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SOCIAL PLANNING
COUNCIL OF OTTAWA
790 Bronson AV, Ottawa,
ON K1S 4G4
Phone 613-236-9300
Fax 613-236-7060
Email
office@spcottawa.on.ca
Website
<http://www.spcottawa.on.ca>

MARIA B. HENNESSY

CHANGES

TO THE NON-PROFIT LEGISLATION:

THE CANADA NOT-FOR-PROFIT

CORPORATIONS ACT

&

ONTARIO NOT-FOR-PROFIT

CORPORATIONS ACT, 2010

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INTRODUCTION

This booklet has been prepared to provide general information about the transition process under both the new Canada Not-For-Profit Corporations Act (CNCA)¹ at the federal level and the Ontario Not-For-Profit Corporations Act (ONCA)² at the provincial level.

You can find here some highlights of the Acts, available tools and sources of information, as well as comments regarding few of the proposed amendments to the ONCA, and key points to keep in mind during the preparation for transitioning to the ONCA.

To facilitate an accurate understanding of terminology, we have a glossary prepared as part of this booklet, which can be found on pages **25** onwards.

DISCLAIMER

This booklet is provided as an information guide by the Social Planning Council of Ottawa. It is current only as of the date of the booklet (November 11, 2013), and does not reflect subsequent changes in the laws. It covers only some key aspects of the CNCA and the ONCA. This booklet is distributed for general information purposes with the understanding that under no circumstance its contents represent legal advice. Users are advised to consult with a lawyer or other appropriate advisor concerning the specifics of their particular situation.

¹ For the purpose of this booklet the Canada Not-For-Profit Corporations Act will be referred as CNCA.

² In this booklet the Ontario Not-For-Profit Corporations Act will be referred as ONCA

BACKGROUND

- The CNCA was enacted in June 23, 2009. It came into force on October 17 2011. The CNCA and its regulations can be found on the website of the Department of Justice. <http://laws-lois.justice.gc.ca/eng/acts/C-7.75/>
- The CNCA is the law that governs the internal affairs of federal not-for-profit corporations and replaced the Canada Corporations Act (CCA Part II), which previously governed federal not-for-profit corporations.
- All federal corporations incorporated under the old legislation must transition to the CNCA by **October 17, 2014**.
- The provisions of the “old legislation” - (CCA, Part II) - will continue to apply to the federal existing corporations until they make the transition. The CCA can be found at <http://laws-lois.justice.gc.ca/eng/acts/C-1.8/index.html>
- Bill 65 enacts the new Ontario Not-for-Profit Corporations Act, 2010 (ONCA). On October 25, 2010 the ONCA received Royal Assent and replaced Part III of the Ontario Corporations Act (OCA). http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2347
- On June 5, 2013, Bill 85 was introduced to the legislature. In schedule 7, the Bill proposes amendments to the ONCA, which are mainly administrative and technical in nature.³ http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2812
- On September 4, 2013, the Ministry of Consumer Services announced that Bill 85 is expected to be debated in the Legislature during the fall of 2013. If the Bill is passed the ONCA is anticipated to come into force no earlier than six months after enactment of Bill 85. The specific date will be determined by the Ministry of Consumer Services in the coming months.

³ The Ontario Nonprofit Network suggested some amendments to the ONCA <http://www.theonn.ca/wp-content/uploads/2011/06/ONCA-Backgrounder-Amendments-April-2013-1.pdf>

- ONCA sets out how the not-for profit corporations in Ontario are created, governed and dissolved.

When the Act comes into effect, it will **generally** apply to all Ontario not-for-profit corporations. Existing Ontario not-for-profit corporations will have a three-year transition period to make the necessary changes to bring them into conformity with the Act.

- All provisions of the ONCA will apply to **new** Ontario not-for-profit corporations that incorporate under the ONCA.⁴
- The **CNCA and ONCA** have some similar provisions; for instance, under both **Acts**:
 - a. the letters patent used for the creation and/or reorganization of the corporations are replaced by **articles** in which the corporations will set out their purposes.
 - b. the Acts eliminated the Ultra Vires concept, which means that the acts of corporations outside their purposes are considered valid,⁵
 - c. Under both Acts, incorporated corporations have the capacity, rights, powers and privileges of a natural person. This means, for instance, that the corporations, can be sued and sue in their own names, enter into contracts, hold title to land, own property under their own names, etc. It also implies that corporations have a formal operating structure with existence until their termination, that the legal liability of their members is limited and that the personal responsibility of their directors and officers may be limited to certain circumstances.

⁴ The corporations that incorporate under ONCA must pay the incorporation fee plus they must keep records, hold annual meetings, file tax returns annually, and comply with the requirements of other statutes, i.e. Income Tax Act.

⁵ In practice this provision does not make much difference as the directors are compelled to act within the limits of their corporations' mandates and comply with other statutes, such as, Income Tax Act, etc.

