

**THE 2012 OBA INSTITUTE**

**Charity and Not-For-Profit Law**

**Board Issues under the New Not-For-Profit Corporations Act (Canada and Ontario):  
Potential Problems and Practical Solutions**

**DIGGING FOR DIRT: HANDLING REQUESTS FOR INFORMATION**

February 10, 2012

(Final)

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# DIGGING FOR DIRT: HANDLING REQUESTS FOR INFORMATION

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#### A. INTRODUCTION

In the Internet era where information is readily available at our fingertips, the reality of garnering information about not-for-profit (“NFP”) corporations is that access to corporate records is subject to a considerable array of rules and requirements. NFP legislation, like its for-profit counterparts, sets out significant recordkeeping obligations for corporations, as well as establishes prescribed rights to examine corporate records to certain persons with status, such as the directors and members of the corporation.

The purpose of this paper is to provide an overview concerning what information is available and to whom under the *Canada Not-for-Profit Corporations Act*<sup>1</sup> (“CNCA”) and the *Ontario Not-for-Profit Corporations Act, 2010*<sup>2</sup> (“ONCA”), collectively referred to as “NFP Legislation”. In order to deal with requests for such information, though, it is first necessary to know what records an NFP corporation must keep. In this regard, the new NFP Legislation has been modelled on reformed for-profit corporate statutes that were developed during the 1970s and 1980s. Accordingly, the provisions of and the case law associated with the *Canada Business Corporations Act*<sup>3</sup> (“CBCA”) and *Ontario Business Corporations Act*<sup>4</sup> (“OBCA”) is referenced

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<sup>1</sup> S.C. 2009, c. 23 [CNCA].

<sup>2</sup> S.O. 2010, c. 15 [ONCA].

<sup>3</sup> R.S.C., 1985, c. C-44 [CBCA].

<sup>4</sup> R.S.O. 1990, c. B.16 [OBCA].

where relevant in order to provide some context concerning how the new NFP Legislation may be applied and how the courts may interpret their provisions.

This paper will also compare the ONCA and CNCA to their respective predecessors, being the *Ontario Corporations Act*<sup>5</sup> (“OCA”), and *Canada Corporations Act*<sup>6</sup> (“CCA”), in order to highlight changes in recordkeeping requirements. However, it should be noted that there are limited provisions in the CCA and OCA that deal with recordkeeping obligations and access to information. Therefore, unless stated otherwise in this paper, the reader can assume that no provision exists under the CCA and OCA that corresponds with provisions under the CNCA and ONCA, respectively.

By way of background, until relatively recently federal NFP corporations only had to be concerned with Part II of the CCA, which regulated the incorporation and governance of federal non-share capital corporations. Since the CNCA, which received Royal Assent on June 23, 2009, was proclaimed in force on October 17, 2011, existing federal NFP corporations governed by the CCA will now have three years from the date of proclamation (i.e. until October 14, 2014), in order to continue under the CNCA. Until then, the CCA will continue to apply to those corporations that have not yet continued under the CNCA.

With regards to Ontario corporations, the OCA had not been substantively amended since 1953. Bill 65, *An Act to revise the law in respect of not-for-profit corporations, 2010*, was introduced on May 12, 2010 to replace the OCA with the ONCA, which received Royal Assent on October 25, 2010. The ONCA is now expected to be proclaimed in force in late 2012. Once the ONCA is proclaimed, existing NFP corporations will have three years to amend their constating documents to conform with the ONCA. At the end of that period of time, any documents that have not been amended will be deemed to be amended to conform with the ONCA.

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<sup>5</sup> R.S.O. 1990, c. C.38 [OCA].

<sup>6</sup> R.S.C., 1970, c. C-32 [CCA].

## B. RECORDKEEPING REQUIREMENTS FOR THE CORPORATION

### 1. Summary of Federal Recordkeeping Requirements

Before setting out the various entitlements of certain individuals to records and information under the CNCA, it is important to first summarize the recordkeeping obligations of CNCA corporations under the CNCA. In this regard, the following documents are required to be kept by CNCA corporations:<sup>7</sup>

- the articles and the by-laws, and amendments to them, and a copy of any unanimous member agreement;
- the minutes of meetings of members and any committee of members;
- the resolutions of members and any committee of members;
- if any debt obligation is issued by the corporation, a debt obligations register that complies with s. 44 of the CNCA;
- a register of directors;
- a register of officers;
- a register of members;
- adequate accounting records;
- minutes of meetings of the directors and any committee of directors;
- resolutions adopted by the directors or any committee of directors; and
- a copy of the financial statements of each of its subsidiaries and of each body corporate the accounts of which are consolidated in the financial statements of the corporation.

Only some of the records summarized above are required to be kept under the CCA. The CCA only requires that the following records to be kept: a copy of the letters patent, the by-laws and any supplementary letters patent; separate lists of the shareholders and the directors; meeting minutes of the shareholders, the directors, and any executive committee; proper accounting

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<sup>7</sup> Sections 21 and 174(1) of the CNCA.

records; and books for the registration and transfer of the shares of the capital stock and of the bonds, debentures, debenture stock and other securities of the company.<sup>8</sup>

In general, all of the records that are to be kept by a federal corporation must be maintained at the registered office or any other place in Canada designated by the directors, except for the directors' records in the case of the CNCA.<sup>9</sup> The directors' records consist of accounting records, meeting minutes for the directors and any committee of directors, and any resolutions adopted by the directors or any committee of directors.<sup>10</sup> Those particular records may be kept at the registered office or any other place that the directors see fit, including outside Canada. However, where the accounting records of a CNCA corporation are kept outside of Canada, accounting records adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis must be kept at the registered office or designated place in Canada.<sup>11</sup>

Notwithstanding the above, a CNCA corporation may keep all of its corporate and accounting records outside of Canada, but the records would have to be available for inspection, by technological means, during regular office hours at the registered office or any other designated place in Canada, and the corporation would have to provide technical assistance to facilitate inspection. However, that exemption is subject to the *Income Tax Act*<sup>12</sup> ("ITA"), the *Excise Tax Act*,<sup>13</sup> the *Customs Act*<sup>14</sup> and "any other Act administered by the Minister of National Revenue".<sup>15</sup> The corresponding provisions in the CBCA are similar in form and substance.<sup>16</sup>

The precedence of the ITA over the CNCA precludes CNCA corporations that are registered charities or registered Canadian amateur athletic associations ("RCAAs") from keeping their records outside of Canada. In this regard, s. 230(2) of the ITA provides that every registered charity and RCAA must keep records and books of account at an address in Canada kept on

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<sup>8</sup> Sections 109(1)(a)-(d), 112, 117, and 218(2) of the CCA.

<sup>9</sup> Sections 109(2) and 117(2) of the CCA and 21(1) of the CNCA.

<sup>10</sup> Section 21(3) of the CNCA.

<sup>11</sup> Section 21(8) of the CNCA.

<sup>12</sup> R.S.C., 1985, c. 1 (5th Supp.) [ITA].

<sup>13</sup> R.S.C. 1985, c. E-15.

<sup>14</sup> R.S.C. 1985, c. 1 (2nd Supp.).

<sup>15</sup> Section 21(9) of the CNCA.

<sup>16</sup> See section 20 of the CBCA.

file by the Canada Revenue Agency. Therefore, the records required to be kept under the CNCA for registered charities and RCAAAs could be kept anywhere in Canada, provided that they are available for inspection in the aforementioned manner.

## 2. Summary of Ontario Recordkeeping Requirements

Many of the records that must be kept by a Part III OCA corporation must also be kept by an ONCA corporation, although the corporation's recordkeeping obligations under the ONCA are more extensive. In this regard, the following records must be kept by an ONCA corporation:<sup>17</sup>

- the articles and by-laws, and amendments to them;
- the minutes of meetings of the members and of any committee of members;
- the resolutions of the members and of any committee of members;
- the minutes of meetings of the directors and of any committee of directors;
- the resolutions of the directors and of any committee of directors;
- a register of directors containing prescribed information;
- a register of officers containing prescribed information;
- a register of members;
- accounting records that are adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis and contain prescribed information;
- the consents of directors to act as directors, including individuals named in the articles as a first director, whether or not he or she is an incorporator, and elected and appointed directors; and
- a copy of the financial statements of each of the corporation's subsidiaries and of each body corporate the accounts of which are consolidated in the financial statements of the corporation.

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<sup>17</sup> Sections 92(1)-(2), 97(1) and 98(1) of the ONCA.



It should be noted that currently no regulations have been issued in relation to the ONCA. Therefore, no comparison can be made regarding the prescribed content requirements for the registers of directors and officers and the accounting records.

The OCA requires the following records to be kept: a copy of the letters patent and any supplementary letters patent; the by-laws; special resolutions of the corporation; separate registers of members and directors; meeting minutes of the members, the directors, and any executive committee; and proper books of account.<sup>18</sup>

There are other differences in the recordkeeping obligations between the two statutes. While only the special resolutions of the corporation must be kept under the OCA, ordinary and special resolutions of the members, the directors and any committee of members or directors must be kept under the ONCA.<sup>19</sup> There is also no requirement in the OCA to keep director consents and copies of the financial statements of subsidiaries and other bodies corporate, as is the case under the ONCA.

