

Updates to the Hospital Prototype Corporate By-Law

January 2024

On April 3, 2023, the Ontario Government introduced Bill 91 or the *Less Red Tape, Stronger Economy Act, 2023* (“**Bill 91**”). Bill 91 amends various pieces of legislation including the *Ontario Not-for-Profit Corporations Act, 2010* (“**ONCA**”). The amendments to ONCA are effective as of **October 1, 2023**.

The Ontario Hospital Association (OHA) with the support of Borden Ladner Gervais LLP (BLG), has updated the OHA’s Prototype Corporate By-law resource (the “**Prototype By-law**”), which was first published in 2021, to reflect these recent amendments. Two toolkit templates, the Sample Finance and Audit Committee Terms of Reference and the Sample Annual Declaration and Consent Form, have also been updated to ensure compliance. A brief overview of the amendments to ONCA is set out below.¹

What is Changing?

TELEPHONIC AND ELECTRONIC MEETINGS.

Board and Members’ meetings may 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 for the holding of such meetings.² 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 telephonic or electronic Board meetings must be able to communicate with each other *simultaneously and instantaneously*; all persons entitled to attend Members’ meetings must be able to *reasonably participate*.³ ONCA formerly required that Board and Members’

meetings held by telephonic or electronic means permit all persons to *communicate adequately* with each other. Hospitals that adopted the Prototype By-law prior to October 1, 2023 are likely already using virtual technology (e.g. Zoom, Teams, Webex, etc.) that enables persons entitled to attend Board and Members’ meetings to communicate with each other simultaneously and instantaneously. These hospitals 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.

NOTICE OF MEETINGS.

Notice of meetings do not need to specify a place if the meeting is to be held entirely by telephonic or electronic means.⁴ Notice of telephonic or electronic Board or Members’ meetings must 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.⁵ Announcements with respect to adjourned Board and Members’ meetings must also provide instructions for attending and participating in the continued meeting by the telephonic or electronic means that will be made available

¹ This summary is for information purposes only and does not constitute legal advice or opinion. Organizations should not rely solely on this summary and are encouraged to seek their own legal advice with respect to the impact of the amendments in their particular circumstances.

² ONCA, s. 34(7) and s. 53(5).

³ ONCA, s. 34(8) and s. 53(6).

⁴ ONCA, s. 34(3.1).

⁵ ONCA, s.34(3.2) and 55(1.2).

for the meeting.⁶ 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.

AUDIT COMMITTEE COMPOSITION.

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.⁷ 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 Ministry guidance is not yet available, it appears 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 prior to October 1, 2023 will likely need to amend their By-law and Audit Committee Terms of Reference at the next reasonable opportunity to reflect this change and **in the interim should comply with the amendment and ensure that the composition of any audit committee be limited to directors.** Non-directors with finance or audit expertise may 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.

CONSENT TO TELEPHONIC OR ELECTRONIC MEETINGS.

All of the directors no longer need to consent to the holding of Board or Board committee meetings. Hospitals that adopted the Prototype By-law and/or the Annual Declaration and Consent Form 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.

⁶ ONCA, s. 34(5) and s. 55(5).

⁷ ONCA, s. 80(1).

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 their by-law to comply with this amendment.

What Should Hospitals Do?

Hospitals that have already updated their governance documents to transition to ONCA compliance should review their by-laws and policies to determine if any updates are required to comply with these amendments. In most cases, any required updates can be made at the next reasonable opportunity, provided efforts are made to comply with the amendments in the interim. With the exception of the composition of the audit committee, the amendments are relatively minor in nature.

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.

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