

The logo for Carters, featuring the word "CARTERS" in a large, white, serif font on a dark blue background.

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

MOVING FORWARD WITH THE ONCA: UNDERSTANDING KEY PROVISIONS AND PRACTICAL TIPS

Wednesday, December 8, 2021

WELCOME

Welcome to this special webinar on the new *Not-for-profit Corporations Act, 2010* (Ontario) ("ONCA"). This webinar is designed to provide a basic understanding of the key provisions of the ONCA, as well as to share some practical tips where possible. This special webinar is presented by **Carters Professional Corporation (Carters)**, a law firm with offices in Toronto, Ottawa and Orangeville, and experienced in advising charities and not-for-profits across Canada, as well as internationally.

AGENDA

9:00 am	Introduction by Moderator Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent
9:10 am	ONCA Proclamation, Transition Process and Overview Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.
9:35 am	Membership Issues and Meetings Ryan M. Prendergast, B.A., LL.B.
10:00 am	Board of Directors' Issues and Meetings Jacqueline M. Demczur, B.A., LL.B.
10:25 am	By-law Issues to Consider Esther S.J. Oh, B.A., LL.B.
11:50 am	Other Topics of Interest, Including Public Benefit Corporations and Financial Reporting Esther Shainblum, B.A., LL.B., LL.M., CRM
11:15 am	Question and Answer Use the Q&A box on the Zoom menu to submit your questions
11:30 am	Closing Comments and End of Program

FORMAT OF THE WEBINAR

Presentations will be 25 minutes in length. The presenters will respond to questions at the end of the webinar from 11:15 to 11:30 a.m.

Questions for the Presenters: Please use the "Q&A" window on the Zoom webinar toolbar to type the name of the speaker to whom your question is directed, along with your question. Please do not use the chat window to send questions, as the chat window is for technical questions only.

We will answer as many questions as is possible live during the Q & A session, but it is probable that not every question received will be answered.

Technical Questions: Please refer to the FAQ Sheet that was sent to each attendee by email. Use the **CHAT** feature to connect with our IT technicians on site. Do not use the Q&A section for technical questions.

Please note that there is no video replay available for this webinar.

CARTERS RESOURCE MATERIALS

Today's electronic [Handout Package](#), including the PowerPoint presentations and various resource materials, is posted on our website and can be downloaded for your use. These materials, along with numerous other articles, webinar materials, and newsletters of interest to charities and not-for-profit corporations, including back issues of *Charity & NFP Law Bulletins*, *Charity & NFP Law Updates* and *Church Law Bulletins*, are available free of charge at our websites at www.charitylaw.ca, www.carters.ca, www.churchlaw.ca, and www.antiterrorism.ca. As well, a link is being provided to the current recently updated version of the [2021 Legal Risk Management Checklist for Ontario-Based Charities](#) and the [2021 Legal Risk Management Checklist for Ontario-Based Not-for-Profits](#).

CHARITY & NFP LAW UPDATE

To receive the monthly *Charity & NFP Law Update*, please e-mail us at info@carters.ca with "mailing list" in the subject line. Alternatively, please click on the on the webinar event resources button to sign up to our [Mailing List](#) indicating your consent to receive firm newsletters and information about future seminars. You may access the November 2021 edition of the [Charity & NFP Law Update](#) through our website

ABOUT CARTERS

Carters Professional Corporation is a law firm with expertise in the area of church, charity and other not-for-profits and is committed to assisting clients in avoiding legal problems before they occur through effective legal risk management advice, including assistance with:

- Anti-bribery Compliance
- Counter-terrorism Policy Statements
- CRA Charity Audits
- Charitable Organizations & Foundations
- Charitable Incorporation & Registration
- Charitable Trusts
- Charity Related Litigation
- Church Discipline Procedures
- Church Incorporation
- Corporate Record Maintenance
- Director and Officer Liability
- Dissolution and Wind-Up
- Employment Related Issues
- Endowment and Gift Agreements
- Foreign Charities Commencing Operations in Canada
- Fundraising and Gift Planning
- Gift Acceptance Policies
- Governance Advice
- Human Rights Litigation
- Insurance Issues
- International Trademark Licensing
- Investment Policies
- Legal Risk Management Audits
- Legal Audits
- National and International Structures
- Privacy Policies and Audits
- Religious Denominational Structures
- Sexual Abuse Policies
- Special Incorporating Legislation
- Charity Tax Opinions and Appeals
- Trademark and Copyright Protection
- Transition Under the ONCA

EVALUATION

We appreciate your evaluation and comments. Feel free to use the Feedback Evaluation form that will be emailed to you at the end of the webinar or email your comments to seminars@carters.ca. Complete the fillable pdf form and send by email to seminars@carters.ca as an attachment by clicking the "Submit Form" button.

BOOK DRAW AND SPECIAL WEBINAR DISCOUNT

LexisNexis Canada Inc. is providing three Book Draw Prizes for [Charities Legislation & Commentary, 2022 Edition](#), co-edited by Terrance S. Carter, Maria Elena Hoffstein, and Adam Parachin. This unique charity law publication includes the full text of the Ontario *Not for Profit Corporation Act* (ONCA) as well as applicable regulations. The draw will be held at the end of the Webinar for those still in attendance.

If attendees wish to purchase a copy of the *Charities Legislation & Commentary, 2022 Edition*, they can click [here](#) to get a special 15% discount code. Go to the [Lexis website](#) to order the book and enter the discount code from the flyer.

UPCOMING EVENTS IN 2022

The **Ottawa Region Charity & Not-for-Profit Law Webinar** will be held on **Thursday, February 17, 2022**. More details will be available soon at www.carters.ca.

The **2022 Annual Church & Charity Law Webinar™** will be held on **Thursday November 10, 2022**. More details will be available in the New Year at www.carters.ca.

CARTERS OFFICE LOCATIONS

Toronto Office

67 Yonge Street, Suite 1402
Toronto, Ontario, Canada
M5E 1J8
Tel: (416) 594-1616
Fax: (416) 594-1209

Orangeville Office

211 Broadway, P.O. Box 440
Orangeville, Ontario, Canada
L9W 1K4
Tel: (519) 942-0001
Fax: (519) 942-0300

Ottawa Office

117 CentrepoinTE Drive, Suite 350
Nepean, Ontario, Canada
K2G 5X3
Tel: (613) 235-4774
Fax: (613) 235-9838

2021
LEXPERTRANKED
LAWYER



CARTERS PROFESSIONAL CORPORATION 2022
RECOGNIZED BY
Best Lawyers™

GENERAL DISCLAIMER

Please note the following Disclaimer that applies to all presentations: 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

MODERATOR AND SPEAKER BIOGRAPHIES



Terrance S. Carter, B.A., LL.B, TEP, Trademark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis, 2021), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2019 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*. Mr. Carter is a past member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections.



Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by *Lexpert*, *Best Lawyers in Canada*, and *Chambers and Partners*. In addition to being a frequent speaker, Ms. Man is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters. She is a member and former chair of the CBA Charities and Not-for-Profit Law Section, a member of the Technical Issues Working Group of Canada Revenue Agency's (CRA) Charities Directorate, and a member and former chair of the OBA Charities and Not-for-Profit Law Section. Ms. Man has also written on charity and taxation issues for various publications.



