

 <p><b>CARTERS</b> BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p><b>The 2020 Ottawa Region Charity &amp; Not-for-Profit Law Seminar February 13, 2020</b></p>
<p><b>Governance 101 for Charities and NFPs: Back to the Basics</b></p> <p><b>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.</b> tman@carters.ca 1-877-942-0001</p> <p>© 2020 Carters Professional Corporation</p>	
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<p><b>SETTING THE CONTEXT</b></p> <ul style="list-style-type: none"><li>• Governance in general terms means establishing, implementing and monitoring appropriate rules and policies by the organization’s governing body in order to achieve its purposes</li><li>• Proper governance requires appropriate structural and operational due diligence, and effective decision making</li><li>• This presentation reviews common questions regarding governance</li><li>• Potpourri of questions, from real life situations</li></ul> <p><a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.carters.ca">www.carters.ca</a></p>

- Reference will be made to some not-for-profit legislation
  - OCA – *Ontario Corporations Act*
  - ONCA – *Ontario Not-for-Profit Corporations Act*
    - Anticipated to be proclaimed in force in 2020
    - Once proclaimed, will replace OCA
  - CNCA – federal *Canada Not-for-profit Corporations Act*

## 1. WHAT ARE YOU?

### “We are a not-for-profit!”

- Terms “non-profit” and “not-for-profit” are used interchangeably and generally refer to organizations that do not operate with a view to make profit and any profits made are not passed on to their members
- “NFP” or “not-for-profit” is generally a corporate term, meaning a membership based corporation
- An NFP can have different income tax status:
  - Registered charity
  - Non-charitable tax-exempt non-profit organization

## 2. FIND YOUR BIRTH CERTIFICATE

**“We are a corporation and we have a constitution, but no by-laws”**

**“What is letters patent/articles? Never seen them before!”**

- Every organization has a “governing document”
- It gives an organization its legal existence, and normally identifies the organization’s name, purposes, and its structure and internal procedures
- Different types of governing document (see table on next slide)
- Corporations must have by-laws

<b>Ontario OCA Corporations</b>	<b>Federal CNCA Corporations</b>	<b>Unincorporated associations</b>	<b>Trusts</b>
Letters patent	Articles of incorporation or Articles of continuance	Constitutions	Trust deed
Supplementary Letters Patent	Articles of Amendment	Amendments to Constitution	Amendments to trust deed
By-laws	By-laws	By-laws (optional)	Usually no by-laws

### 3. WE HAVE NO RECORDS!

**“Mary was our treasurer who keeps all our records. Her house was flooded last summer so we lost all our corporate records”**

- Very important to have proper records because
  - Meet *Income Tax Act* and CRA requirements, registered charities and non-profit organizations are required to keep books and records
  - Meet specific records keeping requirements in incorporating legislation
  - Meet other legislative requirements, etc. *Employment Insurance Act, Canada Pension Plan, Excise Tax Act, etc.*

- Other requirements that an organization has to maintain – e.g., funders, certification bodies, umbrella organizations
- Good governance and administration, e.g., maintain corporate history, comply with donor’s restriction, mitigate risks, prepare for legal challenges (e.g., CRA audits, law suits, insurance claims)
- Understand records requirements
- Adopt and implement records policy

## 4. WHAT BY-LAWS? WHO NEEDS BY-LAWS!

**“We don’t want to spend legal fees drafting by-laws, after all they are all the same. We took the by-laws from the foodbank next door and adopted it for our church. Voila, what a piece of artwork!”**

- By-laws is a living document and must reflect the uniqueness of each organization
- Internal governance process of a foodbank is very different from that of a church
- One size of by-laws does not fit every situation

**“We never follow our by-laws! In fact, I don’t even know where it is. It might be in the big book we got from our lawyer. And who has that big book?”**

- Important to ensure legality of proceedings
- Not following by-laws may invalidate decisions made, and make them subject to challenge
- Normally, when a lawyer incorporates a corporation, the lawyer would also prepare a corporate minute book (the “big book”?) containing key governing documents, e.g., articles of incorporation, by-law, initial organizational minutes, registers (i.e., listing) of members/directors/officers
- Minute book is a key part of the records
- Must keep the minute book in a safe place and continue to upkeep it

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**“Our by-law is too long, can we shorten it to 2 pages?”**

**“We do not understand our by-law, it is drafted by a lawyer!”**

- By-laws is a living document that reflects how the members of the organization want to operate
- By-laws set out rules for basic corporate structure and process, e.g.,
  - Membership – structure and meetings
  - Board - structure and meetings
  - Officers
  - Other key issues, e.g., who can do banking and sign documents, indemnity, conflict of interest

