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**DIRECTORS' AND OFFICERS' DUTIES AND LIABILITIES
UNDER THE CNCA AND THE ONCA**

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A. INTRODUCTION

Individuals who volunteer as directors and officers of not-for-profit (“NFP”) corporations are no doubt aware that volunteering as such can attract civil liability. Specifically, directors and officers in Canada face an array of duties and obligations at common law and under statute, the successful fulfillment of which is critical in order to avoid personal liability as well as for the well being of the organization. In this regard, the key aspect of directors’ and officers’ duties and liabilities under statute has become particularly relevant with the recent proclamation of the *Canada Not-for-profit Corporations Act* (“CNCA”)¹ and soon to be proclaimed Ontario *Not-for-Profit Corporations Act* (“ONCA”)² (collectively referred to as “NFP legislation”). The purpose of this paper is to provide an overview of directors’ and officers’ duties and liabilities under the CNCA and the ONCA. In this regard, this paper complements our paper originally prepared and presented for the Law Society of Upper Canada in March 2011, which had been updated and revised for the Association for Research on Nonprofit Organizations and Voluntary Action (ARNOVA) in November 2011 (attached hereto for reference purposes as Appendix A), entitled *Directors’ and Officers’ Duties & Liabilities of Charities and Not-for-Profit Organizations in Ontario*.

This paper begins with a brief historical background of the NFP legislation. Next, the standard of care for directors and officers of NFP corporations is addressed, followed by an overview of directors’ and officers’ duties under the NFP legislation. The paper then provides an overview of liabilities, together with the statutory protections available under the NFP legislation to assist directors and officers in complying with their duties and avoiding liability. Since legislators of

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¹ SC 2009, c 23 [“CNCA”].

² 2010, SO 2010, Chapter 15 [“ONCA”].

the CNCA and ONCA have closely modelled the NFP legislation on the for-profit corporate statutes, the *Canada Business Corporations Act* (“CBCA”)³ and Ontario *Business Corporations Act* (“OBCA”),⁴ respectively, comparisons to provisions in these statutes will be made as well as to case law where relevant in order to provide some context concerning how the NFP legislation may be applied and how the courts may interpret their provisions.

B. HISTORY AND THE MODERNIZATION OF THE NOT-FOR-PROFIT SECTOR

To have a clearer understanding of the current status of the law on NFP corporations, it is important to briefly outline the history of the NFP legislation. NFP corporations federally incorporated under Part II of the *Canada Corporations Act* (“CCA”)⁵ will be governed by the CNCA and those provincially incorporated under Part III of the *Ontario Corporations Act* (“OCA”)⁶ will soon be governed by the ONCA. Both the CNCA and ONCA have been modelled after the CBCA and OBCA, respectively.

The CNCA received Royal Assent on June 23, 2009 and was proclaimed in force effective as of October 17, 2011. It replaces Part II of the CCA, which had not been substantially revised for close to a century. In this regard, the CCA was outdated, cumbersome, and filled with gaps, making it inadequate for the not-for-profit sector. NFP legislative reform was needed to accommodate modern charitable and NFP corporations. The CNCA now provides a clear set of procedures and other rules which apply to federal NFP corporations. As a result, the CNCA is generally seen as a positive development by most federally incorporated NFP corporations. However, there will no doubt be challenges in dealing with the CNCA, particularly because of its genesis emanating from the CBCA with its focus on members rights and remedies akin to that of shareholders of a for-profit corporation.

It should be noted that the new rules under the CNCA do not apply automatically to federal corporations incorporated by letters patent under Part II of the CCA prior to the proclamation date of October 17, 2011. Those corporations will first be required to continue under the CNCA by October 17, 2014 (i.e. within three years of the proclamation date) by applying for articles of

³ RSC, 1985, c C-44 [“CBCA”].

⁴ RSO 1990, c B 16 [“OBCA”].

⁵ RSC, 1970, c C-32 [“CCA”].

⁶ RSO 1990, c C 38 [“OCA”].

continuance. Failure to continue within this time frame will result in dissolution of the corporation.⁷ Prior to applying for continuance, the CCA will continue to apply to CCA incorporated corporations that were in existence prior to October 17, 2011. Upon the issuance of the certificate of continuance, however, the CCA will cease to apply to them.

The ONCA received Royal Assent on October 25, 2010 and the anticipated proclamation date is sometime in late 2012. The ONCA will replace Part III of the OCA, an antiquated piece of legislation which has not been substantively amended since 1953 and does not meet the needs of Ontario's NFP corporations. The new legislation will provide a modern legal framework for Ontario's thousands of NFP corporations and will generally make it easier for them to operate. However, like the CNCA there are challenges that will no doubt arise because of the influence of the OBCA on the ONCA, particularly with regard to membership rights and remedies.

Existing OCA incorporated organizations will also have three years to amend their letters patent, by-laws and special resolutions to conform with the new act. The ONCA has not yet been proclaimed in force. When this occurs, NFP corporations incorporated under the OCA will have three years from that date to continue under the new legislation. At the end of the three years, if those documents have not been amended, they will be deemed to be amended to conform with the requirements of the ONCA.

The OCA currently continues to govern NFP corporations in Ontario. Since many charities are structured as Ontario NFP corporations, the ONCA will govern the incorporation, governance and dissolution of charities, but will not affect the regulation of charities. The legal restrictions, requirements and other affairs of charities continue to be governed by applicable charity law at both the federal and provincial levels, which is the same for federal charitable corporations that continue under the CNCA. In this regard, the Office of the Public Guardian and Trustee ("OPGT") continues to have supervisory jurisdiction over charitable corporations, whether they be federal or provincial charitable corporations operating in Ontario. Where there is a conflict

⁷ Subsection 297(5) of the CNCA states that any CCA Part II corporation that does not apply for a certificate of continuance to be continued under the CNCA within 3 years after the coming into force of the CNCA, may be dissolved under section 222 by the Director. Transitional provisions of the CNCA (sections 297 and 298) are not contained in the version of the CNCA posted on the Department of Justice's website. Rather, reference must be made to the Royal Assent version of the CNCA available on the Parliament of Canada website at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4015127&Language=E&Mode=1&File=134>.

between charity law and the ONCA, section 5 of the ONCA states that charity law prevails. While there is no equivalent provision in the CNCA, it is the position of the OPGT that the common law with respect to charities overrides the CNCA.⁸ This will be discussed later in this paper.

C. OVERVIEW OF STANDARD OF CARE FOR DIRECTORS AND OFFICERS OF NFP CORPORATIONS UNDER THE ONCA AND CNCA

Directors and officers of corporations, whether they are for-profit or NFP corporations, are held to a certain standard of care when exercising their respective duties. In this regard, directors of for-profit corporations are held to an objective standard of care under the CBCA and the OBCA. As a consequence, directors of for-profit corporations must generally act honestly and in good faith with a view to the best interests of the corporation, and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.⁹

Unfortunately, the law dealing with NFP corporations has not been as neatly arranged in the past as the law dealing with for-profit corporations with regard to the standard of care for directors. In this regard, it is difficult to analyze the duties and liabilities of directors and officers of NFP corporations incorporated under either the CCA or the OCA, since a statutory standard of care has not been provided for under either of these acts. As a result, until NFP corporations are continued under the NFP legislation, the duty of care for directors still operating under the CCA or OCA remains the common law subjective standard.

