

## Briefing Note

**To:** Association of Family Health Teams of Ontario (“**AFHTO**”) and its member Family Health Teams (“**FHT**”)

**From:** Kathy O’Brien & Simmie Palter

**Date:** February 25, 2022

**Re:** **Impact of Ontario’s *Not-for-Profit Corporations Act, 2010* on the FHT members of AFHTO**

---

### **Background**

Ontario’s *Not-for-Profit Corporations Act, 2010* (“**ONCA**”) was proclaimed into force on October 19, 2021. Most FHTs are currently incorporated under and governed by the *Corporations Act* (Ontario) and will have to update their governance documents (such as their incorporating documents and by-laws) by October 18, 2024 to be compliant with ONCA.

This Briefing Note accompanies an updated template FHT By-law that we have prepared for AFHTO.

### **A Word About Language**

In keeping with ONCA, the FHT may be referred to as the Corporation in this Briefing Note (and the FHT template By-law). The “Board” of each FHT means the Board of Directors, even if the FHT uses other terminology (such as Board of Trustees or Board of Governors). ONCA requires that the term “Board of Directors” be used going forward.

### **Transition Process**

ONCA provides that any valid letters patent, supplementary letters patent, by-laws and special resolutions of any existing Ontario non-profit (collectively called the “**Existing Governance Documents**”) continue to be valid until the third anniversary of ONCA’s proclamation, even if they are inconsistent with the provisions of ONCA.

The transition rules applicable to each FHT are as follows:

1. The FHT can continue to be governed by its Existing Governance Documents until October 18, 2024. This means that nothing needs to be done immediately by the FHT Board simply due to ONCA's proclamation.
2. The FHT Board should ensure that its Board work plan includes updating its Existing Governance Documents no later than October 18, 2024.

If the FHT takes no action by this deadline, please be assured that the FHT will not be penalized or dissolved. However, the FHT's Existing Governance Documents will be "deemed" to be amended as of October 18, 2024 to align with ONCA. This is obviously not advisable – since it would mean that parts of your Existing Governance Documents will effectively be amended in "invisible ink". We strongly recommend that the Existing Governance Documents do need to be updated to avoid this uncertainty.

3. If the FHT should wish to amend its letters patent/supplementary letters patent (e.g., to change its name or purposes, or to amalgamate with another corporation) prior to October 18, 2024, it would need to do so under ONCA's scheme. Once the FHT makes any filing under ONCA to amend its incorporating documents, it must immediately become compliant with ONCA, even if that date is before October 18, 2024.
4. If the FHT has any questions between now and October 18, 2024 about corporate procedural or governance matters that are not answered by its Existing Governance Documents, the provisions of ONCA will answer this question, not the provisions of the *Corporations Act*. We recommend that the FHT seek legal advice during this transition period in order to navigate this new legislative landscape.

### **Recommended Steps in the Transition Process**

#### **Part A: FHT Review**

It is recommended that each FHT conduct an internal review of its Letters Patent (incorporating document) and By-laws to ensure that:

- the objects/purposes reflect the FHT's activities (current or aspirational); and
- the governance structure (Board composition, Board committees, officers, membership, etc.) reflects current practices.

The Board may recommend updates to the FHT's objects, its governance structure or both, in addition to the changes described below, i.e. those required to bring the FHT's incorporating documents and By-laws into compliance with ONCA.

## **Part B: Legal Review – Mandatory Changes**

### **i. Letters Patent**

1. **Size of Board.** ONCA requires that a non-profit's incorporating documents (called Articles) must indicate the size of the non-profit's Board, which can either be a fixed number or a minimum/maximum. If the Articles contain a minimum/maximum, the FHT must always establish a fixed number within that range by special resolution (meaning the members must approve the fixed number by a 2/3 vote).

We recommend that each FHT propose a minimum/maximum to be included in the Articles (for example, between 7-13, as suggested in the template FHT By-law), and that the fixed number would be set by special resolution from time to time within that range. The amended By-laws would highlight the need to set this fixed number and the process for doing so.

