

 <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>By-law Issues to Consider</b></p> <p><b>By Esther S.J. Oh, B.A., LL.B.</b> estheroh@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p> <table border="0"><tr><td data-bbox="259 833 645 891">CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td><td data-bbox="645 833 1209 891">Toronto Ottawa 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.churchlaw.ca">www.churchlaw.ca</a></td></tr></table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa 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.churchlaw.ca">www.churchlaw.ca</a>
CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa 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.churchlaw.ca">www.churchlaw.ca</a>		

<p>2</p>	
<p><b>OVERVIEW</b></p> <ul style="list-style-type: none"><li>By-laws for New Incorporation Under the ONCA</li><li>By-laws for Pre-existing Corporations</li><li>By-law Drafting Considerations</li><li>How to Amend ONCA By-law</li></ul> <p><a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.carters.ca">www.carters.ca</a></p>	

## A. BY-LAWS FOR NEW INCORPORATION UNDER THE ONCA

- After incorporation under the *Not-for-profit Corporations Act, 2010* (Ontario) (“ONCA”), if directors do not pass any by-law within 60 days after incorporation, the corporation is deemed to have passed the standard organizational by-laws approved by the Ministry (ONCA s. 18) – automatic process
- Corporations deemed to have passed standard organizational by-laws may amend or repeal and replace the by-law at any time
- See <https://www.ontario.ca/page/not-profit-corporations-act-2010-standard-organizational-law>
- By-laws do not need to be filed with the Ontario Ministry

- Pros and cons of standard organizational by-laws
  - Pros
    - Prevents corporations from not having by-laws after incorporation
  - Cons
    - Reflects “generic” governance (e.g., open membership, 1 class of members, 1 year term for directors, Dec 31 year end)
    - May not reflect unique characteristics of the corporation
    - Are corporations aware that they are deemed to have adopted the standard organizational by-laws?
- If incorporation was filed on urgent basis and by-laws were not finalized and adopted within the 60 day period – will need to adopt customized new by-law according to the process set out in the standard by-law and to repeal the standard by-law

## B. BY-LAWS FOR PRE-EXISTING CORPORATIONS

- As mentioned in an earlier presentation, corporations previously under Part III Ontario *Corporations Act* (OCA) will have 3 years to bring their articles and by-laws into compliance with ONCA – *i.e.*, until October 19, 2024
- If do nothing – letters patent, supplementary letters patent, by-laws and special resolutions will continue to govern for 3 years even if inconsistent with ONCA, but will be deemed amended after 3 years of proclamation to comply with the ONCA – which will result in uncertainty
- Prudent to do optional transition process within 3 years to
  - Adopt articles of amendment
  - Ensure by-law complies with ONCA

- By-laws will need to be replaced or substantially revised by either
  - Amending the current by-law to comply with ONCA
  - Preparing a fresh ONCA-compliant by-law
- Standard organizational by-laws by the Ministry do not automatically apply to existing OCA corporations
- Generally easier to start with fresh ONCA by-law than to amend current by-law
  - Some changes may require detailed consideration and consultation with members
  - Some changes may only be administrative

- All OCA corporations are required to have a by-law. However, a number of OCA corporations may not have a general operating by-law at all
  - This inadvertent omission might easily occur because there is currently no repository for OCA corporations to file a by-law with the Ontario Ministry of Government Services after incorporation
- Lack of any by-laws after incorporation can create problems should disputes arise in later years
- Can lead to unsatisfactory and unexpected results, including the court ruling that the incorporators continue to be the only directors and members of the corporation after the corporation having operated for many years, or the court ordering the winding up of the corporation all together

## C. BY-LAW DRAFTING CONSIDERATIONS

### 1. Overview Comments

- By-law is a living document and must reflect the uniqueness of each organization and how the organization is to operate
- Important to ensure legality of proceedings
- Not following by-laws may invalidate decisions made, and make them subject to challenge
- By-law should comply with legal requirements
  - Rules in incorporating legislation
  - Common law rules
  - Good governance and best practices

