca Karen J. Cooper - kcooper@carters.ca Jennifer M. Leddy - jleddy@carters.ca Tanya L. Carlton - tcarlton@carters.ca	
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OVERVIEW	
<ul style="list-style-type: none">• Status of the ONCA• Overview of transition process• Resources• Overview of key elements of the ONCA• Practical steps	
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A. STATUS OF ONCA	
<ul style="list-style-type: none">• The Ontario <i>Corporations Act</i> (OCA) has not been substantively amended since 1953• The Ontario <i>Not-for-Profit Corporations Act, 2010</i> (ONCA) will apply to OCA Part III corporations• ONCA received Royal Assent on October 25, 2010• Ministry of Government Services - responsible for searches and filing• Ministry of Consumer Services - responsible for remaining areas, including policy and interpretation issues	
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- Original anticipated proclamation date was July 1, 2013
- Delayed to no earlier than Jan 2014
 - Announced by Minister on March 28, 2013
 - Will review the ONCA after proclamation to determine if amendments are necessary - review enhancement of membership voting rights
 - Explore possibility of delaying proclamation of provisions giving voting rights to non-voting members for 3 years after proclamation
- Proposed changes to ONCA in Bill 85 - first reading
- Delayed to later in 2014
 - Announced by Minister on September 4, 2013
 - Bill 85 to be debated in Legislation in fall of 2013
 - ONCA to be proclaimed no earlier than 6 months after enactment of Bill 85

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B. OVERVIEW OF ONCA TRANSITION PROCESS

- ONCA applies automatically upon proclamation
- ONCA currently provides for an optional transition process within 3 years of proclamation
- Bill 85 clarifies that non-compliant provisions of LP, SLPs, by-laws and special resolutions will continue to be in effect during 3 years after proclamation of the ONCA, unless they were amended during this time
- If no transition during 3 years
 - Corporation will not be dissolved
 - LP, SLPs, by-laws and special resolutions will be deemed amended to comply with the ONCA
 - Will result in uncertainty in relation to which provisions remain to be valid
 - Prudent to adopt new by-law and articles of amendment

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- But proposed amendments in Bill 85 imply that transition process is mandatory
 - Any provision that is required by the ONCA to be contained in the articles must be contained in the articles before the end of the 3 year period, failing which those provisions would be deemed to become invalid at the end of 3 year period
 - Articles, by-laws or special resolutions can only be changed during the transitional period if changes are also made to bring them into conformity with the ONCA

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- Social clubs with share capital will have 5 years to continue to come under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*
- ONCA transition process
 - Review letters patent and by-laws
 - Prepare articles of amendment and new by-laws
 - Get membership approval
 - File required documents
 - Certificate of amendment will be issued
 - Charities - send certificate of amendment, articles of amendment and new by-law to CRA

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C. RESOURCES

- *Charity Law Bulletin* No. 262 “The Nuts and Bolts of the Ontario *Not-for-Profit Corporations Act, 2010*”
- *Charity Law Bulletin* No. 299 “Transitioning Under The New Ontario *Not-for-Profit Corporations Act, 2010: Practical Considerations*”
- *Charity Law Bulletin* No. 315, “Bill 85 to amend Ontario Not-For-Profit Corporations Act, 2010”
- To view ONCA
http://www.ontla.on.ca/web/bills/bills%20_detail.do?locale=en&Intranet=&BillID=2347

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- Ministry updates
http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx
 - Key terms, frequently asked questions, transition checklist, default by-laws, plain language guide
 - Toolkit
 - Community Legal Education Ontario launched the “Get Ready for the ONCA” project
 - Released electronic toolkit that can be used by corporations to explain ONCA to its members and stakeholders - includes, presentation slides, speaking points, presenter Q&A, newsletter and bulletin articles, webtext, Facebook posts
 - Regulations to be released

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D. OVERVIEW OF KEY ELEMENTS OF THE ONCA

