

BARRISTERS  
SOLICITORS  
TRADEMARK AGENTS

## The Annual *Church & Charity Law*<sup>™</sup> Webinar Continues Virtually November 4, 2021

### Transitioning to the ONCA for Churches and Charities

By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.  
tman@carters.ca  
1-877-942-0001

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TOLL FREE: 1-877-942-0001

Toronto Ottawa Orangeville  
www.carters.ca www.charitylaw.ca www.churchlaw.ca

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## OVERVIEW

- STATUS OF ONCA**
- PRACTICAL STEPS FOR TRANSITION**
- FOR REFERENCE  
OVERVIEW OF KEY ELEMENTS OF ONCA**

- This presentation does not cover the following
  - 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*

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**FINALLY .....**  
**YES FINALLY ...**  
**HERE!**

**The Beginning of a  
New Era**

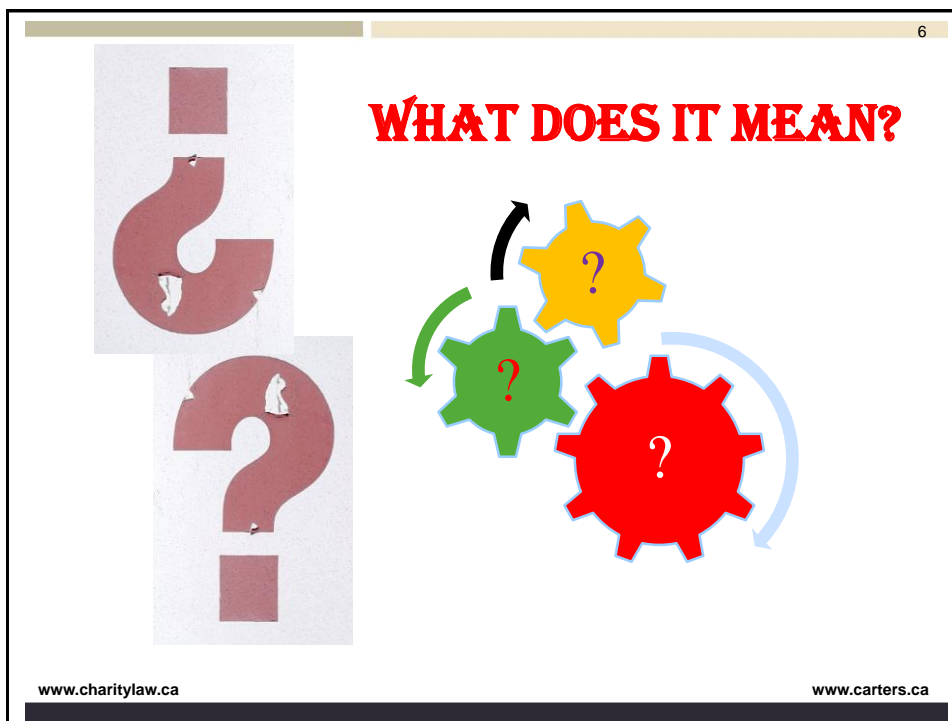
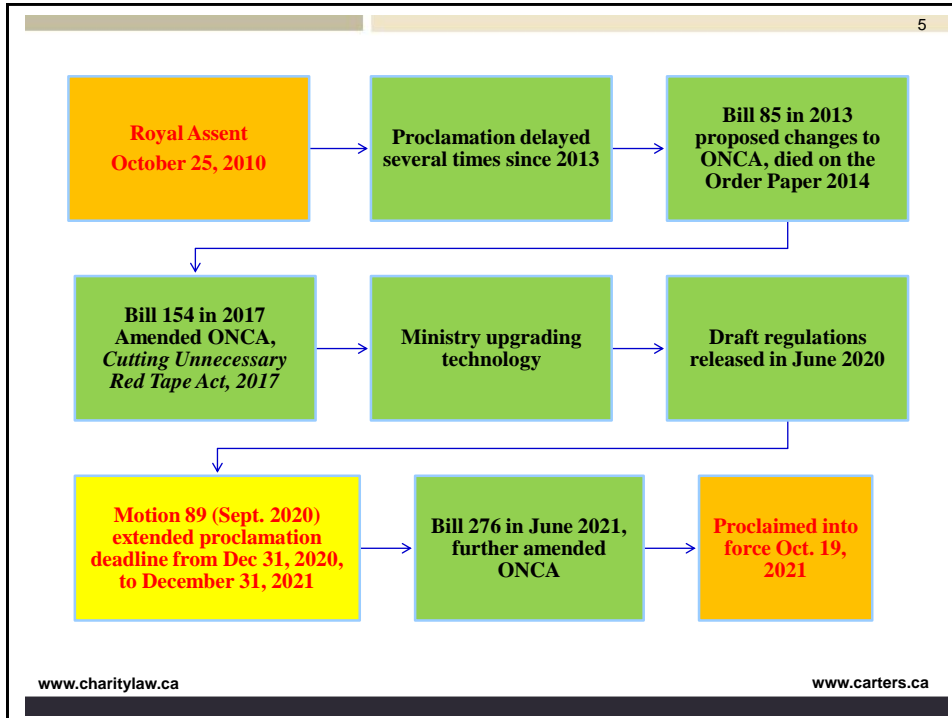
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**A. ONCA IS FINALLY HERE**

