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# The Ontario Not-for-Profit Corporations Act, 2010: Better Late Than Never

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The much anticipated *Ontario Not-for-Profit Corporations Act, 2010* ("**ONCA**") will come into force on October 19, 2021, after receiving Royal Assent in 2010. The new legislation, once it is in effect, will automatically apply to not-for-profit corporations incorporated in Ontario, and will introduce various changes to governance requirements and processes – in large part aligning Ontario's not-for-profit corporate statute with the federal *Canada Not-for-profit Corporations Act* enacted in 2011.

Existing Ontario not-for-profit corporations will have three years to bring their processes and governing documents into compliance with the ONCA. Failure to transition to compliance will result in a corporation's governing documents being deemed amended to comply at the end of the three-year period, at which point the corporation will be operating in breach of the statute.

### Who is governed by ONCA?

- Most non-share capital corporations incorporated under Ontario legislation (except for some incorporated under special or private acts), including those currently operating under the *Corporations Act* (Ontario)
- The Act does *not* apply to not-for-profits operating in Ontario if they are incorporated (or continued) federally under the *Canada Not-for-profit Corporations Act*

### What's new with ONCA?

- More efficient incorporation process
  - Incorporation as a charitable corporation no longer requires approval from the Office of the Public Guardian and Trustee
  - All applications for Articles of Incorporation will be submitted directly to ServiceOntario
- Enhanced member rights
  - Board size, member class structure and many other fundamental matters can only be changed by amending the Articles, with member approval (either majority or 2/3s)
  - Member classes, and their voting rights, must be specified in the Articles
- Clarification of director and officer duties
  - Directors will be subject to the 'objective' fiduciary standard of care that was added to the *Corporations Act* in 2017 – requiring directors to perform their duties as would a "reasonably prudent person"
  - Directors will have explicit due diligence and good faith reliance defences
  - Directors and officers must comply with a robust conflict of interest regime
- Expanded means of voting and meeting procedures

- By-laws can provide for alternative means of voting such as by mail, telephone or electronic means in addition to, or in place of, voting by proxies
- Notice of members' meetings can be given electronically

- Distinctive rules for "public benefit corporations" (PBCs)
  - A PBC is any charitable corporation or a non-charitable corporation that receives more than $10,000 in a financial year through grants or gifts from non-members/officers/directors of the corporation
  - PBCs can be subject to a more rigorous financial review standard – audit engagement or review engagement, rather than the compilation report ('Notice to Reader') standard that is more likely to apply to a non-PBC, subject to applicable revenue thresholds
  - PBCs may only have up to 1/3 of directors be employees (though Ontario charity law restricts the ability of any employee to also serve as a charitable corporation director)
  - Unlike non-PBCs, PBCs cannot distribute fair value of a membership to a member upon termination of membership or, upon dissolution, distribute remaining property among the members
  - Unlike members of non-PBCs, members of PBCs do not have a right to dissent to certain corporate changes and be paid out fair value of their membership
- Confirm right to participate in commercial activities
  - Commercial activities must be in support of one or more of the not-for-profit's purposes and must be included in the articles
  - A surplus can be earned so long as the funds are reinvested in pursuit of the not-for-profit purposes of the corporation

**What should existing Ontario NFPs do?**

- Before ONCA comes into force, sign up with the Ontario Business Registry (see below)
- Compliance review of governing documents
  - During the three-year transition window, you should complete a full review of your Letters Patent and By-Laws to determine to what extent they conflict with provisions of the ONCA. It is almost inevitable that every *Corporations Act* corporation will have Letters Patent or by-laws that have certain elements inconsistent with the ONCA. Failure to update governing documents by the end of the three-year period will result in non-compliance with the ONCA to the extent the Letters Patent and By-laws are inconsistent with the ONCA.
  - As part of the review, you should determine whether your corporation is or may become a **"public benefit corporation"** and the implications of this for governance
- Holistic review of governing documents
  - In addition to a compliance review, you should optimize your legal spend and take the opportunity to complete a holistic review of your Letters Patent and By-laws to determine if they reflect the reality of your organization or where you'd like it to be. For example:
    - Are your current objects consistent with your current and any planned future activities? (This is a critical analysis for charities in particular.)
    - Is your current membership structure appropriate – should there be one class of members or multiple member classes?
    - Should membership be limited to those individuals serving as directors or include a broader stakeholder-based group?

    - Do the existing conditions, and other features, of membership reflect your current practice or otherwise need updating?
    - What rights, newly available in the ONCA, should your by-law include, such as electronic voting?
    - Do the specified titles and roles of your officers still meet your organization's needs?
    - Do the terms applicable to your board need updating – number, composition, term, rotations, qualifications of directors, etc.
    - Do you want to consider entrenching principles of equity and non-discrimination in your by-laws?

- Special rule for social companies
  - All social companies currently incorporated under the *Corporations Act* will need to decide whether they will continue (by filing Articles of Continuance) as a not-for-profit under the ONCA, a co-operative corporation under the *Co-operative Corporations Act* or a share capital corporation under the *Business Corporations Act*. Failure to do so will result in automatic dissolution at the end of the fifth year. Social company boards will need to consider the tax implications of payments to shareholders should they decide to continue as a not-for-profit corporation.

**The Ontario Business Registry**

The Ontario Business Registry will launch on the same day the ONCA comes into effect. The Registry will enable businesses and not-for-profits to access government services and complete transactions online 24/7. The Registry will be the primary method for submitting filings and will eliminate the need to visit ServiceOntario in person.

The Ministry has indicated that not-for-profit corporations with an annual filing deadline between May 15, 2021 and October 19, 2021 are exempt from the annual return filing requirement until the launch of the Registry.

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