

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p><b>Moving Forward with the ONCA: Understanding Key Provisions and Practical Tips</b></p> <p><b>Webinar - December 8, 2021</b></p>
<p><b>Board of Directors' Issues and Meetings</b></p> <p><b>By Jacqueline M. Demczur, B.A., LL.B.</b> jdemczur@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
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<p><b>A. ROLE OF THE DIRECTORS AND REQUIRED NUMBER</b></p> <ul style="list-style-type: none"><li>• Directors must “manage or supervise the management of [its] activities and affairs”</li><li>• There must be a minimum of 3 directors, regardless of whether the corporation is a registered charity</li><li>• Range of directors is possible under the <i>Not-for-profit Corporations Act, 2010</i> (Ontario) (“ONCA”), provided the minimum and maximum number are in the articles</li><li>• The exact number of directors can be changed within the range by a special resolution (2/3rds vote) of the members</li><li>• Fixed number of directors is also possible if set out in the articles but, if this number changes, then articles of amendment will be required at an additional cost</li></ul>	
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## B. QUALIFICATIONS FOR DIRECTORS

- The mandatory qualification requirements are:
  - Must be an individual
  - Must be 18 years of age or older
  - Cannot have been found incapable of managing property or incapable by any court in Canada
  - Cannot have the status of bankrupt
- Most corporations add extra qualifications to the by-laws, including: (1) raise minimum age; (2) must be member in good standing for period of time before election; (3) if a charity, cannot be an ineligible person under *Income Tax Act* (Canada) (“ITA”), *etc.*
- Consider if these extra requirements only have to be fulfilled at the time of election or are ongoing

- While common, a director does not need to be a corporate member unless required by the by-laws
- No more than one-third of the directors of any public benefit corporation (PBC) can be employees of the corporation or any affiliate
- However, this requirement is not applicable to ONCA corporations with charitable registration under the ITA, *i.e.* no employees can be directors of a charity
- Possible in articles to give a class/group of members exclusive right to elect one or more directors
- ONCA permits *ex officio* directors, *i.e.* by virtue of their office, if the by-laws permit, *e.g.* past president
- Alternate directors not permitted, *i.e.* no person shall act for an absent director at a board meeting

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## C. ELECTION AND APPOINTMENT OF DIRECTORS

- First directors are named in certificate of incorporation of newly established corporations
- Members elect directors at first meeting and each subsequent annual meeting where election needed
- Term of office of any elected director can be 1 year to maximum of 4 years as provided in the by-laws
- ONCA silent on maximum term of office
- Rotating terms for directors is possible
- If not elected for express term, then a director's term will cease at end of next annual members' meeting
- Existing directors, though, remain in office until their successors are elected

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- Where members fail to elect required number of directors, then directors who were elected (provided there is a quorum) may exercise all directors' powers
- Directors can appoint additional directors provided:
  - The appointed director's term is only for 1 year, *i.e.* to the end of the next annual members' meeting
  - The number of appointed directors cannot exceed 1/3 of number elected at last annual meeting
- With certain exceptions, directors must consent in writing within 10 days to hold office, or are deemed not to have been elected or appointed
- Acts still valid even if irregularities after 10 day period
- Directors entitled to attend and be heard at every members' meeting

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## D. NOMINATION OF DIRECTORS

- Under the ONCA, members have the right to nominate candidates for election as directors from the floor at annual meetings
- While it is not possible to prevent members from nominating directors from the floor, one option is to put procedures in place to require members to provide advance notice of any planned nominations
- This is sometimes referred to as an “advance notice by-law” and can be included directly in the corporation’s by-laws if desired

## E. COURT REVIEW OF DIRECTORS’ ELECTION OR APPOINTMENT

- A corporation, or any director or member, can apply to the court to determine any “controversy” about the election or appointment of a director
- The court can make any order “that it thinks fit” to:
  - Restrict the director from acting until dispute over
  - Declare the result of the disputed election
  - Require a new election/appointment with directions
  - Determine members’ voting rights
- An act of a director/officer is valid despite any irregularity in their election or appointment, or defect in their qualifications

## F. WHEN DIRECTORS CEASE TO HOLD OFFICE

- Directors automatically cease to hold office when they: (1) die; (2) resign; (3) are removed from office; or (4) no longer fulfill any mandatory requirements
- A director's resignation is effective at the time that it is received by the corporation or the time specified in the resignation itself, whichever is later
- Mandatory right of members to remove any director(s) by ordinary resolution (majority vote) at special meeting, other than *ex officio* directors – this right *cannot* be changed in the articles or by-laws
- Any director elected by a class/group of members with that exclusive right can only be removed by that class/group by ordinary resolution (majority vote)

