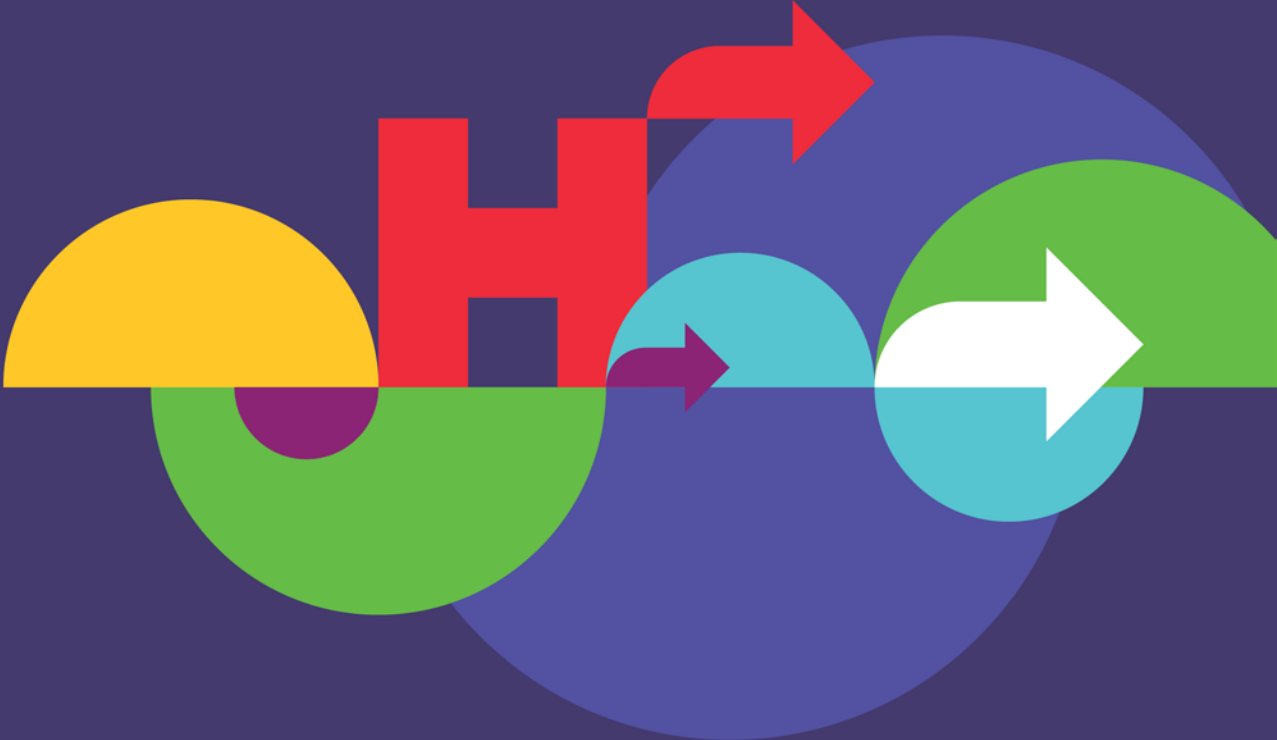


Transitioning to and Governing Under the New Ontario *Not-for-Profit Corporations Act, 2010*

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This document is intended as a general guide to assist hospitals in understanding the new *Not-for-Profit Corporations Act, 2010* (“**ONCA**”), which was proclaimed in force on October 19, 2021. It accompanies the new ONCA-compliant OHA Hospital Prototype Corporate By-law, and sample Forms from the OHA Guide to Good Governance (Third Edition), which have been updated for consistency with ONCA. It provides hospitals with additional information to assist in complying with and transitioning under ONCA.¹

In order to comply with ONCA, it is not sufficient to adopt compliant by-laws; the hospital’s articles, and governance policies and practices must also comply with ONCA. There is also a three-year transition period in ONCA to be aware of.

The first section of this document provides answers to some common questions that arise from transitioning under ONCA. The second section provides some tips for governing under ONCA, with an emphasis on things that are new and different.

Transitioning under ONCA

ONCA automatically applies. Do we have to do anything to come under ONCA?

As of October 19, 2021, ONCA automatically applies to Ontario public hospitals, and the *Corporations Act* ceases to apply. You do not have to take any action to come under ONCA.

Three years to transition. What applies between October 19, 2021 and October 18, 2024?

You must consider ONCA and your letters patent and by-laws (“**governing documents**”), and relevant resolutions, policies, and governance practices, to understand where and how ONCA will apply during the transition period.

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. For example, to the extent that your by-laws are silent and ONCA provides for something, ONCA now applies.

The second section below on governing under ONCA is therefore important for all hospitals to review and consider – during the transition period and beyond.

