



The *Ontario Not-for-Profit Corporations Act, 2010*: A modern era for not-for-profit corporations in Ontario

November 10, 2021

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Health Law Group

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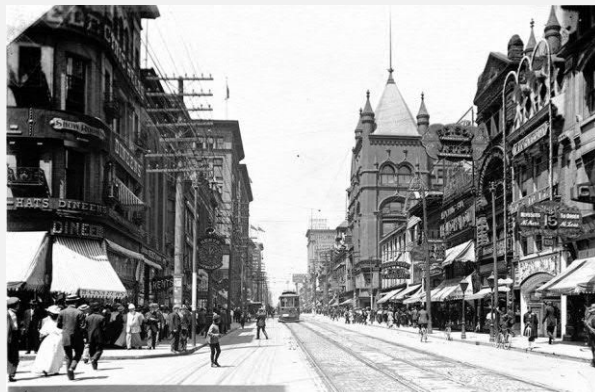
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Corporations Act



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▼ Not-For-Profit Corporations Act (Ontario) (ONCA)

- The Act revises the law in respect of not-for-profit corporations incorporated under the laws of Ontario
- Modelled after the regime in place for for-profit corporations
- Received Royal Assent on October 25, 2020
- Proclaimed into force on October 19, 2021
- Replaces the Corporations Act (Ontario) for most Ontario not-for-profit corporations

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▼ Non-Share Capital Corporations



Charity



Non-Profit

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Transitioning to the Act

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Time/deadlines for transition

- Upon ONCA being proclaimed in force, Part III of the Corporations Act was repealed
- ONCA applies to existing corporations
- Current Letters Patent and By-laws will continue to apply
- Existing corporations will have 3 years to file articles of amendment to amend Letters Patent and amend By-laws, etc. to conform to ONCA
- After 3rd anniversary, non-compliant provisions will be *deemed* to be amended to be in conformity with the requirements of the New Act

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▼ Exceptions to 3 year rule

Provisions regarding the following matters if contained within a corporation's by-laws or special resolutions on October 19, 2021 will continue to apply after the 3 year period until articles of amendment are endorsed:

- Number of directors
- Two or more classes or groups of members
- Voting rights of members
- Delegates under section 130 of the OCA
- Distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution

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▼ Process to Transition Existing Corporations

- Establish roles / timing / approvals for process
- Consider your organization's current practices versus what is prescribed in your current documents
- Review documents for conformity to desired governance structure
- Review documents for compliance with ONCA
- Create term sheet or other summary
- Create definitive documents – articles/by-laws/policies
- Obtain approvals / file documents

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▼ Gather and Review Relevant Documents

- Letters Patent and any Supplementary Letters Patent
- By-Laws – ensure you have all amendments
- Terms of Reference for Board Committees
- Board resolutions that designate additional Board offices and descriptions of their duties
- List of Directors and Members
- A copy of the ONCA and Regulations or a comprehensive summary of each and the government issued standard organizational by-law (once issued)
- Prior year's financial statements

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▼ Amending Letters Patent

	Old Act	New Act
Terminology	Letters Patent Supplementary Letters Patent Letters Patent of Amalgamation Letters Patent of Continuance	Articles of Incorporation Articles of Amendment Articles of Amalgamation Articles of Continuance
Corporate Approval Process to amend above	Special Resolution (Board plus 2/3 members voting thereon)	Special Resolution (2/3 of members voting thereon)
Government Approval Process	Discretionary	As of right
Public Guardian & Trustee Approval Process	Required for charities	No longer required so long as "after acquired property clause" is included

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▼ Completing application for Articles

- Need to insert a company key – mailed to registered office
- Company email address
- Requested date of articles
- Confirmation of Authorization- warning re penalties
- Name: 4 options for English and French
- Number of Directors – fixed or min/max
- North American Industry Classification System (“NAICS”) code
- Is the corporation a charity? Does the corporation have consent from PGT not to use the “After Acquired Property clause”

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▼ New role for PGT viz Articles

	Old Regime	New Regime
Approval of PGT required for incorporating documents and amendments	Yes	No longer required so long as after acquired property clause is included
Corporation required to provide the following with incorporating documents and amendments:		
Copies of formation document (articles etc. and amendments)	Yes	Yes but Service Ontario will provide it
Street & mailing addresses of corporation and directors and officers	Yes	Yes but Service Ontario will provide it on incorporation; thereafter corporation must provide it
3 years worth of financial statements	Yes	No

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▼ After Acquired Property Clause

All funds and other property held by the corporation immediately before the articles become effective or that are received subsequently by the corporation pursuant to any will, deed or other instrument made before the articles become effective, together with any income or other accretions to the funds or other property, will be applied only to the purposes of the corporation as they were immediately before the articles become effective

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▼ Amending By-Law

- Decision: model or more expansive by-law
- Generally, can come into effect following board approval (majority vote); will cease to have effect if not confirmed by members (2/3 approval) at the next following meeting of members
- Must provide specific notice of amendment in notice of meetings of directors and members

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Public Benefit Corporations

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Classification of Corporations

- **Public Benefit Corporation - Charitable:**
 - A corporation incorporated for charitable purposes – uses common law definition
- **Public Benefit Corporations – Non-Charitable:**
 - A corporation that is not a charitable corporation but receives more than \$10,000 in a financial year in funding from:
 - public donations from persons who are not members, directors, officers, or employees, or
 - grants or similar financial assistance from the federal, provincial or a municipal government or an agency of any such government body
- **Non-Public Benefit Corporation:**
 - All other not-for-profit corporations

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▼ Timing for change in status

December 2020

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1	2	3	4	5
6	7	8	9	10 10k	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31 Year End		

April 2021

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15 AM	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