- Resulting vacancy in any director's position to be filled at the same members' meeting
- Subject to the by-laws, directors have right to give the corporation a statement providing reasons for:
  - Their resignation; or
  - For opposing their removal as a director if a meeting is called for the purpose of removing them
- If this right is not desired by the corporation, then it can be expressly prohibited in the by-laws
- However, if this right is not prohibited, then the corporation must immediately give its members a copy of the director's statement, with no liability for doing so

## G. FILLING VACANCIES AMONG DIRECTORS

- With certain exceptions, a quorum of directors can fill any vacancy among the directors
- However, where there is no quorum (see below), then remaining directors must call a special members' meeting to fill the vacancy, failing which any member may call the meeting
- Any director elected or appointed to fill a vacancy holds office for the unexpired term of their predecessor
- Where all directors have resigned or been removed without replacement, then the person who manages or supervises the corporation's management is deemed to be a director with certain exceptions

## H. APPOINTMENT OF OFFICERS

- Subject to articles or by-laws, directors designate offices, appoint officers and set their duties
- Directors must appoint a director as chair to carry out the duties set out in the by-laws
- Other standard officers are vice-chair, treasurer and secretary
- Directors can be appointed to any officer position but, except for the chair, it is not mandatory to do so unless stated in the by-laws
- For registered charities though, the corporation must consider restrictions on remuneration of directors who also serve as officers

## I. INITIAL BOARD MEETING

- After incorporation, a first directors' meeting *must* be held (no specified time frame is set by the ONCA) at which they *may* address various matters:
  - Make by-laws
  - Adopt form of corporate records
  - Authorize the issue of debt instruments
  - Appoint officers
  - Appoint an auditor until first annual members' meeting
  - Make banking arrangements
  - Issue memberships
- These matters (and all board business) can be addressed by unanimous written resolutions, but actual meetings are common and best practice if possible

## J. REGULAR BOARD MEETINGS

- Subject to the articles or by-laws, and other than the first meeting, directors can meet at any place and on any notice that the by-laws provide
- Any director can waive a meeting's notice, with attendance at the meeting itself being waiver *unless* it is done to object that the meeting not lawfully called
- Notice does not need to specify business to be transacted at the meeting *unless* it is a section 36(2) matter, *e.g.* appointing directors, approving financials
- Notice of a meeting that continues an adjourned meeting is not required subject to certain conditions
- No proxies or delegates allowed at directors' meetings
- Directors are entitled to attend – no right for members to attend Board meetings

- Quorum is a majority of the directors (or the minimum number required by the articles) unless stated otherwise in the articles or by-laws
- Where there is no quorum because a director has a conflict of interest, the remaining directors are deemed to constitute a quorum to vote on the resolution
- If there is a quorum (even with vacancies), then the directors in office can exercise all directors' powers
- Must maintain quorum throughout board meetings
- Subject to by-laws, if all directors consent, then they can participate in meetings by telephone/electronic means if all participants can communicate adequately
- However, this requirement is temporarily suspended until September 30, 2022 under ONCA regulation

- Written resolutions in lieu of Board meetings are valid if signed by all directors entitled to vote on the matter, with resolutions to be kept in corporate minute book
- Unless ballot is demanded, any entry in the minutes that a resolution was carried or defeated is proof of the same unless there is contrary evidence
- Directors present at board meetings deemed to consent to any resolution passed/action taken unless their dissent is recorded in the minutes (few options)
- If a director votes or consents to a resolution, they are not entitled to enter a dissent later
- If a director not present at the meeting, then they are deemed to have consented to any resolution/action at that meeting, unless they dissent within 7 days of becoming aware of the said resolution/action



## K. DELEGATION BY DIRECTORS

- Directors can appoint managing director or committee of directors and delegate any powers to them except:
  - Submitting questions to members for approval
  - Filling a vacancy among the directors or auditor
  - Appointing additional directors
  - Issuing debt obligations unless authorized by directors
  - Approve financial statements
  - Adopt, amend or repeal by-laws
  - Establish contributions to be made, or dues to be paid, by members

