

## **Presenter Q and A**

**For associations to provide more detail or respond to questions that may arise during the presentation**

**Q What does the Not-for-Profit Corporations Act, 2010 (ONCA) do?**

A Ontario's Not-for-Profit Corporations Act, 2010 sets out how not-for-profit corporations in Ontario are created, governed and dissolved.

**Q Why did the government move not-for-profit corporations from the Corporations Act to this Act?**

A The Act was created to provide a modern legal framework for Ontario not-for-profit corporations by ensuring greater transparency and accountability in how not-for-profit corporations are governed. The Act was developed following extensive consultation with the not-for-profit sector.

**Q When does the new Act come into effect?**

A The Not-for-Profit Corporations Act, 2010 received Royal Assent on October 25, 2010. The Act is targeted to come into effect in 2014. Amendments to more than 80 statutes including ONCA were introduced in the legislature in June 2013. It is anticipated that these amendments will be debated in the legislature in fall 2013. If the amendments are passed by the legislature, ONCA is anticipated to come into force no earlier than six months after passage in order to ensure adequate time for not-for-profit corporations to prepare for transition.

Organizations are encouraged to check the Ministry of Consumer Services' website for updates on the Act's effective date and for more information on the Act. This includes a variety of tools being prepared to ease the implementation, such as a plain language guide, transition checklist and draft default by-law.

**Q What features of ONCA will immediately affect my organization when it comes into effect?**

A There are several new features that not-for-profit corporations will want to consider, and that are outlined in the presentation. (see also Q and A below). The new key features are explained on the Ministry of Consumer Services' Not-for-Profit Corporation's Act web pages, under Key Terms. They are also explained in the plain language guide that is published on the site.

**Q I thought the Act was coming into effect this year. Why is there a delay in proclamation?**

A While the government was actively working towards a target date of July 1<sup>st</sup>, 2013 to proclaim the Act, it is now targeted to come into effect in 2014. Amendments to more than 80 statutes including ONCA were introduced in the Legislature in June 2013. It is anticipated that these amendments will be debated in the Legislature in fall 2013. If the amendments are passed by the Legislature, ONCA is anticipated to come into force no earlier than six months after passage in order to ensure adequate time for not-for-profit corporations to prepare for transition.

**Q What will happen when the Act comes into effect?**

A When the Act comes into effect, in general it will apply automatically to all Ontario not-for-profit corporations.

This means that:

- All the provisions of the Act will apply automatically to **new** not-for-profit organizations that incorporate under it.
- In general, the provisions of the Act will apply automatically to **existing corporations** where their incorporating documents (i.e., letters patent, supplementary letters patent, by-laws and special resolutions) don't say anything about a particular requirement of the Act.
- Existing not-for-profit corporations will have a three-year transition period once the Act is in force to amend their incorporating documents. Existing corporations are encouraged to review their documents before the end of this period.

The government takes the position that provisions of these documents that are valid under the current Corporations Act will continue to be valid until the end of the three-year transition period or sooner if the corporation amends them to conform with the Act. Corporations are encouraged to review their documents before the end of this period.

The Ministry of Consumer Services has developed a plain language guide, transition checklist and a draft version of the default by-law to help users understand their rights and obligations under the Act. More information may be found in the transition checklist and the plain language guide on the ministry's website.

**Q Who will be affected by the Act?**

A When the Act comes into effect, it will apply to every corporation without share capital incorporated in Ontario under an Act of the Ontario Legislature, including the current Corporations Act (CA) except:

- Share capital companies with social purposes, referred to as “companies that have objects in whole or in part of a social nature”, such as share capital social clubs governed under Part II of the CA (i.e. some golf, tennis or country clubs). These companies will continue to be governed by the CA for a transition period of five years. These companies must continue as:
  - A non-share capital corporation under ONCA; or
  - A co-operative corporation under the Co-operative Corporations Act; or
  - A share capital corporation under the Ontario Business Corporation Act.
- Insurance corporations under Part V of the CA will continue to be governed by the CA
- Corporations without share capital to which the Co-operative Corporations Act applies
- If a statute expressly provides otherwise

**Q What is meant by “if a statute expressly provides otherwise”?**

A Some Ontario not-for-profit corporations are incorporated by or under special or private Acts or by or under other public Acts. Depending on the circumstances, the Act may apply or the specific governing statute may take priority. These corporations are encouraged to consult a lawyer to find out which legislation applies.

**Q What happens if not-for-profit corporations do not conform after the three-year transition period?**

A On the third anniversary of the day the Act comes into force, any provision of an existing not-for-profit corporation’s incorporation and other documents that are valid under the CA but still do not conform to the Act will be considered to have been amended to the extent necessary so that it does conform.

Organizations are encouraged to check the Ministry of Consumer Services’ website for more information.

