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# Federation of Citizens Association (FCA) JANUARY 19, 2022

## THE ONCA: OVERVIEW OF KEY PROVISIONS AND PRACTICAL TIPS

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### FEDERATION OF CITIZENS ASSOCIATION (FCA)

January 19, 2022

## The ONCA: Overview of Key Provisions and Practical Tips

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### A. ONCA IS FINALLY HERE!

- The Ontario Not-for-Profit Corporations Act, 2010 (“ONCA”) was proclaimed into force on October 19, 2021
- ONCA now automatically applies to all non-share capital membership corporations under Part III of Ontario Corporations Act (“OCA”)

Share capital social clubs

Corporations under **Part II of OCA** have 5 years from October 19, 2021 to continue under the ONCA, the *Co-Operative Corporations Act* or the *Ontario Business Corporations Act*

Special Act corporations

Need special case-by-case review

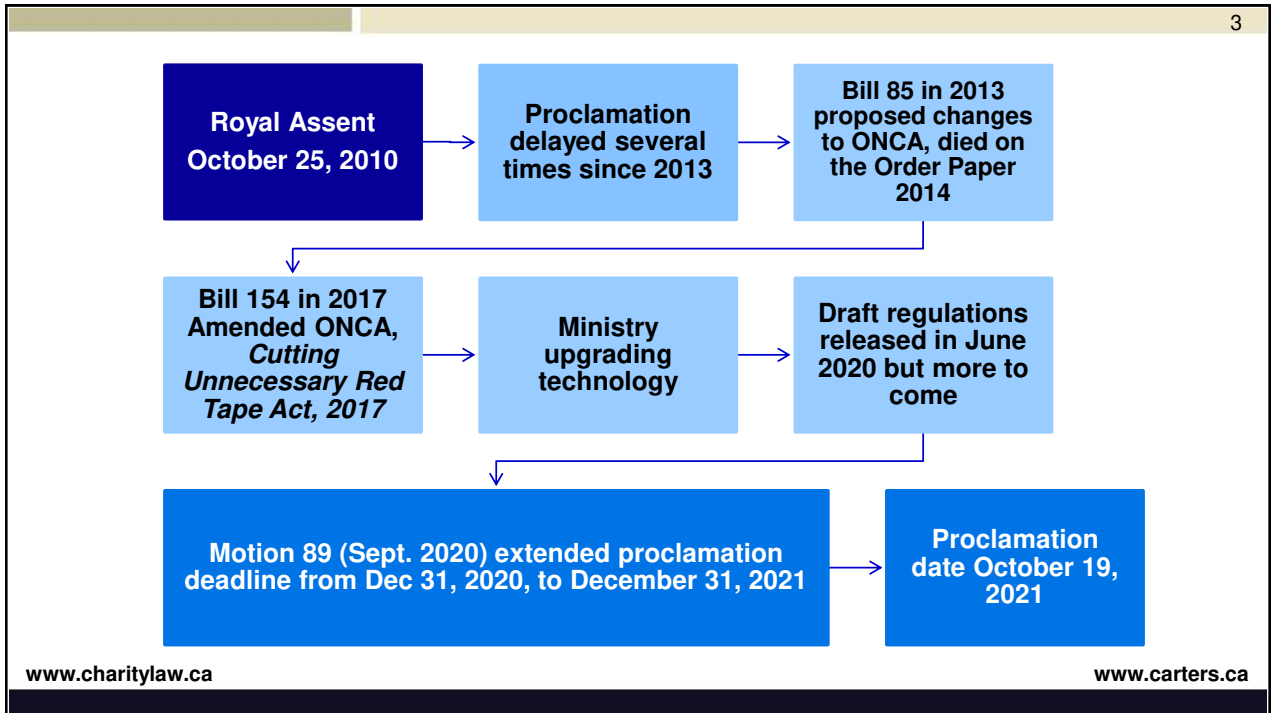
Corporations Sole

ONCA does not apply except as prescribed (see O. Reg. 396/21)

- The ONCA does not apply to corporations established under the Canada Not-for-Profit Corporations Act (“CNCA”)

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- ## B. PURPOSE OF ONCA AND WHAT'S NEW
- A modern regulatory regime for not-for-profit corporations in Ontario
  - Enhanced corporate governance, transparency and accountability
  - Makes incorporation process for new corporations more efficient
  - Enhances rights of members
  - Increases protections for directors and officers
    - Statutory duty of care
    - Due diligence and good faith defence
  - Distinguishes between public benefit corporations (“PBCs”) and other not-for-profit corporations (non-PBCs)
  - Simplifies review of a corporation’s financial records
  - Provides electronic document filing through the online Ontario Business Registry, which was also launched on October 19, 2021
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## C. IMPLICATIONS OF ONCA PROCLAMATION

