

# Ontario Not-for-profit Corporations Act

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# Ontario Business Registry

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# Agenda



Overview



What's the homework?



A closer look at Directors




A closer look at Members



# Overview

To be proclaimed in force on October 19<sup>th</sup>, 2021, and will automatically apply to Part III Ontario Corporations Act (OCA) corporations



# ONCA – stated purposes

## **Incorporation**

- improve the efficiency of the incorporation process
- Remove Office of the Public Guardian and Trustee approval from the incorporation requirements of charitable corporations

## **Financial Oversight**

- Simplify the review process for financial records
- Improve the access of members to financial records
- **Distinguish** between **public benefit corporations** and other not-for-profit corporations

# ONCA – stated purposes

## Articles of Incorporation

- **Require** articles to include there are two or more classes or groups of members, where applicable

## Governing and corporate oversight

- Clarify the rules for governing the corporation and increase accountability
- Provide directors with a due diligence and good faith reliance defence
- Clarify the requirements for directors and officers to report a conflict of interest
- **Allow** members to take action if they think directors are not acting in the corporation's best interests
- **Allow** by-laws to provide alternative voting methods, including via mail, telephone or electronic means
- **Permit** the appointment of a proxy holder if allowed by the articles or by-laws
- Clarify that participating in commercial activity **is** permissible if it supports the not-for-profit purposes

## Rules fall into three categories

- Three types of rules under ONCA
  - Mandatory rules – cannot be overridden by articles or by-laws
  - Default rules – by-laws or articles can override
  - Alternate rules – articles/by-laws can include certain option rules permitted by ONCA (see: <https://www.ontario.ca/page/not-profit-corporations-act-2010-standard-organizational-law>)

# The Public Benefit Corporation



PBCs include

- Charitable corporations
- Non-charitable corporations that receive more than \$10,000 in a financial years in funding from public sources

If a non-charitable corporation reaches threshold, deemed to be a PBC in the next financial year, as of the date of the first AGM until the end of that year



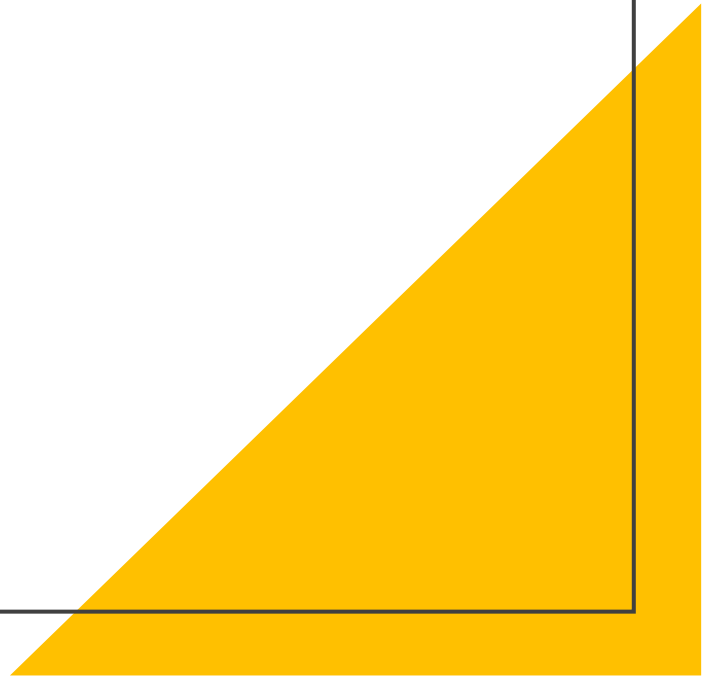
# Consequences of being a public benefit corporation

- Not more than 1/3 of the directors may be employees of the corporation or affiliates
- Higher thresholds for dispensing with appointing an auditor or person to conduct a review engagement
- Liquidation and dissolution – net assets must be distributed to a Canadian corporation that is a registered charity with a similar purpose, or to the government
- On dissolution of a non-charitable corporation net assets must be distributed to a PBC with similar purposes, to a Canadian corporation that is a registered charity with similar purposes or to the government

# New audit requirements

Type of corporation/Gross Annual Revenues		Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation	Gross Annual Revenue of \$100,000 or less	May dispense with both an audit and/or a review engagement by extraordinary resolution (80%)	
	More than \$100,000 but less than \$500,000	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)	
	\$500,000 or more	An auditor must be appointed	Audit is required
Non-PCB	\$500,00 or less in annual revenue	May dispense with both an audit and a review engagement by extraordinary resolution (80%)	
	More than \$500,000 in annual revenue	May by extraordinary resolution (80%) dispense with an auditor and instead appoint a person to person to conduct a review engagement	

