

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>Older Adult Centres' Association of Ontario (OACAO)</p>
<p>Mississauga – October 21, 2013</p>	
<p>Getting Ready for the ONCA A Step by Step Guide</p>	
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<p>OVERVIEW</p>	
<ul style="list-style-type: none">• Status of the ONCA• Overview of ONCA transition process• Resources• Overview of key elements of the ONCA• Practical steps for transition	
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A. STATUS OF ONCA

- The Ontario *Corporations Act* (OCA) has not been substantively amended since 1953
- The Ontario *Not-for-Profit Corporations Act, 2010* (ONCA) will apply to OCA Part III corporations
- ONCA received Royal Assent on October 25, 2010
- Ministry of Government Services - responsible for searches and filing
- Ministry of Consumer Services - responsible for remaining areas, including policy and interpretation issues

- Original anticipated proclamation date was July 1, 2013
- Delayed to no earlier than Jan 2014
 - Announced by Minister on March 28, 2013
 - Will review the ONCA after proclamation to determine if amendments are necessary - review enhancement of membership voting rights
 - Explore possibility of delaying proclamation of provisions giving voting rights to non-voting members for 3 years after proclamation
- Proposed changes to ONCA in Bill 85 - first reading
- Delayed to later in 2014
 - Announced by Minister on September 4, 2013
 - Bill 85 to be debated in Legislation in fall of 2013
 - ONCA to be proclaimed 6 months after enactment of Bill 85

B. OVERVIEW OF ONCA TRANSITION PROCESS

- ONCA applies automatically upon proclamation
- ONCA currently provides for an optional transition process within 3 years of proclamation
 - If no transition process taken, then
 - Corporation will not be dissolved
 - LP, SLPs, by-laws and special resolutions will be deemed amended to comply with the ONCA, resulting in non-compliant provisions deemed invalid
 - Will result in uncertainty in relation to which provisions remain to be valid
 - Prudent to adopt new by-law and articles of amendment

- But proposed amendments in Bill 85 imply that transition process is mandatory
 - Clarifies that non-compliant provisions of letters patent and by-laws will continue to be in effect until the earlier of the date of amendment and three years from proclamation
 - Any provision that is required by the ONCA to be contained in the articles must be contained in the articles before the end of the 3 year period, failing which those provisions would be deemed to become invalid at the end of 3 year period
 - Articles, by-laws or special resolutions can only be changed during the transitional period if changes are also made to bring them into conformity with the ONCA

- Social clubs with share capital will have 5 years to continue to come under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*
- ONCA transition process
 - Review letters patent and by-laws
 - Prepare articles of amendment and new by-laws
 - Get membership approval
 - File required documents
 - Certificate of amendment will be issued
 - Charities - send certificate of amendment, articles of amendment and new by-law to CRA

C. RESOURCES

- *Charity Law Bulletin* No. 262 “The Nuts and Bolts of the Ontario *Not-for-Profit Corporations Act, 2010*”
- *Charity Law Bulletin* No. 299 “Transitioning Under The New Ontario *Not-for-Profit Corporations Act, 2010: Practical Considerations*”
- *Charity Law Bulletin* No. 315, “Bill 85 to amend Ontario Not-For-Profit Corporations Act, 2010”
- To view ONCA
http://www.ontla.on.ca/web/bills/bills%20_detail.do?locale=en&Intranet=&BillID=2347
- Ministry updates
http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx
 - Key terms, frequently asked questions, transition checklist, default by-laws, plain language guide
 - Regulations to be released

- Ministry updates
http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx
 - Key terms, frequently asked questions, transition checklist, default by-laws, plain language guide
 - Toolkit
 - Community Legal Education Ontario launched the “Get Ready for the ONCA” project
 - Released electronic toolkit that can be used by corporations to explain ONCA to its members and stakeholders - includes, presentation slides, speaking points, presenter Q&A, newsletter and bulletin articles, webtext, Facebook posts
 - Regulations to be released

D. OVERVIEW OF KEY ELEMENTS OF THE ONCA

1. Incorporation and Corporate Powers

- Removes ministerial discretion to incorporate - incorporation will be as of right
- Obtain certificate of incorporation, not letters patent
- Only one incorporator is needed
- No need to file by-laws or financial statements with the government, but default by-law will apply if no by-laws adopted within 60 days after incorporation
- Corporation has the capacity, rights, powers and privileges of a natural person
- Eliminates the concept of a corporation’s activities being *ultra vires*

