Are You Ready?
New Amendments
Non-Profit Governance in Ontario

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Where Are We Now?

• *Corporations Act* (OCA) was enacted in 1907 and until recently has not been substantially updated in many years

• Ontario *Not-for-Profit Corporations Act, 2010* (the “New Act”) received Royal Assent in 2010 but the legislation has not yet come into force

• Until the New Act comes into force, the OCA continues to govern

• OCA very recently amended to give flexibility in some areas
AGENDA

1. Amendments to the *Corporations Act* (OCA)
2. Review of key future changes in ONCA
3. Governance action items
Amendments to the OCA Status

• *Cutting Unnecessary Red Tape Act, 2017* came into force on November 14, 2017

• Amends various statutes, including the OCA

• Each amendment with its own in force date
Amendments to the OCA

Key Changes

• Director Members
• Removal of Directors
• Members Meetings
• Standard of Care
• Natural Person Rights
• Audit Exemption
Amendments to the OCA
Key Changes – Director Members

• Previously, Directors were required to become Members within 10 days of being elected as Directors

• Now, Directors not required to be Members if so provided in By-Laws
Amendments to the OCA

Key Changes – Removal of Directors

• Previously, to remove a Director, a vote of 2/3rds of the Members was required.

• Now, threshold for Director removal reduced to majority vote of Members.

• Persons who are Directors by virtue of their office (ex-officio) cannot be removed in this manner.
Amendments to the OCA
Key Changes – Members Meetings

• Previously, meetings of the Members (AGM, Special Meetings) had to be held in person

• Now, unless the corporation’s By-laws provide otherwise, Members can hold meetings by telephonic or electronic means
Amendments to the OCA
Key Changes – Standard of Care

• Previously, standard of care for Directors established through common law
  • Directors must exercise the level of care, skill and judgment that may reasonably be expected of a person with *their* knowledge and experience
  • Subjective standard – depends on personal knowledge and experience
Amendments to the OCA
Key Changes – Standard of Care

• Now, duties and standard of care expected of Directors and Officers explicitly stated:
  • Act honestly and in good faith with a view to the best interest of the corporation; and
  • Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
  • Objective standard

• Cannot delegate ultimate responsibility for risk
Amendments to the OCA
Key Changes – Natural Person Rights

• Previously, corporations only had powers stated in legislation, constating documents (By-laws/Letters Patent)
• Now, corporations have capacity, rights powers and privileges of a natural person
  • No longer necessary to pass a By-law in order to confer any particular power on the corporation or its Directors
  • Example, no longer necessary to pass a borrowing By-law to borrow funds
• However, corporations may not carry on activities or exercise any powers prohibited in OCA or constating documents
• Acts of corporations not invalid only by reason of being contrary to the OCA or constating documents
Amendments to the OCA
Key Changes – Audit Exemption

• Previously, exemption from audit only available if annual income of a corporation was less than $100,000 and all Members consented in writing to the exemption for that financial year

• Now, Members can pass an extraordinary resolution (80%) not to appoint an auditor and not to have an audit in respect of a financial year if annual revenue in that financial year was no more than $100,000
Amendments to the OCA

- The OCA amendments do not require any By-law changes for compliance
- The purpose of these amendments is to give flexibility to corporations while awaiting the coming into force of the ONCA
- Review governance structure and practices to determine whether or not changes are desired
Status of ONCA

• Royal Assent received October 25, 2010
• Recent update from Ministry of Government and Consumer Services - target in force date for ONCA, early 2020
• Regulations under development
Status of ONCA

• On in force date (to be announced):
  • Apply automatically to all Ontario not-for-profit corporations
  • Three year transition period to amend incorporating documents to conform (if valid now, then continue to be valid until amendment or end of transition period)
  • After transition period, provisions deemed amended to conform
ONCA - Key Future Changes

- Incorporation as of Right
- Public Benefit Corporations
- Director Composition
- Officers
- Conflict of Interest
- Membership
- Membership Rights
- Proxies
- Electronic Voting
- Audit Exemption
- Conflict with other Laws
ONCA – Key Future Changes

Incorporation as of Right

• Incorporation as of right on submission of Articles, other required information and fees, rather than at the discretion of the Minister of Government and Consumer Services