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Level of Financial Review

	Gross Annual Revenue	Type of External Financial Review	Type of Resolution required to avoid Full Audit
PBC	\$500,000+	Full Audit	N/A
	\$100,001 to \$499,999	Review Engagement	Extraordinary (80%) of those entitled to vote, must be renewed annually
	\$0 to \$100,000	None Required	Same as above
Non-PBC	\$500,001+	Review Engagement	Same as above
	\$0 to \$500,000	None Required	Same as above

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Board and Members Matters

	PBC	Non-PBC
Board Composition Requirements	Minimum 3 directors, not more than 1/3 may be employees of PBC or affiliates	Minimum 3 directors
Entitled to Members dissent rights?	No	Yes

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On Dissolution etc

	PBC	Non-PBC
Entitled to receive FMV for membership interests	No	Yes
To whom may residual assets on dissolution be distributed?	A charity or non-charitable corporation with similar purpose or to a government agency	Rateably among its members, unless articles state otherwise**
*BUT if it was a PBC in any of 3 years prior to year of dissolution then deemed a PBC		

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Members & Basic Members Rights

Laurie Turner

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Members versus Directors



As a reminder...

- Members and directors have distinct roles within a corporation – *even if members and directors are one and the same*
- Members are similar to shareholders of a for-profit corporation (but are not “owners”)
- Directors are responsible for the management (or supervision of the management of) the corporation’s activities and affairs
- Directors have fiduciary obligations; members do not

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▼ Election and Removal of Directors

- Generally, members elect directors at annual meetings
- Members can (subject to exception for ex-officio directors) **remove directors by ordinary resolution**
- The remaining directors may fill vacancies except where:
 - Members have filled vacancy (at meeting at which a director was removed)
 - A quorum of directors does not exist
 - There has been a failure to elect the number or minimum number of directors established by the Articles
 - A membership group or class has an exclusive right to elect the director whose vacancy is being filled
 - The By-laws provide otherwise

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▼ Audits & Review Engagements



- Audit versus review engagement
- Members have right to appoint auditor or person to conduct review engagement and set the remuneration for such person
- Subject to one exception, **members may remove auditors or person conducting review audit by ordinary resolution**
- A quorum of directors may fill vacancy in respect of an auditor or person conducting a review engagement where members have not done so *unless the By-laws provide otherwise*

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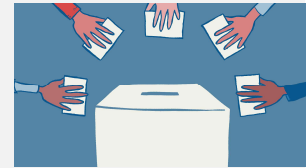
▼ Members' Meetings

- Notice of members' meetings must be given in accordance with By-laws, but in any case, not less than 10 days and **not more than 50 days** before the meeting is to occur
- Where "special business" will be transacted at the meeting, the notice must:
 - ☑ **State the nature of business in sufficient detail to permit a member to form a reasoned judgment on the business**
 - and**
 - ☑ **Include the text of any special resolution that will be submitted to the meeting**

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▼ Methods for Voting



- Voting is by show of hands, unless the by-laws otherwise require or a ballot is demanded
- **Members may vote by proxy only if permitted by Articles or By-laws (which may specify that proxyholder must be a member)**
- A corporation may also provide in its by-laws for **voting by mail** or by telephonic or electronic means (in addition to or instead of proxy-voting) but only if:
 - ☑ **it has been verified as having been given by a member entitled to vote**
 - and**
 - ☑ **the corporation is not able to identify how each member voted**

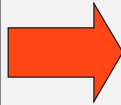
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▼ Rights of Non-Voting Members

Corporations Act

- Non-voting members no votes under any circumstances



ONCA

Non-voting have voting rights if:

- Extraordinary sale
- Amalgamation
- Continuance to another jurisdiction
- Change to any rights or conditions attached to non-voting members or change the rights of other classes of members relative to the rights of the non-voting members

*Subject to next two slides

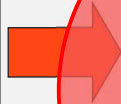
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▼ Rights of Non-Voting Members & Fundamental Changes

- ONCA does not include any right for non-voting members to vote – this means, non-voting members remain just that – non-voting!
- *Voting* members still have the right to approve fundamental changes but there are no class approval rights (i.e. no right of class or group to vote separately on certain fundamental changes) -> this is distinct from federal non-profit legislation (CNCA)

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▼ Fundamental Changes

Include (but are not limited to) amendments to Articles to:

- ✓ Change the corporation's name
- ✓ Create a new class or group of members
- ✓ Change a condition of membership
- ✓ Change the purposes of the corporation
- ✓ Add, modify or remove provisions re transfer of membership



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Inspection Rights



Members may examine and take extracts of various records of the corporation including minutes of board and members' meetings, past board and members' resolutions, register of directors, officers and members, provided that:

- Right to take extracts of documents is subject to payment of reasonable fee – other than Articles and By-laws, which members are entitled to receive (1x) for free
- Examination must occur during corporation's regular office hours
- Members' register is subject to additional restrictions

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Inspection Rights (Cont.)

What information?	When?	Action Required by Member
<ul style="list-style-type: none"> ✓ Financial statements ✓ Report of the auditor or person who conducted review engagement ✓ Any further information respecting the financial position of the corporation and the results of its operations required by the Articles or the By-laws 	<ol style="list-style-type: none"> 1. At annual meetings 2. Not less than 5 days prior to any annual meeting 	<ol style="list-style-type: none"> 1. None. Stated information must be presented to members 2. Must inform corporation of desire to receive the information in advance
<ul style="list-style-type: none"> ✓ A copy of the financial statements of each of its subsidiaries and of each body corporate, in each case the accounts of which are consolidated in the financial statements of the corporation 	On request, during office hours	Member (or attorney or legal representative) must make a request to examine such records

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▼ Right to Requisition Meeting

- Members holding at least 10% of the votes to be cast at the meeting to be held (or lower % set by By-laws) may requisition the directors to call a members' meeting
- Requisition:
 - *May* consist of a number of documents
 - Must be signed by the requisitioning members
 - Must state the business to be transacted at the meeting
 - Must be sent to each director and the corporation's registered office
- Subject to few exceptions, failure of the directors to call a properly requisitioned meeting within the specified time period (21 days) will trigger right of any requisitioning member to call the meeting directly



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▼ Member's Proposals & Members' Remedies

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Remedies

Corporations Act
Limited remedies
available to members
in respect of unjust or
inequitable conduct



ONCA
Much broader
remedies available to
members

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Remedies (Cont.)

