OVERVIEW

• Current status of the Ontario Not-for-Profit Corporations Act, 2010 (“ONCA”)
• Overview of key features of the ONCA
• Transition process and practical steps

RESOURCES

• Charity Law Bulletin “The Nuts and Bolts of the Ontario Not-For-Profit Corporations Act, 2010” on our website at www.charitylaw.ca
• To view ONCA in its entirety, see: http://www.ontla.on.ca/web/bills/bills%20_detail.do?locale=en&In
tranet=&BillID=2347

A. CURRENT STATUS OF ONCA

• The Ontario Corporations Act (“OCA”) has not been substantively amended since 1953
• ONCA will apply to OCA Part III corporations
• ONCA received Royal Assent on October 25, 2010
• ONCA is expected to be proclaimed in force on July 1, 2013
• Default by-laws and plain language guides will be available
• Outline of proposed regulations released on July 16, 2012 for public comment
• Ministry of Government Services – will be responsible for searches and filing
• Ministry of Consumer Services – will be responsible for remaining areas, including policy and interpretation issues
B. OVERVIEW OF KEY ELEMENTS OF THE ONCA

1. Incorporation and Corporate Powers
   • Replaces the letters patent system with a statutory regime similar to Ontario Business Corporations Act
   • Removes ministerial discretion to incorporate, in that incorporation will be as of right
   • Obtain certificate of incorporation, not letters patent
   • Only one incorporator is needed
   • No requirement to file by-laws or financial statements with the government, but default by-law will apply if no by-law adopted within 60 days after incorporation
   • Import to and export from Ontario

2. Public Benefit Corporations (PBCs)
   • All corporations categorized into PBCs and non PBCs
   • PBCs include
     – “charitable corporations” - uses common law definition
     – Non-charitable corporations that receive more than $10,000 in a financial year in funding from public donations or the federal or a provincial or municipal government or an agency of such government
   • When a non-charitable corporation reaches the $10,000 threshold in a financial year, it will be deemed to be a PBC in the next financial year, as of the date of the first annual meeting of members in that financial year
• Consequences of being a PBC
  – Not more than one third of the directors of a PBC may be employees of the corporation or its affiliates
  – Higher thresholds for dispensing with the default requirement to appoint an auditor or a person to conduct a review engagement requirements
  – Upon liquidation and dissolution, its net assets must be distributed in the following manner
    • If it is a charitable corporation, then to a charitable corporation with similar purposes or to a government or government agency
    • If it is a non-charitable corporation, then to a PBC with similar purposes or to a government or government agency

• Upon the liquidation and dissolution of a non-PBC, its net assets must be distributed in accordance with the articles, or if the articles do not address that issue, then rateably to the members
• A PBC may not distribute the fair value of a membership to a member upon termination of that member’s membership
• It is possible that some non-charitable corporations could oscillate between PBC and non-PBC because PBC/non-PBC status depends on the source and amount of funding in the previous year and the PBC status attaches for only part of a year
• Non-charitable corporations will need to monitor their funding sources

• If a non-charitable corporation is concerned about oscillation, it can voluntarily be structured as a PBC
  – Ensure 2/3 of directors are not employees (but charities cannot have any directors who are employees)
  – Ensure the articles provide that property will be paid to another PBC with similar purposes or to a government or government agency upon liquidation
  – For those years when it exceeds the $10,000 threshold
    – Follow audit and audit and review rules for PBC corporations – may not be an issue if the corporation’s practice is to have its financial statement audited
3. Financial Review
- Members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting

<table>
<thead>
<tr>
<th>Type of Corp/Gross Annual Revenues (GAR)</th>
<th>Requirements for an Auditor</th>
<th>Audit/Review Engagement</th>
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<tbody>
<tr>
<td>Public Benefit Corporation (PBC) with GAR of $10,000 or less (s.76(1))(a)</td>
<td>May, by extraordinary resolution (80%), dispense with an audit</td>
<td>May, by extraordinary resolution (80%), dispense with both an audit and a review engagement</td>
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<tr>
<td>More than $10,000 but less than $500,000 (s.76(1))(b)</td>
<td>May, by extraordinary resolution (80%), dispense with an audit</td>
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<tr>
<td>$500,000 or more (s.76(1))(c)</td>
<td>Must be appointed annually</td>
<td>Audit is required</td>
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Type of Corp/Gross Annual Revenues (GAR)
- Non-PBC corporation with GAR of $500,000 or less in annual revenue (s.76(2))(b):
  - May, by extraordinary resolution (80%), dispense with an audit
  - May, by extraordinary resolution (80%), dispense with both an audit and a review engagement