• If Directors do not pass an organizational By-law within 60 days of incorporation, corporation is deemed to have passed the standard organization By-law approved by the Ministry (default By-law)

• Ministry will approve the standard organizational By-law and make it publically available on its website
ONCA – Key Future Changes
Public Benefit Corporations

• New distinction between public benefit corporations and other not-for-profit corporations
• Public benefit corporations subject to more stringent controls
• Charitable corporations automatically considered public benefit corporations
• Non-charitable corporations will be public benefit corporations if receiving $10,000 (or other prescribed amount) in the form of donations/gifts or government grants/financial assistance
ONCA – Key Future Changes
Director Composition

• Articles may provide for minimum and maximum number of Directors, with the number to be determined by Special Resolution (2/3rds)

• Directors not required to be Members, unless By-laws provide otherwise

• In public benefit corporations, not more than 1/3 of Directors may be employees of the corporation (or its affiliates)

• Maximum term length, reduced from 5 years to 4 years, but no limit on number of terms that can be served
ONCA – Key Future Changes Officers

• Director must be appointed as Chair of the Board
• “President” no longer a required office
• “Secretary” no longer a required office
ONCA – Key Future Changes Conflict of Interest

• Lists specific requirements for Directors and Officers to disclose conflicts of interest in certain circumstances
  • For example, conflict of interest may arise where a Director/Officer sits on the Board of two not-for-profit corporations that intend to enter into a contract with each other or where a Director/Officer is an owner of a business that is contracted to perform services for the corporation
ONCA – Key Future Changes
Membership

• If a corporation has two or more classes of Members, classes must be set out in the Articles (instead of in the By-laws)

• By-laws must set out the conditions of Membership
ONCA – Key Future Changes

Membership Rights

• ONCA grants voting rights to non-voting Members on fundamental changes, for example:
  • Amendments to membership rights of a class or group of members
  • Amalgamation
  • Continuance to another jurisdiction
  • Sale, lease or exchange of all or substantially all property of the corporation

• These provisions will come into force no earlier than 3rd anniversary of the day ONCA comes into force

• Provides corporations with opportunity to evaluate governance structure, if necessary
ONCA – Key Future Changes

Proxies

- Proxies not mandatory
- Members can appoint a proxyholder only if the Articles or By-laws allow
- Articles or By-laws can require proxyholder to also be Member of the corporation
ONCA – Key Future Changes
Electronic Voting

• Corporations may provide in By-laws for voting by mail or telephonic/electronic means in addition to or instead of voting by proxy

• Voting by mail or telephonic/electronic means may only be used if:
  • The votes can be verified as having been made by the Member entitled to vote; and
  • The corporation is not able to identify how each Member voted
## ONCA – Key Future Changes

### Audit Exemption

<table>
<thead>
<tr>
<th>Type of corporation</th>
<th>Amount of revenue per financial year</th>
<th>Type of financial review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public benefit corporation</td>
<td>$100,000 or less</td>
<td>Waive*</td>
</tr>
<tr>
<td>Public benefit corporation</td>
<td>More than $100,000, but less than $500,000</td>
<td>Review engagement*</td>
</tr>
<tr>
<td>Public benefit corporation</td>
<td>$500,000 or more</td>
<td>Audit</td>
</tr>
<tr>
<td>Non-public benefit corporation</td>
<td>$500,000 or less</td>
<td>Waive*</td>
</tr>
<tr>
<td>Non-public benefit corporation</td>
<td>More than $500,000</td>
<td>Review engagement*</td>
</tr>
</tbody>
</table>

*Approval to waive an audit or to waive both an audit and review engagement requires an **extraordinary resolution** (80%)

Table courtesy of Ministry of Government and Consumer Services
ONCA – Key Future Changes
Conflict with other Laws

• If there is a conflict between ONCA and any other Act, the other Act will prevail

• If there is a conflict between a provision of ONCA that applies to a charitable corporation and any other law relating to charities, the other law prevails, regardless of whether it is found in legislation or is a rule/principle of common law or equity
Governance Action Items
Getting Ready

• Directors have a duty to be educated and informed about changes in governance law

• Board should begin considering the impact of ONCA on the organization's governance model and practices

• Consider proactive amendments to Letters Patent and By-laws, for example, Membership structure
Questions?

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