
INSTITUTE OF CORPORATE DIRECTORS

York Region Chapter

Thornhill– November 28, 2013

Navigating Changes for Not-for-Profit Corporations – Are you Ready?

By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent

tcarter@carters.ca

1-877-942-0001

© 2013 Carters Professional Corporation



Carters Professional Corporation / Société professionnelle Carters
Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce
www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

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



BARRISTERS
SOLICITORS
TRADEMARK AGENTS

**INSTITUTE OF CORPORATE
DIRECTORS (YORK REGION)**

Thornhill – November 28, 2013

**Navigating Changes For Not-For-Profit
Corporations – Are You Ready?**

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

© 2013 Carters Professional Corporation

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

Ottawa Toronto Mississauga Orangeville
www.carters.ca www.charitylaw.ca www.anti-terrorism-law.ca

2

OVERVIEW

- Status and Overview of the CNCA
- Status and Overview of the ONCA
- Basic Framework of the CNCA and ONCA
- Essential Things to Know About the CNCA and ONCA
- Timing of Continuance/Transition
- Practical Steps

www.charitylaw.ca
www.carters.ca

3

A. STATUS AND OVERVIEW OF THE CNCA

1. Status of CNCA

- Canada Corporations Act ("CCA") since 1917
- Enacted on June 23, 2009, in force October 17, 2011
- Replaces Part II of CCA
- Existing CCA corporations required to continue under the CNCA within 3 years - i.e., by October 17, 2014
- Failure will lead to dissolution of the corporation
- According to Industry Canada, there are an estimated 17,000 Part II CCA non-profit corporations.
- As of October 31, 2013, only 2100 or 15% of not-for-profit corporations incorporated under the CCA had continued under the CNCA

www.charitylaw.ca
www.carters.ca

4

CONTINUE

2. Overview of CNCA Continuance Process

- CNCA continuance process requires that all CCA corporations:
 - Review Letters Patent and By-laws
 - Prepare Articles of Continuance, Notice of Directors and Registered Office, and new By-laws
 - Get membership approval - Articles must be approved by 2/3 vote of members
 - File required documents with Industry Canada, no filing fee
 - Industry Canada will issue a Certificate of Continuance
 - Need to file approved new By-laws within 12 months of adoption
 - Charities - send Certificate of Continuance, Articles of Continuance and new By-law to CRA

www.charitylaw.ca
www.carters.ca

5

3. Resources For CNCA

- Corporations Canada's website
http://strategis.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs03925.html
 - Transition Guide
 - How to operate under the CNCA
 - Model by-law and by-law builder
- Paper by Theresa Man "Working With The Canada Not-for-profit Corporations Act: Incorporation And Continuance" April 8, 2013
<http://www.carters.ca/pub/article/charity/2013/tlm0408.pdf>
- Charity Law Bulletins* on "Countdown to the Canada Not-For-Profit Corporations Act - Practice Tips" 1 to 9, Bulletin Nos. 191, 193, 199, 213, 215, 220, 231, 239, 247

www.charitylaw.ca
www.carters.ca

6

B. STATUS AND OVERVIEW OF ONCA

1. Status of ONCA

- The Ontario *Corporations Act* ("OCA") has not been substantively amended since 1953
- The New Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") will apply to OCA Part III corporations
- ONCA received Royal Assent on October 25, 2010 but not expected to be proclaimed until sometime in 2014
- The Provincial Government announced in September 2013 that proclamation of the ONCA would not occur until at least 6 months after the passing of Bill 85 to amend the ONCA introduced on June 5, 2013
- Defined by-laws and plain language guides have been released online at:
<http://www.sse.gov.on.ca/mcs/en/Pages/onca6.aspx>

www.charitylaw.ca
www.carters.ca

7

transition


- Unlike the CNCA
 - 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 proclaimed in force
 - Subject to Bill 85, if no transition process taken:
 - Corporation will not be dissolved
 - LP, SLPs and by-laws will be deemed amended to comply with ONCA requirements, resulting in non-compliant provisions deemed invalid
 - Will result in uncertainty in relation to which provisions remain to be valid
 - Better to do transition process to avoid confusion interpreting by-law provisions

www.charitylaw.ca
www.carters.ca

8


transition

- Bill 85 amendments to ONCA received first reading June 6, 2013 and includes the following changes:
 - \$10,000 threshold for public benefit corporations can be changed by regulations
 - Consents to be a director must be in writing
 - Members' right to class vote by non-voting classes is delayed until proclaimed in force at least three years after proclamation of the ONCA
 - Clarification that non compliant provisions of letters patent and bylaws will continue to be in effect until the earlier of the date of amendment and three years from proclamation



