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LAW PROGRAM  
October 13, 2022**

**BY-LAWS: DEFAULT v  
MANDATORY v PERMISSIVE  
PROVISIONS OF THE ONCA**

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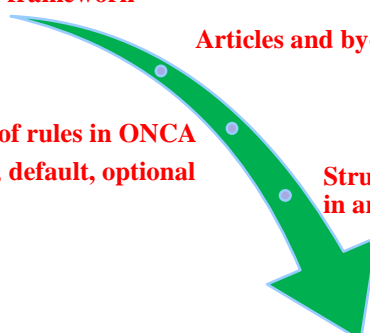
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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p><b>Ontario Bar Association Charity &amp; Not-for-Profit Law Program October 13, 2022</b></p>
<p><b>By-Laws: Default v Mandatory v Permissive Provisions of the ONCA</b></p> <p><b>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.</b> tman@carters.ca 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p>	
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**OVERVIEW**



**ONCA  
hierarchy and  
framework**

**Articles and by-laws**

**Three types of rules in ONCA  
mandatory, default, optional**

**Structuring of provisions  
in articles and by-laws**

**Brief overview of by-law  
related matters**

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## A. ONCA HIERARCHY AND FRAMEWORK

- Need to understand the ONCA framework when drafting by-laws
- 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

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## B. ARTICLES AND BY-LAWS

- Articles and by-laws must go hand in hand as a set
- “Articles” also defined in the ONCA to include letters patent, supplementary letters patent, and special Act
- Cannot draft by-laws on their own
- Articles and by-laws are living documents and must reflect the uniqueness of each organization and how the organization is to operate
- Articles and by-laws need to comply with legal requirements
  - Complies with rules in incorporating legislation
  - Reflects common law rules
  - Reflects good governance and best practices
- Not following articles and by-laws may invalidate decisions made, and expose them to being subject to challenge

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## C. THREE TYPES OF RULES IN ONCA

<b>Mandatory Rules</b>	Cannot be overridden by the articles or by-laws	n/a
<b>Default Rules</b>	Apply automatically if articles/by-laws silent	Overriding provisions may be set out in articles or by-laws – depending on the rules in question
<b>Optional Rules</b>	May opt in to have certain optional rules apply	Opt-in provisions may be set out in articles or by-laws – depending on the rules in question

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## D. STRUCTURING OF PROVISIONS IN ARTICLES AND BY-LAWS

- Articles**
- By-laws**
- Overriding/ opt-in provisions in the correct document(s)**
- Elevate by-law provisions to articles**

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## (1) Articles

- Certain provisions/issues must be set out in the articles, e.g.
  - Purposes
  - Dissolution clause
  - Membership classes and voting rights – new in ONCA
  - Number of directors – new in ONCA
- Not recommend to also set out these issues in the by-laws to avoid inconsistency or confusion – e.g. purposes and dissolution clause

## (2) By-laws

- 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

### (3) Overriding/ Opt-in Provisions in Correct Document(s)

- Need to ensure overriding/opt-in provisions are inserted in the correct document(s)
- 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, some of them
  - Must be in the articles
  - Must be in the by-laws
  - May be in the articles or the by-laws
- When drafting overriding/opt-in provisions, ensure these mechanisms are in compliance with the ONCA

### (4) Elevate By-law Provisions to Articles

- Articles may set out any provisions permitted by the ONCA or other law to be set out in the by-laws of the corporation [s. 7(4)]
- Articles may require a greater number of votes of directors or members than that required by the ONCA to effect any action – this does not apply to the removal of directors which must be by ordinary resolution of the members [s. 7(6)]
  - For example – ONCA requires by-law amendments made by directors be subject to confirmation, rejection or amendment by ordinary resolution of the members
    - Can insert provision in the articles to require by-law amendments be subject special resolution of the members

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## Examples

**Mandatory rules**

What to do?

**Default rules**

How to override?

**Optional rules**

How to opt-in?

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## Mandatory Rules

- Examples
  - Must have at least 3 directors
  - Directors must be elected by members at annual members meeting by ordinary resolution (except *ex officio* directors)
  - Directors can be removed by ordinary resolution of members (except *ex officio* directors)
  - Length of notice of members' meetings
  - Length of term of directors cannot exceed 4 years

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## Default Rules

- 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
  - Hold 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)
  - How by-laws may be amended

- Can override default rules in the document(s) specified in the ONCA
  - (1) 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 remove directors)



- (2) Override by provisions in by-laws – examples
  - Quorum for membership meetings other than a simple majority
  - Require directors must be members
  - Not allow members to participate membership meetings by electronic means (hybrid meetings)
- (3) 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
  - Require proxyholders be restricted to members

## Optional Rules

- Examples
  - Proxy votes (needs to be permitted by articles or by-laws)
  - Holding membership meetings entirely by electronic means (needs to be permitted by by-laws)
  - Multiple classes of membership (needs to be permitted by articles)

## E. BRIEF OVERVIEW OF BY-LAW RELATED MATTERS

- Standard organizational by-laws after new incorporation under ONCA
  - After incorporation under the ONCA, corporation is deemed to have passed the standard organizational by-laws approved by the Ministry if directors do not pass any by-law within 60 days after incorporation (ONCA s. 18)
  - Thereafter, corporations may amend or repeal and replace the organizational by-law at any time
  - Pros – Prevents corporations from not having by-laws after incorporation
  - Cons – Reflects “generic” governance, may not reflect unique characteristics of the corporation

- Corporations previously under Part III OCA will have 3 years to bring their articles and by-laws into compliance with ONCA
  - Prudent to do optional transition process to
    - adopt articles of amendment
    - Replaced or substantially revise by-laws
- By-laws do not need to be filed with the Ontario Ministry
- General by-law drafting
  - Clear wording and plain language
  - Anticipate potential problems and provide simple solutions
  - Do not be too brief
  - Number all by-laws
  - Use proper headings, formatting, spacing and numbering to make the by-law easier to read

## F. KEY TAKEAWAYS

- **It is COMPLICATED !**
- Drafters need to have clear understanding of the ONCA rules, hierarchy of rules, and inter-play between the rules
- Important role for lawyers to play
- Need to assist clients to understand the applicable rules and offer options
- No one size fits all, so each client's situation will require custom drafting rather than adopting a "by-law in a box"

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