The general rule that applies to both the ONCA and OCA is that records must be kept at the registered office of the corporation.<sup>20</sup> The ONCA provides the added option of keeping these records at another place in Ontario designated by the directors, except for the meeting minutes of and resolutions of the directors and any committee of directors and the accounting records.<sup>21</sup> These remaining records must be located at the registered office or another place designated by the directors but may be outside of Ontario.<sup>22</sup> Notwithstanding the above, the ONCA permits all of the aforementioned records to be kept in a place outside Ontario if they are available for inspection by technological means during regular office hours at the registered office and the corporation provides technical assistance to facilitate inspection, but all of which is “subject to federal and Ontario tax statutes or any other Act.”<sup>23</sup> As mentioned above in relation to the CNCA, the ITA would preclude ONCA corporations that are registered charities or RCAAAs from keeping their records outside of Canada.

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<sup>18</sup> Sections 299(1), 300 and 302 of the OCA.

<sup>20</sup> Section 304(1) of the OCA and section 93(1) of the ONCA.

<sup>20</sup> Section 304(1) of the OCA and section 93(1) of the ONCA.

<sup>21</sup> Section 93(1) of the ONCA.

<sup>22</sup> Section 93(2) of the ONCA.

<sup>23</sup> Section 93(3) of the ONCA.

### 3. Retention Period

The only records that are subject to a retention period in the CNCA and CBCA are the accounting records that must be kept by the corporation. The provisions in the two statutes are worded almost identically and they impose the same retention period of six years after the end of the financial year to which the records relate.<sup>24</sup> Interestingly, the same provision exists in the ONCA, although not in the OBCA or the OCA.<sup>25</sup> In all three statutes where this provision is present, the provision is expressly subject to other legislation. In the case of the two federal statutes, the six year retention period is subject to any other federal or provincial legislation. The ONCA provision is worded differently, in that it is subject to “any other Act or rule of a taxing authority that requires a longer retention period”.<sup>26</sup>

Where the NFP corporation in question is a registered charity or RCAA, reference should be made to the ITA and *Income Tax Regulations*<sup>27</sup> (“ITR”) to confirm the applicable retention period with regards to “books and records” referenced therein. In this regard, s. 230(4) of the ITA requires registered charities and RCAAs to keep certain “books and records” for prescribed time periods that are set out in s. 5800 of the ITR, and all other remaining “records and books” shall be kept until the expiration of six years from the end of the last taxation year to which the records and books of account relate. As an example in this regard, s. 5800(1)(d) of the ITR provides that the records of the minutes of meetings of members and all documents and by-laws governing a registered charity or RCAA must be kept until two years after the registration of the charity or RCAA is revoked. Another example is s. 5800(1)(a) of the ITR, which requires the retention of the minutes of director meetings for two years after the day the corporation is dissolved.

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<sup>24</sup> Section 20(2.1) of the CBCA, section 21(4) of the CNCA and section 4 of the *Canada Not-for-profit Corporations Regulations*, S.O.R./2011-223 [CNCR].

<sup>25</sup> Section 92(3) of the ONCA.

<sup>26</sup> *Ibid.*

<sup>27</sup> C.R.C., c. 945 [ITR].

## C. WHAT RIGHTS DO DIRECTORS HAVE TO INFORMATION?

### 1. Federal Corporations

All of the records listed in section B1 on page 3 of this paper in relation to CNCA corporations are at all reasonable times, to be open to inspection by the directors. The corporation shall, at the request of the directors, provide them any extracts of the records free of charge.<sup>28</sup> The corresponding provisions in the CBCA are similar in form and substance, although they do not expressly entitle the directors to receive free extracts of records.<sup>29</sup>

In addition to access to the directors' records, a director can obtain additional information by compelling the public accountant or former public accountant to fulfill his or her duty to attend a meeting of the members at the corporation and answer questions relating to such duties. To do so, the director must send the public accountant or former public accountant notice not less than 10 days prior to the meeting. Notice to the corporation must be sent at the same time that notice is sent to the public accountant.<sup>30</sup> The CBCA contains the same provision.<sup>31</sup>

### 2. Ontario Corporations

The directors' access to records under the ONCA is similar to the CNCA. All of the records listed in section B2 on page 5 of this paper in relation to ONCA corporations must be available for inspection during regular business hours by the directors, except for the financial statements of subsidiaries of the corporation and of each body corporate whose accounts are consolidated in the financial statements of the corporation. Upon the request of any director, the corporation is required to provide extracts of those records at no charge.<sup>32</sup> Similar broad access to the records is provided for in the OCA for Part III corporations.<sup>33</sup>

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<sup>28</sup> Section 21(7) of the CNCA.

<sup>29</sup> See section 20(4) of the CBCA.

<sup>30</sup> Section 187(2)-(3) of the CNCA.

<sup>31</sup> See section 168 of the CBCA.

<sup>32</sup> Sections 94(1)-(2) and 97(2) of the ONCA.

<sup>33</sup> See section 304(1) of the OCA.

As with federal NFP corporations, a director of an ONCA corporation may compel the current or former auditor to attend a meeting of the shareholders. In the case of the ONCA, notice must be given to the auditor not less than 21 days prior to the meeting, and the corporation is to be given a copy of the notice at the same time the auditor receives notice.<sup>34</sup> No equivalent provision is set out in the OCA.

#### **D. WHAT RIGHTS DO MEMBERS HAVE TO VIEW, COPY AND USE INFORMATION?**

##### **1. Federal Corporations**

###### **a) Records Generally Available for Inspection**

Without having to fulfil any requirements beforehand, members and their personal representatives of CNCA corporations may examine the following records of the corporation during usual business hours:<sup>35</sup>

- the articles and the by-laws, and amendments to them, and a copy of any unanimous member agreement;
- the minutes of meetings of members and any committee of members;
- the resolutions of members and any committee of members;
- if any debt obligation is issued by the corporation, a debt obligations register that complies with s. 44;
- a register of directors;
- a register of officers; and
- financial statements of each of the corporation's subsidiaries and of each body corporate the accounts of which are consolidated in the financial statements of the corporation.

Upon payment of a reasonable fee, a member and his or her personal representative may take extracts from those records.<sup>36</sup> However, with regards to the articles, by-laws, any amendments to

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<sup>34</sup> Section 75 of the ONCA.

<sup>35</sup> Sections 22(1) and 174(2) of the CNCA.

them, and any unanimous member agreement, as well as the financial statements referred to above, the members may request a free copy of them.<sup>37</sup>

Members may also access the register of members and register of debt obligations, subject to the satisfaction of certain requirements beforehand. However, given the complexities involving these requirements, the next section of this paper outlines what those rules are.

b) Access to Registers and Lists<sup>38</sup>

Under the CNCA, members who wish to examine the debt obligations register or the register of members must satisfy certain requirements beforehand. To examine either register, the member must first make a request to the corporation and provide the corporation with a statutory declaration.<sup>39</sup> Access to either register is to be provided by the corporation during its usual business hours within 10 days after it has received the statutory declaration.<sup>40</sup> To obtain an extract from either register, the member must pay a fee.<sup>41</sup>

Upon fulfilling those requirements, the member can require the corporation to furnish the requested list within 10 days after receiving the statutory declaration.<sup>42</sup> There is a limitation, though, on the number of times that a member or member's personal representative may apply for a list of members. They may only apply once in each calendar year, except where there is to be a special meeting of members for which the applicant receives notice.<sup>43</sup>

Similarly, the CBCA provides that shareholders may pay a reasonable fee and submit an affidavit containing the prescribed information to the corporation for a list of shareholders. The corporation must provide the list within 10 days of receiving the affidavit.<sup>44</sup> According to case law involving the CBCA, the purpose of the ten day rule is to give the corporation a reasonable

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<sup>36</sup> *Ibid.*

<sup>37</sup> Sections 22(3) and 174(2) of the CNCA.

<sup>38</sup> In general, a list of members sets out the names of all persons who are members and their addresses. A register of members sets out the names and addresses persons who are and have been members.

<sup>39</sup> Sections 22(2) and 23(1) of the CNCA.

<sup>40</sup> Sections 22(2) and 23(1) of the CNCA and section 7 of the CNCR.

<sup>41</sup> Sections 22(1) and 23(1) of the CBCA.

<sup>42</sup> Section 8(1) of the CNCR.

<sup>43</sup> Section 23(3) of the CNCA.

<sup>44</sup> Section 21(3) of the CBCA.

period of time to prepare and check a list.<sup>45</sup> In this regard, the corporation is not required to provide the list before the expiration of the ten days, even if the list can be prepared well in advance of the deadline.<sup>46</sup>

The CNCA prohibits a member or a member's personal representative who obtains a list of members or information from a register of members to use the list or information except in connection with:<sup>47</sup>

- an effort to influence the voting of members;
- requisitioning a meeting of members; or
- any other matter relating to the affairs of the corporation.

Section 21(9) of the CBCA also restricts the permitted uses by any person of a list of shareholders or information from a securities register, but does not include the requisitioning of a meeting of shareholders as a permitted use. Instead, the CBCA permits a list of shareholders or information from a securities register to be used in relation to an offer to acquire debt obligations of the corporation.

