

# Preparing for the ONCA transition: What organizations need to know

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## Background

On Tuesday August 17, 2021, the Ontario Government announced that the Not-for-Profit Corporations Act, 2021 (Ontario) (the ONCA) will finally come into force on October 19, 2021. At the same time, Ontario will launch a new Ontario Business Registry that will replace outdated technology and provide Ontarians with better access to government services. The ONCA received royal assent on October 25, 2010 rendering the coming into effect of this modern legislative framework over ten years in the making.

Upon coming into force, the ONCA will replace the Corporations Act (Ontario) (the OCA), which dates back to 1907. It will automatically apply to all Ontario not-for-profit corporations and charities governed by Part III of the OCA; being non-share capital corporations. Those corporations will have a **three-year transition period** (commencing on October 19, 2021) to make any changes to their letters patent/supplementary letters patent, by-laws and special resolutions to ensure that such documents do not conflict with the new legislation. After the three-year transition period, any provisions in letters patent/supplementary letters patent, by-laws or special resolutions that are inconsistent with the ONCA (with a few limited exceptions) will be deemed to be amended to comply with the ONCA. Share capital corporations governed by Part II of the OCA will be dealt with differently - stay tuned for our upcoming article on this topic.

For certainty, it is worth noting that the ONCA does not apply to not-for-profit corporations incorporated federally under the Canada Not-for-profit Corporations Act (CNCA), even if they operate in Ontario. Those corporations do not need to make any changes to their governing documents because of the ONCA's coming into force.

With the ONCA finally coming into force and considering the three-year transition period, organizations will want to start preparing for the transition. To that end, set out below are some steps that can be taken now.

### 1. Review current letters patent and supplementary letters patent

As a first step, organizations should ensure that they have complete copies of their letters patent (i.e. the incorporation document) and any supplementary letters patent (i.e. official amendments to the original incorporation document). Those documents are **normally kept in the corporation's minute book. If you are unable to locate them or are** not sure you have a complete set of documents in your files, you can order copies from the Ontario Government for a small fee. BLG can also order them on your behalf.

The letters patent and supplementary letters patent should then be reviewed for the purpose of identifying clauses that either need to be updated or that can be removed completely. For example, the objects of the corporation should be examined to **determine whether they continue to accurately reflect your organization's current and future purposes and activities.** In that regard, it should be noted that the objects will now **be called "purposes" and the letters patent/supplementary letters patent will be replaced** with articles of incorporation/articles of amendment.

Registered charities that are planning to amend their charitable objects/purposes as part of their ONCA transition should note that a copy of their new articles of amendment will need to be sent to the Charities Directorate of the Canada Revenue Agency. Along with this, they will need a statement of activities that provides a detailed description of its programs as they relate to each of its purposes. Alternatively, registered charities may consult with the Charities Directorate in advance of making any formal changes to its objects/purposes to avoid the need to make further amendments in the event the Charities Directorate is of the view that the new purposes are unsatisfactory.

**Many organizations currently have old "power provisions" lingering in their letters patent or supplementary letters patent.** Those clauses might state that the organization has the **power to "own, sell or buy land" or to "borrow money on the credit of the corporation."** For most organizations, such clauses are no longer necessary as both the OCA and the ONCA give corporations the capacity, rights, and powers of a natural person.

**Registered charities are also likely to have "special provisions" in their current letters patent and supplementary letters patent;** namely those that set out some of the duties and obligations of the charity and its directors, and which are required to be included by the Public Guardian and Trustee. Those include, for example, provisions that prohibit the corporation from being carried on for the purpose of gain for its members or that prohibit directors from receiving any remuneration for services provided in their capacity as a director. We understand that it will no longer be necessary, under the ONCA, to add those special provisions to the articles of charitable corporations. It is important to remember though that the underlying principles of the special provisions will continue to apply as they largely reflect principles of charities law.

## **2. Determine if your organization will be a public benefit corporation**

The ONCA distinguishes between public benefit corporations and other not-for-profit corporations. Under the ONCA, 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) In the form of donations or gifts from persons who are not members, directors, officers or employees of the corporation, or
- (ii) In the form of grants or similar financial assistance from the federal government or a provincial or municipal government or an agency of any such government. A charitable corporation is automatically a public benefit corporation by definition. A non-charitable corporation will be considered a public benefit corporation in the next financial year after it receives the prescribed sum of \$10,000 in public funds.