**Q Are there any materials available to support not-for-profit corporations as they transition to the Act?**

A To help ensure there is a smooth implementation, the Ministry of Consumer Services is working with sector partners on tools to assist not-for-profit corporations with their transition (e.g., plain language guide, transition checklist and draft default by-law). These tools are available on the ministry’s website.

The ministry recognizes the importance of providing strong support to the sector. Many not-for-profit corporations are small organizations with minimal resources to expend on transitioning to the Act. The government has given a grant to Community Legal Education Ontario (CLEO) to support not-for-profit corporations during the transition period, and will continue to work closely with the Ontario Nonprofit Network (ONN) and sector partners on ways to smooth the transition.

**Q What are the features of the Act?**

**A** The Act:

- Makes a new distinction between public benefit corporations and other not-for-profit corporations. A public benefit corporation is a charitable corporation or a non-charitable corporation that receives more than \$10,000 a financial year in:
  - donations or gifts from persons who are not members, directors, officers or employees of the corporation; or
  - grants or similar financial assistance from federal, provincial or municipal governments or a government agency
- Makes it mandatory for corporations to make proxies available to members. However, a not-for-profit corporation may provide in its by-laws other means of voting (by mail, telephone or electronic means) in addition to or in place of voting by proxies
- Clarifies that not-for-profit corporations can engage in commercial activities if the activities are in support of the corporation's not-for-profit purposes. A not for profit corporation may be subject to restrictions on its activities under other legislation (e.g. Income Tax Act).
- Allows for a simpler process that may be used in place of an audit for reviewing the corporation's financial records in some situations
- Requires a corporation with two or more classes or groups of members to have the classes or groups set out in the articles, instead of in the by-laws
- Sets out a due diligence and good faith reliance defence for directors
- Lists specific requirements for directors and officers to report conflicts of interest in certain circumstances
- States that corporations do not always have to include a member's proposal in meeting notices in certain circumstances
- Provides clearer rules for governing the corporation and increasing accountability. For example, a statutory duty of care applies to directors and officers, requiring them to act honestly and in good faith with a view to the best interests of the corporation, and to exercise reasonable care, diligence and skill
- Provides members with actions they can take if they believe directors are not acting in the best interests of the corporation
- Provides members with greater access to financial records

- No longer requires approval of the Office of the Public Guardian and Trustee to incorporate as a charitable corporation

**Q Are the obligations of a public benefit corporation different from those of other not-for-profit corporations?**

A Yes. Special rules apply to public benefit corporations (charitable corporations or non-charitable corporations that receive more than \$10,000 a financial year from outside funding) under the Act that do not apply to other not-for-profit corporations. Examples include:

- Different audit and review engagement requirements ([section 76](#) of the Act).
- Board composition (i.e. not more than one-third of the directors of a public benefit corporation may be employees of the corporation or of any of its affiliates) ([section 23](#) of the Act)
- Restrictions on the distribution of a corporation's property upon winding up ([section 150](#) of the Act) and upon dissolution ([section 167](#) of the Act)

**Q In what circumstances can the simpler process for reviewing the corporation's finances be used?**

A The ability to use the simpler process (a review engagement rather than an audit) will depend on whether the not-for-profit corporation is also a public benefit corporation and the amount of its annual revenue.

**Public Benefit Corporations**

Members of a public benefit corporation with annual revenue of more than \$100,000 but less than \$500,000, can waive the audit requirement by passing an **extraordinary resolution\***, but the corporation would still need to conduct a review engagement. If a public benefit corporation has annual revenue of \$500,000 or more, an audit is still mandatory.

Members of a public benefit corporation with annual revenue of \$100,000 or less, can waive both the audit **and** the review engagement, by an **extraordinary resolution**.

**Other Not-for-Profit Corporations**

If a corporation is not a public benefit corporation and has annual revenue of more than \$500,000, its members can waive the requirement to have an audit by an extraordinary resolution, but must conduct a review engagement.

If this type of corporation has annual revenue of \$500,000 or less, its members can waive both an audit and a review engagement by passing an extraordinary resolution.

***For web and print versions:***

<b>Type of Corporation</b>	<b>Amount of Annual Revenue</b>	<b>Type of Financial Review</b>
Public Benefit Corporation	\$ 100,000 or less	Waive*
	More than \$100,000 but less than \$500,000	Review engagement*
	\$500,000 or more	Audit
Non-Public Benefit Corporation	\$500,000 or less	Waive*
	More than \$500,000	Review engagement*

\* note that approval to waive an audit or to waive both an audit and review engagement requires an extraordinary resolution – approval by at least 80 per cent of the votes cast at a special meeting of the members (including annual general meetings or if all voting members agree.

**Q How will the Act enhance member’s rights?**

A The Act will improve the rights of members of not-for-profit corporations.

A not-for-profit corporation may have different types of members, including non-voting and voting members, as long as at least one membership class has voting rights. Different classes or groups of members must be set out in the articles.

Corporations must set out the conditions for memberships in their by-laws.

