

---

**THE OTTAWA REGION**  
**Charity & Not-for-Profit Law Seminar**

**Ottawa – February 16, 2011**

---

**Recent Corporate Law Reform:  
Overview and Practical Tips**

---

**By Jane Burke-Robertson, B.A., LL.B.**

janebr@carters.ca

1-866-388-9596


© 2011 Carters Professional Corporation

**CARTERS**

**Carters Professional Corporation / Société professionnelle Carters**  
Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce  
[www.carters.ca](http://www.carters.ca)   [www.charitylaw.ca](http://www.charitylaw.ca)   [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca)

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

---



**CARTERS**  
BARRISTERS  
SOLICITORS  
TRADEMARK AGENTS

**THE OTTAWA REGION  
Charity & Not-for-Profit Law  
Seminar  
Ottawa – February 16, 2011**

**Recent Corporate Law Reform:  
Overview and Practical Tips**

**By Jane Burke-Robertson**  
janebr@carters.ca  
1-866-388-9596

© 2011 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION  
TOLL FREE: 1-877-942-0001

Ottawa Toronto Mississauga Orangeville  
[www.carters.ca](http://www.carters.ca) [www.charitylaw.ca](http://www.charitylaw.ca) [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca)

---

---

---

---

---

---

---

---

---

---

2

**TOPICS FOR REVIEW**

- Part I: The *Canada Not-For-Profit Corporations Act* ("CNCA")
  - Existing Corporations/New Corporations
  - Essentials to know
  - Provisions to be aware of
- Part II: The *Ontario Not-For-Profit Corporations Act* ("ONCA")
  - Overview of ONCA

[www.carters.ca](http://www.carters.ca)[www.charitylaw.ca](http://www.charitylaw.ca)

---

---

---

---

---

---

---

---

---

---

3

**PART I: CANADA NOT-FOR-PROFIT CORPORATIONS ACT ("CNCA")**

1. Status

- On June 23, 2009 *Canada Not-for-Profit Corporations Act* ("CNCA") received Royal Assent, but not yet proclaimed in force
- Draft regulations were published by Industry Canada on June 25, 2010 but not yet finalized
- Estimated that CNCA will come into force in mid-2011

[www.carters.ca](http://www.carters.ca)[www.charitylaw.ca](http://www.charitylaw.ca)

---

---

---

---

---

---

---

---

---

---

4

- 2. Existing Corporations
  - Continuance
    - The new rules do not apply automatically to CCA corporations
    - Existing CCA corporations will be required to continue under the CNCA within 3 years of proclamation. This means you will need to:
      - Review your letters patent and by-laws
      - Contact CRA (if a registered charity) where there are proposed changes to the purpose
      - Prepare articles, notice of directors and notice of registered office

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

5

- Create new by-laws
- Get members approval
- File required documents with IC
- IC will issue a Certificate of Continuance
- Can make amendments to existing articles, letters patent or memorandum or articles of association, at the time of applying for continuance

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

6

- What Information must be included in the Articles of Continuance?
  - Corporation's name
  - Province or Territory where the registered office is situated
  - Min. and Max. number of directors or fixed number
  - Statement of purpose
  - Restrictions on activities, if any

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

7

- Content of Articles of Continuance
  - The classes, or regional or other groups of members that the corporation is authorized to establish
  - Statement regarding distribution of property on dissolution
  - Any additional provisions that Corporation may want in its articles

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

8

- By-laws
  - By-laws will need to be replaced or substantially revised
  - CCA contained very few rules so lengthy and detailed by-laws were necessary
  - Minimalist approach to by-law drafting. CNCA contains detailed provisions and rules for corporations to follow so by-laws do not require same level of detail

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

9

- By-laws
  - No Ministerial approval of by-laws needed, although must file by-laws with Industry Canada within 12 months of membership approval (but failure to file does not affect validity)

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

10

- By-laws
  - CNCA provides both a general framework and sets of rules for corporations to operate. Three types of rules in CNCA:
    - Default rules - By-laws or articles can override
    - Mandatory rules – Cannot be overridden by the articles or by-laws
    - Alternate Rules – Articles/ by-laws can include certain optional rules provided by CNCA

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

11

- By-laws
  - “Default rules” in CNCA –apply automatically where by-law 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 is permitted
    - A majority of members constitutes a quorum

