 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The 2019 Ottawa Region Charity & Not-for-Profit Law Seminar™ February 14, 2019</p>
<p>The Coming of the ONCA (WE HOPE) and What to Start Thinking About</p> <p>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.</p> <p>tman@carters.ca 1-877-942-0001</p> <p>© 2019 Carters Professional Corporation</p>	
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<p>OVERVIEW</p> <ul style="list-style-type: none">• Status of ONCA• Overview of ONCA Transition Process• Overview of Key Elements of The ONCA• Practical Steps For Transition <p>www.charitylaw.ca www.carters.ca</p>	

A. STATUS OF ONCA

- Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) may finally be proclaimed in early 2020!!
- Ontario *Corporations Act* (“OCA”) has not been substantively amended since 1953 - Part III of OCA governs non-share capital corporations
- New ONCA will apply to Part III OCA corporations
- Key timeline of ONCA
 - October 25, 2010 - ONCA received Royal Assent
 - 2013 - Original anticipated proclamation date, later delayed to January 2014
 - June 5, 2013 - Bill 85 introduced, proposing changes to ONCA, with ONCA to be proclaimed 6 months after enactment of Bill 85
 - May 2, 2014 - Ontario Legislature dissolved, Bill 85 died on the Order Paper

- September 2015 - Ministry announced that the ONCA would come into force after two things have happened
 - Legislature has passed technical amendments to the ONCA and related legislation
 - Technology at the Ministry is upgraded to support these changes and improve service delivery and the Ministry would provide the sector with at least 24 months’ notice before proclamation
- Technical amendments
 - Ontario Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, was introduced on September 14, 2017, and received Royal Assent on November 14, 2017
 - Bill 154 introduced changes to the OCA, ONCA and Ontario *Business Corporations Act*
 - See *Charity & NFP Law Bulletin* No. 409 at [carters.ca](http://www.carters.ca)

- Technology - Following the Royal Assent of Bill 154, Ministry's website indicates that it is upgrading technology to support the changes implemented by Bill 154 and to improve service delivery
- 24 month's notice - Ministry's website also states that it is working to bring ONCA into force as early as possible, with a target of early 2020 - thus giving NFP corporations at least 24 months' notice before the ONCA comes into force
- See Ministry's website for updates
<https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations#section-1>
- Further details will be provided by the Ministry of Government and Consumer Services closer to when the ONCA comes into force.

B. OVERVIEW OF ONCA TRANSITION PROCESS

- ONCA applies automatically upon proclamation, except where overridden by existing corporate documents
- Optional transition process within 3 years of proclamation in order to make the necessary changes to their governing documents
- Prudent to go through the transition process by adopting new by-law and articles of amendment
- 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

- Not moving the following provisions from by-laws or special resolutions to articles in order to comply with ONCA is fine until articles of amendment are endorsed
 1. Number of directors
 2. Two or more classes or groups of members
 3. Voting rights of members
 4. Delegates under section 130 of the OCA
 5. Distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution
- Share capital social clubs under the OCA will have 5 years to continue under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*

C. OVERVIEW OF KEY ELEMENTS OF THE ONCA

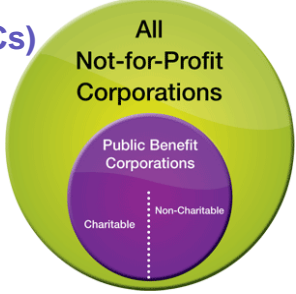
1. Incorporation and Corporate Powers

- 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
- 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*
- ONCA will not apply to corporations sole "except as is prescribed"

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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 (or another amount prescribed in the regulations) in a financial year in funding from public donations or the federal or a provincial or municipal government or an agency of such government - Need to monitor revenue sources and level annually



The diagram consists of a large green circle labeled 'All Not-for-Profit Corporations'. Inside this circle is a smaller purple circle labeled 'Public Benefit Corporations'. A vertical dashed line divides the purple circle into two sections: 'Charitable' on the left and 'Non-Charitable' on the right.

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- If a non-charitable corporation reaches 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 1/3 of the directors may be employees of the corporation or its affiliates
 - Higher thresholds for dispensing with appointing an auditor or a person to conduct a review engagement
 - For charitable corporations, net assets on dissolution must be distributed to a Canadian corporation that is a registered charity with similar purposes, or to the government or government agency
 - For non-charitable corporations, net assets on dissolution must be distributed to a PBC with similar purposes, to a Canadian corporation that is a registered charity 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 (PBCs cannot do this)

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

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 AGMs
- Can have ex-officio directors
- Directors may appoint directors between AGMs
 - 1 year term, 1/3 cap

- If different groups of members elect x 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 (all consents must be in writing)

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

- All classes of members (regardless of voting or non-voting classes) are entitled to vote separately as a class on fundamental changes and certain amendments to articles, including
 - Change to any rights or conditions attached to a class of members or change to the rights of other classes of members relative to the rights of a particular class of members
 - Amalgamation if affects membership rights
 - Continuance to another jurisdiction if affects membership rights
- Thus a class of members could reject a change - effectively resulting in a class veto
- Bill 154 proposes to delay implementation of all membership class votes for at least 3 years after proclamation of ONCA

- 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

7. Members' Meetings

- Notice of meeting - 10 to 50 days before the meeting
- Record date - 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
- Voting – optional proxy votes, voting by mail, voting by telephonic or electronic means
- Proxyholders - May require only members are eligible to be proxyholders
- Circulation of financials - Financial statements, 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 (or other period prescribed in the regulations) before an AGM

8. Members' Rights and Remedies

- Members may remove directors by simple majority vote (but not ex officio directors)
- Members have extensive rights and remedies - e.g.,
 - Requisition holding members' meeting (by 10% of voting right)
 - Submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)
 - Submit proposal to nominate directors (by 5% of voting right)
 - Access corporate records, including membership list

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- 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
- Having a smaller membership may reduce the exposure to these rights

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9. 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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D. PRACTICAL STEPS FOR TRANSITION

1. Collect governing documents
 - Letters patent, supplementary letters patent
 - All by-laws, including amendments
 - Collect governance related documents - e.g., organizational charts, policies, manuals
2. Review governing documents
 - Do they reflect current governance process? If not, what is current governance process?
 - Are changes desired?
 - 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
 - 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

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?
 - What to do if current by-laws or desired governance does not comply with ONCA?
5. Prepare 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
6. Obtain membership approval and filings
 - Need special resolution to approve, then file articles (but not by-laws) with Ministry
 - Other filings, e.g., registered charities will need to file with Canada Revenue Agency

CONCLUSION

- Monitor ONCA/Bill 154
- Have A committee in charge of the process
- Engage board of directors
- Prepare early
- Seek legal help

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