

 <p>CARTERS BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>Carters Annual <i>Charity & Not-for-Profit Law</i> Webinar November 9, 2023</p>
<p>Things Charities & NFPs Should Do but Don't</p> <p>By Ryan M. Prendergast, B.A., LL.B. rprendergast@carters.ca 1-877-942-0001</p> <p>© 2023 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.antiterrorismlaw.ca</p>

<p>2</p>
<p>INTRODUCTION & OVERVIEW</p> <ul style="list-style-type: none">• The focus of this presentation involves common areas of non-compliance for not-for-profit corporations (“NFPs”), whether they be registered charities or non-profit organizations• Not-for-profits are often volunteer based but must comply with a complex corporate and tax regulatory framework• Is your organization “guilty” of some of the issues discussed in this presentation? If so, you’re in very good company!• Few organizations are perfect but there is always room for improvement <p>www.carters.ca www.charitylaw.ca</p>

- The following slides are divided into the following topics
 - Corporate/Tax Filings
 - Financial Statement/Financial Review Issues
 - Directors/Members Meeting Issues
 - Corporate Maintenance
- These topics are not organized by areas of importance or urgency, but rather practical observations on a wide range of issues
- These issues are not covered in depth but provide tips to help stay compliant

A. CORPORATE/TAX FILINGS

1. *Corporations Information Act (Ontario)* (“CIA”) Annual and Initial Returns

- Not-for-profit corporations incorporated in Ontario or federal not-for-profit corporations operating in Ontario (*i.e.*, extra-provincial corporations) have various filing obligations that are not set out in the *Not-for-profit Corporations Act, 2010* (Ontario) (“ONCA”)
 - Annual Returns
 - ONCA corporations (even those that haven’t yet transitioned from the *Corporations Act Ontario*) to the ONCA must file an annual return within six months after the end of the corporation’s taxation year

- Previously, Ontario not-for-profit corporations that were registered charities were exempt because they could file a worksheet with their T3010 with Canada Revenue Agency and CRA would share this with Ontario to fulfil their annual return requirements under the CIA
- CRA has **stopped** doing this since **May 15, 2021** but many registered charities remain unaware that this is the case
- Ontario not-for-profits can file their annual return on the Ontario Business Registry (“OBR”)
 - Need to be familiar with the OBR
 - Make sure you have your company key if not already obtained

– Initial Returns

- Extra-provincial corporations that carry on business in Ontario must file an initial return under the CIA within 60 days after the date the corporation begins to carry on business
 - Many federal not-for-profit corporations assume because they are not incorporated in Ontario means that they have no CIA filing requirements but this is not correct
- Non-compliance with these filing obligations can lead to penalties or potentially administrative dissolution if left unattended

2. Filing Corporate Returns for Federal Not-for-profit Corporations

- Federally incorporated not-for-profit corporations under the *Canada Not-for-profit Corporations Act* (“CNCA”) are also required to file an annual return
 - Many federal not-for-profit corporations that are registered charities assume that because they have filed their T3010 with CRA there is no other filing requirement
 - An annual return must be filed with Corporations Canada within 60 days of the “anniversary date” of the corporation
 - This is completely unrelated to the financial year of the corporation – the “anniversary” is the date of incorporation, amalgamation or continuance

- On June 14, 2023, Corporations Canada announced that it would begin the dissolution process for CNCA corporations starting July 2023 for those that have not filed annual returns for three years
 - Dissolution, *i.e.*, loss of legal status, can also lead to revocation of charitable status for federal not-for-profit corporations that are registered charities
- The annual return requires the CNCA corporation to provide the date for the last annual meeting of members and whether the corporation is “soliciting” or “non-soliciting” under the CNCA

- Federal not-for-profit corporations that are “soliciting corporations” under the CNCA are required to file their financial statements with Corporations Canada
 - Corporations Canada has begun to contact soliciting corporations that have not filed financial statements - non-filing of financial statements can also result in **dissolution**
 - Many federal not-for-profit corporations that file their financial statements with their T3010 assume they have completed this obligation
 - CRA does not share financial statements with Corporations Canada – a separate filing is required
 - Soliciting corporation status can apply to non-charities as well

- Both soliciting and non-soliciting corporations are required to file their by-laws with Corporations Canada
 - Section 153 of the CNCA requires by-laws to be filed 12 months after the day on which the members confirm or amend the by-law, amendment or repeal
 - Many federal not-for-profit corporations either never file their by-laws or only file them after incorporation and never file amended or subsequent
- Ontario not-for-profit corporations have no filing requirement of by-laws
- While not a legal obligation, both federally and provincially incorporated registered charities should consider providing their by-laws to CRA

