



## Focus on

### *Ontario Not-For-Profit Corporations Act (ONCA)*

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- 1 Transitioning to the ONCA
- 2 Contact Us

#### Transitioning to the ONCA

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#### Introduction

The *Ontario Not-for-Profit Corporations Act, 2010* ("ONCA") is targeted to come into effect on July 1, 2013. The new Act is intended to provide a more comprehensive set of rules for Ontario not-for-profit corporations, and also to bring more transparency and accountability to their operations, to members, and, in certain cases, to the public. The ONCA will replace Part III of the *Ontario Corporations Act* ("OCA"), which was last substantively amended in 1953.

The Ontario government has not yet published the regulations that will accompany the ONCA. It has announced that it will also release default standard organizational by-laws, forms, and guidance documents in the months prior to the ONCA's entry into force. While these documents are not yet available, many corporations have already begun reviewing the requirements under the ONCA, and preparing for the significant changes to the not-for-profit corporate regime in Ontario.

#### Key Changes

Key changes for not-for-profit corporations transitioning to the ONCA include the introduction of: certain obligations for a new category of "public benefit corporations"; a cap of four years on directors' terms; enhanced rights for voting and non-voting members; more focus on "classes" of members; new requirements for member meetings; new requirements for "articles", which will replace a corporation's letters patent; and new financial review options for certain not-for-profit corporations.

## The Transition Period

The federal and the Ontario governments have taken different approaches to transition under their respective new Not-for-Profit Corporations Acts. Under the federal regime, there is a mandatory three-year transition process requiring each corporation to file new organizational documents by October, 2014, failing which the corporation risks dissolution.

The Ontario government has instead taken an “assumed transition” approach. Not-for-profit corporations currently incorporated under Part III of the OCA will have three years to bring their letters patent, by-laws and any special resolutions into conformity with the ONCA.<sup>1</sup> On the third anniversary of the date the ONCA enters into force, any provision of those governing documents that does not conform with the provisions of the Act will be deemed to have been amended to conform. Put another way, to the extent that a provision of those governing documents conflicts with the ONCA, that provision will become ineffective after the three-year transition period. Not-for-profit corporations should therefore make the necessary amendments before that time.

Irrespective of whether a corporation intends to maintain its existing governing documents “as is” during the three-year transition period, it will be important for all not-for-profit corporations to have a good understanding of the key changes coming under the ONCA.

## Types of Corporations

Under the ONCA, and effective immediately upon the ONCA coming into force, not-for-profit corporations will be either public benefit corporations (“PBCs”) or non-PBCs. A PBC is either a charitable corporation, or a non-charitable

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<sup>1</sup> There is a five-year transition period for “companies that have objects in whole or in part of a social nature,” such as share capital social clubs (e.g., golf, tennis or country clubs) that are governed under Part II of the OCA.

corporation that receives more than \$10,000 in a financial year in the form of donations or gifts from third parties, or government grants or similar financial assistance. As we will see below, certain obligations are imposed specifically on PBCs, due to their public funding.

## By-laws

Default standard organizational by-laws will be established by the statutory Director. While these may be used as a template for corporations that do not have by-laws, or for corporations wishing to adopt a basic set of by-laws, many corporations will prefer to revise the by-laws they currently use. This may be the case, for example, for corporations that have either gone through a governance review in the recent past, and want to maintain certain by-law changes that reflect that review, or simply for corporations whose Board, officers, members and staff are familiar with the by-laws they currently use as their ongoing “rule book”.

A by-law review for ONCA compliance will ordinarily require a corporation to consider matters that include:

- Director and officer provisions, including term, meetings, indemnification and insurance, conflict of interest;
- Member provisions, including the qualifications, categories and rights of voting and non-voting members, meeting requirements, and proxy and alternative means of voting; and,
- General provisions, including borrowing powers and audit requirements.

## Directors

### Number, Election, and Term

Under the ONCA, the minimum number of directors continues to be three, and ex-officio directors are still permitted. No more than one-third of the directors of a PBC may be employees of the corporation or an affiliated corporation; there is no such limit for non-PBCs. Directors’

terms for both PBCs and non-PBCs are subject to a maximum of four years. This may represent a change for certain corporations; however, it should be noted that there is no maximum number of terms for directors.

### **Duties and Defence**

The ONCA codifies an “objective standard of care” in line with the standard applicable to business corporations. Directors and officers must act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The ONCA also stipulates that directors and officers must comply with the ONCA, and the articles and by-laws of the corporation. A “reasonable diligence” defence is available to directors (but not to officers), such that directors will not be liable if they meet the above-noted objective standard of care, which includes good-faith reliance on financial statements, or on professional advice or reports.

### **Members Classes**

Under the ONCA, the corporation’s classes of members must be set out in the articles, whereas most not-for-profit corporations would currently set these out solely in their by-laws. Where a corporation has more than one class of members (for example, full members and “associate members”), the articles must provide voting rights for at least one class, and the by-laws must set out the conditions for membership in each class.

