CANADIAN SOCIETY OF ASSOCIATION EXECUTIVES THIRD ANNUAL CSAE TRILLIUM CHAPTER **WINTER SUMMIT**

Niagara Falls – February 8, 2013

Digging For Dirt -**Accessing Corporate Records**

By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent tcarter@carters.ca 1-877-942-0001

© 2013 Carters Professional Corporation



Toronto · Ottawa Mississauga · Orangeville Toll Free: 1-877-942-0001



CARTERS BARRISTERS SOLIDITORS TRADEMARK AGENTS	CANADIAN SOCIETY OF ASSOCIATION EXECUTIVES THIRD ANNUAL CSAE TRILLIUM CHAPTER WINTER SUMMIT Niagara Falls – February 8, 2013			
Digging for Dirt: Accessing Corporate Records				
By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent tearter@carters.co 1 1-377-942-001 1				
© 2013Carters Professional Corporation				
CARTERS PROFESSIONAL CORPORATIO TOLL FREE: 1-877-942-0001	N Cttawa Toronto Mississauga Orangeville www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca			

A. INTRODUCTION AND OVERVIEW

- In this "Internet Era", where information is readily available, it may come as a surprise that access to the corporate records of not-for-profit corporations (which includes both charities and non-profit organizations) is subject to an array of rules and requirements
- Legislation sets out significant recordkeeping obligations for not-for profit corporations while providing members, directors and limited third-parties with the right to examine corporate documents
- The purpose of this presentation is to summarize the rights and obligations concerning access to corporate records under the federal and provincial legislation
- When "digging for dirt," the "dirt" is always in the details

www.charitylaw.ca

www.carters.c

Topics to be discussed include:

- Background to the changing corporate landscape
- Why are corporate records important?
- · What do corporate records consist of?
- Basic corporate record keeping requirements
- Preventing loss and destruction of corporate records
- · Rectifying corporate records
- Where should corporate records be kept?
- · What rights of access do directors have?
- What rights of access do members have?
- What information is available to the general public and creditors?
- Improper use of information obtained from a register or list of members
- How long should corporate records be kept?
- Publicly available corporate records

www.charitylaw.ca

www.carters.ca	1	www.charitylaw.ca



B. BACKGROUND TO THE CHANGING CORPORATE LANDSCAPE

1. Context

- New not-for-profit legislation at the federal and provincial level has been modeled on for-profit legislation that was developed during the 1970s and 1980s, specifically the Canada Business Corporations Act and the Ontario Business Corporations Act
- There has been a general push in governance policy to develop a legislative platform for not-for-profit corporations that is similar to that of for-profit corporations



www.charitylaw.c

www.carters.ca

- Members have become equated to shareholders and provided with similar rights and remedies
- As part of this corporate reform, the whole area of what constitutes corporate records and who can have access to the records of not-for-profit corporations has become more robust
- In order to understand the impact of recent corporate reform upon corporate record keeping requirements and access to corporate records, it is important to first undertake a brief overview of the corporate reform that has taken place

www.charitylaw.ca

www.carters

2. Federal Legislation Reform Summary

- Canada Corporations Act ("CCA") since 1917
- Canada Not-for-Profit Corporations Act ("CNCA") enacted on June 23, 2009, came into force October 17, 2011
- · Replaced Part II of CCA
- New rules do not apply automatically to CCA corporations
- Existing CCA corporations required to continue under the CNCA within 3 years— i.e., until October 17, 2014
- · Failure will result in dissolution of the corporation
- See paper by Theresa Man "The Practical Impact of the Canada Not-For-Profit Corporations Act" May 2011, http://www.carters.ca/pub/article/charity/2011/tlm1005.pdf
- See Charity Law Bulletins Nos. 191, 193, 199, 213, 215, 220, 231, 239, 247 for practice tips

www.charitylaw.ca



3. Ontario Legislation The Corporations Act (Ontario) ("OCA") has not been substantively amended since 1953 Ontario Not-for-Profit Corporations Act ("ONCA") will now apply to OCA Part III corporations ONCA received Royal Assent on October 25, 2010, expected to be proclaimed in force on July 1, 2013 Unlike the CNCA, there is an optional transition process for corporations to file articles of amendments or adopt new by-laws to comply with ONCA requirements within 3 years of ONCA in force