Clarifying
www.charitylaw.ca
www.carters.ca

9



Requirements

- New requirement that 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 the 3 year period
- Any amendments to articles, by-laws and special resolutions will require that all article, by-law and special resolution amendments required under the ONCA be adopted

www.charitylaw.ca
www.carters.ca

10

2. Overview Of ONCA Transition Process

- ONCA transition process requires that all OCA corporations within three years of proclamation will need to:
 - Review letters patent and by-laws
 - Prepare articles of amendment and new by-laws
 - Get membership approval
 - File required documents for certificate of amendment
 - Certificate of amendment will be issued
 - Charities - send certificate of amendment, articles of amendment and new by-law to CRA
- 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*

www.charitylaw.ca
www.carters.ca

11

3. Resources For ONCA


- 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
- To view Bill 85
http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2812
- Ministry updates
http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx

www.charitylaw.ca
www.carters.ca

12

C. BASIC FRAMEWORK OF THE CNCA AND ONCA

- Both the CNCA and the ONCA are conceptually structured on a business corporate model which gives enhanced rights of members
- Member rights are now similar in many respects to rights of shareholders
- Necessary to know the rules in the Act
- CNCA - lots of details in the regulations with reference to "prescribed"
- ONCA - less details in the regulations
- Need to refer back and forth between the applicable acts and the related regulations
- Articles - similar to birth certificate
- By-laws - operating structure



www.charitylaw.ca
www.carters.ca

13

- CNCA - unanimous member agreement is an option for non-soliciting corporations
- CNCA/ONCA provides both a general framework and a set of rules for corporations to operate
- Three types of rules in CNCA/ONCA
 - 1 – Mandatory Rules - Cannot be overridden by the articles or by-laws
 - 2 – Default Rules - By-laws or articles can override
 - 3 – Alternative Rules - Articles/ by-laws can include certain optional rules provided the Act

www.charitylaw.ca
www.carters.ca

14

D. ESSENTIAL THINGS TO KNOW ABOUT THE CNCA AND ONCA

1. Incorporation as of Right

- Incorporation as of right under CNCA and ONCA
- Obtain certificate of incorporation, not letters patent
- Simpler and faster process
- One or more persons can be incorporators
- Replaces the letters patent system with a statutory regime
- Removes ministerial discretion to incorporate
- Corporation has the capacity, rights, powers and privileges of a natural person
- Eliminates the concept of a corporation's activities being *ultra vires*

www.charitylaw.ca
www.carters.ca

15

2. Corporations that Receive Public Funding


- Corporations that receive public funding are subject to special requirements
- Different rules in the CNCA and ONCA
- CNCA - Soliciting and Non-soliciting Corporations
 - All corporations categorized into soliciting and non-soliciting corporations
 - If a corporation receives more than \$10,000 in its last financial period from public sources, it will become a soliciting corporation
 - 3 year status - from the AGM in the following fiscal year for 3 years

www.charitylaw.ca
www.carters.ca

16

(CNCA cont'd)


- Public sources
 - (a) requests for donations or gifts from persons who are not
 - o members, directors, officers, or employees of the corporation at the time of the request
 - o legal or common law spouse of the above persons
 - o children, parents, brothers, sisters, grandparents, uncles, aunts, nephews or nieces of the above persons
 - (b) grants or other similar financial assistance received from the federal or a provincial or a municipal government, or agencies of such government
 - (c) donations or gifts received from a soliciting corporation



www.charitylaw.ca www.carters.ca

17

- 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 Industry Canada
 - Audit and public accountant rules more stringent (see later in presentation)
 - On liquidation, the articles must provide for the distribution of any remaining property on dissolution to qualified donees (e.g. registered charities, governments in Canada, the United Nations etc.)




www.charitylaw.ca www.carters.ca

18

(CNCA cont'd)


- Corporations need to monitor funding sources and carefully track soliciting status
- If a corporation is concerned about oscillating in and out of soliciting status, can voluntarily be structured as a soliciting corporation
 - Ensure at least 3 directors and at least 2 are not officers or employees of the corporation or its affiliates
 - Ensure the articles provide that property will be paid to qualified donees on dissolution
 - Do not enter into unanimous member agreement



www.charitylaw.ca www.carters.ca

19


- ONCA - Public Benefit Corporations (PBC)
 - PBCs include
 - Charitable corporations - common law definition
 - Non-charitable corporations that receive more than \$10,000 in a fiscal year in funding from public donations, the federal or provincial governments, or a municipality or agency
 - 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
 - PBC status in place for one year