Ryan M. Prendergast, B.A., LL.B. - Mr. Prendergast joined Carters in 2010, becoming a partner in 2018, with a practice focus of providing corporate and tax advice to charities and non-profit organizations. Ryan has co-authored papers for the Law Society of Ontario, and has written articles for *The Lawyers Weekly*, *Hilborn:ECS*, Ontario Bar Association *Charity & Not-for-Profit Law Section Newsletter*, *Charity & NFP Law Bulletins* and publications on www.charitylaw.ca. Ryan has been a regular presenter at the annual *Church & Charity Law Seminar™*, Healthcare Philanthropy: Check-Up, Ontario Bar Association and Imagine Canada Sector Source. Ryan is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*.



Esther S.J. Oh, B.A., LL.B. – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management for www.charitylaw.ca and the *Charity & NFP Law Bulletin*. Ms. Oh is a regular speaker at the annual *Church & Charity Law Seminar™*, and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.



Jacqueline M. Demczur, B.A., LL.B. – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations*, and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity & NFP Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Church & Charity Law Seminar™*.



Esther Shainblum, B.A., LL.B., LL.M., CRM – Ms. Shainblum practices at Carters Professional Corporation in the areas of charity and not for profit law, privacy law and health law. From 2005 to 2017 Ms. Shainblum was General Counsel and Chief Privacy Officer for Victorian Order of Nurses for Canada, a national, not-for-profit, charitable home and community care organization. Before joining VON Canada, Ms. Shainblum was the Senior Policy Advisor to the Ontario Minister of Health. Earlier in her career, Ms Shainblum practiced health law and corporate/commercial law at McMillan Binch and spent a number of years working in policy development at Queen's Park.

ADDITIONAL LAWYERS AT CARTERS



Sepal Bonni, B.Sc., M.Sc., J.D., Trademark Agent - Sepal Bonni is a registered trademark agent and practices in all aspects of brand protection. Her trademark practice includes domestic and foreign trademark prosecution, providing registrability opinions, assisting clients with the acquisition, management, protection, and enforcement of their domestic and international trademark portfolios, and representing clients in infringement, opposition, expungement, and domain name dispute proceedings. She also assists clients with trademark licensing, sponsorship, and co-branding agreements. Sepal also advises clients on copyright and technology law related issues.



Sean S. Carter, B.A., LL.B. – Sean Carter is a partner with Carters and the head of the litigation practice group at Carters. Sean has broad experience in civil litigation and joined Carters in 2012 after having articulated with and been an associate with Fasken (Toronto office) for three years. He is ranked as a leading expert by *The Best Lawyers in Canada*. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity & NFP Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Ontario and Ontario Bar Association CLE learning programs.



Nancy E. Claridge, B.A., M.A., LL.B. – Called to the Ontario Bar in 2006, Nancy Claridge is a partner with Carters practicing in the areas of corporate and commercial law, anti-terrorism, charity, real estate, and wills and estates, in addition to being the assistant editor of *Charity & NFP Law Update*. After obtaining a Master's degree, she spent several years developing legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was a Senior Editor of the *Osgoode Hall Law Journal*, Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean's Gold Key Award and Student Honour Award. Nancy is recognized as a leading expert by *Lexpert*.



Barry W. Kwasniewski, B.B.A., LL.B. – Mr. Kwasniewski is a partner with the firm and joined Carters' Ottawa office in 2008 to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and been retained by charities, not-for-profits and law firms to provide legal advice pertaining to insurance coverage matters.



Jennifer M. Leddy, B.A., LL.B. – Ms. Leddy joined Carters' Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed "Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose." Ms. Leddy is recognized as a leading expert by *Lexpert*.



Adriel N. Clayton, B.A. (Hons), J.D. - Called to the Ontario Bar in 2014, Adriel Clayton manages Carters' knowledge management and research division, and practices in commercial leasing and real estate. Before joining Carters, Adriel practiced real estate, corporate/commercial and charity law in the GTA, where he focused on commercial leasing and refinancing transactions. Adriel worked for the City of Toronto negotiating, drafting and interpreting commercial leases and enforcing compliance. Adriel has provided in-depth research and writing for the *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations*.



Heidi N. LeBlanc, J.D. – Heidi is a litigation associate practicing out of Carters' Toronto office. Called to the Bar in 2016, Heidi has a broad range of civil and commercial litigation experience, including matters pertaining to breach of contract, construction related disputes, defamation, real estate claims, shareholders' disputes and directors'/officers' liability matters, estate disputes, and debt recovery. Her experience also includes litigating employment-related matters, including wrongful dismissal, sexual harassment, and human rights claims. Heidi has represented clients before all levels of court in Ontario, and specialized tribunals, including the Ontario Labour Relations Board and the Human Rights Tribunal of Ontario.



[Martin Wissmath](#), B.A., J.D. – Called to the Ontario Bar in 2021, Martin joined Carters after finishing his articling year with the firm. In addition to his legal practice, he assists the firm's knowledge management and research division, providing support for publications and client files, covering a range of legal issues in charity and not-for-profit law. His practice focuses on employment law, privacy law, corporate and information technology law, as well as the developing fields of social enterprise and social finance. Martin provides clients with legal advice and services for their social-purpose business needs, including for-profit and not-for-profit organizations, online or off-line risk and compliance issues.



Lynne Westerhof, B.A., J.D., Student-at-law – Lynne graduated from the University of Toronto, Faculty of Law in June 2021. During law school she was a participant in the Donald G. H. Bowman National Tax Moot, President of the U of T chapter of the Christian Legal Fellowship, and a Division Leader and Caseworker in family law at Downtown Legal Services. Lynne worked as a summer student for Social Capital Partners where she researched the legal context of employee ownership trusts and did additional research for a tax professor about non-profit social enterprises. Prior to law school, Lynne received a Bachelor of Arts with a major in English from the University of British Columbia.

00629669.DOCX

CARTERS

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

MOVING FORWARD WITH THE ONCA: UNDERSTANDING KEY PROVISIONS AND PRACTICAL TIPS

Wednesday, December 8, 2021

ONCA PROCLAMATION, TRANSITION PROCESS, AND OVERVIEW

By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.


tman@carters.ca
1-877-942-0001

© 2021 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION
BARRISTERS . SOLICITORS . TRADEMARK AGENTS
TOLL FREE: 1-877-942-0001

Toronto Ottawa Orangeville

www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

 BARRISTERS SOLICITORS TRADEMARK AGENTS	Moving Forward with the ONCA: Understanding Key Provisions and Practical Tips Webinar - December 8, 2021		
<p align="center"> ONCA Proclamation, Transition Process, and Overview By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. tman@carters.ca 1-877-942-0001 © 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 1224 891"> Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca </td> </tr> </table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca
CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca		

<div>OVERVIEW</div> <div>2</div>
<div>STATUS OF ONCA</div> <div>PRACTICAL STEPS FOR TRANSITION</div> <div>KEY ELEMENTS OF ONCA</div>
<ul style="list-style-type: none"> • This presentation does not cover the following <ul style="list-style-type: none"> – Special act corporations – they need special case-by-case review – Share capital social clubs under Part II of OCA – they will have 5 years (from October 19, 2021) to continue under the ONCA, the Ontario <i>Business Corporations Act</i> or the <i>Co-operative Corporations Act</i>
<div>www.charitylaw.ca</div> <div>www.carters.ca</div>

3



FINALLY
YES FINALLY ...
HERE!