If no transition process taken, then
Corporation will not be dissolved
Letters Patent, Supplementary Letters Patent and by-laws and special resolutions inconsistent with ONCA will be deemed amended to comply with new ONCA requirements
See Charity Law Bulletin Nos. 262 and 299 at www.charitylaw.ca for more details

4. Helpful Guide to "Ever Popular" Acronyms

• "CCA" = Canada Corporations Act

• "CNCA" = Canada Not-for-Profit Corporations Act

• "OCA" = Ontario Corporations Act

• "ONCA" = Ontario Not-for-Profit Corporations Act, 2010

• "NPO" = Non-Profit Organizations under the Income Tax Act

• "Not-for-Profits" = Not-for-Profit Corporations, including both registered charities and NPOs



C. WHY ARE CORPORATE RECORDS IMPORTANT? A corporation is nothing more than a legal fiction However, at law, a corporation is "a person" But as a fictional person, it has no memory of its own As such, the only thing that constitutes the memory of a corporation is what is kept as a written record Maintaining corporate records therefore ensures that the corporation will have a good "corporate memory"

This is particularly important for a non-share capital corporation because there are no shareholders with an interest in the corporation as equity owners to keep the memory alive
Good record keeping also serves to protect the board of directors by documenting their due diligence
In any event, failure to maintain proper corporate records is illegal and can result in fines, imprisonment or both

www.charitylaw...

www.charitylaw...

Corporate records can become essential in the event of any one or more of the following:
 Litigation by third parties
 Challenges by members (including litigation)
 Challenges by directors (including litigation)
 CRA tax audits (especially charities audits)
 Review by regulatory authorities
 Banking institution requirements
 Future amalgamations and mergers
 Attracting succession of directors



D. WHAT DO CORPORATE RECORDS CONSIST OF?

- Although each corporate statute differs, a list of corporate records that a corporation should generally keep will consist of the following:
 - Letters Patent, Supplementary Letters Patent and by-laws
 - Register of directors, members, officers
 - Minutes of directors meetings
 - Minutes of members meetings
 - Minutes of committees of directors or members
 - Register of debt obligations
 - Accounting records
 - Financial statements

www.charitylaw.c

ww.carters.c

E. BASIC CORPORATE RECORD KEEPING REQUIREMENTS

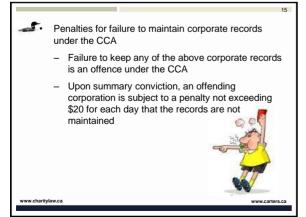
1. Federal Corporations

Under the CCA

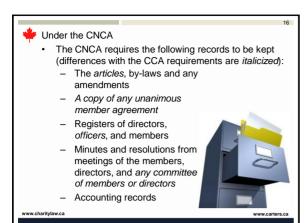
- · The CCA requires the following records to be kept:
 - A copy of the letters patent, bylaws and any supplementary letters patent and a copy of the memorandum of agreement of the company, if any
 - Registers for members and directors
 - Meeting minutes of the members, the directors, and any executive committee
 - Proper accounting records
 - A register of mortgages

www.charitylaw









*

- If any debt obligation is issued by the corporation, a debt obligations register must be maintained
 - The CNCA now requires records of "debt obligations" and no longer just "mortgages"
- Financial statements of each of the corporation's subsidiaries and of each body corporate the accounts of which are consolidated in the financial statements of the corporation
 - The reference to subsidiaries and consolidated entities is new to the requirement to keep financial statements

www.charitylaw.ca

www.carters.



- Penalties for failure to maintain records under the CNCA
 - The CNCA does not have offences that specifically address the failure to maintain or provide records
 - Instead, there is a generally worded offence of contravening the CNCA or the regulations