www.charitylaw.ca www.carters.ca

20


- Consequences of being a PBC
 - Not more than one-third of the directors of a PBC may be employees of the corporation or of any of its affiliates
 - Higher thresholds for dispensing with the auditor and/or review engagement requirements (see later in presentation)
 - On liquidation, the articles must provide for the distribution of any remaining property on dissolution
 - Charitable corporation - to a charitable corporation with similar purposes to its own or to a government or government agency,
 - Non-charitable corporation - to another PBC with similar purposes or to a government or government agency



www.charitylaw.ca www.carters.ca

21

- Low threshold means many corporations may become soliciting/PBC corporations
- Solution?
 - Monitor funding sources and quantum to see when a change in status may occur, or
 - Voluntarily be structured as a soliciting/PBC corporation



www.charitylaw.ca www.carters.ca

22

3. Public Accountant and Financial Review

- CNCA
 - Corporations divided into two categories
 - “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 CNCA
 - 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.charitylaw.ca
www.carters.ca

23

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.charitylaw.ca

www.carters.ca

24

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.charitylaw.ca

www.carters.ca

25

- ONCA
 - PBCs are subject to higher thresholds for dispensing with the auditor and/or review engagement

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

www.charitylaw.ca

www.carters.ca

26

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%)


www.charitylaw.ca

www.carters.ca

27

4. Directors – Number and Change

- CNCA
 - Minimum 1 director
 - For soliciting corporations - minimum 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates
 - Articles may provide a minimum and maximum range
- ONCA
 - Minimum 3 directors
 - For PBCs - not more than one-third of the directors may be employees of the corporation or of any of its affiliates
 - Articles may provide a minimum and maximum range



www.charitylaw.ca
www.carters.ca

28


5. Directors Taking Office

- CNCA
 - Elected by members by ordinary resolution at an annual meeting
 - Maximum 4 year term (but no limit on number of maximum terms)
 - Ex-officio directors not permitted, so need to find "work arounds"
 - e.g. Separate membership class for each ex-officio director
 - e.g. Qualification requirements to be a director reflect requirements of ex-officio directors
 - e.g. Ex-officio members with directors being limited to its members

www.charitylaw.ca
www.carters.ca

29

- May have staggered terms
- Articles can provide for appointment of directors by board (up to 1/3 of those elected at previous AGM)
- A director must be present when elected or sign a consent
- May be removed at anytime by a majority vote of members, which percentage vote cannot be increased



www.charitylaw.ca
www.carters.ca


30

- ONCA
 - Elected at meetings of members
 - Board may appoint one or more additional directors up to 1/3 of the number of elected directors to hold office until the next AGM
 - Ex-officio directors continue to be permissible
 - Directors are no longer required to be corporate members
 - Maximum 4 year term (but no limit on number of maximum terms)
 - May have staggered terms
 - Directors must sign a consent
 - May be removed at anytime by majority vote of members

www.charitylaw.ca
www.carters.ca

31

6. Directors and Officers – Powers, Duties and Defence



- Similar rules in CNCA and ONCA state that “the directors shall manage or supervise the management of the activities and affairs of the corporation”

Every director and officer has a duty to comply with the CNCA/ONCA, regulations, articles and by-laws

- Directors may borrow money on the credit of the corporation without members’ authorization, unless articles or by-laws provide otherwise
- May delegate many duties to one or more directors
- 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

www.charitylaw.ca
www.carters.ca

32

7. Abstention from Voting by Directors

- Abstention voting is no longer possible for directors under both the CNCA or the ONCA
- A director present at a meeting of directors is deemed to have consented to any resolution passed, unless:
 - the director’s dissent is entered in the minutes;
 - the director requests that his or her dissent be entered in the minutes;
 - the director gives his or her dissent to the secretary of the meeting before the meeting is terminated; or
 - the director submits his or her dissent immediately after the meeting is terminated to the corporation
- A director not present at such meeting is deemed to have consented unless, within seven days after becoming aware of the resolution, the director,
 - causes his or her dissent to be placed with the minutes of the meeting; or
 - submits his or her dissent to the corporation

www.charitylaw.ca
www.carters.ca

33

- 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
- Objective standard of care replaces common law subjective standard of care
- 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

www.charitylaw.ca

www.carters.ca

34

8. Members

- Both CNCA and ONCA generally provide for similar principles with regard to members but different rules
- A corporation must have members but directors do not need to be members
- Can have
 - One class of members in which case all are voting
 - Two or more classes as long as articles give right to vote to at least one class
- 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
- Under the ONCA, Bill 85 delays voting rights for non-voting members until at least three years after proclamation