ONCA provides members with numerous remedies:

- Removal of directors by ordinary resolution
- Increased access to financial information of the corporation
- Right to requisition meeting



Each of which were detailed in last presentation

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▼ Remedies (Cont.)

- Member's proposals
- Dissent rights in respect of prescribed fundamental changes (only applicable to non-PBC)
- Apply to the court:
 - For a compliance order
 - To require an investigation of the corporation
 - For permission to act in the name of the corporation or intervene in an action in which the corporation is a party (i.e. derivative action)
 - For an order winding-up the corporation



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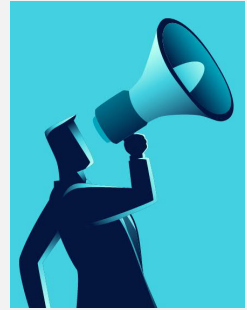
In a nutshell...



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Right to Make a Proposal



- Any member having a right to vote at an annual meeting is entitled to:
 - ✓ Give notice of any matter that the member proposes to raise at the meeting
 - ✓ Discuss at any meeting any matter with respect to which the member would have been entitled to submit a proposal
- Proposals:
 - Must be submitted at least 60 days before the meeting and must not exceed the prescribed length
 - Subject to limited exceptions, must be included with the notice of meeting and, if requested by the member, must be accompanied by a statement in support of the proposal by the member who submitted the proposal together with the member's name and address
 - May include nominations for the election of directors if the proposal is signed by not less than 5% of members (or lower % set in By-laws) of a class or group of members entitled to vote at the meeting at which the proposal is to be submitted

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Right to Make Proposal (Cont.)

However.... a corporation is not required to comply with the requirements pertaining to proposals in the prescribed circumstances, including (for example) where:

- It appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation, its directors, officers or members
- It clearly appears that the proposal does not relate in any significant way to the corporation's activities or affairs
- In the last two years:
 - The member failed to present a proposal that they submitted and was included in a notice of meeting of members
 - Substantially the same proposal was submitted to members in a notice of meeting and the proposal was defeated

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▼ Dissent Rights

- Where a corporation resolves to make certain fundamental changes, a member who has the right to vote on a resolution in respect of same has a right to dissent (subject to certain exceptions)
- Only applies where the corporation is not a PBC
- Process for dissent is prescribed by ONCA – includes the member's provision of an objection of a proposed fundamental change
- Corporation must provide notice of any resolution that has been passed to each member who filed an objection; notice must set out the rights of the dissenting member and procedures to be followed to exercise dissent rights

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▼ Dissent Rights (Cont.)

- In response, member may give notice to the corporation that includes a demand for payment of the fair value of member's membership interest
- Member's delivery of notice of demand for payment triggers termination of such member's membership interests – subject to certain exceptions
- Corporation is required to give dissenting members notice of its offer to pay OR notification that it is unable lawfully to pay
- If no offer is made or member rejects the offer, an application can be made to the court to fix the value of the membership; court may appoint appraiser(s)

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▼ Compliance Order

- Members (and prescribed former members) may apply to the court to make an order directing:
 - the corporation
 - any director, officer, employee, agent, auditor, trustee, receiver, receiver-manager, or liquidator of the corporationto:
 1. comply with ONCA, its regulations, or the corporation's Articles or By-laws; or
 2. restrain such person from acting in breach of the foregoing
- Court may make any further order that it sees fit



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▼ Derivative Actions

- Members (and prescribed former members) may apply to the court to make an order granting the member leave:
 - to bring an action in the name of and on behalf of a corporation or any of its subsidiaries
 - to intervene in an action to which the corporation or any of its subsidiaries is a party, to prosecute, defend or continue the action on its behalf
- Court can only make an order of the nature described above if it is satisfied that the prescribed conditions are met – including that the corporation is not a religious corporation
- Court can make any order it thinks is fit

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Investigative Order

- Members may apply to the court to direct an investigation to be made of the corporation or any of its affiliated corporations
- Court has broad powers in connection with such investigations – e.g. to appoint or replace inspector; authorize an inspector to enter any place in prescribed circumstances; to require a person to produce documents
- Court's power is subject to condition that it may only exercise such powers where it appears to the court that one of the prescribed actions or omissions has occurred



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Order to Wind-Up

- A corporation may be wound up by order of the court if the court is satisfied that any of the prescribed actions or omissions has occurred; for example where:
 - ✓ the powers of the directors have been exercised in a manner that is unfairly prejudicial or unfairly disregards the interests of members, etc.
 - ✓ the members have authorized (by special resolution) an application to be made to the court to wind-up the corporation
- Wind-up order may be made in response to a member's application (among other things)
- Court has broad discretion in responding to an order, including to grant the order, dismiss the application or appoint a liquidator
- If corporation is wound-up, court may make an order dissolving the corporation in response to any application of a liquidator or other interested person

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Directors & Officers

Victoria Mitrova

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Notable Changes



- Composition of the Board
- Term of Directors
- Standard of Care for Directors
- Directors' Deemed Assent
- Directors' Conflicts of Interest
- Changes in Required Officers