Any director or officer who authorized, permitted or acquiesced in the commission of the offence is a party to and guilty of the offence and is liable on summary conviction to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months or to both

www.charitylaw.ca



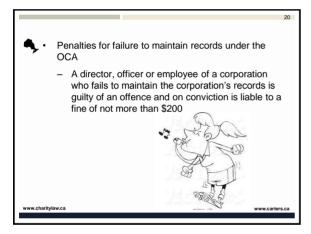
2. Ontario Corporations

Under the OCA

- The OCA requires the following corporate records to be maintained:
 - A copy of the letters patent, any supplementary letters patent and the memorandum of agreement, if any, or, special Act, if applicable
 - All by-laws and special resolutions
 - Minutes of members' meetings, directors' meetings and any executive committee meetings
 - A register of members
 - A register of directors
 - Proper books of account and accounting records for all financial and other transactions

www.charitylaw.c

www.carters.c



Under the ONCAThe ONCA red(differences w

- The ONCA requires the following records to be kept (differences with the OCA requirements are italicized):
 - The articles, by-laws and any amendments to them
 - Meeting minutes for and resolutions of the members, the directors, and any committee of members or directors
 - Separate register of directors, officers and members

www.charitylaw.ca

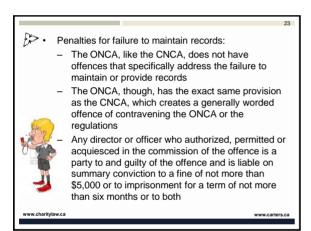




- Accounting records adequate to allow directors to ascertain the financial position of the corporation
- The ONCA specifies the level of detail it requires of accounting documents, whereas the OCA simply requires the documents be "proper"
- financial statements of each of its subsidiaries and of each body corporate
 - This requirement did not exist in the OCA but is identical to that in the CNCA
- The consents of directors to act as directors
 - This is a new requirement

www.charitylaw.c

ww.carters.c

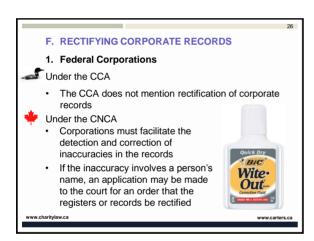


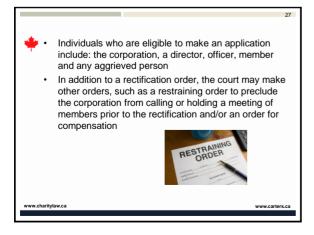
F. PREVENTING LOSS AND DESTRUCTION OF CORPORATE RECORDS 1. Federal Corporations Under the CCA • The CCA does not mention loss or destruction of corporate records Under the CNCA • The corporation and its agents must take reasonable precautions to prevent the loss or destruction of corporate records and falsification of entries in records

www.carters.ca 8 www.charitylaw.ca



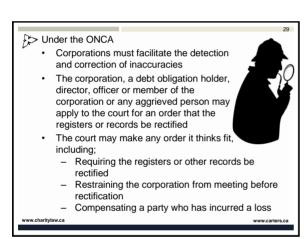
2. Ontario Corporation Under the OCA The OCA does not mention loss or destruction of corporate records Under the ONCA Like the CNCA, the corporation and its agents must take reasonable precautions to prevent the loss or destruction of corporate records and falsification of entries in records Note: Important to note that in addition to corporate requirements, loss of records could also jeopardize charitable status for registered charities

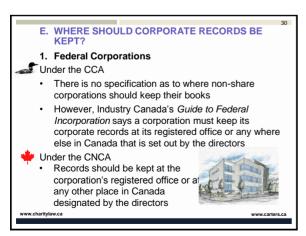






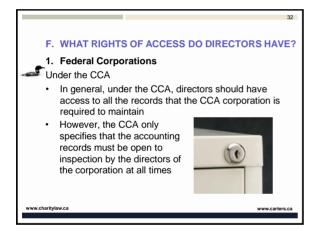
2. Ontario Corporations Under the OCA If there is an inaccuracy involving a person's name, the aggrieved person, a shareholder, a member or the corporation itself can apply to have the error rectified The Court may also direct the corporation to compensate the aggrieved party for any damages