9

- By-laws should use terminology consistent with the definitions in the ONCA, *e.g.*,
  - Ordinary resolution (majority vote of members)
  - Special resolution (two thirds vote of members at a special meeting)
  - Public benefit corporation (to be reviewed later today)
- By-laws should set out rules for basic corporate structure and process, *e.g.*,
  - Members – qualifications, admission, rights, termination, and meetings
  - Directors – qualifications, election/appointment, term, cease office, filling vacancy, and meetings
  - Officers – qualifications, appointment, term, cease office, filling vacancy, duties
  - Other key issues, *e.g.*, banking and execution of documents, indemnity, conflict of interest

www.charitylaw.ca www.carters.ca

10

- To make by-laws practical
  - Use clear wording and plain language
  - Use headings, formatting, spacing and numbering to make the by-law easier to read
  - Anticipate potential problems and provide simple solutions that are self-explanatory
  - Do not be too brief
  - Number all by-laws in order they are adopted
  - Maintain historical record of by-laws

www.charitylaw.ca www.carters.ca

## 2. Structuring of Rules in By-laws

- As mentioned in earlier presentations, there are three types of rules in ONCA
  - Mandatory rules
    - Cannot be overridden by the articles or by-laws
  - Optional rules
    - Articles/ by-laws can include certain optional rules under ONCA
  - Default rules
    - Apply automatically if articles/by-laws silent
    - By-laws or articles can override

- Mandatory rules – examples
  - Must have at least 3 directors
  - Directors must be elected by members at annual members meeting by ordinary resolution
  - Directors can be removed by ordinary resolution of members (except for *ex officio* directors)
  - When notice of members' meetings may be given
- Optional rules – examples
  - Proxy votes (needs to be permitted by articles or by-laws – but may want to avoid due to complexities under ONCA)
  - Holding membership meetings entirely by electronic means (needs to be permitted by by-laws)

- Default rules in ONCA - examples
  - Membership can only be transferred back to corporation
  - Directors can borrow and grant security without members' authorization
  - 1 vote per member
  - How membership may be terminated
  - Holding of membership meetings in Ontario
  - A majority of members constitutes a quorum
  - Proxyholders need not be members
  - Directors may meet anywhere
  - A majority of the directors constitutes a quorum
  - Directors not required to be members
  - Members can participate membership meetings by electronic means (hybrid meetings)

- Examples of where by-law or articles can override default rules, in the document(s) specified in the ONCA
  - Override by provisions in articles - examples
    - Different voting powers of members (default is 1 vote per member)
    - Different classes of members with different voting rights
    - Restrict the activities of the corporation
    - Hold membership meetings outside Ontario
    - Require a greater number of votes of directors or members to effect any action than are required by the ONCA (other than ordinary resolution to elect and remove directors)

15

- Override by provisions in by-laws - examples
  - Quorum for membership meetings other than a simple majority
  - Require directors to be members
  - Not allow members to participate membership meetings by electronic means (hybrid meetings)
- Override by provisions in articles or by-laws - examples
  - Other modes of transferability of membership
  - Directors can borrow and grant security without members' authorization
  - How membership may be terminated
  - Quorum for board meetings other than a simple majority
  - Restrict where directors may meet
  - To require proxyholders be restricted to members

www.charitylaw.ca

www.carters.ca

16

### 3. Practical Issues to Consider

- a) Reconsider proxy voting rights for members
  - ONCA and the regulations contain very detailed rules that apply to proxy voting
    - Corporations may wish to not include optional proxy voting rights for members if a corporation lacks the infrastructure to comply with the highly complicated requirements that apply (Part VI of ONCA and ss. 3(1) to (8) of regulations)
- b) *Ex officio* directors permitted
  - Many corporations have boards of directors composed, in whole or in part, of individuals who are not directly elected by the members, but rather are directors *ex officio*, *i.e.* by virtue of holding another office
    - Unlike the CNCA, *ex officio* directors are permitted in the ONCA (s. 23(4))

www.charitylaw.ca

www.carters.ca



17

- c) Appointment of directors by the board
  - As an option, the ONCA states that the board may appoint directors between annual meetings
    - The number of appointed directors must not exceed one third of the directors elected at the previous annual meeting of members (“AGM”)
    - The appointed directors can only hold office until the close of the next AGM
    - This is a mandatory right, not required to be authorized by articles or by-laws (s. 24(7))
  - Where a corporation has director terms that are 2 or 3 years, permitting the board to appoint up to one third of the directors can result in confusion
    - The appointed directors can only serve until the close of the next AGM (while the other directors would be serving for a longer term)