However, the CBCA and OBCA have been used as models upon which to build a modern framework for the governance of NFP corporations. Thus, like the CBCA and OBCA, for directors and officers of NFP corporations incorporated under the NFP legislation, a statutory standard of care is now expressly provided. With such a basis, this means that the body of case law that has accumulated with regard to the CBCA and OBCA over the years can be referenced for guidance concerning how the new NFP legislation may be interpreted and applied.

⁸ Dana De Sante, representative for the Office of the Public Guardian & Trustee, “How Charity Law and the Common Law May Impact the ONCA and CNCA” (Presentation delivered at the Ontario Bar Association Continuing Legal Education, 7 June 2011).

⁹ CBCA, *supra* note 3 at s 122; OBCA, *supra* note 4 at s 134.

However, in line with the CBCA and OBCA, the CNCA and ONCA establish an objective standard of care by which to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. In this regard it is important to point out with respect to the objective standard of care under the CNCA and the ONCA that the courts are loathe to make *ex post facto* assessments of directors' decisions which may seem to be unreasonable or imprudent in light of information that becomes available after an unsuccessful business decision.¹⁰ This is known as the "Business Judgment Rule" and protects directors and officers against hindsight and second-guessing by creditors and other stakeholders, holding directors and officers to a standard of reasonableness, not perfection.¹¹ In this sense, the court is required:

... to consider the nature of the impugned acts and the method in which they were carried out. That does not mean that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.¹²

Directors and officers of NFP corporations wanting to rely on the Business Judgment Rule need to be able to demonstrate that they have been diligent in their decision-making, since this rule will only be available where it can be shown that adequate scrutiny of the issues was conducted prior to making a decision. In *UPM-Kymmene Corp v UPM-Kymmene Miramichi Inc*, the court stated that:

...directors are only protected to the extent that their actions actually evidence their business judgment. The principle of deference presupposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions. Courts are entitled to consider the content of their decision and the extent of the information

¹⁰ *Peoples Department Store Inc (Trustee of) v Wise*, 2004 SCC 68 at para 64, [2004] 3 SCR 461 (SCC) ["Peoples"].

¹¹ *Ibid* at para 67.

¹² *Brant Investments Ltd et al v KeepRite Inc et al* (1991), 3 OR (3d) 289, [1991] OJ No 683 (Ont CA).

on which it was based and to measure this against the facts as they existed at the time the impugned decision was made. Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination.¹³

1. CNCA

At the federal level, the CNCA provides for an objective standard of care for directors and officers of federal NFP corporations. In this regard, subsection 148(1) of the CNCA sets out both the fiduciary duty (subsection (a)) and the duty of care (subsection (b)) of the director and officer to the corporation as follows:

Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Both the CNCA and CBCA state that no provision in a contract, the articles, the by-laws or a resolution relieves a director or an officer from the duty to act in accordance with the acts or the regulations or relieves them from liability for a breach thereof.¹⁴ However, there is an exception to this provision for unanimous member agreements (“UMAs”) under the CNCA and unanimous shareholder agreements (“USAs”) under the CBCA, respectively. While this is discussed in more detail below, these provisions provide that to the extent that UMAs or USAs restrict the powers of directors, such directors are relieved of those duties and liabilities and therefore presumably relieved of the standard of care referred to above.

2. ONCA

The ONCA provides for the same standard of care for directors and officers as the CNCA, referred to above. In this regard, subsection 43(1) of the ONCA also sets out both the fiduciary duty in subsection (a) and the duty of care in subsection (b). As a result, directors

¹³ [2002] OJ No 2412 at para 153, 214 DLR (4th) 496 (Ont SCJ), affd in [2004] OJ No 636 (Ont CA).

¹⁴ CNCA, *supra* note 1 at ss 148(4); CBCA, *supra* note 3 at ss 122(3).

and officers in exercising their powers and discharging their duties will be held accountable through a statutory standard of care to:

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.¹⁵

Also like the CNCA, the directors' and officers' standard of care additionally includes the duty to comply with the act and the regulations, as well as the corporation's articles and by-laws.¹⁶ However, in contrast to the CNCA's UMA provision, the ONCA specifically prohibits directors or officers from contracting out of their statutory duty to act in accordance with the act, or relieving themselves from liability for a breach of the act by providing a provision in a contract, the articles, the by-laws or a resolution.¹⁷ In this regard, the ONCA does not provide for UMAs.

D. STATUTORY DUTIES OF DIRECTORS AND OFFICERS

1. General Statutory Fiduciary Duty

The statutory requirement of the fiduciary duty on directors and officers of NFP corporations is set out in the statutes under a general standard of care, as discussed above, in subsection 148(1)(a) of the CNCA and subsection 43(1)(a) of the ONCA. In this regard, the CNCA and ONCA mirror the standards for fiduciary duties as set out in the CBCA and OBCA for for-profit organizations.¹⁸

2. Duty to Manage or Supervise Management

Under the CNCA and ONCA, directors of a corporation have a duty to manage or supervise the management of the activities and affairs of the corporation.¹⁹ Under the CNCA, "activities" includes any conduct of a corporation that furthers its purpose and any business carried on by a body corporate, and "affairs" means the relationships among a corporation, its

¹⁵ ONCA, *supra* note 2 at ss 43(1).

¹⁶ *Ibid* at ss 43(2).

¹⁷ *Ibid* at ss 43(3).

¹⁸ CBCA, *supra* note 3 at ss 122(1)(a); OBCA, *supra* note 4 at ss 134(1)(a).

¹⁹ CNCA, *supra* note 1 at s 124; ONCA, *supra* note 2 at s 21.

affiliates and the directors, officers, shareholders or members of those bodies corporate.²⁰ The ONCA does not define “activities” but defines “affairs” as the relationships among a corporation, its affiliates and the members, directors and officers of a corporation and its affiliates, with the exception of “activities” carried on by a corporation and its affiliates.²¹

Directors will need to diligently attend to this duty by being familiar with all aspects of the corporation’s operations including attending directors’ and members’ meetings,²² ensuring proper delegation of the powers of the directors,²³ and reviewing the minutes and resolutions or actions taken at missed meetings. Such activities and affairs are of particular importance because of certain provisions under the NFP legislation that impacts their duty to manage or supervise the management or the corporation. For example, while a director is authorized to delegate to officers the powers to manage the activities and affairs of the corporation under subsection 142(1) of the CNCA and subsection 42(1) of the ONCA, a director must be careful not to improperly delegate unauthorized duties under subsection 138(2) of the CNCA or subsection 36(2) of the ONCA, such as approval of financial statements or adopting, amending, or repealing by-laws. Moreover, under subsection 147(1) of the CNCA and subsection 45(1) of the ONCA, a director who is present at a meeting is deemed to have consented to any resolution passed or action taken at the meeting, unless a dissent is recorded. Furthermore, if a director misses a meeting at which a resolution was passed or action was taken, they are still deemed to have consented to that resolution or action unless appropriately dissented to after the missed meeting.²⁴

3. Duty to Comply with the Incorporating Statute

Directors must comply with all applicable acts and regulations and the corporation’s governing documents (articles, by-laws, and UMAs, if applicable).²⁵ These provisions are similar to those contained under the CBCA and OBCA.²⁶

²⁰ CNCA, *supra* note 1 at ss 2(1).

²¹ ONCA, *supra* note 2 at ss 1(1).