¹ This document does not provide an in-depth analysis of applicable law, nor is it comprehensive of all legal requirements to which hospitals are subject. It is intended to provide an overview for hospitals to assist in deciding when they need to seek advice or additional information. Hospitals should not rely solely on the summary information contained in this document in deciding whether to take or refrain from taking action.

The material in this document is for general information only and may need to be adapted by hospitals to accommodate their unique circumstances. This document reflects the interpretations and recommendations regarded as valid at the time of publication based on available information. It is not intended as, nor should it be construed as, legal or professional advice or opinion. Hospitals and individuals concerned about the applicability of the materials are advised to seek legal or professional counsel.

Here are answers to some common questions on what to do during the transition period:

Q: What applies where our governing documents are silent?

A: ONCA now applies.

As of October 19, 2021, where ONCA has addressed certain matters and your letters patent and by-laws are silent, ONCA will fill in the gaps (now and after the three-year transition period).

For example, unless your by-laws expressly provide for Directors' dissent, ONCA will deem Directors to have consented to resolutions passed at a Board or Board Committee meeting, unless dissent is made as prescribed (during or immediately after if present at the meeting; within 7 days if not present).

Q: Do non-ONCA-conforming provisions in our governing documents prevail?

A: Non-conforming provisions in governing documents prevail for three years.

During the three-year transition period, any provision in your governing documents or any special resolution 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).

Q: What happens to non-ONCA-conforming provisions in our governing documents after three years?

A: Non-conforming provisions will be deemed amended after three years.

As of October 19, 2024, any provision in your governing documents that you have not already amended to conform with ONCA will be deemed to be amended to the extent necessary to conform with ONCA.² This means that non-conforming provisions will be read as if they were amended to conform with ONA.

However, without proactive amendments, it may not be clear which provisions will be deemed amended and exactly how the deeming will operate to amend them after October 19, 2024.

Therefore, if your governing documents do not clearly conform to ONCA, we recommend that you amend them during the transition period. Consider the time it will take for amendments to be developed, considered and approved, and ensure you leave plenty of time in advance of the third anniversary for the changes to be effected.

² There are some limited exceptions: Certain limited *Corporations Act*-compliant provisions (e.g., with respect to the number of Directors, providing for two or more classes of Members, respecting voting rights of Members, respecting delegates) will remain valid until articles are amended, even if that is after October 19, 2024.

Q: Should we amend governing documents during the transition period?

A: There are a number of reasons to amend governing documents before October 19, 2024.

- 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

Q: Can we make targeted amendments to governing documents during the transition period?

A: Yes, that is our interpretation of the transition provisions.

The ONCA transition provisions allow for targeted amendments to the governing documents over the next three years, as long as those targeted amendments are ONCA-compliant.

For example, you might wish to take advantage of some new ONCA provisions that were previously unavailable to you, and some of these might require enabling provisions in your governing documents. If you want to amend your Board composition to take advantage of new provisions for a floating Board, for instance, you can do so without a comprehensive ONCA-compliant update, as long as the new Board composition provision is ONCA-compliant.

You can also do one comprehensive ONCA-compliant amendment to the governing documents. However, to restate articles, they must fully conform with ONCA.

Considerations include timing and resources, and whether you want full ONCA compliance now or targeted ONCA-compliant amendments now. For example, do you want to strategically delay any ONCA-compliant amendments (i.e., is there something non-ONCA-compliant in your current governing documents that you want to take advantage of for the next three years)?

Q: Do we need to amend/restate articles to replace letters patent? How do we do it?

A: It depends.

You do not need to restate your letters patent as articles, but we recommend that you either restate or amend in order to avoid confusion. This will allow you to have one set of constating document provisions instead of having them contained in several amending instruments, and certainty that your provisions will not be deemed amended or how the deeming would operate to amend them.

To obtain Restated Articles of Incorporation, the current letters patent/articles must fully conform with ONCA.

If you need or want to make any amendments to your letters patent, you will need to apply for Articles of Amendment.

There are different processes for approval of Articles of Amendment and approval of Restated Articles of Incorporation.

- (i) **Only the Board approves Restated Articles of Incorporation.** If/when your letters patent/articles (including all supplementary letters patent/articles) comply with ONCA, the Board may approve the filing of Restated Articles of Incorporation. No Member approval is required.
- (ii) **The Board and the Members approve Articles of Amendment.** If your letters patent do not comply with ONCA and/or if you wish to take advantage of new ONCA provisions, a special resolution (approval by 2/3rds of Members) is required to approve the filing of Articles of Amendment.

*There are new ONCA-specific requirements for the content of notice for a Members' meeting where special business (including amendment of governing documents) is to be transacted. ONCA requires that the notice state the nature of that business in sufficient detail to permit a Member to form a reasoned judgment on the business, and the notice must state the text of any resolution to be submitted to the meeting.

