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# CSAE TRILLIUM WINTER SUMMIT

March 4, 2021

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## THE NEW ONTARIO *NOT-FOR-PROFIT CORPORATIONS ACT* (ONCA) AND WHAT YOU NEED TO GET READY

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## The New Ontario *Not-for-Profit Corporations Act (ONCA)* and What You Need to Get Ready

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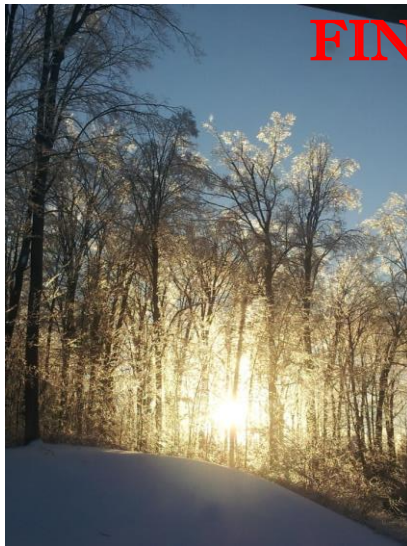
### OVERVIEW

Status of ONCA

Practical steps for transition

Overview of key elements of ONCA

- This presentation is not about share capital social clubs under Part II of OCA – they will have 5 years to continue under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*

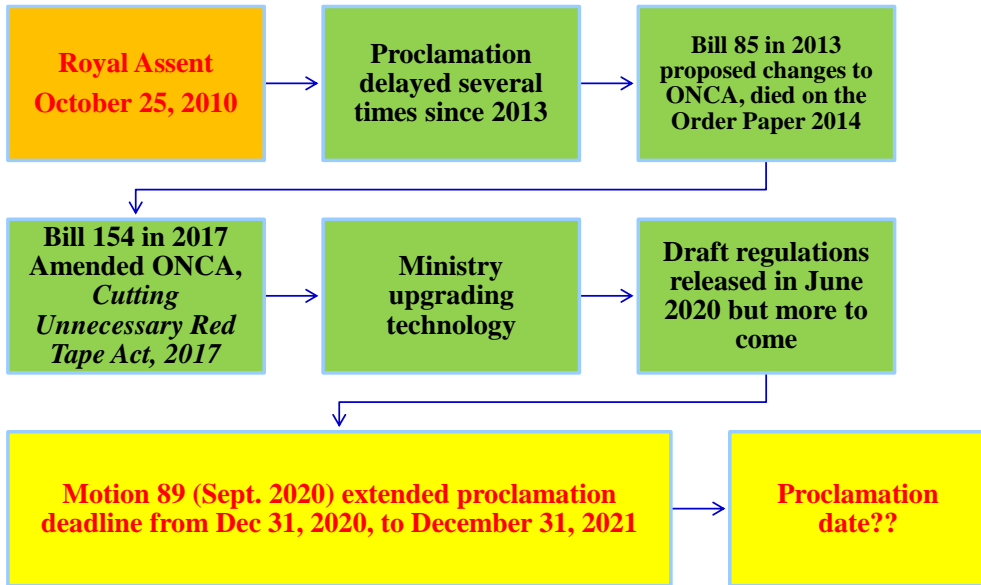


**FINALLY .....**  
**(We hope)...**

*The Beginning of  
a New Era*

## A. THE ONCA IS COMING SOON

- Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) is expected to be proclaimed in 2021
- Once proclaimed, ONCA will replace Part III of Ontario *Corporations Act* (“OCA”) which governs non-share capital membership corporations
- See Ministry’s website for updates  
<https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations#section-1>
- LONG history of ONCA to this point (next slide)



## What does it mean?



## B. IMPLICATIONS OF ONCA PROCLAMATION

- ONCA applies to all OCA corporations automatically upon proclamation
- If do nothing –
  - Corporation will not be dissolved
  - LP, SLPs, by-laws and special resolutions will continue to govern for 3 years even if inconsistent with ONCA, but will be deemed amended after 3 years 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

- Optional transition process within 3 years of proclamation to make necessary changes to current governing documents
  - adopt articles of amendment
  - adopt ONCA-compliant by-law
- Prudent to go through the transition process

| Current documents under OCA    | If do nothing after proclamation of ONCA  |   | Optional transition after proclamation   |
|--------------------------------|---|---|--|
|                                | During first 3 years after proclamation   | After 3 years   | During first 3 years after proclamation  |
| LP<br>SLPs                     | - LP and SLPs will continue to govern even if inconsistent with ONCA  | Provisions inconsistent with ONCA will be deem amended to comply with the ONCA => uncertainty and messy | <b>Adopt articles of amendment</b><br>Goals:<br>- Ensure comply with ONCA<br>- Certainty and no mess                     |
| By-laws<br>Special resolutions | - By-laws will continue to govern even if inconsistent with ONCA<br>- ONCA will apply to areas not addressed in the by-laws | Provisions inconsistent with ONCA will be deem amended to comply with the ONCA => uncertainty and messy | <b>Amend by-law or adopt new ONCA-compliant by-law</b><br>Goals:<br>- Ensure comply with ONCA<br>- Certainty and no mess |



## What do I do?



## C. HOW TO GET READY FOR ONCA TRANSITION

### Collect

#### Collect governing documents

- Confirm corporation is actually under the OCA
- Collect LP, SLPs, by-laws (including amendments)
- Collect governance related documents - e.g., organizational charts, policies, manuals

### Review

#### 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

## Study

### Study key ONCA features

- To determine how current governance structure will be impacted by the ONCA
- ONCA framework
  - Rules in the Act
  - Some details in the Regulations (still to come)
  - 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 permitted by ONCA

## Compare

### Compare ONCA vs current gov. docs.

- Are the current by-laws or desired governance structure/process inconsistent with ONCA? What to do if they are?