1. Incorporation and Corporate Powers

- Replaces the letters patent system with a statutory regime similar to Ontario *Business Corporations Act*
- Removes ministerial discretion to incorporate, in that incorporation will be as of right
- Obtain certificate of incorporation, not letters patent
- Only one incorporator is needed
- No need to file by-laws or financial statements with the government, but default by-law will apply if no by-laws adopted within 60 days after incorporation

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- Corporation has the capacity, rights, powers and privileges of a natural person
- Eliminates the concept of a corporation's activities being *ultra vires*
 - If a corporation acts outside of its purposes, then it has breached the ONCA but the act is valid
 - Makes little difference in practice, because directors have a duty to comply with the articles of the corporation, which may limit the purpose of the corporation and charities have to comply with the requirements in other statutes (e.g., *Income Tax Act*)

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2. Public Benefit Corporations (PBCs)

- All corporations categorized into PBCs and non PBCs
- PBCs include
 - “charitable corporations” - common law definition
 - Non-charitable corporations that receive more than \$10,000 in a financial year in funding from public sources
 - Public sources means
 - Donations or gifts from persons who are not members, directors, officers or employees of the corporation
 - Grants or similar financial assistance from the federal, provincial or municipal government or government agency

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- If a non-charitable corporation reaches \$10,000, deemed to be a PBC in the next financial year - from AGM in the next financial year to the end of that financial year
- Bill 85 amendments proposes \$10,000 threshold can be changed by regulations

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- Consequences of being a PBC
 - Not more than one third of the directors may be employees of the corporation or its affiliates
 - Higher thresholds for dispensing with the default requirement to appoint an auditor or a person to conduct a review engagement
 - Upon liquidation and dissolution, its net assets must be distributed in the following manner
 - If it is a charitable corporation, then to a charitable corporation with similar purposes or to a government or government agency
 - If it is a non-charitable corporation, then to a PBC with similar purposes or to a government or government agency

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- Upon the liquidation and dissolution of a non-PBC, its net assets must be distributed in accordance with the articles, or if the articles do not address that issue, then rateably to the members (PBCs cannot do this)
- Non-charitable corporations will need to monitor level and sources of revenue
- Low threshold of \$10,000 - possible that a non-charitable corporation could move in and out of PBC status depending on its revenue in a year

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- If a non-charitable corporation is concerned about moving in and out of PBC status, it can voluntarily be structured as a PBC
 - Ensure 2/3 of directors are not employees (but charities cannot have any directors who are employees)
 - Ensure the articles provide that property will be paid to another PBC with similar purposes or to a government or government agency upon liquidation
- For those years when it exceeds the \$10,000 threshold
 - Follow audit and review rules for PBC corporations - may not be an issue if the corporation's practice is to have its financial statement audited

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3. Financial Review

- Members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting

Type of Corp/Gross Annual Revenues (GAR)	Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation (PBC) with GAR of \$100,000 or less (ss.76(1)(b))	May, by extraordinary resolution (80%), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
More than \$100,000 but less than \$500,000 (ss.76(1)(a))	May dispense with an auditor and have someone else conduct a review engagement. This requires an extraordinary resolution (80%)	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)
\$500,000 or more (by implication of ss.68(1))	An auditor must be appointed annually	Audit is required

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Type of Corp/Gross Annual Revenues (GAR)	Requirements for an Auditor	Audit/Review Engagement
Non-PBC corporation with GAR of \$500,000 or less in annual revenue (ss.76(2)(b))	May, by extraordinary resolution (80%), dispense with an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
More than \$500,000 in annual revenue (ss.76(2)(a))	May, by extraordinary resolution (80%), dispense with an auditor, and instead appoint a person to conduct a review engagement	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)

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4. Number of Directors and Election

- Minimum 3 directors
- Articles may provide a maximum and minimum range
- For PBCs - not more than 1/3 of the directors may be employees of the corporation or its affiliates (charities can have none)
- Directors are elected at meetings of members
- Ex-officio directors continue to be permissible

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- If different groups of members elect x directors to the board, must structure membership as separate classes
 - For example
 - Directors elected by different regional representation of membership
 - Directors elected by different sector representation of membership
 - Directors elected by founding members
 - Examples of possible workarounds
 - Qualification requirement for candidates
 - Candidate nomination process
 - Appointment of directors
 - Ex officio members and closed membership