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▼ Composition of the Board

- Still must have a minimum of 3 directors, **but they no longer need to be members**
 - For PBCs, no more than 1/3rd of directors can be employees
- *Ex officio* directors **are** permitted
- Articles can provide for a min./max. # of directors
 - **One-time special resolution can give directors power to fix # within min./max.**

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▼ Term of Directors

- Directors are elected at AGMs via ordinary resolution **for a term of no longer than 4 years**
 - **No limit on number of terms**
- Staggered terms **are** permitted
- Directors are able to appoint additional directors between AGMs
 - # appointed cannot exceed 1/3 of directors elected at prior AGM

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▼ Term of Directors (cont'd)

- Directors **must provide written consent** to take office within 10 days of election/appointment
 - Consent can be given outside of 10 day period
 - Does not apply to directors re-elected/re-appointed without break in term
- Directors may be removed by **ordinary resolution** (except for *ex officio* directors)
 - If director elected by specific group/class of members, only that group/class can remove the director

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▼ Standard of Care

- ONCA sets an **objective** standard of care for directors and officers

What does this mean?

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

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▼ Standard of Care (cont'd)

- ONCA includes a **reasonable due diligence defence**
 - **Directors** not liable 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 from officers/employees or certain professionals

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▼ Directors' Deemed Assent

- Director present at meeting **deemed to have consented** to any resolution passed unless:
 - Dissent is entered into minutes;
 - Director requests dissent is entered into minutes;
 - Director gives dissent to secretary *before* meeting terminated; or
 - Director submits dissent immediately *after* meeting terminated.
- **Absent directors deemed to have consented** unless they dissent within 7 days of becoming aware of resolution

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▼ Directors' Conflict of Interest

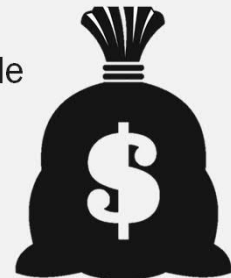
- ONCA broadens conflict of interest provisions
 - Apply to both directors **and officers**
 - Apply where director/officer is (1) party to or (2) **a director or officer of, or has a material interest in, any other person** who is party to a material contract or transaction with corporation
- Directors cannot attend meeting and cannot vote on resolutions
 - Remaining directors can constitute quorum
- If all directors are conflicted out, ONCA authorizes members to approve matter

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▼ Directors' Conflict of Interest (cont'd)

- Subject to the articles and by-laws, directors able to fix remuneration of directors, officers, and employees
- Directors, officers and members can receive reasonable remuneration and expenses for any services to the corporation in another capacity
- Be aware of special rules for **charities**
 - Directors of charities cannot be paid for acting as directors
 - However, charities can now pay for other services provided by a director or a person "connected to a director"
 - In addition to ONCA, other rules have to be followed



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▼ Changes in Required Officers

- Directors can designate offices, appoint officers, and may specify their duties and delegate their powers to them, subject to certain limitations
- ONCA only requires that the directors appoint a **chair**

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▼ Exceptions for Public Hospitals

Briana Maguire

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▼ Special Provisions for Public Hospitals

- Rotation of directors – max 5 year term
- Special directors – life, term, or honorary directors may be appointed
- No voting by proxy permitted
- Not necessary to send notice of meetings to each member

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▼
Q&A

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Reference Materials

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ONCA - Ontario's New Not-for-Profit Corporations Act is Now in Force

READING TIME

22 MINUTE READ

OCTOBER 21, 2021

Charities and Non-Profit Bulletin

On October 19, 2021, the *Not-for-Profit Corporations Act*, 2010 (Ontario) (the "ONCA") was proclaimed into force and replaced the *Corporations Act* (Ontario) (the "OCA"), which regulated Ontario's not-for-profit corporations before the proclamation of the ONCA. The ONCA signals the dawn of a modern era for Ontario's not-for-profit corporations, providing a regulatory framework similar to that available to Ontario's for-profit corporations under the *Business Corporations Act* (Ontario) (the "OBCA"). It will free Ontario's not-for-profit corporations from many of the oft-not observed restrictions contained in the OCA. In these ways, the ONCA follows in the footsteps of the *Canada Not-for-Profit Corporations Act* (the "CNCA"), which received Royal Assent on June 23, 2010 and regulates federal not-for-profit corporations.

This bulletin highlights a number of key features of the ONCA. It is necessarily summary in nature. Please contact any of the authors of this bulletin for additional information regarding any specific provision of the ONCA.

▼ Application of the ONCA

The ONCA applies to companies without share capital with the following exceptions:

“corporations sole” incorporated by or under: (i) a general or special Act of Parliament of the late Province of Upper Canada; (ii) a general or special Act of Parliament of the late Province of Upper Canada that has its registered office and carries on its activities in Ontario that was incorporated with purposes that are within the legislative authority of the Province of Ontario;^[1]

corporations without share capital that are subject to the *Co-operative Corporations Act* (i.e. co-operative corporations, a “Co-op”) or Part V of the OCA (i.e. insurance corporations);

corporations with social purposes. These corporations will continue to be subject to the OCA until November 14, 2022, after which time they will be required to continue as a non-share capital corporation under the ONCA, a Co-op, or share capital corporation under the OBCA; and

a corporation incorporated for the construction and working of a railway, an incline railway or a street railway.

Notably, if there is a conflict between any provision of the ONCA or a regulation made under it and a provision of any other Act or regulation applying to a body corporate without share capital, the provision in such other Act or regulation (as the case may be) will prevail. Similarly, to the extent that any provision of the ONCA or a regulation made thereunder relating to a charitable corporation conflicts with a provision of any other law relating to charities (including any Act, regulation or rule or principle of common law), the provision of the other law will prevail.

▼ Incorporation and Continuance under the ONCA

The ONCA institutes a procedure by which applicants may incorporate as of right on submission of articles of incorporation and other required information and payment of the applicable fees. While this procedure differs from the procedure under the OCA (by which incorporation remains at the discretion of the Minister of Government and Consumer Services), it mirrors the procedure applicable to incorporation pursuant to the CNCA and the OBCA.