## L. DUTIES OF DIRECTORS (AND OFFICERS)

- Directors held to an objective standard of care in exercising powers and discharging duties to the corporation:
  - Act honestly and in good faith to the best interests of the corporation; and
  - Exercise care, diligence and skill of a reasonably prudent person in comparable circumstances
- Directors must comply with ONCA, its regulations and corporation's articles and by-laws
- Directors cannot contract out of their statutory duties
- Reasonable diligence defence is available, including reliance in good faith on auditor's financial statements, and reports/advice from officers, employees and professional advisors

## M. POWER TO ENACT, REPEAL AND AMEND BY-LAWS

- Subject to articles and by-laws, directors can make, amend or repeal by-laws, with the exception of:
  - Adding, changing or removing provision re transfer of membership;
  - Changing manner of giving notice to members entitled to vote at members' meeting; and/or
  - Changing method of absentee voting at members' meetings
- Except for these matters, enactment, amendment or repeal is effective until confirmed, amended or rejected by members
- Many corporations, though, include provisions in the articles to require members' approval of all by-law amendments by special resolution (2/3rds vote)

## N. DIRECTORS' LIABILITY

- Directors who, *contrary to the ONCA*, vote for/consent to a resolution authorizing a payment: (1) to a member, director or officer; or (2) of an indemnity; are jointly and severally liable to restore the monies back to the corporation
- Any liable director can apply for court order compelling recipient of money/property to repay the amount
- This is subject to 2 year limitation, which runs from date of the authorizing resolution
- Directors also have joint and several liability for up to 6 months of wages and vacation pay to employees, which is triggered where corporation itself cannot make the payment or is liquidated, wound up or declares bankruptcy

## O. DISCLOSURE: CONFLICT OF INTEREST BY DIRECTORS

- Requirements differ depending on if the corporation is a not-for-profit/non-charity or a charity under ITA
- For not-for-profit/non-charities, directors (and officers) are required to disclose nature and extent of any interest that they have in an existing or proposed “material contract or transaction”
- Director cannot attend any Board meeting at which the contract or transaction is discussed or vote on the matter, with these actions recorded in the minutes
- If required disclosure is made by the director, then the material contract or transaction is valid if approved by the directors, and it was reasonable and fair to the corporation when approved

- Same disclosure of interest rules apply for charitable corporations under the ONCA
- However, if directors decide to proceed with material contract or transaction in which a director has an interest, then that director shall be immediately required to resign from the board or be removed by passing of a board resolution to the effect
- There are certain limited exceptions:
  - Ontario Reg. 4.01 under *Charities Accounting Act* (Ontario) (“CAA”) and related PGT Guidance permit remuneration of directors who provide certain services to the corporation without court order
  - If the remuneration is authorized by a formal court order (open court) or a consent order through the PGT under CAA, section 13

## P. INDEMNIFICATION OF DIRECTORS

- Directors (and officers) may be indemnified for all costs, charges and expenses, including judgements, reasonably incurred by them from association with the corporation, as well as receive advances of costs
- This, though is subject to limitations: (1) must have acted honestly and in good faith, with view to best interests of the corporation; and (2) must have reasonable grounds for believing conduct is lawful
- For registered charities, indemnification is subject to compliance with the CAA and its Reg. 04/01, which require certain conditions to be fulfilled and various factors to be considered before indemnification decisions are made
- Derivative actions possible to obtain court-ordered indemnification of a person

## Q. INSURANCE FOR DIRECTORS (AND OFFICERS)

- Permissible to purchase and maintain liability insurance for the benefit of present and past directors (and officers) related to indemnification
- However, for charitable corporations, liability insurance to compensate for financial losses suffered in the course of managing the charity in good faith cannot be purchased unless:
  - There is compliance with the CAA and its Reg.04/01 that permits the purchase; or
  - The purchase is authorized by a court order
- Similar to indemnification, certain conditions (as set out in Reg.04/01) have to be fulfilled and various factors considered before decision to purchase insurance can be made by the charity

## R. REMUNERATION OF DIRECTORS (AND OFFICERS)

- Under the ONCA, subject to the articles and by-laws, remuneration is possible for directors, officers and employees of the corporation for acting in these capacities, with the directors to fix the remuneration
- Subject to the by-laws, directors, officers and members may receive reasonable remuneration and expense for any services that they perform for the corporation in any other capacity
- However, ONCA corporations which are registered charities must include a provision in the articles prohibiting remuneration for directors, subject to exceptions under the CAA
- Reimbursement of directors' reasonable expenses incurred on the charity's behalf is possible

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