**The Beginning of a
New Era**

www.charitylaw.ca

www.carters.ca

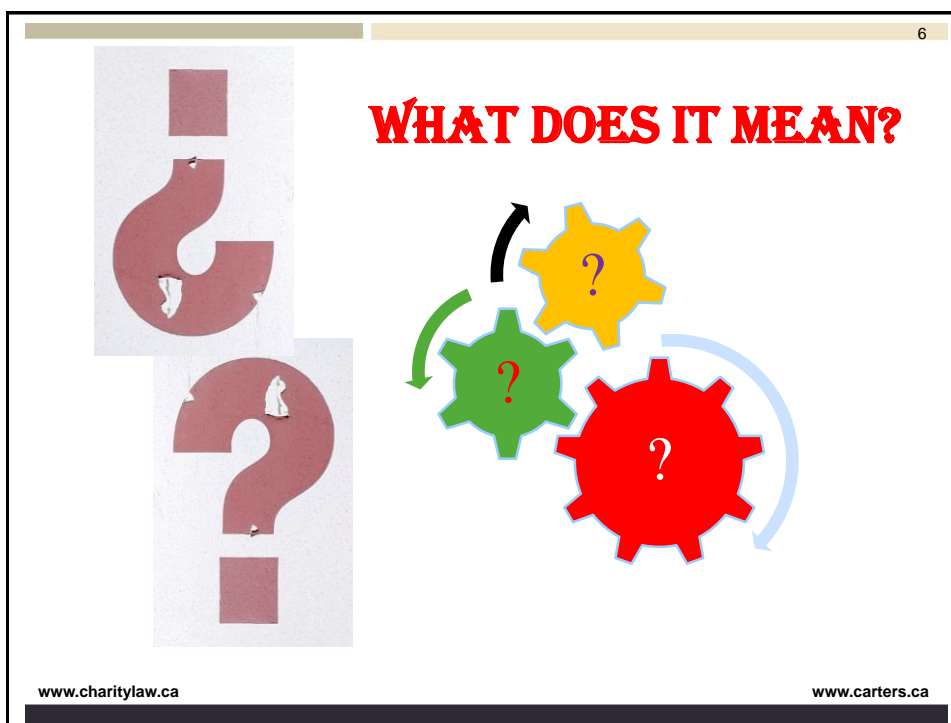
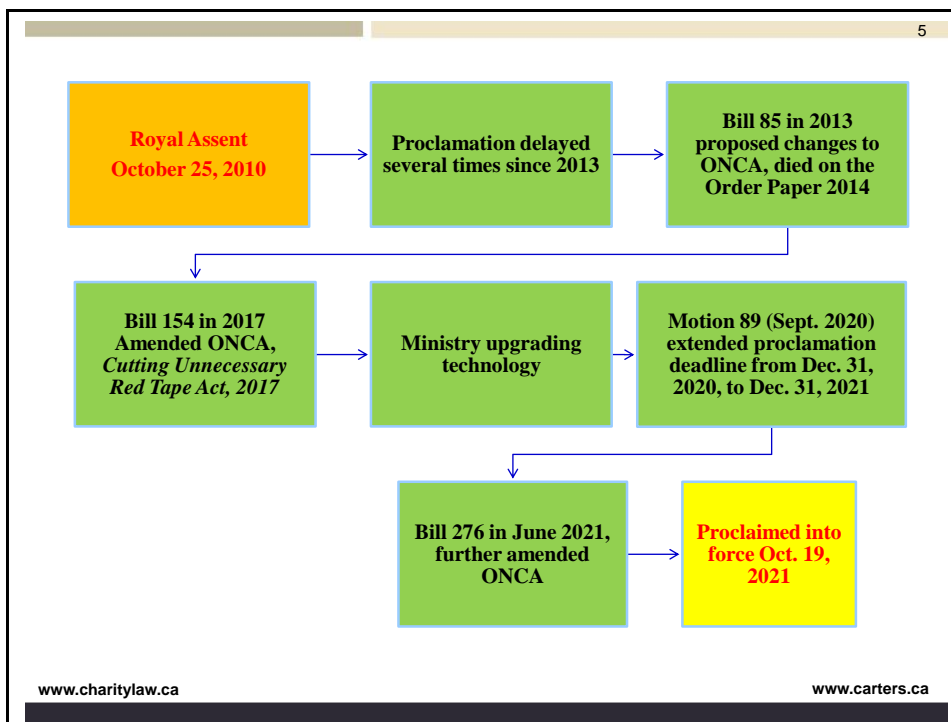
4

A. ONCA IS FINALLY HERE

- Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) was proclaimed into force on October 19, 2021
- ONCA now applies to non-share capital membership corporations under Part III of Ontario *Corporations Act* (“OCA”)
- New online Ontario Business Registry
- VERY LONG history of ONCA to this point (next slide)

www.charitylaw.ca

www.carters.ca



7

B. IMPLICATIONS OF ONCA PROCLAMATION

- ONCA applies to all Part III OCA corporations automatically upon proclamation
- If do nothing –
 - Corporation will not be dissolved
 - LP, SLPs, 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 - will result in uncertainty

www.charitylaw.ca

www.carters.ca

8

- Not moving the following provisions from by-laws or special resolutions to articles in order to comply with ONCA is fine until articles of amendment are endorsed
 1. Number of directors
 2. Two or more classes or groups of members
 3. Voting rights of members
 4. Delegates under section 130 of the OCA
 5. Distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution (i.e., this exemption does not apply to public benefit corporations)

www.charitylaw.ca

www.carters.ca

9

- Optional transition process within 3 years of proclamation to make necessary changes to current governing documents
 - adopt articles of amendment
 - optional to adopt restated articles
 - adopt ONCA-compliant by-law
- Prudent to go through the transition process
- End result – After the transition process, corporation will be governed by
 - LP, SLPs, articles of amendment – can be consolidated in restated articles of incorporation
 - ONCA-compliant by-law

www.charitylaw.ca

www.carters.ca

10

Current documents	If do nothing after proclamation of ONCA		Optional transition during first 3 years after proclamation
	During first 3 years after proclamation	At end of 3 rd year	
LP SLPs	- LP and SLPs continue to govern even if inconsistent with ONCA	Provisions inconsistent with ONCA will be deemed amended to comply with the ONCA => uncertainty and messy	Adopt articles of amendment Goals: - Ensure comply with ONCA - Certainty and no mess
By-laws Special resolutions	- By-laws continue to govern even if inconsistent with ONCA - ONCA applies to areas not addressed in the by-laws	Provisions inconsistent with ONCA will be deemed amended to comply with the ONCA => uncertainty and messy	Adopt new ONCA-compliant by-law or amend by-law to comply with ONCA Goals: - Ensure comply with ONCA - Certainty and no mess

www.charitylaw.ca

www.carters.ca

11

WHAT ARE THE ONCA RULES?



www.charitylaw.ca

www.carters.ca

12

1. Incorporation and Corporate Powers

Incorporation	Incorporation as of right with only 1 incorporator
	Certificate of incorporation issued - no more LPs
By-laws	No need to file by-laws or financial statements
	Default by-law will apply if no by-laws adopted within 60 days after incorporation
Powers	Corporations have powers of a natural person
	ONCA does not apply to corporations sole "except as is prescribed"

www.charitylaw.ca

www.carters.ca

2. Public Benefit Corporations (PBCs)

PBCs include



(1) Charitable corporations

* Means having purposes recognized to be charitable at common law

* whether it is a registered charity is irrelevant

(2) Non-charitable corporations that receive more than \$10,000 (or another amount prescribed in the regulations) in a financial year in funding from the following sources => Need to monitor revenue sources and level annually

