

Preparing for the ONCA Thursday

Business Corporations Act | Corporate & Commercial | Corporate Law | Non-Profit & Charities | Non-Profit and Charities | Not-for-profit Corporations Act (ONCA) | Ontario

12 November 2020

The ONCA is coming early 2021

The *Not-for-profit Corporations Act* (Ontario) (ONCA) that we have been waiting for since 2010 is likely going to come into effect on 1 January 2021 or shortly thereafter. When it comes into effect, all existing corporations governed by the OCA will automatically be continued under the ONCA. There is no need for corporations to take any action. The former legislation, the *Corporations Act* (Ontario), will no longer apply to most non-share capital corporations incorporated under the OCA, except for certain transitional provisions.

While corporations are not required to make changes to their governing documents, there are a number of good reasons why directors of non-share capital corporations might want to consider making some revisions.

Make changes to take advantage of this modern legislation

For those corporations that have been waiting for this new and modern legislation to come into effect before making changes to their Letters Patent and by-laws, now is the time to get started. All corporations should review their governing documents now and consider whether there are provisions that might be amended to bring them up-to-date with current non-profit and charity sector best practices and the requirements of the ONCA. This is also a good opportunity to review and refresh all existing governance practices, including those unwritten practices and those not in accordance with the governing documents.

Some OCA corporations have been in existence for more than 100 years, and have accumulated numerous amendments and versions of their Letters Patent and by-laws, which may no longer reflect how the organization is governed or its activities. The coming into effect of the ONCA provides an excellent opportunity to create an up-to-date and clean version of these documents, compliant with the ONCA.

Many Letters Patent contain restrictions, including references to powers of the corporation and ability to borrow, which may no longer be required under the ONCA. These restrictions, among others, should be removed to allow the organizations to take advantage of the ONCA.

New changes allow non-voting members in Ontario

There have been some recent changes to the draft legislation, and an indication from the Ministry that class voting rights are not going to be proclaimed in the ONCA. Some OCA corporations amended their provisions dealing with membership classes in anticipation of the new ONCA provisions regarding voting rights. Since these provisions will now not be proclaimed, corporations with class voting rights in their governing documents should consider whether those provisions still reflect the organization's needs.

Some current governance practices may no longer be possible or will expire

As soon as the ONCA comes into effect, it will no longer be possible to change the fixed number of directors provided for in the Letters Patent, by-laws or special resolutions, except by Articles of Amendment. Currently, some corporations choose to increase or decrease the size of their boards yearly, and that practice will no longer be possible until Articles of Amendment are filed under the ONCA to establish a minimum and maximum number of directors. Corporations wishing to retain this flexibility will likely need to file Articles of Amendment following proclamation.

Additionally, certain provisions contained in existing Letters Patent and by-laws which comply with the OCA, but not the ONCA, will automatically cease to apply after a three-year transitional period and will be deemed to be amended to be compliant with the ONCA. This could create confusion and uncertainty in a corporation's governing documents and practices. To address this uncertainty, we advise corporations to move consciously and deliberately into the ONCA regime.

Certain specific provisions will continue to be valid under the ONCA

While most non-compliant provisions in existing Letters Patent and by-laws will be deemed to comply after three years, there are certain specific exceptions. Some corporations may want to consider amending their Letters Patent and by-laws prior to the proclamation of the ONCA so that certain provisions and practices can remain in effect throughout the transition period, and beyond. Corporations may be able to amend their by-laws to include certain provisions which would remain in effect beyond the transition period, including:

- the fixed number of directors
- two or more classes or groups of members
- voting rights of members
- delegate voting structure
- the distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution (a public benefit corporation is a new category of corporation which will include all charities and any other corporation which essentially receives non-member donations or government grants exceeding \$10,000 annually)

Corporations interested in exploring these changes should move quickly to ensure that the amendments are filed prior to the proclamation of the ONCA.

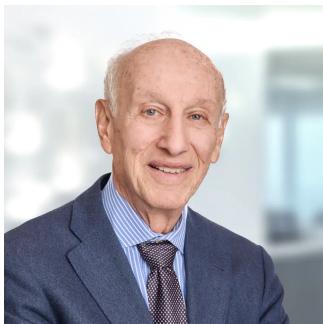
Special act corporations

Corporations incorporated by a special act of the Province of Ontario may want to review their governing statute act and by-laws, and seek advice on how the repeal of the OCA and the proclamation of the ONCA may affect them. Regardless of whether the special act refers to the OCA or not, special act corporations are likely to be affected in some way by the coming into force of the ONCA.

If you have any questions we would be pleased to answer them. You can contact any of the lawyers in our [non-profit and charity law group](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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