- All Part III OCA corporations have 3 years to bring letters patent (“LP”), as amended by supplementary letters patent (“SLP”), and by-laws into compliance with ONCA – *i.e.*, until October 18, 2024
- If these corporations do nothing –
  - They will not be dissolved
  - LP, SLPs, by-laws and special resolutions continue to govern for 3 years even if inconsistent with ONCA, but will be deemed amended after 3 years to comply with ONCA – messy and uncertain
  - However, if by-laws and special resolutions silent on any matter addressed in the ONCA, then those ONCA provisions apply now
- Certain provisions need to move to ONCA articles from by-laws or special resolutions but not during transition period: (1) number of directors; (2) membership classes; (3) members’ voting rights; (4) delegates; and (5) distribution of remaining property of non-public benefit corporations

## D. ONCA TRANSITION PROCESS

- Optional transition process possible to do within this 3 year period to make necessary changes to current governing documents
  - Adopt articles of amendment
  - Adopt ONCA-compliant by-law
  - Optional to adopt restated articles
- However, it is prudent to go through this transition process to avoid uncertainty
- If done, then, after the transition process, the corporation will be governed by:
  - (1) LP, SLPs and articles of amendment – possible to consolidate them into restated articles; and
  - (2) ONCA-compliant by-law
- If an existing registered charity, then may need consent of Ontario Public Guardian and Trustee (“PGT”) for portions of articles of amendment (slide 9)

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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 <sup>rd</sup> 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

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- ### E. NEW INCORPORATIONS UNDER THE ONCA
- ONCA now provides incorporation as of right – no more “letters patent”, instead use “articles of incorporation”
  - Powers of a natural person – no more power clauses required
  - Standard information in Articles: (1) name; (2) purposes; (3) registered office address in Ontario; (4) details of first incorporators
  - New information to be provided:
    - Number of directors – fixed number or range
    - Membership classes and applicable voting rights
    - Mandatory special provisions if also a registered charity
    - Consents from first directors who are not incorporators
  - Must prepare ONCA compliant by-law but no need to file with Ministry
  - However, the Ministry’s default by-law will apply if no by-laws adopted within 60 days of incorporation: <https://www.ontario.ca/page/not-profit-corporations-act-2010-standard-organizational-law>
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- If new ONCA corporation will be seeking charitable status under the Income Tax Act (Canada) (“ITA”), then no longer necessary for the PGT to review and approve its purposes
- However, the PGT does need to consent to any corporate name which includes the words “Foundation” or “Charity”, with the use of “Foundation” requiring inclusion of foundation purpose clause in the Articles
- The PGT has recently updated its Not-for-Profit Incorporator’s Handbook: <https://www.publications.gov.on.ca/300775>
- Once charitable status is obtained, then the ONCA corporation still need to fulfil the existing reporting obligations to the PGT
- If future articles of amendment are done to amend purposes, then the corporation may need PGT’s consent to exclude “after acquired” clause

## F. WHAT ARE THE ONCA RULES?

- There are three types of rules in ONCA

- Mandatory rules

- Default rules

- Optional rules

### 1. Mandatory Rules Cannot Be Overridden By The Articles Or By-laws (some examples - not exhaustive):

- 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

## 2. Default Rules - Apply Automatically But Can Be Overridden

- membership can only be transferred back to the corporation
- directors can borrow without members' authorization
- one vote per member and how membership may be terminated
- holding membership meetings in Ontario
- majority of members constitutes a quorum
- proxyholders need not be members
- directors may meet anywhere
- majority of the directors constitutes a quorum
- directors not required to be members
- participation in membership meetings by electronic means (hybrid)

## 3. Optional Rules – Can Decide To Include Them In By-laws If Desired:

- proxy voting but may want to avoid due to complexities under ONCA
- holding membership meetings entirely by electronic means

- 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

- 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 (except for mandatory rules requiring ordinary resolution to elect and remove directors)

– 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 in membership meetings by telephone/electronic means

– 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

## G. DIRECTORS' ISSUES AND BOARD MEETINGS

### 1. Role of Directors and Required Number

- 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 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 also possible if set out in the articles but, if number changes, then articles of amendment will be required at additional cost



## 2. Qualifications for Directors

- Mandatory qualifications under ONCA are:
  - Must be an individual 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: (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 ITA
- Consider if these extra requirements only have to be fulfilled at time of election or need to be ongoing

- 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 can be employees of the corporation or any affiliate (note: this 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