Given the similar language contained in the CBCA and the CNCA, it is anticipated that case law on the former may be used to interpret the latter. For example, the word "affairs", as used in s. 21(9)(c) of the CBCA, relates to the relationships between the corporation, shareholders, directors and officers. Any use of the securities register that involves communication between the shareholders as shareholders, or regarding the corporation, directors and/or officers is an allowable use.<sup>48</sup> As the emphasis in the definition of "affairs" is the relationship between parties, the motive of the shareholder in seeking to use a shareholder list should not be considered, but rather the actual use to which the list will be put.<sup>49</sup> Using the same reasoning, it is expected that the motive of a member in requesting a list of members under the CNCA will not come into play when a request for a list of members is challenged.

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<sup>45</sup> *Maxx Petroleum Ltd. v. American Eagle Petroleum Ltd.*, [1993] A.J. No. 331 (C.A.).

<sup>46</sup> *Ibid.*

<sup>47</sup> Section 23(7) of the CNCA.

<sup>48</sup> *EnCana Corp. v. Douglas*, 2005 ABCA 439 (CanLII) at para. 5.

<sup>49</sup> *Ibid.*, at para. 37-39.

c) Documents to be Presented at Annual Meeting

At every annual meeting, the directors must place before the members of a CNCA corporation the following documents:<sup>50</sup>

- Prescribed comparative financial statements of the corporation;
- the report of the public accountant, if any; and
- any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous member agreement.

The same documents must be placed before the shareholders of a CBCA corporation.<sup>51</sup> In a motion concerning the production of documents by a former shareholder of a CBCA corporation, the Master hearing the motion held that the report of the auditor, if any, is only required to be presented by the directors, but not audited financial statements.<sup>52</sup> As well, the duty to provide the above documents is owed to existing shareholders, not former shareholders.<sup>53</sup> Based on that reasoning, it would appear that only existing members of a CNCA corporation would be entitled to the documents in question, and that the directors would not be required to provide the members with audited financial statements.

Case law concerning the CBCA indicates that, notwithstanding the use of the phrase “if any” in relation to the report of the public accountant, a CBCA corporation is obliged to uphold a member’s right to receive financial statements and the public accountant’s report.<sup>54</sup> In *Merrill v. Afab Security*, the Superior Court of Ontario interpreted that same phrase, with regard to s. 155(1)(b) of the CBCA in relation to the report of the auditor as referring to the situation where all of the shareholders consent to dispense with the appointment of an auditor pursuant to s. 163

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<sup>50</sup> Section 172(1) of the CNCA.

<sup>51</sup> Section 155(1) of the CBCA.

<sup>52</sup> *Kiar v. Compas Inc.*, [2004] O.J. No. 2783 (S.C.) at para. 6.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Merrill v. Afab Security*, 2007 CanLII 9614 at para. 21(Ont. S.C.).

of the CBCA, and therefore, a report of the auditor would not be required to be placed before the shareholders in that case.<sup>55</sup>

Under the CNCA, a copy or summary of the documents that must be placed before the members, or a copy of a publication of the corporation reproducing the information in the documents or summary, must be sent to all members 21 to 60 days before the day on which an annual meeting of members is held or before the day on which a resolution in lieu of a meeting is signed under s. 166 of the CNCA.<sup>56</sup> Members may decline to receive a copy or summary of the documents or a copy of the publication by providing written notice to the corporation.<sup>57</sup> If a summary is sent to a member, then the corporation is required to inform the member of the procedure for obtaining a copy of the actual documents for free.<sup>58</sup> As an alternative to sending out a copy or summary of the documents or a copy of the publication, the corporation may, if the by-laws so provide, simply notify the members that the documents are available at its registered office and members may request a free copy at the office or by prepaid mail.<sup>59</sup>

i) Financial statements

Two separate sets of comparative financial statements pertaining to different time periods must be provided to the members and shareholders in the case of the CNCA and CBCA respectively. For the first set of financial statements, if the corporation has completed a financial year, then the relevant period is that which immediately began after the end of the last completed financial year and ending not more than six months before the annual meeting. If the corporation has not completed a financial year, then the relevant period is that which began on the date the corporation came into existence and ended not more than six months before the annual meeting.<sup>60</sup> The second set of financial statements relate to the immediately preceding financial year.<sup>61</sup>

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<sup>55</sup> *Ibid.*, at para. 19.

<sup>56</sup> Section 175(1) of the CNCA and section 77 of the CNCR.

<sup>57</sup> Section 175(1) of the CNCA.

<sup>58</sup> *Ibid.*

<sup>59</sup> Section 175(2) of the CNCA.

<sup>60</sup> Section 155(1)(a)(i) of the CBCA and section 172(1)(a)(i) of the CNCA.

<sup>61</sup> Section 155(1)(a)(ii) of the CBCA and section 172(1)(a)(ii) of the CNCA.



Neither the CNCA nor the CBCA prescribes any requirements regarding the substance of the financial statements. As will be discussed below, the OCA is the only statute considered in this paper that imposes requirements regarding the substantive content of the financial statements. With regards to form, the directors of CNCA and CBCA corporations must approve the financial statements of the corporation and such approval must be evidenced by the manual signature of one or more directors or a facsimile of the signature reproduced in the financial statements.<sup>62</sup>

ii) Report of the Public Accountant or Auditor

It is not always the case that the members of a CNCA corporation will receive a public accountant's report. This is because the CNCA categorizes corporations into either soliciting corporations or non-soliciting corporations and different levels of financial review apply to the different categories of corporations. A corporation becomes a soliciting corporation if, in a fiscal year, the corporation receives more than \$10,000 in gross annual revenue, directly or indirectly, from public sources, such as public donors, grants from the government or other entities that have themselves received in excess of \$10,000 in the previous financial year from public donors or from government.<sup>63</sup> A corporation that does not meet the definition for a soliciting corporation is a non-soliciting corporation.

All soliciting corporations and non-soliciting corporations are further divided into designated corporations and non-designated corporations, depending on their income as follows:<sup>64</sup>

- For soliciting corporations, a corporation receiving \$50,000 or less in gross annual revenues for its last fiscal year is a designated corporation, and a corporation receiving income in excess of this level is a non-designated corporation.<sup>65</sup>
  - Members of a designated soliciting corporation are required to appoint a public accountant by ordinary resolution at each annual meeting.<sup>66</sup> In that case, the

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<sup>62</sup> Section 158(1) of the CBCA and section 178(1) of the CNCA.

<sup>63</sup> Section 2(5.1) of the CNCA and section 16(d) of the CNCR.

<sup>64</sup> This description of the different categories of corporations is from Theresa L.M. Man, "The Practical Impact of the Canada Not-for-Profit Corporations Act" (Paper delivered at The Intensive Short Course on Legal and Risk Management for charities and Not-for-Profit Organizations, Osgoode Hall Law School Professional Development CLE, 6 October 2011).

<sup>65</sup> Section 179(1) of the CNCA.

<sup>66</sup> Section 181 of the CNCA.

public accountant must conduct a review engagement of the financial statements, but the members may pass an ordinary resolution to require an audit instead.<sup>67</sup> It is possible for the members to waive the appointment of a public accountant annually by a unanimous resolution.<sup>68</sup> In that case, a compilation of the financial statements would be sufficient.

- All non-designated soliciting corporations must appoint a public accountant. In terms of the level of review required, it will depend on the income of the corporation. Those corporations that receive more than \$50,000 and up to \$250,000 in gross annual revenues for the last fiscal year must have the public accountant conduct an audit, but their members can pass a special resolution to require a review engagement instead. Those corporations that receive more than \$250,000 in gross annual revenues for the last fiscal year must have the public accountant conduct an audit, and it is not permissible for their members to require a review engagement instead.<sup>69</sup>
- For non-soliciting corporations, a corporation receiving \$1 million or less in gross annual revenues for its last fiscal year is a designated corporation and a corporation receiving income in excess of this level is a non-designated corporation.<sup>70</sup>
  - Members of a designated non-soliciting corporation are required to appoint a public accountant by ordinary resolution at each annual meeting.<sup>71</sup> In that case, the public accountant must conduct a review engagement of the financial statements, but the members may pass an ordinary resolution to require an audit instead.<sup>72</sup> It is possible for the members to waive the appointment of a public accountant annually by a unanimous resolution. In that case, a compilation of the financial statements would be sufficient.

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<sup>67</sup> Section 188 of the CNCA.

<sup>68</sup> Section 182 of the CNCA.

<sup>69</sup> Section 189 of the CNCA.

<sup>70</sup> Section 179(1) of the CNCA.

<sup>71</sup> Section 181 of the CNCA.

<sup>72</sup> Section 182 of the CNCA.

- All non-designated non-soliciting corporations must appoint a public accountant.<sup>73</sup> The public accountant must conduct an audit and it is not permissible for their members to require a review engagement instead.