THE CANADA NOT-FOR-PROFIT CORPORATIONS ACT

FEDERAL NOT-FOR-PROFIT CORPORATIONS

- Since October 17, 2011 **all federal not-for-profit corporations** (non-share capital corporations) **must** incorporate under the CNCA.
- The not-for-profit corporations incorporated under the old legislation (Part II of the Canada Corporation Act) have until **October 17, 2014** to continue operating under the new legislation (**CNCA**).
- Under the new legislation, the corporations are required to complete a continuance process. Failure to do so before the expiration of the transition period (**October 17, 2014**) will result in **dissolution** of the corporation. **For registered charities, the dissolution may lead to the revocation of their registration as charity, which would carry tax implications for the corporations**, i.e. revocation tax (pay 100% of the value of corporations' remaining assets).
- During the transition period, it is advisable for federal corporations that are or aim to become registered charities under the Income Tax Act to consult the Charities Directorate of the Canada Revenue Agency (CRA) regarding:
 - a. Statement of purpose of the corporation
 - b. Number of directors on boards of directors
 - c. Non-profit clauses, as well as provisions related to the remuneration of directors
 - d. Documents to be filed with CRA after the transition process is completedConsultations can be made at www.cra-arc.gc.ca/charities or at 613-954-0410, or toll free at 1-800-267-2384.

SOME HIGHLIGHTS OF THE CNCA

- The Act brings more simplified processes.
- The CNCA offers more flexibility for fundamental changes, i.e. amalgamation.

- The corporations may carry on activities throughout Canada, and outside Canada to the extent that the laws of that jurisdiction permit.
- The corporations should carry on their operations without financial gain to their members, unless it is part of the development of their activities or it is permitted by the Act.
- At special meetings, members may remove a director by majority vote (**50% plus 1.**)
- Ex-officio directors are not permitted. In other words, no member of the board of directors can be part of it by virtue of an office or position.
- The responsibility of managing and supervising the management of a corporation rests with the board of directors. Nevertheless, this responsibility can be restricted in the articles that govern the corporation.
- Annual meetings of members should be held; however, written resolutions instead of a meeting are allowed.
- A corporation is considered **soliciting** when it has received more than \$10,000.00 in income from public sources, i.e. gifts, donations from non-members, grants from government, or funds from other corporations that also received income from public sources.
- Members of a corporation must appoint a public accountant (PA) at their annual meeting. However, members by unanimous vote can decide not to appoint a public accountant in two cases: a) if the soliciting corporation has a gross annual revenue **equal to or less than \$50,000.00** and b) if the non-soliciting corporation has a gross annual revenue **equal to or less than \$1million.**
- The CNCA specifies the types of financial review that an auditor can carry out (audit or review engagement,) as well as the options that members can choose, based on the gross annual revenue of the corporations.

TYPE OF CORPORATION	GROSS ANNUAL REVENUE	CNCA FINANCIAL REVIEW	MEMBERS' OPTIONS
SOLICITING	Equal or less than \$50,000	Review engagement	Audit *
SOLICITING	Between \$50,000 & \$250,000	Audit	Review engagement
SOLICITING	More than \$250,000	Audit	NIL
NON-SOLICITING	Equal or less than \$1 million	Review engagement	Audit *
NON-SOLICITING	More than \$1 Million	Audit	NIL

*** If no PA is appointed the corporations must produce only a compilation, which is a financial statement based on information provided by the organization and prepared in compliance with the Canadian generally accepted accounting principles.**

- Every corporation must have at least one (1) director, but a **soliciting** corporation must have no fewer than three (3) directors; at least two (2) of them, should not be officers or employees of the corporation or its affiliates.
- The corporations must have members and the articles governing the identity of the corporations, must set out the classes of members. If the corporation has only one (1) class of members, all members are eligible to vote (have voting right), whether or not it is specified in the articles. If the corporation has two (2) or more classes of members, the articles must assign voting right to at least one (1) class of members.
- The members can request a meeting of members with **5%** of those with voting right.
- Any member can submit proposals to amend the by-laws or require any matter to be discussed at annual meetings.
- Members can submit proposals to nominate directors of the board, with **5%** of those with voting right.

- Members can have access to corporate records, including membership list.
- Except for **soliciting** corporations, unanimous member agreement is available. This is an agreement that can be reached in two ways: among **all** members **or** among all members and one (**1**) or more non-members. It restricts, in whole or in part, the powers of the director to manage or supervise the management of the corporation on its activities and affairs.
- In corporations that have multiple membership classes or groups, all members are entitled to vote as a separate class or group on certain amendments to the articles or bylaws and fundamental changes. Therefore, each class or group of members (including non-voting members) will have de facto **veto** right (the power to block a decision).

TRANSITION PROCESS

- Industry Canada produced a five-step Transition Guide for federal not-for-profit corporations.

