
**CANADIAN SOCIETY OF ASSOCIATION
EXECUTIVES
(CSAE) – TRILLIUM CHAPTER**

APRIL 3, 2013

**THE NEW ONTARIO *NOT-FOR-PROFIT
CORPORATIONS ACT, 2010***


By Theresa L.M. Man and Terrance S. Carter
tman@carters.ca tcarter@carters.ca
1-877-942-0001

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Toronto · Ottawa
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Toll Free: 1-877-942-0001



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The New Ontario *Not-for-Profit Corporations Act, 2010*

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tman@carters.ca tcarter@carters.ca
1-877-942-0001
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OVERVIEW

- Current Status of the ONCA
- Overview of Key Features of the ONCA
- Transition Process and Practical Steps

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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”
 - 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&tracet=&BillID=2347
- Ministry updates
http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx

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A. CURRENT STATUS OF THE 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 - will be responsible for searches and filing
- Ministry of Consumer Services - will be responsible for remaining areas, including policy and interpretation issues

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- ONCA was expected to be proclaimed in force on July 1, 2013
- Minister announced on March 28, 2013
 - Will delay proclamation of the ONCA to 2014
 - Will review the ONCA after proclamation to determine if amendments are necessary - priority to reviewing enhancement of membership voting rights
 - Exploring the possibility of delaying proclamation of provisions giving voting rights to non-voting members for 3 years after proclamation
- Check Ministry's website for update
http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx

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- Transition checklist available on Ministry's website
<http://www.sse.gov.on.ca/mcs/en/Pages/onca4.aspx>
- Other resources also available (key terms, frequently asked questions)
http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx
- Default by-laws, plain language guide, electronic tool kits will be available
- Regulations to be released - outline of proposed regulations released on July 16, 2012, for public comment

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- Unlike the CNCA
 - Optional transition process to file articles of amendments or adopt new by-law to comply with the ONCA within 3 years of proclamation
 - If no transition process taken, then
 - Corporation will not be dissolved
 - LP, SLPs and by-laws 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
 - Better to do transition process

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- 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*
- This means that all OCA corporations will need to
 - Review letters patent and by-laws
 - Prepare articles of amendment and new by-laws
 - Get membership approval
 - File required documents
 - Certificate of amendments will be issued
 - Charities - send certificate of amendments, articles of amendments and new by-law to CRA

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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 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

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- Corporation has the capacity, rights, powers and privileges of a natural person
- Eliminates the concept of a corporation's activities being *ultra vires*
 - If a corporation acts outside of its purposes, then it has breached the ONCA but the act is valid
 - Makes little difference in practice, because directors have a duty to comply with the articles of the corporation, which may limit the purpose of the corporation and charities have to comply with the requirements in other statutes (e.g., *Income Tax Act*)

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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
- 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

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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

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- If a non-charitable corporation is concerned about moving in and out of PBC status, 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 review rules for PBC corporations - may not be an issue if the corporation's practice is to have its financial statement audited

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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.75(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

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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%)

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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

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- 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

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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

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- 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
- Directors and officers must comply with the ONCA, the articles and by-laws

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- Reasonable diligence defence for directors (not officers)
 - 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

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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, even non-voting, 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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- 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
- The Ministry is reviewing this issue and possibly delaying this right until 3 years after proclamation

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- Some corporations may want to collapse all membership classes into one class and remove non-voting membership classes
 - Change them into a non-membership category, such as “affiliates”, “associates”, “supporters”
 - May set out their rights and duties as non-members
 - Consider timing for such change
 - But their donations will not be exempt from the \$10,000 threshold
 - For corporations that are non-profit organizations, query whether this may affect the NPO status
- Caution - timing when to collapse membership classes

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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 of the corporation, expulsion, or termination of membership in accordance with the articles or by-laws
 - Rights terminated upon termination of membership

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- 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

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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

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- 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
- Every member entitled to vote at a meeting may appoint a proxyholder who does not have to be a member
- By-laws may allow voting by telephone or electronic means, in addition to voting by proxy

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- Members are entitled to attend members' meetings by telephonic or electronic means, unless the by-laws provide otherwise
- If permitted by by-laws, the board or the members may decide whether to hold a members' meeting *entirely* 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

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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

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- Members may requisition meetings of the members (but need 10% of the votes to do so, or lower if the by-laws so state)
- 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

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- Possible that non members may still qualify as “complainants” for the purpose of compliance or restraining order or derivative action (except a religious corporation) based on the broad scope of the definition of “complainant” in the ONCA
- However, lack of economic incentives to invoke these corporate law remedies may mean less member litigation than shareholder litigation in relation to OBCA and CBCA corporations
- But even a non-member could allege breach of trust under s.10 of the *Charities Accounting Act* in the case of charities

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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

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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

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- 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 of 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

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- 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 from placing 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

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- 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

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- 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

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C. 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

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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

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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

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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?

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- 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 document 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
 - Under ONCA - separate vote by class or group of members will be required if to change the rights attached to a class or group of members or for certain fundamental changes
 - Each class of members (including non-voting members) will have a *de facto* veto right
 - Some corporations may want to collapse classes into 1 voting class
 - Consider timing to make the change

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- Changes to board structure
 - How to appoint the past president
 - How many directors can the board appoint
- 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

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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 considerations and consultation with members

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- 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

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- Types of ONCA rules
 - ONCA provides both a general framework and sets of rules for corporations to operate
 - 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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- Mandatory Rules
 - Rules that cannot be overridden by the articles or by-laws - examples:
 - Minimum 3 directors
 - Directors can be removed by majority vote of members (or by class vote) (except ex officio directors)
 - Notice of meetings of members given 10 to 50 days before the meeting
 - Members' right to submit and discuss proposals
 - Members' right to requisition meeting
 - Members' right to vote by proxy
 - Board may appoint up to 1/3 directors elected at last AGM
 - Must ensure compliance of these rules

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- Default Rules
 - Apply automatically where by-law/articles are silent - examples:
 - Directors can borrow and grant security without members' authorization
 - Membership can only be transferred back to corporation
 - Participation in meetings by electronic means
 - A majority of members constitutes a quorum
 - Directors may meet anywhere
 - Directors not required to be members
 - A majority of the directors constitutes a quorum
 - Directors can make, amend or repeal by-laws, except those requiring a special resolution of members

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- May include provisions to override default rules - articles or by-laws
- When drafting by-laws, must ensure the by-laws is the appropriate document to include the desired overriding provisions
- When drafting overriding provisions, ensure these mechanisms are in compliance with the ONCA

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- Alternate Rules
 - Optional rules that are provided by the ONCA - examples:
 - Requisition of meeting - default rule is 10% of members (ONCA permits by-laws to specify a lower but not higher requirement)
 - Holding members' meeting entirely by electronic means
 - Members voting by mail or by telephonic or electronic means, in addition to or instead of voting by proxy
 - Discipline of members
 - Audit committee
 - Articles or by-laws must provide for these rules
 - Ensure compliance with ONCA

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- ONCA siliient
 - Can include provisions on issues that the ONCA is silent, provided that the provisions included do not contravene the ONCA and its regulations - examples:
 - Dispute resolution mechanisms to resolve disputes between members
 - Stewardship provisions dealing with charitable property of the corporation (where it is a registered charity)
 - Statement of faith subscribed to by a faith-based corporation
 - These provisions may be set out in the policies or the by-laws

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8. Approaches to By-law Drafting

- 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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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

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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 with the Ministry
- 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

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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

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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


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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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