Under the CBCA and the CNCA, the shareholders and members, respectively, have the right to examine the auditor.<sup>74</sup> However, case law involving the CBCA has established that it is permissible for the directors to call and then postpone a meeting of the shareholders, thus precluding such an examination at that time. Since the directors are responsible for managing the business and affairs of the corporation, the courts have held that it is within the scope of the board's powers to make such a decision without contravening the CBCA.<sup>75</sup> Although the shareholders will be deprived of their right to examine the auditor at that particular time, the shareholders have other means of exercising that right.<sup>76</sup>

Those other means for shareholders to examine the auditor include: an oppression remedy, the ability to requisition a meeting, apply for a court order under s. 144 of the CBCA directing that the meeting proceed, the statutory requirement to hold an annual general meeting no later than 15 months from the preceding general meeting under s. 133 of the CBCA, the ability to remove the directors at an annual general meeting, as well as a provision in an unanimous shareholders agreement limiting the directors' power to cancel meetings called by the directors.<sup>77</sup> Given the similar wording of s. 130, s. 160, s. 168 and s. 170 of the CNCA, members of CNCA corporations would likewise have several ways of exercising their right to examine the public auditor notwithstanding the directors' ability to postpone a meeting of members.

#### d) Ways to Bar Access to Records

Under the CNCA and CBCA, a member or shareholder's right to examine the corporation's consolidated financial statements can be blocked by the corporation making an application to the court within 15 days of receiving the member's request.<sup>78</sup> The member requesting the

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<sup>73</sup> Section 181 of the CNCA.

<sup>74</sup> Section 168 of the CBCA and 187 of the CNCA.

<sup>75</sup> *Environmental Management Solutions Inc. v. D'Addario*, [2005] O.J. No. 5921 (S.C.) at para. 21-22.

<sup>76</sup> *Canadian Jorex Ltd. v. 477749 Alberta Ltd.*, 1991 ABCA 330 at para. 14 (CanLII) (C.A.).

<sup>77</sup> *Ibid.*

<sup>78</sup> Section 157(3) of the CBCA, section 174(3) of the CNCA and section 76 of the CNCR.

consolidated financial statements and the Director must be given notice of the application and may appear and be heard on the matter.<sup>79</sup> The court may bar the member's right to access the consolidated financial statements if it is satisfied that the examination would be detrimental to the corporation or a subsidiary.<sup>80</sup>

A CNCA corporation may also make an application to the Director for authorization to refuse, in whole or in part, access to corporate records or corporation information that is required to be provided under Part 4 of the CNCA dealing with corporate records. This authorization will be granted where the Director reasonably believes that allowing the access or furnishing the information would be detrimental to any member or the corporation.<sup>81</sup> No equivalent provision exists in the CBCA or the CCA.

Conversely, any member may make an application to the Director to direct a CNCA corporation to refuse, in whole or in part, access to corporate records or information that the corporation is required to provide under Part 4 of the CNCA. The Director may so direct where the Director reasonably believes that allowing the access or furnishing the information would be detrimental to any member or the corporation.<sup>82</sup> No equivalent provision exists in the CBCA or the CCA.

#### e) Investigations and audits

Where the corporation sets up roadblocks to access to corporate records and information, a member may respond by making an application to have an investigator appointed.

Under both the CNCA and CBCA, a member or, in the case of a CBCA corporation, a security holder, can apply to a court having jurisdiction in the place where the corporation has its registered office to have an inspector appointed.<sup>83</sup> Among other things, the court can also give directions to the inspector on any matter arising in the investigation, authorize the inspector to examine any person under oath at a hearing, and require an inspector to make an interim or final

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<sup>79</sup> Section 157(4) of the CBCA and section 174(4) of the CNCA.

<sup>80</sup> Section 157(3) of the CBCA and section 174(3) of the CNCA.

<sup>81</sup> Section 25(1) of the CNCA.

<sup>82</sup> Section 25(2) of the CNCA.

<sup>83</sup> Section 229(1) of the CBCA and section 242(1) of the CNCA.

report to the court.<sup>84</sup> One of the following grounds must be met for an inspector to be appointed:<sup>85</sup>

- the activities of the corporation or any of its affiliates are or have been carried on with intent to defraud any person;
- the activities or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a member or debt obligation holder;
- the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; or
- persons concerned with the formation, activities or affairs of the corporation or any of its affiliates have acted fraudulently or dishonestly.

## 2. Ontario Corporations

### a) Records Generally Available for Inspection

Members may examine all of the records listed in section B2 on page 5 of this paper in relation to ONCA corporations, except for the directors' records. The same access is essentially provided to members of Part III OCA corporations, except that the governing documents they have access to are in the form of letters patent and supplementary letters patent as opposed to articles and by-laws.<sup>86</sup> Upon request, members are entitled to one copy of those records under the ONCA, except for the register of members, at no charge.<sup>87</sup> As noted above, the ONCA not only has more extensive recordkeeping requirements, but it also has greater entitlements for members to view records.

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<sup>84</sup> Section 230(1) of the CBCA and section 242(1) of the CNCA.

<sup>85</sup> Section 229(2) of the CBCA and section 242(2) of the CNCA.

<sup>86</sup> Section 305 of the OCA.

<sup>87</sup> Sections 95, 96(1), 97(2) and 98(2) of the ONCA.

## b) Access to Register of Members and List of Members

Under the ONCA, members who wish to examine the register of members must satisfy certain requirements beforehand. To examine the register of members, the member must first make a request to the corporation, provide the corporation with a statutory declaration, and pay a fee.<sup>88</sup> Access to the register of members is to be provided by the corporation during its regular business as soon as practicable.<sup>89</sup>

The ONCA does not replicate the requirements in s. 306 of the OCA for a member to obtain a list of members. Under s. 306 of the OCA, a member must file an affidavit in the form set out in the OCA. In the affidavit, the applicant must swear that it requires and will use the list of members only for “purposes connected with the corporation”.<sup>90</sup> The OCA defines “purposes connected with the corporation” as including any effort to influence the voting of the members at any meeting of the corporation, which includes the acquisition or offering of shares to acquire control or to effect an amalgamation or reorganization and any other purpose approved by the Minister.<sup>91</sup>

The description of “purposes connected with the corporation” in s. 307(6) of the OCA is similarly not exhaustive. To limit the purposes to which membership lists could be used would run counter to the principle of democracy inherent in shareholders’ [members] rights.<sup>92</sup> As well, to give s. 307(6) a restrictive interpretation would diminish shareholders’ abilities to communicate concerns about corporate governance to each other and thereby detract from their rights of audit and review of directors’ acts and conduct in properly constituted meetings of shareholders.<sup>93</sup>

Once the requirements set out in s. 306 of the OCA are satisfied, the member would not be disentitled to the list even where the corporation alleges that the member’s intent is to “sow mischief”<sup>94</sup> or that the motive of the member is not to benefit the corporation.<sup>95</sup> All that is

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<sup>88</sup> Section 96(1) of the ONCA.

<sup>89</sup> *Ibid.*

<sup>90</sup> Section 306(1) of the OCA.

<sup>91</sup> OCA, section 306(3).

<sup>92</sup> *Rodgers v. Calvert*, [2004] O.J. No. 3653 (S.C.) at para. 20.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Polish Alliance of Canada, Branch 43 v. Polish Alliance of Canada*, [2009] O.J. No. 2882 (S.C.) at para. 20.

relevant is the applicant's statement in his or her affidavit that the register of members will be used for purposes connected for purposes connected with the corporation.<sup>96</sup>

In comparison, a member of an ONCA corporation must make a request, pay a fee and give the corporation the statutory declaration that provides that it will not use the list of members or the information from a register of members except in connection with:<sup>97</sup>

- an effort to influence the voting of members;
- requisitioning a meeting of the members; or
- another matter relating to the affairs of the corporation.”

The applicant under the ONCA who meets these requirements is to be allowed access to the register during the corporation's regular office hours as soon as is practical.<sup>98</sup>

c) Documents to be presented at the annual meeting

At each annual meeting of members, the directors of an ONCA corporation are required to provide the members with:<sup>99</sup>

- financial statements,
- the auditor's report, or of the person who conducted a review engagement, as the case may be, and
- any further information respecting the financial position of the corporation and the results of its operations required by the articles or the by-laws.

An ONCA corporation must give a copy of the above documents to all members who have requested a copy not less than 21 days before each annual meeting or before the signing of a

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<sup>95</sup> *Lawrence v. Toronto Humane Society*, [2006] O.J. No. 2410 (C.A.) at para. 99,

<sup>96</sup> *Ibid.*

<sup>97</sup> Section 96 of ONCA

<sup>98</sup> *Ibid.*

<sup>99</sup> Section 84(1) of the ONCA.

resolution in lieu of an annual meeting.<sup>100</sup> As will be discussed further below, an ONCA corporation may be required to provide the report of a person appointed to conduct a review engagement instead of an auditor's report.<sup>101</sup> Unlike the CBCA, CNCA, and OBCA, there is no option under the ONCA or the OCA to send a summary of the documents to the members.<sup>102</sup>

Different time periods exist among the NFP legislation for sending copies to the members. Whereas a minimum of 21 days of advance notice is the norm among the NFP and for-profit corporation statutes, the OBCA has different time periods, depending on whether the corporation is an offering or a non-offering corporation.<sup>103</sup>

#### i) Financial Statements

In relation to Ontario corporations, only the OCA sets out requirements for the content of the financial statements. The financial statements of Part III OCA corporation must consist of: a statement of profit and loss for such period, a statement of surplus for such period, and a balance sheet as at the end of such period.<sup>104</sup>

According to case law involving the OBCA, a corporation cannot impose terms on a shareholder's right to the information and material in audited financial statements. A shareholder's right to information or material (including audited financial statements) as granted to him or her under the OBCA is a clear mandatory right prescribed by the legislature that is vested personally in the shareholder.<sup>105</sup> It is unnecessary for a shareholder to give any reason in exercising his rights under the OBCA. Further, a shareholder need not negotiate with the corporation to obtain what he or she is entitled to.<sup>106</sup> Given the modelling of the ONCA on the OBCA, the same principles may very well apply to the former.