- 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
- VERY LONG history of ONCA to this point (next slide)

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## B. IMPLICATIONS OF ONCA PROCLAMATION

- ONCA applies to all Part III 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 of proclamation 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

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- 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
- End result – After the transition process, corporation will be governed by
  - LP, SLPs, articles of amendment – consider consolidating them in restated articles
  - ONCA-compliant by-law

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Current documents	If do nothing after proclamation of ONCA		Optional transition during first 3 years after proclamation
	During first 3 years after proclamation	At end of 3 <sup>rd</sup> year	
LP SLPs	- LP and SLPs continue to govern even if inconsistent with ONCA	Provisions inconsistent with ONCA will be deemed amended to comply with the ONCA => uncertainty and messy	<b>Adopt articles of amendment</b> Goals: - Ensure comply with ONCA - Certainty and no mess
By-laws Special resolutions	- By-laws continue to govern even if inconsistent with ONCA - ONCA applies to areas not addressed in the by-laws	Provisions inconsistent with ONCA will be deemed amended to comply with the ONCA => uncertainty and messy	<b>Adopt new ONCA-compliant by-law or amend by-law to comply with ONCA</b> Goals: - Ensure comply with ONCA - Certainty and no mess

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**WHAT DO I DO?**

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## C. HOW TO GET READY FOR ONCA TRANSITION

1. Collect

COLLECT GOVERNING DOCUMENTS

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- Confirm corporation is actually under the OCA
- Collect LP, SLPs, by-laws (including amendments)
- Letters patent, supplementary letters patent
- Obtain microfiche copies from Ministry
- All by-laws, including amendments
- Amending by-laws
- Members' resolutions and board resolutions
- Are by-laws valid? Were they properly adopted?
- Collect governance related documents - e.g., organizational charts, policies, manuals

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## 2. Review

### REVIEW GOVERNING DOCUMENTS

- Do they reflect current governance process? If not, what is current governance process?
- Are changes desired? What are they?
- Are there new provisions to be inserted?
- Write them down, come up with a wish list

## 3. 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
- See overview of rules in second part of this presentation

## 4. Compare

### COMPARE ONCA VS CURRENT GOV. DOCS.

- Are the current by-laws or the desired governance structure and process inconsistent with ONCA requirements?
- If inconsistent with ONCA mandatory requirements
  - Need to adjust governance structure and process to comply
- If inconsistent with ONCA default requirement
  - Consider whether to opt out
- If ONCA provides options
  - Decide which option to adopt
- Consider what else to include

## 5. Prepare

### PREPARE NEW ONCA DOCUMENTS

- Prepare articles of amendment
  - To amend LP and SLPs
  - Consider consolidating in restated articles
- Prepare ONCA-compliant by-law
  - By-law will need to be replaced or substantially revised because the ONCA is very different from OCA
  - OCA contained very few rules, ONCA provides many detailed rules
  - Generally easier to start with fresh ONCA by-law than to amend current by-law
  - Some changes may require detailed consideration and consultation with members
  - Some changes may only be administrative

