

THE ONCA IS FINALLY COMING! PREPARING FOR TRANSITION

By Theresa L.M. Man *

A. INTRODUCTION

AFTER MORE THAN a decade-long wait, the much-anticipated Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) will be proclaimed into force on October 19, 2021. With its looming proclamation date just around the corner, not-for-profit corporations incorporated under Part III of the Ontario *Corporations Act* (“OCA”) will need to familiarize themselves with how the ONCA will change their future corporate structure and governance and how they will need to transition under the ONCA, including amending constating documents to conform with ONCA requirements.

This *Charity & NFP Law Bulletin* provides a brief outline of the transition process and considerations for Part III OCA corporations to take into account before transitioning to the ONCA. This brief overview of the ONCA transition process is intended to help Ontario corporations transition as smoothly as possible. As a result of the sweeping changes that the ONCA will bring about, it will be important for boards, executives, staff, and legal counsel of corporations in Ontario to become familiar with the provisions of the ONCA in planning for the transition under the ONCA after its proclamation.

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B. DEEMED AMENDMENTS TO GOVERNING DOCUMENTS

UPON PROCLAMATION, the ONCA will automatically apply to all non-share capital corporations incorporated under Part III of the OCA. The ONCA provides that Part III OCA corporations are not required to take any action to come under the ONCA.¹ Any provisions in a corporation's letters patent, supplementary letters patent, by-laws or special resolutions that are inconsistent with the ONCA will continue to apply for three years after proclamation and would take precedence over the inconsistent ONCA requirements. However, at the end of three years after proclamation, *i.e.* on October 19, 2024, they will be amended to comply with the ONCA.² It may be difficult to determine which provisions are deemed to be amended and in what way.

To avoid uncertainty of documents as a result of the deemed amendment process, it is prudent to undertake the optional "transition process" during the three-year period by amending their governing documents to bring them into compliance with the requirements of the ONCA. In this regard, Part III OCA corporations may be transitioned into the ONCA during the three-year period by (a) filing articles of amendment to amend provisions in their letters patent or supplementary letters patent; and (b) adopting an ONCA-compliant by-law. As well, a corporation may have its articles restated with board approval, provided that (a) the articles are in conformity with the ONCA and (b) if the articles have been deemed to be amended, the corporation has amended its articles to bring them into conformity with ONCA.

In addition, certain provisions that are commonly set out in by-laws or special resolutions of Part III OCA corporations will be required to be set out in the articles under the ONCA. These are provisions respecting (1) the number of directors of the corporation; (2) two or more classes or groups of members; (3) voting rights of members; (4) delegates made pursuant to section 130 of the OCA; and (5) the distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution. These provisions can be moved to the articles as part of the optional "transition process" explained above. However, if these provisions are not moved from the corporation's bylaws or special resolutions to its articles in order to comply with the requirements in the ONCA, they will continue to be valid indefinitely until articles of amendment are endorsed (*i.e.*, the fact that these provisions are in the "wrong" document would not be deemed to be invalid at the end of the three-year transition period).

¹ *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15 ["ONCA"], s 207.

² *Ibid*, ss 207(2).

C. PRELIMINARY STEPS AND CONSIDERATIONS FOR TRANSITION

THE FOLLOWING is an overview of key steps and considerations to enable a smooth transition into the ONCA. Many of these considerations are very similar to those in relation to federal corporations that continued from the *Canada Corporations Act* under the *Canada Not-for-profit Corporations Act*.

1. Gather and review current governance structure and practice

The first step is to collect and review all governing documents of the corporation, including the letters patent, supplementary letters patent and by-laws. Copies of letters patent and supplementary letters patent are available from the Ministry of Government and Consumer Services. Records of meeting minutes should also be reviewed to determine whether there are any resolutions contained in their meeting minutes amending their by-laws or special resolutions changing the number of directors.

Where a corporation's objects are set out in their by-laws (which is sometimes done to allow members can review them without having to obtain a copy of the letters patent or supplementary letters patent), those objects may have been amended as part of the by-law amendment process without changing the "official" objects in their letters patent or supplementary letters patent. In these situations, the objects contained in the by-laws should also be taken into account when preparing the articles of amendment.

All documents should be reviewed in detail to understand the current governance structure and practice, with consideration given to whether these documents accurately reflect the current governance structure and practice. It may also be necessary to review various other operational documents, including governance policies and organizational charts. These documents may reveal the governance structure and practice that is being followed by the corporation, which should be reflected in the ONCA-compliant by-laws to be prepared.

2. Review key features of the ONCA

The next step is to gain a clear understanding of the ONCA rules under which they must operate. This understanding will help determine how the ONCA rules will impact the governance process and structure, and what provisions to include in the articles of amendment and ONCA-compliant by-laws.