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- Must comply with legal requirements:
  - Incorporating legislation
  - Common law
  - Good governance and best practices
- Cannot be too brief
- Clear wording and plain language
- Anticipate potential problems and provide simple solutions
- Number all by-laws
- Keep records of historical by-laws
- Requires clear legal drafting, not creative novel writing

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**“Our members approved by-laws changes at our AGM. They are in our minutes.”**

- There are generally 3 ways to amend by-laws
- Adopt resolution – Generally not recommend, easy for changes to get lost and buried in the minutes
- Adopt amending by-law - Suitable when few changes
  - Pro – present short amending by-laws for adoption, easy for directors and members to understand
  - Cons – Need to refer back and forth with original by-law and amending by-law (but can prepare consolidated by-law for reference)
- Adopt new general operating by-law- Suitable when there are lots of changes
  - Pro – All changes are in one by-law
  - Cons – Entire by-law is open for amendment

## 5. WHO ARE OUR MEMBERS?

**“We do not have members, we only have directors”**

- Corporations and unincorporated associations must have members
- Membership can be:
  - Open – broad-based or narrow
  - Closed – directors and members are the same persons
- Generally no legal requirements on the minimum or maximum number of members

**“I am so excited that my 10 year old child just became a member of our church!”**

- Generally not a good idea to have minors as members
- Members have a lot of rights under the OCA, ONCA, CNCA
- Can affect membership notice and quorum requirements
- Not recommended to make minors “non-voting members” – because CNCA and ONCA have class veto rights on certain decisions
- Can make minors a non-membership category of persons, as such “adherents” or “youth participants”

## 6. I LOVE MEMBERSHIP MEETINGS!

**“We only have 5% of our members come to our AGMs”**

- Important for by-laws to require an appropriate quorum level
- May set a percentage or a number
- Not too high to make it difficult to make quorum
- Not too low so that a small group of members could highjack the meeting
- Needs to reflect the needs of the organization and what is practical
- If by-laws is silent, OCA, ONCA and CNCA default is majority of members



**“We do not want members to be able to call meetings”**

- Members have the right to requisition members meetings - OCA and ONCA (10%), CNCA (5%)
- ONCA and CNCA allow members to submit “proposals” – any member may submit a “proposal” to bring a matter to discuss at AGM (detailed rules in ONCA and CNCA)
- For unincorporated associations, depends on what the constitution and by-laws provide

**“The proxy form drafted by our lawyer is too complicated?”**

- A proxy gives the proxyholder the right to vote at membership meetings on behalf of the appointing member
- A proxy must comply with the requirements in the incorporating legislation (e.g., CNCA contains very detailed prescriptive rules)
- A proxy must also reflect rules in common law, e.g, how the proxy forms are designed and drafted, how proxies are solicited, collected, tracked etc.
- Proxies must be clear in order to avoid future litigation involving proxies
- Need to consider how to track and count proxies

**“We can’t hold our AGM this month. Oh well, we will just hold it in 3 months.”**

- Must comply with requirements in incorporating legislation when to hold AGMs
- OCA and ONCA - not later than 15 months after last AGM
- CNCA rule - not later than 15 months after last AGM, but not later than 6 months after fiscal year end
- If not incorporated, no legal requirement – check constitution or by-laws
- Registered charities – must file T3010 within 6 months after fiscal year end. Should have FS approved by the members by then even if no other legal requirements to do so

**“What is a special business vs special resolution? I am confused!”**

- These are terms defined in ONCA and CNCA
- They are not related and are not the same
- “Special resolution” means 2/3 of the votes cast
- “Special business” means any matters for decision at an AGM that are not consideration of the financial statements, public accountant’s report, election of directors and re-appointment of the incumbent public accountant
- Notice of AGM must (a) state the nature of special businesses in sufficient detail to permit a member to form a reasoned judgment on the business; and (b) state the text of any special resolution to be presented for adoption

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## 7. WHO? HE IS ON OUR BOARD? OH NO!