(i) Donations or gifts from persons who are not members, directors, officers or employees of the corporation

(ii) Grants or similar financial assistance from the federal, provincial or municipal government or government agency

Change status

If a non-charitable corporation reaches threshold, it will be deemed to be a PBC in the next financial year, as of the date of the first AGM in that financial year until the end of that financial year

Consequences of being a PBC

Not more than 1/3 of the directors may be employees of the corporation or its affiliates

Higher thresholds for dispensing with appointing an auditor or person to conduct review engagement

On dissolution of charitable PBCs - net assets must be distributed to a Canadian corporation that is a registered charity with similar purposes, or to the government

On dissolution of non-charitable PBCs - net assets must be distributed to a PBC with similar purposes, to a Canadian corporation that is a registered charity with similar purposes, or to government

Liquidation and dissolution of a non-PBC

Net assets must be distributed in accordance with the articles, or if the articles do not address that issue, then rateably to the members (PBCs cannot do this)

3. Financial Review

Thresholds

Members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting

There are rules for exemption
(see tables on next 2 slides)

Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation (PBC) with GAR of	\$100,000 or less (ss.76(1)(b))	May, by extraordinary resolution (80%), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than \$100,000 but less than \$500,000 (ss.76(1)(a))	May dispense with an auditor and have someone else conduct a review engagement. This requires an extraordinary resolution (80%)	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)
	\$500,000 or more (by implication of ss.68(1))	An auditor must be appointed annually	Audit is required

17

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

18

4. Directors

Number & Qualifications

Minimum 3 directors

Articles may provide maximum & minimum range

Directors not need to be members

Election and appointment

Directors elected at AGMs

Ex-officio directors possible

Directors may appoint directors between AGMs (1 year term, 1/3 cap)

If different member groups elect x directors to the Board, must structure members as separate classes

www.charitylaw.ca

www.carters.ca

19	
Term	Maximum 4 year term of directors
	No limit on maximum number of terms
	Staggered terms for directors possible
	Removal of any director by majority vote of members (mandatory), except ex officio directors
	Directors must consent in writing to take office
www.charitylaw.ca www.carters.ca	

20	
Objective standard of care for directors and officers	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
Reasonable diligence defence for directors	Not liable if fulfilled their duty if they exercised 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	

21

5. Members

Basic concepts	Corporation must have members
	By-laws must set out conditions for membership
	Default rule is 1 vote per member (subject to articles)
Classes	Must set out the classes of members
	If 1 class, all members must be voting, but if 2+ classes, voting rights must be given to at least 1 class
Default rules to terminate members	Death, resignation, expiry of membership term, liquidation or dissolution, expulsion, or termination

www.charitylaw.ca

www.carters.ca

22

May allow directors, members or committee to discipline members or terminate	Articles/by-laws must set out circumstances and the manner in which the power may be exercised
	Must exercise power in good faith and fair & reasonable manner - 15 days notice of disciplinary action or termination with reasons, give member opportunity to be heard
	Member may apply for compliance or restraining order if power misused
Class veto votes	ONCA originally gave all member classes (even non-voting) separate vote on fundamental matters and certain amendments to articles, <i>i.e.</i> class veto
	Bill 154 (2017) proposed delaying membership class votes for at least 3 years after proclamation
	Motion 89 did not extend class vote provisions beyond Dec. 31, 2020 = class votes provisions died

www.charitylaw.ca

www.carters.ca

23

Extensive rights

Requisition members' meeting (by 10% of voting right)

Submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)

Submit proposal to nominate directors (by 5% of voting right)

Access corporate records (e.g., membership list)

Broad remedy powers (e.g., dissent and appraisal remedy derivative action, compliance & restraining orders, court ordered wind-up and liquidation)

www.charitylaw.ca

www.carters.ca

24

6. Members' Meetings

Notice of meeting

10 to 50 days before the meeting

Record date

Directors may fix "record date" of no more than 50 days before members' meeting (to determine who are members for the meeting)

Voting

Optional proxy votes, voting by mail, voting by telephonic or electronic means

Proxyholders

May limit proxyholders to members

Circulation of financials

FS, auditor/review engagement report, & information required by articles or by-laws must be given to members upon request at least 21 days (or as prescribed in regulations) before AGM

www.charitylaw.ca

www.carters.ca

25

WHAT DO I DO?

www.charitylaw.ca

www.carters.ca

26

C. HOW TO GET READY FOR ONCA TRANSITION

1. Collect

COLLECT GOVERNING DOCUMENTS

- Confirm corporation is actually under the OCA
- Collect LP, SLPs, by-laws (including amendments)
- Letters patent, supplementary letters patent
- Obtain microfiche copies from Ministry
- All by-laws, including amendments
- Members' resolutions and board resolutions
- Are by-laws valid? Were they properly adopted?
- Collect governance related documents - e.g., organizational charts, policies, manuals

www.charitylaw.ca

www.carters.ca

27

2. Review

REVIEW GOVERNING DOCUMENTS

- 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?
- Write them down, come up with a wish list

www.charitylaw.ca

www.carters.ca

28

3. Study

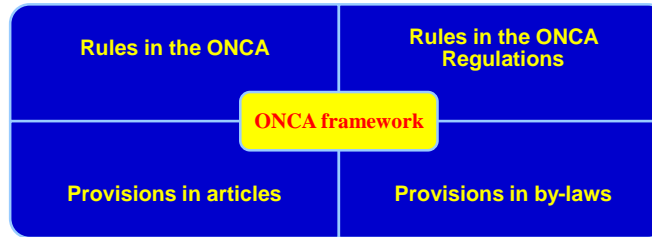
STUDY KEY ONCA FEATURES

- To determine how current governance structure will be impacted by the ONCA
- ONCA framework
 - Rules in the Act
 - Some details in the Regulations
 - Articles and by-laws
- Three types of rules in ONCA
 - Mandatory rules - cannot be overridden by the articles or by-laws
 - Default rules - by-laws or articles can override
 - Alternate rules - articles/by-laws can include certain optional rules permitted by ONCA

www.charitylaw.ca

www.carters.ca

29



- Need to understand the ONCA framework
- 4 Regulations under the ONCA
 - O. Reg. 394/21 Names and filings
 - O. Reg. 395/21 General
 - O. Reg. 396/21 Corporations Sole
 - O. Reg. 693/21 Extension Of Temporary Suspension Period

www.charitylaw.ca

www.carters.ca

30

4. Compare

COMPARE ONCA VS CURRENT GOV. DOCS.