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<sup>100</sup> Section 84(2) of the ONCA.

<sup>101</sup> Section 84(1)(b) of the ONCA.

<sup>102</sup> See section 159 of the CBCA, section 175(1) of the CNCA and section 154(2) of the OBCA.

<sup>103</sup> Section 154(3)-(4) of the OBCA. Copies of documents must be sent to the shareholders of offering corporations not less than 21 days before each annual meeting of shareholders or before the signing of a resolution in lieu of a meeting of shareholders. Copies of documents must be sent not less than 10 days before each annual meeting of shareholders or before the signing of a resolution in lieu of an annual meeting.

<sup>104</sup> Section 97(1)(a) of the OCA.

<sup>105</sup> *Cooper v. The Premier Trust Company* (1945), [1945] O.R. 35 (C.A.) at 43.

<sup>106</sup> *Labatt Brewing Co. v. Trilon Holdings Inc.* (1998), 41 O.R. (3d) 384 (Ct. J. (Gen. Div.)) at 387.



ii) Auditor's report

It is important to note that it may not always be the case that an auditor will be appointed and an auditor's report will need to be prepared for Ontario NFP corporations. Depending on the applicable statute, it is possible to completely dispense with the appointment of an auditor and the completion of financial review.

For Part III OCA corporations, one or more auditors must be appointed by the members so that the former can complete an annual audit for the purpose of reporting to the members on the financial statements at the annual general meeting, save and except where the annual income is less than \$100,000 and all members consent in writing, as explained further below.<sup>107</sup> In contrast, the general rule for ONCA corporations is that at each annual meeting the members are required to appoint by ordinary resolution an auditor to conduct an audit or a person to conduct a review engagement, where applicable.<sup>108</sup> It is possible, however, to dispense with making any appointment and the completion of financial review under the ONCA, depending on the category of the corporation and the annual revenue.<sup>109</sup> This means, as explained below, that the members may receive the auditor's report, the report of the person who conducted a review engagement, or no report whatsoever.

If a Public Benefit Corporation's ("PBC"), as that term is defined in the ONCA,<sup>110</sup> has annual revenue that is more than \$100,000 and less than \$500,000 in a financial year, its members may approve by extraordinary resolution to have a review engagement in lieu of an audit. If a PBC's annual revenue for a financial year is \$100,000 or less, then its members may approve by extraordinary resolution to dispense with the appointment of the auditor and not have an audit or review engagement.<sup>111</sup> These two alternatives are not available to a PBC that has \$500,000 or more in annual revenue.

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<sup>107</sup> Sections 94, 96, and 96.1 of the OCA..

<sup>108</sup> Section 77(1) of the ONCA.

<sup>109</sup> This description of the different categories of corporations that follows is from Terrance S. Carter and Theresa L.M. Man, "The Nuts and Bolts of the Ontario Not-for-Profit Corporations Act, 2010" Charity Law Bulletin No. 262 online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2011/chylb262.htm>>.

<sup>110</sup> See section section 1(1) of the ONCA.

<sup>111</sup> Section 76(1) of the ONCA.

The monetary thresholds for dispensing with financial review are less onerous for non-PBCs. If a non-PBC's annual revenue is more than \$500,000 in a financial year, then its members may approve by extraordinary resolution a review engagement in lieu of an audit. If a non-PBC's annual revenue is \$500,000 or less in a financial year, its members may decide by extraordinary resolution not to appoint an auditor and to dispense with an audit or a review engagement.<sup>112</sup> It should be noted that the ONCA expressly provides that the monetary thresholds for dispensing with financial review in relation to both PBCs and non-PBCs may be amended by regulations.

Similar to a PBC with annual revenue of \$100,000 or less, an OCA corporation may be exempt from the appointment and duties of the auditor (e.g. report to the shareholders) for a particular financial year if the corporation is not a "public company", the annual income of the corporation is less than \$100,000.00 and all of the members' written consent to the exemption is obtained.<sup>113</sup> A public company is defined as a company that is not a "private company" (i.e. a company whose Special Act legislation, letters patent or supplementary letters patent provides for the following: the right to transfer its shares is restricted, there is a maximum of shareholders, and it is prohibited to invite the public to subscribe for its shares or securities).<sup>114</sup>

Under both the ONCA and OCA, the auditor's report, or the report of the person who completed a review engagement in the case of the ONCA, must be put before the corporation at any annual meeting during the auditor's term of office.<sup>115</sup> While the ONCA does not prescribe requirements for the content of the report, the OCA requires that the auditor's report must state whether, in the auditor's opinion, the financial statements presents fairly the financial position of the corporation and the results of its operations in accordance with generally accepted accounting principles.<sup>116</sup> If the financial statement of an OCA corporation contains a statement of source and application of funds or a statement of changes in net assets, the auditor's report must state whether, in the auditor's opinion, in effect, the statement of source and application of funds or the statement of changes in net assets presents fairly the information shown therein.<sup>117</sup> As well, the auditor's

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<sup>112</sup> Section 76(2) of the ONCA.

<sup>113</sup> Section 96.1 of the OCA.

<sup>114</sup> Section 1 of the OCA.

<sup>115</sup> Section 96(2) of the OCA and section 77 of the ONCA.

<sup>116</sup> Section 96(2) of the OCA

<sup>117</sup> Section 96(3) of the OCA

report of an OCA corporation must make one or more of the following statements where the auditor considers it necessary:<sup>118</sup>

- if the corporation's financial statement is not in agreement with its accounting records;
- if the corporation's financial statement is not in accordance with the requirements of the OCA;
- if the auditor has not received all the information and explanations that the auditor has required; or
- if proper accounting records have not been kept, so far as appears from the auditor's examination.

Under the ONCA, members have the option of compelling the auditor or a former auditor to fulfill its duty to attend a meeting of the members at the corporation and answer questions relating to their duties. To do so, a member must provide the auditor or former auditor notice of not less than 21 days prior to the meeting. It is not a requirement that the member to be entitled to vote at the meeting.<sup>119</sup> In comparison, the OCA does not impose a similar duty on the auditor. Members may merely hope that the auditor exercises its right, which is provided under the both OCA and ONCA, to attend and be heard at the meetings of shareholders or members.<sup>120</sup>

As mentioned above, the CNCA and CBCA impose the same duty upon the public accountant or a former public accountant of the corporation to attend a meeting of members and answer questions where requested, though the notice period is 10 days prior to the meeting and the provisions in those statutes are more detailed. Both require the member to send its notice to the present or former public accountant or auditor and a copy of that notice to the corporation at the same time.<sup>121</sup>

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<sup>118</sup> Section 96(4) of the OCA

<sup>119</sup> Section 75(2) of the ONCA

<sup>120</sup> Section 96(6) of the OCA and section 75(1) of the ONCA,

<sup>121</sup> Section 168(2)-(3) of the CBCA and section 187(2)-(3) of the CNCA.

#### d) Ways to Bar Access to Records

Unlike the OCA, the ONCA provides various means to limit the members' access to corporate records and information. First, the corporation may make an application for a court order precluding the right to examine the financial statements within 15 days of receiving a member's request to do so.<sup>122</sup> The corporation must give the person making the request notice of the application and that person may appear and be heard on the matter.<sup>123</sup> Such an order will be made where the court is satisfied that the examination would be detrimental to the corporation or subsidiary.<sup>124</sup> As well, a subsidiary does not have to comply if the financial statements of its holding corporation are in consolidated or combined form and include the accounts of the subsidiary.<sup>125</sup>

A second way that the corporation may limit the members' access to corporate records is through an application to a court requesting authorization to refuse to allow access to any records or information that must be kept under Part X of the ONCA. If the court decides that access to records or information would be detrimental to any member of the corporation, then it could deny access in whole or in part and on any terms as it thinks fit.<sup>126</sup>

A third way that members' access may be limited is through a court application by any member of an ONCA corporation for an order directing the corporation not to provide access to any records or information that must be kept under Part X in whole or in part. The same test that is applied in relation to the corporation's application for court authorization is also applied in relation to an application by a member.<sup>127</sup>

Interestingly, while the ONCA provides the means to limit the members' access to records, the OCA does not provide such means, but instead protects members' right to access by the offence of refusing members, their agents or legal representatives from inspecting or making extracts of such records. Upon conviction, this offence is punishable by a maximum fine of \$200.<sup>128</sup> Neither

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<sup>122</sup> Section 98(3) of the ONCA.

<sup>123</sup> Section 98(3) of the ONCA.

<sup>124</sup> Section 98(3) of the ONCA.