²² CNCA, *supra* note 1 at s 135 and s 136; ONCA, *supra* note 2 at s 33 and s 34.

²³ CNCA, *supra* note 1 at s 138; ONCA, *supra* note 2 at s 36.

²⁴ CNCA, *supra* note 1 at ss 147(3); ONCA, *supra* note 2 at ss 45(3).

²⁵ CNCA, *supra* note 1 at ss 148(2); ONCA, *supra* note 2 at ss 43(2).

²⁶ CBCA, *supra* note 3 at ss 122(2); OBCA, *supra* note 4 at ss 134(2).

Unlike the CBCA, however, directors of CNCA corporations must also “verify the lawfulness of the articles and the purpose of the corporation”.²⁷ Interestingly, the ONCA does not contain an equivalent provision.

4. Duties to Members

Directors have certain duties to the members of the corporation, although it is not specifically a fiduciary relationship, since that fiduciary duty is owed to the corporation and not separately to its members. Nonetheless, directors must ensure that the corporation abide by the terms of its letters patent/articles and bylaws, which have been considered by the courts as akin to a contract between the corporation and its members.²⁸

Both the CNCA and ONCA, however, provide more rights for members. For example, members will have more remedies if they believe directors are not acting in the best interests of the corporation, have greater access to financial records, and if disciplinary action is being considered against a member, the member will have the right to be given notice with reasons and the right to be heard. These, as well as other rights, will be discussed later in this paper.

5. Use of Unanimous Member Agreement

An interesting feature of the CNCA is the introduction of a UMA in section 170.²⁹ This is an agreement which restricts, in whole or in part, the powers of the directors to manage, or supervise the management of, the activities and affairs of the corporation. Subsection 170(5) provides that the parties to the agreement who are given those powers have all the rights, powers, duties and liabilities of a director of the corporation, whether they arise under this act or otherwise, thereby presumably relieving the director from responsibility. Therefore, all the decision-making authority is shifted to the stakeholders as they will have the same fiduciary duties as a director would. However, a UMA does not necessarily relieve the director of their duties under this statute. Since the director’s duties arise under the common law it may be that such an agreement is deemed unenforceable from the standpoint of relieving the director from all liability.

²⁷ CNCA, *supra* note 1 at ss 148(3).

²⁸ Jane Burke-Robertson et al, *Primer for Directors of Not-for-Profit Corporations* (2002), online: Industry Canada <[http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Primer_en.pdf/\\$FILE/Primer_en.pdf](http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Primer_en.pdf/$FILE/Primer_en.pdf)> at 27.

²⁹ The ONCA does not make a provision for such an agreement.

Additionally, members may *not* enter into a UMA if they are members of corporation that is a “soliciting corporation” as defined in subsections 2(1), s 2(5.1), and s 2(6) of the CNCA. A corporation becomes a soliciting corporation if, in a single financial year, the corporation receives more than a prescribed amount of \$10,000 in gross annual revenues from

- (a) requests for donations or gifts from non-members;
- (b) grants or other similar financial assistance received from a government body; or
- (c) donations or gifts received from a corporation that in turn would meet the definition of “soliciting corporation.”³⁰

If a corporation meets this definition, they are deemed a soliciting corporation, but the commencement date of the soliciting corporation status only takes effect at its next annual meeting of members. This status only ceases if the corporation does not receive more than \$10,000 in public money in any of the following three years, thereby requiring a corporation to remain a soliciting corporation for three years after the annual meeting in which it became a soliciting corporation. Under subsection 2(6) of the CNCA, a corporation can obtain an exemption from the Director from being designated as a soliciting corporation if the Director is satisfied that the determination would not be prejudicial to the public interest.

E. COMMON LAW FIDUCIARY DUTIES OF DIRECTORS

The fiduciary duty for directors of corporations is owed to the corporation, as evidenced in the language of the provisions in the CBCA, OBCA, CNCA, and ONCA, to act “with a view to the best interests of the corporation”.³¹ The common law has also reinforced the duty to the corporation and not directly to the members, creditors, or other stakeholders.³² However, in determining whether directors are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to

³⁰ CNCA, *supra* note 1 at ss 2(5.1) and ss 16(d) of the *Canada Not-for-profit Corporations Regulations*, SOR/2011-223 [“CNCR”].

³¹ CBCA, *supra* note 3 at ss 122(1)(a); OBCA, *supra* note 4 at ss 134(1)(a); CNCA, *supra* note 1 at ss 148(1)(a); ONCA, *supra* note 2 at ss 43(1)(a).

³² *Supra* note 10 at para 43.

consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.³³

This duty was also explained in a recent 2010 decision of the Ontario Superior Court, *London Humane Society (Re)*.³⁴ The court in *London Humane Society* affirmed that directors of both for-profit and NFP corporations are primarily in a fiduciary relationship to the corporation, not its shareholders or members. In this regard, Justice Granger stated that:

Directors of not-for-profit and charitable organizations are subject to fiduciary duties at common law. The Supreme Court of Canada has held that directorial fiduciary duties are owed primarily to the corporation, not to the corporation's shareholders or other stakeholders (See *Re BCE Inc.*, 2008 SCC 69 at paras. 36-38). While most litigation in this area focuses on for-profit corporations, various academic texts apply the same concept to the directors of not-for-profit corporations. Consequently, the Board of Directors at the LHS owed a fiduciary duty to the LHS as a corporation, but not separately to its members.³⁵

In satisfaction of the general fiduciary duty owed to the corporation, directors and officers of NFP corporations must comply with the following duties which are expressly provided for in the NFP legislation as applicable.

1. Duty to Act in Good Faith, Honestly and Loyally

As explained earlier, both the CNCA and ONCA in subsections 148(1)(a) and 43(1)(a), respectively, outline directors' and officers' fiduciary duty to act honestly and in good faith with a view to the best interests of the corporation. In dealing honestly with the corporation, a director must disclose the entire truth in his or her dealings as a director.³⁶ For example, in the case of a for-profit corporation incorporated under the CBCA, *PWA Corp v Gemini Automated Distribution Systems Inc.*,³⁷ PWA appointed three directors to the board of directors and gave instructions to them to withhold important information from the rest of the board. The Ontario Court of Appeal (leave to appeal to the Supreme Court of Canada

³³ *BCE Inc v 1976 Debentureholders* (2008), 2008 SCC 69, [2008] 3 S.C.R. 560 (SCC) ["BCE"].

³⁴ *London Humane Society (Re)*, 2010 ONSC 5775, [2010] OJ No 4827 (Ont Sup Ct J) ["*London Humane Society*"].

³⁵ *Ibid* at para 19.

³⁶ R Jane Burke-Robertson & Arthur BC Drache, *Non-Share Capital Corporations*, loose-leaf, (Toronto: Carswell, 1992) ch 5 at 6-16.

³⁷ *PWA Corp v Gemini Automated Distribution Systems Inc.*, (1993) 101 DLR (4th) 15 (Ont Ct J (Gen Div)), affd [1993] OJ No 1793 (ONCA), leave to appeal refused [1993] 3 SCCA No 343 (SCC) ["*PWA Corp*"].

refused) found that the three directors were in breach of their fiduciary duties to act in good faith by failing to disclose vital information.

