 <p>CARTERS BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The 2022 Ottawa Region Charity & Not-for-Profit Law Webinar February 17, 2022</p>		
<p>Transition Challenges under the ONCA</p> <p>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. tman@carters.ca 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p> <table border="0"><tr><td data-bbox="259 833 645 891">CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td><td data-bbox="652 833 1209 891">Ottawa Toronto Orangeville www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca</td></tr></table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Ottawa Toronto Orangeville www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca
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FINALLY

YES FINALLY ...

HERE!



**Beginning
of a New
Era 😊**

A. ONCA IS FINALLY IN FORCE

- Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) was proclaimed into force on October 19, 2021
- ONCA now applies to non-share capital membership corporations under Part III of Ontario *Corporations Act* (“OCA”)
- New online Ontario Business Registry (OBR) also launched on October 19, 2021
- This presentation does not cover special issues, e.g.
 - Special act corporations – they need special case-by-case review
 - 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*

So ...
 what does it mean to
 me?

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B. IMPLICATIONS OF ONCA PROCLAMATION

Automatic application of ONCA

- ONCA applies to all Part III OCA corporations automatically upon proclamation

Effect of doing nothing

- Corporation will not be dissolved BUT the following governing documents will continue to govern for 3 years even if inconsistent with ONCA, but will be deemed amended after 3 years of proclamation to comply with the ONCA - will result in uncertainty
 - Letters patent (“LP”)
 - Supplementary letters patent (“SLPs”)
 - By-laws
 - Special resolutions

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Optional transition process

- Can take 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

End result

- After the transition process, corporation will be governed by
 - LP & SLPs, as amended by Articles of Amendment – consider consolidating them in Restated Articles
 - ONCA-compliant by-law
- For more details, see materials from webinar entitled “*Moving Forward with the ONCA*” held on December 8, 2021
<https://www.carters.ca/pub/seminar/charity/2021/ONCA/Handout2021.pdf>

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C. ONCA Framework

- 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

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Transition Steps ...

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D. STEPS TO TRANSITION UNDER ONCA

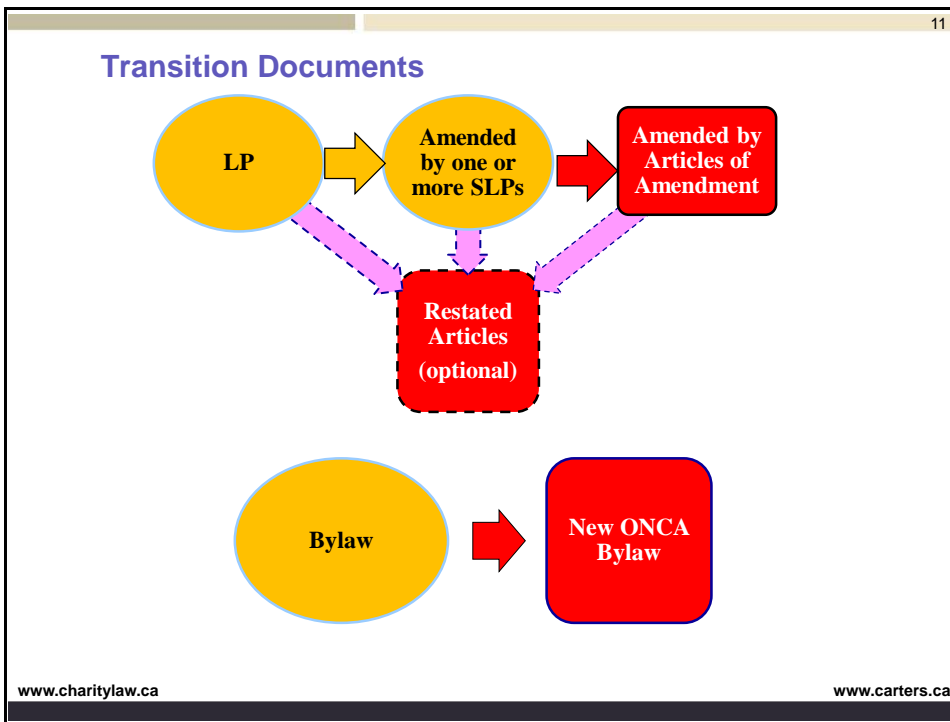
COLLECT GOVERNING DOCUMENTS	<p>Confirm corporation is actually under the OCA</p> <hr/> <p>Collect LP, SLPs, by-laws (including amendments)</p> <hr/> <p>Collect governance related documents - e.g., organizational charts, policies, manuals</p>
REVIEW GOVERNING DOCUMENTS	<p>Do they reflect current governance process? If not, what is current governance process?</p> <hr/> <p>Are changes desired? Write them down, come up with a wish list</p>
STUDY KEY ONCA FEATURES	<p>Determine how current governance structure will be impacted by the ONCA</p> <hr/> <p>Understand the ONCA framework and rules in the ONCA and Regulations</p> <hr/> <p>Are the current by-laws or desired governance structure/process inconsistent with ONCA? What to do if they are?</p>