If your letters patent are deemed amended on the three-year anniversary date (October 19, 2024), you will still have to file amended articles (with approval by 2/3rds of the Members) if you wish to restate your articles in the future.

Note that Members always approve by-law amendments. Under ONCA, certain by-laws (affecting Members' rights) do not take effect until Members approve them.

Do we need Approval from the Minister of Health?

Pursuant to an amendment to the *Public Hospitals Act* also effective on October 19, 2021, you must now submit any draft articles under ONCA to the Minister of Health for pre-approval.

The OHA and the Ministry are discussing the protocol for this pre-approval. Based on our most recent information to date, the Ministry will release guidance soon (likely in the form of an update to the Section 4 Approvals Protocol under the *Public Hospitals Act*).

As a reminder, as a registered charity, any changes to your governing documents must be filed with the Canada Revenue Agency's Charities Directorate.

Are there any unique considerations for special act corporations?

Some public hospitals were established by special act. While ONCA applies to them generally, there are some limited exceptions where ONCA does not apply to special act hospitals:

- Amendment of articles pursuant to Articles of Amendment
- Restatement of articles pursuant to Articles of Restatement
- Amalgamation of a hospital with one or more corporations pursuant to an amalgamation agreement and Articles of Amalgamation
- Reorganization of a hospital pursuant to Articles of Reorganization
- Proposal and adoption of an arrangement pursuant to Articles of Arrangement

As noted below, if your hospital was established by a special act, the provisions of the special act prevail over ONCA.

Does other legislation prevail?

ONCA provides that in case of a conflict between an ONCA provision and a provision in any other Act, the other Act prevails. This means that:

- If your hospital was established by a special act, the provisions of the special act prevail over ONCA; AND
- For all hospitals, whether or not established by special act, other legislation, such as the *Public Hospitals Act*, the *Excellent Care for All Act*, the *Charities Accounting Act*, and other applicable legislation will continue to apply, and will prevail over ONCA where there is a conflict (e.g., while ONCA allows for Member proxies, the PHA does not, and the PHA prevails). The same prevalence is given to charities law (whether by way of Act, regulation, or principle of common law or equity).

What is the “temporary suspension period” under ONCA?

Schedule 1 of ONCA includes some special rules that apply during a temporary suspension period to make it easier for corporations to hold virtual meetings during the COVID-19 pandemic, even if there are conflicting provisions in your governing documents.

The temporary suspension period is set to expire on September 30, 2022, but could be further extended by Regulation.

As a result, until September 30, 2022,³ even if there are conflicting provisions in your governing documents:

- A Board meeting may be held by qualifying telephonic or electronic means.
- A Members' meeting may be held by qualifying telephonic or electronic means.
- There are different rules that apply for voting at Members' meetings.
- Member voting by mail or by telephonic or electronic means is permitted.

As noted, the *Public Hospitals Act* prohibits proxy voting by Members; this also prevails over the special rules during the temporary suspension period. While hospital Members can participate in meetings using alternative means during the temporary suspension period, even if there are conflicting provisions in the Governing Documents, they cannot participate by proxy.

Since these rules are temporary, the references in the rest of this document, and the new ONCA-compliant OHA Hospital Prototype Corporate By-law, are to the default rules under ONCA. While the temporary rules provide some limited flexibility for virtual meetings during the suspension period, they do not impact on transitioning or on governing after the suspension period.

Governing Under ONCA

Some tips for governing under ONCA:

1. **Membership.** Members have new rights (e.g., proposals). Hospitals that do not have a membership model where the Directors are the only Members should consider adopting a fixed record date, now available under ONCA. The record date determines the Members who are entitled to notice, to vote, and to make proposals.
2. **Telephonic/Electronic Meetings for Members (and Committees).** Consider the extent to which you wish to avail yourself of new rules allowing Members to participate in a meeting by telephonic or electronic means (subject to the by-laws), Members to vote electronically or by mail (if permitted by by-laws), and telephonic/electronic meetings and written resolutions for Committees.
3. **Annual Meeting (no longer an Annual General Meeting or "AGM").**⁴ Develop a timeline for the annual meeting of Members. Keep in mind:
 - If you have a model where membership is open to individuals who are not Directors, consider the date on which Members are admitted; new record date rules determine entitlement to notice, to vote, and to make proposals.
 - Notice is now required to be provided a minimum of 10 and a maximum of 50 days.⁵

³ This date is current as of December 1, 2021; we recommend that it be confirmed before being relied on.

⁴ Note that while ONCA now provides for Members to vote by proxy, this does not apply to public hospitals – the *Public Hospitals Act*, which prevails over ONCA, prohibits proxy voting by Members.

