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BARRISTERS
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ALLIANCE FOR A GRAND COMMUNITY WEBINAR

December 7, 2022

TRANSITION CHALLENGES UNDER THE ONCA

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 <p>CARTERS BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>Alliance for a Grand Community Webinar</h2> <h3>December 7, 2022</h3>
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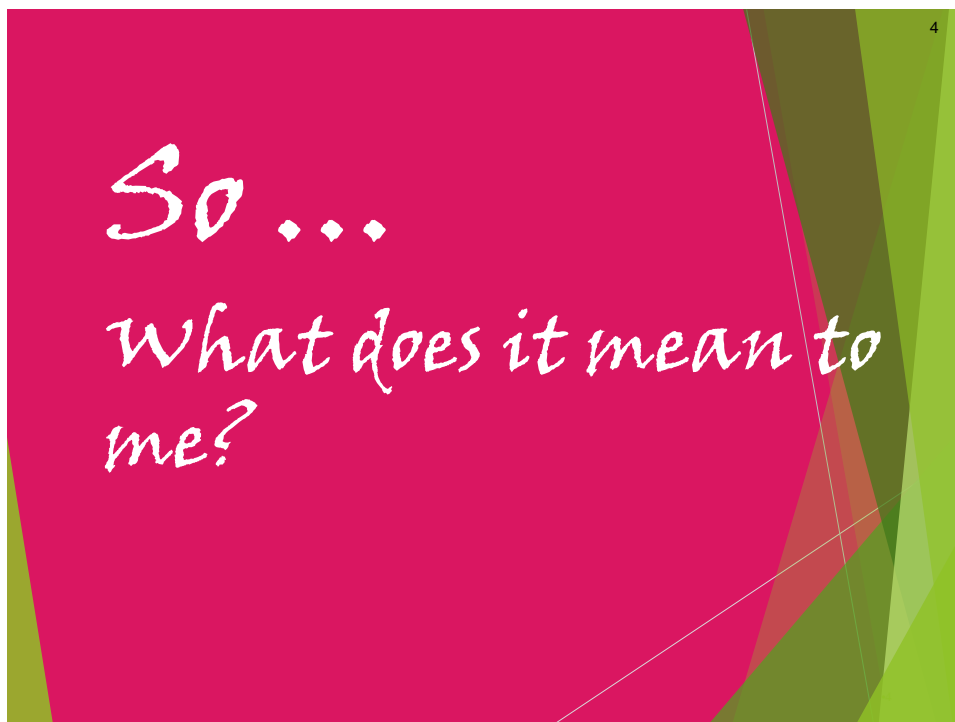
ONCA IS HERE!

.....
**YES FINALLY ... ONCA in
effect on October 19,
2021**

- ▶ Beginning of a New Era
- ▶ New rules
- ▶ New documents required

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*



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
- 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

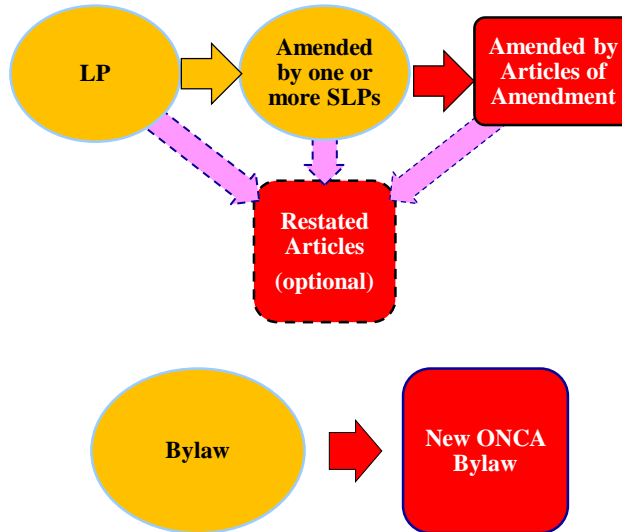
Optional transition process

- 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

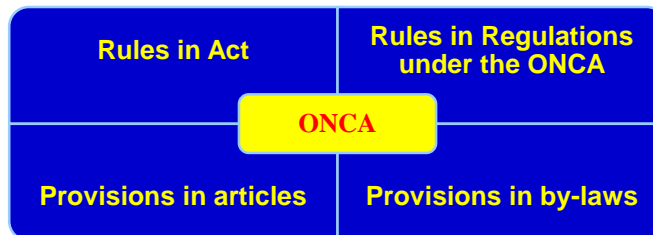
End result

- 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

Transition Documents



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

Three Types of Rules In ONCA

Mandatory Rules	Cannot be overridden by the articles or by-laws	n/a
Default Rules	Apply automatically if articles/by-laws silent	Overriding provisions may be set out in articles or by-laws – depending on the rules in question
Optional Rules	May opt in to have certain optional rules apply	Opt-in provisions may be set out in articles or by-laws – depending on the rules in question

