

 <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>	
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<h3>OVERVIEW</h3> <ul style="list-style-type: none">Membership StructuresMembership RightsDiscipline and Termination of MembershipMembership RemediesMembership MeetingsPractical Resolutions for Membership Issues	
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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

- 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

- 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

- 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

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- 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)

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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)

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- 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

- 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

- 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

- 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)

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

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

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

- 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)

- 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.

- 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

- 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

- 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

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

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