

# KEEPING CURRENT

August 19, 2021

## SPECIAL RELEASE Re Proclamation of *Not-For-Profit Corporations Act, 2010* (Ontario) (the “ONCA”) ONCA will be proclaimed October 19, 2021

By Cliff Goildfarb, Heather Keachie, James M. Parks, Christine Jubian and Chere-Lee Howe

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada’s largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

**Clifford S. Goildfarb**  
Counsel  
416.865.6616  
cgoildfarb@grllp.com

**Heather Keachie**  
Associate  
416.865.4017  
hkeachie@grllp.com

**James M. Parks**  
Counsel  
416.865.6788  
jparks@grllp.com

**Christine Jubian**  
Associate  
416.865.6615  
cjubian@grllp.com

**Chere-Lee Howe**  
Corporate & Not-for-Profit Law Clerk  
416.865.6695  
chow@grllp.com

The Government of Ontario has just announced that the ONCA will be coming into effect on October 19, 2021. The lengthy delay since the ONCA was passed in 2010 was caused by the need to have a new online Ontario Business Registry. The new Registry will come into effect at the same time as the ONCA.

The ONCA replaces the Ontario *Corporations Act* (the “OCA”) and is a significantly updated piece of legislation. Corporations transitioning to the ONCA will want to review the differences in the ONCA carefully. We will detail some of those differences in the coming weeks.

### Transition Provisions

All non-share capital corporations currently governed by Part III of the OCA will automatically fall under the ONCA without the need to take any positive steps. The letters patent and supplementary letters patent of Part III corporations will be known as “articles of incorporation” and “articles of amendment”. It will no longer be possible to incorporate a non-share capital corporation under the OCA, with the exception of mining and insurance companies. Existing Part II companies

and social clubs that have share capital will remain under the OCA. This includes companies under Parts IV and V (mining and insurance companies). Social clubs will have to continue out of the OCA within five years. Non-share capital corporations under the ONCA will be designated as either “public benefit” or “non-public benefit”, depending on financial tests set out in the ONCA. New accounting requirements will affect many existing corporations.

### Transition Period

Existing provisions in the letters patent or bylaws of corporations under the OCA which are compliant with the OCA, but not the ONCA, will continue to remain in effect for three years until October 19, 2024, unless they are amended in the meantime. If they are not amended by that date they will be deemed to have been amended by the ONCA and the articles and bylaws will no longer accurately reflect the corporate law applicable to the corporation.

A limited number of provisions will remain in effect indefinitely, even if they are non-compliant with the ONCA, until amended. These provisions include:

- provisions respecting the number of directors of the corporation;
- provisions providing for two or more classes or groups of members;
- provisions respecting voting rights of members;
- provisions respecting delegates made pursuant to section 130 of the OCA; and
- provisions respecting the distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution.

### **Consider Optimal Size of Board**

One consequence of the transition between the two statutes is that the size of the board of all existing OCA corporations will be fixed at the number established immediately prior to October 19. For example, a corporation may have been incorporated with three directors. Under the OCA it was possible to pass a special resolution of the members to fix the size of the board at any number greater than three. Corporations which needed to change the size of their boards would regularly take advantage of this provision. When the ONCA comes into effect the size of the boards will be frozen at their current number and the only way to increase or decrease the number of directors to be elected at an annual meeting will be by obtaining articles of amendment, under which it will be possible to establish a minimum of three directors and a maximum of as many directors as the corporation feels will be necessary to accommodate future changes in board size. The actual number of directors to be elected can then be fixed from time to time as needed.

### **Share Capital Social Clubs**

Social clubs with share capital, including some golf clubs, tennis clubs, etc., will remain under the OCA, but will have to take steps within five

years after October 19, 2021 to continue under one of three statutes or they will automatically be dissolved. The three statutes are the ONCA, the Ontario *Business Corporations Act* and the Ontario *Co-operative Corporations Act*. For more information on the impact of the ONCA on social clubs with share capital, see our discussion [here](#).

### **Special Act Corporations**

In addition, many non-share corporations which are incorporated under their own individual Ontario special act or under certain Ontario statutes which are currently subject to some of the provisions of the OCA will now be subject to the ONCA. However some of these corporations will need to have their special acts amended to remove references to the OCA and substitute the ONCA, or to choose to continue their existence under the ONCA.

### **What steps do corporations need to take now?**

All OCA corporations which have not yet done so should review their existing incorporating documents to determine if they need to be amended to bring them into compliance with the ONCA. Non-compliant provisions which will remain in effect for three years or indefinitely should be identified so that appropriate action can be taken if a decision is made not to amend them currently.

The same process should be followed with bylaws. Even if the existing bylaws are substantially in compliance with ONCA, it would likely be prudent for corporations to update bylaws to take advantage of the modern provisions of the ONCA.

If changes to a corporation's governing documents are desirable to bring them into compliance with the ONCA, we recommend that corporations also apply for "restated articles of incorporation", which will gather all the changes into one document and remove confusing and no longer applicable provisions from the articles.



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At Gardiner Roberts we have been working to create new ONCA-compliant documents, including special provisions to be incorporated into articles of incorporation and articles of amendment, a new standard bylaw, and other documents that will replace the current forms used under the OCA.

### **Contact us**

We will be pleased to review your existing corporate governance documents and assist you in bringing your corporation up-to-date. Please feel free to get in touch with the lawyer that you deal with at Gardiner Roberts to initiate this process, or contact one of our [non-profit and charity law specialists](#).

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