

## Ontario Not-for-Profit Corporations Act to come into force on October 19, 2021

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The Ministry of Government and Consumer Services has announced the Not-for-Profit Corporations Act, 2010<sup>[1]</sup> (Ontario) (ONCA), which received Royal Assent on October 25, 2010, will be proclaimed and come into force on October 19, 2021, joining other jurisdictions in Canada that have modernized their not-for-profit corporations' laws.<sup>[2]</sup>

Once ONCA is in force, it will automatically apply to Ontario not-for-profit corporations incorporated under the Corporations Act (Ontario)<sup>[3]</sup> (Corporations), subject to the three-year transition period described in further detail below. ONCA 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.

In this Osler Update we will highlight material issues for Corporations to consider as they prepare to update their governing documents, including letters patent, supplementary letters patent and by-laws (Constating Documents) and transition to ONCA.

### Amendment of governing documents

For Corporations, letters patent under the Corporations Act will become articles of incorporation under ONCA. While ONCA provides for a three-year transition period for Corporations to make necessary changes to their Constating Documents, if after the three-year transition period they still do not comply with ONCA, the conflicting provisions will be deemed to be amended to comply with ONCA, subject to the exceptions for certain by-law and special resolution provisions detailed below.<sup>[4]</sup> During the three-year transition period prior to the Constating Documents having been deemed to be amended, if there is a conflict between the Constating Documents and ONCA with regard to the corporate processes required to transition the corporation to ONCA, the process set out in the corporation's Constating Documents would continue to govern.

Notably, ONCA's transitional provisions provide for an extended period of validity for certain by-law provisions, including provisions respecting the number of directors, provisions providing for two or more classes or groups of members, and provisions respecting voting rights of members. Such provisions contained in a Corporation's by-laws or a special resolution that were valid before ONCA coming into force, and that are not removed and added to its articles, will continue to be valid and in effect until the day the articles of amendment are endorsed, whether before, on or after October 19, 2024.<sup>[5]</sup>

Corporations should carefully review their Constating Documents to mitigate the risk of

unintended consequences and uncertainty in interpretation due to deemed amendments under ONCA. In particular, Corporations should consider their membership classes due to enhanced rights for voting members under ONCA (discussed in further detail below).

## Director and officer conflicts of interest

ONCA provides for new requirements for directors and officers to report conflicts of interest. A director or officer of a corporation who is a party to a material contract or transaction, or a proposed material contract or transaction with the corporation, or is a director or an officer of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the corporation, must disclose to the corporation or request to have entered in the minutes of meetings of the directors the nature and extent of their interest.<sup>[6]</sup>

ONCA also includes a statutory reasonable due diligence and good faith reliance defence for directors.<sup>[7]</sup>

## Negative voting requirements

A director who was not present at a meeting at which a resolution was passed or action taken will be deemed to have consented to the resolution or action unless, within seven days after becoming aware of the resolution, the director either causes their dissent to be placed with the minutes of the meeting or submits their dissent to the corporation.<sup>[8]</sup>

## Enhanced member rights

When preparing the articles of amendment, Ontario not-for-profit corporations should consider the new corporate enhanced member rights. In particular, corporations should be aware of the enhanced rights under the new legislation in respect of derivative actions<sup>[9]</sup>, dissent<sup>[10]</sup> and oppression remedies<sup>[11]</sup>.

ONCA also has been revised to remove certain provisions included in prior iterations of the legislation. The previous version of ONCA would have provided voting rights for non-voting members in respect of certain fundamental corporate changes and, additionally, certain fundamental matters would have had to be approved by votes by separate classes of members. These expanded voting rights for non-voting members are no longer included in ONCA.<sup>[12]</sup>

## Other Legislative and Concurrent Changes

Among other things, ONCA will:

- make a new distinction between public benefit corporations and other not-for-profit corporations;<sup>[13]</sup>
- clarify that not-for-profit corporations can engage in commercial activities if the activities support the corporation's not-for-profit purposes (subject to restrictions under other legislation such as the Income Tax Act);<sup>[14]</sup>

- allow members to put forward proposals at annual general meetings and special meetings and provide the corporation with exceptions from complying with these provisions;<sup>[15]</sup>
- allow corporations more flexibility for reviewing financial records (i.e., a “review engagement” rather than an audit and, in some circumstances, neither an audit nor a review engagement will be necessary);<sup>[16]</sup> and
- provide members with greater access to financial records.<sup>[17]</sup>

Concurrent with the pronouncement of ONCA, the Ontario Business Registry will be launched, allowing Ontario not-for-profit corporations to access government services online 24 hours per day, 365 days per year. The Ontario Business Registry also allows intermediaries such as Ontario lawyers, paralegals and law clerks to conduct transactions and make filings on behalf of Ontario not-for-profit corporations. The incorporation process for not-for-profit corporations in Ontario will be made more efficient, and the process for incorporation as a charitable corporation streamlined.<sup>[18]</sup>

## Next steps

Ontario not-for-profit corporations should review their Constating Documents and begin implementing necessary changes to ensure compliance with ONCA within three years from proclamation of ONCA (i.e., prior to October 19, 2024). Osler has successfully worked to create Constating Documents for clients that are compliant with the requirements of ONCA, and we would be pleased to provide guidance and answer any questions relating to the implementation of ONCA.

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[1] SO 2010 c 15. [ONCA]

[2] Ministry of Government and Consumer Services, “Guide to the Not-for-Profit Corporations Act, 2010” (August 24, 2021), Government of Ontario, available: <https://www.ontario.ca/page/guide-not-profit-corporations-act-2010>. [*Guide to the Not-for-Profit Corporations Act*]

[3] RTSO 1990 c C38.

[4] ONCA, at section 207(2).

[5] ONCA, at section 207(3).

[6] ONCA, at section 41(1).

[7] ONCA, at section 44.

[8] ONCA, at section 45(1).

[9] ONCA, at section 181-184.

[10] ONCA, at section 187.

[11] ONCA, at section 174.

[12] Section 105 of ONCA has now been repealed.

[13] ONCA, at section 1. A “public benefit corporation” means (a) a charitable corporation, or (b) a non-charitable corporation that receives more than \$10,000 in a financial year, (i) as donations from individuals who are not members, employees or closely related to them, or (ii) the government. Public benefit corporations must follow different rules relating to matters such as financial reporting, board composition and distribution of assets upon winding down or dissolution.

[14] ONCA, at section 8(3).

[15] ONCA, at section 56.

[16] ONCA, at section 76.

[17] ONCA, at section 84(1)-(2). The directors of a corporation shall place before the members at every annual meeting, (a) the financial statements approved by the directors, (b) the report of the auditor or of the person who conducted a review engagement, as the case may be, and (c) any further information respecting the financial position of the corporation and the results of its operations required by the articles or the by-laws. Not less than 21 days before each annual meeting of the members or before the signing of a resolution in lieu of the annual meeting, a corporation shall give a copy of the documents referred to in the foregoing to all members who have informed the corporation that they wish to receive a copy of those documents.

[18] See Guide to the Not-for-Profit Corporations Act. All applications for articles of incorporation will now be submitted directly to ServiceOntario; Incorporation as a charitable corporation no longer requires approval from the Office of the Public Guardian and Trustee.