Corporations under the ONCA must set out their purposes in their articles; however, subject to any restrictions in the regulations, the purposes may include any purposes within the legislative authority of Ontario and corporations have the capacity and, subject to the ONCA, the rights, powers and privileges of a natural person.^[2] Unlike the OCA, the ONCA permits corporations to have purposes that are commercial in nature, provided that the corporation's articles must provide that any such commercial purposes are intended solely to advance or support one or more of the non-profit purposes of the corporation. Notwithstanding the foregoing, not-for-profit corporations that are also registered charities must continue to comply with the requirements of the *Income Tax Act* (Canada) and Canada Revenue Agency's policies on related business.

Not-for-profit corporations that are subject to the ONCA will have until October 19, 2024 to take the necessary steps to bring their governing documents (i.e. letters patent and by-laws) into compliance with the ONCA (failing which, the corporation's governing documents will be deemed to be amended, subject to certain exceptions, to comply with the ONCA).^[3]

▼ Nature of Corporations

The ONCA distinguishes between two basic categories of corporation. A corporation may be a "public benefit corporation" (similar to the concept of a "soliciting corporation" under the CNCA) or not a public benefit corporation (what the CNCA terms a "non-soliciting corporation"). Not surprisingly, public benefit corporations are subject to more stringent controls in a number of key areas than are non-public benefit corporations.

Again, it is no surprise that "charitable corporations" are automatically considered public benefit corporations. The definition of "charitable corporation" established by the ONCA is a corporation incorporated for "the relief of poverty, the advancement of education, the advancement of religion or other charitable purpose". Presumably, the "other charitable purpose" will be defined by common law and will allow for the evolution of the concept of a charitable corporation. On the other hand, a non-charitable corporation (which the ONCA defines to be any corporation that is not a charitable corporation) will be considered a public benefit corporation only if it receives more than \$10,000 (or other prescribed amount)^[4] in a financial year in the form of:

- donations or gifts from persons other than its members, directors, officers or employees; or
- grants or similar financial assistance from the federal, provincial or municipal government or an agency thereof.

Since the categorization of a corporation as a public benefit corporation will affect numerous matters relating to its corporate governance, for a non-charitable corporation whose status would otherwise shift during the course of a financial year from non-public benefit to public benefit, it is deemed not to change its status to a public benefit corporation during the financial year; instead, the corporation's status will only change as of the date of the first annual meeting in the subsequent financial year.

▼ Registered Office

The head office of every corporation incorporated before the proclamation of the ONCA is deemed to be the registered office of the corporation. The registered office must be in Ontario and, subject to change by resolution or special resolution (as further detailed below), at a place specified in its articles. The directors of a corporation may – without the consent of the corporation's members – change the location of the registered office provided that the registered office remains in the same municipality or geographic township. If the corporation wishes to change the municipality or geographic township of its registered offices, such change must be approved by a "special resolution" of the members.^[5]

Generally, records of the corporation required to be maintained by it must be retained at its registered office or at another location in Ontario designated by the directors. In certain circumstances, provided they remain available for inspection at the registered office, including by technological means, and provided the corporation provides the necessary technical assistance to facilitate access to the

records, the records may be kept outside of Ontario.^[6] Directors are to be given access to all mandated records, while members are entitled, on payment of a reasonable fee, to take extracts from certain records only (members are entitled free of charge to one copy of the articles and by-laws, including amendments). Members also have rights, on satisfaction of certain conditions, to access member registers and lists of members, provided the information or list is not used otherwise than in connection with an effort to influence member voting, requisitioning a member meeting or another matter relating to the affairs of the corporation. The ONCA contains provisions that allow both the corporation and members to apply to court for orders limiting or denying access to records or information required to be kept by the corporation.

▼ Special Resolution

One notable change between the OCA and the ONCA, is the definition given to the term “special resolution” by these Acts. Under the OCA, a “special resolution” is a resolution that is passed by the corporation’s directors and confirmed (with or without variation) by: (i) at least two-thirds of the votes cast on such resolution at a general meeting of the members called for that purpose; or (ii) way of a written resolution, executed by all of the members that would be entitled to vote at a meeting called for the purpose of approving the resolution. On the other hand, a “special resolution” under the ONCA does not require the consent or approval by the corporation’s directors. Accordingly, where the ONCA requires a matter to be approved by way of “special resolution”, the approval of the corporation’s members (either at a meeting or by way of written resolution, subject to the thresholds referenced in this paragraph in (i) and (ii) above) is all that is required.

▼ Directors and Officers

One of the most welcome changes from the OCA is the elimination of the requirement that a specified percentage of the directors of the corporation must be members (unless the by-laws otherwise provide). However, every corporation must have a minimum of three directors and not more than one-third of the directors of a public benefit corporation may be employees of the corporation or any of its affiliates (they may, however, be officers, as long as they are not also employees). Directors are elected by ordinary resolution of the members for a term of not more than four years, as provided in the by-laws of the corporation. Staggered terms of office for directors are permitted. In a departure from the CNCA, *ex officio* directors (i.e. individuals who are directors solely by virtue of an office that they occupy – e.g. the CEO of a related foundation) are also permitted. Except for *ex officio* directors, directors may be removed from office by ordinary resolution at a special meeting of members; provided that if a group or class of members is exclusively entitled to elect that director, only that group or class of members may remove such director.

The ONCA permits existing directors to appoint additional directors until the close of the next annual meeting without any special authorization of the members, provided the total number so appointed does not exceed one-third of the number elected at the previous annual meeting.