This duty also requires that the directors consider the best interests of the corporation as a whole, rather than allowing one sectional interest of the shareholders to prevail over others. The court in *Peoples* further stated that “[a]t all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders.”³⁸

2. Duty to Avoid Conflict of Interest

Both the CNCA and ONCA contain provisions for a director or officer to disclose their interest if they are a party to a material contract or transaction, a director or officer of a party to the contract, or have a material interest in a party to the contract.³⁹ Specifically, subsection 141(2) of the CNCA requires a director to disclose their interest during a meeting of the directors or of committees of directors at which the contract is first proposed, or at the first meeting after a director becomes so interested. For officers, specific times for proper disclosure also exist, similar to those of a director.⁴⁰ This disclosure is an ongoing obligation and an important one, as a director or officer may be required to account for any profit or gain realized on the contract or transaction.⁴¹ A contract or transaction that has been disclosed is not invalid and the director or officer would not be required to account for any profit if proper disclosure was made under section 141 of the CNCA, the directors approved the contract, and the contract was reasonable and fair to the corporation when it was approved.⁴²

The ONCA contains substantially the same statutory disclosure of interest regime found in the CNCA as outlined above.⁴³ These provisions in both the CNCA and the ONCA are the equivalent for for-profit directors and officers, as found in the CBCA and OBCA.⁴⁴

³⁸ *Supra* note 10 at paras 42-43.

³⁹ CNCA, *supra* note 1 at ss 141(1); ONCA *supra* note 2 at ss 41(1).

⁴⁰ CNCA, *supra* note 1 at ss 141(3).

⁴¹ *Ibid* at ss 141(10).

⁴² *Ibid* at ss 141(8).

⁴³ See ONCA, *supra* note 2 at s 41.

⁴⁴ CBCA, *supra* note 3 at s 120; OBCA, *supra* note 4 at s 132.

However, neither the CNCA nor the ONCA extinguish the common law duty regarding directors of a charity avoiding a conflict of interest. In this regard, despite the statutory protection provided where the director declares a conflict of interest, where the high fiduciary duties apply to a director of a charity, no reliance can be placed on these provisions since the director will generally still be in breach of their fiduciary duty at common law.

3. Duty to Continue

Directors have continuing obligations to the corporation which cannot simply be relieved by resignation. This duty to continue is illustrated in both the CNCA's and ONCA's provisions permitting certain individuals to sue directors for various matters. These provisions allow for up to two years for injured parties to sue. Under subsection 145(5) of the CNCA, certain complainants are permitted to sue up to two years from the date of the resolution approved by any director authorizing payments or distributions contrary to the Act. The ONCA contains a similar provision under subsection 39(5). As such, it is possible for a former director to continue to be held accountable for their duties while they were still a director even up to two years since ceasing to be a director, but only for actions or inactions up to the moment of their resignation.

F. FIDUCIARY DUTIES FOR CHARITABLE PROPERTY

The development of the common law in Ontario concerning directors of charitable corporations has held that directors of charitable corporations are subject to high order fiduciary obligations similar to those of trustees with regard to charitable property.⁴⁵ In the past, Ontario courts have held that directors of charitable corporations were akin to quasi-trustees with respect to their relationship to the charitable property of the corporation.⁴⁶ Over time, this evolved into the concept that directors are not necessarily akin to trustees, but rather are high order fiduciaries with quasi-trustee responsibilities.⁴⁷

⁴⁵ Ken Goodman, "Fiduciary Considerations Involving Charitable Property" (Paper delivered at the Canadian Bar Association/Ontario Bar Association 2010 Annual Church & Charity Law Seminar, 18 November 2010) at 5 [unpublished].

⁴⁶ *Ontario (Public Trustee) v Toronto Humane Society* (1987), 60 OR (2d) 236, 27 ETR 40, (Ont H Ct J) ["*Toronto Humane Society*"]. For more on this topic, see Maurice C. Cullity, "The Charitable Corporation: A "Bastard" Legal Form Revisited", online: (2002) 17:1 *The Philanthropist* 2 at 17 <<http://www.thephilanthropist.ca/index.php/phil/article/view/88/88>>.

⁴⁷ *Supra* note 45.

This high fiduciary duty of care with regard to charitable property is in part a function of the *Charities Accounting Act* (“CAA”) which states in subsection 1(2) that:

[a]ny corporation incorporated for a religious, educational, charitable or public purpose shall be deemed to be a trustee within the meaning of this Act, its instrument of incorporation shall be deemed to be an instrument in writing within the meaning of this Act, and any real or personal property acquired by it shall be deemed to be property within the meaning of this Act.⁴⁸

The purpose of subsection 1(2) of the CAA is not to define what a charitable corporation is, but rather to identify what corporations are deemed to be a trustee within the meaning of the CAA and to provide that any property acquired by such corporations is deemed to be charitable property within the meaning of the CAA.

The CNCA and ONCA are consistent with the CAA in this regard. Specifically, both the CNCA and ONCA state that:

A corporation owns any property of any kind that is transferred to or otherwise vested in the corporation and does not hold any property in trust unless that property was transferred to the corporation expressly in trust for a specific purpose or purposes.⁴⁹

While the CAA is silent on who has the capacity to carry out the duties and responsibilities of a trustee for a corporation’s trust property, such directors or officers as the guiding minds of a corporation that falls under subsection 1(2) of the CAA, would likely have the high fiduciary duty of care with respect to the charitable purposes or charitable property of the corporation. In contrast, the CNCA states that, in this capacity, directors are *not* trustees for any property of the corporation, including property held in trust by the corporation.⁵⁰ The ONCA does not provide a similar provision in this regard, but instead contains a provision in subsection 5(2) that if there is a conflict between the act and laws applicable to charitable corporations then charity law will prevail. The CNCA is silent on which law prevails in the case of a conflict. The OPGT, though, has informally taken the position that section 32 of the CNCA does not override statutory

⁴⁸ *Charities Accounting Act*, RSO 1990, c C 10 [“CAA”].

⁴⁹ CNCA, *supra* note 1 at s 31; ONCA, *supra* note 2 at s 87.

⁵⁰ CNCA, *supra* note 1 at s 32.

principles dealing with charities.⁵¹ Therefore, in Ontario at least, charity law would prevail and thus the assumption is that directors of NFP corporations act as the high fiduciaries in relation to charitable property.⁵²

G. STATUTORY LIABILITIES OF DIRECTORS AND OFFICERS

Given that a corporation cannot be sufficiently punished itself, its directors and officers are often exposed to similar liability as that of the corporation. Penalties for non-compliance with statutory requirements can result in directors, and possibly officers, being subject to fines, repayment of debt and even imprisonment, as discussed below. Since the focus of this paper is on NFP corporations incorporated under either the CNCA or ONCA, directors of NFP corporations located or operating in other provinces will also need to review the comparable provincial legislation and statutory obligations in their respective provinces.

1. Liability for Improper Payments to Members, Directors and Officers

a) CNCA

Under section 147 of the CNCA, directors who vote for or consent to a resolution authorizing a payment or distribution to a member, director or officer or a payment of an indemnity contrary to the act, are jointly and severally liable to restore any money or other property to the corporation.⁵³ If a director satisfies a judgment rendered under section 147 of the CNCA, that director is entitled to recover from the other directors who also voted for or consented to the unlawful act on which the judgement was founded.⁵⁴ Similarly, a director who is liable under this section can also seek an order from the court compelling the member or other recipient that received the improper payment from the corporation to return the property to the director. The limitation period for enforcing such liability is two years from the date of the resolution authorizing the improper payment.⁵⁵

As well, the CNCA authorizes directors to fix the remuneration of directors, officers, and employees.⁵⁶ However, this is in contradiction to the common which prohibits the

⁵¹ *Supra* note 8.

