

# ONCA Proclamation: What it Means for Ontario Hospitals

Presented By

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# Agenda

1. Current State of the Law
2. What Does Transitioning to ONCA look like for Hospitals?
3. A Dozen Tips for Governing Under ONCA

# Current State of the Law

Current Act: *Corporations Act* (Ontario)

- 1907
- Updated 1953 and 1998, 2017

New Act: *Not-for-Profit Corporations Act, 2010* (Ontario) (“ONCA”)

- Passed on October 19, 2010
- **Proclamation on October 19, 2021**

# Who is Covered by ONCA?

- Ontario non-share capital corporations currently incorporated under the *Corporations Act* or a Special Act of the Ontario Legislature
  - Some limited carve-outs in ONCA for special act corporations, corporations sole have special rules, and different transition rules for e.g. insurance cos., social clubs; beware
- Scope of application in health sector very broad: e.g. Hospitals, Foundations, Auxiliaries, Research Institutes, Volunteer Associations, trade associations (OHA), and a wide range of health services providers (i.e. CMHA branches, community health centres, etc.)
- Entities governed by specific legislation still governed by that legislation (other laws, to the extent conflicting with ONCA, prevail over ONCA):
  - Hospitals – subject to *Public Hospitals Act*, *ECFAA*, etc.
  - Special act entities – special act will general prevail
  - Charitable & Not-for-Profit LTC Homes – subject to *Long-Term Care Homes Act, 2007*, etc.

# What does ONCA do?

- Expands and enhances members' rights
- Greater flexibility in some areas of corporate governance
- Simplifies some processes and procedures applicable to boards
- Imposes some new requirements
- Brings non profit corporate law closer to laws applicable to for profit corporations (*Ontario Business Corporations Act*)
- Articles of Incorporation and Articles of Amendment
  - No longer letters patent
  - Incorporation as of right
  - Online filings rather than paper

# Application of ONCA: Automatic

- On Oct. 19, 2021, ONCA will **automatically** apply and the *Corporations Act* will **automatically** cease to apply to hospitals
- Hospital corporations are not **required** to take any action to transition to ONCA

NOTE: vs. the modernized federal not-for-profit corporate legislation (*Canada Not-for-Profit Corporations Act*) where if filing of articles of continuance did not happen, the entity was dissolved

# Transitioning under ONCA: 3 year window

ONCA contemplates a 3 year 'transition' period, during which:

- Provisions in existing letters patent, supplementary letters patent, by-laws and special resolutions will continue to prevail for 3 years to the extent they conflict with ONCA as long as they were valid under *Corporations Act* (s. 207(1))

NOTE: Certain provisions are different during COVID

- If letters patent, supplementary letters patent, by-laws and special resolutions are not amended to comply with ONCA on the 3<sup>rd</sup> anniversary of proclamation (i.e. Oct. 19, 2024), they will be “deemed” compliant (s. 207(2))

NOTE: Best practice is to avoid 'deemed' amended governance documents

# Transitioning under ONCA: What Applies When?

- Some provisions of ONCA will apply whether or not they are included in your by-laws, e.g.:
  - Member proposal rights
  - Requirement for directors to consent to their election
  - Indemnity and conflict provisions
  - Directors dissent to a board motion or action

These new provisions will not apply for the first 3 years **only if** your by-laws have a provision that is in conflict and such provision is valid today

- Some provisions of ONCA will **only apply** if included in the by-laws or articles and some will apply **unless excluded** by the by-laws, e.g.:
  - Directors need not be members unless by-laws require
  - Member discipline / termination by board must include circumstances in which the board may exercise power in by-law



# Transitioning under ONCA: Articles of Amendment

- Amendments to Letters Patent and Supplementary Letters Patent (and any provisions currently in by-laws that must be in articles under ONCA) are effected by filing **Articles of Amendment** with Service Ontario
- ONCA enables narrow amendments to specific provisions in governance documents, and broad amendments of general application, provided the provisions amended are brought into conformity with ONCA
- As of September 27, 2021, forms of articles and other government forms under ONCA are not yet published

# Transitioning under ONCA: Other Regulators

- **PGT:** As of September 27, 2021, the Office of the Public Guardian and Trustee has not announced any changes to its processes
- **MOH:** On Oct. 19, 2021 an amendment to s. 4(1) of the *Public Hospitals Act* will be proclaimed which will require pre-approval by the Minister of Health of hospital articles (incorporation, amendment, amalgamation, etc.)
  - OHA has made inquiries with the Ministry to better understand the proposed approval processes and any expected timelines. The OHA anticipates additional guidance on this process to be released and will inform the sector as soon as this information becomes available.
- **CRA:** All registered charities (including hospitals) must file copies of constating documents with the CRA promptly following any amendment

# Transitioning under ONCA: Corporate Approvals

## Corporate Approvals:

- Restating letters patent as articles requires only board approval (only available if the letters patent already conform to ONCA)
- If letters patent do not conform, or if an amendment is desired to take advantage of ONCA, articles of amendment approved by special resolution (2/3rd) of the members are required
- By-law amendments will require board and member approval