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- Power of the board to appoint directors between AGMs
 - Limitations
 - Can only appoint up to 1/3 the number elected at the last AGM (not 1/3 of the entire board)
 - Only 1 year term to expire at next AGM
 - Need to take into account of rotating term
 - Number appointed is within the max/min or fixed size of the board
 - How to prevent the board from appointing directors if this is not desirable, e.g.,
 - If fixed number of directors, ensure no vacancy on the board
 - If max/min number of directors, ensure power to fix board size stays with the members (not delegated to the directors) and no vacancy on the board

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- Directors must consent to take office (Bill 85 proposes all consents be in writing)
- Directors are no longer required to be members
- Maximum 4 year term for directors (but no limit on number of maximum terms)
- May have staggered terms
- Removal by majority vote of members

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5. Directors and Officers – Powers, Duties and Defence

- Directors may borrow money on the credit of the corporation without members' authorization, unless articles or by-laws provide otherwise
- Directors may view certain corporate records that the corporation is required to prepare and maintain (e.g., meeting minutes, accounting records, members' resolutions, etc.) and receive free extracts of them

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- Objective standard of care for directors and officers to
 - Act honestly and in good faith with a view to the best interests of the corporation
 - Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
- Reasonable diligence defence for directors (not officers)
 - Not liable if fulfilled their duty if they exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
 - Defence includes good faith reliance on financial statements and reports of professionals

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6. Members

- A corporation must have members
- Articles must set out the classes of members
- If only one class of members, all must be voting
- If two or more classes, articles must provide voting right to at least 1 class
- By-laws must set out the conditions for membership
- Default 1 vote per member, unless articles provide otherwise

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- All classes of members (including non-voting classes), are entitled to vote separately as a class on certain amendments to articles and by-laws changes
 - Extraordinary sale
 - Amalgamation if affects membership rights
 - Continuance to another jurisdiction if affects membership rights
 - Change to any rights or conditions attached to a class of members or change the rights of other classes of members relative to the rights of a particular class of members

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- Regardless of whether the membership class is a voting class or non-voting class
- Thus a class of members could reject a change - effectively resulting in a class veto
- The treatment of members mirrors that in the Ontario *Business Corporations Act* in relation to shareholder's rights
- In most cases, giving non-voting members the right to vote on fundamental changes may not be justified
- Bill 85 proposes to delay class vote rights of non-voting classes until proclaimed in force - at least three years after proclamation of the ONCA
- But Bill 85 does not delay class vote rights of voting classes

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- Common examples of having different membership classes
 - Members from different industry sectors
 - Members from different geographical regions
 - Members from different age groups
 - Founders
 - Broad-based community support, donors
 - Honorary members
 - Life members

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- Considerations whether to retain multiple class structure
 - What is the purpose of having multiple classes?
 - Is the corporation prepared to seek class approval (including the non-voting members) in future?
 - It is possible to group the voting members into one class of members?
 - Would the members be willing to restructure their membership status?
 - What is the likelihood of changing the membership structure or membership rights in any class in the future?
 - What is the likelihood of engaging in fundamental changes (such as amalgamating with another organization with similar visions/missions) in the future?

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- Some corporations may want to collapse all membership classes into one class and remove non-voting membership classes
 - Change them into a non-membership category, such as "affiliates", "associates", "supporters"
 - May set out their rights and duties as non-members
 - Consider timing for such change
 - But their donations will not be exempt from the \$10,000 threshold
 - For corporations that are non-profit organizations, query whether this may affect the NPO status

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- When to collapse membership classes
 - Bill 85 proposes delaying class voting rights for non-voting members until end of 3 years
 - Collapsing membership class during the 3 year period will not be subject to class votes by non-voting members, but may be subject to class votes by voting classes
 - Collapse voting classes before proclamation

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- Default rules to terminate membership and member's rights apply unless articles or by-laws state otherwise
 - Upon death, resignation, expiry of membership term, liquidation or dissolution of the corporation, expulsion, or termination of membership
 - Rights terminated upon termination of membership

