

ONCA Resource Documents Education Session

Presented By

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January 12, 2022

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Agenda

1. Overview of Resource Documents
2. Application to Other Entities
3. Process for Implementing ONCA
4. Update on Regulatory/Process Issues

Introduction to the *Not-for-Profit Corporations Act, 2010* (“ONCA”) Resource Documents

- 2021 OHA Hospital Prototype Corporate By-law
- Guidance Document
- Sample Updated Forms

Approach to Drafting

- Addressing ONCA requirements
- Use of simple, accessible drafting
- Use of enabling rather than prescriptive language
- Addressing recent amendments to the *Public Hospital Act*
- Addressing governance best practices

Introduction to ONCA Resource Documents

- The ONCA Resource Documents are not a substitute for legal advice
 - Template documents assume e.g., closed membership, full voting rights
 - Template documents assume customization by individual hospitals
 - Template documents do not address the unique features of some hospitals (e.g. denominational hospitals, academic health science centres, special act hospitals, etc.)
 - Intended to help the sector get 80% of the way there, recognizing that each hospital will need to locally customize and seek legal advice where required

2021 OHA Hospital Prototype Corporate By-law

- Designed to reflect ONCA requirements
- Designed for a closed membership model (where the Directors and Members are one and the same)
- Designed for a public hospital where all Members have full voting rights (i.e., where the ex-officio non-voting Directors have voting rights as Members)
- Not customized
- Remove footnotes!

Guidance Document: “Transitioning to and Governing Under ONCA”

- General guide to assist hospitals in understanding ONCA
- Two sections:
 - Transitioning under ONCA (three-year transition period)
 - Tips for governing under ONCA
- In order to comply with ONCA, it is not sufficient to adopt compliant by-laws
 - Articles, governance policies, practices must also comply with ONCA

Sample Forms from the Guide to Good Governance (Updated for ONCA Compliance)

- Finance and Audit Committee Terms of Reference
- Executive Committee Terms of Reference
- Nominations Policy
- Conflict of Interest Policy
- Board Code of Conduct
- Annual Declaration and Consent

Application to Other Entities

- While the ONCA Resource Documents are designed specifically for hospitals, with further customization (e.g. removal of PHA requirements), the template documents may be a useful starting point for other not-for-profit / charitable entities, including:
 - Foundations
 - Auxiliaries
 - Research Institutes
 - Long-Term Care Homes, etc.

Process for Implementing ONCA

Analyze Governing Documents

- Locate existing governing documents (GDs):
 - Letters Patent/Articles/Special Act
 - By-laws (admin vs. professional staff)
 - Relevant governance-related resolutions (e.g., variations in Board size)
 - Policies and procedures

Process for Implementing ONCA: Analyze Governing Documents

- Remember: Three year transition period, BUT
- Analyze GDs to determine what substantively should change (and when):
 - During the three-year transition period, any provision in GDs that was valid under the *Corporations Act* but does not conform to ONCA continues to be valid and in effect until October 19, 2024 (absent any action that you might take to conform), BUT
 - As of October 19, 2021, where ONCA has addressed certain matters and your GDs are silent, ONCA will fill in the gaps (now AND after the three-year transition period).

Process for Implementing ONCA

Analyze Governing Documents

- Analyze GDs to ensure compliance with ONCA, now AND after three year transition period:
 - Again, ONCA fills in the gaps – now and later
 - So: be aware that adopting ONCA-compliant governing documents or relying on transition provisions that deem governing documents to be compliant for three years does not necessarily guarantee that your governance practices are ONCA-compliant
- Think about what changes you want to make to your GDs
 - Plan to make them before October 2024
 - Non-conforming provisions will be deemed amended after three years

Process for Implementing ONCA: Why Amend GDs Before 2024?

- Reasons to amend governing documents before transition period ends include:
 - To ensure ONCA compliance (Directors and Officers have a duty to comply with ONCA)
 - To take advantage of new, flexible, modern governance provisions under ONCA (some require inclusion in governing documents)
 - To exclude ONCA provisions that you do not wish to apply (to the extent that you are able)
 - 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”
 - To avoid confusion or legal uncertainty – especially with respect to the impact of the deeming provisions in ONCA

Process for Implementing ONCA: Planning Considerations

- Consider if a local Board/GC education session on ONCA is desirable: “what’s new and noteworthy in ONCA in the context of my hospital?”
- Governance Committee-driven process to update governance documents
 - Consider early development of an ONCA work plan for the Governance Committee and Board (incorporating required internal, member and regulatory approvals base on your GDs and circumstances)
 - Consider the steps outlined here and in ONCA Resource Documents when determining work-back realistic timing (and whether to pause during this pandemic wave)
 - Aim for completion well in advance of October 2024
- Consider support role of legal counsel

Process for Implementing ONCA Planning Considerations

- Approval: Board and Members?
 - The Board and the Members approve Articles of Amendment (2/3)
 - Members always approve by-law amendments
 - (If only restating Articles of Incorporation, may only require Board approval)
- Account for required approvals in workback and consider details
 - E.g., Annual or Special Meeting?
 - Other required approvals?

Process for Implementing ONCA: Planning Considerations

- Filings/Approvals:
 - Ministry of Health
 - Ontario Public Guardian and Trustee
 - Service Ontario
 - CRA
- Consider required contractual notices and/or consents
- Potential challenges in current circumstances

Process for Implementing ONCA: Additional Considerations

- Secondary governance document updates (e.g. policies, forms, etc.) and governance practices (e.g. minute taking, dissent, etc.)
 - Considering articles/by-laws alone does not ensure compliance with ONCA
 - Consider sequencing

Thank You

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