- Are the current by-laws or the desired governance structure and process inconsistent with ONCA requirements?
- If inconsistent with ONCA mandatory requirements
 - Need to adjust governance structure and process to comply
- If inconsistent with ONCA default requirement
 - Consider whether to opt out
- If ONCA provides options
 - Decide which option to adopt
- Consider what else to include

www.charitylaw.ca

www.carters.ca

31

5. Prepare

PREPARE NEW ONCA DOCUMENTS

- Prepare articles of amendment
 - To amend LP and SLPs
 - To delete old provisions that no longer apply
 - To add new provisions
 - If want to update purposes, better to do it separately after ONCA transition (especially for registered charities)
- Consider consolidating in restated articles of incorporation
 - After filing articles of amendment => LP and SLPs continue to have effect, as amended by articles of amendment
 - Have to flip back and forth through LP, SLP, articles of amendment to see which provisions take precedence
 - Can file restated articles of incorporation to consolidate
 - When filing restated articles, certain special provisions will automatically be inserted depending on if the corporation has charitable proposes

www.charitylaw.ca

www.carters.ca

32

5. Prepare

PREPARE NEW ONCA DOCUMENTS (CONT'D)

- Prepare ONCA-compliant by-law
 - By-law will need to be replaced or substantially revised because the ONCA is very different from OCA
 - OCA contained very few rules, ONCA provides many detailed rules
 - 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

www.charitylaw.ca

www.carters.ca

33

6. Approve & File

APPROVAL AND FILINGS

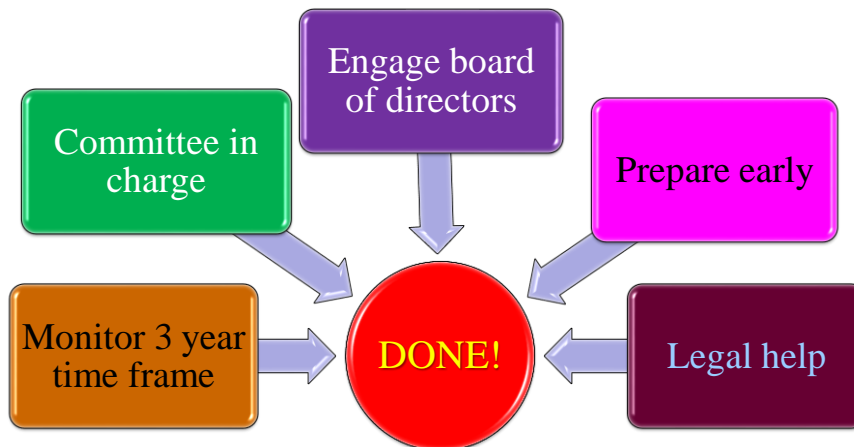
- Board and members to adopt articles and by-law
- Need special resolution of members to approve articles of amendment (*i.e.*, 2/3 of votes cast)
- File articles of amendment with the Ministry (but not by-laws), Ministry will issue certificate of amendment
- If file restated articles - Ministry will issue certificate of restated articles of incorporation
- Registered charities - file articles and by-law with Canada Revenue Agency, Charities Directorate
- May require other filings – *e.g.*, funders, umbrella organizations
- Update corporate records
- Board, staff and volunteer training

www.charitylaw.ca

www.carters.ca

34

KEY TAKEAWAYS



www.charitylaw.ca

www.carters.ca

CARTERS

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

MOVING FORWARD WITH THE ONCA: UNDERSTANDING KEY PROVISIONS AND PRACTICAL TIPS

Wednesday, December 8, 2021

MEMBERSHIP ISSUES AND MEETINGS

By Ryan M. Prendergast, B.A., LL.B.


rmp@carters.ca
1-877-942-0001

© 2021 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION
BARRISTERS . SOLICITORS . TRADEMARK AGENTS
TOLL FREE: 1-877-942-0001

Toronto Ottawa Orangeville

www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>Moving Forward with the ONCA: Understanding Key Provisions and Practical Tips</h2> <p>Webinar - December 8, 2021</p>
<h3>Membership Issues and Meetings</h3> <p>By Ryan M. Prendergast, B.A., LL.B. rmp@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
<p>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</p>	<p>Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca</p>

<div></div> <div>2</div>
<h3>OVERVIEW</h3> <ul style="list-style-type: none">Membership StructuresMembership RightsDiscipline and Termination of MembershipMembership RemediesMembership MeetingsPractical Resolutions for Membership Issues <p>www.charitylaw.ca www.carters.ca</p>

3

A. MEMBERSHIP STRUCTURES

- Classes and Membership Structure
 - Not-for-profit corporations under the *Not-for-profit Corporations Act, 2010* (Ontario) (“ONCA”) are required to be membership based
 - Members can be divided into one or more classes with different rights and obligations attached to each class
 - Must set out the classes of members in the articles (see ONCA 48(3))
 - If the classes are not set out in the articles, the default is one class
 - Note that unlike the *Canada Not-for-profit Corporations Act*, ONCA does not permit unanimous members agreements

www.charitylaw.ca

www.carters.ca

4

- Voting or Non-Voting?
 - If the corporation has one class of members, all members must be voting
 - If there are two or more classes, voting rights must be given to at least 1 class
 - If the corporation has or wants non-voting members, this must be set out in the articles, otherwise the default is one vote at a meeting of members (see ONCA 48(6))
 - ONCA originally provided for non-voting members to have certain protections in relation to fundamental changes, similar to the *Canada Not-for-profit Corporations Act* (CNCA)
 - Non-voting members no longer have these protections, but still may have limited rights

www.charitylaw.ca

www.carters.ca

5

- Types of Membership
 - The by-laws must set out the conditions required for being a member of the corporation, including whether a corporation or other entity may be a member
 - While corporate statutes generally do not prohibit *ex officio* members, the ONCA specifically provides that the by-laws may provide for persons to be members by virtue of their office
- ONCA provides that corporation must recognize any individual authorized by a member corporation or other entity to represent the member at meetings

www.charitylaw.ca

www.carters.ca

6

- Membership Transfer
 - Memberships can only be transferred to corporation unless articles or by-laws otherwise provide
- Membership Dues or annual contributions
 - Unless the articles or by-laws state otherwise, directors may require members to make an annual contribution or pay annual dues and may determine the manner in which the contribution is to be made or the dues are to be paid

www.charitylaw.ca

www.carters.ca

7

- Fundamental Changes
 - ONCA originally gave all member classes separate vote on fundamental matters concerning amendments to articles, *i.e.*, class veto, similar to CNCA
 - Fundamental changes under section 103 of ONCA require special resolution of the members to make amendments to the articles, but members all vote together and do not vote separately as a class
 - Paragraphs (g), (k), and (l) would only apply if those issues are in the articles and not in the by-laws (See section 17 for cross reference to these paragraphs)

www.charitylaw.ca

www.carters.ca

8

B. MEMBERSHIP RIGHTS

Access to corporate records (e.g., membership list)

Elect and Removal of Directors

Appoint the auditor or person to conduct a review engagement

Requisition members' meeting (by 10% of voting right)

Submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)

Submit proposal to nominate directors (by 5% of voting right)

www.charitylaw.ca

www.carters.ca

9

- Access to Corporate Records
 - Members are entitled to free copies of articles and by-laws, as well as financial statements
 - Members may examine or receive an extract of
 - articles and by-laws
 - minutes of meetings of the members and of any committee of members
 - resolutions of the members and of any committee of members
 - register of directors
 - register of officers
 - register of members
 - register of ownership interests

www.charitylaw.ca

www.carters.ca

10

- Members can access the register of members required under 92(1)(h), subject to a statutory declaration
 - Contains names of current members, former members within past 6 years, address for service, email address and class (see 6(3) of regulations)
- Members can obtain a membership list setting out the name and address of each member, “and such additional information as required by the by-laws”, subject to statutory declaration
- Members can apply to court where refusal of access to records by board
 - Use of list limited to an effort to influence voting, requisition a meeting of members, or another matter relating to affairs of the corporation