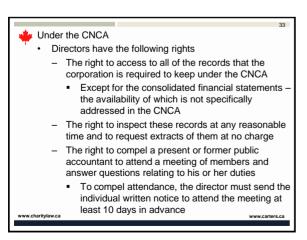






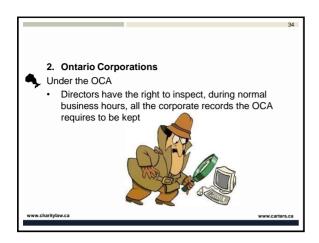
2. Ontario Corporations Under the OCA Records must be kept at the corporation's head office Under the ONCA Records should be kept at the corporation's registered office or at any other place in Ontario designated by the directors Except the meeting minutes, resolutions of the directors and committee of directors and accounting records - which may be kept outside of Ontario The ONCA also permits all records to be kept outside Ontario if they are available by technological means during regular business hours and the corporation will assist in providing access to the records Note: CRA requires charities to keep physical records in Canada





www.carters.ca 11 www.charitylaw.ca





Under the ONCA

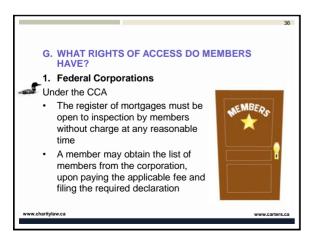
■ Directors have the following rights

The right to access all the records that the corporation is required to keep under the ONCA

The directors' right to access records under the ONCA is similar to that under the CNCA

The right to inspect these records during regular business hours and to request free extracts of them

The right to compel a present or former auditor to attend a meeting of members and answer questions relating to the corporation's duties



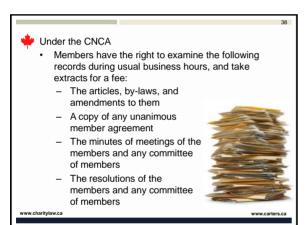




- In the declaration, the member must swear not to use the list for any purpose prohibited by section 111.1 (e.g. to communicate to any members any information relating to any goods, services, publications or securities except securities of the company) and not to use the list except to influence the voting of the members or any other matter relating to the affairs of the company
- Once an applicant satisfies these requirements, the member has a right to obtain the list within 10 days of filing the declaration
- Interestingly, there is no requirement in the CCA to place financial statements, the report of the accountant or any other information before the members at annual meeting of members

www.charitylaw.

www.carters.c





- The register of directors
- The register of officers
- Financial statements of each of the corporation's subsidiaries and of each body corporate the accounts of which are consolidated in the financial statements of the corporation
- Free copies of the following records are available upon request:
 - The articles, by-laws and amendments to them
 - A copy of any unanimous member agreement
 - The financial statements discussed above
- Members may examine the register of members and register of debt obligations or obtain a list of members by making a request to the corporation or its agent or mandatary accompanied by a statutory declaration

www.charitylaw.c





- At every annual meeting, the directors must place before the members of a CNCA corporation the following documents:
 - Prescribed comparative financial statements of the corporation
 - The report of the public accountant, if any
- Any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous member agreement
- 21 60 days before the meeting, the corporation must send the members a copy or summary of these documents or, if the by-laws so provide, inform the members that the documents are available for free at its registered office

www.charitylaw.c

......



- In addition, a member, whether or not entitled to vote at the meeting, can request the present or former public accountant of the corporation attend the annual general meeting at the expense of the corporation and answer questions relating to his or her duties as auditor
- In order to make such a request, the member must give the public accountant written notice, not less than 10 days before the meeting
- The public accountant or former public accountant must attend the meeting at the expense of the corporation and answer questions relating to his or her duties



www.charitylaw.c

www.carters.

2. Ontario Corporations

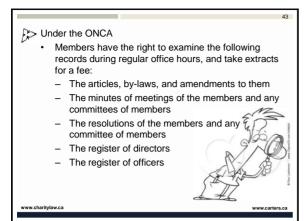


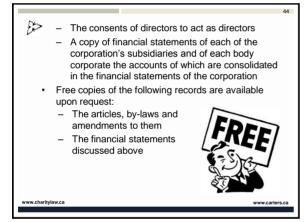
- Members have a right to inspect the following records during normal business hours of the corporation
 - A copy of the letters patent and of any supplementary letters patent issued to the corporation and of the memorandum of agreement, if any, or, if incorporated by special Act, a copy of the Act
 - All by-laws and special resolutions of the corporation
 - Minutes of meetings of the members
 - A register of members
 - A register of directors

www.charitylaw.ca

www.carters.ca	14	www.charitylaw.ca
WWW.0411010.04		www.onantylaw.oa







A member may examine the register of members of a corporation after making a request to the corporation and making a statutory declaration