B. FINANCIAL STATEMENTS/FINANCIAL REVIEW ISSUES

1. Signature on Approved Financial Statements

- Both the ONCA and the CNCA require the directors to approve the financial statements and the approval is to be evidenced by the signature of one or more directors
 - Financial statements are very rarely signed anywhere
 - Public accountants assisting the corporation are usually unaware of this requirement
 - Consider that the financial statements may be made public as is the case for registered charities

2. Notice Provided to the Auditors

- Both the CNCA and ONCA require that notice of meetings of members, any meeting, not just the annual meeting, must be given to the public accountant/auditor/person conducting an audit or a review engagement (“auditors”)

– For larger charities and NFPs it is not unusual for the auditors to attend the annual meeting to present the financial statements, but not every meeting

– For smaller charities and NFPs typically the auditors do not attend and the presentation of financials is left to the treasurer

– Given the cost of the attendance of the auditor this rarely happens in practice

- If an audit committee is utilized, both the ONCA and CNCA have composition requirements for such committees
 - Both ONCA and CNCA require that a majority of the committee must not be officers or employees of the corporation or of any of its affiliates
 - Audit committees must have at least 1 director under the ONCA and at least 3 under the CNCA
 - As well, the ONCA and CNCA require that notice of meetings of the audit committee be given to the auditors
 - The auditor does not have to attend but must attend if a member of the audit committee requests it

3. Having Financial Statements Subject to the Correct Level of Financial Review

- Both the CNCA and ONCA have specific levels of financial review applicable whether the corporation is “soliciting” or “non-soliciting” in the case of the CNCA or “public benefit” or “non-public benefit” in the case of the ONCA
- Many charities and NFPs either incorrectly self-assess which category they fall into and as a consequence whether they are required to have an audit or review engagement, or assume CRA has jurisdiction in this area when it does not
- The following slides provide an overview of these requirements

CNCA Financial Review Chart

Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Soliciting	Designated	\$50,000 or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	More than \$50,000 and up to \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit, but members can pass a special resolution to require a review engagement instead
	Non-Designated	more than \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.
Non-Soliciting	Designated	\$1 million or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	more than \$1 million	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

www.carters.ca

www.charitylaw.ca

ONCA Financial Review Chart

Type of Corp/Gross Annual Revenues	Requirements for an Auditor	Audit/Review Engagement
Public benefit corporation	\$100,000 or less	May, by extraordinary resolution (80 per cent), decide not to appoint an auditor
	More than \$100,000 and less than \$500,000	May dispense with an auditor and have someone else conduct a review engagement. This dispensation requires an extraordinary resolution (80 per cent)
	\$500,000 or more	An auditor must be appointed annually
Non-public benefit corporation	\$500,000 or less in annual revenue	May, by extraordinary resolution (80 per cent), dispense with an auditor
	More than \$500,000 in annual revenue	May, by extraordinary resolution (80 per cent), dispense with an auditor, and instead appoint a person to conduct a review engagement

www.carters.ca

www.charitylaw.ca

4. Keeping Records in Accordance with the *Charities Accounting Act (Ontario)* (“CAA”)

- Prior to regulations under the CAA in 2001, trust property, such as restricted purpose gifts, had to be kept in separate trust accounts and could not be co-mingled
- Section 3 of O. Reg. 4/01 both clarified allows trust funds to be combined for investment purposes where it advances their “administration and management”
- Subsection 3(5) of O. Reg. 4/01 requires specific records to be kept but many charities are unaware
 - These regulations can apply to both provincially and federally incorporated charities, even common law charities

5. Having an Investment Policy that Complies with the *Trustee Act (Ontario)*

- *Trustee Act (Ontario)* can apply to both charities in Ontario and non-profit organizations in Ontario that hold charitable property
- These entities have investment authority under the *Trustee Act (Ontario)*, but an investment plan or policy needs to be in place that complies with the requirements of the *Trustee Act (Ontario)*
- Many investment policies utilized by charities discuss matters relevant to their investment advisors, but not the requirements of provincial investment law for charitable property

C. DIRECTORS/MEMBERS MEETING ISSUES

1. Holding Annual Meetings within the Prescribed Time Period

- Both the ONCA and CNCA set out prescribed time periods for the holding of annual meetings
- Generally speaking, the annual meeting must be held within six months of the end of the fiscal period
 - Needs to be done to meet necessary approvals for financial statement and tax returns and distribution to the members
 - Some corporations have had the habit of doing this on a biannual or triannual basis
 - Sometimes the inability to have financial statements available within the 6-month window puts them offside