### 3. Election and Appointment of Directors

First directors named in certificate of incorporation of new 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

- 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 of members
- With certain exceptions, directors must consent in writing within 10 days to hold office, or are deemed not to have been elected or appointed
- However, their acts valid even if irregularities after this 10 day period
- Directors entitled to attend and be heard at every members' meeting

#### 4. Nomination of Directors and Directors Ceasing to Hold Office

- Members have the right to nominate candidates for election as directors from the floor at annual meetings
- While not possible to prevent nominations from the floor, one option is to put procedures in place to require members to provide advance notice of any planned nominations – known as “advance notice by-law”
- Directors automatically cease to hold office when they: (1) die; (2) resign; (3) are removed; or (4) no longer fulfill mandatory requirements
- Resulting vacancy in any director’s position to be filled at same members’ meeting subject to certain restrictions
- Unless prohibited in by-laws, directors have right to give the corporation a statement providing reasons for their resignation or opposing their removal by the members, which corporation must circulate

#### 5. Regular Board Meetings

- Subject to articles or by-laws, and other than 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 being waiver *unless* they are there to object that meeting not lawfully called
- Notice does not need to state business to be transacted with exceptions
- Directors entitled to attend – members have no right to attend
- No proxies or delegates allowed at directors’ meetings
- If any director not present at a meeting, then they are deemed to consent to any resolution/action passed, unless they dissent within 7 days of becoming aware of the said resolution/action

- Written resolutions in lieu of Board meetings are valid if signed by all directors entitled to vote on the matter – keep them in minute book
- Quorum is majority of the directors (or the minimum number required by the articles) unless changed in articles or by-law
- Where there is no quorum because a director has a conflict of interest, remaining directors deemed to be a quorum to vote on the resolution
- Must maintain quorum throughout Board meetings
- If all directors consent, then they can participate in meetings by telephone or electronic means if all participants can communicate adequately – default rule but can be overridden in the by-laws if desired
- However, given pandemic, any prohibition on this issue is temporarily suspended until September 30, 2022 by ONCA Regulation 693/21

## 6. Power to Enact, Repeal and Amend By-laws

- Subject to articles and by-laws, directors can make, amend or repeal by-laws, with exception of:
  - Adding, changing or removing provisions re transfer of membership;
  - Changing manner of giving notice to members entitled to vote at meetings and/or
  - Changing method of absentee voting at members' meetings
- Except for these matters, the directors' enactment, amendment or repeal of by-laws is effective immediately subject to being it is confirmed, amended or rejected by the members at next meeting
- Many corporations, though, include provisions in the articles to require members' approval of all by-law amendments by special resolution (2/3rds vote)

## 7. Disclosure: Conflict of Interest by Directors (and Officers)

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 the applicable portion of any Board meeting at which the contract or transaction is discussed or vote on the matter, with these actions recorded in the minutes, but does not need to resign if contract or transaction is approved

Same disclosure of interest rules apply for charitable corporations under the ONCA

- However, if directors of charitable corporation 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

Limited exception:

- 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

## 8. 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

## H. MEMBERSHIP ISSUES AND MEETINGS

### 1. Classes and Membership Structure

- ONCA not-for-profit corporations required to be membership-based
- ONCA provides enhanced rights of members
- 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 - if the classes are not set out in the articles, then default is 1 class
- If there is 1 class, then all members must be voting
- If there are 2+ classes, then voting rights must be given to at least 1 class
- ONCA originally provided for non-voting members to have voting rights on fundamental changes but these were later removed
- Non-voting members may still have some limited rights under ONCA

## 2. Types of Membership and Related Matters

- 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
- Memberships can only be transferred to corporation unless articles or by-laws state otherwise
- Unless prohibited by articles or by-laws, directors may require annual contributions or annual dues and determine how they are to be paid

## 3. 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)

## 4. Membership Rights

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

Elect and remove 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)

- Access to Corporate Records
  - Members entitled to free copies of articles, by-laws and financial statements, as well as have right to examine or receive extracts of various documents, e.g. minutes of members' meetings, registers of directors, officers, members and ownership interests
- Removal of Directors
  - Under OCA, members could remove directors by a 2/3rds vote, but this amended to provide for ordinary resolution (majority)
  - 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 thresholds 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)

## 5. Discipline & 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

## 6. Membership Remedies

- Broad remedy powers (e.g., dissent & 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 CNCA 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

## 7. Membership Meetings

- Note ONCA provisions subject to current COVID-related exemptions for electronic meetings and 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
- Financial statements, 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 annual meeting

