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Getting Ready for the Ontario Not-for-Profit Corporations Act (ONCA)

By **Theresa L.O. 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
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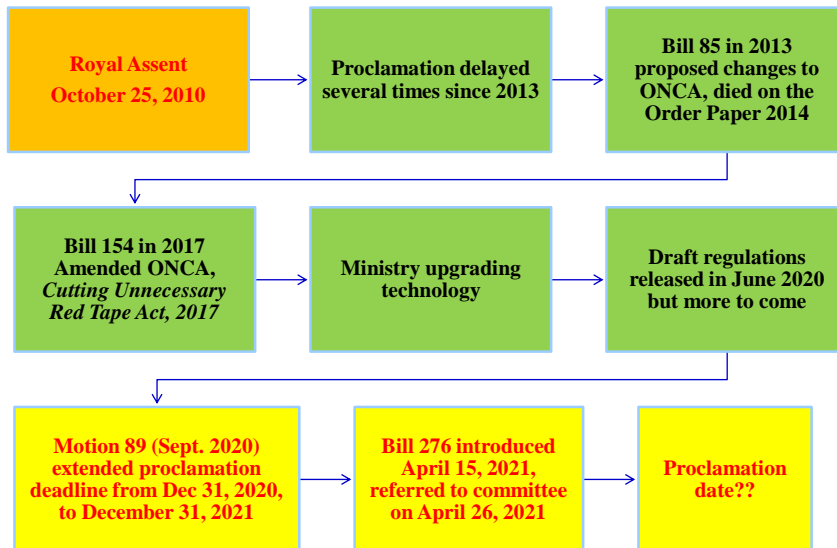
Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by *Lexpert*, *Best Lawyers in Canada*, and *Chambers and Partners*. In addition to being a frequent speaker, Ms. Man is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters. She is past chair of the CBA Charities and Not-for-Profit Law Section, a member of the Technical Issues Working Group of Canada Revenue Agency's (CRA) Charities Directorate, and a member and former chair of the OBA Charities and Not-for-Profit Law Section. Ms. Man has also written on charity and taxation issues for various publications.

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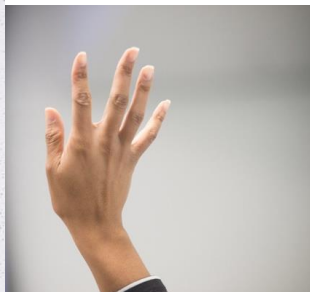
A. THE ONCA IS COMING SOON

- Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) is expected to be proclaimed in 2021
- Once proclaimed, ONCA will replace Part III of Ontario *Corporations Act* (“OCA”) which governs non-share capital membership corporations
- See Ministry’s website for updates
<https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations#section-1>
- LONG history of ONCA to this point (next slide)



Current documents under OCA	If do nothing after proclamation of ONCA		Optional transition after proclamation
	During first 3 years after proclamation	After 3 years	During first 3 years after proclamation
LP SLPs	- LP and SLPs will continue to govern even if inconsistent with ONCA	Provisions inconsistent with ONCA will be deem amended to comply with the ONCA => uncertainty and messy	Adopt articles of amendment Goals: - Ensure comply with ONCA - Certainty and no mess
By-laws Special resolutions	- By-laws will continue to govern even if inconsistent with ONCA - ONCA will apply to areas not addressed in the by-laws	Provisions inconsistent with ONCA will be deem amended to comply with the ONCA => uncertainty and messy	Amend by-law or adopt new ONCA-compliant by-law Goals: - Ensure comply with ONCA - Certainty and no mess

What do I do?



C. HOW TO GET READY FOR ONCA TRANSITION

Collect

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

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

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

Compare

Compare ONCA vs current gov. docs.

- Are the current by-laws or desired governance structure/process inconsistent with ONCA? What to do if they are?