⁵² For a more detailed explanation on fiduciary duties for charitable property, see attached Appendix A.

⁵³ CNCA, *supra* note 1 at ss 145(1).

⁵⁴ *Ibid* at ss 145(2).

⁵⁵ *Ibid* at ss 145(5).

⁵⁶ *Ibid* at ss 143(1).

payment of remuneration or other benefits to directors of charities for all services, whether acting as a director, officer, employee, or for other professional services that they may provide to the organization, unless court approval is first obtained or a statute specifically authorizes such payments.⁵⁷

b) ONCA

The ONCA contains similar liability for improper payments under section 39 of the ONCA. In this regard, directors are also liable on a joint and several basis if they vote for or consent to a resolution authorizing a payment or distribution to a member, director or officer or a payment of an indemnity contrary to the act.

While a director who is liable under subsection 39(1) can also apply to the court for an order compelling a director, officer or other recipient to return to the director any improper payment received from the corporation, the ONCA provides the court with expanded authority to order a member, director or other recipient to pay or deliver to a director any money or property that was paid or distributed to them contrary to section 46 or 89, and may make any further order the court thinks fit.⁵⁸

Like the CNCA, the ONCA also provides for the remuneration of directors under subsection 47(1). However, pursuant to subsection 5(2) of the ONCA, such authorized remuneration of directors would not apply to directors of charitable corporations as it would be a conflict of interest with the common law.⁵⁹

2. Liability for Employee Wages

a) CNCA

Section 146 of the CNCA holds directors jointly and severally, or solidarily, liable to employees for all debts not exceeding six months wages for services performed for the corporation while they are directors. This provision is identical to s 119 of the CBCA.

⁵⁷ See *Re David Feldman Charitable Foundation (1987)*, OJ No 1432 (Ont Surr Ct); *Faith Haven Bible Training Centre (Re)*, [1988] OJ No 969, 29 ETR 198 (Ont Surr Ct); *Harold G. Fox Education Fund v Public Trustee (1989)*, 69 OR (2d) 742, [1989] OJ No 1085 (Ont H Ct J); *Toronto Humane Society*, *supra* note 46.

⁵⁸ ONCA, *supra* note 2 at ss 39(4).

⁵⁹ *Supra* note 57.

However, a director is not liable under this section unless one of the following conditions are met:

(a) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the debt has been proved within six months after the date of the assignment or receiving order.⁶⁰

In addition, a director must be sued while he or she is a director or within two years of ceasing to be a director in order to be liable under this section.

Similar to liability for improper payments referred to above, a director who has satisfied a claim under this section is entitled to recover from the other directors who were liable for the claim their respective shares.⁶¹ In addition, a director who pays a debt referred to in this section that is proven in liquidation and dissolution or bankruptcy proceedings is subrogated to any priority that the employee would have been entitled to and if judgment is obtained, the director is entitled to an assignment of the judgment.⁶²

b) ONCA

The ONCA also contains similar provisions to that of the CNCA for directors' liability for employee wages. However, like subsection 131(1) of the OBCA, subsection 40(1) the ONCA specifically includes directors' liability for up to 12 months vacation pay. Directors may also be liable for damages for their delinquent actions which appeared on

⁶⁰ CNCA, *supra* note 1 at ss 146(2).

⁶¹ *Ibid* at ss 146(6).

⁶² *Ibid* at ss 146(5).

winding up of the corporation, like in the CNCA.⁶³ The ONCA also contains similar relieving provisions that the directors may rely upon.

However, whereas directors under the CBCA and CNCA can rely on the “reasonable diligence” defence to escape liability for wages, directors of ONCA corporations, as with the OBCA, are strictly liable for these amounts. In this regard, section 44 of the ONCA does not apply to section 40 in the same manner that section 149 of the CNCA applies to section 146 concerning liability for wages. As a result, it would appear that the “reasonable diligence” defence is not available for directors of ONCA corporations with respect to liability for wages.

Two cases dealing with liability for employee wages under the CBCA and OBCA may be important in determining directors’ liability under the equivalent NFP legislation. In the case of *Proulx v Sahelian Goldfields Inc*,⁶⁴ the Ontario Court of Appeal held that directors were liable under the OBCA to reimburse employees for expenses, such as airfare, food and lodging that they incurred on behalf of the corporation, as these expenses were incurred in the course of providing services for the corporation and therefore constituted a debt for which directors were liable. In the case of *Mills-Hughes v Raynor*,⁶⁵ the Ontario Court of Appeal discussed the extent of the liability of directors to employees for services performed for the corporation under the CBCA. Blair J.A. found that directors’ liability “for all debts” means that directors are liable for vacation pay despite the failure to explicitly list liability for vacation pay in the CBCA.

3. Liability for General Offences, False or Misleading Statements and Misuse of Membership Information

a) CNCA

It is important to point out certain offences under the CNCA not specifically relating to directors and officers but which nonetheless may apply to them. For example, the CNCA contains a general offence provision under subsection 262(1) with penalties of up to \$5000 and/or up to six months imprisonment for any contravention of the act or

⁶³ ONCA, *supra* note 2 at ss 40(1) and 159(2).

⁶⁴ [2001] OJ No 3728, 204 DLR (4th) 670 (Ont CA).

⁶⁵ [1988] OJ No 38, 47 DLR (4th) 381 (Ont CA).

regulations, other than the requirement that the directors and officers of the corporation comply with the organization's articles, by-laws, and UMA under subsection 148(2). In addition, it is an offence for a person to use information obtained from a register or list of members or debt obligation holders for a purpose other than those specified in the statutory declaration without the written permission of the member or debt obligation holder about whom the information is being used.⁶⁶ Such person upon conviction would be liable for up to \$25,000 and/or for up to six months imprisonment.⁶⁷ It is also an offence for any person to make or assist in making a false or misleading statement in a document required under this act or the regulations and upon conviction is guilty of an offence and liable on summary conviction to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months or to both.⁶⁸

However, the directors and officers may also be held responsible for offences of the body corporate under section 262 that they have authorized, permitted, or acquiesced to in the commission of the offence and are liable to a fine up to \$5,000 or to imprisonment for a term of up to six months or to both, whether or not the body corporate has been prosecuted or convicted.⁶⁹ A due diligence defence is specifically provided for these offences where a person is not to be convicted if they can establish that they exercised due diligence to prevent the commission of the offence.⁷⁰

b) ONCA

Mirroring the provisions in the CNCA, the ONCA contains similar offences with corresponding penalties.⁷¹ However, the general offence under section 193 for any contravention of the act or regulations, other than the requirement that the directors and officers of the corporation comply with the organization's articles and by-laws, does not include an exclusion for breach of a UMA as does the CNCA, since UMA's are not permitted under the ONCA. Individuals may be held liable for false or misleading

⁶⁶ CNCA, *supra* note 1 at ss 262(3).

⁶⁷ *Ibid.*

⁶⁸ *Ibid* at ss 262(2).

⁶⁹ *Ibid* at ss 262(4).

⁷⁰ *Ibid* at ss 262(5).