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- Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership
 - If the articles or by-laws provide for this power, then must set out circumstances and the manner in which the power may be exercised
 - The power must be exercised in good faith and in a fair and reasonable manner
 - Must give 15 days notice of a disciplinary action or termination with reasons
 - Opportunity for the member to be heard
 - Member may apply for a compliance or restraining order if that power is misused

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7. Members' Meetings

- No longer requires notice be sent by mail, provided that notice is given 10 to 50 days before the meeting
- Directors may fix a "record date" of no more than 50 days before a members' meeting to determine who the members are for purpose of calling a members' meeting
- Must be held in Ontario at the place provided in the by-laws or, in the absence of such a provision, at the place within Ontario that the directors determine
- May be held outside Ontario if the place is specified in the articles or all the members entitled to vote at the meeting agree that the meeting is to be held at that place

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- Every member entitled to vote at a meeting may vote by proxy
 - Proxy vote is optional if by-law allows members to vote by mail or by telephonic or electronic means
 - Not possible to require the proxyholder must be a member - if concerned
 - Encourage (not require) members to appoint other members to be proxyholders
 - Include other requirements of who may qualify to be a proxyholder
 - Keep membership small
 - Keep business to be dealt with at members' meeting short

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- Members are entitled to attend members' meetings by telephonic or electronic means, unless the by-laws provide otherwise
- If permitted by by-laws, the board or the members may decide whether to hold a members' meeting *entirely* by telephonic or electronic means
- Financial statements, the auditor's report or report of person who conducted a review engagement, and any further information required by the articles or by-laws must be given to members upon request at least 21 days before an AGM

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8. Members' Rights

- Members may elect and remove directors at anytime
- A member entitled to vote at an annual meeting of members may raise any matter as a "proposal" but must give at least 60 days notice
 - A proposal may nominate directors for election if it is signed by at least 5% of voting members or such lower percentage set out in the by-laws (but nominations may still be made at the meeting)
 - Proposal must relate in a significant way to the activities and affairs of the corporation
 - Directors can refuse to discuss the proposal if they give at least 10 days notice, but a member may appeal their decision to court

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- Members may requisition meetings of the members (but need 10% of the votes to do so, or lower if the by-laws so state)
- Members may examine certain corporate records - articles, by-laws, the minutes of meetings and resolutions of members and committee of members, registers of directors, officer and members
- Right to access membership lists - to include name and address - only for the purpose of influencing voting, requisitioning a members' meeting or other matters relating to the affairs of the corporation
- Right to financial statements

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9. Members' Remedies

- Compliance or restraining order - if a corporation, or its directors and officers, fails to comply with the duties set out in the ONCA and regulations, the articles or by-laws
- Rectification order - if the name of a person has been wrongfully entered, retained, deleted or omitted from the registers or records of a corporation, that person may apply to a court for an order rectifying the registers or records
- Dissent and appraisal remedy for non-PBCs - in relation to fundamental changes

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- Derivative action
 - Allows members to bring an action in the name of the corporation to enforce one of its rights
 - Exemption for “religious corporation” - e.g., cannot bring derivative action to recover misappropriated church property
 - Lack of definition for “religious corporation” means that the courts will have to define that term
- Investigation order
 - A member (or holder of debt) may apply to the court for an investigation of the corporation

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- Possible that non members may still qualify as “complainants” for the purpose of compliance or restraining order or derivative action (except a religious corporation) based on the broad scope of the definition of “complainant” in the ONCA
- However, lack of economic incentives to invoke these corporate law remedies may mean less member litigation than shareholder litigation in relation to OBCA and CBCA corporations
- But even a non-member could allege breach of trust under s.10 of the *Charities Accounting Act* in the case of charities

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- Must respect these rights, cannot contract out
- Not just affect corporations with broad based membership, rights also apply to closed membership corporations
- Having a smaller membership may reduce the exposure to these rights

