

The Ontario Not-for-Profit Corporations Act and your Governance Actions

Grow | Protect | Operate | Finance
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Introduction

After years of languishing on the legislation table, the Ontario Not-for-Profit Corporations Act (the "ONCA") finally came into force on October 19, 2021, and will apply to most Ontario not-for-profit corporations incorporated under the Ontario Corporations Act (the "OCA"). We are sending you this brochure to describe what Dentons can do to help you with your transition from the OCA to the ONCA. Note that the ONCA does not apply to not-for-profit corporations incorporated federally under the Canada Not-for-Profit Corporations Act (the "CNCA").

Unlike the approach taken when the CNCA was enacted in 2011, where corporations had 3 years to "continue" under the CNCA by filing articles of continuance and approving a new general by-law or amendments to their existing general by-law to comply with the new legislation, Ontario has taken a different approach to the transition to the ONCA.

With a few exceptions, any provision in the corporation's letters patent, supplement letters patent, by-laws or any special resolution of the corporation that was valid immediately before the ONCA was proclaimed in force and that is not in conformity with the ONCA continues to be valid and in effect until October 19, 2024, the third anniversary of the proclamation of the ONCA. At that time, any non-compliant provision that has not been amended to bring it into conformity with the ONCA is deemed to be amended to the extent necessary to bring it into conformity on the third anniversary of the proclamation of the ONCA.

The following exceptions continue to be valid indefinitely until amended even though they may not comply with the ONCA:

- A provision respecting the number of directors of the corporation.
- A provision providing for two or more classes or groups of members.
- A provision respecting voting rights of members.
- A provision respecting delegates made pursuant to section 130 of the OCA.
- A provision respecting the distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution.

Despite this, we recommend as a better practice that corporations take the opportunity to review their letters patent, supplementary letters patent, any special resolutions and their by-laws and then take steps first at the board level and then at the member level to bring these documents into compliance with the ONCA. If not, we would be concerned with the confusion which will inevitably result when referencing these documents and determining which provisions are deemed amended and which are not.



Principal Changes That Come Into Effect Immediately

As noted above, the ONCA will apply now to corporations incorporated under the old OCA, and provisions in your company's letters patent, supplementary letters patent, special resolutions and by-laws inconsistent with the ONCA will be deemed to be amended to comply with the ONCA now. However, some provisions of the ONCA will impact certain procedures of your company immediately as



Financial Statements

To date, all not-for-profit corporations subject to the old OCA were required to prepare and deliver to their members audited financial statements unless the members passed an extraordinary resolution not to appoint an auditor and the annual revenues of the corporation were no more than \$100,000.

Following the approach taken in the CNCA, the ONCA distinguishes between a corporation that is a "public benefit corporation" and one that is not. Under the CNCA, the comparative definition is a "soliciting corporation". Whether the corporation is a "public benefit corporation" and the revenues of the corporation will impact whether audited financial statements may be required.

A "public benefits corporation" is defined in the ONCA as:

- A charitable corporation (meaning a corporation incorporated for the relief of poverty, the advancement of education, the advancement of religion or other charitable purpose); and
- A non-charitable corporation that receives \$10,000 or other prescribed amount (no other amount has been prescribed to date) in a financial year:
 - In the form of donations or gifts from persons who are not members, directors, officers or employees of the corporation; or
 - In the form of grants or similar financial assistance from the federal government or a provincial or municipal government or an agency of any such government

Basically, if you are issuing tax receipts or taking in large amounts of money from the public or government grants, you are subject to a greater level of scrutiny.