2. Public Benefit Corporations (PBCs)

- All corporations categorized into PBCs and non PBCs
- PBCs include
 - “charitable corporations” - 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
- Bill 85 amendments proposes \$10,000 threshold can be changed by regulations

- If a non-charitable corporation reaches \$10,000 threshold, deemed to be a PBC in the next financial year, as of the date of the first AGM in that financial year until the end of that financial year
- Public sources means
 - Donations or gifts from persons who are not members, directors, officers or employees of the corporation
 - Grants or similar financial assistance from the federal, provincial or municipal government or government agency

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- 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
 - Upon liquidation and dissolution of PBC, 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

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- 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 (PBCs cannot do this)
- Non-charitable corporations will need to monitor level and sources of revenue
- Low threshold of \$10,000
 - Possible that a non-charitable corporation could move in and out of PBC status depending on its revenue in a year
 - If a non-charitable corporation is concerned about moving in and out of PBC status, it can voluntarily be structured as a PBC

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3. Financial Review

- Members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting

Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation (PBC) with GAR of	\$100,000 or less (ss.76(1)(b))	May, by extraordinary resolution (80%), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than \$100,000 but less than \$500,000 (ss.76(1)(a))	May dispense with an auditor and have someone else conduct a review engagement. This requires an extraordinary resolution (80%)	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)
	\$500,000 or more (by implication of ss.68(1))	An auditor must be appointed annually	Audit is required

Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Non-PBC corporation with GAR of	\$500,000 or less in annual revenue (ss.76(2)(b))	May, by extraordinary resolution (80%), dispense with an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than \$500,000 in annual revenue (ss.76(2)(a))	May, by extraordinary resolution (80%), dispense with an auditor, and instead appoint a person to conduct a review engagement	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)

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
- 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
- Directors must consent to take office (Bill 85 proposes all consents be in writing)

- If different groups of members elect x directors to the board, must structure membership as separate classes – need to consider workarounds
- Power of the board to appoint directors between AGMs
 - Limitations
 - Can only appoint up to 1/3 the number elected at the last AGM (not 1/3 of the entire board)
 - Only 1 year term to expire at next AGM
 - Need to take into account of rotating term
 - Number appointed is within the max/min or fixed size of the board
 - How to prevent the board from appointing directors if this is not desirable?

5. Directors and Officers – Powers, Duties and Defence

- 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
- Reasonable diligence defence for directors
 - Not liable if fulfilled their duty if they exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
 - Defence includes good faith reliance on financial statements and reports of professionals

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
- Default 1 vote per member, unless articles provide otherwise

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- All classes of members (including non-voting classes), are entitled to vote separately as a class on certain amendments to articles and by-laws changes
 - Extraordinary sale
 - Amalgamation if affects membership rights
 - Continuance to another jurisdiction if affects membership rights
 - Change to any rights or conditions attached to a class of members or change the rights of other classes of members relative to the rights of a particular class of members

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- Regardless of whether the membership class is a voting class or non-voting class
- 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
- Bill 85 proposes to delay class vote rights of non-voting classes until proclaimed in force - at least three years after proclamation of the ONCA
- But Bill 85 does not delay class vote rights of voting classes

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- Common examples of having different membership classes
 - Members from different industry sectors
 - Members from different geographical regions
 - Members from different age groups
 - Founders
 - Broad-based community support, donors
 - Honorary members
 - Life members

- Considerations whether to retain multiple class structure
 - What is the purpose of having multiple classes?
 - Is the corporation prepared to seek class approval (including the non-voting members) in future?
 - Is it possible to group the voting members into one class of members?
 - Would the members be willing to restructure their membership status?
 - What is the likelihood of changing the membership structure or membership rights in any class in the future?
 - What is the likelihood of engaging in fundamental changes (such as amalgamating with another organization with similar visions/missions) in the future?

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- Some corporations may want to collapse membership classes into one class and remove non-voting classes
 - Change them into a non-membership category, such as “affiliates”, “associates”, “supporters”
 - May set out their rights and duties as non-members
 - Donations will be included in \$10,000 threshold
 - Query whether this may affect NPO status
- When to collapse membership classes
 - Bill 85 proposes delaying class voting rights for non-voting members until end of 3 years
 - Collapsing membership class during the 3 year period will not be subject to class votes by non-voting members, but may be subject to class votes by voting classes
 - Collapse voting classes before proclamation?