<sup>125</sup> Section 98(5) of the ONCA.

<sup>126</sup> Section 99(1) of the ONCA.

<sup>127</sup> Section 99(2) of the ONCA.

<sup>128</sup> Section 305(2) of the ONCA.

the OBCA nor the ONCA create a specific offence for failing to provide access to records to the members, though the former does make it a general offence to fail or neglect to comply with any provision of the OBCA without reasonable cause.<sup>129</sup>

e) Investigations and audits

The OCA requires at least one tenth of the members of a non-share corporation to make an application for a court order appointing an inspector to investigate the affairs and management of the corporation or a person to audit its books<sup>130</sup> and report back to the court.<sup>131</sup> Evidence must be provided that shows that the applicants have a good reason to require an investigation or audit.<sup>132</sup>

Making this type of application is not an exercise for the unwary. Applicants may be required to provide security to cover the probable cost of the investigation or audit.<sup>133</sup> The investigation or audit may not be open-ended, but rather, the court may make rules and prescribe the manner and the extent to which the investigation or audit is to be conducted.<sup>134</sup> It is within the court's discretion to order that the expense of the investigation be defrayed by the corporation, the applicants, or in part by both the corporation and the applicants.<sup>135</sup>

The powers of inspectors and auditors can be far-reaching. All officers and agents of the corporation must produce for the examination of any court-appointed inspector or auditor all books and records in their custody or power.<sup>136</sup> Any such inspector or auditor may examine upon oath the officers, agents and employees of the corporation in relation to its affairs and management.<sup>137</sup> Refusal to cooperate with the inspector or auditor in either situation is an offence and on conviction is liable to a fine of not more than \$200.<sup>138</sup>

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<sup>129</sup> Section 258(1)(j) of the OBCA.

<sup>130</sup> Section 310(1) of the OCA.

<sup>131</sup> Section 310(4) of the OCA

<sup>132</sup> Section 310(2) of the OCA

<sup>133</sup> Section 310(3) of the OCA

<sup>134</sup> *Ibid.*

<sup>135</sup> Section 310(4) of the OCA

<sup>136</sup> Section 310(7) of the OCA

<sup>137</sup> Section 310(8) of the OCA

<sup>138</sup> Section 310(9) of the OCA

In lieu of a court-appointed inspector, the corporation may, by a resolution passed at an annual meeting or at a general meeting called for that purpose, appoint an inspector to investigate its affairs and management.<sup>139</sup> An inspector appointed in this manner has the same powers as a court-appointed inspector, although will report in such manner and to such persons as the corporation by resolution directs.<sup>140</sup>

In comparison to the OCA, an application for a court ordered investigation under the ONCA requires only one member to apply.<sup>141</sup> The powers of the court to direct the investigation are far more broadly defined in the ONCA than in the OCA. Among the various directions that may be made, the court can require persons to attend hearings conducted by the inspector, require the corporation to pay the costs of the investigation, require an investigation be discontinued or make any other order that the court thinks fit.<sup>142</sup>

The purpose of these various statutory provisions is to permit the investigation of the business and affairs of a corporation where it is apparent that its books and records are not properly kept or are not accurate, or where there has been some deceit practiced against the shareholders.<sup>143</sup> This remedy is cautiously granted by the courts under certain circumstances. The courts will not intervene in the affairs of a private corporation through an inspection where there are alternative methods to obtain the information. Therefore, in a court case dealing with the investigation provisions under the OBCA, where there was nothing to suggest that the shareholders had been denied access to corporate records and that the corporation would prevent or interfere with any private inspector chosen by the applicants, the court refused to appoint an inspector.<sup>144</sup> This cautious approach to investigations under the OBCA would likely apply under the ONCA.

#### f) Disposal of records

With regard to a winding-up under s. 123 to 164 of the ONCA, members or any person interested in corporate documents and records must ensure that they take action to obtain them in a timely

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<sup>139</sup> Section 310(5) of the OCA

<sup>140</sup> Section 310(6) of the OCA

<sup>141</sup> Section 174(1) of the ONCA.

<sup>142</sup> *Ibid.*

<sup>143</sup> Kevin McGuinness, "Investigation (Inspection) orders" *Halsbury's Laws of Canada - Business Corporations* (1 September 2009) (Q.L.).

<sup>144</sup> *Re Baker et al. and Paddock Inn Peterborough Ltd.* [1977] O.J. No. 2247 (H.C.J.) at para. 6.

fashion. Where a corporation is wound-up and is about to be dissolved, its documents and corporate records as well as that of the liquidator may be disposed of in one of two ways.

In the case of a voluntary winding up, the documents and records will be disposed of as directed by the corporation in a resolution. In the case of a court-ordered winding-up, disposal will be as directed by the court. Five years after the dissolution of the corporation, there will be no responsibility for the corporation, liquidator or any custodian of the documents and records in relation to any person claiming to be interested in the documents and records.<sup>145</sup> Accordingly, persons interested in documents and records must take the steps necessary to obtain them in a timely fashion.

It appears that this provision was modelled on s. 236(1) of the OBCA, as the CNCA, CBCA, CCA, and OCA do not have equivalent provisions. The key difference between the provisions in the ONCA and OBCA is that s. 236(1) of the OBCA does not exclude the responsibility of the corporation, the liquidator or the custodian of the documents and records after the passage of a certain time period.

## **E. WHAT INFORMATION IS AVAILABLE TO THE PUBLIC?**

### **1. Federal Corporations**

Neither the CBCA nor CNCA have any provisions which permit members of the general public to access corporate records and other information directly from the corporation. However, a creditor of a CBCA or CNCA corporation may examine the following records during the corporation's usual business hours and pay to take extracts from them:<sup>146</sup>

- the articles and the by-laws, and amendments to them, and a copy of any unanimous member or shareholder agreement;
- the minutes of meetings of members or shareholders; and

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<sup>145</sup> Section 165 of the ONCA.

<sup>146</sup> Section 20(1) of the CBCA and section 22 of the CNCA.

- if any debt obligation is issued by a CNCA corporation, a debt obligations register, or in the case of a CBCA corporation, a securities register.

In addition, the CNCA permits creditors to also access the following records and pay to take extracts from them:<sup>147</sup>

- the minutes of meetings of any committee of members;
- the resolutions of members and any committee of members;
- the register of directors; and
- the register of officers.

## 2. Ontario Corporations

The ability of members of the general public to access corporate records and other information directly from a corporation is limited under the OCA, but possible. Under the ONCA, though, except for creditors of the corporation, there is no access to corporate records and information available to members of the general public.

With regards to the specifics of the OCA, s. 307 provides that any person may require a corporation, other than a private company, to provide it with a list of members' names and addresses by paying a fee and filing an affidavit with the corporation or its agent.<sup>148</sup> The list of members must be provided to the applicant within ten days of the filing of the affidavit and must be updated to not more than ten days prior to the filing date of the affidavit.<sup>149</sup>

As with members requesting a list of members, the affidavit to be sworn by the applicant must provide that the list of members is required and will be used only for purposes connected with the corporation.<sup>150</sup> The same definition of purposes connected with the corporation that is used in

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<sup>147</sup> Section 22 of the CNCA.

<sup>148</sup> Section 307(1) of OCA.

<sup>149</sup> *Ibid.*

<sup>150</sup> Section 307(2) of OCA.



relation to member requests for a list of members under s. 306(3) is also used in s. 307(6) relation to requests by the general public.<sup>151</sup>

Consistent with case law interpreting the same language in s. 306 of the OCA, which deals with member requests for a list of members, s. 307 creates a “broad right of access to the membership list of a corporation, consistent with the objective of ensuring timely disclosure of corporate information, but tempered by the purpose for which such information is sought and the actual use to which the information contained such lists may be put.”<sup>152</sup> There is neither a requirement in s. 307 that a specific dispute, question or controversy in which the applicant was interested to ground a request to inspect a corporation's membership list<sup>153</sup>, nor must the applicant's request be in the best interests of the corporation.<sup>154</sup> The phrase “connected with the corporation” requires only a showing that there is a good faith reason for an access request under s. 307(1) that is related to or associated with the corporation in some legitimate fashion. This may, but need not, include a purpose directly linked to the corporation's formal objects and purposes as reflected in its constating and other corporate documents.<sup>155</sup>

The same offences that are provided for in relation to member requests for a list of members apply in relation to any person that makes such a request.<sup>156</sup> However, in addition to the offences of using the list to send advertising on share and securities other than that of the corporation<sup>157</sup> and of failing to furnish the list upon receipt of a request,<sup>158</sup> there is also a offence for any person to offer for sale or sell or purchase or otherwise traffic a list or a copy of a list of members.<sup>159</sup> The penalty for trafficking is a maximum fine of \$1,000.00 for persons that are not corporations.<sup>160</sup> Where the person is a corporation, every director and officer of the corporation

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<sup>151</sup> Section 307(6) of OCA.

<sup>152</sup> *Lawrence v. Toronto Humane Society*, [2006] O.J. No. 2410 (C.A.) at para. 56.

<sup>153</sup> *Ibid.*, at para. 70.

<sup>154</sup> *Ibid.*, at para. 78.