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10. Audit Committee

- Majority of committee members must not be officers or employees of the corporation or of any of its affiliates
- Must give the auditor or person appointed to conduct a review engagement notice of audit committee meeting
- Auditor or person appointed to conduct a review engagement is entitled to attend meeting at the expense of the corporation and be heard, and shall attend every meeting of the committee if requested to do so by one of its members
- Auditor, person appointed to conduct a review engagement or a member of the audit committee may call a meeting of the committee

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11. Delegation and Committee of Directors

- Directors may delegate their powers to a managing director (who must be a director) or a committee of directors
- Implies that an executive committee must consist entirely of directors

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- But directors may not delegate the following powers
 - To submit a question or matter to members for approval
 - To fill a vacancy among the directors or auditor
 - To appoint additional directors
 - To issue debt obligations except as authorized by the directors
 - To approve financial statements under s. 83
 - To adopt, amend or repeal by-laws
 - To establish contributions to be made, or dues to be paid, by members under s. 86

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12. Conflict of Laws

- ONCA must be read in conjunction with applicable charity law
- If there is a conflict between the ONCA or its regulations and a provision made in any other legislation that applies to the following
 - A non-share capital corporation, then the provision in the other legislation prevails
 - A charitable corporation, then the legislation applicable to charitable corporations prevails
- Some provisions of the ONCA will not apply to charities

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- ONCA permits directors to fix their remuneration and to receive reasonable remuneration and expenses for any services they provide to the corporation in any other capacity
 - Common law rule overrides the ONCA - prohibits directors of a charity to receive direct and indirect remuneration from the charity
 - But directors may be reimbursed out-of-pocket expenses
 - Possible to seek PGT consent court order to permit directors be paid, but generally high threshold for such an order

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- ONCA permits directors and officers to enter into contracts or transactions with the corporation as long as they disclose any conflict of interest that may exist
 - Common law rule overrides the ONCA - prohibits directors of charities from placing their personal interests in conflict with their duty to the charity
 - Regardless of whether there is actual loss to the charity
 - Possible to seek PGT consent court order to permit directors be paid, but generally high threshold for such an order

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- ONCA permits corporation to invest its funds as its directors think fit, subject to its articles or by-laws or any limitations accompanying a gift
 - Section 10.1 of the *Charities Accounting Act* overrides the ONCA - states that s.27 to s.31 of the *Trustees Act* applies
 - Prudent investor rule applies to the directors of charities
 - Directors must consider certain criteria to invest
 - Authorizes delegation to an agent in certain circumstances

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- ONCA permits corporation to indemnify the directors and officers and to purchase insurance
 - ONCA expressly requires that the purchase of insurance be in compliance with the *Charities Accounting Act* and its regulations
 - Regulation 4/01 under the *Charities Accounting Act* requires directors to consider certain factors enumerated in the regulation before they consent to the indemnification of its directors or purchasing D&O insurance
 - The indemnification or the purchase of insurance must not render the corporation insolvent

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E. PRACTICAL STEPS FOR TRANSITION

Recall

- ONCA applies automatically upon proclamation
- ONCA currently provides for an optional transition process within 3 years of proclamation
- Bill 85 clarifies that non-compliant provisions of LP, SLPs, by-laws and special resolutions will continue to be in effect during 3 years after proclamation of the ONCA, unless they were amended during this time
- But proposed amendments in Bill 85 in effect imply that transition process is mandatory
 - Need to file articles to include provisions required by ONCA, otherwise will be deemed invalid
 - Cannot amend articles, by-laws or special resolutions unless changes are also made to bring them into conformity with the ONCA

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1. Collect Governing Documents

- Letters patent, supplementary letters patent
- All current by-laws, including amendments
 - Amending by-laws
 - Members' resolutions?
 - Board resolutions?
 - Are by-laws valid? Were they properly adopted?
- Can obtain microfiche copies from Ministry for LP and SLPs
- CRA may have by-laws
- Collect governance related documents - e.g., organizational charts, policies, manuals

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2. Review Governing Documents and Consider

- Do they reflect current governance structure? If not, what is current governance structure?
- Do they reflect current governance process? If not, what is current governance process?
- Are changes desired? What are they?
- Are there new provisions to be inserted?
- Write them down
- Come up with a wish list

3. Review the Key Features of the ONCA

- This understanding will help the corporation determine how its governance structure and the content of the articles of amendment and by-laws will be impacted

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4. Compare ONCA Rules with Current Governance Structure and Practice

- Are the current by-laws or the desired governance structure and process inconsistent with ONCA requirements?
 - If inconsistent with an ONCA mandatory requirement, how will the corporation adjust its governance structure and process in order to ensure compliance?
 - If inconsistent with an ONCA default requirement, is the preferred alternative mechanism permitted under the ONCA? Should the overriding provision be set out in the articles or by-laws?