The guide also contains the following annexes:

- a. Provisions in letters patent and by-laws replaced by the CNCA
- b. Instructions for completing articles of continuance
- c. Mandatory and default rules
- d. Checklist for continuance/transition documents
- e. Glossary

In addition, the guide offers examples of articles of continuance with one class and two classes of members, as well as examples of by-laws, and special resolutions.

http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs04954.html

- The CNCA contains default rules that can be adapted by the corporations in both, their articles of constitution and by-laws, if the rules do not suit the corporations' needs. However, there are a few rules that apply to all corporations and must be followed, which are:
 - a. the conditions required for membership, and

- b. the notice of meetings to members who are entitled to vote at the meeting **If there is no provision on these matters the default rules apply (see Annex A and C of the CNCA transition guide.)**
- Corporation Canada provides the **Form 4031**, in which the articles of continuance should be set out (see **Annex B of the CNCA transition guide.**) A PDF form is available at www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05260.html
 - Corporation Canada prepared for the corporations a page highlighting the most common deficiencies in filling out the Form 4031 and how to avoid them at the time of completion. <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05430.html>
 - Corporation Canada also developed an online interactive tool “**By-law Builder,**” which offers multiple options of by-law provisions that corporations can chose according to their specific needs. http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs04734.html
 - With a few exceptions, the board of directors through a resolution can make, amend, or repeal by-laws. The resolution takes effect immediately but it should be submitted to the following members’ meeting. Members can confirm, amend or reject the by-laws. The directors **cannot** make by-laws that require special resolution of members (**2/3 of the votes cast at a meeting.**)
 - The mandatory provisions of the Act must be approved by a special resolution of members (**2/3 of the votes cast at a meeting**). The same is true for the rules of transferability of membership and absentee voting. The other provisions may be approved by simple majority vote (**50% plus 1.**)
 - The transition process entails obtaining the Certificate of Continuance and making by-laws in compliance with the CNCA. **There is no fee to obtain the Certificate of Continuance or to file by-laws for the existing federally incorporate not-for-profit corporations.**
 - The articles of continuance should be approved by special resolution of members of the corporations (**2/3 of the votes cast at the meeting**) and signed by a member of the board of directors or officer of the corporation, who is making the transition into the CNCA. Afterward, the articles must be submitted to **Corporation Canada**, which will issue a Continuance Certificate.

- Both, the Certificate of Continuance and the articles, are the constitution of the corporation under the new Act and replace the letters patent.
- The documents that the corporations should file with Corporation Canada to obtain the Continuance Certificate are:
 - a. Articles of continuance **Form 4031**
www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05260.html
 - b. Initial Registered Office Address and First Board of Directors **Form 4002**
available in a PDF format at **[http://www.ic.gc.ca/eic/site/cd-dgc.nsf/vwapj/FRM-4002-e.pdf/\\$file/FRM-4002-e.pdf](http://www.ic.gc.ca/eic/site/cd-dgc.nsf/vwapj/FRM-4002-e.pdf/$file/FRM-4002-e.pdf)**
 - c. Name Search Report **NUANS**. If the name of the corporation is changing on the continuance process **www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05260.html**

For more information see Annex D of the CNCA transition guide and Checklist for continuance

- The corporations **do not have to file the by-laws to obtain the Continuance Certificate**. The by-laws must be filed with **Corporations Canada** within twelve (12) months after members have approved them. The by-laws come into effect immediately after being made, and under the CNCA, Corporations Canada is not required to review and provide Ministerial approval of the by-laws.
- Corporations can file their application of Continuance:
By email at **corporationscanada@ic.gc.ca**
By fax at 613-941-4803
By mail at:
Corporations Canada
Jean Edmonds Building
South Tower 9th floor
365 Laurier Avenue West
Ottawa, ON, K1A 0C8
- After the Continuance Certificate is issued, changes to any provision to the corporations' articles that establish their identity need a special resolution of the members (**2/3 of the**

votes cast during a meeting). As well, the corporation should present an application to Corporations Canada for a **Certificate of Amendment**, which has a fee of \$200.00.

ADDITIONAL SOURCES OF INFORMATION

- Frequently Asked Questions
<http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04973.html>
- Incorporation and continuance process
http://www.carters.ca/pub/seminar/charity/2013/tlm0408_files/frame.htm
- Information on the new CNCA
http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs04953.html
- Reporting Obligations under Canada Not-For-Profit Corporation Act
<http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04956.html>
- Requirements for Soliciting Corporation under the Canada Not-For-Profit Corporations Act
<http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05011.html>
- More information can be found online at:
<http://www.corporationscanada.ic.gc.ca/eic/site/cd-dgc.nsf/eng/home>, or by calling at:
Toll free within Canada 1-800-333-5556
Phone within the National Capital Region and outside Canada 613-941-9042.

