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## Not-for-Profit Corporations Act: Transition Checklist

This checklist provides a list of key considerations and items that existing not-for-profit corporations under the Corporations Act (CA) will need to carry out by the end of the three-year transition period after Ontario's [Not-for-Profit Corporations Act, 2010 <http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_10n15\\_e.htm>](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_10n15_e.htm) (ONCA) comes into effect.

In addition to this checklist, existing not-for-profit corporations are encouraged to review the guide to ONCA, which covers incorporation and information regarding directors, officers and members.

### Disclaimer

*While the purpose of this checklist is to help corporations through the transition from CA to ONCA, it is not a comprehensive list of all relevant considerations and statutory provisions. This document is not intended to provide legal advice. A not-for-profit corporation should consult its own appropriate advisors concerning issues specific to its organization that may arise during the transition period, including rules related to charitable corporations and/or any related financial or taxation issues.*

Issues to consider as part of the transitioning process from the CA to ONCA:

### Review of letters patent and supplementary letters patent:

It is recommended that an existing not-for-profit corporation obtain legal advice to ensure these requirements are met:

- Review purposes to make sure they reflect the corporation's current or proposed future activities, and is consistent with other laws or court decisions which may govern the corporation.
- Review to ensure they are not in conflict with ONCA or its regulations, as the provision in ONCA or the regulations generally take priority.
- Review special provisions:

### Public Benefit Corporations

- Does the corporation come within the definition of a public benefit corporation? If so, are no more than one-third of the directors employees of the corporation or of any of its affiliates? Refer to section 23 of ONCA.
- Is there a clause providing for distribution of remaining assets upon voluntary dissolution? Refer to section 167 of ONCA.
  - If the corporation is a charitable corporation, do the special provisions provide for distribution to a charitable corporation with similar purposes or to a government or government agency? Refer to section 167 of ONCA.
  - If the corporation is a non-charitable public benefit corporation, do the special provisions provide for distribution to another public benefit corporation with similar purposes or to a government or government agency?

## Directors

- Consider whether the articles should be amended to have a minimum or maximum number of directors instead of a fixed number. A corporation must have at least three directors. Refer to section 22 of ONCA.

## Powers of Corporation

- Consider reviewing existing powers of corporations set out in letters patent. Determine whether it is necessary to include all such powers -- section 15 of ONCA now provides that a corporation has the capacity, and subject to ONCA, the rights, powers and privileges of a natural person (natural person powers). For example, unless the articles or the by-laws provide otherwise, a corporation may borrow money. Refer to section 85 of ONCA.
- Consider whether any specific restrictions on activities or powers should continue to be set out in special provisions.

## Membership

- Consider the membership structure of the corporation to ensure it still meets the needs of the corporation.
- Consider whether the corporation should have more than one class or group of members. If yes, the classes or groups of members must be set out in the articles.
- If there is to be more than one class or group of members, consider an amendment to the special provisions to specifically provide for each class or group of members, and fix the rights and conditions of each class or group. Refer to section 103 of ONCA. *Under the CA, the practice is to provide for multiple classes or groups of members in the by-laws, instead of the articles.*
- Consider whether or not to add a provision providing for transferability of membership. Refer to section 48 of ONCA.

For any changes to the letters patent or supplementary letters patent of an existing not-for-profit corporation, in particular a charitable corporation, it is strongly recommended that the corporation get the advice of a tax professional regarding its tax status and requirements.

### **Review of the by-laws:**

When ONCA comes into effect, if a corporation does not pass an organizational by-law within 60 days after the date of incorporation, a default standard organizational by-law approved by the statutory Director will apply to new organizations that incorporate under it. Refer to section 18 of ONCA. A default by-law is available. Please refer to the Incorporation section of the guide to ONCA for more information. Existing not-for-profit corporations may wish to use the default by-law to help review and make any changes to the by-laws needed to comply with ONCA.

### **Director and Officer Provisions**

- Consider whether directors must be members of the corporation. Refer to section 23 of ONCA.
- Consider whether to change term of office of directors. [Note: the maximum term of office is four years]. Refer to section 24 of ONCA.
- Review existing provisions for directors' meetings to consider whether any changes should be made.
- Consider revising any provision concerning indemnification and insurance for directors and officers in light of new provisions in ONCA. Refer to section 46 of ONCA.
- Review any provisions relating to ex officio directors (persons who automatically become directors by reason of holding a particular office such as being a director of another organization).
- Consider revising the conflict of interest provisions for directors in light of the new requirements in ONCA. Refer to section 41 of ONCA. Please refer to the Directors section of the guide to ONCA for

more information on the conflict of interest provisions.