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- If different options are prescribed, which one should the corporation choose? Should the preferred option be set out in the articles or by-laws?
- Are there provisions that the corporation would like to include in its governing documents and the ONCA is silent on those issues? If so, should the provisions be set out in the articles or by-laws?

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5. Determine Whether Changes Should be Made Prior to Transition

- Changes to membership rights for corporations that have multiple classes of members
 - Separate vote by class or group of members will be required to change the rights attached to a class or group of members or for certain fundamental changes
 - Each class of members (including non-voting members) will have a *de facto* veto right
 - Some corporations may want to collapse classes into 1 voting class
 - Consider timing to make the change
 - Consider effect of Bill 85 - perhaps collapse voting classes prior to proclamation

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- Changes to board structure
 - How to elect directors
 - How to appoint the past president and other ex officios
 - How many directors can the board appoint
- Changes to corporate objects
 - Purposes of the corporation will need to be stated in the articles of amendment
 - May want to update them to reflect and align with current or future activities
 - If registered charity, needs CRA approval
 - Corporate objects vs power clauses

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6. Timing of Transition

- Revising governance structure to be reflected in new by-law may need some time for directors and members to consider
- Considerations
 - Length of time and complexity of process to revise the by-laws
 - Nature of changes in new by-laws - substantive vs administrative
 - Size of membership
 - Changes to membership structure
 - Changes to corporate objects

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7. Drafting Articles of Amendment and New By-laws

- Information on articles of amendment not available yet
- By-law will need to be replaced or substantially revised because the ONCA differs from the OCA
- OCA contained very few rules, ONCA provides many detailed rules
- Some changes may only be administrative
- Some changes may require detailed consideration and consultation with members

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- Understanding the ONCA framework
 - Rules in the Act
 - Some details in the Regulations
 - Need to refer back and forth between the Act and the Regulations
- Types of ONCA rules
 - ONCA provides both a general framework and sets of rules for corporations to operate
 - Three types of rules in ONCA
 - Mandatory rules - cannot be overridden by the articles or by-laws
 - Default rules - by-laws or articles can override
 - Alternate rules - articles/ by-laws can include certain optional rules provided by ONCA

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- Mandatory Rules
 - Rules that cannot be overridden by the articles or by-laws - examples:
 - Minimum 3 directors
 - Directors can be removed by majority vote of members (or by class vote) (except ex officio directors)
 - Notice of meetings of members given 10 to 50 days before the meeting
 - Members' right to submit and discuss proposals
 - Members' right to requisition meeting
 - Members' right to vote by proxy
 - Board may appoint up to 1/3 directors elected at last AGM
 - Must ensure compliance of these rules

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- Default Rules
 - Apply automatically where by-law/articles are silent - examples:
 - Directors can borrow and grant security without members' authorization
 - Membership can only be transferred back to corporation
 - Participation in meetings by electronic means
 - A majority of members constitutes a quorum
 - Directors may meet anywhere
 - Directors not required to be members
 - A majority of the directors constitutes a quorum
 - Directors can make, amend or repeal by-laws, except those requiring a special resolution of members

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- May include provisions to override default rules - articles or by-laws
- When drafting by-laws, must ensure the by-laws is the appropriate document to include the desired overriding provisions
- When drafting overriding provisions, ensure these mechanisms are in compliance with the ONCA