ONTARIO NOT-FOR-PROFIT CORPORATIONS ACT, 2010

ONTARIO NOT-FOR-PROFIT CORPORATIONS

- When ONCA comes into effect, it will apply to every corporation without share capital incorporated in Ontario under any Act of the Ontario Legislature, including Ontario Corporations Act (OCA), with the exception of :
 1. Insurance corporations
 2. Corporations without share capital under the Cooperative Act
 3. Corporations excepted by legal statutes, such as those incorporated by or under special or private Acts or other public Acts, i.e. agricultural societies, conservation societies, etc.
 4. Share capital corporations with **social nature**, such as social clubs that are ruled by Part II of the OCA. These corporations will continue under OCA for **five (5) years**. After that period, they will continue as one (1) of the following types of corporations:
 - a. A non-share capital corporation under ONCA, or
 - b. A cooperative corporation under the Cooperative Corporations Act, or
 - c. A share capital corporation under Ontario Business Corporations Act.
- Under ONCA there is no express obligation for the already incorporated Ontario not-for-profit corporations to make a transition. Corporations will not cease to exist after the three (3) years transition period, if they do not bring their documents into conformity with the ONCA (letters patent, supplementary letters patent, by-laws, and special resolutions). At the end of the three (3) years deadline, the documents of the corporations will be considered to be amended to bring them into agreement with the ONCA. Consequently, conflicting provisions in the documents with the ONCA may be partially or completely ineffective, if they have not been amended before of the end of the transition period.⁶

⁶ For the not-for-profit corporations already incorporated, their governance documents prevail over ONCA during the three (3) years transition period, **but** at the end of this period ONCA will prevail

- The old legislation (Part III of the OCA) will be revoked upon proclamation of the ONCA.⁷
- To transition from the old legislation (OCA), the corporations must follow the process prescribed by ONCA in order to obtain **articles of amendment**. In other words, the members who under OCA are entitled to vote at the annual meeting may authorize the directors by special resolution (**2/3 of the votes cast at the meeting**) to apply for the articles of amendment under ONCA
- For incorporation ONCA requires that the corporations include specific information in the articles of incorporation, such as: the corporation's name, its purpose, the address of the corporation's registered office, number of directors on the board and, if applicable, classes or groups of members and the voting rights of each class or group.
- ONCA contains three (**3**) types of rules:
 - a. **mandatory** rules (i.e. minimum three [**3**] directors),
 - b. **default** rules. These can be modified by the articles or by-laws (i.e. directors can borrow money and grant security on property without members' authorization, directors may meet anywhere), and
 - c. **alternate** rules. These are the optional rules provided by ONCA that can be included in the articles and in by-laws (i.e. audit committee, holding members' meeting entirely by electronic means).
- Where ONCA is silent, corporations can include provisions in their by-laws or policies that do not contravene ONCA and its regulations; for instance, corporations can include mechanisms to resolve disputes among members.
- Under ONCA all applications for articles of incorporation should be submitted to **Service Ontario**. To find a Service Ontario Centre in your area, visit <http://www.ontario.ca/government/how-do-i-search-location>
- By-laws or application for certificate of amendment do not need to be filed with the Ontario government for incorporation; but they should be made and approved within sixty (**60**) days of filing for incorporation or certificate of amendment.

⁷ This can bring uncertainty regarding which provisions continue to be valid.

- Corporations **incorporated under ONCA** that do not adopt organizational by-law within sixty (**60**) days of their incorporation, will be considered to have adopted the default organizational by-law, which may be amended or revoked by the corporations at a later time.
- The default organizational by-law **does not apply** to corporations incorporated under OCA, even if the corporations do not have any organizational by-law.

SOME HIGHLIGHTS OF THE ONCA

ONCA provides a modern legal framework for not-for-profit corporations, in order to ensure that there will be more transparency and accountability in how the corporations are ran. ONCA for instance:

- a. facilitates the process, i.e. corporations can incorporate electronically;
 - b. provides more clarity about boards of directors and members⁸; and
 - c. simplifies the requirements for audits and financial review.
- Under ONCA there are two categories of corporations: Public Benefit Corporations (PBCs) and Non-Public Benefit Corporations (Non-PBCs). The PBC are divided in charitable corporations and non-charitable corporations.

PBCs	Charitable Corporation (incorporated for the relief of poverty, advancement of education, advancement of religion, or other charitable purpose) ⁹
	Non-Charitable Corporations (receive more than \$10,000 during a fiscal year in gifts or donations from persons that are not members, directors, officers, or employees of the corporations; or receive grants or similar financial assistance from the federal, provincial, or municipal government or government agency)

⁸ The obligations of the directors are now codified in ONCA, whereas before they were a common law matter.

⁹ To follow under the category of PBC it is irrelevant whether or not the corporation has been registered as a charity with the Charities Directorate of the Canada Revenue Agency (CRA).

- Charitable corporations can issue receipts for donations, but they must make an application to the Charities Directorate for a charitable registration number.¹⁰
- The approval of the Office of the Public Guardian and Trustee (OPGT) is no longer required to incorporate as a charitable corporation.
- There is no longer necessary to include in the articles of incorporation of a charitable corporation special provisions about the duties and obligations of the charity and its directors.¹¹
- The OPGT **will still need to pre-approve** applications for articles of amendment, amalgamation and continuation.
- Application for change only of the name of the charitable corporation **does not need** the approval of the OPGT.¹²
- All the corporations under ONCA must have a minimum of three (**3**) directors. For the PBCs, no more than one-third (**1/3**) of their directors may be employees of the corporations or the corporations' associates.
- Members by ordinary resolution (**50 plus 1 vote**) may elect or remove directors with exception of ex-officio. The by-laws of the corporations may stipulate rules governing ex-officio directors. These are members of the board of directors who can be part of it by virtue of an office or position.
- Directors may be elected up to four (**4**) years term.
- A person who is elected or appointed to become a director must consent before or within ten (**10**) days after their election or appointment. If the consent is provided after ten (**10**) days, it must be in writing.