**Transition
Steps ...
What do I ?**



D. STEPS TO TRANSITION UNDER ONCA

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 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 KEY ONCA FEATURES	Determine how current governance structure will be impacted by the ONCA
	Understand the ONCA framework and rules in the ONCA and Regulations
	Are the current by-laws or desired governance structure/process inconsistent with ONCA? What to do if they are?

PREPARE ARTICLES OF AMENDMENT AND RESTATED ARTICLES	Articles of Amendment – to amend LP and SLPs
	Optional to prepare Restated Articles of Incorporation – to consolidated provisions in LP, SLPs and Articles of Amendment
PREPARE ONCA-COMPLIANT BY-LAW	By-law will need to be replaced or substantially revised because the ONCA is very different from OCA
	Generally easier to start with fresh ONCA by-law than to amend current by-law
	Some changes may require consideration and consultation with members, some changes may only be administrative
APPROVAL AND FILINGS	Board and members to adopt articles and by-law
	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)
	Registered charities - file articles and by-law with Canada Revenue Agency, Charities Directorate



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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 Common Issues that require changes

- Rules in the ONCA and OCA are very different
- ONCA has many more rules than OCA
- Many governance areas will require changes
- Next slides are examples of key areas that require consideration or changes

Membership (examples of key rules)

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	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
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)
	Any member can nominate candidates for election to the board from the floor of AGMs
	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)

Issues to consider	Choice of broad-based membership or limited membership
	Must clearly set out membership qualifications and their rights
	Must have clear membership admission process
	Must have clear membership removal process that complies with ONCA requirements
	Must have clear membership records

Membership Meetings (examples of key rules)

AGMs	Must be held within 15 months of last AGM but not later than 6 months of year end (same as old OCA rules)
Notice of meeting	Must be sent 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

Directors (examples of key rules)

Number & Qualifications	Minimum 3 directors
	Articles may provide maximum & minimum range; or a fixed number
	Directors not need to be members
Election and appointment	Directors elected at AGMs (cannot be elected outside AGMs)
	May have <i>ex officio</i> directors
	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	Length of a term is maximum 4 years
	No limit on maximum number of terms
	May have staggered terms for directors
	Elected directors (not <i>ex officio</i> directors) may only be removed by simple majority vote of members (mandatory)
	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

Public Benefit Corporations (PBCs)



PBCs include	(1) Charitable corporations * Means having purposes recognized to be charitable at common law * whether it is a registered charity is irrelevant
	(2) Non-charitable corporations that receive more than \$10,000 (or another amount prescribed in the regulations) in a financial year in funding from the following sources => Need to monitor revenue sources and level annually (i) Donations or gifts from persons who are not members, directors, officers or employees of the corporation (ii) Grants or similar financial assistance from the federal, provincial or municipal government or government agency
Change status	If a non-charitable corporation reaches threshold, it will be 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

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 <u>charitable PBCs</u> - net assets must be distributed to a <u>Canadian corporation that is a registered charity with similar purposes</u> , or to the government
	On dissolution of <u>non-charitable PBCs</u> - net assets must be distributed to a <u>PBC with similar purposes</u> , to a <u>Canadian corporation that is a registered charity with similar purposes</u> , or to government
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)

Financial Review

Options	Audit
	Review engagement
	Compilation
Choice of options - factors	PBC or non-PBC
	Revenue threshold in the year
	Membership approval
Thresholds	Normal rule - 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 (see tables on next 2 slides)

Rules for PBCs

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

Rules for Non-PBCs

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%)

#3 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

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

- For charities - need to obtain consent from PGT under certain situations for charities
- (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 to waive the after acquired clause
 - 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

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