2. Keeping Minutes of Meetings

- Charities and NFPs have an obligation to keep minutes of meetings from both corporate and tax legislation
 - Some charities and NFPs keep minutes, but there are some instances where no minutes have been kept
 - Where minutes are kept, the corporation may assume that minutes of committees are not necessary
 - Both the ONCA and CNCA require minutes to be kept of committees of directors or members
 - Some corporations believe “in camera” meetings do not require minutes
 - All meetings of directors, members, and committees must have minutes

3. Holding Electronic Meetings Properly

- Since the COVID-19 pandemic, holding meetings electronically through many platforms, Zoom, Teams, *etc*, have become more common place
- Both the CNCA and ONCA allow for meetings by electronic means or electronic participation at meetings
 - However, these statutes have specific requirements that must be met in order for meetings to be valid
- “Email” meetings are not valid, but still used by some charities and NFPs – but meetings need to be contemporaneous and allow all participants to communicate adequately

- Under the CNCA, regulations require that meetings held by electronic means must require a method for the “vote to be gathered in a manner that permits their subsequent verification” and “permits the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each member or group of members voted”
 - In practice this means that Zoom or other platforms will need to be used in conjunction with another platform that allows for anonymized votes
- The ONCA had this requirement but was amended in the summer of 2023

4. Being Aware of Special Meeting Requirements under the ONCA

- Both the CNCA and ONCA provide for different voting thresholds
 - “Ordinary resolutions” majority
 - “Special Resolutions” approval by two-thirds of the votes cast
- Certain matters under the ONCA require a special resolution, *e.g.*, changes to the corporations name, *etc.*
- “Special resolution” is defined under the ONCA as being submitted to a “special meeting” implying that it cannot be done at an annual meeting

D. CORPORATE MAINTENANCE ISSUES

1. Knowing Where Key Documents are Located

- Do you know where my articles are?
 - It’s not unusual for the lawyer to be asked by various parties for a copy of the charity or NFP’s articles of incorporation, amendments, by-laws, amendments to the by-laws, *etc.*
 - The ONCA and CNCA include legal requirements for not-for-profit corporation to keep various corporate records, including their articles and by-laws and other related registers

2. Keeping Registers of Directors/Officers/Members

- As noted above, not-for-profit corporations have various filing obligations
 - Many charities and NFPs assume that by completing some of the filings related to who is on the board, *i.e.*, who are the directors, there are no other obligations
 - Both the ONCA and CNCA include requirements for charities and NFPs to keep registers of directors, officers and members

- These registers must contain prescribed information and be kept up to date

- Even NFPs with no members, *i.e.*, closed-membership corporations need to keep a register of “members”, *i.e.*, the directors

3. Keeping Corporate Profiles Up to Date

- It is true that director information must be kept up to date with both corporate and tax regulators
 - Many charities and NFPs will update either Corporations Canada/Ministry of Government Services or CRA and assume different levels of government share records
 - This is **not** the case! Registered charities can and should keep both CRA and their applicable corporate regulator up to date
- Some charities file their T3010 and include changes to directors only once a year and assume this is sufficient
 - From a corporate law standpoint, charities and NFPs must provide notices of change within 15 days of changes to the board, not just once a year

4. Keeping Signed Directors Consents

- Both the ONCA and CNCA include requirements for individuals elected as directors to consent to doing so
 - However, the ONCA requires that the consent must be “in writing”
 - As such, new directors of ONCA corporations should sign a written consent and those records should be kept with the books and records of the corporation

5. Fixing the Number of Directors where there is a Minimum and Maximum

- Under the ONCA and CNCA, the articles can provide for a fixed number of directors, e.g., 5, or a minimum and maximum, e.g., 3 and 6, etc.
- However, many charities and NFPs never “fix” the number of directors where the articles provide for a range
- This is important to do, as it is used to determine quorum and other purposes for a valid meeting or how many directors are to be elected

E. KEY TAKEAWAYS



- This sampling of things to do is not exhaustive
 - These are just examples of issues in practice that get forgotten



- Compliance for charities and NFPs is complicated – many charities and NFPs are “guilty” of some of these examples, even large well-funded ones



- Every charity and NFP can improve
 - Keeping good corporate records and being compliant with these legal obligations can help:
 - Stop issues arising on a CRA audit;
 - Help mitigate legal claims; and
 - Avoid governance battles between the board and membership

www.carters.ca

www.charitylaw.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.

© 2023 Carters Professional Corporation

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

Toronto Ottawa Orangeville
www.carters.ca www.charitylaw.ca www.antiterrorism.ca