<sup>155</sup> *Ibid.*, at para. 87.

<sup>156</sup> See section 307 of the OCA.

<sup>157</sup> Section 307(4) of the OCA.

<sup>158</sup> Section 307(5) of the OCA.

<sup>159</sup> Section 308 of the OCA.

<sup>160</sup> *Ibid.*

that authorized, permitted or acquiesced to such use of the list of members is also guilty of an offence and liable to a maximum fine of \$1,000.00.<sup>161</sup>

With regards to the ONCA, creditors are entitled to access to the following records:<sup>162</sup>

- the corporation's articles and by-laws, and amendments to them;
- the minutes of meetings of the members and of any committee of members;
- the resolutions of the members and of any committee of members;
- the register of directors;
- the register of officers; and
- the register of members.

As between the ONCA and OCA, the ONCA provides broader access to records for creditors, in that the creditors of OCA corporations do not have any access to the register of officers.

### 3. Corporations Information Act

Under the *Corporations Information Act*<sup>163</sup> (Ontario) ("CIA"), both non-share and share corporations are required to make certain filings. On payment of the required fee, the public may examine and make extracts from the record of the following documents:<sup>164</sup>

- initial return of the corporation, including an extra-provincial corporation that begins to carry on business in Ontario;
- annual return of the corporation, for both Ontario and extra-provincial corporations;
- any notice of change for every change in the information required to be filed under the CIA;
- any special filing required of a corporation by the Minister; and

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<sup>161</sup> *Ibid.*

<sup>162</sup> Sections 95(1) and 97(2) of the ONCA.

<sup>163</sup> R.S.O. 1990, c. C.39 [CIA].

<sup>164</sup> Section 10(1) of the CIA.

- any return or notice for any of the aforementioned matters requested by the Minister to be filed.

An additional fee must be paid to obtain certified copies of the contents of the above documents.<sup>165</sup>

Where a corporation carries on business in Ontario but its jurisdiction is unknown, that information can be obtained by referring to its initial return. The form of the information return differs as between extra-provincial corporations and corporations that were incorporated, continued or amalgamated in Ontario (“Ontario corporations”). Notably, the return for Ontario corporations sets out the names and addresses of the directors, the names and addresses for service of the corporation’s five most senior officers, and the dates those officers became and, where applicable, ceased to be an officer.<sup>166</sup> If applicable, it is also possible to find out the date of incorporation in another jurisdiction, where the corporation was continued in Ontario.<sup>167</sup>

In comparison, the initial return for an extra-provincial corporation sets out the date that the corporation commenced, and where applicable, ceased, operations in Ontario, the address of the principal office in Ontario, and the name and address of the agent for service, if required.<sup>168</sup>

Aside from those differences, there is much overlap in the content of the initial returns for domestic Ontario corporations and extra-provincial corporations. Both of their initial returns set out basic information, such as the name of the corporation, the Ontario corporation number and the date of incorporation or amalgamation.<sup>169</sup>

It should be noted that s. 19(1)(b) of the ONCA precludes a corporation from denying that the persons named in the articles or the most recent notice or return filed under the CIA, whichever is more current, are not the directors of the corporation. An equivalent provision is set out in s. 19(b) of the OBCA.

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<sup>165</sup> Section 10(2) of the CIA.

<sup>166</sup> Section 1.1 of R.R.O. 1990, Reg. 182.

<sup>167</sup> Section 1.1(2) of R.R.O. 1990, Reg. 182.

<sup>168</sup> Section 2 of R.R.O. 1990, Reg. 182.

<sup>169</sup> Sections 1.1 and 2 of R.R.O. 1990, Reg. 182.

Similarly, s. 19(1)(c) of the ONCA precludes a corporation from denying that the location named as the registered office in the articles or in the most recent notice or return filed under the CIA, whichever is more current, is not the registered office of the corporation. The OBCA includes a similar provision, but that provision cannot be said to be equivalent to s. 19(1)(c) of the ONCA because it does not expressly refer to a notice filed pursuant to the CIA.<sup>170</sup>

## F. PRIVACY LAW CONSIDERATIONS

Although Canadian privacy legislation is beyond the scope of this paper, it is nonetheless important to point out a few privacy law considerations that are raised concerning access to certain corporate records.

In this regard, depending on the circumstances, the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) may apply to NFP corporations. The private sector provisions in PIPEDA apply to “personal information” that: (i) an organization that collects, uses or discloses the course of “commercial activities” or (ii) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a “federal work, undertaking or business”. Personal information” means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.<sup>171</sup> As such, information on a business card would not constitute personal information, but employee files would fall within the meaning of personal information.<sup>172</sup>

Whether a NFP corporation incorporated under the laws of Ontario will be subject to PIPEDA depends on whether the organization engages in the commercial activities contemplated by PIPEDA or its activities are connected with the operation of a federal work, undertaking or business. The mere fact that a NFP corporation is incorporated in Ontario and conducts its

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<sup>170</sup> See section 19(c) of the OBCA.

<sup>171</sup> PIPEDA, section 2(1).

<sup>172</sup> Canada, The Office of the Privacy Commissioner of Canada, *A Guide for Businesses and Organizations - Your Privacy Responsibilities* (Ottawa: 2009) online: [http://www.priv.gc.ca/information/guide\\_e.cfm](http://www.priv.gc.ca/information/guide_e.cfm).

activities and undertaking within Ontario is not determinative of whether it is a federal work or undertaking within the meaning of PIPEDA.<sup>173</sup>

Notwithstanding the application of PIPEDA to a particular charity or NFP organizations,<sup>174</sup> it has been established that general privacy legislation may not be used to shield the corporation from providing access to corporate records and information as required under NFP Legislation.<sup>175</sup> Section 7 of PIPEDA permits the disclosure and use of personal information without consent under certain circumstances, such as the disclosure and use of information that is authorized by law.<sup>176</sup> Therefore, the request of a shareholder of a CBCA corporation for access to the register of shareholders was granted in *EnCana Corp. v. Douglas* because s. 21 of the CBCA authorized such access upon the payment of the required fee and submission of an affidavit, both of which had been done by the shareholder.<sup>177</sup>

The “authorized by law” exemption can be used in relation to business records other than those required to be kept by NFP Legislation. For example, in a case dealing with *Canada Labour Code* (“CLC”) arbitration, the arbitrator overturned the employer’s refusal to provide the union with a list of all employee home addresses and telephone numbers on the basis that such disclosure would violate PIPEDA.<sup>178</sup> The arbitrator came to that decision based on s. 5(3) of PIPEDA, which permits the use or disclosure of personal information “only for purposes that a reasonable person would consider are appropriate in the circumstances.” As the collective agreement required that the employer provide this list, the disclosure of the list would be permitted by s. 5(3) of PIPEDA.<sup>179</sup> As well, since the collective agreements are binding on the employer and trade union under CLC, the disclosure of list of employees was required by law (i.e. authorized by law pursuant to s. 7 of PIPEDA), and therefore could be disclosed.<sup>180</sup>

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<sup>173</sup> *Supra* note 48(1) at para. 35.

<sup>174</sup> The private sector provisions in PIPEDA apply to every organization that collects, uses or discloses personal information the course of commercial activities. Whether a charity or NFP organizations will be subject to PIPEDA depend on whether these organizations engage in the kind of commercial activities contemplated by PIPEDA.

<sup>175</sup> *Supra* note 48 at para. 26.

<sup>176</sup> See sections 7(2)(d) and 7(3)(i) of PIPEDA.

<sup>177</sup> *Supra* note 48 at para. 25-27.

<sup>178</sup> *Via Rail Canada Inc. v. National Automobile, Aerospace, Transportation and General Workers' Union, National Council 4000*, [2003] C.L.A.D. No. 138.

<sup>179</sup> *Ibid.* at para. 12.

<sup>180</sup> *Ibid.* at para. 17.

## G. PUBLICLY AVAILABLE REPORTS

### 1. Federal Corporations

The following reports may be obtained by the public in relation to a federal corporation, except where stated otherwise:

#### a) Search for a Federal Corporation

This report shows current information that has been filed with Corporations Canada on CBCA and CNCA corporations.<sup>181</sup> Information that can be found on this report includes the corporation and business numbers, address of the registered office, annual filings information, and corporate history. This report is available online for free on the Corporations Canada website.<sup>182</sup>

#### b) Certificate of Compliance

A Certificate of Compliance certifies that, on the date of the request, a particular CBCA corporation exists, has filed the required annual returns and has paid all required fees. The fee charged by Corporations Canada is \$10.00.<sup>183</sup>

#### c) Certificate of Existence

A Certificate of Existence is used when confirmation that a CBCA corporation existed on specific date or a specific time is required. This certificate does not certify that a corporation has filed the required annual returns and has paid all the required fees. The fee charged by Corporations Canada is \$10.00.<sup>184</sup>

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<sup>181</sup> See Corporations Canada, “How do I file my application under the Canada Not-for-profit Corporations Act (NFP Act)?” online: Industry Canada < <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04968.html>>.

<sup>182</sup> See Corporations Canada, “Search for a federal corporation” online: Industry Canada <[https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrICrpSrch.html?locale=en\\_CA](https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrICrpSrch.html?locale=en_CA)>.