- More than $500,000 in annual revenue (s.76(2))(c):
  - May, by extraordinary resolution (80%), dispense with an audit;
  - May, by extraordinary resolution (80%), dispense with both an audit and a review engagement

4. Number of Directors and Election
- Minimum 3 directors
- Articles may provide a maximum and minimum range
- For PBCs - not more than 1/3 of the directors may be employees of the corporation or its affiliates (charities can have none)
- Directors are elected at meetings of members
- Board may appoint additional directors up to 1/3 of the number of directors elected at the previous AGM
- Ex-officio directors continue to be permissible
- Directors are no longer required to be members
- Maximum 4 year term for directors (but no limit on number of maximum terms)
- May have staggered terms
- Removal by majority vote of members
5. Directors and Officers – Powers, Duties and Defence
   • Directors may borrow money on the credit of the corporation without members’ authorization, unless articles or by-laws provide otherwise
   • Directors may view certain corporate records that the corporation is required to prepare and maintain (e.g. meeting minutes, accounting records, members’ resolutions, etc.) and receive free extracts of them
   • Objective standard of care for directors and officers to
     – Act honestly and in good faith with a view to the best interests of the corporation
     – Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

6. Members
   • A corporation must have members
   • Articles must set out the classes of members
   • If only one class of members, all must be voting
   • If two or more classes, articles must provide voting right to at least 1 class
   • By-laws must set out the conditions for membership
   • Where more than one class, the members of each class have certain built in protections
   • Default 1 vote per member, unless articles provide otherwise
   • All classes of members, even non-voting classes of members, are entitled to vote separately as a class on certain amendments to articles and by-laws dealing with rights and classes of membership
• Non-voting members are given voting rights in some limited circumstances
  – Extraordinary sale
  – Amalgamation
  – Continuance to another jurisdiction
  – Change to any rights or conditions attached to non-voting members or change the rights of other classes of members relative to the rights of the non-voting members
• Thus a class of members could reject a change - effectively resulting in a class veto
• The treatment of members mirrors that in the Ontario Business Corporations Act in relation to shareholder’s rights

• In most cases, giving non-voting members the right to vote on fundamental changes may not be justified
• Some corporations may want to collapse all membership classes into one class and remove non-voting membership classes
• Default rules to terminate membership and member’s rights apply unless articles or by-laws state otherwise
  – Upon death, resignation, expiry of membership term, liquidation or dissolution of the corporation, expulsion, or termination of membership in accordance with the articles or by-laws
  – Rights terminated upon termination of membership

• Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership
  – If the articles or by-laws provide for this power, then must set out circumstances and the manner in which the power may be exercised
  – The power must be exercised in good faith and in a fair and reasonable manner
    ▪ Must give 15 days notice of a disciplinary action or termination with reasons
    ▪ Opportunity for the member to be heard
  – Member may apply for a compliance or restraining order if that power is misused
7. Members’ Meetings

- Must be held in Ontario at the place provided in the by-laws or, in the absence of such a provision, at the place within Ontario that the directors determine.
- May be held outside Ontario if the place is specified in the articles or all the members entitled to vote at the meeting agree that the meeting is to be held at that place.
- No longer requires notice be sent by mail, provided that notice is given 10 to 50 days before the meeting.
- Directors may fix a “record date” of no more than 50 days before a members’ meeting to determine who the members are for purpose of calling a members’ meeting.

8. Members’ Rights

- Members may elect and remove directors at anytime.
- A member entitled to vote at an annual meeting of members may raise any matter as a “proposal” but must give at least 60 days notice.
  - A proposal may nominate directors for election if it is signed by at least 5% of voting members or such lower percentage set out in the by-laws (but nominations may still be made at the meeting).
  - Proposal must relate in a significant way to the activities and affairs of the corporation.
  - Directors can refuse to discuss the proposal if they give at least 10 days notice, but a member may appeal their decision to court.
Members may requisition meetings of the members (but need 10% of the votes to do so, or lower if the by-laws so states)

Members may examine certain corporate records – articles, by-laws, the minutes of meetings and resolutions of members and committee of members, registers of directors, officer and members

Right to access membership lists - to include name and address – only for the purpose of influencing voting, requisitioning a members’ meeting or other matters relating to the affairs of the corporation

Right to financial statements

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9. Members’ Remedies

Compliance or restraining order – if a corporation, or its directors and officers, fails to comply with the duties set out in the ONCA and regulations, the articles or by-laws