¹⁰ The jurisdiction for charitable corporations is provincial.

¹¹ However, the principle of special provisions will continue in effect as they reflect mandates of charities law. When there is a conflict between Charity law and ONCA, Charity Law will prevail.

¹² The OPGT has available pre-approved purpose clauses to describe the purposes of a charitable corporation. http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/nfpinc/Not_for_Profit_Incorporators_Handbook_EN.pdf

If the corporations are unable to use the OPGT's pre-approved purpose clauses **or** the Charities Directorate's model "object" clauses to describe their purposes (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/pley/cgd/drftprpss-eng.html>), they must get pre-clearance from the Charities Directorate for the custom-made purpose clauses.

- To become a director, in addition to the qualifications included in the corporation's by-laws, he or she must:
 - a. be eighteen (**18**) years of age or more,
 - b. have not been found incapable under any court in Canada or elsewhere, or under the Substitute Decision Act of 1992 or the Mental Health Act, and
 - c. have not declared bankrupt
- If a class or group members has the exclusive right to elect a director, only them, through an ordinary resolution (**50% plus 1**), may remove the director.
- Directors may appoint additional directors to hold office until the next annual members' meeting, up to a maximum of one-third (**1/3**) of the number of directors elected at the last annual members' meeting.
- Directors and officers have the duty to look to the best interests of the corporation and to act honestly and in good faith. The directors under ONCA are provided with a reasonable due defense, if they exercise the care, diligence and skills that a cautiously and prudent person will exercise under similar circumstances.
- ONCA lists specific cases under which the director and officers must report conflict of interest, i.e. when a director sits on the board of two (**2**) not-for-profit corporations that intend to enter in a contract with each other, a conflict of interest may occur.¹³
- Directors have the right to attend and be heard at the members' meeting, but members do not have the right to attend the directors meeting.
- Directors may be appointed as officers of the corporation.
- ONCA gives more powers to members, similar to the powers of shareholders.
- Unless the articles indicate something different, each member has the right of one (**1**) vote at the meeting of members. All the members of a corporation with only one (**1**) class or group of members have the right to vote at the meeting of members. In corporations with multiple classes or groups of members, at least one (**1**) class or group of members, must have the right to vote.

¹³ In matters of conflict of interest, common law prevails over ONCA.

- Under ONCA voting and non-voting class members are entitled to vote separately as a class, to approve by special resolution, changes that affect their class of membership or important related changes. This means that each class member could reject the change by using a de facto class **veto** right. Only voting members can make proposals, or request a meeting of members, but they need to have ten percent (**10%**) of the votes that they may cast at the meeting of members.
- The conditions for membership must be set out in the corporations' by-laws.
- In certain circumstances a member's proposal does not need to be included in meeting notices. This is the case of proposals regarding personal matters against the corporation or when the proposal is not substantially related with the activities of the corporation.
- ONCA contains default rules about termination of membership and members' rights. The Act explicitly requires that the disciplinary action or termination of membership be done in "good faith and in a fair and reasonable manner."¹⁴ According to ONCA a process is considered "fair and reasonable"¹⁵ if the member is provided with a fifteen (**15**) day notice, including the reasons for the disciplinary action or termination, and the member is given an opportunity to contest those reasons.
- ONCA provides members with some remedies if they believe directors are not acting on the best interest of the corporation, i.e. members can request the court to order directors and officers to comply with the Act, articles, or by-laws.¹⁶
- In addition to the right that members have to see the financial records at the annual meeting, they can request to receive them no less than twenty one (**21**) days before the meeting.
- ONCA provides new voting alternatives i.e. it makes **mandatory** to make available proxies for members voting, by mailed-in-ballot, telephone voting or electronic means voting. This in addition to or in place of voting by proxies (person authorized to act on behalf of other).
- Under ONCA, by default, membership may only be transferred to the corporation.

¹⁴ Subsection 51 (2) of the ONCA

¹⁵ Subsection 51 (3) of the ONCA

¹⁶ It is not clear in ONCA if the remedies are restricted to members only.

- The examination of members’ register (list) is limited to a member, his/her attorney or legal representative, corporation’s creditors and a director of the corporation.
- Under ONCA in each annual meeting, the members must appoint by ordinary resolution (**50% plus 1**) an auditor to audit the financial statements. Although, if the annual revenue of a Public Benefit Corporation (PBC) is more than \$100,000 but less than \$500,000 its members **annually**, and through extraordinary resolution (**2/3 of the votes cast at the meeting**), may approve to have review engagement instead of audit. If the PBC has annual revenue of less than \$ 100,000, in **each annual** meeting the members may decide with a special resolution (**2/3 of the votes cast at the meeting**), not appoint an auditor and not have an audit or a review engagement. However, if the PBC has annual revenue of \$500,000 or more an annual audit is required.