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

12

- “Default Rules”
  - 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

13

- "Mandatory Rules"
  - Rules that cannot be overridden by the articles or by-laws. Examples:
    - Directors are elected by members
    - Directors can be removed by majority vote of members (or by class vote)
    - By-laws must contain conditions for membership in the corporation
    - Notice of meetings of members - must comply with the regulations

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

14

- "Alternate Rules"
  - Optional rules that are provided by the CNCA. Examples:
    - Consensus decision-making
    - Appointment of directors – (must be in articles)
    - Can send notice to members that financial statements available at registered office (instead of default rule which states that statements be sent to members 21-60 days before the annual meeting)

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

15

- "Alternate Rules"
  - Requisition of meeting – default rule is 5% of members (CNCA permits by-laws to specify a lower but not higher amount)
  - Can specify that absentee voting will be allowed by proxy, mailed in ballot or telephone/electronic means (not permitted unless in by-laws)
  - The articles may require a greater number of votes of directors or members to effect any action (except removal of directors)

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

16

- Timing of Continuance
  - Some corporations will want to continue right away, others will wait
  - Some considerations
    - Increased director protection
    - Existing by-laws already require amendment
    - Contemplation of fundamental changes
    - Different levels of financial review

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

17

- Transition Process
  - Make sure you have a copy of your current by-laws (ask IC if not sure)
  - Prepare early by carrying out a review of existing by-laws so can anticipate changes that will be needed
  - Industry Canada will have a number of useful transition resources
  - CRA expected to provide guidance for registered charities - amendment of charitable objects on continuance expected to trigger CRA review

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

18

3. New Corporations

- Simplified Process of Incorporation
  - Incorporation "as of right"
  - One incorporator (individual or corporation)
  - No legal element, like "corp" needed and same name clearance rules as CCA
  - Results in certificate of incorporation instead of letters patent

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

19

- Articles
  - Articles of incorporation contain same content as articles of continuance (discussed earlier)
  - Different format
  - Must file Notice of Directors and Notice of Registered Office
- By-laws
  - Refer to earlier discussion regarding by-laws

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

20

4. Essentials to Know

- Soliciting and non-soliciting corporations
  - Where a corporation receives more than the prescribed amount [\$10,000] in its last financial period from public sources [(a) public donations, (b) federal, provincial and municipal governments or (c) conduit entities], it will become a soliciting corporation
  - Status acquired on the prescribed date [AGM] for a prescribed duration [3 years]
  - Low threshold means most corporations will become soliciting corporations

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

21

- Implications of being a soliciting corporation
  - Must have a minimum of 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates
  - Required to file annual financial statements with The Director under s. 176(1)
  - Audit and public accountant rules more stringent
  - On liquidation, the articles must provide for the distribution of any remaining property on dissolution to qualified donees

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---



22

- Directors – Number and Change
  - Minimum of 1 director (3 for a soliciting corporation, at least 2 of whom are not officers or employees of the corporation or its affiliates)
  - Must file notice of change within 15 days of any change or of a change in a director's address

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

23

- Directors Taking Office
  - Elected by members by ordinary resolution at an annual meeting for a term expiring within prescribed period of 4 years
  - May have staggered terms
  - Articles can provide for appointment of directors by board (up to 1/3 of those elected at previous AGM)

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

24

- Ex-Officio Directors
  - Ex-officio directors not permitted but there may be possible "work arounds"
  - For instance, having special membership class of one member, which class would have the right to elect a director
  - Or possible for the articles to provide for the appointment of directors by the board and have a board policy that certain office holders will be appointed as directors

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

25

- Members
  - A corporation must have members
  - Can have one class of members in which case all are voting; or
  - Two or more classes as long as articles give right to vote to at least one class

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

26

- Members
  - Where more than one class, the members of each class have certain built in protections
  - All classes of members, even non-voting classes of members, are entitled to vote separately as a class on certain amendments to articles and by-laws dealing with rights and classes of membership

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

27

- Members
  - Where more than one class, voting takes place by class where change to one class
  - Thus a class of members could reject a change - effectively resulting in a class veto (limited opt-out available)
  - Corporations wanting maximum flexibility will have one class of members

