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

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OVERVIEW

• Status of the ONCA
• Overview of ONCA transition process
• Resources
• Overview of key elements of the ONCA
• Practical steps for transition

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
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

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

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
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

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

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
C. RESOURCES

- 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
- 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

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
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 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

   • 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
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

Show Me The Money!
<table>
<thead>
<tr>
<th>Type of Corp/Gross Annual Revenues (GAR)</th>
<th>Requirements for an Auditor</th>
<th>Audit/Review Engagement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Benefit Corporation (PBC) with GAR of $100,000 or less (ss.76(1)(b))</td>
<td>May, by extraordinary resolution (80%), decide not to appoint an auditor</td>
<td>May dispense with both an audit and a review engagement by extraordinary resolution (80%)</td>
</tr>
<tr>
<td>More than $100,000 but less than $500,000 (ss.76(1)(a))</td>
<td>May dispense with an auditor and have someone else conduct a review engagement. This requires an extraordinary resolution (80%)</td>
<td>May elect to have a review engagement instead of an audit by extraordinary resolution (80%)</td>
</tr>
<tr>
<td>$500,000 or more (by implication of ss.68(1))</td>
<td>An auditor must be appointed annually</td>
<td>Audit is required</td>
</tr>
<tr>
<td>Non-PBC corporation with GAR of $500,000 or less in annual revenue (ss.76(2)(b))</td>
<td>May, by extraordinary resolution (80%), dispense with an auditor</td>
<td>May dispense with both an audit and a review engagement by extraordinary resolution (80%)</td>
</tr>
<tr>
<td>More than $500,000 in annual revenue (ss.76(2)(a))</td>
<td>May, by extraordinary resolution (80%), dispense with an auditor, and instead appoint a person to conduct a review engagement</td>
<td>May elect to have a review engagement instead of an audit by extraordinary resolution (80%)</td>
</tr>
</tbody>
</table>
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

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
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

24.

- 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

25.

- 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
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.

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?

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.
• 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?

• 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
• 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
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
• 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. 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.

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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
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?

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?
6. Timing of Transition

- Substantive vs. admin changes
- Size of membership
- Complexity of changes
- Changes to corporate objects

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

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
9. Other Consequential Filings and Records Updates

- Copies of articles and by-law
- Business name registrations,
- Fund-raising registrations
- PGT?
- Funders
- Umbrella organizations
- Update corporate records
- Board, staff and volunteer training

CONCLUSION

Committee in charge
Engage board of directors
Prepare early
Monitor ONCA/Bill 85
DONE!
Legal help

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