- What is discussed?
  - At an annual general meeting
    - Consider financial statements and audit/review engagement report
    - Elect Directors, as needed
    - Appoint/reappoint the auditor or person to conduct review engagement, or passing extraordinary resolution dispensing with financial review
  - 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

## 8. Regular, Proxy & Absentee Voting

### • Regular Voting

- Default voting mechanism is show of hands unless ballot is demanded

### • Proxy Voting

- Under the OCA, it was mandatory right to appoint a proxyholder
- Under the ONCA, a member can appoint a proxyholder only if permitted in articles or by-laws (optional rule)
- 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

## I. 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

- 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:

- 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

## 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

### 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

- 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

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

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



- 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)

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

- 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

- 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

## J. FUNDAMENTAL CHANGES

- Under the ONCA, a special resolution (2/3rds vote of members) is required for the following fundamental changes:
  - Amendment of articles
  - Amalgamation with another corporation
  - Continuance into the ONCA from another jurisdiction
  - Continuance out of the ONCA into another jurisdiction
  - Reorganization
  - Arrangements

- 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 filed
  - 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

### – 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

## – 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

## K. HOW TO GET READY FOR THE ONCA TRANSITION

### 1. Collect

#### COLLECT THE 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

## 2. Review

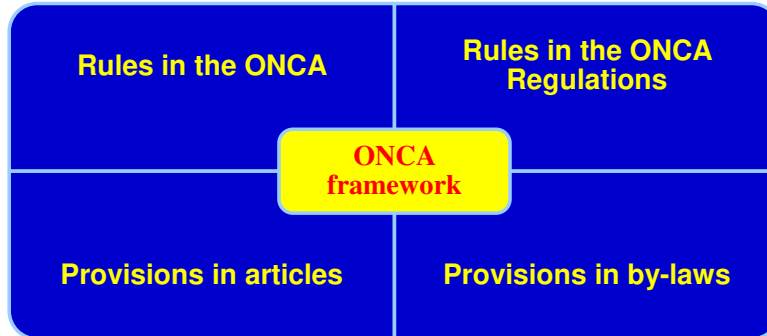
### REVIEW GOVERNING DOCUMENTS

- Do they reflect current governance process? If not, what is the 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

## 3. Study

### STUDY KEY ONCA FEATURES

- Need to understand the ONCA framework to determine how the current governance structure may be impacted
- 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



- 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

## 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 requirements
  - Consider whether to opt out
- If ONCA provides options
  - Decide which option to adopt
- Consider what else to include

## 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 required under ONCA
  - 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

## 5. Prepare (cont'd)

### 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

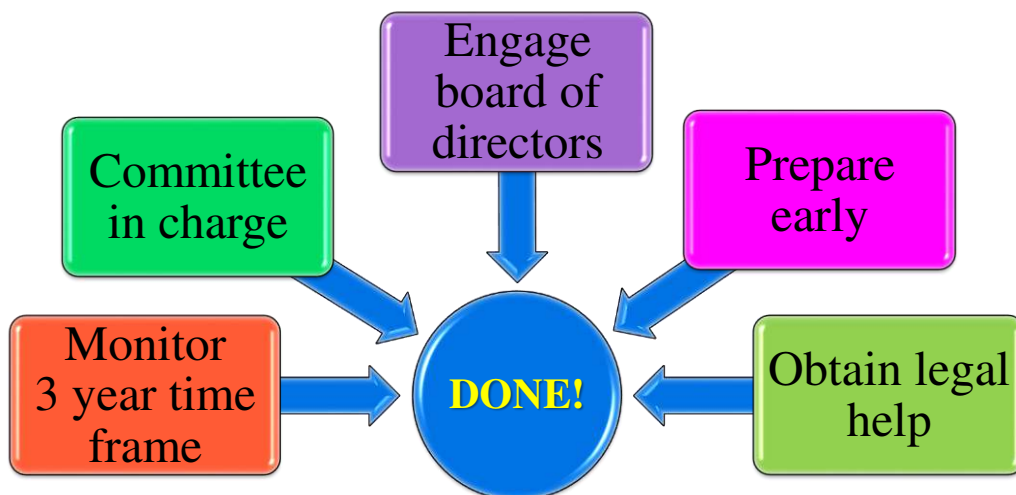


## 6. Approve & File

### 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) – May also need consent of PGT if registered charity
- 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 of amendment and new 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

### L. KEY TAKEAWAYS FOR ONCA TRANSITION



## QUESTIONS?



[www.charitylaw.ca](http://www.charitylaw.ca)

[www.carters.ca](http://www.carters.ca)

# CARTERS

BARRISTERS  
SOLICITORS  
TRADEMARK AGENTS

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