⁷¹ ONCA, *supra* note 2: General offence provision ss 193(1); use of information ss 193(3); false or misleading statements ss 193(2); offences of the body corporate ss 193(4); due diligence defence ss 193(5).

statements in documents under the ONCA,⁷² with the same penalties as listed in the CNCA. The same specific due diligence defence is also available.⁷³

4. Liability During Liquidation and Dissolution

a) ONCA

Similar to subsection 230(2) of the OBCA, under subsection 159(2) of the ONCA, if during the course of winding up it appears that a present or former director or officer of the corporation has misapplied, retained, or became liable or accountable for property of the corporation, or has committed any misfeasance or breach of trust in relation to it, the court may, on the application of the liquidator or of any creditor, member or contributory, compel that director or officer to restore the property to the corporation, or to contribute a sum to the property of the corporation by way of compensation in respect of the misapplication, retention, misfeasance or breach of trust, or both, as the court thinks just.

b) CNCA

The CNCA does not contain an equivalent section to the ONCA. However, like the CBCA, the CNCA has a broader provision under subsection 232(4) permitting the liquidator to apply to the court in order to examine anyone who has concealed, withheld or misappropriated any property of the corporation. The provision of the CNCA differs from the CBCA, however, in that subsection 232(4) of the CNCA requires that the court be satisfied that there are reasonable grounds to believe that an individual may have concealed property of the corporation before making an order to examine them.

H. REMEDIES UNDER THE CNCA AND ONCA AFFECTING DIRECTORS AND OFFICERS

Legislators of the CNCA and ONCA have drawn a parallel between members of NFP corporations and shareholders of for-profit corporations, thereby affording members of NFP corporations expanded rights and remedies. However, while many rights and remedies are available to members, access to many of the remedies discussed below are also available to “complainants”, which are defined in the NFP legislation to include people other than just members.

⁷² *Ibid* at ss 193(2).

⁷³ *Ibid* at ss 193(5).

In the CNCA, “complainant” is broadly defined in section 250 as a former or present member or debt obligation holder of the corporation or any of its affiliates; shareholder of an affiliate corporation; former or present director or officer of the corporation or affiliate; the Director; or any other person that the court thinks fit to make an application. In the ONCA, complainant is defined in section 182 to limit the pool of potential complainants to former members, directors or officers of the corporation or its affiliates within the past two years.

Depending on which statute applies, members are able to apply to the court for an oppression remedy, a court-ordered liquidation and dissolution, a derivative action, and compliance or restraining order.

1. Oppression Remedy

The oppression remedy exists only in the CNCA. An oppression remedy is an order that a court may make if it is satisfied that any of the following is oppressive or unfairly prejudicial to or unfairly disregards the interests of any shareholder, creditor, director, officer, or member:

- (1) any act or omission of the corporation or any of its affiliates;
- (2) the conduct of the activities or affairs of the corporation or any of its affiliates; or
- (3) the exercise of the powers of the directors or officers of the corporation or any of its affiliates.⁷⁴

The oppression remedy is derived from for-profit business corporations’ legislation⁷⁵ and thus a commentary of what to expect with regard to the oppression remedy under the CNCA needs to consider the applicable case law with regard to equivalent oppression provisions under section 241 of the CBCA and subsection 248(1) of the OBCA. In this regard, in assessing a claim of oppression, the court first analyzes whether the complainant had reasonable expectations.⁷⁶ The factors for determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship

⁷⁴ CNCA, *supra* note 1 at s 253.

⁷⁵ See CBCA, *supra* note 3 at s 241 and OBCA, *supra* note 4 at s 248.

⁷⁶ *Supra* note 33.

between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.⁷⁷ If a reasonable expectation can be established, the court then looks at whether that reasonable expectation was violated by conduct falling within the terms of “oppression”, “unfair prejudice” or “unfair disregard”. To establish this, a claimant under the CBCA for example must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences under section 241 of the CBCA. In this regard, the court will show deference to the business judgment of the board of directors, recognizing the impossible task of satisfying every stakeholder and will see if they have exercised their business judgment in a responsible way.

The powers of the court for interim or final orders in satisfying a finding of oppression under the CNCA are considerable. Among the possible orders that a court can make is an order that the corporation, “or any other person... pay a member all or part of the amount that the member paid for their membership”.⁷⁸ Personal liability of directors and officers under the oppression remedy will depend on the circumstances of the case. However, the court’s discretionary power has been found to include the power to make orders against directors to provide compensation for losses suffered as a result of the conduct of the corporation. In the case of *Budd v Gentra Inc* (“*Budd*”), the Ontario Court of Appeal found that subsection 241(3) of the CBCA (with similar wording under subsection 253(3)(g) of the CNCA) dealing with the powers of the court for an oppression remedy permitted orders for personal liability:

It provides that in rectifying the matter complained of "the court may make any interim or final order it thinks fit." Those words are followed by a list of 14 orders which may be made and the express indication that those specific orders do not limit the generality of the remedial power given in the opening language of s. 241(3). The specific orders referred to in s. 241(3) include the power to require "any other person to pay to a security holder any part of the monies paid by him for securities" (s. 241(3)(g)), and the power to compensate an aggrieved person (s. 241(3)(j)). Both orders can be made against the company and/or individuals, including directors and officers.⁷⁹

⁷⁷ *Ibid.*

⁷⁸ CNCA, *supra* note 1 at ss 253(3)(g).

⁷⁹ [1998] OJ No 3109 at para 29, 111 OAC 288, (Ont CA) [*Budd*].

Budd established a two step test for determining when an oppression remedy contains a reasonable cause of action against directors or officers personally:

Are there acts pleaded against specific directors or officers which, taken in the context of the entirety of the pleadings, could provide the basis for finding that the corporation acted oppressively within the meaning of s. 241 of the CBCA; and

Is there a reasonable basis in the pleadings on which a court could decide that the oppression alleged could be properly rectified by a monetary order against a director or officer personally?⁸⁰

In *Budd*, the directors were found not personally liable because the first step could not be satisfied, as the statement of claim failed to deal with the director defendants or management defendants on an individual basis.

2. Court-Ordered Liquidation, Dissolution and Winding Up

Both the CNCA and ONCA provide for a court-ordered wind up of the corporation.⁸¹ Under the CNCA, the court may order a liquidation or dissolution of the corporation if the court is satisfied that, in respect of a corporation or any of its affiliates, any act or omission, conduct of the activities or affairs, or the exercise of the powers of the directors are oppressive, unfairly prejudicial to or unfairly disregard the interests of any shareholder, creditor, director, officer or member, or causes such result.

Under the ONCA, similar language is used to that of the CNCA outlined above except in the context of a winding up order. However, due to the absence of an oppression remedy under the ONCA, it also does not allow for oppressive behaviour as grounds for winding-up a corporation. Therefore, under section 136 of the ONCA, a court may order a wind-up of the corporation should any act or omission, activities or affairs, or power of the directors be exercised in a manner that is unfairly prejudicial to or that unfairly disregards the interests of any member, creditor, director or officer but does not include “oppressive” behaviour.

Additionally under the CNCA, the court may also order liquidation or dissolution if it is satisfied that:

⁸⁰ *Ibid* at para 47.

⁸¹ CNCA, *supra* note 1 at s 224; ONCA, *supra* note 2 at s 136.