www.charitylaw.ca

www.carters.ca

11

- Removal of Directors
 - Under former *Corporations Act* (Ontario) (“OCA”), members could remove directors by a 2/3rds vote
 - OCA was amended prior to proclamation of ONCA to provide for ordinary resolution
 - ONCA permits voting members to remove directors by ordinary resolution, except for *ex officio* directors
 - Only classes of members with the right to elect specific directors can remove those directors, or fill vacancies related to that director

www.charitylaw.ca

www.carters.ca

12

- Voting Members who hold at least 10% of the votes may requisition a membership meeting, subject to limits set out in s. 60(3)
 - By-laws can set lower threshold
- Voting Members have right to submit and discuss proposals
 - Voting members with at least 5% can submit proposals to nominate directors
 - Lower threshold can be set out in by-laws
 - A voting member can submit proposals to amend articles in relation to section 103
 - A voting member can submit a proposal to make, amend, or repeal a by-law
 - See limits at s. 56(6)

www.charitylaw.ca

www.carters.ca

13

C. DISCIPLINE AND TERMINATION OF MEMBERSHIP

- Default termination on death, resignation, removal expiry of membership term, liquidation or dissolution,
- The ONCA allows directors, members or committee to discipline members or terminate
 - Articles/by-laws must set out circumstances and the manner in which the power may be exercised
 - Must exercise power in “good faith” and fair & reasonable manner - 15 days notice of disciplinary action or termination with reasons, give member opportunity to be heard 5 days before termination/suspension implemented
 - ONCA specifically provides for member to apply for compliance or restraining order to challenge removal

www.charitylaw.ca

www.carters.ca

14

D. MEMBERSHIP REMEDIES

- Broad remedy powers (e.g., dissent and appraisal remedy derivative action, compliance & restraining orders, court ordered wind-up and liquidation)
 - Members can bring an application for a court ordered investigation for the grounds set out in s. 174
 - Grounds include where there is conduct that is oppressive or unfairly prejudicial
 - Under s. 183, members can bring an application to start a derivative action
 - There is an exclusion for “religious corporations”
 - Potentially broader than exclusion found under the *Canada Not-for-profit Corporations Act* which limits religious corporation exclusion to where it involves a tenet of faith
 - ONCA does not reference an oppression remedy specifically unlike other jurisdictions
 - Members can also seek a compliance or restraining order

www.charitylaw.ca

www.carters.ca

15

E. MEMBERSHIP MEETINGS

- Note ONCA provisions subject to current COVID related exemptions for electronic voting until September 30, 2022
- Types of Meetings
 - Annual Meetings
 - Must be held within 18 months from incorporation and not later than 15 months after holding the preceding annual meeting
 - Special Meetings
 - May be called by board at any time or requisitioned by members
 - Notice of Meeting
 - Must be given 10 to 50 days before the meeting

www.charitylaw.ca

www.carters.ca

16

- How to Conduct a Members Meeting
 - Where to hold (s. 53)?
 - ONCA membership meetings must be held in Ontario, unless all members entitled to vote agree to hold outside Ontario or if the articles specify
 - Who can attend?
 - Notice must be given to members entitled to receive notice, each director, and the auditor
 - Directors may fix “record date” of no more than 50 days before members’ meeting (to determine who are members for the meeting)

www.charitylaw.ca

www.carters.ca

17

- Giving Notice
 - Must give notice in accordance with the by-laws
 - Meetings discussing “special business” must specify and give adequate information/special resolution
- In person or virtual (s. 53(3) and(4))?
 - Default is that members can participate in meeting by electronic or telephonic means “if the corporation makes such means available”
 - Entirely by electronic means where call participants can “**communicate adequately**”
 - “telephonic or electronic means” means any means ... to transmit information or data, including telephone calls, voice mail, fax, e-mail, automated touch-tone telephone system, computer or computer networks.

www.charitylaw.ca

www.carters.ca

18

- What is discussed?
 - At an annual general meeting
 - Consideration of the financial statements and of the audit or review engagement report
 - Election of Directors
 - Appointment or reappointment of the auditor or person to conduct review engagement, or passing extraordinary resolution dispensing with financial review
 - At a special meeting or annual meeting, any other business is “special business”
- Quorum for meetings of members
 - Quorum is a majority of members **entitled to vote**, in person or by proxy, unless the by-laws say otherwise
 - Continuous quorum is not required

www.charitylaw.ca

www.carters.ca

19

- Voting, Electronic and Absentee Voting
 - Default voting mechanism is show of hands unless ballot is demanded
 - Subject to the by-laws
 - Proxy Voting
 - Under the *Corporations Act* (Ontario) (OCA), right to appoint a proxyholder was a statutory right
 - Under the ONCA, a member can appoint a proxyholder only if permitted in articles or by-laws
 - Proxyholders do not have to be members, unless required in the articles/by-laws

www.charitylaw.ca
www.carters.ca

20

- Other forms of absentee voting
 - By-laws may provide for voting by mail or by telephonic or electronic means, **in addition to or instead of voting by proxy**
 - Can only be used if
 - votes may be verified as having been made by members entitled to vote
 - corporation is not able to identify how each member voted

www.charitylaw.ca
www.carters.ca

F. PRACTICAL RESOLUTIONS FOR MEMBERSHIP ISSUES

- On incorporation or transition, review membership class structure and rights
 - Determine what needs to be set out in articles and by-laws in order to make sure membership structure and rights properly reflected
- Carefully consider membership structure, e.g., mass membership or restricted membership
 - Members have significant rights under the ONCA, therefore important to consider membership eligibility
 - Determine who may, or may not, be a member and which class of members should control the corporation
- By-laws should clearly set out what the membership qualification requirements are and carefully set out an appropriate membership admission process

www.charitylaw.ca

www.carters.ca

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 www.charitylaw.ca www.churchlaw.ca

CARTERS

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

**MOVING FORWARD WITH THE ONCA:
UNDERSTANDING KEY PROVISIONS
AND PRACTICAL TIPS**

Wednesday, December 8, 2021

**BOARD OF DIRECTORS' ISSUES
AND MEETINGS**

By Jacqueline M. Demczur, B.A., LL.B.


jdemczur@carters.ca
1-877-942-0001

© 2021 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION
BARRISTERS . SOLICITORS . TRADEMARK AGENTS
TOLL FREE: 1-877-942-0001

Toronto Ottawa Orangeville

www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

 BARRISTERS SOLICITORS TRADEMARK AGENTS	<p>Moving Forward with the ONCA: Understanding Key Provisions and Practical Tips</p> <p>Webinar - December 8, 2021</p>		
<p>Board of Directors' Issues and Meetings</p> <p>By Jacqueline M. Demczur, B.A., LL.B. jdemczur@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p> <table border="0"> <tr> <td data-bbox="248 821 627 865"> CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001 </td> <td data-bbox="627 821 1204 865"> Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca </td> </tr> </table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca
CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca		

<div style="text-align: right;">2</div>
<p>A. ROLE OF THE DIRECTORS AND REQUIRED NUMBER</p> <ul style="list-style-type: none"> • Directors must “manage or supervise the management of [its] activities and affairs” • There must be a minimum of 3 directors, regardless of whether the corporation is a registered charity • 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 • The exact number of directors can be changed within the range by a special resolution (2/3rds vote) of the members • 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 <p>www.charitylaw.ca www.carters.ca</p>