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

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

18

- d) Election of directors by Ordinary Resolution
  - Some corporations set higher approval requirements to elect directors to the board, e.g. two-thirds and higher
    - However, ONCA requires directors to be elected by majority vote only (ordinary resolution) at an annual meeting of members (s. 24(1))
- e) Limits on length of director terms
  - While not common, some corporations have lengthy terms of office for directors
    - Director term of office cannot exceed four years, although re-election is possible (s. 24(1))

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

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

- f) Structuring of membership
  - ONCA is conceptually structured on a business corporation model which gives enhanced rights of members
    - *i.e.* – member rights are similar in many respects to rights of shareholders
  - In light of enhanced rights given to members under and ONCA mentioned in previous presentations, corporations may wish to consider establishing a closed membership corporation *i.e.* whereby the directors and members are the same individuals
  - Other participants in the corporation’s programs can be referred to as a non-membership category, such as “affiliates”, “associates”, “supporters”, or “congregants”

- g) By-laws not a self-contained document
  - Articles and by-laws must go hand in hand as a set
  - Cannot not draft by-laws on their own
  - Certain issues must be set out in the articles, not recommend to also set out in the by-laws to avoid inconsistency or confusion – for example
    - Purposes
    - Dissolution clause
    - Membership classes and voting rights – new in ONCA
    - Number of directors – new in ONCA

- Provisions to override default rules, some of them
  - Must be in the articles
  - Must be in the by-laws
  - May be in the articles or the by-laws
- Provisions to permit optional rules in the bylaw or articles that the corporation may want to include
- Need to ensure overriding provisions are inserted in the correct document
- Where the ONCA requires certain provisions to be included in the by-laws, those provisions may be included in the articles instead [s. 8(4)]
- When drafting overriding provisions, ensure these mechanisms are in compliance with the ONCA

- h) ONCA provisions subject to charity law
- Special legislation and charity law will prevail over the ONCA in the event of a conflict, as a result some provisions of the ONCA will not apply to charities
    - *E.g.* ONCA permits directors to fix their remuneration and receive reasonable remuneration for services
      - But directors of charities cannot receive direct/indirect remuneration from the charity
        - Subject to the regulations under the *Charities Accounting Act* (Ontario) which outline limited circumstances where charitable corporations would be authorized to pay directors and related persons for goods, services or facilities

## D. HOW TO AMEND ONCA BY-LAW

- By-law needs to state how amendments to the by-law can be done
- Default provision (s. 17) states:
  - Unless the articles or by-laws state otherwise, the directors may adopt, amend or repeal by-laws
    - Effective upon approval by the board by board resolution (s. 17(1))
    - Except for matters referred to in 103(1)(g), (k) or (l)
  - Must be confirmed by members at next meeting to remain in force (doesn't require special resolution) (s. 17(2))

- Issues set out in s. 103(1) (g), (k) or (l)
  - (g) add, change or remove a provision respecting the transfer of a membership
  - (k) change the manner of giving notice to members entitled to vote at a meeting of members
  - (l) change the method of voting by members not in attendance at a meeting of the members
- Not clear how to amend the issues set out in s. 103(1) (g), (k) or (l) because s. 103(1) requires a special resolution to amend “articles”, not “by-laws”
- Some corporations may want to avoid the 2-tier amendment mechanism
  - Can insert provision in articles to require all by-laws be subject to membership approval (by special resolution) before effective

## CARTERS

BARRISTERS  
SOLICITORS  
TRADEMARK AGENTS

### Disclaimer

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.

© 2021 Carters Professional Corporation

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

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