**Q How will the new Act affect charitable corporations?**

A Organizations wanting to incorporate as charitable corporations no longer need approval from the Office of the Public Guardian and Trustee (OPGT) of the Ministry of the Attorney General. All applications for articles of incorporation will be submitted directly to ServiceOntario.

These organizations will also not need the approval of the Charities Directorate of the Canada Revenue Agency to incorporate. However, to issue tax receipts to donors, an organization must make a separate application to the Charities Directorate for a charitable registration number.

As it can be difficult to draft purpose clauses which legally qualify as charitable, the OPGT suggests applicants continue to use the pre-approved purpose clauses to describe the purposes of the corporation. These are available on the Attorney General’s website.

It will also no longer be necessary to add the special provisions, which set out some of the duties and obligations of the charity and its directors, to the articles of incorporation of charitable corporations. But the principles of the special provisions will continue to apply to the corporation as they reflect aspects of charities law

It is important to note that the OPGT will still need to pre-approve applications for articles of amendment, amalgamation and continuation. Applications for articles to change only the name of the charitable corporation will now require the approval of the OPGT.

**Q What should existing not-for-profit corporations do as they transition to the Act?**

A In general, the provisions of the Act will apply automatically to **existing corporations** where their incorporating documents (i.e., letters patent, supplementary letters patent, by-laws and special resolutions) don't say anything in a particular requirement of the Act. Existing not-for-profit corporations will have a three-year transition period once the Act is in force to amend their incorporating documents.

The government takes the position that at proclamation any provision in an existing not-for-profit corporation's by-laws, letters patent, supplementary letters patent, and special resolutions that was valid under the Corporations Act, will continue to be valid until the end of the three-year transition period or sooner if the corporation amends them to conform with ONCA.

Existing not-for-profit corporations are not required to change these documents upon proclamation but are encouraged to review their documents prior to the end of the transition period in order to make any necessary changes.

Organizations are encouraged to check the Ministry of Consumer Services' website for more information.

There are a number of tools available on the Ministry of Consumer Services' website and supports that not-for-profit corporations may use when preparing to transition to the Act. Not-for-profit corporations should:

- Read the plain-language guide to the Act that explains the sections that will likely have the most impact.
- Work through the transition checklist that provides some key considerations most existing not-for-profit corporations may wish to keep in mind to ensure compliance with the Act.

- Refer to the draft default by-law to help review and make any necessary changes to your by-laws during the transition. (It is important to note the default by-law does not apply automatically to existing not-for-profit corporations. Once the Act comes into force, the approved default by-law will apply automatically to newly incorporated not-for-profit corporations that do not pass an organizational by-law within 60 days after the date of incorporation).
- Network with other not-for-profit corporations similar to yours to find out how they might be addressing items.
- Talk to professionals such as accountants and other corporate advisors. The government has also given a grant to Community Legal Education Ontario (CLEO) to support not-for-profit corporations during the transition period.

If you do decide that you need legal advice, some organizations provide low-cost or free advice. These include:

- The Law Society Referral Service (1-800-268-8326), which provides you with the name of a lawyer or paralegal within or near your community, will provide a free consultation of up to 30 minutes to help you determine your rights and options.
- Legal clinics in your community that may offer pro bono legal assistance.

**Q Will the Ministry of Consumer Services be providing funding to support the sector in what for many not-for-profit corporations will be a complex transition? Is the Ministry of Consumer Services considering funding an external third party to provide an advisory service?**

A The ministry recognizes the importance of providing strong support to the sector. Many not-for-profit corporations are small organizations with minimal resources to expend on transitioning to the Act. The government has given a grant to Community Legal Education Ontario (CLEO) to support not-for-profit corporations during the transition period.

The Ministry of Consumer Services will continue to work closely with the Ontario Nonprofit Network (ONN) and sector partners on strategies to support the sector.

**Q Is the government considering amendments to the Act to address the Ontario Nonprofit Network's concerns prior to it coming into force to respond to stakeholders requests for changes?**

A The Ministry is committed to reviewing the Act, including the issues that ONN has raised on behalf of its members, following proclamation, based



on experience in the sector. Where the case for amendments that will improve the Act is made, reforms may be brought forward for the government's consideration.

In January 2013, an Implementation Steering Committee was created, co-chaired by the Ontario Nonprofit Network, to advise on tools for the sector and monitor implementation.

The Act is the result of an extensive consultation process that began in 2007. The Ministry of Consumer Services' efforts and resources are committed to working towards a smooth and efficient implementation of the Act.

The government introduced legislation in June 2013 that would, if passed, affect some parts of ONCA. For example, in response to stakeholders' requests, provisions that would give limited voting rights to non-voting members would not come into force for at least three years following proclamation of ONCA. Another proposed amendment would clarify the three year transition period. For additional information, please see Bill 85, the Companies Statute law Amendment Act, 2013 at [http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&Intranet=&BillID=2812](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2812).