3

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

www.charitylaw.ca

www.carters.ca

4

- 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

www.charitylaw.ca

www.carters.ca

5

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

www.charitylaw.ca
www.carters.ca

6

- 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

www.charitylaw.ca
www.carters.ca

7

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

www.charitylaw.ca

www.carters.ca

8

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

www.charitylaw.ca

www.carters.ca

9

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)

www.charitylaw.ca

www.carters.ca

10

- 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

www.charitylaw.ca

www.carters.ca

11

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

www.charitylaw.ca

www.carters.ca

12

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

www.charitylaw.ca

www.carters.ca

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

15

- 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

www.charitylaw.ca

www.carters.ca

16

- 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

www.charitylaw.ca

www.carters.ca

17

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

www.charitylaw.ca

www.carters.ca

18

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

www.charitylaw.ca

www.carters.ca

19

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)

www.charitylaw.ca

www.carters.ca

20

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

www.charitylaw.ca

www.carters.ca

21

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

www.charitylaw.ca

www.carters.ca

22

- 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

www.charitylaw.ca

www.carters.ca

23

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

www.charitylaw.ca

www.carters.ca

24

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

www.charitylaw.ca

www.carters.ca

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

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

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

MOVING FORWARD WITH THE ONCA: UNDERSTANDING KEY PROVISIONS AND PRACTICAL TIPS

Wednesday, December 8, 2021

BY-LAW ISSUES TO CONSIDER

By Esther S.J. Oh, B.A., LL.B.


estheroh@carters.ca
1-877-942-0001

© 2021 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION
BARRISTERS . SOLICITORS . TRADEMARK AGENTS
TOLL FREE: 1-877-942-0001

Toronto Ottawa Orangeville

www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

 BARRISTERS SOLICITORS TRADEMARK AGENTS	Moving Forward with the ONCA: Understanding Key Provisions and Practical Tips Webinar - December 8, 2021		
<h2>By-law Issues to Consider</h2> <p>By Esther S.J. Oh, B.A., LL.B. estheroh@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p> <table border="0"><tr><td>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td><td>Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca</td></tr></table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca
CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca		

	2
<h3>OVERVIEW</h3> <ul style="list-style-type: none">By-laws for New Incorporation Under the ONCABy-laws for Pre-existing CorporationsBy-law Drafting ConsiderationsHow to Amend ONCA By-law <p>www.charitylaw.ca www.carters.ca</p>	

3

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

www.charitylaw.ca

www.carters.ca

4

- 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

www.charitylaw.ca

www.carters.ca

5

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

www.charitylaw.ca

www.carters.ca

6

- 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

www.charitylaw.ca

www.carters.ca

7

- 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

www.charitylaw.ca

www.carters.ca

8

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

www.charitylaw.ca

www.carters.ca

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

11

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

www.charitylaw.ca

www.carters.ca

12

- 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)

www.charitylaw.ca

www.carters.ca

13

- 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)

www.charitylaw.ca

www.carters.ca

14

- 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)

www.charitylaw.ca

www.carters.ca

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

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

www.carters.ca

19

- 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"

www.charitylaw.ca

www.carters.ca

20

- 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

www.charitylaw.ca

www.carters.ca

21

- 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

www.charitylaw.ca

www.carters.ca

22

- 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

www.charitylaw.ca

www.carters.ca

23

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))

www.charitylaw.ca

www.carters.ca

24

- 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

www.charitylaw.ca

www.carters.ca

CARTERS

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

**MOVING FORWARD WITH THE ONCA:
UNDERSTANDING KEY PROVISIONS
AND PRACTICAL TIPS**

Wednesday, December 8, 2021

**OTHER TOPICS OF INTEREST,
INCLUDING PUBLIC BENEFIT
CORPORATIONS AND FINANCIAL
REPORTING**

By Esther Shainblum, B.A., LL.B., LL.M., CRM


eshainblum@carters.ca
1-877-942-0001

© 2021 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION
BARRISTERS . SOLICITORS . TRADEMARK AGENTS
TOLL FREE: 1-877-942-0001

Toronto Ottawa Orangeville

www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

 BARRISTERS SOLICITORS TRADEMARK AGENTS	Moving Forward with the ONCA: Understanding Key Provisions and Practical Tips Webinar - December 8, 2021
Other Topics of Interest, Including Public Benefit Corporations and Financial Reporting By Esther Shainblum, B.A., LL.B., LL.M., CRM eshainblum@carters.ca 1-877-942-0001 © 2021 Carters Professional Corporation	
CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca

2	
OVERVIEW	
Public Benefit Corporations	
Auditors, Financial Reporting and Financial Disclosure	
Fundamental Changes	
Share Capital Social Clubs	
Corporations Sole	
www.charitylaw.ca	www.carters.ca

A. PUBLIC BENEFIT CORPORATIONS

- The *Not-for-profit Corporations Act, 2010* (Ontario) (“ONCA”) creates a new classification system for not-for-profit corporations
- Under the ONCA, all corporations are characterized as either Public Benefit Corporations (“PBCs”) or non-Public Benefit Corporations (“non-PBCs”)
- Whether a corporation is a PBC or a non-PBC has a number of implications, including the fact that PBCs are subject to stricter financial review requirements than non-PBCs

1. What is a PBC?

- PBC is defined in section 1(1) of the ONCA as:
 - (a) A charitable corporation; or
 - (b) A non-charitable corporation that receives more than \$10,000 or other prescribed amount in a financial year,
 - (i) In the form of donations or gifts from persons who are not members, directors, officers or employees of the corporation; or
 - (ii) In the form of grants or similar financial assistance from the federal government or a provincial or municipal government or an agency of any such government

5

- Charitable corporations will always be PBCs, regardless of the amount or source of their revenue
- Non-charitable corporations will only be PBCs if they meet the criteria set out in the ONCA:
 - Receive more than \$10K in a financial year
 - In gifts or donations from persons not connected to the NFP; or
 - In grants or financial assistance from government
- The definition of PBC turns on the meaning of “charitable corporation”, which is defined in section 1(1) of the ONCA as:

www.charitylaw.ca

www.carters.ca

6

- A corporation incorporated for the relief of poverty, the advancement of education, the advancement of religion or other charitable purpose, and
- “non-charitable corporation” means a corporation that is not a charitable corporation
- Similar to the common law definition of charity
- However not limited to registered charities under the *Income Tax Act* (Canada) (“ITA”) regulatory regime
- Could include unregistered charities and any corporation that is deemed to be a trustee under the Ontario *Charities Accounting Act* (“CAA”), which could include corporations that are not registered charities
- If so, they would automatically be PBCs

www.charitylaw.ca

www.carters.ca

7

2. Timing of Becoming a PBC

- Charitable corporations are always PBCs
- For non-charitable corporations, PBC status is never applied retroactively and always applies for the following financial year beginning at the first annual meeting of members
- Non-charitable corporations that hit the threshold in one financial year will become PBCs for the next financial year, starting at the first annual meeting of members in that financial year [Section 1(2)]
- Non-charitable corporations would cease to be a PBC at the end of that financial year

www.charitylaw.ca

www.carters.ca

8

3. Consequences of Being a PBC

- Three main consequences flow from being a PBC:
 - a) PBCs are subject to more stringent financial review requirements than non-PBCs
 - b) There are restrictions on the composition of the board of directors of a PBC
 - c) There are restrictions on how any remaining property of a PBC can be distributed upon dissolution or liquidation

www.charitylaw.ca

www.carters.ca

9

a) Financial review requirements for PBCs

- ONCA permits some corporations to conduct a review engagement rather than an audit in certain circumstances
- Review engagements are more limited and are typically less expensive than an audit
- Default is that audit is required unless the rules in Section 76 permit a review engagement or a waiver of both an audit and a review engagement

www.charitylaw.ca

www.carters.ca

10

Type of Corporation	Amount of Annual Revenue	Type of Financial Review
PBC	\$500,000 or more	Audit
PBC	> \$100,000 to less than \$500,000	Can waive audit in favour of review engagement by extraordinary resolution
PBC	\$100,000 or less	Can waive both audit and review engagement by extraordinary resolution
Non-PBC	> \$500,000	Can waive audit in favour of review engagement by extraordinary resolution
Non-PBC	\$500,000 or less	Can waive both audit and review engagement by extraordinary resolution

