
THE OTTAWA REGION CHARITY & NOT-FOR-PROFIT LAW SEMINAR

Ottawa – February 13, 2014

Update on the ONCA: Issues to Consider Moving Forward

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 <p>CARTERS BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>THE OTTAWA REGION CHARITY & NOT-FOR-PROFIT LAW SEMINAR</p> <p>Ottawa – February 13, 2014</p>
	<p>Update on the ONCA: Issues to Consider Moving Forward</p> <p>By Tanya L. Carlton, OCT, B.Sc. (Hons.), B.Ed., J.D. tcarlton@carters.ca 1-866-388-9596</p> <p>© 2014 Carters Professional Corporation</p>
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OVERVIEW

- Status of the ONCA
- Overview of ONCA Transition Process
- Overview of Key Elements of the ONCA
- Practical Steps for Transition
- Resources

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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

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- Timeline of Proclamation Date of ONCA:
 - July 1, 2013 - Original anticipated proclamation date
 - March 28, 2013 - Ministry announced proclamation delayed to no earlier than January 2014
 - June 5, 2013 - First reading of Bill 85 proposing changes to ONCA
 - September 4, 2013 - Ministry announced proclamation delayed further to later in 2014
 - It is possible that proclamation of ONCA may not happen before the first half of 2015

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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 in 3 years, then
 - Corporation will not be dissolved
 - LP, SLPs, by-laws and special resolutions will be deemed amended to comply with the ONCA - will result in uncertainty
 - Prudent to adopt new by-law and articles of amendment

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- 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

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• ONCA Transition Process

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    graph TD
      A[Review letters patent and by-laws] --> B[Prepare articles of amendment & new by-laws]
      B --> C[Get membership approval]
      C --> D[File required documents]
      D --> E[Certificate of amendment will be issued]
      E --> F[Charities - send certificate of amendment, articles of amendment & new by-law to CRA]
    
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C. OVERVIEW OF KEY ELEMENTS OF THE ONCA

1. Incorporation and Corporate Powers

- Incorporation will be as of right - ministerial discretion no longer exists
- Will obtain a certificate of incorporation, not letters patent
 - Only require one incorporator
- Still no need to file by-laws, however, default by-law will apply if no by-laws are 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*

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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 sources

The diagram shows a large green circle labeled "All Not-for-Profit Corporations". Inside this circle is a smaller purple circle labeled "Public Benefit Corporations". Within the "Public Benefit Corporations" circle, there are two sub-sections: "Charitable" and "Non-Charitable", separated by a vertical dashed line.

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- 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
- If a non-charitable corporation reaches \$10,000 threshold, deemed to be a PBC in the next financial year
 - Will go from the AGM in the next financial year to the end of that financial year

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- Consequences of being a PBC
 - Not more than 1/3 of the directors 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, 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 for non-charitable PBCs
 - Need to monitor revenue sources and level annually
 - Some corporations may move in and out
 - Consider structuring as a PBC anyways

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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
- There are rules for exemption

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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
	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%)
	\$500,000 or more (by implication of ss.68(1))	An auditor must be appointed annually

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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
	More than \$500,000 in annual revenue (ss.76(2)(a))	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 AGMs
- Can still have ex-officio directors
- Directors may appoint directors between AGMs
 - 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

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- If different groups of members elect directors to the board, must structure membership as separate classes - need to consider workarounds
- 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)

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5. Directors and Officers – Powers, Duties and Defence

- The ONCA states that “the Directors shall manage or supervise the management of the activities and affairs of the corporation”
- 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
- 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

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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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- 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
 - Honourary members
 - Life members

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- All classes of members (regardless of voting or non-voting classes), are entitled to vote separately as a class on certain amendments to articles and by-law 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
- 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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- Considerations whether to retain multiple class structure
 - What is the purpose of having multiple classes?
 - Is the corporation prepared to seek class approval (including from the non-voting members) in the future?
 - Can the voting classes be grouped into one class?
 - Would the members be willing to restructure their membership status?
 - What is the likelihood of changing the membership structure or membership rights in the future?
 - What is the likelihood of engaging in fundamental changes (such as amalgamation) in the future?

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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
 - 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

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- 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
- 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

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- 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
 - Must 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
- Every member entitled to vote at a meeting may vote by proxy
 - Proxy vote is optional if by-law allows members to vote by mail or by telephonic or electronic means
 - Proxyholder does not have to be a member

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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 the 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
- Members have extensive rights and remedies - e.g.,
 - Right to requisition a meeting of members (need 10% of the votes to do so, or lower if the bylaws so state)
 - Right to submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member may do so)
 - Right to submit proposal to nominate directors (need at least 5% of voting members, or lower if the bylaws so state)
 - Right to access corporate records, including membership list
 - Right to financial statements

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9. Members' Remedies

- Compliance or restraining order
- Rectification order
- Dissent and appraisal remedy for non-PBCs - in relation to fundamental changes
- Derivative action, subject to faith-based defiance by religious corporations
- Court ordered wind-up and liquidation
- Rights do 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

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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

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- ONCA permits directors to fix their remuneration and to receive reasonable remuneration and expenses for their services
 - Directors of charities cannot receive direct/indirect remuneration from the charity as common law overrules ONCA
 - But directors may be reimbursed out-of-pocket expenses
- 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
 - Directors of charities cannot enter into contracts or transactions as common law overrules ONCA
- Possible to seek PGT consent court order but high threshold

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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
 - 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 Regulation 4/01 under the *Charities Accounting Act*
 - The indemnification or the purchase of insurance must not render the corporation insolvent

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D. PRACTICAL STEPS FOR TRANSITION

1. Collect Governing Documents

- Letters patent, supplementary letters patent
 - Can request microfiche copies from Ministry
- All by-laws, including amendments
 - Amending by-laws
 - Members' resolutions and board resolutions
 - Need to confirm that by-laws are valid and were properly adopted
- 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

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?

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5. Determine Whether Changes Should be Made Prior to Transition

- Changes to membership classes - consider effect of Bill 85
- Changes to board structure?
- 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, need 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 yet available
- 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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- Need to understand the ONCA framework
 - Rules in the Act
 - Some details in the Regulations
 - Will need to refer back and forth between the two
- 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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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

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9. Other Consequential Filings and Records Updates

<p>CRA</p> <p>Provincial</p> <p>Other filings</p> <p>Internal</p>	<ul style="list-style-type: none">• Copies of articles & by-laws <ul style="list-style-type: none">• Business name registrations,• Fundraising registrations• PGT? <ul style="list-style-type: none">• Funders• Umbrella organizations <ul style="list-style-type: none">• Update corporate records• Board, staff & volunteer training
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E. 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

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- 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
 - 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

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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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