www.charitylaw.ca

www.carters.ca

35

- For CNCA (and possibly ONCA after delayed proclamation of rights of non-voting members) non-voting members, as well as each separate class of voting members, will be given voting rights in certain circumstances, e.g.,
 - Extraordinary sale of assets
 - Amalgamation
 - Continuance to another jurisdiction
 - 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
- Thus a class of members could reject a change - effectively resulting in a class veto (limited opt-out available)
- Corporations wanting maximum flexibility will generally opt to have only one class of members



www.charitylaw.ca

www.carters.ca

36

- Some corporations may want to collapse all membership classes into one class or change non-voting membership classes into "supporters", "adherents" or other non-member type of name
- Timing of such changes will be important for CNCA, since non-voting members will have the right to vote on continuance unless they are removed before application for continuance
- Timing will also be important for the ONCA since on proclamation of the ONCA every voting class membership will have the right to vote as a separate class (i.e. veto) on the matters listed above

www.charitylaw.ca
www.carters.ca

37

- 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 in accordance with the articles or by-laws
 - Rights terminated upon termination of membership
- Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership, provided that the circumstances and the manner of such power is set out in the article or by-law
- ONCA also requires that disciplinary action or termination be done in good faith and in a fair and reasonable manner

www.charitylaw.ca
www.carters.ca

38


9. Members' Meetings

- CNCA
 - Regulations provide a variety of prescribed means of giving notice of members' meetings
 - Default rule is to vote in person, unless participate in meeting electronically
 - By-law can set out prescribed method of absentee voting (mail in ballot, electronic voting or proxy)
 - May participate in members' meetings by telephone or electronically
 - Proxy voting need not be limited to members
 - By-laws can provide for consensus decision making
 - Right to requisition a meeting of members (5% members)
 - Must give 21 to 60 days notice and include summary of financial statements

www.charitylaw.ca
www.carters.ca

39

- ONCA
 - Every member entitled to vote at a meeting may appoint a proxyholder who does not have to be a member
 - By-laws may provide for three other methods of voting for persons who cannot be present at a meeting in addition to or as an alternative to proxies: by mail, telephone, or by computer (electronic means)
 - Right to requisition a meeting of members (10% members)
 - Notice must be given 10 to 50 days before the meeting with a copy of financial statements if requested
 - May participate in members' meetings by telephone or electronically


Members


www.charitylaw.ca
www.carters.ca

40

10. Members' Rights

- CNCA
 - Right of any member to submit proposals to amend by-laws, or require any matter to be discussed at annual meetings
 - Right to nominate directors (5% member) including nomination at the meeting (need for "advance notice" by-law?)
 - Right to access corporate records, but not director minutes
 - May sign resolutions in writing
 - Availability of unanimous members' agreement (except for soliciting corporations)
 - Default one vote per member, unless articles provide otherwise

RIGHTS



www.charitylaw.ca
www.carters.ca

41

- ONCA
 - Subject to possible future amendments with regard to members voting rights, any member entitled to vote at an annual meeting may raise any matter as a "proposal" but must give 60 days notice
 - A proposal may include nominations for directors if signed by at least 5% of members or such lower percentage set out in the by-laws including nominations at the meeting (need for "advance notice" by-law?)
 - 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 the refusal decision to court

www.charitylaw.ca
www.carters.ca

42



- Members may requisition meetings of the members (but need 10% of the votes that may be cast at a meeting to do so, or lower if the by-laws so states)
- Right to access membership lists - to include name and address, by-laws may provide for more information
- Right to inspect financial records
- There are certain minimum rights in the event of a disciplinary action or termination of membership (e.g. a fair and reasonable process)
- Default 1 vote per member, unless articles provide otherwise

www.charitylaw.ca
www.carters.ca

43


11. Members' Remedies

- CNCA
 - Right to seek an oppression remedy against the corporation where members allege that they have been approved
 - Right to seek a court order to commence a derivative action on behalf of the corporation
 - Restraining orders against the corporation, directors or officers
 - Court ordered wind-up and liquidation on application of a member
 - Court ordered investigation

www.charitylaw.ca
www.carters.ca

44

- ONCA
 - Compliance Order - where 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



www.charitylaw.ca
www.carters.ca

45

- Derivative Action - gives members the right to bring an action in the name of the corporation (except religious corporations) to enforce one of its rights
- Dissent and Appraisal Remedy - the right to a dissent and appraisal remedy is limited to corporations that are not public benefit corporations
- Investigation Order - a member (or holder of debt) may apply to the court for an investigation of the corporation

www.charitylaw.ca
www.carters.ca

46

12. Special Exemption for Religious Corporations

- CNCA
 - Precludes the members' remedies referred to above, where the court determines that:
 - The corporation is a "religious corporation" - but not defined
 - 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
- ONCA
 - "Religious corporations" are exempt from derivative action
 - But again no definition of "religious corporation"

www.charitylaw.ca
www.carters.ca

EXEMPT

47

13. Amalgamations

- CCA corporations, once continued under the CNCA, will be able to amalgamate with one another
- Amalgamations between CNCA and ONCA corporations (as well as other jurisdictions) will also be possible