"Public Benefit Corporations" must appoint an auditor to prepare audited financial statements unless:

- In the case where the corporation had annual revenues in that financial year of more than \$100,000 or such other prescribed amount (no other amount has been prescribed to date) and less than \$500,000 or such other prescribed amount (no other amount has been prescribed to date), the corporation may by extraordinary resolution (a resolution that is: a) submitted to a special meeting of the members of a corporation duly called for the purposes of considering a resolution and passed at the meeting with or without amendment by at least 80% of the votes cast; or b) consented to by each member of the corporation entitled to vote at a meeting of the members or the member's attorney) resolve to have a review engagement instead of an audit in respect of that financial year; and
- In the case where the corporation had annual revenues in that financial year of \$100,000 or less or such other prescribed amount (no other amount has been prescribed to date), the corporation may by extraordinary resolution resolve to not appoint an auditor and to not have an audit or a review engagement in respect of that financial year.
- If the corporation is not a "public benefit corporation", members may pass an extraordinary resolution:

To have a review engagement instead of an audit in respect of the corporation's financial year if the corporation had annual revenue in that financial year of more than \$500,000 or such other prescribed amount (no other amount has been prescribed to date); or

To not appoint an auditor and to not have an audit or a review engagement in respect of the corporation's financial year if the corporation had annual revenue in that financial year of \$500,000 or less or such other prescribed amount (no other amount has been prescribed to date).





Proxies

The ONCA provides that a member may appoint a proxyholder only if the articles or by-laws of the corporation permit it. If so permitted, a member entitled to vote at a meeting of members may appoint a proxyholder. Under the old OCA, a member was entitled to appoint a proxyholder, regardless of whether permitted in your letters patent or by-laws.



Employee Directors

Under the ONCA, not more than one-third of the directors of a public benefit corporation may be employees of the corporation or any of its affiliates.



What We Need From You

Your task is to bring all of your documents in compliance with the ONCA, and to clean up items that you may not have kept current while running your business. To enable a comprehensive review, we need your: original letters patent and any supplementary letters patent; original by-laws and any amendments; members, directors and officers registers; and any accompanying resolutions that approved any of the changes to these items. If you have a maintained minute book of all your corporate documents, that's where we start. If not, assembling the items on this list is the next best thing.



What We Review For

Our principal focus will be reviewing your letters patent, any supplementary letters patent and by-laws.

Under the old OCA, corporations were incorporated by letters patent (modern statutes like the ONCA provide for incorporation by articles of incorporation). Under the old OCA, amendments to the letters patent were effected by supplementary letters patent wherein under the ONCA, amendments to letters patent of companies incorporated under the old OCA will be effected by articles of amendment. Corporations incorporated after the ONCA came into effect will be incorporated by articles of incorporation and amendments to its articles of incorporation will be effected by articles of amendment. The ONCA includes letters patent and supplementary letters patent as part of its definition of "articles".

For our review of your letters patent and any supplementary letters patent, we will determine whether articles of amendment are necessary to comply with the ONCA. If so, we will assist you in preparing articles of amendment. Your board of directors will first approve the form of articles of amendment under the ONCA. They must then be approved by a special resolution of the members (and potentially each class or group of members). Under the ONCA, a special resolution means a resolution that:

- Is submitted to a special meeting of members of a corporation duly called for the purposes of considering the resolution and passed at the meeting with or without amendment by at least two-thirds of the votes cast; or
- Consented to by each member of the corporation entitled to vote at the meeting of the members of the corporation of the member's attorney.

For our review of your by-laws, we will likely recommend that an entirely new general by-law be enacted which is fully compliant with the ONCA. Of course, it will be customized to reflect the particular circumstances of your organization. We generally find this is more efficient than making specific changes throughout your general by-laws to reflect the ONCA. However, we will discuss with you your preferred approach. Once the approach is agreed, we will assist in preparing the form of new general by-law or amendments.

New by-laws or amendments must be approved first by your board of directors and then submitted to your members for confirmation by ordinary resolution. An "ordinary resolution" means a resolution that:

- Is submitted to a special meeting of members of a corporation duly called for the purposes of considering the resolution and passed at the meeting with or without amendment by a majority of the votes cast; or
- Consented to by each member of the corporation entitled to vote at the meeting of the members of the corporation of the member's attorney.

As part of this review, we will also identify any inconsistencies between the way you have operated and your letters patent and by-laws and propose a "whitewater" resolution for approval by the board of directors and/or members as necessary.



What We File

Upon the approval of all of the necessary resolutions, we then file any necessary documents to transition you to the ONCA. This includes articles of amendment, and may include other filings if we find that your register, ledgers, or returns are out of date.