Rectification order – if the name of a person has been wrongfully entered, retained, deleted or omitted from the registers or records of a corporation, that person may apply to a court for an order rectifying the registers or records

Dissent and appraisal remedy for non-PBCs - in relation to fundamental changes

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Derivative action

- Allows members to bring an action in the name of the corporation to enforce one of its rights
- Exemption for “religious corporation” - e.g. Cannot bring derivative action to recover misappropriated church property
- Lack of definition for “religious corporation” means that the courts will have to define that term

Investigation order

- A member (or holder of debt) may apply to the court for an investigation of the corporation
10. Audit Committee

- Majority of committee members must not be officers or employees of the corporation or of any of its affiliates
- Must give the auditor or person appointed to conduct a review engagement notice of audit committee meeting
- Auditor or person appointed to conduct a review engagement is entitled to attend meeting at the expense of the corporation and be heard, and shall attend every meeting of the committee if requested to do so by one of its members
- Auditor, person appointed to conduct a review engagement or a member of the audit committee may call a meeting of the committee

11. Conflict of Laws

- ONCA must be read in conjunction with applicable charity law
- If there is a conflict between the ONCA or its regulations and a provision made in any other legislation that applies to the following:
  - A non-share capital corporation, then the provision in the other legislation prevails
  - A charitable corporation, then the legislation applicable to charitable corporations prevails
- Some provisions of the ONCA will not apply to charities
ONCA permits directors to fix their remuneration and to receive reasonable remuneration and expenses for any services they provide to the corporation in any other capacity.

- Common law rule overrides the ONCA – prohibits directors a charity to receive direct and indirect remuneration from the charity.
- But directors may be reimbursed out-of-pocket expenses.
- Possible to seek PGT consent court order to permit directors be paid, but generally high threshold for such an order.

ONCA permits directors and officers to enter into contracts or transactions with the corporation as long as they disclose any conflict of interest that may exist.

- Common law rule overrides the ONCA - prohibits directors of charities to place their personal interests in conflict with their duty to the charity.
- Regardless of whether there is actual loss to the charity.
- Possible to seek PGT consent court order to permit directors be paid, but generally high threshold for such an order.

ONCA permits corporation to invest its funds as its directors think fit, subject to its articles or by-laws or any limitations accompanying a gift.

- Section 10.1 of the Charities Accounting Act overrides the ONCA - states that s.27 to s.31 of the Trustees Act applies.
- Prudent investor rule applies to the directors of charities.
- Directors must consider certain criteria to invest.
- Authorizes delegation to an agent in certain circumstances.
ONCA permits corporation to indemnify the directors and officers and to purchase insurance

- ONCA expressly requires that the purchase of insurance be in compliance with the Charities Accounting Act and its regulations
- Regulation 4/01 under the Charities Accounting Act requires directors to consider certain factors enumerated in the regulation before they consent to the indemnification of its directors or purchasing D&O insurance
- The indemnification or the purchase of insurance must not render the corporation insolvent

C. OVERVIEW OF TRANSITION PROCESS

- Part III of the OCA will be repealed upon proclamation of the ONCA and ONCA will immediately apply
- 3 year grace period for OCA corporations to comply
- Failure to bring the governing documents to comply with the requirements of the ONCA within the 3 year grace period
  - Will not result in dissolution of the corporation by the government
  - Letters patent, supplementary letters patent and by-laws will be deemed to be amended to comply with the ONCA, non-compliant provisions deemed to become invalid
  - Will result in uncertainty as to which provisions apply

Prudent for existing OCA corporations to transition under the ONCA within the three year grace period

Steps for transition
- Review its letters patent and by-laws
- Contact CRA (if a registered charity) where there are proposed changes to the purpose(s)
- Prepare Articles of Amendment
- Create new by-laws
- Get membership approval
- File documents
- Charities – send Articles of Amendment and new by-law to CRA
• Unresolved issues regarding transition process
  – It has not been determined if charities incorporated in Ontario will be required to have their articles approved by the PGT
  – Not known what will be the position of CRA on the process of transition, i.e. will it be the same as CNCA?
• Social clubs with share capital will have 5 years to continue – different rules

D. PRACTICAL STEPS FOR TRANSITION
1. Collect governing documents
   • Letters patent, supplementary letters patent
   • All current by-laws, including amendments
     – Amending by-laws
     – Members’ resolutions?
     – Board resolutions?
     – Are by-laws valid? Were they properly adopted?
   • Can obtain microfiche copies from Ministry for LP and SLPs
   • CRA may have by-laws
   • Collect governance related documents – e.g., organizational charts, policies, manuals