14. Change of Jurisdiction

- Possible for a corporation from another jurisdiction to be imported and continue as a CNCA or ONCA corporation
- Possible for a CNCA/ONCA corporation to be exported and continued as a corporation under another jurisdiction

www.charitylaw.ca
www.carters.ca

48

15. By-laws

- CNCA - by-laws no longer required to be approved by Industry Canada, but must be filed with Industry Canada within 12 months, but failure to file will not affect validity
- ONCA - no need to file by-laws with the Ministry
- Default by-law will apply if no by-law adopted

16. Audit Committee


- Special rules about committee members, right of public accountant to attend or call committee meetings
 - e.g. Majority of committee members must not be officers or employees of the corporation or of any of its affiliates

www.charitylaw.ca www.carters.ca

49

17. Conflict of Laws


- ONCA must be read in conjunction with applicable charity law - explicit concept in ONCA
- 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 (including special legislation)
 - A charitable corporation, then the legislation applicable to charitable corporations prevails
- As such, some provisions of the ONCA will not apply to charities



www.charitylaw.ca www.carters.ca

50

- 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 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




www.charitylaw.ca www.carters.ca

51

- 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 to place 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

www.charitylaw.ca
www.carters.ca

52



- 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 but must have investment policy and agency agreement in place

www.charitylaw.ca
www.carters.ca

53

- 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
- CNCA is silent on all of these issues but it is likely the same approach would apply

www.charitylaw.ca
www.carters.ca

54

E. PRACTICAL STEPS

1. Collect Governing Documents


- Letters patent, supplementary letters patent
 - Locate all copies
 - Amendments made by board or members resolutions alone not valid, must have SLP issued
 - CCA corporations - can contact Industry Canada to obtain copies
 - OCA corporations - can obtain microfiche copies from Ministry
- All current by-laws, including amendments, corporate minutes
- Other governance related documents: organizational charts, policies, manuals

www.charitylaw.ca
www.carters.ca

55

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? What are they?
- Write them down
- Come up with a wish list



www.charitylaw.ca
www.carters.ca

56

3. Study the Key Features of the CNCA/ONCA and Consider


- Are your current by-laws or desired governance structure and process inconsistent with CNCA/ONCA statutory requirements?
- If inconsistent with statutory mandatory requirement, must comply with them
- If inconsistent with CNCA/ONCA default requirements, is the preferred option permitted under the CNCA/ONCA? Should the option be set out in the articles or by-laws?
- If CNCA/ONCA optional requirements provided, may choose one of the permissible options - Should the option be set out in the articles or by-laws?

www.charitylaw.ca
www.carters.ca

57

4. Drafting New By-laws

- By-laws will need to be replaced or substantially revised because the old and new rules are very different
- Minimalist approach by-laws
 - Rationale: CNCA & ONCA and regulations 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, e.g., committee structures (but not audit committee)



www.charitylaw.ca
www.carters.ca

58


5. General Points

- Industry Canada have continuance tools available, e.g.,
 - Model by-laws (minimalist approach) and by-law builder
 - Guides for transition, operation and incorporation
 - Sample Articles of Continuance
- Ontario Ministry will have continuance tools available, e.g.,
 - Plain language guides
 - Default by-laws
 - Updating the Not-for-Profit Incorporator's Handbook
 - Information sheets


www.charitylaw.ca
www.carters.ca

59

- Some changes may only be administrative
- Some changes may require detailed considerations and consultation with members
- Have someone or a small committee be responsible for the process
- Have the board engaged in the process early on
- Seek legal help to conduct legal review and prepare draft by-laws and articles as required



www.charitylaw.ca
www.carters.ca

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>Disclaimer</h2>		
<p>This powerpoint 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>© 2013 Carters Professional Corporation</p>			
<table border="0"> <tr> <td>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td> <td>Ottawa Toronto Mississauga Orangeville www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca</td> </tr> </table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Ottawa Toronto Mississauga Orangeville www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca
CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Ottawa Toronto Mississauga Orangeville www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca		
