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Moving Forward with the ONCA: Understanding Key Provisions and Practical Tips

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Other Topics of Interest, Including Public Benefit Corporations and Financial Reporting

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OVERVIEW

- Public Benefit Corporations
- Auditors, Financial Reporting and Financial Disclosure
- Fundamental Changes
- Share Capital Social Clubs
- Corporations Sole

A. PUBLIC BENEFIT CORPORATIONS

- The *Not-for-profit Corporations Act, 2010* (Ontario) ("ONCA") creates a new classification system for not-for-profit corporations
- Under the ONCA, all corporations are characterized as either Public Benefit Corporations ("PBCs") or non-Public Benefit Corporations ("non-PBCs")
- Whether a corporation is a PBC or a non-PBC has a number of implications, including the fact that PBCs are subject to stricter financial review requirements than non-PBCs

1. What is a PBC?

- PBC is defined in section 1(1) of the ONCA as:
  (a) A charitable corporation; or
  (b) A non-charitable corporation that receives more than $10,000 or other prescribed amount in a financial year,
    (i) In the form of donations or gifts from persons who are <u>not</u> members, directors, officers or employees of the corporation; or
    (ii) In the form of grants or similar financial assistance from the federal government or a provincial or municipal government or an agency of any such government

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- Charitable corporations will always be PBCs, regardless of the amount or source of their revenue
- Non-charitable corporations will only be PBCs if they meet the criteria set out in the ONCA:
  - Receive more than $10K in a financial year
    - In gifts or donations from persons not connected to the NFP; or
    - In grants or financial assistance from government
- The definition of PBC turns on the meaning of "charitable corporation", which is defined in section 1(1) of the ONCA as:

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- A corporation incorporated for the relief of poverty, the advancement of education, the advancement of religion or other charitable purpose, and
- "non-charitable corporation" means a corporation that is not a charitable corporation

- Similar to the common law definition of charity
- However not limited to registered charities under the *Income Tax Act* (Canada) ("ITA") regulatory regime
- Could include unregistered charities and any corporation that is deemed to be a trustee under the Ontario *Charities Accounting Act* ("CAA"), which could include corporations that are not registered charities
- If so, they would automatically be PBCs

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2. Timing of Becoming a PBC

- Charitable corporations are always PBCs
- For non-charitable corporations, PBC status is never applied retroactively and always applies for the following financial year beginning at the first annual meeting of members
- Non-charitable corporations that hit the threshold in one financial year will become PBCs for the next financial year, starting at the first annual meeting of members in that financial year [Section 1(2)]
- Non-charitable corporations would cease to be a PBC at the end of that financial year

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3. Consequences of Being a PBC

- Three main consequences flow from being a PBC:

a) PBCs are subject to more stringent financial review requirements than non-PBCs

b) There are restrictions on the composition of the board of directors of a PBC

c) There are restrictions on how any remaining property of a PBC can be distributed upon dissolution or liquidation

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a) Financial review requirements for PBCs

- ONCA permits some corporations to conduct a review engagement rather than an audit in certain circumstances
- Review engagements are more limited and are typically less expensive than an audit
- Default is that audit is required unless the rules in Section 76 permit a review engagement or a waiver of both an audit and a review engagement

Type of Corporation	Amount of Annual Revenue	Type of Financial Review
PBC	$500,000 or more	Audit
PBC	> $100,000 to less than $500,000	Can waive audit in favour of review engagement by extraordinary resolution
PBC	$100,000 or less	Can waive both audit and review engagement by extraordinary resolution
Non-PBC	> $500,000	Can waive audit in favour of review engagement by extraordinary resolution
Non-PBC	$500,000 or less	Can waive both audit and review engagement by extraordinary resolution

- Extraordinary resolution is a resolution that is approved by at least 80% of the votes cast at a special meeting of the members

b) Restrictions on board of directors of PBCs

- Section 23(3) – Not more than one-third of the directors of a public benefit corporation may be employees of the corporation or of any of its affiliates
  - However, a PBC that is a charitable corporation would not be able to provide any remuneration to directors except when done in compliance with the regulations under the CAA or section 13 of the CAA
- Section 3(3) – corporations are deemed to be affiliated if one of them is the subsidiary of the other, both are subsidiaries of the same corporation or each of them is controlled by the same person

c) Restrictions on distribution of property upon dissolution

- "Net assets" – any property remaining after satisfying a dissolving corporation's debts, obligations and liabilities
- Section 150 and section 167 – restrictions upon how a PBC's net assets can be distributed upon dissolution (see next slide)

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Type of Corporation	Limitations on Distribution of Net Assets Upon Dissolution
Charitable corporation - PBC	to a Canadian body corporate that is a registered charity under the Income Tax Act (Canada) with similar purposes to its own, the Crown in right of Ontario, the Crown in right of Canada, an agent of either of those Crowns or a municipality in Canada
Non-charitable corporation – PBC	to another public benefit corporation with similar purposes to its own, a Canadian body corporate that is a registered charity under the Income Tax Act (Canada) with similar purposes to its own, the Crown in right of Ontario, the Crown in right of Canada, an agent of either of those Crowns or a municipality in Canada

