
20TH ANNUAL CHURCH AND CHARITY LAW SEMINAR

Mississauga – November 14, 2013

Getting Ready for the ONCA: A Step-by-Step Guide

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July 1, 2013 - Original anticipated proclamation date

March 28, 2013 – Ministry announced proclamation delayed to no earlier than Jan 2014

- Will review the ONCA after proclamation to determine if amendments are necessary, e.g. membership voting rights
- Explore possibility of delaying proclamation of provisions giving voting rights to non-voting members for 3 years after proclamation

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June 5, 2013 – first reading of Bill 85 proposing changes to ONCA

Sep 4, 2013 – Ministry announced proclamation delayed further to later in 2014

- Bill 85 to be debated in Legislation in fall of 2013
- ONCA to be proclaimed 6 months after enactment of Bill 85

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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
 - 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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Application of ONCA to special act corporations

- General rule - If special act is inconsistent with the ONCA, the special act prevails

Express provision in special act

- ONCA does not apply
- Certain sections of the ONCA do not apply
- Certain sections of the ONCA apply

Special act silent

- If special act is silent on an issue addressed by the ONCA, ONCA applies

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Overview of Transition Process

Review LP, SLPs, By-laws

Prepare Articles of Amendment and new By-law

Membership approval, filing, issue Certificate of Amendment

Charities – file copies with CRA

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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”

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- 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
 - Electronic toolkit that can be used to explain ONCA to members and stakeholders - slides, speaking points, presenter Q&A, newsletter and bulletin articles, webtext, Facebook posts

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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
- 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*

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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



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- 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 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 charitable corporation with similar purposes or to a government or government agency
 - For non-charitable corporations, net assets on dissolution 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	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%)

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



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- 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 (Bill 85 proposes all consents be in writing)

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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
 - 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
 - Honorary 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 fundamental changes and certain amendments to articles, including
 - 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
 - Amalgamation if affects membership rights
 - Continuance to another jurisdiction if affects membership rights

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- Thus a class of members could reject a change - effectively resulting in a class veto

One class at a time 

- 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 non-voting members) in future?
 - Can the voting classes be grouped into one class?
 - Will restructuring be acceptable to members?
 - What is the likelihood of changing the membership structure or membership rights in the future?
 - What is the likelihood of engaging in fundamental changes 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"
 - Donations will be included in \$10,000 threshold
 - Query whether this may affect 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?

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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 - 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"
- 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

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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

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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
- 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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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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- 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

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- 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*

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E. PRACTICAL STEPS FOR TRANSITION

1. Collect Governing Documents

- LP, SLPs
 - Microfiche copies from Ministry
- All by-laws, including amendments
 - Amending by-laws
 - Members' resolutions and board resolutions
- 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?

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6. Timing of Transition

Substantive vs admin changes

Size of membership

Complexity of changes

Changes to corporate objects

timing

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7. 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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8. 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
- ONCA framework - Act, Regulations, Articles, by-laws
- Three types of rules in ONCA - Mandatory, default, alternate

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9. Other Consequential Filings and Records Updates

CRA	<ul style="list-style-type: none"> • Copies of articles and by-law
Provincial	<ul style="list-style-type: none"> • Business name registrations, • Fund-raising registrations • PGT?
Other filings	<ul style="list-style-type: none"> • Funders • Umbrella organizations
Internal	<ul style="list-style-type: none"> • Update corporate records • Board, staff and volunteer training

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CONCLUSION

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    graph TD
      A[Engage board of directors] --> D((DONE!))
      B[Prepare early] --> D
      C[Legal help] --> D
      E[Monitor ONCA/Bill 85] --> D
      F[Committee in charge] --> D
  
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