## Prepare

### Prepare new ONCA documents

- Articles of amendment
- Current by-law be replaced or substantially revised

## Approve

### Approval and filings

- Need special resolution of members to approve
- File articles of amendment with the Ministry (but not the by-laws)
- Registered charities will need to file all of the ONCA documents with Canada Revenue Agency, Charities Directorate



# What are the ONCA rules?



## D. OVERVIEW - KEY ELEMENTS OF THE ONCA

### 1. Incorporation and Corporate Powers

|               |  |
|---------------|--|
| Incorporation | <p>Incorporation as of right with only 1 incorporator</p> <hr/> <p>Certificate of incorporation issued - no more LPs</p>                               |
| By-laws       | <p>No need to file by-laws or financial statements</p> <hr/> <p>Default by-law will apply if no by-laws adopted within 60 days after incorporation</p> |
| Powers        | <p>Corporation will have powers of a natural person</p> <hr/> <p>ONCA will not apply to corporations sole "except as is prescribed"</p>                |

## 2. Public Benefit Corporations (PBCs)



PBCs include

Charitable corporations

Non-charitable corporations that receive more than \$10,000 (or another amount prescribed in the regulations) in a financial year in funding from public sources (see next slide) => Need to monitor revenue sources and level annually

Change status

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

Liquidation and dissolution of a non-PBC

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)

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 person to conduct review engagement

On dissolution of charitable corporations - net assets must be distributed to a Cdn. corporation that is a registered charity with similar purposes, or to the government

On dissolution of non-charitable corporations - net assets must be distributed to a PBC with similar purposes, to Cdn. corporation that is a registered charity with similar purposes, or to government

## 3. Financial Review

Thresholds

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

|  |   |   | 21  |
|--|---|---|---|
| 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   |

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|--|---|---|---|
| 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. Directors

Number & Qualifications

Minimum 3 directors

Articles may provide maximum & minimum range

Directors not need to be members

Election and appointment

Directors elected at AGMs

Ex-officio directors possible

Directors may appoint directors between AGMs (1 year term, 1/3 cap)

If different member groups elect x directors to the Board, must structure members as separate classes

Term

Maximum 4 year term of directors

No limit on maximum number of terms

Staggered terms for directors possible

Removal of any director by majority vote of members (mandatory), except ex officio directors

Directors must consent in writing to take office

Objective standard of care for directors and officers

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 exercised 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

## 5. Members

Basic concepts

Corporation must have members

By-laws must set out conditions for membership

Default rule is 1 vote per member (subject to articles)

Classes

Articles must set out the classes of members

If 1 class, all members must be voting, but if 2+ classes, voting rights must be given to at least 1 class

Default rules to terminate members

Death, resignation, expiry of membership term, liquidation or dissolution, expulsion, or termination

May allow directors, members or committee to discipline members or terminate

Articles/by-laws must set out circumstances and the manner in which the power may be exercised

Must exercise power in good faith and fair & reasonable manner - 15 days notice of disciplinary action or termination with reasons, give member opportunity to be heard

Member may apply for compliance or restraining order if power misused

Class veto votes

ONCA originally gave all member classes (even non-voting) separate vote on fundamental matters and certain amendments to articles, *i.e.* class veto

Bill 154 (2017) proposed delaying membership class votes for at least 3 years after proclamation

Motion 89 did not extend class vote provisions beyond Dec. 31, 2020 = class votes provisions died

Extensive rights

Requisition 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)

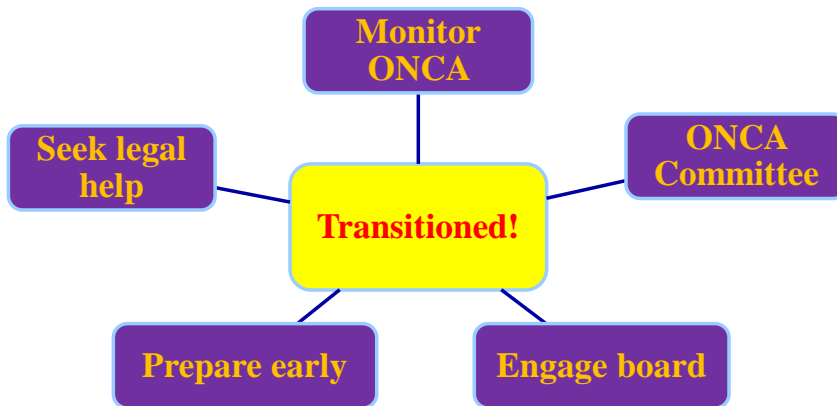
Access corporate records (e.g., membership list)

Broad remedy powers (e.g., dissent and appraisal remedy derivative action, compliance & restraining orders, court ordered wind-up and liquidation)

## 6. Members' Meetings

|                           |   |
|---------------------------|---|
| Notice of meeting         | 10 to 50 days before the meeting  |
| Record date               | Directors may fix "record date" of no more than 50 days before members' meeting (to determine who are members for the meeting)  |
| Voting                    | Optional proxy votes, voting by mail, voting by telephonic or electronic means  |
| Proxyholders              | May limit proxyholders to members   |
| Circulation of financials | FS, auditor/review engagement report, & information required by articles or by-laws must be given to members upon request at least 21 days (or as prescribed in regulations) before AGM |

## E. KEY TAKEAWAYS





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