2. **Chair with Tie-Breaking Vote.** The current template FHT By-law gives the chair of the Board a second, tie-breaking vote. ONCA permits each member of the corporation to have one vote and any increases must be set out in the Articles. Accordingly, the FHT Board, if it wishes to continue allowing the chair to have a second, tie-breaking vote or if it wishes to implement this practice, must include this in the Articles of Amendment.
3. **Classes of Members.** To the extent that a FHT has more than one class of members – meaning different groups or categories of members that have different voting rights – those classes also have to be embedded in the Articles.

**Recommendation:** We recommend that each FHT apply for Articles of Amendment (no later than October 18, 2024) to become compliant with ONCA's requirements relating to the contents of incorporating documents.

Articles of Amendment would include the net new requirements of ONCA. These Articles of Amendment would have to be read alongside the existing Letters Patent to obtain a complete picture of the incorporating documents governing the FHT.

Process: Approval of Articles of Amendment will require the FHT to pass a special resolution, meaning that the Board must approve the Articles and then take them to a special meeting of the members to be approved by a 2/3 vote.

As soon as the Articles of Amendment are processed by the Ontario Ministry of Government and Consumer Services (which should be only a few business days from submission), the FHT's By-laws must become compliant with ONCA. Therefore, work on the By-laws will go hand-in-hand with the preparation of the Articles of Amendment.

Optional: The FHT Board may also wish to apply for "Restated Articles of Incorporation" after the Articles of Amendment are received – this document would include all the contents of the existing Letters Patent and Supplementary Letters Patent and the contents of the Articles of Amendment, all consolidated into one complete and standalone document. The Board alone can approve this application – which we think is a good step. (It is unfortunate that there is no process to apply for Amended & Restated Articles in one step – it is a two-step process under ONCA.)

## ii. By-laws

ONCA has a number of new technical requirements that will have to be incorporated into the By-laws. None of these is particularly significant to the Board or its governance structure, but we describe them below so that you can understand some of the amendments incorporated in the new template FHT By-law.

Please also keep in mind that, under ONCA, there are special rules for public benefit corporations – that is, charities or not-for-profit corporations that receive more than \$10,000 annually from private donors or through government. We have assumed all FHTs are public benefit corporations, given their level of government funding.

The mandatory changes to the By-laws include:

1. **Director qualifications.** ONCA imposes new qualifications to serve as a director:
  - a. relating to fitness to serve (i.e., cannot be a person found to be "incapable" under Ontario law or by a court in Canada or elsewhere); and
  - b. a director cannot have the status of a "bankrupt" (vs. an "undischarged bankrupt", which was the requirement under the *Corporations Act*).These qualifications are in addition to the special requirements for FHT Directors required by the FHT Funding Agreement and set out in the template By-Law.
2. **Director restrictions for public benefit corporations.** Not more than one third (1/3) of the Directors may be employees of the FHT. Generally, it is recommended that employees of the FHT not act as Directors at all, so this requirement is consistent with previous advice on Board composition for FHTs. The definition of "Excluded Persons" in the template By-law prohibits any employee of the FHT from serving on the Board.
3. **Removal of directors.** ONCA permits only the members of the FHT to exercise voting rights to remove a director from office before the expiry of their term. This

required an amendment to the previous template FHT By-law, to remove the clause that allowed the Board alone to remove a director in certain circumstances, such as failure to meet attendance requirements.