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

28

- Members' Meetings
  - Regulations provides a variety of prescribed means of giving notice of members' meetings
  - By-law can set out any prescribed method of absentee voting (mail in ballot, electronic voting or proxy)
  - May participate in members' meetings by electronic means
  - By-laws can provide for consensus decision making
  - Right to requisition a meeting of members

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

29

- Two Types of By-laws: Different Levels of Approval
  - Type 1: "General By-laws" effective upon passage by the board by ordinary resolution
  - Must be confirmed by members at next meeting to remain in force
  - Type 2: "Special By-laws" providing for matters affecting member's rights such as: Notice of meetings of members, membership transferability, amendments to membership conditions, absentee voting by members
  - Effective when confirmed by members by special resolution (no need for board approval)

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

30

- Two Types of By-laws: Different Levels of Approval
  - By-laws drafted under CNCA must be very clear about which amending formula applies to various provisions (or risk certain by-law provisions not being legally in force). Some options:
    - Have two by-laws with all by-law provisions requiring special resolution in one separate by-law
    - Have one by-law but place all provisions requiring special resolution in one clearly marked section
    - Have one by-law and provide in articles that all by-law amendments require a special resolution

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

31

4. Other Provisions to be Aware of

- Members' Rights
  - Right to submit proposals to amend by-laws or nominate directors or require any matter to be discussed at annual meetings
  - Right to access corporate records
  - May sign resolutions in writing
  - Availability of unanimous members agreement (except for soliciting corporations)

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

32

- Members' Remedies
  - Right to seek an oppression remedy against the corporation
  - Right to seek a court order to commence a derivative action
  - Compliance and restraining orders
  - Court ordered wind-up and liquidation on application of a member

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

33

- Special Exemption for Religious Corporations
  - CNCA precludes the members' remedies, referred to above where the court determines that:
    - The corporation is a religious corporation
    - The act or omission, conduct or exercise of powers is based on a tenet of faith held by the members of the corporation; and
    - It was reasonable to base the decision on a tenet of faith, having regard to the activities of the corporation (ss. 251(3), 253(2) and 224(2))

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

34

- Due Diligence Defence – Directors and Officers
  - Not liable if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
  - Good faith reliance on financial statements and reports of professionals

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

35

**PUBLIC ACCOUNTANT AND FINANCIAL REVIEW**

- CNCA divides corporations into two categories for purpose of determining obligation to appoint a public accountant and the corresponding level of financial review required:
  - Designated corporations:
    - A soliciting corporation with gross annual revenues for its last completed financial year that is equal to or less than \$50,000 or that is deemed to have such revenues under the Act; and

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

36

**PUBLIC ACCOUNTANT AND FINANCIAL REVIEW**

- A non-soliciting corporation with gross annual revenues for its last completed financial year that is equal to or less than \$1 million
- Non-designated corporations are soliciting and non-soliciting corporations with annual revenues in excess of these amounts

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

37

**PUBLIC ACCOUNTANT AND FINANCIAL REVIEW**

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.

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

---

---

---

---

38

**PUBLIC ACCOUNTANT AND FINANCIAL REVIEW**

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.

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

---

---

---

---

39

**PART II: ONTARIO NOT-FOR-PROFIT CORPORATIONS ACT ("ONCA")**

1. Historical Context

- The Ontario *Corporation Act* ("OCA") has not been substantively amended since 1953
- Bill 65 introduced the new Ontario *Not-For-Profit Corporations Act* ("ONCA")
- ONCA introduced on May 12, 2010 and received Royal Assent on October 25, 2010
- ONCA not expected to be proclaimed in force until sometime in 2012
- Draft regulations not yet released

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

---

---

---

---

40

- 2. Overview of the Key Elements of the ONCA
  - Simplified Process of Incorporation
    - Replaces the letters patent system with a statutory regime similar to CNCA and OBCA
    - Removes ministerial discretion to incorporate (incorporation is as of right)
    - Only one incorporator needed (individual or corporation)
    - Results in certificate of incorporation instead of letters patent

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

41

- Public Benefit Corporations (PBC)
  - Public Benefit Corporations (PBC) include
    - A charitable corporation (at common law), or
    - A non-charitable corporation that receives more than \$10,000 in a fiscal year in funding from public donations or the federal or provincial governments, or a municipality (1(1))
  - When a non-charitable corporation reaches the \$10,000 threshold, the PBC status won't attach until the first annual meeting of members in the next fiscal year (s.1(2))