For non-PBC with annual revenue of more than \$500,000 its members **annually** and by special resolution (**2/3 of the votes cast at the meeting**), may decide to have a review engagement instead of an audit. Nevertheless, if the non-PBC has annual income of \$500,000 or less, its members through special resolution (**2/3 of the votes cast at the meeting**) in their **annual** meeting, may approve not appoint an auditor and not have an audit or a review engagement.

TYPE OF CORPORATION	GROSS ANNUAL REVENUE	ONCA FINANCIAL REVIEW	MEMBERS’ OPTIONS
PBC	Less than \$100,000	Auditor	Waive*
PBC	More than \$100,000 less than \$500,000	Auditor	Review engagement
PBC	More than \$500,000	Auditor	Audit
NON-PBC	\$500,000 or less	Auditor	Waive*
NON-PBC	More than \$500,000	Auditor	Review engagement

*** Corporations that are authorized to waive the audit or the review engagement must produce an internal financial report.**

- ONCA makes clear that not-for-profit corporations can engage in commercial activities to support their purposes. However, other statutes can put a limit on such as activities.
- Under ONCA the corporations do not need to pass a by-law for borrowing powers.
- Upon liquidation and dissolution corporations must distribute their net assets as follow:

PBCs { **Charitable corporations** to charitable corporation with similar purpose or to a government or government agency
Non-charitable corporations to a PBC or to a government or government agency

Non-PBCs { According to the corporation's articles, or
If no provisions in the articles then proportionately to the members

- Corporations may decide to have committees and the board of directors can set out them to deal with issues that require special expertise. Members of the executive committee must also be members of the board of directors, and the audit committee must have a majority of members that are not officers or employees of the corporation.
- Acting upon the authority granted by the board of directors of a corporation, a committee or a managing director can take decisions that make the corporation legally responsible.

SOME OF AMENDMENTS TO ONCA IN BILL 85

Following are some of the proposed amendments to ONCA in schedule 7 of the Bill 85

- a. Under ONCA non-charitable corporations that receive more than \$10,000 during its fiscal year from specific public sources will become PBCs. Bill 85 proposed that such amount may be set by regulation, which will facilitate adjusting the amount periodically, without the need to amend ONCA.

- b. ONCA provides that the person appointed or elected to be a director must express his/her consent within ten (**10**) days after the election or appointment, or in writing if the consent is given after (**10**) days. The amendment proposes to require all consent in writing and corporations must keep the consent of directors “in the approved form”¹⁷.
- c. Bill 85 proposed **mandatory transition** process, and the ONCA’s mandatory provisions must be added to the articles of the corporations during the transition period. Otherwise, the provision(s) that do not follow ONCA’s mandate will be considered invalid when the transition period expires. Furthermore, Bill 85 proposed that all amendments to articles, by-laws, or special resolutions must be done all at once during the transition period and not incrementally.
- d. In case of corporations with more than one class of members, ONCA stipulates that each class of members with or without voting rights are entitled to vote separately as a class, to approve by special resolution, certain changes affecting their class membership and certain fundamental changes to the corporation (i.e. amalgamation). In practice, the provision under discussion implies that each class of members, including non-voting members, has a de facto class **veto** right. Bill 85 proposed to delay the voting right of non-voting members for at least three (**3**) years after ONCA comes into effect. The practicality of this proposed amendment is that corporations can adopt certain articles of amendment or certain new by-laws during the transition period, without seeking class approval of their non-voting members. However, the class approval by voting members remains in effect as the right of voting members to class vote has not been postponed.
- e. The Bill clarifies that the rights of creditors and others at the moment of incorporation remain valid after continuance.

A FEW CONSIDERATIONS FOR THE TRANSITION

Following are a few considerations for the transition process:

- Gather all the corporation documents: letters patent, supplementary letters patent, by-laws and special resolutions. If the letters patent and supplementary letters patent are not

¹⁷ Bill 85 Schedule 7 S. 9 (1)

located, the corporation can contact the Ontario Ministry of Government Services to request copies. www.mgs.gov.on.ca. Also if the corporation is registered charity the Charities Directorate may have some of these documents.¹⁸ <http://www.cra-arc.gc.ca/charities/>