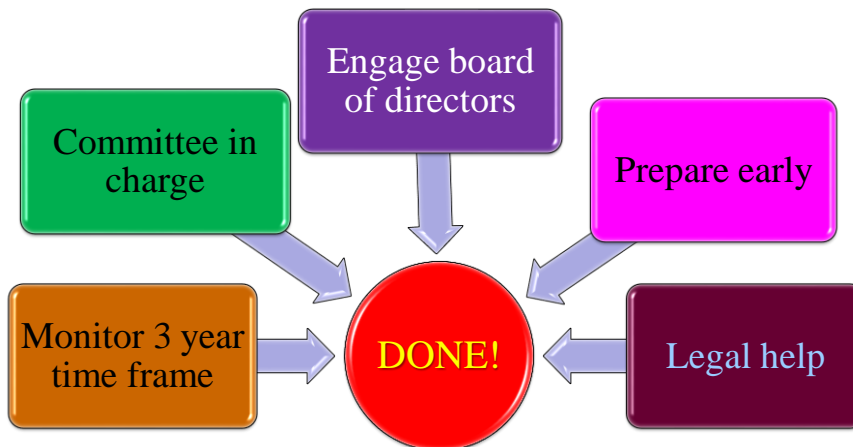


## 6. Approve & File

### APPROVAL AND FILINGS

- Board and members to adopt articles and by-law
- Need special resolution of members to approve articles of amendment (*i.e.*, 2/3 of votes cast)
- File articles of amendment with the Ministry (but not by-laws), Ministry will issue certificate of amendment
- Registered charities - file articles and by-law with Canada Revenue Agency, Charities Directorate
- May require other filings – e.g., funders, umbrella organizations
- Update corporate records; Board, staff and volunteer training

### D. KEY TAKEAWAYS



## FOR REFERENCE – WHAT ARE THE ONCA RULES?



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### E. OVERVIEW - KEY ELEMENTS OF THE ONCA

#### 1. Incorporation and Corporate Powers

**Incorporation**      Incorporation as of right with only 1 incorporator

Certificate of incorporation issued - no more LPs

**By-laws**              No need to file by-laws or financial statements

Default by-law will apply if no by-laws adopted within 60 days after incorporation

**Powers**                Corporations have powers of a natural person

ONCA does not apply to corporations sole "except as is prescribed"

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## 2. Public Benefit Corporations (PBCs)

PBCs include (1) Charitable corporations



(2) 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 ratably 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  
(see tables on next 2 slides)

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

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%)

## 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

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Objective standard of care for directors and officers	<p>Act honestly and in good faith with a view to the best interests of the corporation</p> <hr/> <p>Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances</p>
Reasonable diligence defence for directors	<p>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</p> <hr/> <p>Defence includes good faith reliance on financial statements and reports of professionals</p>

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<b>5. Members</b>	
Basic concepts	<p>Corporation must have members</p> <hr/> <p>By-laws must set out conditions for membership</p> <hr/> <p>Default rule is 1 vote per member (subject to articles)</p>
Classes	<p>Must set out the classes of members</p> <hr/> <p>If 1 class, all members must be voting, but if 2+ classes, voting rights must be given to at least 1 class</p>
Default rules to terminate members	<p>Death, resignation, expiry of membership term, liquidation or dissolution, expulsion, or termination</p>

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<p>May allow directors, members or committee to discipline members or terminate</p>	<p>Articles/by-laws must set out circumstances and the manner in which the power may be exercised</p> <p>Must exercise power in good faith and fair &amp; reasonable manner - 15 days notice of disciplinary action or termination with reasons, give member opportunity to be heard</p> <p>Member may apply for compliance or restraining order if power misused</p>
<p>Class veto votes</p>	<p>ONCA originally gave all member classes (even non-voting) separate vote on fundamental matters and certain amendments to articles, <i>i.e.</i> class veto</p> <p>Bill 154 (2017) proposed delaying membership class votes for at least 3 years after proclamation</p> <p>Motion 89 did not extend class vote provisions beyond Dec. 31, 2020 = class votes provisions died</p>

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<p>Extensive rights</p>	<p>Requisition members' meeting (by 10% of voting right)</p> <p>Submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)</p> <p>Submit proposal to nominate directors (by 5% of voting right)</p> <p>Access corporate records (<i>e.g.</i>, membership list)</p> <p>Broad remedy powers (<i>e.g.</i>, dissent and appraisal remedy derivative action, compliance &amp; restraining orders, court ordered wind-up and liquidation)</p>

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## 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

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