(1) a unanimous member agreement entitles a complaining member to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred, or

(2) it is just and equitable that the corporation should be liquidated and dissolved.⁸²

Under the ONCA, the members by special resolution may authorize an application to the court to wind-up the corporation.⁸³ While this is a voluntary wind-up, it is still considered an order of the court under section 136. A similar provision is provided for in section 221 of the CNCA. However, such a voluntary wind-up is treated differently than in the ONCA. In the CNCA, if there is a special resolution of the members to dissolve the corporation, then the procedure for dissolution is outlined in section 221, which is carried out without the involvement of the court. Under the CNCA, the court may not order a wind-up if the corporation is a religious corporation. This is discussed in further detail below.

3. Derivative Action

A derivative action, provided for in both the CNCA and ONCA, allows for a complainant to apply to the court for an order granting them leave to bring an action in the name of and on behalf of the corporation or any of its subsidiaries, or to intervene in an action, for the purpose of prosecuting, defending or discontinuing the action on its behalf.⁸⁴

Under the NFP legislation, the court may not grant leave to commence a derivative action unless the court is satisfied that the complainant has given notice to the directors of their intention to apply to the court for a derivative action within 14 days before bringing the application or if the directors do not bring the action, prosecute or defend it diligently or discontinue it; and the complainant is acting in good faith; and it is in the interests of the corporation that the action be brought, prosecuted, defended or discontinued.⁸⁵ Additionally, the court may not grant leave if the corporation is a religious corporation, which is discussed in more detail below.⁸⁶

⁸² CNCA, *supra* note 1 at ss 224(1).

⁸³ ONCA, *supra* note 2 at ss 136(c).

⁸⁴ CNCA, *supra* note 1 at ss 251(1); ONCA, *supra* note 2 at ss 183(1).

⁸⁵ CNCA, *supra* note 1 at ss 251(2); ONCA, *supra* note 2 at ss 183(2).

⁸⁶ CNCA, *supra* note 1 at ss 251(3); ONCA, *supra* note 2 at ss 183(3).

Under the NFP legislation, the court may make any of the following orders in a derivative action:

- (a) an order authorizing the complainant or any other person to control the conduct of the action;
- (b) an order giving directions for the conduct of the action;
- (c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former or present shareholders, members and debt obligation holders of the corporation or its subsidiary instead of to the corporation or its subsidiary;
- (d) an order requiring the corporation or its subsidiary to pay reasonable legal costs incurred by the complainant in connection with the action; and
- (e) in the case of the CNCA, a further order allowing any other order that it thinks fit.⁸⁷

4. Compliance or Restraining Order

A compliance or restraining order under the NFP legislation directs a corporation or any director, officer, employee, agent or mandatary, public accountant, auditor, trustee, receiver, receiver-manager, sequestrator or liquidator of a corporation to comply with the CNCA and ONCA, the regulations or the articles, by-laws or UMA, if applicable, of the corporation, or restrains any such person from acting in breach of them and may also make any further order that it thinks fit.⁸⁸

5. Specific Rights for Members

It is also important to note that the NFP legislation also enhances the accountability of directors to members by providing members with the power to remove directors by ordinary resolution at any time.⁸⁹

As well, under the CNCA, members who are entitled to vote at an annual meeting also have the right to submit proposals to make, amend or repeal a by-law by submitting notice of any

⁸⁷ CNCA, *supra* note 1 at s 252; ONCA, *supra* note 2 at s 184.

⁸⁸ CNCA, *supra* note 1 at s 259; ONCA, *supra* note 2 at s 191.

⁸⁹ CNCA, *supra* note 1 at s 130 and 131; ONCA, *supra* note 2 at ss 26(1).

matter that they propose to raise at the meeting and then discuss at the meeting any proposals that they so submitted.⁹⁰ A proposal may include nominations for the election of directors if the proposal is signed by not less than the prescribed percentage of the members entitled to vote at the meeting at which the proposal is to be presented, or any lesser number of members if provided in the by-laws.⁹¹ Under the ONCA, like the CNCA, a member who is entitled to vote at an annual meeting may raise any matter, referred to as a “proposal”, that the member proposes to raise at the meeting but must give 60 days notice.⁹² Directors can refuse to discuss the proposal if they give at least 10 days notice, but a member may appeal the refusal decision to court.⁹³

Members under both the CNCA and ONCA can also apply to the court to have a contract or transaction annulled or set aside if a director or officer fails to comply with their duties regarding disclosure of interest, and the court may require that the director or officer account to the corporation for any profit or gain realized.⁹⁴

The CNCA and ONCA also provide members with a right to access membership registers and lists on request to the corporation or its agent or mandatary accompanied by a statutory declaration.⁹⁵ The statutory declaration must state the name and address of the applicant and, if the applicant is a body corporate, its address for service, and state that the list of members or the information contained in the register of members will not be used except in connection with an effort to influence the voting of members, requisitioning a meeting of members, or any other matter relating to the affairs of the corporation.⁹⁶

⁹⁰ CNCA, *supra* note 1 at ss 152(6) and ss 163(1).

⁹¹ *Ibid* at ss 163(5).

⁹² ONCA *supra* note 2 at ss 56(1), (6)(a).

⁹³ *Ibid* at ss 56(8), (9).

⁹⁴ CNCA, *supra* note 1 at ss 141(10); ONCA, *supra* note 2 at ss 41(11).

⁹⁵ CNCA, *supra* note 1 at ss 23(1); ONCA, *supra* note 2 at ss 96(1).

⁹⁶ CNCA, *supra* note 1 at ss 23(5) and (7); ONCA, *supra* note 2 at ss 96(3) and (5).

Members also have the right to inspect financial records during regular business hours and make copies or take extracts free of charge under both the CNCA and ONCA.⁹⁷

I. STATUTORY PROTECTION OF DIRECTORS

The NFP legislation affords greater protection for directors and officers of NFP corporations than their predecessors under the CCA and OCA. The following provides a brief overview of certain select statutory protections from liability in this regard.

1. “Reasonable Diligence” Defence

a) CNCA

The CNCA increases protection for directors and officers by including a statutory due diligence defence in sections 149 and 150, respectively. Directors are entitled to rely on section 149 of the CNCA to exonerate themselves from liability for unpaid wages under section 146, for improper payments to members under section 145, or the duty to comply under subsection 148(2) if they have exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on the corporation’s financial statements or the report of “a person whose profession lends credibility to a statement made by that person”.

Subsection 149(2) of the CNCA also states that a director will have complied with his or her statutory duty under subsection 148(1) if the director has relied in good faith on the corporation’s financial statements or the report of a professional.

Section 150 affords officers the same reasonable diligence and good faith limitations as are provided to directors under section 149.

b) ONCA

Like the CNCA, directors under the ONCA are also provided with a “reasonable diligence defence” including reasonable reliance on officers and employees of the

⁹⁷ CNCA, *supra* note 1 at ss 174(2); ONCA, *supra* note 2 at ss 98(2). For more information see Terrance S. Carter, “Digging for Dirt: Handling Requests for Information” (Paper delivered at The 2012 Ontario Bar Association Institute - Board Issues under the New Not-For-Profit Corporations Act (Canada and Ontario): Potential Problems and Practical Solutions, 10 February 2012), online: Carters Professional Corporation <<http://www.carters.ca/pub/article/charity/2012/tsc0210.pdf>>.

corporation and on professional advice. A director is not liable if they exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including good faith reliance on financial statements and accounting professionals.⁹⁸ However, there is no similar provision to section 190 of the CNCA extending this statutory protection to officers under the ONCA.