While an individual must provide their consent to being elected or appointed as a director within 10 days of their election or appointment, like the OBCA, the ONCA permits such consent to be given retroactively outside the 10 day consent period. In addition, the foregoing requirement for consent does not apply to a director who is re-elected or re-appointed without any break in their term of office.

Unless the articles or by-laws otherwise provide, directors may meet at any place and on any notice that the by-laws require and a majority of directors constitutes a quorum for directors' meetings. As long as a quorum remains, despite any vacancy in the board, the directors may continue to exercise all of the powers of directors.

Subject to the articles or by-laws, the directors may designate offices, appoint officers, and may specify their duties and delegate their powers to them, subject to certain limitations. There is no longer a requirement that a president of a corporation be appointed; however, like the OCA, the ONCA requires that the board of directors appoint a chair from amongst themselves (such that the chair will necessarily be a director of the corporation).

Like the OBCA, the ONCA expressly sets out the standard of care by which directors and officers are to abide in exercising their powers and carrying out their duties. They must act honestly and 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. A reasonable due diligence

defence is included in the ONCA entitling directors to rely in good faith on certain financial information and reports of officers or employees of the corporation in certain circumstances and on reports of certain experts.

The ONCA, like the CNCA, however, does not itself immunize directors from liability they may incur as a result of serving as a director of a not-for-profit corporation. The ONCA does, however, permit corporations to indemnify their directors and officers, former directors and officers and individuals acting in that or a similar capacity of another entity, provided that such indemnification may only be provided where:

- the individual acted honestly, in good faith and with a view to the best interests of the corporation or other entity (as the case may be); and

- if the matter is a criminal or administrative proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that his or her conduct was lawful.

The ONCA also permits corporations to purchase insurance for the benefit of those for whom indemnification is available, provided that charitable corporations are only permitted to purchase such insurance where they are permitted to do so by the Ontario *Charities Accounting Act* or a regulation under that Act permitting the purchase of such insurance or where the corporation, or a director or officer of the corporation, obtains an order of the court authorizing such purchase.

Conflicts of interest are dealt with by a disclosure and refraining from voting regime similar to that under the OBCA. Significantly, the ONCA now expressly recognizes a conflict in circumstances where a director is a director or officer of, or has a material interest in, any other person who is party to a material contract or transaction with the corporation. If all of the directors are conflicted and unable to vote on a proposed material contract or transaction as a result of that conflict, the ONCA specifically authorizes the members to approve the matter, thus recognizing a practice that many corporations with overlapping boards having transactions between them have adopted. If no quorum exists for the purpose of voting on a resolution to approve a contract or transaction only because a director is not permitted to be present at the meeting by reason of a conflict, the remaining directors are deemed to constitute a quorum for the purposes of voting on the resolution.

The ONCA provides that, subject to the articles or by-laws, directors may fix their remuneration and that of the officers and employees of the corporation and directors, officers and members may receive reasonable remuneration and expenses for any services to the corporation in another capacity. Notwithstanding the foregoing provisions of the ONCA, corporations that are also registered charities are subject to broad restrictions imposed by the Ontario *Charities Accounting Act* in respect of payments to directors. For this reason, registered charities must consult the Ontario *Charities Accounting Act* prior to making any payments to their directors.

▼ Members' Rights

The ONCA gives extensive voting rights and remedies to members of not-for-profit corporations, very similar to those existing for shareholders under the OBCA and for members under the CNCA. Unlike the CNCA and the OBCA, however, there is no mechanism for a unanimous member or shareholder agreement that would otherwise remove the powers of the directors and give them to the members.

Any member entitled to vote at an annual meeting may submit a proposal concerning any matter he or she may wish to raise at a meeting and discuss any matter at the meeting which he or she would have been entitled to submit in a proposal. The proposal, and a statement in support thereof with the member's name and address, must be included in the notice of the meeting if the member requests, provided the member pays the costs associated therewith. A proposal may include nominations for the election of directors provided that the proposal is signed by not less than 5% of the members of a class or group of members (or lower percentage set forth in the corporation's by-laws) who are entitled to vote on the resolution.^[7]

Like the OBCA, the ONCA contains certain exceptions from these member rights to guard against abuses in its use. Members holding at least 10% of the votes that may be cast at a meeting, or such lower percentage as may be set out in the by-laws, may requisition the calling of a meeting of members and the directors must comply with that requisition, subject to certain standard exceptions, failing which, the requisitioning members may call the meeting themselves. The ONCA also includes a provision allowing a court to order that a meeting of members be held, on application by a director or a member entitled to vote.

Subject to the by-laws, the quorum for a members' meeting is a majority of those entitled to vote at the meeting, present in person or by proxy. Unless the articles otherwise provide, each member is entitled to one vote at member meetings. Voting is by show of hands, unless the by-laws otherwise require or a ballot is demanded. A corporation may also provide in its by-laws for voting by mail or by telephonic or electronic means, in addition to or instead of voting by proxy. However, voting by mail or by telephonic or electronic means may only be used if the votes may be verified as having been given by members entitled to vote and the corporation is not able to identify how each member voted.

The ONCA provides that members may only vote by proxy if the corporation's articles or by-laws permit proxy voting. The corporation's articles or by-laws may also require that proxyholders be members of the corporation. Where proxies are permitted by the corporation, proxy holders will generally have the same rights as the members appointing them to speak at the meeting, to vote by ballot and, except where they have conflicting instructions from more than one member appointing them, to vote by show of hands.

Members are also given certain protective rights under the ONCA, similar to those available to shareholders of for profit corporations under the OBCA:

A member or debt obligation holder of a corporation may apply to the court for an investigation of a corporation or its affiliates and the court may make a broad variety of orders if it appears that the corporation's activities or those of its affiliates have been carried on with intent to defraud, the activities or powers of the directors have been carried on or exercised in a way that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the member or debt obligation holder, the corporation or its affiliates were formed or dissolved for a fraudulent or unlawful purpose or persons associated with formation, activities or affairs of the corporation or its affiliates have acted fraudulently or unfairly.