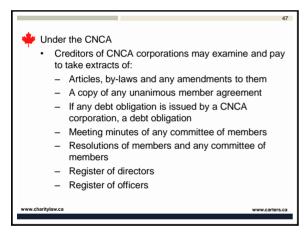
- As soon as is practical, the corporation must allow the applicant access to the register during the corporation's regular office hours and, on payment of a reasonable fee, provide the applicant with extracts

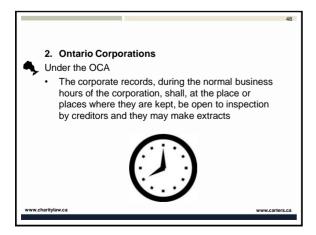
• The same process may also be followed to obtain a list of the names and addresses of the members and such additional information as is required by the bylaws as soon as is practical

Note: Members do not have a right of access to minutes of directors under any corporate legislation

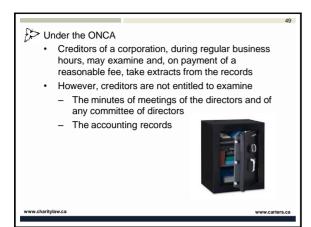


H. WHAT INFORMATION IS AVAILABLE TO THE GENERAL PUBLIC AND CREDITORS? • None of the Acts permit the general public to examine corporate records. • However, the legislation does permit creditors to access certain records under limited circumstances 1. Federal Corporations Under the CCA • There are no provisions that permit creditors to access corporate records NO PUBLIC ACCESS www.chaftylaw.ca









I. IMPROPER USE OF INFORMATION OBTAINED FROM A REGISTER OR LIST OF MEMBERS

1. Federal Corporations
Under the CCA

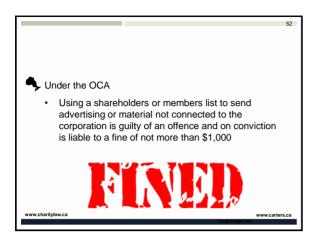
• Using a list of shareholders improperly is an offence that can result in a fine not exceeding \$1,000 or imprisonment for not longer than 6 months or both

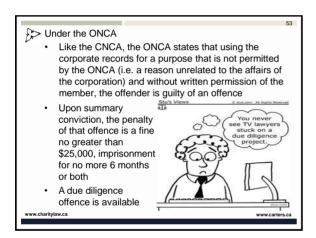
• A director or officer who acquiesced to the offence is also guilty and is liable to a similar penalty

www.carters.ca

Under the CNCA
 The CNCA includes an offence that specifically addresses the improper use of information obtained from a register of members or a list of members
 Where such information is used for a purpose that is not permitted by the CNCA (i.e. a reason unrelated to the affairs of the corporation) and without written permission of the member, the offender is guilty of an offence
 Upon summary conviction, the penalty of that offence is a fine no greater than \$25,000, imprisonment for no more 6 months or both
 A due diligence offence is available







J. HOW LONG SHOULD CORPORATE RECORDS BE KEPT? 1. Federal Corporations Under the CCA • The CCA does not impose any retention period • CRA, however, states that as a general rule, a corporation should keep its records for 6 years Under the CNCA • The only records that are subject to a retention period are the accounting records • The statute imposes a retention period of 6 years after the financial year to which the records relate - The retention period is subject to other federal and provincial statutes



2. Ontario Corporation Under the OCA The OCA does not impose any retention period Under the ONCA The same provision exists in the ONCA as in the CNCA only the retention period is subject to "any other Act or rule of a taxing authority that requires a longer retention period" 3. Best Practice Do not destroy any corporate records (other than accounting records) because the records make up the collective memory of the corporation

K. PUBLICLY AVAILABLE REPORTS
1. Federal Corporations
Search for a Federal Corporation
Letters Patent and Supplementary Letters Patent
By-laws
Certificate of Incorporation
Articles of Incorporation
Final statements under the CNCA if a "soliciting corporation"
Notices Filed (Form 3 – Annual Summaries)
Corporations Canada Search

2. Ontario Corporations

Profile Report

Point-In-Time Report

Document List

List of Business Names Registered by a Corporation

Certificate of Status

Copy of Return/Notice (Form 1)

Microfiche of incorporation documents, including Letters Patent and Supplementary Letters Patent, but no by-laws

Ontario Business Search Reports

www.carters.ca 19 www.charitylaw.ca