4. **Consent to act as director.** There is a new requirement for any director, when first elected to the Board, to consent in writing to serve as director, and this consent must be kept with the other corporate registers (lists of directors, members) that the corporation must retain. We have added a new provision to the template By-laws to remind the corporation what records/registers it is required to maintain.
5. **Mid-term replacement directors.** Where there is a mid-term vacancy on the Board, any replacement director must serve the entire remaining term, not just until the next annual meeting of the members.
6. **Directors' right to dissent.** ONCA gives directors the right to dissent to any decision made by the Board, either at a Board meeting the director attended or at a Board meeting where the director was absent. There are rules around the specific timing of lodging this dissent that are included in the template By-laws.
7. **Directors' conflict of interest.** ONCA provides a specific definition for conflict of interest where a director is also a director or officer of, or has a "material interest" in, any party that is entering into (or proposing to enter into) a material contract or transaction with the FHT. Also, if multiple directors must recuse themselves and do not vote, the remaining directors are deemed to constitute a quorum. These changes required a tweak to the conflict of interest provisions in the template By-laws.
8. **Indemnification of directors and officers.** The template By-laws have been updated to align with the ONCA indemnification provisions, which allow funds to flow to directors and officers as proceedings against them are undertaken (rather than waiting for a determination of those proceedings).
9. **Audit Committee composition.** If the FHT has an audit committee, ONCA requires that a majority of the committee members cannot be either officers or employees of the Corporation. We recommend that this requirement regarding composition of the Audit Committee be included in the By-laws where applicable.
10. **Auditor independence.** There are new requirements relating to the qualifications of serving as an auditor, including:
  - a. being properly licensed under the *Public Accounting Act* (Ontario); and
  - b. being "independent" for purposes of ONCA, which includes:
    - i. The auditor cannot be a member, director, officer or employee of the FHT or its affiliates

- ii. The auditor cannot be in business with a director, officer or employee of the FHT or its affiliates
- iii. The auditor cannot be a lender to (or related to a lender to) the FHT or its affiliates.

11. **Filling auditor vacancy.** The Board must fill any vacancy in the position of auditor arising between annual meetings, unless the Articles require the members to do so.
12. **Members' meetings – notice.** There are new limits on how far in advance the FHT can give notice of members' meetings (minimum 10 days, maximum 50 days).
13. **Information to members in advance of the annual meeting.** Members may demand financial information be provided to them 5 days' in advance of the annual meeting.
14. **Confirmation of by-laws by members.** ONCA requires by-law amendments to be taken to the next meeting of members (not the next annual meeting of members) for confirmation.
15. **Change from head office to registered office.** ONCA changes the phrase "head office" to "registered office" and deems the FHT's current head office (established under the *Corporations Act*) to be its registered office. Under ONCA, a corporation may, by a majority decision of the Board, change, within a municipality or geographic township, the location of its registered office; however, moving the registered office outside of the municipality or geographic township requires approval by the Board and at least two-thirds of the members casting votes. The registered office must be listed in the FHT's articles.
16. **Notice of Board business.** If the Board is going to consider any Board Exclusive Responsibilities (defined below under Part C) at any Board meeting, the agenda/notice for the Board meeting needs to identify that business specifically.
17. **AGM regular vs. special business.** ONCA changes slightly what is considered regular business at an AGM vs. "special" business for which specific notice needs to be provided to the members. In particular, if the members are being asked to vote in a new auditor (vs. the incumbent auditor), that is considered special business that needs to be highlighted in the AGM notice.
18. **Auditor attendance at meetings.** The appointed auditor is entitled to attend members' meetings and audit committee meetings at the corporation's expense.
19. **Member proposals.** ONCA gives the members increased rights to make proposals that must be included on the agenda of the AGM:

- a. Any member can demand that an item be added to the agenda; and
- b. Members having 5% of the vote at an AGM can put a nominee forward to be included in the election of directors at the AGM – apparently even if that nominee does not meet the criteria established by the FHT.

These proposals must be submitted to the FHT at least 60 days before the date of the meeting. The amended By-laws do not highlight these member rights, but the FHT Board needs to be aware that these rights do exist.

### **Part C: Legal Review – Discretionary Changes**

ONCA introduces certain flexibility that the *Corporations Act* did not include. The Board will want to consider if any of these discretionary changes are beneficial and therefore worth incorporating in the By-laws.

1. **Delegation by the Board to committees.** One of the potentially more impactful changes in ONCA to the Board's governance is that the Board may delegate some (but not all) decision-making to management or Board committees. This is a marked departure from the *Corporations Act*, which allowed delegation of Board authority only to a properly constituted Executive Committee and to no other committee. recommendations that are ultimately decided upon at the Board level.