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

42

- Consequences of Being a Public Benefit Corporations (PBC)
  - Not more than one-third of the directors of a PBC may be employees of the corporation or of any of its affiliates. (23(3))
  - Higher thresholds for dispensing with the auditor and/or review engagement

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

43

- On liquidation, the articles must provide for the distribution of any remaining property on dissolution to
  - If it is a charitable corporation, to a charitable corporation with similar purposes to its own or to a government or government agency,
  - If it is a non-charitable corporation, to another public benefit corporation with similar purposes to its own or to a government or government agency (s.167(1))

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

44

- Directors – Number and Change
  - Minimum of 3 directors. Directors are elected at meetings of members.
  - Appointment of directors – (Same as CNCA) The board may appoint one or more additional directors as long as the number of appointed directors does not exceed one-third the number of elected directors. The term of appointment lasts until the next AGM.

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

45

- Unlike CNCA, ONCA specifically permits ex-officio directors (s.23(4))
- Directors and Officers – Duties
  - Same as CNCA. Every director and officer has a duty to:
    - Act honestly and in good faith with a view to the best interests of the corporation
    - Exercise the care, diligence and skill of a reasonably prudent person

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---



46

- Due Diligence Defence – Directors and Officers
  - Generally the same as CNCA
  - Not liable if exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
  - Good faith reliance on financial statements and reports of professionals

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

47

- Members' Rights
  - A member entitled to vote at an annual meeting may raise any matter as a "proposal" but must give 60 days notice. Directors can refuse to discuss the proposal if they give at least 10 days notice, but a member may appeal the refusal decision to court .
  - Members may requisition meetings of the members (but need 10% of the votes to do so, or lower if the by-laws so states)
  - Right to access membership lists
  - Right to inspect financial records

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

48

- Members' Remedies
  - Unlike the CNCA, no oppression remedy exists under the ONCA
  - Right to seek a court order to commence a derivative action
  - Derivative action is not available with regard to religious corporations (s.183(3)), but religious corporations not defined

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

49

- Non-voting members are given voting rights in some limited circumstances
  - An extraordinary sale ( which is defined as a “lease or exchange of all or substantially all of the property of the corporation”)
  - An amalgamation
  - A change to any rights or conditions attached to those non-voting members or a change in the rights of other classes of members relative to the rights of the non-voting members

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

---

---

50

**Audit Requirements**

Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation (PBC) with GAR of →	Less than \$100,000 (s.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%)
	Over \$100,000 but less than \$500,000 (s.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%)
	Over \$500,000 (s.68)	An auditor must be appointed annually	Audit is required

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

---

---

51

Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
NON-PBC corporation with GAR of →	Less than \$500,000 in annual revenues (s.76(2)(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%)
	Over \$500,000 (s.76(2)(a))	May, by extraordinary resolution (80%), dispense with an auditor and have someone else conduct a review engagement.	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

---

---

52

- Continuing under the ONCA
  - Existing OCA corporations will be required to continue under the ONCA within 3 years of it coming into force
  - Social clubs with share capital will have 5 years
  - OCA corporations can, by articles of amendment, amend any provision in its letters patent, supplementary letters patent, by-laws or special resolution to bring the provision into conformity with the ONCA

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

53

- By-laws
  - ONCA will contain much of what used to be required in the by-laws
  - The result will be minimalist approach to by-law drafting similar to the CNCA
  - Need to pass by-laws early on. If by-laws are not passed within 60 days after incorporation, the corporation will be deemed to have passed the standard by-laws approved by The Director (s.18)

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

54

- Directors
  - More flexibility than under OCA. For instance, directors do not have to be members
  - Unlike CNCA, ONCA allows ex-officio directors
  - Unlike the CNCA, an ONCA corporation does not need to specify in the articles for the appointment of additional directors

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

<b>CARTERS</b> BARRISTERS SOLICITORS TRADEMARK AGENTS	<b>Disclaimer</b>
<p>This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.</p> <p>© 2011 Carters Professional Corporation</p>	
CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Ottawa Toronto Mississauga Orangeville <a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.antiterrorismlaw.ca">www.antiterrorismlaw.ca</a>

---

---

---

---

---

---

---

---