### **Voting**

There is a default of one vote per member, unless the articles provide otherwise. Not-for-profit corporations with “associate” or other non-voting member categories should note that under the

ONCA<sup>2</sup>, these members will be entitled to vote separately on certain matters, including:

- Certain changes that affect a class of members (e.g. a proposal to increase the rights of any class or group of members);
- Amalgamating with another corporation; or,
- Selling, leasing or exchanging all or mostly all of a corporation’s property.

### **Member Meetings**

The ONCA expressly permits a “resolution in lieu of a meeting”: a member resolution signed by all the members entitled to vote on that resolution is as valid as if it had been passed at a meeting. Corporations must send or make proxies available to members prior to members meetings, and may provide for alternative means of voting (e.g. phone or electronic means), either in addition to or as an alternative to proxy voting.

### **Other member rights**

Members will have important new or enhanced rights under the ONCA. These include voting members’ right, subject to the exceptions set out in the ONCA, to raise any matter as a “proposal” at an annual meeting of members, or, with the support of at least 10% of membership votes (or a lower percentage that is set out in the corporation’s by-laws), to requisition meetings of members. Any member may access membership lists and financial statements. Furthermore, members’ remedies include compliance or restraining orders, rectification orders, and investigation orders; dissent and appraisal (for members of non-PBCs) in respect of certain fundamental changes; and derivative action (an

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<sup>2</sup> The Ontario government has stated on its website its intent that if an existing corporation provides for non-voting members in its letters patent, any supplementary letters patent, by-laws or special resolutions, the non-voting members remain non-voting for the three-year transition period. See <http://www.sse.gov.on.ca/mcs/en/Pages/onca3.aspx>.

action taken in the name of the corporation to enforce a right).

In view of the changes to member entitlements under the ONCA, corporations may wish to review categories of “associate” or other non-voting members, and consider whether to convert these groups to non-member status, for example as “affiliates”, “friends”, or “supporters”.

### Financial Accounting

The type of corporation and its level of revenues will dictate whether audit and review options are available to it under the ONCA, and what those options are. The following charts illustrate the differences applicable to non-PBCs and PBCs, at their respective levels of gross annual revenues. In the charts, an “extraordinary resolution” means one passed by at least 80% of the votes cast at a special meeting of the members, or one consented to by each member entitled to vote at a meeting of the members.

Non Public Benefit Corporation	
Gross Annual Revenues	Audit / Financial Review
More than \$500,000	Members may pass an <b>extraordinary resolution</b> to appoint someone to conduct a review engagement, instead of having an audit.
\$500,000 or less	Members may pass an <b>extraordinary resolution</b> to dispense with both audit and review engagement.

Public Benefit Corporation	
Gross Annual Revenues	Audit / Financial Review
\$500,000 or more	An audit is required. Must appoint an auditor annually.
Less than \$500,000 but more than \$100,000	Members may pass an <b>extraordinary resolution</b> to appoint someone to conduct a review engagement, instead of having an audit.
\$100,000 or less	Members may pass an <b>extraordinary resolution</b> to dispense with both audit and review engagement.

### 5 Steps to Transition under the ONCA

The approach and time each corporation takes to fulfill the following transitional steps will depend on the type, size and complexity of the corporation, how familiar the Board and members are with its procedures, and whether or not the corporation is combining its ONCA transition with an overall governance review. While all corporations will have three years to bring organizational documents into compliance with the ONCA, as explained above, some ONCA provisions will apply immediately. Each corporation should therefore ensure that its transition plan can accommodate the consultation it will need with members, the Board, and legal and financial advisors as may be required.

1. Review the current letters patent and by-laws, consider the corporation’s current structure and procedures, and determine whether the corporation will either retain or remove the provisions that are no longer required.
2. Consider the default standard organizational by-laws (to be established by the statutory Director). Consider the mandatory and

optional provisions of the ONCA and regulations.

3. Prepare the corporation's Articles of Amendment, if required, and revise the by-laws following a review of the new requirements, default provisions, and choices open to the corporation under the ONCA and regulations.

If the corporation is also a registered charity, consider consulting with a tax expert on the articles and by-laws, as required, and send the Articles of Amendment and revised (or new) by-law to the Canada Revenue Agency for pre-approval.

4. Obtain board of directors and member approval for articles of amendment and by-laws at duly called meetings.
5. File documents with the Ministry (process and forms remain to be determined).

### **Your Choice: Corporate Housekeeping or A "Clean Sweep"**

The ONCA will affect thousands of not-for-profit corporations, including associations, charities, and professional, cultural, and religious and other groups currently incorporated under Part III of the OCA. While the old regime may have become familiar territory, the introduction of the new regime provides an opportunity for not-for-profit corporations to revisit their governance structure and make important choices.

The new legislation is flexible enough to permit corporations to consider the transition as a form of good "corporate housekeeping", to tidy the rules up a bit, but to continue on with many of the rules they are currently accustomed to. On the other hand, some corporations may choose to do a "clean sweep", using the transition as an opportunity to more fundamentally change their governance structure. Get ready to review the legislation and ask questions – to get information, opinions, and advice – on how your not-for-profit corporation will respond to the new rules.

## **Contact Us**

For further information, please contact [Margot Patterson](#) or [Chris Turney](#).