- Review officer positions to determine if any change should be made in light of the current governance structure of the corporation.

## **Member Provisions**

- If current by-laws provide for more than one class or group of members, consider transferring these provisions to the articles by amendment. Please refer to the above note under Review of letters patent and supplementary letters patent concerning amendments to letters patent.
- Consider whether any changes should be made to membership qualifications set out in by-laws.
- Consider whether disciplinary provisions concerning members need to be amended in light of new rights given to members in ONCA. Refer to section 51 of ONCA. Please refer to the Members section of the guide to ONCA for more information. A sample disciplinary provision is found in the default by-law. Please refer to the Incorporation section of the guide to ONCA for more information on the default by-law.
  - Do the by-laws set out the circumstances and manner in which a member may be disciplined or terminated? The requirements of section 51 of ONCA should be reviewed to determine any necessary changes (i.e. a member must be given at least 15 days notice, which must include reasons and indicate the member has the right to be heard orally or in writing or in another format permitted by the articles or by-laws).

Consider whether any amendment is required to the minimum notice period for calling members' meetings.

- Consider providing a specific procedure for members to request a copy of the financial statements at least 21 days before the annual meeting of members. Refer to section 84 of ONCA.
- Consider whether any changes should be made to the method of voting in light of the new requirement for mandatory proxies or alternative means of voting at members' meetings (e.g., in addition to or as an alternative to proxy voting, consider providing for absentee voting by: mail, telephone or computer). Refer to section 65 and section 67 of ONCA

## **Borrowing Powers**

- Review any existing borrowing powers to determine if they should be amended or deleted. Refer to section 85 of ONCA. Unless the articles or by-laws provide otherwise, section 85 of ONCA gives directors the power to borrow money without authorization of the members. Under the existing CA, the by-laws must specifically provide for a power to borrow, which is to be confirmed by the members.

## **General**

- Review all other provisions in the by-laws to ensure that they are up-to-date and meet the requirements of ONCA and its regulations.

## **Companies with social purposes**

Companies referred to as "companies that have objects in whole or in part of a social nature," such as share capital social clubs are corporations with share capital governed under Part II of the CA. They are required to continue as one of the following types of corporations within five years after proclamation of ONCA:

- Non-share capital corporation under ONCA
- Co-operative corporation under the Co-operative Corporations Act
- Share capital corporation under the Ontario Business Corporations Act

It is recommended that these companies obtain tax and legal advice to determine the most effective manner, including timing, to continue under one of the above three Acts. If such a corporation fails to continue under one of these statutes by the fifth anniversary of the day ONCA comes into effect, it will automatically be dissolved as of the following day. In that event, it can revive at any time once it continues under one of the three statutes. Refer to section 2.1 of CA.

The following are some considerations which may assist in making an informed decision concerning under which Act a corporation should continue:

- Have the shareholders made a significant capital contribution to the corporation? If so, do the shareholders wish to continue as a share capital corporation?
- Is there a preference for being a business corporation rather than a co-operative corporation?
- If the corporation is going to continue as a share capital corporation, what is the most appropriate structure for the classes of shares?
- Alternatively, if the corporation is to be continued as a non-profit corporation under ONCA, what is the most appropriate membership structure?
- If the corporation is to be a not-for-profit corporation, consider which purposes and special provisions are appropriate to include in the articles of continuance.
- If the corporation is to be a not-for-profit corporation under ONCA, consider cancellation of shares and payment, if any, to shareholders in light of appropriate tax and corporate law considerations.

The shareholders must approve continuance by a special resolution. Refer to section 2.1 of CA. A special resolution is a resolution that is approved by at least two-thirds of the votes cast at a shareholders' meeting where there is a quorum. If no quorum can be obtained for a shareholders' meeting to approve continuance by special resolution, a corporation may apply to court for an order waiving the requirement for shareholder approval. Refer to section 2.1 of CA.

**Note:** A company referred to as "companies that have objects in whole or in part of a social nature," such as a share capital social club may not file supplementary letters patent under the existing CA to amend its letters patent to bring itself into compliance with the Act under which it applies to continue. Any application to continue must be made under the Act under which the corporation wants to continue. Refer to section 2.1 of CA.