- Determine how much time the corporation needs for the transition, keeping into consideration, the time needed for the revision of the by-laws and other governance documents, the complexity of the changes required, and the consultation process with members, particularly, if the corporation has chapters and divisions across the province or country.
- To facilitate the transition process, it may be advisable to assign the responsibility for the process to somebody and engage the board since the first stages.
- Look for appropriate advice (legal, financial, etc.) on how ONCA will apply or affect the corporation in particular.
- Review the corporation's purposes in the letters patent and supplementary letters patent, to be sure they are consistent with the current and future activities of the corporation and if they are congruent with other laws or court decisions that may apply to the corporation in particular. If not, perhaps this could be a good opportunity to update the corporation's purposes.
- Determine if the corporation's structure and practice are in need of a change.
- Evaluate what kind of challenges present some of the ONCA's provisions to the corporation, i. e. the right of the members to submit proposals, etc.
- Review mandatory provisions such as number of directors, membership structure.¹⁹ If the corporation has set out in their **by-laws** two or more classes of members, keep in mind that under ONCA membership classes must be set out in the **articles** of the corporation.
- Prepare an update list of the members. If the corporation has more than one class of membership, the characteristics of each class of membership should be clear. Under ONCA the conditions for membership must be set out in the **by-laws**.

¹⁸ It is important to ensure that the documents are updated.

¹⁹ It is important to decide whom the corporations want as members, since ONCA confers to members a lot of rights and remedies. **Perhaps, this is an aspect that corporations should look before ONCA comes into effect.**

- Review the corporations' by-laws regarding directors and officers provisions, such as terms in office, conflict of interest, insurance stipulation, etc.²⁰
- Under ONCA corporations do not need to have a by-law for borrowing powers; therefore the corporation should review their provisions for borrowing powers to determine if they should be changed or removed.
- Check the provision regarding voting methods to comply with the new requirements of mandatory proxies and alternatives means of voting.
- Decide if the corporation needs to make a provision specifying different rules for transferability of membership. Otherwise the membership can **only** be transferred back to the corporations.
- Review of all other by-laws to be sure that they are in accordance with the requirements of ONCA.
- Find out if the corporation should update the corporate name registration, or if the corporation should provide the transition documents to the Charities Directorate of Canada Revenue Agency (CRA) or its umbrella organization.
- Update accordingly the corporation's policies, manuals, etc. and train staff and volunteers about the new governance documents.
- Check for updates.

AVAILABLE TOOLS FOR ONTARIO NOT-FOR PROFIT CORPORATIONS

At the Ministry of Consumer Services, corporations can find the following tools:

- A guide written in a plain language under the format of questions and answers that deal with the sections of ONCA that may have a major impact on corporations.

<http://www.sse.gov.on.ca/mcs/en/Pages/onca7.aspx>

²⁰ Under ONCA corporations can amend by-laws in two (2) ways depending of the subject matter of the changes: a. the default mechanism where the board may adopt the by-law, which will be effective after the board's approval (with the requirement of confirmation by the members at the next meeting); b. the ordinary mechanism for matters affecting members' rights, where members by ordinary resolution approve the changes, i.e. transfer of membership.

- A draft default by-law about organizational matters, which corporations can use to review their own organizational by-laws during the transition period in order to introduce, if needed, the necessary changes to be in accord with ONCA.
<http://www.sse.gov.on.ca/mcs/en/Pages/onca6.aspx>
- A transition check list that can be used as a reference tool to ensure compliance with ONCA.
<http://www.sse.gov.on.ca/mcs/en/Pages/onca4.aspx>
- Key terms within the ONCA.
<http://www.sse.gov.on.ca/mcs/en/Pages/onca2.aspx>
- A toolkit that includes presentation slides, speaker points, presenter questions and answers, newsletter, bulletins, web text and Facebook posts. Corporations can use this toolkit to explain ONCA to their members and stakeholders. The toolkit can be requested by email at ONCAtools@ontario.ca.

ADDITIONAL HELP

1. Charities Directorate provides information about registering and operating as charity.
<http://www.cra-arc.gc.ca/charities/>
2. Community Legal Education of Ontario (CLEO) received a grant from the Ontario Government to support the not-for-profit organizations during the transitions period.
<http://nonprofitlaw.cleo.on.ca/>
CLEO's project "Get Ready for the ONCA" is geared to support and prepare not-for-profit organizations for the ONCA by sharing existing resources about the ONCA, producing new tools and checklists, developing webinars, other educational materials and public presentations. More information is found at: nonprofitlaw.cleo.on.ca/webinars-and-events/.

The recorded webinar "Get Ready for the ONCA – the basics" is available on the **Get Ready for the ONCA website**. Organizations can also subscribe to the project's e-

bulletin to get notice when more webinars and new online tools become available by emailing at nonprofitlaw.cleo.on.ca

For questions, the Project coordinator, Brenda Doner, can be contact via telephone at 416-408-4420 extension 828, or via email at brenda.doner@cleo.on.ca

3. Legal clinics may offer pro bono legal assistance.

<https://maps.google.ca/maps?ie=UTF-8&q=legal+clinics+ottawa&fb=1&gl=ca&hq=legal+clinics&hnear=0x4cce05b25f5113af:0x8a6a51e131dd15ed,Ottawa,+ON&view=text&ei=BYpuUunYPLCgyAHQ2IG4AQ&ved=0CFAQtQM>

4. Office of the Public Guardian and Trustee has jurisdiction over Ontario Charitable organizations.

<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/default.asp>

5. Ontario Ministry of Consumer Services website provides updates and information about ONCA.

<http://www.sse.gov.on.ca/mcs/en/Pages/onca1.aspx>

6. Ontario Ministry of Government Services provides copies of letters patent and supplementary letters patent, and other resources.