If the Board wishes to delegate decision-making authority to a committee, that committee may consist only of directors – meaning that any non-directors on the committee would have to be non-voting. In addition, the decision-making authority must not be one of the Board Exclusive Responsibilities (defined in the next paragraph).

ONCA lists seven discrete matters that the Board is not permitted to delegate (we call these "Board Exclusive Responsibilities"), which are:

- a. Submitting to the members any question requiring the approval of the members
- b. Filling a vacancy amongst the directors
- c. Filling a vacancy in the position of auditor
- d. Appointing additional directors (discussed below)
- e. Approving financial statements
- f. Adopting, amending or repealing by-laws
- g. Establishing contributions/dues owed by members

**Recommendation:** The Board should consider whether there are any decisions that it may wish to delegate to a Board committee constituted solely of voting directors, in order to more empower that committee and to relieve pressure from the Board's own agenda, such as:

- Updating Board policies
- Conducting the performance review of the CEO
- Arranging continuing education for the Board
- Addressing matters of Board misconduct.

Alternatively, the Board may wish to maintain all governance decision-making at the Board level.

2. **Audit vs. review engagement.** ONCA gives more flexibility to corporations around choosing to have an audit, review engagement, or sometimes neither. However, this flexibility is not available to FHTs, since the FHT Funding Agreement requires all FHTs to have an audit. FHTs may choose to have an Audit & Finance Committee or not; if they do it is recommended that the Terms of Reference for that committee be set out in the By-law and that no Board Exclusive Responsibilities (such as approving financial statements and appointing a new auditor) are delegated to that committee.
3. **Abolishing member proxies.** ONCA allows the corporation to prohibit member voting by proxies – which would mean that the member would have to attend the meeting personally, either in person or electronically. Unless there's been a need for proxies to achieve quorum in the past, abolishing proxies for members is recommended. If the FHT decides to continue using proxies, ONCA sets out requirements for proxy forms and we can review the FHT's current proxy form to ensure it meets those requirements.
4. **Alternative electronic means of member voting.** ONCA also provides for new and flexible ways for members to vote at member meetings (e.g., through electronic voting platforms). Any such manner of voting must be anonymous (there are voting platforms that can be purchased that allow this). For corporations with large and widespread memberships, these alternatives may make sense. For FHTs, these alternatives may be more burdensome (and expensive) than beneficial.
5. **Directors participating in electronic Board meetings without any consent.** Most FHT's current By-laws require that directors all consent to any director participating in a Board meeting by electronic means. Most Boards just ignore this technicality, in my experience. However, ONCA allows the Board to do away with any consent altogether, which is what is reflected in the template By-law, given how routine it now is for some or all of the Board to participate electronically in meetings.
6. **Additional directors.** There is an ability for the Board to appoint, annually (for 1-year terms), additional directors outside the fixed number set by the Board. This appointment would occur after the annual meeting. The number of additional directors in any year is limited to 1/3 of the number of directors elected at the annual meeting. The Board should consider whether it would like to have this discretion to supplement the Board's skills set



on a short-term basis. This might be helpful for FHTs that wish to have community members on the Board. We have not included additional directors in the FHT template By-law.

7. **Term of Office of Directors.** Under ONCA, directors are limited to serving no more than 4 years in one term; however, the number of terms is not limited at all. It is recommended that a director's term be limited to three years, and that a Director not serve more than three consecutive terms, but each FHT Board has discretion regarding the length of each Director's term (as long as it is not more than 4 years) and the number of terms permitted.

---

We are available to assist any FHT in bringing its governance documents into compliance with ONCA. Again, the deadline for this work is not until October 2024, but many of our clients are planning to make these updates sooner, starting in 2022.

Kathy O'Brien  
Counsel  
[kobrien@inq.law](mailto:kobrien@inq.law)  
416.967.7100 x 1227

Simmie Palter  
Partner  
[spalter@inq.law](mailto:spalter@inq.law)  
416.967.7100 x 1239