The distinction between those two types of corporations is important because they are subject to certain different rules under the Act. For example, in the case of a public benefit corporation, no more than one-third of the directors can be employees of the corporation or of any of its affiliates. In addition, the ONCA prescribes different rules in respect of how a dissolving corporation may distribute any of its remaining property upon dissolution. Furthermore, the level of financial review that the corporation is required to conduct (audit vs. review engagement) differs and depends on whether the organization is a public benefit corporation and its annual revenues.

### 3. Review by-laws

Your organization should also conduct a review of its corporate by-laws to ensure they comply with the ONCA. While you should review the by-laws in their entirety, below are a few examples of provisions to which the organization should be paying particular attention.

#### Membership provisions

Under the ONCA, the by-laws must set out the conditions required for being a member of the corporation, including whether a corporation or other entity may be a member. If the corporation has two or more classes of members, the by-laws must provide the conditions for membership in each class, the manner of withdrawing from a class and the conditions on which membership in a class will cease. To that end, consider whether **your current membership structure continues to meet your organization's needs**. For example, if the corporation has more than one class of members, are the multiple classes still relevant or appropriate? Are there meaningful differences between the rights and obligations of the different classes or could they be merged into a single class?

Pursuant to the ONCA, the by-laws (or articles) may provide that the directors, the members or any committee of directors or members have power to discipline a member or to terminate their membership. If the by-laws (or articles) provide for such a power, they must also set out the circumstances and the manner in which that power may be exercised. Any disciplinary action or termination of membership must be done in good faith and in a fair and reasonable manner. Accordingly, your organization might want to consider whether any such disciplinary provisions need to be added to the by-laws or amended in light of those new rights given to members under the ONCA.

#### Director provisions

Under the ONCA, directors may be members, though it is not required. Prior to the OCA modernization changes enacted in 2017 to compensate for the delays in proclaiming the ONCA into force, directors were required to also be members of the corporation. If your current by-laws still contain that requirement, evaluate whether removing that rule from your by-laws would provide more flexibility.

**Other by-law provisions that may require changes include those that deal with directors' term of office** (the ONCA provides that directors may hold office for a term of up to four years), meetings of directors, indemnification and insurance, and conflicts of interest. Such by-law provisions should align with the new ONCA language set out in those relevant sections of the Act.

## **New form of by-law**

While it is possible that an organization's by-laws will require only minor amendments to be fully compliant with the ONCA, it is more likely that organizations will want to adopt a new form of template by-law that has been designed specifically to comply with the ONCA and its Regulations. In that regard, the Ministry of Government and Consumer Services has developed a default **"standard organizational by-law"** that will automatically apply to a new corporation incorporated under the ONCA that does not pass an organizational by-law within 60 days after the date of its incorporation. That template may also be used as a tool for existing organizations to help them review and identify changes required to their own by-laws. Of course, BLG has developed its own ONCA-compliant template by-law that we can customize to suit your organization's specific needs.

## **4. Final thoughts**

Given the three-year transition period, there is no big rush to get new articles, by-laws and policies in place to comply with the ONCA. However, if your organization is contemplating major changes to its membership or board structures, you should consider starting the review process sooner rather than later, as you might want to consult with your members or other relevant stakeholders regarding the proposed changes. When planning for the transition, particularly in respect of changes that will require membership approval, consider the usual timing of your annual meeting of members to ensure you allocate enough time in the process for consultation, legal review and compliance with the rules that apply to meetings of members (e.g. notice, providing copies of draft articles, by-laws and resolutions, etc.).

For some organizations, the transition to the ONCA will be a good time to make some minor corporate housekeeping changes that will tidy up their practices and procedures, while preserving many of their current rules, which may already comply with the new Act. For others, the transition will be an opportunity for the corporation to conduct a complete overhaul of its outdated governance framework and rules, which may also include a change of name, brand and overall mandate. **Whatever your organization's needs or the extent of review required, our not-for-profit team is here to help.**

## **BLG's ONCA series**

To assist in considering the impact of the ONCA on your organization, BLG has prepared a series of articles that are linked below.

If you have any questions about the transition process, or would like to learn more about the ONCA, please email any of the authors or key contacts listed below, or any other member of our [Charities & Not-For-Profit group](#).

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