A "complainant" may apply to court for leave to bring a derivative action on behalf of a corporation. A "complainant" includes a member, officer or director of the corporation or its affiliates, a person who ceased to be a member, officer or director within the last two years and any other person who, in the discretion of the court, is a proper person to make an application. An order in respect of the commencement of a derivative action may not be made if the court is satisfied that the corporation is a religious corporation.

On compliance with stipulated procedural requirements, members of a corporation that is not a public benefit corporation are given rights of dissent and the right to be paid fair value for their membership interest if the corporation resolves to effect certain types of fundamental changes, such as amending its articles in a way that affects restrictions on its activities or powers, amalgamating, continuing or selling, leasing or exchanging all or substantially all of its assets.

A complainant or creditor of the corporation may apply to court for a compliance or restraining order against the corporation, any director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of the corporation in respect of compliance/breach with the ONCA, any regulations thereunder, the articles or by-laws of the corporation.

Conversely, the articles or by-laws of a corporation may provide that the directors, the members or any committee of directors or members have the power to discipline a member or to terminate their membership. If they do so provide, they must also set out the circumstances and the manner in which that power may be exercised. Any such disciplinary action or termination must be done in good faith and in a fair and reasonable manner, and the ONCA provides some guidance on what kind of procedure is considered to be fair and reasonable.

▼ Financial Matters

Subject to members passing an extraordinary resolution to have a review engagement instead of an audit or not to appoint an auditor and not to have either an audit or review engagement, at each annual meeting, members must appoint an auditor meeting the requirements under the *Public Accounting Act, 2004* and being independent of the corporation, any of its affiliates and the directors and officers of the corporation and its affiliates. The thresholds that permit corporations not to have an auditor differ for public benefit corporations and other corporations. For a public benefit corporation, a review engagement may be used if annual revenues for the financial year were more than \$100,000^[8] (or an amount prescribed by regulation) and less than \$500,000 (or such prescribed amount) or it may dispense with an auditor and not have either an audit or review engagement if annual revenue is equal to or less than \$100,000 (or such prescribed amount). For other corporations, the threshold for a review engagement is annual revenue of more than \$500,000 (or such prescribed amount) and for no auditor, audit or review, is annual revenue equal to or less than \$500,000 (or such prescribed amount). Consideration of such an extraordinary resolution, while not considered special business at an annual meeting, requires that the resolution passes by at least 80% of the votes cast at the meeting (or by written consent of all those entitled to vote at the meeting), a much higher threshold than the special resolution threshold used elsewhere in the ONCA.

Should a corporation choose to have an audit committee, a majority of its members must not be employees or officers of the corporation or any of its affiliates.

Members are entitled to financial statements on an annual basis which, after approval by the directors (and prior to that, the audit committee, if any), must be placed before the members at the annual meeting.

▼ Corporate Finance

Unless the articles or by-laws provide otherwise, directors are given powers similar to those given under the OBCA to borrow money on the credit of the corporation, to issue debt obligations, to give guarantees on behalf of the corporation and to grant security on the corporation's assets. Like the CNCA, the ONCA recognizes that corporations own property transferred or vested in them and do not hold the property in trust unless it was transferred expressly in trust for specific purposes.

No part of the corporation's profits or its properties may be distributed to a member, director or officer except in furtherance of the corporation's activities or as otherwise permitted by the ONCA. Subject to its articles and by-laws, a corporation that is not a public benefit corporation may distribute the fair value of a membership to a member on termination of that member's membership.

Members are not liable, as members, for any liability of the corporation or any act or default of the corporation, except as otherwise provided. The articles may provide for a lien on the membership for a debt owing by a member which may include an unpaid amount in respect of that membership.

▼ By-Laws

The ONCA requires the Director appointed under that Act to approve and make publicly available standard organizational by-laws that are compliant with ONCA for voluntary use by the corporation or by default, as noted below. The currently available standard by-laws can be found [here](#).

Unless the articles or by-laws otherwise provide, directors may make, amend or repeal any by-law regulating the activities or affairs of the corporation, except in respect of the following matters, which require a special resolution of members:

- an addition, change or removal of a provision respecting membership transfer;
- a change in the persons to whom property of the corporation is to be distributed on liquidation after liabilities are discharged;
- a change in the manner of giving notice to members entitled to vote at a meeting of members; and
- a change in the method of voting by members not in attendance at a meeting of members.

Although by-laws, amendments or repeals passed by directors are effective immediately (other than those specified in the bullets above), they must be put to the next meeting of members for approval. If such by-laws are not so put to the next meeting of members or they are put to the next meeting of members but rejected by the members, they will cease to be effective.

If the directors do not pass an organizational by-law within 60 days of the date of incorporation under the ONCA, the corporation is deemed to have passed the standard organizational by-laws approved by the Director under the ONCA (although they can thereafter be amended or repealed and replaced in accordance with the ONCA at any time).^[9]

▼ Fundamental Changes and Continuance

The articles of the corporation may incorporate any provisions that may be included in the by-laws, although the by-laws must set out the conditions required for being a member of the corporation. If so provided in the articles, however, a special resolution of members is required to make any amendment to these provisions. Like articles of incorporation, once articles of amendment have been received by the Director with any other prescribed information or documents and the required fee, the Director must issue the certificate of amendment.

Members must also approve certain other fundamental changes such as amalgamations and the sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of its activities.

The ONCA also provides for continuance of corporations from and into Ontario on satisfaction of certain conditions. A corporation is not permitted to apply for continuance outside Ontario unless the laws of the intended jurisdiction provide in effect that the property rights of the corporation continue, the corporation's liabilities continue, existing causes of action are preserved, proceedings of a civil, criminal, administrative, investigative or other nature may be continued and convictions, rulings, orders and judgments may be enforced notwithstanding the continuance.

