



OBA Charity & Not-for-Profit Law Program

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Understanding Member Rights & Remedies Under ONCA: A Practical Guide

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Overview of Presentation

- Accessing record rights
 - Standard access rights
 - Accessing the membership list
- Proposals and Requisitioned Meetings
 - ONCA requirements
 - Tips for boards in responding to them
- Removals of a director or an auditor
 - Proposals concerning removal of directors
 - Considerations around appointment of new auditor

Member Access Rights to Corporate Records

- Access to Corporate Records
 - Members are entitled to free copies of articles and by-laws, as well as financial statements
 - Can be done “during the corporation’s regular office hours” and may also be done remotely in discretion of corporation
 - 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
 - Corporation can require “payment of a reasonable fee”

- 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
- The board may seek a court order refusing access to financial statements or other records required to be kept by the ONCA a member may request to access
 - Conversely, a member may also seek a court order to prevent disclosure of corporate records where it would be, “detrimental to any member or the corporation”
- Note that these access rights are not limited to members with the right to vote!

- Boards that refuse membership access do so at their own peril
 - *Hemming v. JAZZ.FM 91 Inc.*
 - Decision under the former *Corporations Act* (Ontario)
 - Board had refused membership emails since statute only required names and address (similar to ONCA)
 - Court ordered disclosure of the emails and Jazz.FM91 to pay \$20,000 in costs
 - “best way to deal with [dissident groups] is at a meeting where they get to either stand or fall, but tossing roadblocks in the way of democracy [is] not a very helpful use of the corporation’s money.”

Proposal Rights and Right to Requisition Meeting

- Proposal rights under the ONCA
 - Voting Members have right to submit and discuss **proposals**
 - Corporation must include the proposal in the notice of meeting, including a supporting statement at discretion of member
 - 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

- When can a board refuse including a proposal in a notice of meeting
 - Later delivery, the same proposal being made two years previous and failing, or the member including such proposal two years previous and failing to present it;
 - Where it clearly appears that:
 - the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers, members or debt obligation holders;
 - the proposal does not relate in a significant way to the activities or affairs of the corporation;
 - Right to proposal being abused to secure publicity
- Corporation must within 10 days after receiving a proposal give notice to the member if it will not include proposal give reasons for refusal
- Both the corporation and the member can apply to court to force or exclude proposal

- Requisitioning a meeting of the members
 - 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
 - For members who want to requisition a meeting, it is very important that the process and requirements set out in the legislation are followed
 - Directors must call a meeting within 21 days of the requisition, failing which any member who signed the requisition may call the meeting
 - Directors do not have to call a meeting if
 - the directors have already established a record date for determining members entitled to receive notice of a meeting of members;
 - the directors have already called a meeting; or
 - the business stated in the requisition is improper
 - Reasons for refusal same as those for a proposal

- Ontario Superior Court of Justice case of *Saskatchewan WTF Taekwondo Assn. Inc. v. Taekwondo Canada* considered refusal of requisition by board
 - Case was under *Canada Not-for-profit Corporations Act*, but dealt with interpretation of where primary purpose is to enforce a personal claim or redress a personal grievance
 - Court held that there was “no basis for characterizing the motives of the members who requisitioned the meeting as being in the nature of a personal grievance”
 - “Clearly” means “only requisitions which are clearly personal grievances are to be rejected”
 - Court held that “the right to call a special meeting is a substantive one and is not lightly to be interfered with”

Removal of Directors and Auditor/Person Appointed to Conduct Review Engagement

- The right to remove a director is a fundamental protection for members who perceive that a director or group of directors is acting improperly
- 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
- Important to be aware ONCA allows a director who is being removed to submit to the corporation a written statement giving reasons for opposing the removal or replacement of the director if a meeting is called for that purpose, unless restricted in the by-laws

- Removal of auditor, person appointed to conduct review engagement
 - Members of a corporation may remove an auditor, other than an auditor appointed by a court, or a person appointed to conduct a review engagement from their position by ordinary resolution at a special meeting
 - Articles of a corporation may provide that a vacancy in the position of auditor or of a person appointed to conduct a review engagement shall only be filled by vote of the members.
 - An auditor or other person appointed to fill a vacancy may act for the unexpired term of the auditor's or other person's predecessor

- Important considerations on the removal of auditor
 - ONCA states that no person shall accept an appointment or consent to be appointed as an auditor of a corporation to replace an auditor who has ... been removed ... until the person has requested and received from that auditor a statement of the circumstances and the reasons, in that auditor's opinion, for the auditor's replacement
 - A person otherwise qualified may accept an appointment or consent to be appointed as an auditor if, within 10 days after making this request and the person does not receive a reply from the previous auditor
 - The appointment of a person who does not make a request under subsection is **void**
- Where board or membership initiate removal of an auditor it is important to follow this process

Tips for addressing membership rights

- 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



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.carters.ca. Ryan has been a regular presenter at the annual Charity & Not-for-Profit Law Seminars, Healthcare Philanthropy: Check-Up, Ontario Bar Association and Imagine Canada Sector Source. Ryan is recognized as a leading expert by Lexpert, The Best Lawyers in Canada, and Chambers and Partners.

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