 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>Carters Spring Charity and Not-for-Profit Law Webinar</h2> <p>March 2, 2023</p>		
<h3>Transitioning under the ONCA : More Complicated Than You Think</h3> <p>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. tman@carters.ca 1-877-942-0001</p>			
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	<h2>ONCA</h2> <ul style="list-style-type: none">▪ Beginning of a New Era▪ New legislation▪ New rules▪ New documents required• Can be COMPLICATED!!
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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 rules for special act corporations and share capital social clubs
- This presentation is a general overview of the process to comply with the ONCA – called “ONCA Transition” process

New legislation
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
- The following governing documents will continue to govern for 3 years until October 18, 2024, even if inconsistent with ONCA
 - Letters patent (“LP”)
 - Supplementary letters patent (“SLPs”)
 - By-laws
 - Special resolutions
- Starting on October 19, 2024, inconsistent provisions (with a few exceptions) will be deemed to be amended to the extent necessary to comply with ONCA - will result in uncertainty – **complicated guessing game**

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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

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D. ONCA Framework

Rules in Act	Rules in Regulations under the ONCA
ONCA	
Provisions in articles	Provisions in by-laws

- ONCA is modeled after rules for public for-profit companies
- Lots of rules in ONCA that were not in the OCA
- **Complicated rules and how the rules work with each other**

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Three Types of Rules in ONCA

Mandatory Rules	Cannot be overridden by the articles or by-laws	Corporations must follow these rules
Default Rules	Apply automatically if articles/by-laws silent	Corporations may override the default rules Overriding provisions may be set out in articles or by-laws – depending on the rules in question
Optional Rules	Options for corporations to opt in to have certain optional rules apply	Corporations may opt in to the options available Opt-in provisions may be set out in articles or by-laws – depending on the rules in question

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New documents
required

So...

More paperwork?

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C. ONCA TRANSITION DOCUMENTS

#1 Need ONCA-Compliant By-law

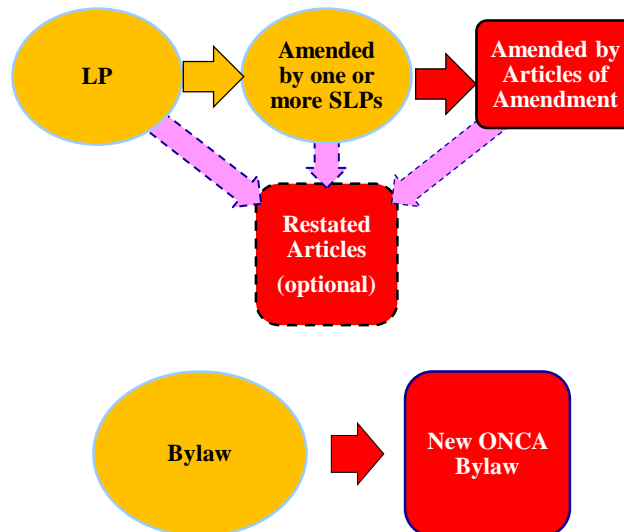
- Current by-law will likely
 - Have provisions that do not comply with ONCA
 - Have gaps in the by-law that do not address some of the new ONCA rules
- Need to know how the ONCA rules works in order to know
 - What rules must be followed
 - What rules may be overridden, how to override, and where to put overriding provisions (articles vs by-law)
 - What rules can be opted in, and where to put the opt-in provisions (articles vs by-law)
 - What else to include in by-law?
- Question – amend current by-law or draft a fresh by-law?
- **Complicated, not just following a template**

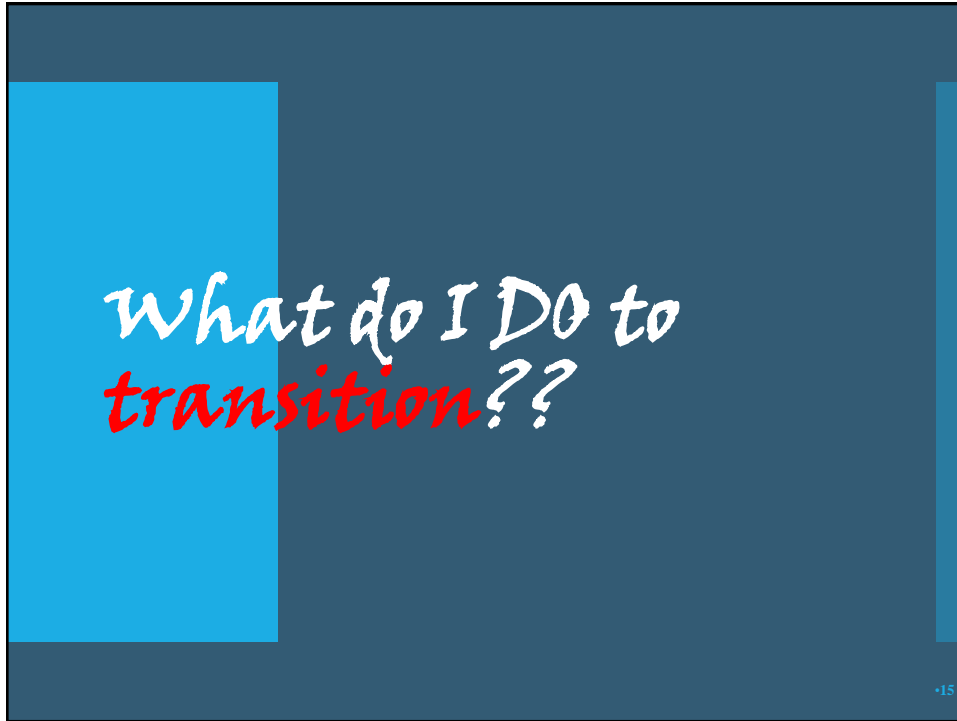
#2 Articles of Amendment and Optional Restated Articles