Prepare

Prepare new ONCA documents

- Articles of amendment
- Current by-law be replaced or substantially revised

Approve

Approval and filings

- Need special resolution of members to approve
- File articles of amendment with the Ministry (but not the by-laws)
- Registered charities will need to file all of the ONCA documents with Canada Revenue Agency, Charities Directorate

What are the ONCA rules?



D. OVERVIEW - KEY ELEMENTS OF THE ONCA

1. Incorporation and Corporate Powers

Incorporation	<p>Incorporation as of right with only 1 incorporator</p> <p>Certificate of incorporation issued - no more LPs</p>
By-laws	<p>No need to file by-laws or financial statements</p> <p>Default by-law will apply if no by-laws adopted within 60 days after incorporation</p>
Powers	<p>Corporation will have powers of a natural person</p> <p>ONCA will not apply to corporations sole "except as is prescribed"</p>

2. Public Benefit Corporations (PBCs)

PBCs include Charitable corporations



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

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Public sources means	<p>Donations or gifts from persons who are not members, directors, officers or employees of the corporation</p> <hr/> <p>Grants or similar financial assistance from the federal, provincial or municipal government or government agency</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> <hr/>

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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 charitable corporations - net assets must be distributed to a Cdn. corporation that is a registered charity with similar purposes, or to the government</p> <hr/> <p>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</p> <hr/>
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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

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

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Term	<p>Maximum 4 year term of directors</p> <hr/> <p>No limit on maximum number of terms</p> <hr/> <p>Staggered terms for directors possible</p> <hr/> <p>Removal of any director by majority vote of members (mandatory), except ex officio directors</p> <hr/> <p>Directors must consent in writing to take office</p> <hr/>	
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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> <hr/>	
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5. Members

Basic concepts	<p>Corporation must have members</p> <hr style="border: 0.5px solid blue;"/> <p>By-laws must set out conditions for membership</p> <hr style="border: 0.5px solid blue;"/> <p>Default rule is 1 vote per member (subject to articles)</p>
Classes	<p>Articles must set out the classes of members</p> <hr style="border: 0.5px solid blue;"/> <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> <hr style="border: 0.5px solid blue;"/>

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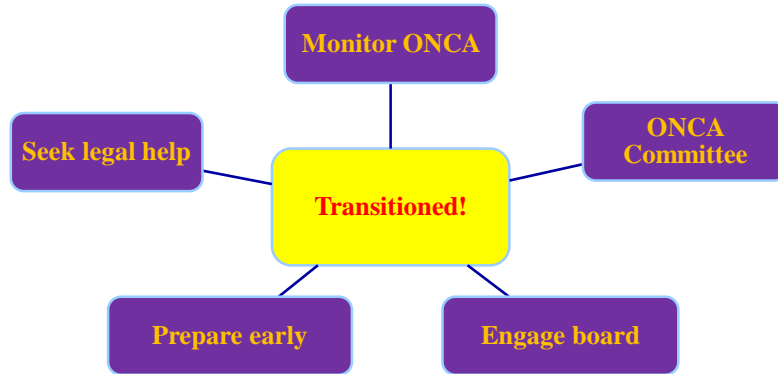
May allow directors, members or committee to discipline members or terminate	<p>Articles/by-laws must set out circumstances and the manner in which the power may be exercised</p> <hr style="border: 0.5px solid blue;"/> <p>Must exercise power in good faith and fair & reasonable manner - 15 days notice of disciplinary action or termination with reasons, give member opportunity to be heard</p> <hr style="border: 0.5px solid blue;"/> <p>Member may apply for compliance or restraining order if power misused</p>
Class veto votes	<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> <hr style="border: 0.5px solid blue;"/> <p>Bill 154 (2017) proposed delaying membership class votes for at least 3 years after proclamation</p> <hr style="border: 0.5px solid blue;"/> <p>Motion 89 did not extend class vote provisions beyond Dec. 31, 2020 = class votes provisions died</p>

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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>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> <hr/>
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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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E. KEY TAKEAWAYS



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