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- Section 167(5.1) – charitable corporations that do not have such a provision in their articles will be deemed to have filed articles of amendment adding a provision to their articles to this effect
- Section 167(5.2) – non-charitable PBCs that do not have such a provision in their articles will be deemed to have filed articles of amendment adding this provision when they file articles of dissolution

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- In contrast, a corporation that is a non-PBC may distribute its net assets in accordance with its articles or, if there is no provision in its articles for distribution of property, rateably to its members according to their rights and interests in the corporation
- Section 167(6) – a corporation that is not a PBC in the financial year in which it files articles of dissolution will be deemed to be a PBC if it met the definition in any of the three preceding financial years

B. AUDITORS, FINANCIAL REPORTING AND FINANCIAL DISCLOSURE

- Section 69(1) – auditor or person appointed to conduct a review engagement must be:
  - Permitted to conduct an audit or review engagement of the corporation under the *Public Accounting Act*, 2004; and
  - Be independent of the corporation, any of its affiliates, and the directors and officers of the corporation and its affiliates
- Section 69(2) sets out when a person is deemed not to be independent including when they or their business partner is a business partner, director, officer or employee of the corporation or any of its affiliates
- A business partner includes a shareholder or member

- Section 80 – permits a corporation to have an audit committee. If it does, the majority of the committee must not be officers or employees of the corporation or of any of its affiliates
- Section 83(3) – If the corporation has an audit committee, the audit committee shall review the financial statements of the corporation before they are approved by the directors
- Section 83(1) – the directors must approve annual financial statements for the period starting at the end of the last financial year and ending no more than six months before the annual meeting
- Section 84(1) – the directors must present the approved annual financial statements to the members at every annual meeting, together with the report of the auditor/reviewer

- Section 84(2) – the corporation must provide a copy of the financial statement, auditor's report and any other relevant documents to a member who has requested them not less than 21 days or a prescribed number of days before the annual meeting. Section 13 of O. Reg 395/21 provides that the prescribed number of days is five business days
  - It is unclear which provision governs

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C. FUNDAMENTAL CHANGES

- Under ONCA a special resolution means a resolution passed by at least 2/3 of the votes cast at a special meeting of the members [section 1(1)]
  - Amendment of articles
    - Section 103 – a special resolution of the members is required to make any amendment to the articles of the corporation
    - Section 106 – articles of amendment must be
  - Amalgamation
    - Section 110 – two or more corporations may amalgamate by signing an amalgamation agreement and submitting it to the members of each corporation

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- Section 111 – a special resolution of the members of each amalgamating corporation is required to approve the amalgamation
- Section 112 – articles of amalgamation must be filed together with statements from a director or officer of each corporation confirming that, among other things, no creditors will be prejudiced by the amalgamation
  - Continuance into ONCA
    - Section 114 – a corporation incorporated outside Ontario may apply for continuance under ONCA and must file articles of continuance
    - Section 115 – a corporation incorporated under another Ontario Act may apply for continuance into ONCA if approved by its shareholders or members by special resolution. Must file articles of continuance

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– Continuance out of ONCA

- Section 116 – a corporation may apply to be continued into another jurisdiction if approved by the members by special resolution. Must file a copy of the instrument of continuance issued to it by the other jurisdiction

– Sale of all property

- Section 118 – the sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of its activities requires approval by the members by special resolution

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– Reorganization

- Section 119 – a corporation may be subject to a court order under the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act,* which order may include changes to by-laws or articles
- Articles of reorganization must be filed
- Members do not have the right to dissent to any amendment to the articles made under this section

– Arrangement

- Section 120 – an arrangement must be approved by special resolution of the members and by court order. Articles of arrangement must be filed

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D. SHARE CAPITAL SOCIAL CLUBS

- Section 2.1 of the ONCA's predecessor, the Ontario *Corporations Act* provides that share capital social clubs have until 5 years after the ONCA is proclaimed to apply to be continued under the ONCA, under the *Co-Operative Corporations Act* or under the Ontario *Business Corporations Act*
- Failing such continuance, they will be dissolved
- If the social company has more than one class of shareholders, each class must authorize the continuance by special resolution by separate vote
- A social club can apply to a court to waive the requirement for a special resolution

E. CORPORATIONS SOLE

- A corporation sole is a legal entity that consists of a single person holding a single office from time to time.
- Usually found in the ecclesiastical and government contexts, such as a Bishop of a Diocese
- Section 4(1.1) – ONCA does not apply to corporations sole except as prescribed
- O. Reg. 396/21 sets out the provisions of ONCA that apply to corporations sole, including its liability to employees for wages, the right of the office holder to be indemnified for losses, and requirements relating to the appointment of an auditor and approval of annual financial statements

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