## Key Governance Considerations When Seeking Member Approval:

- Members may move and then approve an amendment to a proposed motion
- Detailed notice of member meetings at which special business is to be transacted (including proposed resolution)

# Transitioning under ONCA: Benefits

There are several reasons to amend and re-state the by-laws during the 3 year period, e.g.:

1. To ensure compliance with ONCA (directors and officers have a duty to comply with ONCA)
2. To take advantage of new governance provisions and flexibility under ONCA
3. To exclude provisions that you do not wish to apply (to the extent that you are able)
4. To add new provisions (even when they will apply in any event) so that the by-law continues to be a reasonably comprehensive source of governance “rules”
5. To avoid confusion or legal uncertainty at the conclusion of the transition period

# Transitioning under ONCA: Timing

Consider your governance context when determining the time you will need to take to transition to ONCA, e.g.:

- Member approval
- Governance review
- Board Education and Updated Policies

NOTE: OHA and BLG have partnered to develop a further updated ONCA-compliant “Hospital Corporate Prototype By-law” and a companion document to assist the sector in identifying relevant considerations, which is expected to be published this Fall

# A Dozen Tips for Operating Under ONCA

Some (non-comprehensive) “tips” on operating under ONCA:

- 1. Membership.** Members have new rights (e.g., proposals): If you have a broad membership with limits on right to vote, pay attention to the record date rules, and consider a fixed member admission date.
- 2. Directors Must Consent.** Have directors sign a written consent to serve annually. If they do not consent in writing before or within 10 days of their election they are deemed not to be a director. Later consent will validate election but may leave open the issue of the validity of the actions during the period before consent was obtained.
- 3. Declaration of Conflicts.** Ensure an annual general written declaration of conflict becomes standard procedure for officers and directors.

# A Dozen Tips for Operating Under ONCA (cont'd)

4. **Board Size.** A “floating board” will be more flexible but only if directors are authorized to fix the number within the range approved by the members.
5. **Non-directors on Committees.** There is a risk that only a committee comprised entirely of directors may make a decision binding on the board. If you have non board members as community members of your committees, be careful about delegation of a power of the directors to such committee.

# A Dozen Tips for Operating Under ONCA (cont'd)

6. **Telephone Meetings for the Board.** All directors (not just those present) must consent to any director participating by phone – consider including consent in an annual declaration that also deals with conflicts and consent to election as a director. Note that this rule is temporarily overridden during COVID (Dec. 31, 2021 unless further prescribed by regulation).
7. **Alternative Participation in Meetings for Members.** Consider the extent to which you wish to avail yourself of new rules for members to participate in meetings by telephonic or electronic means. Note that during COVID (Dec. 31, 2021 unless further prescribed by regulation) alternative participation is automatically enabled.



# A Dozen Tips for Operating Under ONCA (cont'd)

**8. Non-Delegable Board Business.** Ensure the board is aware that delegation (including to an executive committee) now excludes the following:

- To submit to the members any question or matter requiring the approval of the members
- To fill a vacancy among the directors or in the position of auditor
- To appoint additional directors
- To issue debt obligations except as authorized by the directors
- To approve any financial statements under section 83
- To adopt, amend or repeal by-laws
- To establish contributions to be made, or dues to be paid, by members under section 86.

# A Dozen Tips for Operating Under ONCA (cont'd)

- 9. Governance Policies and Codes of Conduct.** Board policies may need to be amended to reflect provisions of ONCA. In particular, conflict of interest policies and board codes of conduct that set out the duties of directors may require updating. Note that indemnification of former directors and officers is now expressly permitted, advanced costs are permitted, and some indemnification is mandatory.
- 10. Board Duties During Transition.** ONCA imposes a duty on directors to comply with the articles and by-laws. This may be a challenge to keep track of in the three year transition period when the by-laws/practices may be in conflict with ONCA.

# A Dozen Tips for Operating Under ONCA (cont'd)

**11. Board Education.** Some board education will be required. One particular area to address is the new provision that states that a director is deemed to have consented to a board decision (even when they are not present) unless they have submitted or recorded their dissent. A director who votes in favour may not later dissent and a director who was not present has seven days after becoming aware of the resolution to record their dissent.

# A Dozen Tips for Operating Under ONCA (cont'd)

## 12. Member Meetings. No longer an Annual General Meeting or “AGM”

- ONCA enables proxies, but the *Public Hospitals Act* overrides these proxy provisions
- Develop a timeline for the annual meeting of members
  - Consider the date on which you admit members; new record date rules determine entitlement to notice and to vote, proposals
  - Notice between 10-50 days (or in accordance with PHA)
  - Notice for the annual meeting must state any special business in sufficient detail to permit member to form a reasoned judgment and must include text of any special resolution
  - Members have a right to request the board approved annual financial statements and the audit report 21 days before the annual meeting



Questions?

# Thank You

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