2. Review governing documents and consider
   • Do they reflect current governance structure? If not, what is current governance structure?
   • Do they reflect current governance process? If not, what is 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. Review the key features of the ONCA
   • This understanding will help the corporation determine how its governance structure and the content of the articles of amendment and by-laws will be impacted
4. Compare ONCA rules with current governance structure and practice
   • Are the current by-laws or the desired governance structure and process inconsistent with ONCA requirements?
   • If inconsistent with a ONCA mandatory requirement, how will the corporation adjust its governance structure and process in order to ensure compliance?
   • If inconsistent with a ONCA default requirement, is the preferred alternative mechanism permitted under the ONCA? Should the overriding provision be set out in the articles or by-laws?
   • If different options are prescribed, which one should the corporation choose? Should the preferred option be set out in the articles or by-laws?

5. Determine whether changes should be made prior to transition
   • Changes to membership rights for corporations that have multiple classes of members
   • Changes to corporate objects
     – Purposes of the corporation will need to be stated in the articles of amendment
     – May want to update them to reflect and align with current or future activities
     – If registered charity, needs CRA approval
     – May want to apply for SLP under OCA on parallel basis

6. Timing of Transition
   • Some corporations will want to transition right away, others may want to wait
   • Revising governance structure to be reflected in new by-law may need some time for directors and members to consider
   • Considerations
     – Length of time and complexity of process to revise the by-laws
     – Nature of changes in new by-laws – substantive vs administrative
     – Size of membership
     – Changes to membership structure
     – Changes to corporate objects
7. Draft articles of amendment and new by-laws
   • Information on articles of amendment not available yet
   • By-law will need to be replaced or substantially revised because the ONCA differs from the OCA
   • OCA contained very few rules, ONCA provides many detailed rules
   • Some changes may only be administrative
   • Some changes may require detailed considerations and consultation with members
   • Understanding the ONCA framework
     – Rules in the Act
     – Some details in the Regulations
     – Need to refer back and forth between the Act and the Regulations

8. Approaches to by-law drafting
   • Minimalist approach
     – ONCA contains detailed rules, so by-laws do not require the same level of details
     – By-laws to set out provisions:
       ▪ Override the default rules in the ONCA
       ▪ Utilize optional rules in the regulations
       ▪ Important governance procedures
     – Advantages - simple by-laws, no risk of amending by-laws to remove ONCA requirements or violate ONCA requirements
     – Disadvantages - Have to work with 4 or 5 documents back and forth and need to know where to look for what and which provisions take precedence if conflict

   • Comprehensive approach
     – Detailed by-laws will be a consolidation of all mandatory rules, default rules that have not been overridden, overriding provisions, etc.
     – Will still need to work with articles, but limited provisions in the articles
     – Advantages - one go to place for essential governance procedures
     – Disadvantages - More upfront cost and time to prepare by-laws, by-laws will need too clearly identify which provisions can be amended and which ones cannot
9. Obtain membership approval and filing
   • Need special resolution to approve articles of amendment
   • May require separate class vote of the articles and by-laws if certain membership rights are amended
   • Once approved, file articles of amendment and other documents with Ministry
   • Will be issued articles of amendment
   • No need to file approved by-laws with the Ministry

10. Other consequential filings and records updates
    A) Canada Revenue Agency
        • Registered charities have to file articles of amendment and new by-laws with CRA
        • If purposes have been changed as part of the transition process, the corporation may obtain pre-approval from CRA for new purposes before filing articles of amendment
        • If no pre-approval is obtained, then CRA may require that the governing documents be revised if they do not meet CRA’s requirements – need to apply for articles of amendment

    B) Provincial and territorial filings
        • May need to update provincial or territorial registrations
        • e.g., corporate registrations, business name registrations, fund-raising registrations, etc.
        • Ontario charities – not sure what is required by Public Guardian and Trustee
    C) Other filings
        • May be required to provide transition documents with third parties, e.g.,
          – Funding organization
          – Umbrella organization
D) Updating corporate records and procedures
• Corporate minute book
• Other documents, e.g., corporate governance policies, manuals, etc.
• Staff and volunteers will need to be trained and become familiar with the new governance documents

E. CONCLUSION
• Monitor Ministry and CRA updates
• Be familiar with the ONCA rules
• Prepare early
• Have someone or a committee be responsible for the process
• Have the board engaged early on
• Seek legal help, conduct legal review, prepare draft by-laws
• Do not miss the 3 year time frame for transition