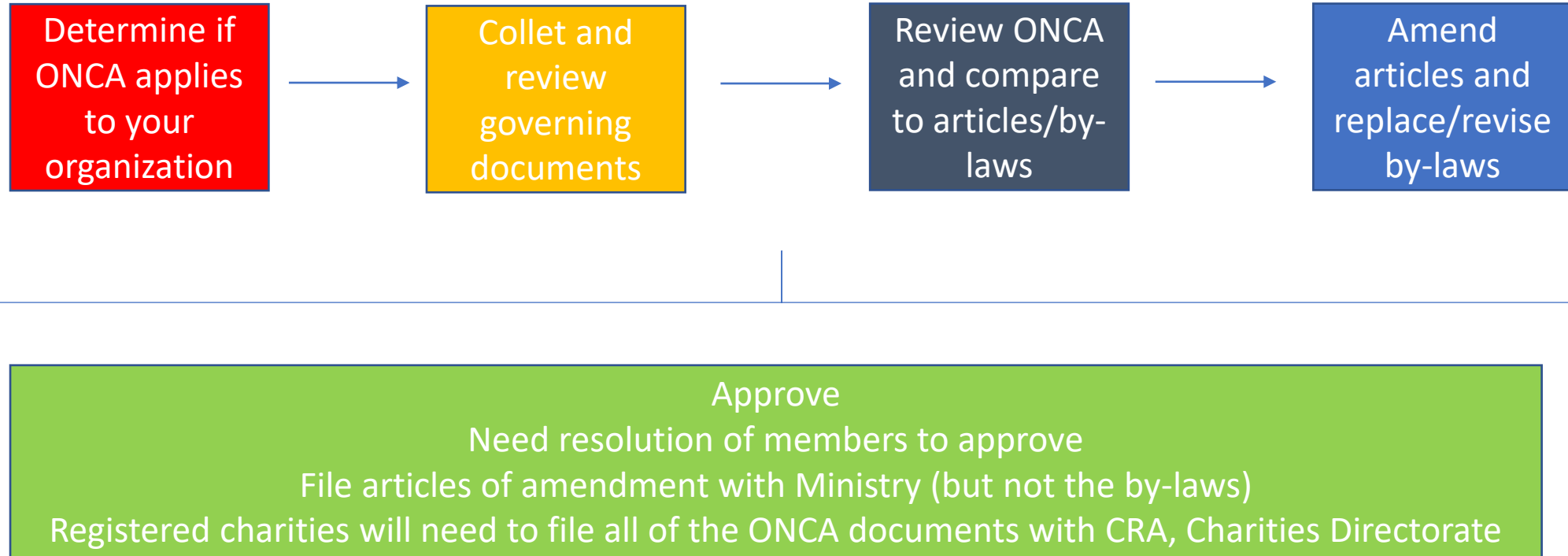
What's the  
homework?



# Important timelines

Current documents under OCA	If do nothing after proclamation		Optional transition after proclamation
	During first 3yrs after proclamation	After 3yrs	During first 3yrs after proclamation
Articles (formally letters patent)	Current articles and by-laws will continue to govern even if inconsistent with ONCA	Provisions inconsistent with ONCA will be deemed amended to comply	Adopt articles of amendment to comply with ONCA
By-Laws and special resolutions			Amend by-laws or adopt new ONCA compliant by-laws

# Process Map





# Directors



# Directors

Minimum three directors

Articles may provide maximum & minimum

Directors need not be members

Directors elected at AGM

Ex officio director possible

Maximum four-year term of directors

No limited on maximum number of terms

Staggered terms for directors possible

Removal of any director by majority vote of members except ex officio directors

Directors must consent in writing to take office

# Directors

Objective standard of care for directors and officers to act honestly and in good faith with a view to the best interests of the corporation

Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

Not liable if fulfilled their duty if they exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances

Defence includes good faith reliance on financial statements and reports of professionals



# Directors

Act sets out specific requirements for directors and officers to report conflicts of interest in certain situations

Conflict includes where director is a party to a contract or transaction or a proposed contract or transaction or is a director or officer of a corporation or has a material interest in a party with a contract or transaction

Provisions are mandatory and may not be amended by by-laws



Members



# Members

Corporation must have members and by-laws must set out conditions for membership

Subject to articles, default rule is one vote per member

Articles must set out the classes of members. If one class all members must be voting, but if 2 or more classes, voting rights must be given to a least one class

Death, resignation, expiry of membership term, liquidate or dissolution, expulsion or termination will end membership

# Members

Corporation may allow directors, members or committee to discipline members or terminate. Articles or by-laws must set out circumstances and way power is exercised

Power must be exercised in good faith and in a fair and reasonable manner – 15 days notice of disciplinary action or termination with reasons, member must be given an opportunity to be heard

Member may apply for compliance or restraining order if power misused

# Conclusions

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ONCA provides a new set of rules for the incorporation, and governance of not-for profit corporations

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Corporations have a three-year period to amend their existing by-laws and articles to comply, failure to do so may lead to confusion

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New audit requirements are introduced which may benefit your organization

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New membership rights based on a desire for transparency are introduced with include the right to pursue an action against officers and directors

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Directors have a statutory duty of care and a new due diligence defence