



Session #205:
**Preparing for ONCA
compliance**

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What do you get when...

- You don't know much about the non-profit sector?
- You just copy what the Harper government did?
- You listen to the wrong people?
- You refuse to hear what those affected are saying?
- You rush the process?

You get ONCA ...

- Initial sector input ignored
- Listened, instead, to business lawyers
- Assumed Harper's law (CNCA) as model
- Legislative hearings in August, 2010, limited time for discussion



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ONCA – an opportunity missed

- Corporate law provides the organizational “bones” of corporate governance – **fundamental to non-profit operations**
- Updating sorely needed – current Act passed in 1917, updated in 1953
- Drafters' goal: copy business corporate law and federal non-profit corporate legislation



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The objective that should have guided reform

Encourage the growth and development of an increasingly healthy and vibrant non-profit sector through

- the removal of unnecessary regulatory barriers, and
- a supportive corporate regulatory regime



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Missing: permanent public benefit

If the organization

- has a public purpose and mission
- operates for the public good not personal gain.
- reinvests any excess revenue in its public purpose; and
- retains its assets in the public domain for the public good

It should always be a Public Benefit Corporation



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Key Ask: PBC asset lock

Provide a permanent asset lock - on dissolution for all non-profit organizations that opt to be Public Benefit Corporations

The public – and government - can feel confident that a PBC

- will always remain devoted to social purposes, and
- its assets remain permanently in the public domain for the public good, and not private gain.

Most non-profit housing projects are under HSA, and an asset lock is, essentially, there – consent required for transfer, etc.



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Law of Unintended Consequences

- ONCA assumed non-profits aren't sufficiently responsive to their membership
- Gave members the ability to pass resolutions and bylaws without prior approval from the Board of Directors
- Extended voting rights to non-voting members

The result: membership base now often restricted to those individuals who serve on their Board of Directors - loss of inclusiveness and community involvement



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Other key ONCA issues

- 21 days lead time for distribution of financial statements
- Requirement that the Chief Executive Officer assumes Board of Director responsibilities upon the resignation of the entire Board.



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How we got to where we are now

- Consultation with sector in 2007, responsible ministry shifted 3 times
- Tabled in the Legislature on closure, Spring 2010
- Passed (but not proclaimed) in Fall of 2010
- ONN requested legislative amendments
- Productive dialogue with sector began in 2012
- Bill 85 addresses minor (not major) issues – not passed yet



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Current Status

- The Ontario Government has delayed ONCA indefinitely
- Bill 85 needs to be passed, and some new programming finished
- Promises two years' warning, and three year transition period to adjust
- ONN's Implementation Steering Committee
- Grant to CLEO for support



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What Proclamation Means under ONCA

- Sections of the Act not covered in by-laws take effect immediately upon proclamation.
 - Proxies – or secret voting by absent members
 - Member Rights (exception with Dissent Rights)
 - Financial Statements (right to receive 21 days prior to meeting)



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Three-Year Transition Rule

- By-laws or letters patent (now, Articles) are valid under the old Act and for three years after ONCA in force
- Provisions in conflict with the new Act, will cease to be valid after those three years or sooner - if amended to conform with the new Act [Bill 85].
 - Example: classes of members – now must be in Articles
- Voting right for all members unless in Articles



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Director duties, protection

- Modernized duty: reasonable care, honestly, in good faith and in the best interests of the corporation
 - Indemnification vastly better
 - Can purchase liability insurance
- Changing # must be in Articles – insert range



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ONCA PBC definition

- Charities are always and permanently PBC – minimum of three directors, and have a higher threshold of accountability.
- Non-charities receiving a total of \$10,000 (from third party) become temporary Public Benefit Corporations (yo-yo corporations) for three years beginning at the annual meeting after the grant.
- Affects audit requirements, # of employee directors, asset distribution



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ONPHA's Model By-laws

- ONPHA has prepared bylaws that are compliant with both Ontario Corporations Act and ONCA – two models – directors as members/broader membership
- Anytime's a good time to review your current Bylaws
- Getting on top of ONCA changes is a bonus



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Key bylaw clauses

- The agenda must include the general nature of any other business to be dealt with at the meeting
- Alternative to proxies: permit absent members to cast a secret ballot if
 - can verify votes were cast only by voting members and
 - cannot identify how member voted
- Quorum specified – o/w, majority of members & only at beginning of meeting



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Adopting by-laws

- Requirements for adopting by-laws and most special resolutions:
- Currently: Requires previously passed by Board of Directors
- ONCA: While normally, the bylaw is passed first by the Board, any member may propose a bylaw, and it must be placed on the annual members' meeting agenda - no need for prior directors' approval
- Both acts provide bylaw takes effect upon being passed by the Board



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Meeting participation

- Currently: does not allow electronic or telephone participation in members' meetings (does allow for directors' meetings).
- Proposed: Allow electronic and telephone participation in member and director meetings
- Proxies – mandatory, any person may hold a proxy
- Form of proxy must be distributed
- Alternative – secret ballot voting by absent members



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Standard of care - new

Each director and officer in exercising his or her powers and discharging his or her duties to the Corporation must

- act honestly, in good faith with a view to the best interests of the Corporation; and
- exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.



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Director Indemnification

Old:

Every director and officer of a company, and his or her heirs, executors and administrators, and estate and effects, respectively, may, with the consent of the company, given at any meeting of the shareholders, from time to time and at all times, be indemnified and saved harmless out of the funds of the company, from and against,

(a) all costs, charges and expenses whatsoever that he, she or it sustains or incurs in or about any action, suit or proceeding that is brought, commenced or prosecuted against him, her or it, for or in respect of any act, deed, matter or thing whatsoever, made, done or permitted by him, her or it, in or about the execution of the duties of his, her or its office; and

(b) all other costs, charges and expenses that he, she or it sustains or incurs in or about or in relation to the affairs thereof, except such costs, charges or expenses as are occasioned by his, her or its own wilful neglect or default.



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ONCA Indemnification

(1) A corporation **may** indemnify a director or officer ... against all costs, charges and expenses ... reasonably incurred in any action or proceeding in which the individual is involved because of an association with the corporation.

Advance of costs

(2) A corporation may advance money to a director, officer for the costs, charges and expenses of an action or proceeding ...



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Insurance

- Explicit authority in ONCA to obtain directors & officers liability insurance
- Caution– charities previously required the approval of the Superior Court of Justice
 - Cannot be indemnified if failed to act honestly and in good faith
 - insurance policy must not impair charity's right to bring an action against the executor, trustee, director or officer



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Removal of a Director

- Requirements for removing a director:
- Currently: directors can only be removed by a vote by two-thirds majority of the members
- ONCA: directors can be removed by a simple majority of members



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Resources

- Contact me: biler@ilercampbell.com
- ONN April 2013 Brief: <http://theonnc.ca/wp-content/uploads/2011/06/ONCA-Backgrounder-Amendments-April-2013-1.pdf>
- CLEO is funded to do educational work on ONCA – here's their website: <http://nonprofitlaw.cleo.on.ca/>
- ONPHA's Model Bylaws - forthcoming