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- Alternate Rules
 - Optional rules that are provided by the ONCA - examples:
 - Requisition of meeting - default rule is 10% of members (ONCA permits by-laws to specify a lower but not higher requirement)
 - Holding members' meeting entirely by electronic means
 - Members voting by mail or by telephonic or electronic means, in addition to or instead of voting by proxy
 - Discipline of members
 - Audit committee
 - Articles or by-laws must provide for these rules
 - Ensure compliance with ONCA

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- ONCA silent
 - Can include provisions on issues that the ONCA is silent, provided that the provisions included do not contravene the ONCA and its regulations - examples:
 - Dispute resolution mechanisms to resolve disputes between members
 - Stewardship provisions dealing with charitable property of the corporation (where it is a registered charity)
 - Statement of faith subscribed to by a faith-based corporation
 - These provisions may be set out in the policies or the by-laws

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8. Approaches to By-law Drafting

- Minimalist approach by-laws
 - Rationale: ONCA contains detailed rules, so by-laws not to duplicate mandatory rules or default rules that are not to be overridden
- Comprehensive approach by-laws
 - One stop approach - consolidation of all applicable rules
 - No need to flip back and forth between articles, but limited provisions in the articles
 - Can have governance policy manuals to address other matters

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- ONCA provides two ways for corporations to amend their by-laws, depending on the subject matter of the changes
 - Default mechanism - Board may adopt by-laws, effective upon passage by the board, by-law must be confirmed by members at next meeting
 - Ordinary approval by members - Require ordinary resolution of members (no need for board approval) for matters affecting members' rights, e.g., membership transferability and conditions, absentee voting

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- ONCA by-laws must be very clear about which amending formula applies to various provisions (or risk certain by-law provisions not being legally in force) - for example
 - Have 2 by-laws with all by-law provisions requiring members ordinary resolution in a separate by-law
 - Have 1 by-law, and place all provisions requiring members ordinary resolution in one clearly marked section
 - Have 1 by-law, and clearly mark throughout by-law which provisions require members ordinary resolution to amend
 - Have 1 by-law and provide all by-law amendments require members ordinary resolution
- Possible to require higher membership approval

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9. Obtain Membership Approval and Filing

- Need special resolution to approve articles of amendment
- May require separate class vote of the articles and by-laws if certain membership rights are amended
- Once approved, file articles of amendment and other documents with Ministry
- Will be issued certificate of amendment
- No need to file approved by-laws with the Ministry

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10. Other Consequential Filings and Records Updates

A) Canada Revenue Agency

- Registered charities have to file articles of amendment and new by-laws with CRA
- If purposes have been changed as part of the transition process, the corporation may obtain pre-approval from CRA for new purposes before filing articles of amendment with the Ministry
- If no pre-approval is obtained, then CRA may require that the governing documents be revised if they do not meet CRA's requirements - need to apply for articles of amendment

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B) Provincial and territorial filings

- May need to update provincial or territorial registrations
 - e.g., corporate registrations, business name registrations, fund-raising registrations, etc.
- Ontario charities - not sure what is required by Public Guardian and Trustee

C) Other filings

- May be required to provide transition documents with third parties, e.g.,
 - Funding organization
 - Umbrella organization

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D) Updating corporate records and procedures

- Corporate minute book
- Other documents, e.g., corporate governance policies, manuals, etc.
- Staff and volunteers will need to be trained and become familiar with the new governance documents

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CONCLUSION

- Monitor Ministry and CRA updates, e.g., plain language guides, default by-laws, updating the Not-for-Profit Incorporator's Handbook, information sheets
- Be familiar with the ONCA rules
- Prepare early, have someone or a committee be responsible for the process
- Have the board engaged early on
- Seek legal help, conduct legal review
- Do not miss the 3 year time frame for transition

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Ottawa Workshop
“Transitioning to the ONCA”

Friday, October 4, 2013

QUESTION SHEET

Please complete the question sheet, tear along the dotted lines and leave it at the front lectern in the Ballroom any time before 11:30 a.m. Questions will be answered during the Question Period.

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Carters Professional Corporation

Ottawa (613) 235-4774 Mississauga (905) 306-2791 Toronto (416) 675-3766 Orangeville (519) 942-0001

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