⁵ Or in accordance with the *Public Hospitals Act*, which currently provides for notice by newspaper publication, with different timing than ONCA, and will, when a new provision is proclaimed, provide for notice of Members' meetings to be given on the hospital's website, with different timing than ONCA.

- Notice for any Members' meeting at which special business is to be transacted (including the annual meeting) must state any special business in sufficient detail to permit Members to form a reasoned judgment and must include text of any resolution.
 - Members have a right to request the Board-approved annual financial statements and the auditor's report and to receive them before the annual meeting.⁶
 - If you lose quorum during a Members' meeting, business can now continue, unless your by-laws provide otherwise.
 - The Chair cannot have a casting vote to break a tie at a Members' meeting unless the articles provide for it.
4. **Director Consent.** Be aware that Directors must now consent to act as Directors in writing. If they do not consent before or within 10 days of their election/appointment, they are deemed not to be a Director. Later consent can validate their election but may leave open the issue of the validity of the actions taken during the period before consent was obtained.
 5. **Disclosure of Conflicts.** ONCA contains new requirements for the disclosure of conflicts. For example, Board-appointed officers, even if not Directors, are now required to disclose conflicts in writing. Consider an annual general written disclosure of conflict for Directors and officers; however, specific disclosures will still need to be made.
 6. **Telephonic/Electronic Meetings for the Board.** All Directors (not just those present) must, in writing, consent to any Director participating by telephonic or electronic means – consider including this consent in an annual declaration that also deals with conflicts and consent to serve as a Director.
 7. **Board Size.** Board size must fit within what is prescribed in the articles. Consider if you want a “floating Board,” which is now permitted under ONCA and can provide more flexibility, but only if Directors are authorized to fix the number within the range approved by the Members. The Board can be given the authority to fix the number of Directors in the by-laws; otherwise, the Members fix the number of Directors.
 8. **Board Composition.** Under ONCA, hospitals are “public benefit corporations”, which have special rules on Director independence. Ensure that not more than one-third of the Directors of a public benefit corporation are employees of the corporation or of any of its affiliates (most hospitals will already be compliant).
 9. **Auditor and Audit Committee.** There are a number of new considerations under ONCA relevant to the auditor and audit committee to be aware of:
 - The auditor must be independent of the hospital, any of its affiliates, and the Directors and officers.
 - Auditor vacancies must be filled immediately.

⁶ Section 84(2) of ONCA provides: “Not less than 21 days, or a prescribed number of days, before each annual meeting of the members or before the signing of a resolution under section 59 in lieu of the annual meeting, a corporation shall give a copy of the documents referred to in subsection (1) to all members who have informed the corporation that they wish to receive a copy of those documents.” The prescribed number of days is 5, pursuant to section 13 of the General regulation under ONCA.

- The auditor must immediately be notified in writing of their appointment.
- The auditor must receive notice of all Members' meetings and audit committee meetings, and the auditor may call an audit committee meeting.
- The auditor must attend a Members' meeting if one Member requests their presence.
- Appointment of a new auditor is special business.

Ensure that the majority of the members of any audit committee are not employees of the hospital or of any of its affiliates, and that the audit committee reviews financial statements before they are approved by the Directors.

10. **Non-Delegable Board Business.** Ensure the Board is aware that delegation (including to an executive Committee/managing Director) now excludes the following:

- To submit to the Members any question or matter requiring their approval
- 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 Board
- To approve certain financial statements⁷
- To adopt, amend, or repeal by-laws
- To establish contributions to be made, or dues to be paid, by Members

Ensure that where non-delegable matters are to be considered by the Board, the Board meeting notice indicates this.

11. **Governance Policies.** Board policies and associated forms and other documents may need to be amended; for example, conflict of interest and nomination policies, Board codes of conduct that set out Director's duties, terms of reference for executive and audit Committees, and annual declarations and consents, for which updated sample Forms have been provided to accompany this document.
12. **Director Indemnification.** Note that indemnification of former Directors and officers is now expressly permitted, advanced costs are expressly permitted, and some indemnification is now mandatory.
13. **Board Duties.** ONCA provides that Directors have a duty to comply with ONCA, the articles (defined to include existing letters patent), and by-laws. Governance professionals can assist hospital Boards to keep track of compliance in the three-year transition period when by-laws/practices may not comply with ONCA.
14. **Board Education.** Some new Board education is required. For example, Directors should be familiar with the new non-delegable business that must be addressed at a Board meeting, the new provisions on disclosure of conflicts, and the new provisions on consent and dissent. Note that under the new dissent provisions, directors should no longer abstain from voting.

⁷ Annual financial statements, approved under section 83 of ONCA.