<sup>183</sup> Corporations Canada, “CBCA - Certificate of Compliance” (07 December 2011) online: Industry Canada <<https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/bs/crtCmp.html?act=6>>.

<sup>184</sup> Corporations Canada, “CBCA - Certificate of Existence” (07 December 2011) online: Industry Canada <<https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/bs/xstnc.html?act=6>>.

d) Certificate of Incorporation, Articles of Incorporation and Notices Filed

Corporations Canada may be contacted for a copy of the certificate of incorporation, articles of incorporation and any notices that have been filed.

e) T-3010-1

Information on all registered charities is also publicly available on the CRA website through accessing the annual return, the T-3010-1. There is no charge to access the T-3010-1 online.

## 2. Ontario Corporations

For NFP corporations in Ontario, the following reports may be obtained by the public.

a) Point-In-Time Report

This report shows information on the public record for only corporations whose jurisdiction was Ontario as of the date of the report since June 27, 1992.<sup>185</sup> All active directors and officers are listed. Unlike a profile report, a point-in-time report will also list all directors and officers that have been reported as ceasing to hold their office as of the date of the report. In order to find out which particular document reported the cessation of office, a document list should be ordered.<sup>186</sup> Some historical information is available. The fee charged by ServiceOntario for an uncertified point-in-time report is \$12.00 for in-person or mail requests and \$8.00 for an online request.<sup>187</sup>

b) Profile Report

This report shows current information on the public record for Ontario corporations or extra-provincial corporations carrying on a business in Ontario. For Ontario corporations, all active

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<sup>185</sup>Ministry of Government Services, "Guide to the Corporation Point-in-Time Report" (January 2009) online: Government of Ontario  
<[http://www.ontario.ca/ontprodconsume/groups/content/@onca/@bundles/@cpps/documents/document/stel02\\_167457.htm](http://www.ontario.ca/ontprodconsume/groups/content/@onca/@bundles/@cpps/documents/document/stel02_167457.htm)>.

<sup>186</sup>*Ibid.*

<sup>187</sup>Ministry of Government Services, "" (18 March 2010) online:  
<<http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?OpenForm&ACT=RDR&TAB=PROFILE&ENV=WWE&NO=007-07249E>>.

directors and officers are listed. Some historical information is available. Since extra-provincial corporations only have to file fundamental information such as the registered office of the corporation, it is necessary to contact the jurisdiction where the corporation was incorporated.<sup>188</sup> The fee charged by ServiceOntario for an uncertified profile report is \$12.00 for in-person or mail requests and \$8.00 for an online request.<sup>189</sup> Certification costs an additional \$8.00.

c) Document List

This report identifies all documents filed by an Ontario corporation or extra-provincial corporation carrying on business in Ontario since June 27, 1992 onwards.<sup>190</sup> Where the information has been recorded in Ontario Business Information System (“ONBIS”), the report also identifies the name of the person authorizing the filing of a document filed under the CIA.<sup>191</sup> The fee charged by ServiceOntario for an uncertified document list is \$5.00 for in-person or mail requests and \$3.00 for an online request.<sup>192</sup> Certification costs an additional \$8.00.

d) List of Business Names Registered by a Corporation

This report provides a list of business names, including registration dates, (new/renewal) filed by the corporation within the previous 5 years.<sup>193</sup> The fee charged by ServiceOntario for an uncertified list of business names registered by a corporation is \$12.00 for in-person or mail requests and \$8.00 for an online request.<sup>194</sup> Certification costs an additional \$8.00.

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<sup>188</sup>Ministry of Government Services, “Guide to the Corporation Profile Report” (01 January 2009) online: Government of Ontario <[http://www.ontario.ca/ontprodconsume/groups/content/@onca/@bundles/@cppsb/documents/document/stel02\\_168152.pdf](http://www.ontario.ca/ontprodconsume/groups/content/@onca/@bundles/@cppsb/documents/document/stel02_168152.pdf)>.

<sup>189</sup> *Supra* note 187.

<sup>190</sup>Ministry of Government Services, “Guide to the Corporation Document List” (01 November 2009) online: Government of Ontario <[http://www.ontario.ca/ontprodconsume/groups/content/@onca/@bundles/@cppsb/documents/document/ont06\\_023863.htm](http://www.ontario.ca/ontprodconsume/groups/content/@onca/@bundles/@cppsb/documents/document/ont06_023863.htm)>

<sup>191</sup> Ministry of Government Services, “Form 07249E, Electronic Search Products” (July 2009) online: <<http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?OpenForm&ACT=RDR&TAB=PROFILE&ENV=WWE&NO=007-07249E>>.

<sup>192</sup> *Supra* note 219.

<sup>193</sup> *Supra* note 223.

<sup>194</sup> *Supra* note 187.



e) Certificate of Status

This certificate provides the current status of the corporation.<sup>195</sup> The fee charged by ServiceOntario is \$30.00 for in-person or mail requests and \$26.00 for an online request.<sup>196</sup>

f) Certificate of No Record

This certificate is issued if there is no record of the corporation in ONBIS.<sup>197</sup> The fee charged by ServiceOntario is \$30.00 for in-person or mail requests and \$26.00 for an online request.<sup>198</sup>

g) Statement of No Record

An uncertified statement is issued if there is no record of the corporation. The fee charged by ServiceOntario is \$12.00 for in-person or mail requests and \$8.00 for an online request.<sup>199</sup>

h) Certificate of Non-Filing

This certificate is issued based on information recorded in the ONBIS on or after June 27, 1992 when a corporation has not filed under the CIA.<sup>200</sup> The fee charged by ServiceOntario is \$30.00 for in-person or mail requests and \$26.00 for an online request.<sup>201</sup>

i) Copy of Return/Notice

This is available only if a Corporation Profile Report is not available. The fee charged by ServiceOntario is \$14.00 for in-person and mail requests.<sup>202</sup> No online requests are possible. If the file is onsite, it will take 10 business days to obtain the copy if the request is made in person

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<sup>195</sup> *Supra* note 223.

<sup>196</sup> *Supra* note 219.

<sup>197</sup> *Supra* note 223.

<sup>198</sup> Ministry of Government Services, "Companies Service Standards and Fees as of April 1, 2011" (May 2009) online: Government of Ontario

<[http://www.ontario.ca/ontprodconsume/groups/content/@onca/@business/documents/document/ont06\\_026733.htm](http://www.ontario.ca/ontprodconsume/groups/content/@onca/@business/documents/document/ont06_026733.htm)>.

<sup>199</sup> *Supra* note 187.

<sup>200</sup> *Supra* note 223.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Supra* note 187.

or fax. Mailed requests will take 4-6 weeks. Unlike the above records, this type of report cannot be provided by a service provider.

j) TC or RC Files

TC (“Transferred Corporations”) or RC (“Removed Corporations”) paper files are old or inactive files stored offsite. They are available 10 working days from the date of the order. Paper files cannot be removed from the public office or taken apart. In order to view these files, a driver’s license or other acceptable identification must be left as a security deposit.<sup>203</sup> The fee charged by ServiceOntario is \$25.00 for in-person, fax and mail requests.<sup>204</sup> If the request is made in person or via fax, it will take a minimum of 10 business days to obtain the files, depending on the number of copies. Mailed requests will take 4-6 weeks. This type of report cannot be provided by a service provider.

k) Corporate Microfiche

This is part of the official public record and provides incorporating and amending documents. It does not provide a complete and current record. For instance, the following documents do not appear on the microfiche record:

- initial Notices/Initial Returns for Ontario corporations filed after December 31, 1994;
- all Notices of Change filed after December 31, 1994;
- 1994/95 Special Notices (Year 3);
- Notices of Intention to Dissolve/Notices of Opportunity to be Heard and Cancellation Orders for Failure to file a Special Notice or Annual Return; and

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<sup>203</sup> *Supra* note 223.

<sup>204</sup> *Supra* note 187.

- 1995 Annual Returns and forward.<sup>205</sup>

The fee charged by ServiceOntario is \$10.00 for in-person, mail and online requests.<sup>206</sup>

1) T-3010-1

Information on registered charities that are Ontario corporations is also publicly available on the CRA website through accessing the annual returns T-3010-1. There is no charge to access the T-3010-1 online.

## H. CONCLUSION

The modeling of the new NFP Legislation on existing for-profit legislation will lead to an unprecedented expansion in the recordkeeping requirements for NFP corporations and the rights to access records by members, directors, and others. As well, the NFP legislation has complicated recordkeeping obligations for NFP corporations with regards to the period of retention and the location of records by requiring consultation with other statutes, such as the ITA, where applicable. While it is foreseeable that many NFP corporations may see these enhanced recordkeeping obligations as burdensome, the upside of these obligations (if it can be characterized as such) is that since the NFP Legislation is modeled on existing for-profit legislation, practitioners will have the benefit of existing case law to provide guidance on the application and interpretation of the new legislation.

It will be interesting to see whether those “digging for dirt” will find the new regime under the NFP legislation easier to access information or not. Given the genesis of NFP legislation based upon reformed for-profit legislation, the assumption is that access will be easier, but time will tell.

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<sup>205</sup> *Supra* note 223

<sup>206</sup> *Supra* note 187.