- 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 “special provisions”
 - Default “special provisions”
 - Other provisions may be required to co-ordinate with mechanisms in the by-law

- After amendment by Articles of Amendment, corporation will need to flip back and forth between the following documents
 - LP
 - LP as amended by SLPs in the past
 - LP as amended by Articles of Amendment
- Can consolidate all these into Restated Articles of Incorporation
 - Will replace LP, all SLPs, and Articles of Amendment
 - Need 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
- **Complicated, not just filling out forms**

Transition Documents





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E. 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?
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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 consolidate 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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<h3 style="color: blue;">Company key and filing/processing problems</h3> <ul style="list-style-type: none"> • There are glitches with the forms and online filing process • Need to write to the Ministry to request the “company key” <ul style="list-style-type: none"> – Company key will be mailed to the head office on record with the Ministry – What if head office location on record with the Ministry is not up-to-date? • Need formal email address for each corporation 	
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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
 - Need to write to PGT in advance to obtain their written consent to waive the after acquired clause
 - Indicate in the Articles of Amendment that consent has been obtained (not need to file a copy)
 - Retain the consent letter in the records of the charity

(b) Other situations where PGT’s consent is required

- Rules on PGT’s consent if corporate name includes the word “Foundation” or “Charity”
- PGT’s consent is required if PGT has requested notification of any application for changes with respect to the corporation

OH!!!

So...

What else is there?

F. ONCA ISSUES TO CONSIDER?

- Rules in the ONCA and OCA are very different
- ONCA has many more rules than OCA
- Many governance areas may require changes
- For example - Do you know these rules in the next few slides? **For your bed-time reading tonight 😊**
 - Extensive membership rights provided in ONCA
 - Must follow ONCA prescribed process in order to discipline or terminate members
 - Rules for membership meetings
 - Rules for board term, election ...
 - Public benefit corporations
 - When to do an audit vs review engagement vs compilation

For Reference:
**Examples of common
ONCA issues to consider**

Membership

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 (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

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May allow directors, members or committee to discipline members or terminate	<p>Articles/by-laws must set out circumstances and the manner in which the power may be exercised</p> <hr/> <p>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</p> <hr/> <p>Member may apply for compliance or restraining order if power misused</p>
Extensive rights	<p>Requisition members' meeting (by 10% of voting right)</p> <hr/> <p>Submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)</p> <hr/> <p>Submit proposal to nominate directors (by 5% of voting right)</p> <hr/> <p>Any member can nominate candidates for election to the board from the floor of AGMs</p> <hr/> <p>Access corporate records (e.g., membership list)</p> <hr/> <p>Broad remedy powers (e.g., dissent and appraisal remedy derivative action, compliance & restraining orders, court ordered wind-up and liquidation)</p>
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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
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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 *ex officio* 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 *ex officio* directors) may only be removed by simple majority vote of members (mandatory)

Directors must consent in writing to take office

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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

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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

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Consequences of being a PBC	<p>Not more than 1/3 of the directors may be employees of the corporation or its affiliates</p> <hr/> <p>Higher thresholds for dispensing with appointing an auditor or person to conduct review engagement</p> <hr/> <p>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</p> <hr/> <p>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</p>
Liquidation and dissolution of a non-PBC	<p>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)</p>

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Financial Review

Options	<p>Audit</p> <hr/> <p>Review engagement</p> <hr/> <p>Compilation</p>
Choice of options - factors	<p>PBC or non-PBC</p> <hr/> <p>Revenue threshold in the year</p> <hr/> <p>Membership approval</p>
Thresholds	<p>Normal rule - members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting</p> <hr/> <p>There are rules for exemption (see tables on next 2 slides)</p>

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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%)

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