**“He is a bad guy on our board, the board just removed him from our board at our last board meeting! Phew!”**

- OCA used to allow the board to remove a board member
- OCA was amended Nov 14, 2017, to prohibit this, subject to by-law provisions reflecting the old rules
- OCA, ONCA and CNCA – directors can only be removed by simple majority vote of members

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**“Our by-laws states that we can have 5 to 10 directors”**

- OCA – by-laws must have a fixed number of directors, does not permit a board to have a minimum range
- ONCA, CNCA – can have flexible board size, but members need to “fix” number of directors when there is a change

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**“We have 150 directors on our board”**

- OCA and ONCA – there must be at least 3 directors
- CNCA –
  - soliciting corporation must have at least 3 directors
  - non-soliciting corporation can have as few as 1 director
- Maximum number of directors
  - No legal rules
  - Too many directors make it difficult for discussions, and to keep confidentiality
  - Generally 5 to 11 is suitable for most organizations

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**“They won’t let me submit a nominations form to nominate you, but I am going to nominate you from the floor regardless!”**

- OCA – silent on nomination rules, therefore subject to nomination policy adopted by the corporation
- ONCA and CNCA give members specific rights to nominate directors that trumps nomination policy
  - 5% of members can submit a proposal to nominate directors (specific rules in ONCA and CNCA on how to submit a proposal)
  - Any member can nominate from the floor

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**“John cannot come to our board meeting this Sunday, he wants to appoint a proxy. He said he appointed one for our AGM!”**

- It is not permissible for directors to appoint proxies
- A director has to fulfill fiduciary duties, something that cannot be delegated to a proxyholder
- If a director cannot attend a board meeting in person, the director can attend by conference call
- Members do not have fiduciary duties, therefore a member can appoint a proxy if permitted by the incorporating legislation and by-laws

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**“He is on our board all right, but he never shows up at our board meetings! Let’s just make him a non-voting director. That would make him feel warm and fuzzy!”**

- Directors of not-for-profits have onerous fiduciary duties to fulfill
- Directors of charities have additional duties as quasi trustees for charitable property
- One key way for a director to discharge fiduciary duties is by attending board meetings and expressing their views by voting
- Non-voting directors – the worst case scenario
  - Have onerous fiduciary duties to fulfill
  - Cannot vote and therefore no means to express their views by a vote

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**“It is an in camera meeting, who needs minutes!  
Where is the camera?”**

- Still need to keep minutes to document the discussion and decisions made
- After in camera meeting, record decision in open meeting minutes
- Need to be careful how to keep the minutes confidential, e.g., print in special color paper, locked in special cabinet, special circulate by email
- Consider adopting policy on in camera meetings

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## **8. MEETING IS FUN!**

**“He did not vote. Should we count him in the no vote?”**

- Depends on how the by-laws is drafted
- For example 10 members, 7 attended, 5 voted
- Majority of all members = 6 (i.e., persons absent will be counted against the motion)
  - Majority of those present = 4 (i.e., persons who abstained will be counted against the motion)
  - Majority of those who voted = 3 (i.e., only persons who voted against the motion will be counted against the motion)

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**“We make decisions by simple majority vote, so we count 50% plus 1.”**

- They are not the same!
- For example 10 members, 7 attended, 5 voted
- Simple majority (of votes cast) = 3
  - 50% plus 1 = 4
    - 50% of 5 = 2.5
    - 2.5 + 1 = 3.5
    - Have to round up to 4 because you can not have half a person!

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**“We could not set up a conference call for the board meeting. We will just circulate the resolution by email.”**

- OCA, ONCA, CNCA rules – Board and members can only make decision by one of two ways:
  - Hold a meeting – can be physical meeting, by telephone or electronic means
  - Written resolution which require unanimous consent
- Common law rules – A valid meeting must allow participants to communicate adequately with each other during the meeting so that they can have a meaningful discussion. Therefore, asking members/directors to indicate their wishes by email is NOT a valid means to meet

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## 9. Audits?

**“Do we need an audit of our financials? They are so expensive! My company never needed an audit”**

- Whether an audit is required depends on the incorporating legislation
- This is NOT an accounting issue
- The rules for not-for-profits are different from those for for-profits
- OCA
  - Default – audit is required
  - Exemption – Audit may be waived only if (a) the revenue for that year is \$100,000 or less, AND (b) approved by 80% of the votes cast by the members to waive an audit for that year

- ONCA
  - Whether an audit or review engagement is required or may be waived depends on
    - Whether the corporation is a “public benefit corporation” as defined in the ONCA
    - Gross revenue for that year
  - See tables in following slides



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

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%)

- CNCA
  - Whether an audit or review engagement is required or may be waived depends on
    - Whether the corporation is a “soliciting corporation” as defined in the CNCA
    - Gross revenue for that year
  - See tables in following slides

Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Soliciting	Designated	\$50,000 or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	More than \$50,000 and up to \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit, but members can pass a special resolution to require a review engagement instead
	Non-Designated	more than \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Non-Soliciting	Designated	\$1 million or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	more than \$1 million	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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- Unincorporated association and trusts – up to you
  - Other considerations – benefits of audited financial statements
    - Provides transparency to members and public
    - Helps directors discharge fiduciary duties
    - Good due diligence and therefore helps to establish a due diligence defence
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