- Extraordinary resolution is a resolution that is approved by at least 80% of the votes cast at a special meeting of the members

www.charitylaw.ca

www.carters.ca

11

- b) Restrictions on board of directors of PBCs
 - Section 23(3) – Not more than one-third of the directors of a public benefit corporation may be employees of the corporation or of any of its affiliates
 - However, a PBC that is a charitable corporation would not be able to provide any remuneration to directors except when done in compliance with the regulations under the CAA or section 13 of the CAA
 - Section 3(3) – corporations are deemed to be affiliated if one of them is the subsidiary of the other, both are subsidiaries of the same corporation or each of them is controlled by the same person

www.charitylaw.ca

www.carters.ca

12

- c) Restrictions on distribution of property upon dissolution
 - “Net assets” – any property remaining after satisfying a dissolving corporation’s debts, obligations and liabilities
 - Section 150 and section 167 – restrictions upon how a PBC’s net assets can be distributed upon dissolution (see next slide)

www.charitylaw.ca

www.carters.ca

13	
Type of Corporation	Limitations on Distribution of Net Assets Upon Dissolution
Charitable corporation - PBC	to a Canadian body corporate that is a registered charity under the Income Tax Act (Canada) with similar purposes to its own, the Crown in right of Ontario, the Crown in right of Canada, an agent of either of those Crowns or a municipality in Canada
Non-charitable corporation – PBC	to another public benefit corporation with similar purposes to its own, a Canadian body corporate that is a registered charity under the Income Tax Act (Canada) with similar purposes to its own, the Crown in right of Ontario, the Crown in right of Canada, an agent of either of those Crowns or a municipality in Canada
www.charitylaw.ca www.carters.ca	

- | | |
|---|--|
| 14 | |
| <ul style="list-style-type: none"> • Section 167(5.1) – charitable corporations that do not have such a provision in their articles will be deemed to have filed articles of amendment adding a provision to their articles to this effect • Section 167(5.2) – non-charitable PBCs that do not have such a provision in their articles will be deemed to have filed articles of amendment adding this provision when they file articles of dissolution | |
| www.charitylaw.ca www.carters.ca | |

15

- In contrast, a corporation that is a non-PBC may distribute its net assets in accordance with its articles or, if there is no provision in its articles for distribution of property, rateably to its members according to their rights and interests in the corporation
- Section 167(6) – a corporation that is not a PBC in the financial year in which it files articles of dissolution will be deemed to be a PBC if it met the definition in any of the three preceding financial years

www.charitylaw.ca

www.carters.ca

16

B. AUDITORS, FINANCIAL REPORTING AND FINANCIAL DISCLOSURE

- Section 69(1) – auditor or person appointed to conduct a review engagement must be:
 - Permitted to conduct an audit or review engagement of the corporation under the *Public Accounting Act*, 2004; and
 - Be independent of the corporation, any of its affiliates, and the directors and officers of the corporation and its affiliates
- Section 69(2) sets out when a person is deemed not to be independent including when they or their business partner is a business partner, director, officer or employee of the corporation or any of its affiliates
- A business partner includes a shareholder or member

www.charitylaw.ca

www.carters.ca

17

- Section 80 – permits a corporation to have an audit committee. If it does, the majority of the committee must not be officers or employees of the corporation or of any of its affiliates
- Section 83(3) – If the corporation has an audit committee, the audit committee shall review the financial statements of the corporation before they are approved by the directors
- Section 83(1) – the directors must approve annual financial statements for the period starting at the end of the last financial year and ending no more than six months before the annual meeting
- Section 84(1) – the directors must present the approved annual financial statements to the members at every annual meeting, together with the report of the auditor/reviewer

www.charitylaw.ca

www.carters.ca

18

- Section 84(2) – the corporation must provide a copy of the financial statement, auditor's report and any other relevant documents to a member who has requested them not less than 21 days or a prescribed number of days before the annual meeting. Section 13 of O. Reg 395/21 provides that the prescribed number of days is five business days
 - It is unclear which provision governs

www.charitylaw.ca

www.carters.ca

C. FUNDAMENTAL CHANGES

- Under ONCA a special resolution means a resolution passed by at least 2/3 of the votes cast at a special meeting of the members [section 1(1)]
 - Amendment of articles
 - Section 103 – a special resolution of the members is required to make any amendment to the articles of the corporation
 - Section 106 – articles of amendment must be
 - Amalgamation
 - Section 110 – two or more corporations may amalgamate by signing an amalgamation agreement and submitting it to the members of each corporation

- Section 111 – a special resolution of the members of each amalgamating corporation is required to approve the amalgamation
 - Section 112 – articles of amalgamation must be filed together with statements from a director or officer of each corporation confirming that, among other things, no creditors will be prejudiced by the amalgamation
- Continuance into ONCA
 - Section 114 – a corporation incorporated outside Ontario may apply for continuance under ONCA and must file articles of continuance
 - Section 115 – a corporation incorporated under another Ontario Act may apply for continuance into ONCA if approved by its shareholders or members by special resolution. Must file articles of continuance

21

– Continuance out of ONCA

- Section 116 – a corporation may apply to be continued into another jurisdiction if approved by the members by special resolution. Must file a copy of the instrument of continuance issued to it by the other jurisdiction

– Sale of all property

- Section 118 – the sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of its activities requires approval by the members by special resolution

www.charitylaw.ca

www.carters.ca

22

– Reorganization

- Section 119 – a corporation may be subject to a court order under the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*, which order may include changes to by-laws or articles
- Articles of reorganization must be filed
- Members do not have the right to dissent to any amendment to the articles made under this section

– Arrangement

- Section 120 – an arrangement must be approved by special resolution of the members and by court order. Articles of arrangement must be filed

www.charitylaw.ca

www.carters.ca

D. SHARE CAPITAL SOCIAL CLUBS

- Section 2.1 of the ONCA's predecessor, the Ontario *Corporations Act* provides that share capital social clubs have until 5 years after the ONCA is proclaimed to apply to be continued under the ONCA, under the *Co-Operative Corporations Act* or under the Ontario *Business Corporations Act*
- Failing such continuance, they will be dissolved
- If the social company has more than one class of shareholders, each class must authorize the continuance by special resolution by separate vote
- A social club can apply to a court to waive the requirement for a special resolution

E. CORPORATIONS SOLE

- A corporation sole is a legal entity that consists of a single person holding a single office from time to time.
- Usually found in the ecclesiastical and government contexts, such as a Bishop of a Diocese
- Section 4(1.1) – ONCA does not apply to corporations sole except as prescribed
- O. Reg. 396/21 sets out the provisions of ONCA that apply to corporations sole, including its liability to employees for wages, the right of the office holder to be indemnified for losses, and requirements relating to the appointment of an auditor and approval of annual financial statements