2. Religious Corporations and the “Faith-Based Defence”

a) CNCA

With respect to the remedies discussed above that are available to members under the CNCA for an oppression or derivative action, the court is precluded from making an order in this regard in the case of a “religious corporation.”⁹⁹ The court is also precluded from ordering the dissolution or winding up of the corporation on the application of a member on the grounds that the exercise of the powers of the directors of the corporation is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, any shareholder, creditor, director, officer or member if the corporation is a religious corporation. Further, the court may not order the liquidation and dissolution of a corporation under subsection 224(1)(a) if: (1) the corporation is a religious corporation; (2) the act or omission, the conduct or exercise of power is based on a tenet of faith held by the members; and (3) it was reasonable to base the decision on a tenet of faith, having regard to the activities of the corporation.

Since the CNCA does not provide a definition for “religious corporation”, it is unclear how this section will apply.

b) ONCA

As previously indicated, the ONCA does not include an oppression remedy similar to the CNCA, although the ONCA does have its own unique remedies for members. As such, there was no need for the ONCA to include an exception to an oppression remedy for religious corporations. However, like the CNCA, a derivative action is not available in the case of a religious corporation.¹⁰⁰ Unlike the CNCA, though, the ONCA does not

⁹⁸ ONCA, *supra* note 2 at s 44.

⁹⁹ CNCA, *supra* note 1 at ss 251(3) and 252(2).

¹⁰⁰ *Ibid* at ss 183(3).

require that the decision of the directors of the corporation to not bring, prosecute, defend or discontinue the action be based on a tenet of faith held by the members and that it was reasonable to base such a decision on a tenet of faith, having regard to the activities of the corporation. As such, it would appear that the ability of the directors to rely on the exemption for religious corporations with respect to derivative actions under the ONCA is not as onerous as under the CNCA.

The term “religious corporation” is also not defined under the ONCA. As such, it remains to be seen how this section will be interpreted.

J. INDEMNITIES AND INSURANCE FOR DIRECTORS AND OFFICERS OF NFP CORPORATIONS

Given the liabilities to which directors and officers of NFP corporations are exposed, it is important for board members to ensure that the corporation has provided appropriate provision for indemnification and insurance as necessary. Provisions under the NFP legislation specify when it is mandatory for a corporation to indemnify, when the corporation may indemnify, and when the corporation cannot indemnify a present or former director or officer.

1. Mandatory Indemnification

Both the CNCA and ONCA provide that a present or former director or officer of a corporation is entitled to indemnification against all costs, charges and expenses reasonably incurred by them in connection with the defence of any civil, criminal, administrative, investigative or other action/proceeding in which they have been involved because of their association with the corporation if the individuals seeking indemnification:

a) were not judged by a court or other competent authority to have committed any fault or omitted to do anything that they ought to have done;

b) acted honestly and in good faith with a view to the best interests of the corporation or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation’s request; and

c) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, had reasonable grounds for believing that their conduct was lawful.¹⁰¹

2. Permissive Indemnification

A corporation is permitted, but not required, to indemnify a present or former director or officer or another individual who acts or acted as the corporation required as a director or an officer or in a similar capacity to another entity against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.¹⁰²

Additionally, both the CNCA and ONCA provide that the corporation may advance the money for the costs, charges and expenses of a proceeding referred to above. However, if the director or officer is later found to have not acted honestly and in good faith with a view to the best interests of the corporation, they will be required to pay the advance back.¹⁰³

3. Prohibited Indemnification

A corporation under the CNCA or ONCA is prohibited from indemnifying a present or former director or officer where:

a) that director or officer failed to act honestly and in good faith with a view to the best interests of the corporation or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request; or

b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, that director or officer had no reasonable grounds for believing that their conduct was lawful; or

¹⁰¹ CNCA, *supra* note 1 at ss 151(1), (3) and (5); ONCA, *supra* note 2 at ss 46(1), (3) and (5).

¹⁰² CNCA, *supra* note 1 at ss 151(1); ONCA, *supra* note 2 at ss 46(1).

¹⁰³ CNCA, *supra* note 1 at ss 151(2) and (3); ONCA, *supra* note 2 at ss 46(2), and (3). For a more detailed explanation on the requirement for charitable corporations to comply with the CAA and regulations on indemnities and insurance for directors and officers, see attached Appendix A.

c) the corporation does not have the approval of the court to indemnify or advance money in respect of an action by or on behalf of the corporation or other entity to obtain judgment in its favour to which the director or officer may be made a party because of their association with the corporation.¹⁰⁴

4. Insurance

With regard to insurance, NFP corporations may also purchase and maintain personal liability insurance for their directors and officers. The CNCA and ONCA both permit a NFP corporation to purchase and maintain insurance for the benefit of a present or former director or officer of the corporation, or another individual who acts or acted at the corporation's request as a director or officer or in a similar capacity of another entity, against all liability incurred by the individual:

(a) in the individual's capacity as a director or an officer of the corporation; or

(b) in the individual's capacity as a director or an officer, or in a similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request.¹⁰⁵

However, under the ONCA a charitable corporation may not purchase insurance for directors and officers unless the corporation complies with the CAA or a regulation made under that act that permits the purchase of such insurance, or the corporation or the director or officer obtains a court order authorizing the purchase.¹⁰⁶ There is no comparable restriction on insurance under the CNCA, but presumably the same requirement under the CAA would apply by implication to federal charitable corporations operating in Ontario.

In addition, it should be noted that directors' and officers' insurance policies are not all the same, so the quality of coverage can change between insurers. In this regard, directors should carefully review their policies to make sure they have coverage for all of the potential risks they may face. It is important for directors and officers of NFP corporations to ask their insurance broker for a written explanation regarding the monetary limits of their policy, the

¹⁰⁴ CNCA, *supra* note 1 at s 151(3) and (4); ONCA, *supra* note 2 at ss 46(3), and (4).

¹⁰⁵ CNCA, *supra* note 1 at ss 151(6); ONCA, *supra* note 2 at ss 46(6).

¹⁰⁶ ONCA, *supra* note 2 at ss 46(7). See also *Charities Accounting Act*, O Reg 4/01, s 2.

extent and period of that coverage, deductibles and any exclusions contained within the policy to ensure that adequate coverage is available for the above discussed liabilities.

K. CONCLUSION

Since the new NFP legislation, as embodied in the CNCA and ONCA, has been modelled to a greater extent on for-profit business statutes, a discussion of directors' and officers' duties and liabilities under the CNCA and ONCA will be a somewhat more familiar process for many compared to that under the CCA and OCA. Notwithstanding the similarities, there are still important differences concerning directors' and officers' duties and liabilities that will need to be carefully considered during the process of continuing under the CNCA or ONCA, or in deciding whether to incorporate federally or provincially under the new NFP legislation. Generally speaking, as is evident from the above review, there is more protection afforded to directors and officers under the NFP legislation than there was under the CCA or the OCA. At the same time, though, there are also many new corresponding liabilities associated with both the CNCA and ONCA. As such, it will be important for practitioners to be able to advise their clients concerning the new intricacies of the new NFP legislation. It is hoped that this paper will help in this process.