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- 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, expulsion, or termination
- Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership
 - Must set out circumstances and the manner in which the power may be exercised
 - Power must be exercised in good faith and in a fair and reasonable manner - give 15 days notice of a disciplinary action or termination with reasons and must give opportunity for the member to be heard
 - Member may apply for a compliance or restraining order if that power is misused

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7. Members' Meetings

- 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
- Proxy vote is mandatory unless by-law allows members to vote by mail or by telephonic or electronic means
- Financial statements, the auditor's report or report of person who conducted a review engagement, and any further information required by the articles or by-laws must be given to members upon request at least 21 days before an AGM

8. Members' Rights and Remedies

- Members may elect and remove directors at anytime
- Members have extensive rights and remedies - e.g.,
 - Right to requisition a meeting of members (10%)
 - Right to submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)
 - Right to submit proposal to nominate directors (5% of voting right)
 - Right to access corporate records, including membership list

- Dissent and appraisal remedy for non-PBCs - in relation to fundamental changes
- Derivative action, subject to faith-based defiance by religious corporations
- Compliance and restraining orders
- Court ordered wind-up and liquidation
- Must respect these rights, cannot contract out
- Not just affect corporations with broad based membership, rights also apply to closed membership corporations
- Having a smaller membership may reduce the exposure to these rights

9. 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

10. 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 receive reasonable remuneration and expenses for their services - but directors of charities cannot receive direct/indirect remuneration from the charity
- 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 - but directors of charities cannot
- ONCA permits corporations to invest its funds as its directors think fit - but charities must also comply with the prudent investor rule in s.27 to s.31 of the *Trustees Act* (s.10.1 of the *Charities Accounting Act*)
- ONCA permits corporations to indemnify the directors and officers and to purchase insurance – but charities must also meet factors in the Regulation 4/01 under the *Charities Accounting Act*

E. 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 an ONCA mandatory requirement, how will the corporation adjust its governance structure and process in order to ensure compliance?
 - If inconsistent with an 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?
- Are there provisions that the corporation would like to include in its governing documents and the ONCA is silent on those issues? If so, should the provisions be set out in the articles or by-laws?

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5. Determine Whether Changes Should be Made Prior to Transition

- Changes to membership rights for corporations that have multiple classes of members
 - ONCA requires separate vote by class or group of members to change the rights attached to a class or group of members or for certain fundamental changes
 - Some corporations may want to collapse classes into 1 voting class
 - Consider effect of Bill 85
- Changes to board structure?
- Changes to corporate objects?

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6. Timing of Transition

- 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

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7. Drafting 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 consideration and consultation with members

- Understanding the 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 provided by ONCA

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- Minimalist approach by-laws
 - Rationale: ONCA contains detailed rules, so by-laws not to duplicate mandatory rules or default rules that are not to be overridden
- Comprehensive approach by-laws
 - One stop approach - consolidation of all applicable rules
 - No need to flip back and forth between articles, but limited provisions in the articles
 - Can have governance policy manuals to address other matters

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- ONCA provides two ways for corporations to amend their by-laws, depending on the subject matter of the changes
 - Default mechanism - Board may adopt by-laws, effective upon passage by the board, by-law must be confirmed by members at next meeting
 - Ordinary approval by members - Require ordinary resolution of members (no need for board approval) for matters affecting members' rights, e.g., membership transferability and conditions, absentee voting

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- ONCA by-laws must be very clear about which amending formula applies to various provisions (or risk certain by-law provisions not being legally in force) - for example
 - Have 2 by-laws with all by-law provisions requiring members ordinary resolution in a separate by-law
 - Have 1 by-law, and place all provisions requiring members ordinary resolution in one clearly marked section
 - Have 1 by-law, and clearly mark throughout by-law which provisions require members ordinary resolution to amend
 - Have 1 by-law and provide all by-law amendments require members ordinary resolution
- Possible to require higher membership approval

8. 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 certificate of amendment
- No need to file approved by-laws with the Ministry

9. Other Consequential Filings and Records Updates

- Canada Revenue Agency - Registered charities have to file articles of amendment and new by-laws with Canada Revenue Agency
- Provincial and territorial filings - e.g., corporate registrations, business name registrations, fund-raising registrations, Public Guardian and Trustee (for charities), etc.
- Other filings - e.g., funding organization or umbrella organization
- Update corporate records and other documents, e.g., corporate governance policies, manuals, etc.
- Train staff and volunteers to become familiar with the new governance documents

CONCLUSION

- Monitor Ministry and CRA updates, e.g., plain language guides, default by-laws, updating the Not-for-Profit Incorporator's Handbook, information sheets
- 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
- Do not miss the 3 year time frame for transition

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