3. Compare the ONCA rules with current governance structure and practice

This would be followed by reviewing how the ONCA rules will impact the governance process and structure. Examples of questions to consider include: whether the current by-laws or the desired governance structure and process are inconsistent with ONCA requirements; if they are inconsistent, how will the corporation adjust its governance structure and process to ensure compliance. Alternatively, it would be necessary to determine whether the governance process and/or structure would need to be adjusted in light of the rules in the ONCA. In this regard, the transition checklist released by the Ministry provides a helpful list of key questions that should be considered.³

4. Drafting and approving transition documents

Finally, ONCA articles of amendments and ONCA-compliant by-laws would be prepared, which would need to be approved by the directors and the members. Articles of amendment would need to be filed with ServiceOntario to obtain a certificate of amendment. For registered charities, the articles/certificate of amendment and new by-laws would need to be filed with the Charities Directorate of the Canada Revenue Agency.

Depending on the operations of a particular corporation, it may be required to provide copies of these documents with third parties. For example, a corporation that receives funding from another organization may be required to provide the funder with the new governance documents; a corporation that operates in subordination to an umbrella organization may need to provide these new documents to the umbrella organization; *etc.* As such, it will be necessary to review the operations of the corporation to determine whether any filings in this regard are required.

Finally, corporate records will need to be updated, including the corporate minute book. Other corporate documents should also be updated, such as corporate governance policies, manuals. Staff and volunteers will also need to be trained and become familiar with the new governance documents.

³ Ministry of Government and Consumer Services, “Not-for-Profit Corporations Act-Transition Considerations” online: Government of Ontario <<https://www.ontario.ca/page/not-profit-corporations-act-transition-considerations>>.

D. TIMING OF TRANSITION

SOME CORPORATIONS may want to complete the transition process early during the three-year period, while others may want to wait. Early on, it should be decided when to start the corporation's by-law review process in order to prepare for transition. The following are some key considerations in this regard:

- Length of time and complexity of process required in revising the by-laws – For corporations whose by-laws or governance process stipulate a lengthy process for revising the corporate by-laws and governance policies and practices, starting their process early should be considered in order to take full advantage of the three-year time frame.
- Nature of changes in the by-laws – If compliance with the ONCA requires substantive changes to the by-laws, consideration should be given to starting the by-law review early. Where only administrative changes to the by-laws are required (*e.g.*, changing the length of notice period for calling members' meetings), there may be flexibility to wait before transitioning. However, such a decision cannot be made until a review of the corporation's current by-laws has been completed. As such, it would be prudent for the corporation to conduct a review of its current by-laws early on.
- Size of membership – A corporation that has a large membership or a complicated membership structure will likely require an extensive consultation in relation to by-law changes. The time required to complete an extensive consultation process should be factored into consideration.
- Board structure – The ONCA continues to permit corporations to have *ex officio* directors. For example, the chair of a hospital board is still permitted to be an *ex officio* director of the hospital foundation's board. However, in situations where a corporation's directors are appointed, nominated or elected by subgroups of members, this may no longer be possible unless each division is made into a separate membership class. As there is no one-size-fits-all mechanism, consideration will need to be given to what mechanism to implement (*e.g.*, by allowing the board to appoint directors who meet certain requirements, imposing a board composition formula, putting in place a nomination procedure, *etc.*). Factors to consider when selecting a mechanism include the constituency of the corporation and the working relationship with the appointing organization. Some may want to take a wait-and-see approach to learn from others who undergo the transition process.

- Changes to membership structure – In some cases, changes to membership structure, or to the rights of some membership classes, *etc.* will be relevant and important factors to consider during the transition process.
- Changes of corporate objects – Some corporations may want to amend their corporate objects for various reasons. This can be done as part of the transition process by including the new objects in the articles of amendment. Although the approval of the Ontario Public Guardian and Trustee may not be required (unless the corporation wants to request approval from the Ontario Public Guardian and Trustee to omit the after-acquired property clause), the new objects will be subject to scrutiny by the Canada Revenue Agency.

E. CONCLUSION

IT IS NECESSARY TO keep track of the three-year time frame in order to ensure the corporation can complete the transition within this time. As explained above, the time that a corporation requires to complete this process will depend on the structure and operations of the corporation. As such, it would be prudent to start preparing for transition as early as possible by reviewing their existing by-laws and getting familiar with the rules in the ONCA so that they can anticipate the changes that will be required.

It would also be helpful to designate a particular person or a committee to be in charge of the transition process, to ensure that the project does not get lost among the day-to-day activities of the corporation. It is also necessary that the board of directors be engaged early on, such as by having the directors attend seminars and presentations on the ONCA transition requirements; having the person/committee of the corporation in charge of the transition process report to the board on a regular basis; setting target dates to complete various steps; and having the members engaged early as well, especially if key governance structures and/or procedures need to be changed.