

Not-for-Profit Corporations Act, 2010 ("ONCA")

Updates to the OHA Hospital Prototype Corporate By-law

January 19, 2024

Updates to the ONCA Toolkit

- *The Less Red Tape Stronger Economy Act, 2023* (“Bill 91”)
 - On April 3, 2023, the Ontario government introduced Bill 91, which amends various pieces of legislation, including ONCA.
 - The amendments to ONCA are effective as of October 1, 2023.
- The OHA, with the support of Borden Ladner Gervais LLP, has updated the following ONCA toolkit documents to reflect these amendments and to ensure compliance with ONCA:
 - Prototype Corporate By-law;
 - Sample Finance and Audit Committee Terms of Reference; and
 - Sample Annual Declaration and Consent Form.

What is Changing?

Board and Members' Meetings

- **Telephonic or Electronic Board and Members' Meetings**

- Board and Members' meetings may now be held entirely by telephonic or electronic means or by any combination of in-person attendance and telephonic or electronic means, but the Articles or By-laws can establish limits or specify additional requirements.
 - **Hospitals that adopted the Prototype By-law prior to October 1, 2023 likely do not need to make any changes to their by-law to comply with this amendment.**

- **Director and Member Participation in Telephonic or Electronic Meetings**

- All persons entitled to attend Board meetings must now be able to communicate with each other **simultaneously and instantaneously**; all persons entitled to attend Members' meetings must now be able to **reasonably participate**.
 - Formerly, ONCA required that Board and Members' meetings held by telephonic or electronic meetings enable persons to **communicate adequately** with each other.
- Hospitals are likely already using virtual technology (Zoom, Teams, Webex, etc.) that enables persons to communicate with each other simultaneously and instantaneously.
 - **Hospitals that adopted the Prototype By-law prior to October 1, 2023 will likely need to amend their by-law to reflect this change at the next reasonable opportunity, and in the meantime should continue to comply with the amendment.**

Board and Members' Meetings (continued)

- **Notice of Board and Members' Meetings**

- Notice of meetings no longer need to specify a place if the meeting is to be held entirely by telephonic or electronic means.
- Notice of telephonic or electronic meetings must now include instructions for attending and participating in the meeting by the telephonic or electronic means that will be made available at the meeting, including instructions for voting by such means at the meeting.
- Announcements with respect to adjourned meetings must now provide instructions for attending and participating in the continued meeting by the telephonic or electronic means that will be made available at the meeting.
 - **Hospitals that adopted the Prototype By-law prior to October 1, 2023 will likely need to amend their by-law to reflect this change at the next reasonable opportunity, and in the meantime should comply with the amendment.**

Board and Members' Meetings (continued)

- **Consent to Telephonic and Electronic Board Meetings**

- All of the directors of a corporation no longer need to consent to the holding of Board or Board committee meetings by telephonic or electronic means.
 - **Hospitals that adopted the Prototype By-law and/or Annual Declaration and Consent Form prior to October 1, 2023 will need to continue to comply with these documents, which now impose a higher standard than ONCA by requiring that directors and committee members consent to the holding of telephonic or electronic meetings, until such time as they amend their documents to reflect this change. Once governing documents are updated, consent is no longer required.**

- **Temporary Suspension Period Rules**

- Special rules that applied during the temporary suspension period to make it easier for corporations to hold telephonic or electronic meetings during the COVID-19 pandemic have been repealed.
 - **Hospitals that adopted the Prototype By-law prior to October 1, 2023 likely do not need to make any changes to comply with this amendment.**

Audit Committee Composition

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- ONCA, s. 80(1) formerly provided that *a corporation may have an audit committee and, if it does, the majority of the committee must not be officers or employees of the corporation or of any of its affiliates.*
 - The amended s. 80(1) now provides: *A corporation may have an audit committee **comprising one or more directors** and the majority of the committee must not be officers or employees of the corporation or any of its affiliates.*
- While there is a lack of consensus on this issue and official guidance is not yet available, it appears that the effect of this amendment is that only directors may serve on the audit committee (if any) of a corporation.
 - **Hospitals that adopted the Prototype By-law and/or Finance and Audit Committee Terms of Reference prior to October 1, 2023 will likely need to amend their by-law and terms of reference at the next reasonable opportunity, and in the interim, should comply with the amendment by ensuring that the composition of any audit committee be limited to directors.**
 - **Non-directors with finance and audit expertise may continue to attend audit committee meetings as invited guests without a vote where necessary to ensure that the audit committee has sufficient expertise to perform its function.**

What does this mean for Hospitals?

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- Hospitals that have already updated their governance documents to transition to ONCA compliance should review their by-laws and governance policies to determine if any updates are required to comply with recent amendments.
 - In most cases, any required updates can likely be made at the next reasonable opportunity, provided efforts are made to comply with amendments in the interim.
 - It is up to individual directors in the context of their fiduciary duty to consider when any required updates should be made in the context of their organization.
 - Most amendments are relatively minor, with the exception of audit committee composition requirements.
- Hospitals that have not yet transitioned to ONCA compliance will need to undertake a more comprehensive review of their constating documents, by-laws and policies to ensure compliance with ONCA.
 - Hospitals have until **October 19, 2024** to transition to ONCA compliance.
 - After this date, any provisions in governing documents that do not conform with ONCA will be deemed amended to the extent necessary to conform with ONCA.
- Directors have a fiduciary duty to comply with applicable laws, including ONCA and the corporation's articles and by-laws.
- **Reminder:** Updated By-laws do not need Ministry of Health approval but do need to be filed with CRA in due course

Questions?

Thank you!

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