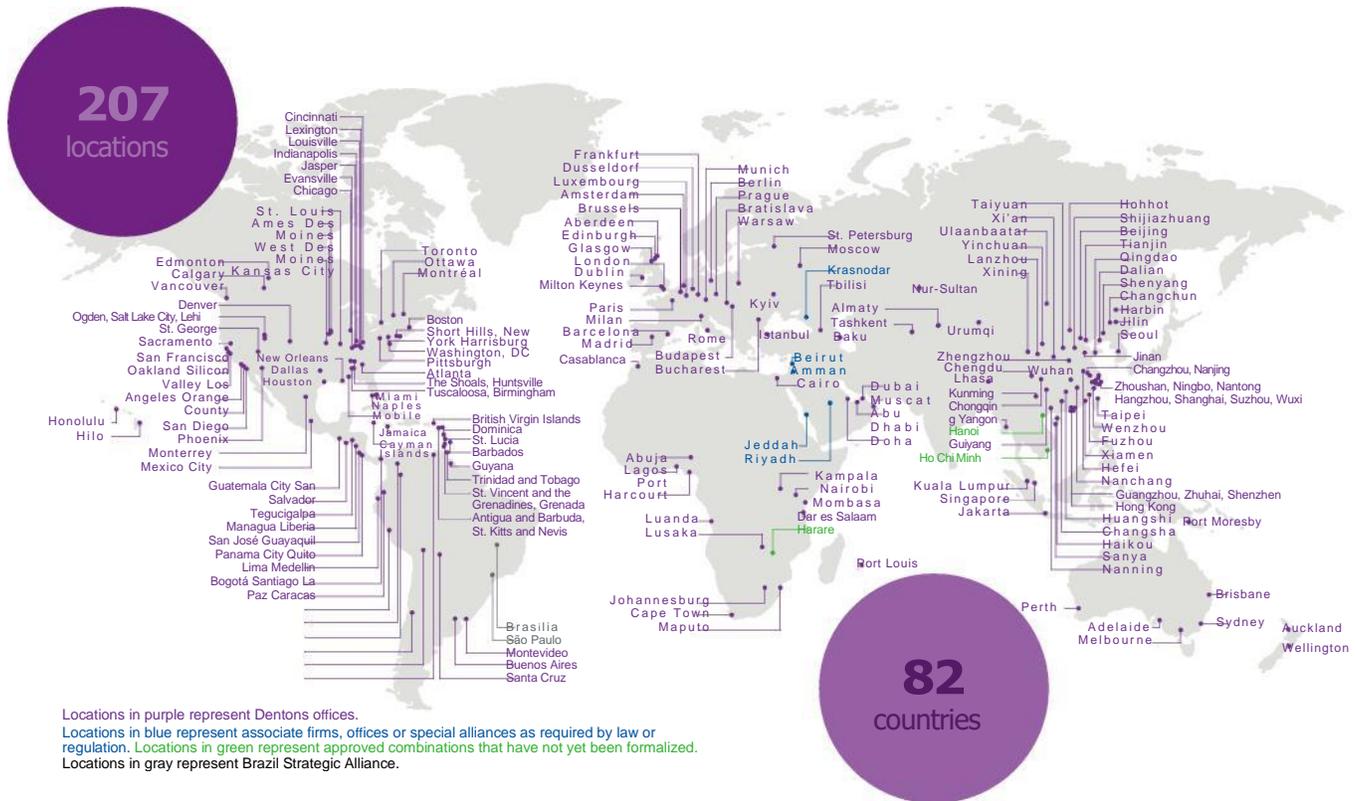
Learn more

For further information on the background and history of the enactment of the ONCA, please see our previous update on the ONCA entitled "The Ontario Not-for-profit Corporations Act – a 10th Anniversary Non-Retrospective."

A brief overview of Dentons

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founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work.



80+
languages spoken



US\$48,600,000+
value of pro bono and volunteer work

*FIGURES REFLECT COMBINATIONS PROPOSED IN 2019-2022.

Lawyer numbers



12,000+
Total number of lawyers

14,000+
All timekeepers

20,000+
Total number of people



700+
Chambers rated lawyers

90+
Lexpert rated lawyers

Why Choose Dentons



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