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**The Canadian Society of  
Association Executives (CSAE)  
Webinar  
May 18, 2022**

**ONCA TRANSITION CHALLENGES**

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 <p><b>CARTERS</b> BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p><b>The Canadian Society of Association Executives (CSAE) Webinar May 18, 2022</b></p>
<p><b>ONCA Transition Challenges</b></p> <p><b>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.</b> tman@carters.ca 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p>	
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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

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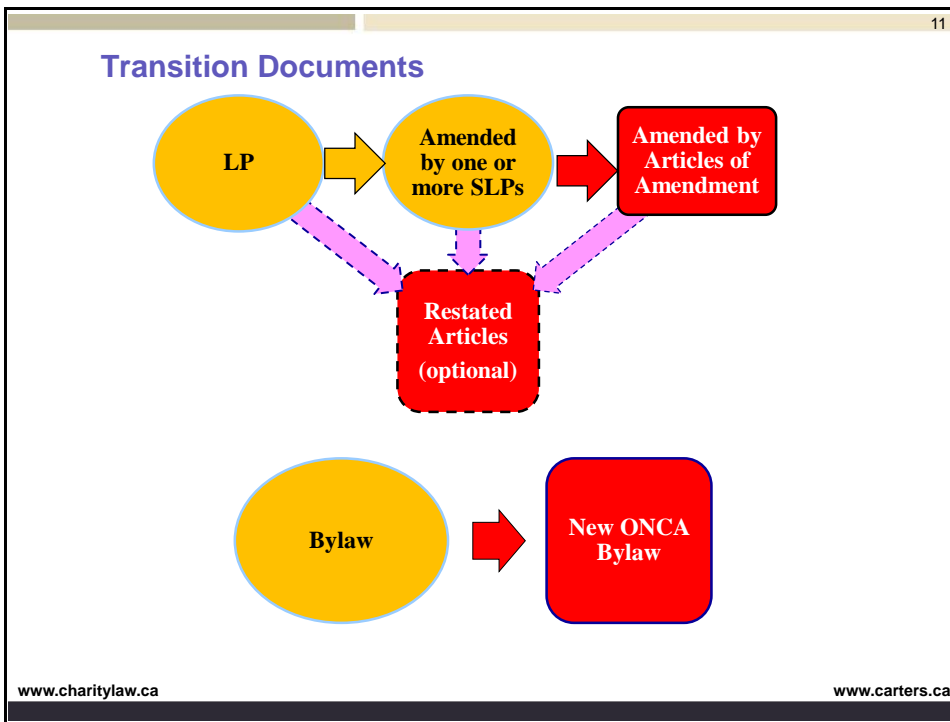
<b>COLLECT GOVERNING DOCUMENTS</b>	<p>Confirm corporation is actually under the OCA</p> <hr/> <p>Collect LP, SLPs, by-laws (including amendments)</p> <hr/> <p>Collect governance related documents - e.g., organizational charts, policies, manuals</p>
<b>REVIEW GOVERNING DOCUMENTS</b>	<p>Do they reflect 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>
<b>STUDY KEY ONCA FEATURES</b>	<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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<b>PREPARE ARTICLES OF AMENDMENT AND RESTATED ARTICLES</b>	<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>
<b>PREPARE ONCA-COMPLIANT BY-LAW</b>	<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>
<b>APPROVAL AND FILINGS</b>	<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

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

- Needs 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

## #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
- See Bulletin 508 “Continuing Dilemma: Ontario Corporations Going Federal?”

<https://www.carters.ca/pub/bulletin/charity/2022/chylb508.pdf>

- 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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