Significantly, the ONCA allows corporations obtaining the requisite member approval by special resolution to carry out arrangements, provided that the court approve the arrangement. Like the OBCA, but unlike the *Canada Business Corporations Act* and the CNCA, it is not necessary that it be impracticable to effect the fundamental change sought by the arrangement other than by way of arrangement for the court to have jurisdiction to grant such approval. This should prove to be an effective tool for corporations proposing to implement multi-step reorganizations.

▼ Liquidation, Winding-Up and Dissolution

The ONCA contains a comprehensive regime relating to the liquidation, winding-up or dissolution of a corporation. Generally, the property of the corporation must first be applied to satisfy any debts, obligations or liabilities of the corporation. After that, if the corporation is a public benefit corporation, the remaining property must be distributed, if it is a charitable corporation, to a charitable corporation with similar purposes and if it is a non-charitable corporation, to another public benefit corporation with similar purposes, or in either case, to a government or government agency. If the corporation is not a public benefit corporation, the remaining property is to be distributed in accordance with its articles or if there is no such provision in its articles, rateably to its members according to their rights and interests in the corporation.

Certain liabilities may continue post-dissolution of the corporation (e.g. civil, criminal or other proceedings) and property that would have been available to satisfy any judgment or order had the corporation not been dissolved remains available for this purpose. As a result, despite the dissolution of a corporation, a member (including the heirs, trustees, and other legal representatives of the member) to whom any of its property has been distributed is liable to a person who successfully brings a claim to satisfy such liabilities to the extent of the member.

[1] There are limited instances in which the ONCA does apply to corporations sole.

[2] The ONCA provides that where a corporation's articles are inconsistent with the ONCA and its regulations, the articles will be deemed to comply with the relevant provision of the ONCA or its regulations.

[3] The excepted provisions are set forth in Section 207(3) of the ONCA and include, by way of example, 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.

[4] As of October 19, 2021, the regulations to the ONCA do not prescribe any different amount.

[5] Refer to the heading "Special Resolution" for more information regarding the nature of special resolutions under the ONCA and how they are distinct from "special resolutions" under the OCA.

[6] These provisions are subject to any federal or provincial (Ontario) tax statutes or other legislation requiring otherwise. In addition, where a corporation is required by the ONCA to maintain a register of ownership interests in land complying with section 92.1 of that Act, such register must be maintained at the corporation's registered office.

[7] The relevant provision of the ONCA specifically provides that this section is not intended to preclude nominations for directors

being made at a meeting of the members.

[8] As of October 19, 2021, the regulations to the ONCA do not prescribe any different amount.

[9] Refer to the first paragraph of this section “By-Laws” for additional details on the Director’s standard organizational by-laws.

▼ Related Solutions

▼ Industries

Charities and Non-Profit Law

▼ Markets

Americas

Canada

▼ Authors



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Lynne Golding is the Leader of the firm's Health group. She has an active corporate/commercial practice based principally in the health industry.

Dealing with both for-profit and not-for-profit entities, Lynne advises clients on transactions in regulated and unregulated industries. A highly regarded name in the health regulatory space, Lynne's practice is principally comprised of clients in the health sector for whom she provides governance advice and structuring and transactional services.

Lynne is a frequent speaker on issues affecting the health sector and has been recognized for her expertise in healthcare law by Chambers Global and the Canadian Legal Lexpert Directory.



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Laurie Turner has an active corporate/commercial practice and advises clients in the for-profit and not-for profit (specifically hospital sector) on a diverse range of matters including corporate restructurings, (e.g. mergers and amalgamations) corporate governance, procurement and privacy, with a particular focus on the health sector.

Laurie is a graduate of Queen's University, Faculty of Law. Prior to attending law school, Laurie earned her undergraduate degree from the University of Toronto (Distinction) and was an Executive Research Assistant to the Canadian Research Chair in Breast Cancer at Sunnybrook & Women's College Health Sciences Centre. Laurie also worked as a Research Assistant for Professor Jurgen Rehm at the Centre for Addiction and Mental Health. Laurie has gained valuable experience through recent secondments at two large teaching hospitals in Toronto and a shared service organization where she advised on a wide range of matters.





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Briana Maguire is an associate in Fasken's Business law group. She maintains a broad corporate/commercial practice and advises both private and publicly-held clients. Briana has been involved in a variety of transactions, including mergers and acquisitions and public and private financings, and regularly acts on matters related to commercial contracting, corporate governance, and regulatory compliance. Briana has a particular focus on the health law sector as well as the franchising industry.

Briana studied law at Queen Mary University of London in the United Kingdom. Prior to law school, she completed a Bachelor of Arts at Western University, and was awarded a gold medal at graduation for top marks in her combined honours specialization program. During her studies, Briana held various student government positions and was actively involved in provincial politics.

Prior to joining the firm, Briana gained valuable experience as working as policy advisor to the Ontario Minister of Health.

Briana articulated with the firm and joined as an associate in 2021.



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Victoria Mitrova maintains a corporate/commercial practice with a focus on legal and regulatory matters in the health care sector.

Victoria is a graduate of Osgoode Hall Law School. Prior to completing her law degree, she obtained a Bachelors of Arts and Science degree with Combined Honours in Biology from McMaster University.

Before joining Fasken, Victoria practiced at a regional firm defending healthcare practitioners in regulatory matters and malpractice claims. She also has previous experience developing educational curriculums for the pharmaceutical, consumer healthcare, and biotechnological fields as a former medical learning consultant.

While in law school, Victoria was an editor of the Osgoode Journal of Law and Social Policy, a caseworker for the Innocence Project, and was heavily involved in the school's moot program.



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