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PREPARE ARTICLES OF AMENDMENT AND RESTATED ARTICLES	<p>Articles of Amendment – to amend LP and SLPs</p> <hr/> <p>Optional to prepare Restated Articles of Incorporation – to consolidated provisions in LP, SLPs and Articles of Amendment</p>
PREPARE ONCA-COMPLIANT BY-LAW	<p>By-law will need to be replaced or substantially revised because the ONCA is very different from OCA</p> <hr/> <p>Generally easier to start with fresh ONCA by-law than to amend current by-law</p> <hr/> <p>Some changes may require consideration and consultation with members, some changes may only be administrative</p>
APPROVAL AND FILINGS	<p>Board and members to adopt articles and by-law</p> <hr/> <p>File Articles of Amendment (and Restated Articles) with the Ministry (but not by-laws), Ministry will issue Certificate of Amendment (and Certificate of Restated Articles)</p> <hr/> <p>Registered charities - file articles and by-law with Canada Revenue Agency, Charities Directorate</p>

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E. TRANSITIONING CHALLENGES – SOME EXAMPLES

#1 Articles of Amendments/Restated Articles process

- Simply adopting an ONCA-compliant by-law is not sufficient
- LP and SLPs need to be amended to comply with new ONCA requirements – by Articles of Amendment
 - Set out the following in the articles:
 - Number of directors
 - Number of membership classes and voting rights
 - Dissolution clause needs to comply with new rules in the ONCA
 - Add additional provisions

- After adoption of Articles of Amendment, corporation will need to flip back and forth between the following documents
 - LP
 - As amended by SLPs in the past
 - As amended by Articles of Amendment
- Can consolidate all these into Restated Articles of Incorporation
 - Needs to carefully consider how to consolidate
 - Additional filing fees and processing time
 - Certain default provisions will be automatically inserted into the articles – may need to anticipate them when doing Articles of Amendment

#2 Company key and filing/processing problems

- There are glitches with the forms and online filing process
- Need to write to the Ministry to request the “company key”
 - Company key will be mailed to the head office on record of the Ministry
 - What if head office location on record with the Ministry is not up-to-date?
- Needs formal email address for each corporation
- Glitches with the form and filing process

#3 Consent from Ontario Public Guardian and Trustee (“PGT”)

- Needs to obtain consent from PGT under certain situations
- (a) Revisions to purposes**
 - If a charitable corporation wants to update its purposes set out in the LP/SLPs, they must be amended by Articles of Amendment
 - Articles of Amendment form will automatically insert “after acquired” clause, regardless of the changes being made, unless the Public Guardian and Trustee (“PGT”) has provided written consent to waive it
 - This does not apply to non-charitable corporations

- Implications of having “after acquired” clause:
 - Funds and other property acquired before the Articles of Amendment can only be used for the purposes before the amendment (will include all income received from a Will, deed or other trust made before the Articles of Amendment became effective, regardless of when the funds or property are received by the charity)
 - Funds and other property acquired after the Articles of Amendment can only be used for the purposes as changed by the Articles of Amendment

- There may be situations where “after acquired” clause may not be appropriate
 - Such as updating old language in the purposes
 - Needs to write to PGT in advance to obtain their written consent
 - File the consent with the Articles of Amendment
 - Retain the consent letter in the records of the charity
- **(b) Other situations where PGT’s consent is required**
 - PGT’s consent is required to use the term “Foundation” in the corporate name
 - If the PGT has requested notification of any application for changes with respect to the corporation

#4 Some ONCA corporations might be better off continuing to CNCA

- *Canada Not-for-Profit Corporations Act (CNCA)* became law in 2011
- Instead of preparing articles and new by-laws to comply with the ONCA, Ontario corporations may become a federal corporation by:
 - Export out of Ontario -> file *Authorization to Continue Out of the NFPCA* with Ontario Ministry
 - Import into CNCA ->
 - File *Articles of Continuance* with Corporations Canada
 - Adopt CNCA-compliant by-law

- Rules in the CNCA are very similar to those in the ONCA
- Examples of key differences
 - ONCA generally has lower thresholds requiring audit/review engagement
 - ONCA corporations are subject to the PGT's jurisdiction
 - CNCA does not permit *ex officio* directors
 - CNCA allows members in different classes (including non-voting members) veto class voting rights for certain fundamental changes
 - CNCA corporations do not need to get PGT's approval for any corporate changes

- Examples of corporations that may be good candidates to go federal
 - Corporations that carry on activities in different provinces
 - Corporations that have members in different provinces and want to hold members' meetings in different provinces from time to time
 - Operational issues – umbrella organization, consistent operation of network of related corporations, etc.

- Examples of corporations that may not want to go federal
 - Attractive features of the ONCA – *ex officio* directors
 - Multiple membership classes
 - Operational Issues – network of related corporations under a federal umbrella organization
 - Prohibitions – some organizations are required to be incorporated provincially in Ontario
 - Corporate process – can the corporation obtain the necessary membership approval to effect such as a fundamental corporate change?
- Needs case by case review

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