<http://www.mgs.gov.on.ca/en/AbtMin/109669.html>

7. Ontario Nonprofit Network (ONN) is working closely with CLEO on ways to better facilitate the transition. <http://www.theonn.ca/what-we-do/constellations/onca/>
Also, ONN provides information about the amendments at www.theonn.ca/onca

8. The Law Society Referral Service 1-800-268-8326 provides names of lawyers or paralegals within the area that offer free advice up to thirty (30) minutes.

9. The Partnership Project from the Ministry of Citizenship and Immigration to strengthened the not-for-profit sector in Ontario has on its website tools and resources i.e. governance.

http://www.citizenship.gov.on.ca/english/pp/better_nfp.shtml

GLOSSARY

Articles: are the legal documents that govern the identity of the corporation, which include the original or restated articles of incorporation, continuance or amalgamation, and subsequent changes (reorganization, articles of amendment, etc.).

Audit engagement: Is a process done by an independent public accountant, who examines the financial statements, accounting records and other supporting documents, in order to provide his/her professional opinion about the corporation's financial condition and activities during the period in which the audit was performed.

Bind: Place under legal obligation, i.e. through a contract.

By-laws: The rules approved by the board of directors or members that govern the internal operation of a corporation. A corporation can adopt the default by-law rules set by the Acts (CNCA, ONCA) or can modify them according to what is allowed by the Acts.

Common law: Principles and rules incorporated in case law rather than statutes, originating from customs and traditions and developed by judges through courts' decisions.

Continuance: The process that corporations should undertake to continue its activities without interruption under the CNCA.

De facto: Something that exists whether is legally recognized or not. In the context of this document it means **by right**.

Default: Rules contained in an Act that automatically enter in effect in absence of rules made by the corporations in their articles or by-laws.

Dissolution: The end of the corporation existence.

Directors: A group of persons chosen by the members to govern the affairs of a corporation (Members of the Board of Directors).

Enact: Make into law, statute, or act.

Ex-officio: A member of a board who is part of it by because of holding another office.

Jurisdiction: For the purpose of this booklet, it is the geographical area or subject matter over which the authority applies, i.e. in Ontario charitable corporations are subject to the jurisdiction of Ontario's Office of the Public Guardian and Trustee.

Letters patent: are written documents used for the creation of corporations and contain the object, organization and reorganization of corporations. Amendments to the letters patent are included on **supplementary letters patent**.

Member: A person who is accepted into the membership of a corporation and as such has rights to vote, obtain information, attend to meetings, etc.

Not-For-Profit Corporations: The term includes formal incorporated or informal incorporated organizations, charities and non-charity organizations that are not pursuing financial profit for the benefit of their members, directors or officers, that are entitled to generate profit only to fulfill their not-for-profit purposes, and may not distribute any profit to their members, directors or officers in case of dissolution or termination.

Nuans/ Name Search Report: It is a five-page report produced by Industry Canada for a fee with validity of 90 days, in which it is determined if the corporation's proposed name is available.

Officers: The executives of corporations (management team) who hold position of authority and report to the directors.

Ordinary resolution: It is a resolution passed by simple majority (**50% plus 1**) of the votes cast at a meeting.

Pro bono: done free of charge i.e. legal services.

Proxy: Person authorized to act on behalf of someone else, i.e. vote by proxy.

Public Accountant: A person who meets the following qualifications:

- a. Member in a good standing of a provincial branch of the Chartered Accountants of Canada, Certified General Accountants, or Certified Management Accountant;
- b. Possess the required provincial licenses to conduct an audit or review engagement within the province where the financial review will take place; and
- c. Is independent of the corporation

Registered charity: Refers to an organization that has received approval and has been given a charitable registration number by the Charities Directorate of Canada Revenue Agency.

Repeal: Means that a law has been revoked or reversed by a reform of the repealed law, or the law has been repealed without replacement.

Review engagement: Is a process in which an independent public accountant prepares financial statements on a review basis and provides limited assurance that the financial information is in agreement with the generally accepted accounting principles and is credible.

Soliciting Corporation: Is the one that has received during a single financial year an income of more than \$10,000 from public sources, including gifts or donations from non-members, grants from government and funds from another corporation that has received also income from public sources.

Special Resolution: It is a resolution passed by at least $\frac{2}{3}$ of the votes cast at a meeting.

Statement of purpose: Statement that describe the purpose(s) of the corporation, which may have been set in the letters patent.

Statute: A formal document enacted by a legislature, or a permanent rule established by an organization, corporation, etc.

Ultra vires: Outside of the legal power or authority of a person or corporation - activities or operations that are outside of the scope of actions of the corporations.

Veto right: The power to block a decision.

Waive: Abstain for enforcing or applying.

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