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**WHAT'S NEW IN THE GOVERNANCE OF
NOT-FOR-PROFIT CORPORATIONS? (CNCA, ONCA)**

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A. INTRODUCTION

The purpose of this paper is to provide a brief overview of the new federal and Ontario not-for-profit corporation legislation. The new legislation, consisting of the *Canada Not-for-profit Corporations Act*¹ (“CNCA”) and the *Ontario Not-for-Profit Corporations Act, 2010*² (“ONCA”), have been modelled on reformed for-profit corporate statutes that were developed during the 1970s and 1980s, such as the *Canada Business Corporations Act*³ (“CBCA”) and the *Ontario Business Corporations Act*⁴ (“OBCA”). Such modelling has resulted in comprehensive and organized rules and provisions applicable to not-for-profit corporations that are similar to that found in for-profit legislation. This move towards harmonization of for-profit and not-for-profit legislation not only permits the interpretation of not-for-profit legislation through analogy to already settled cases regarding for-profit legislation, but it also brings clarity to some areas where none existed before with regard to previous not-for-profit legislation.

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¹ S.C. 2009, c. 23 [“CNCA”].

² S.O. 2010, c. 15 [“ONCA”].

³ R.S.C., 1985, c. C-44 [“CBCA”].

⁴ R.S.O. 1990, c. B.16 [“OBCA”].

By way of background, the CNCA was enacted by Parliament and received Royal Assent on June 23, 2009. Until relatively recently, federal not-for-profit corporations only had to be concerned with Part II of the *Canada Corporations Act*⁵ (“CCA”), which regulated the incorporation and governance of federal non-share capital corporations. Since the CNCA was proclaimed in force on October 17, 2011, existing federal not-for-profit corporations governed by the CCA will now have three years from the date of proclamation (i.e. until October 14, 2014) to continue under the CNCA. Until then, Part II of the CCA will continue to apply to those corporations that have not yet continued under the CNCA.

With regards to Ontario corporations, the *Ontario Corporations Act*⁶ (“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 Part III of the OCA with the ONCA, and received Royal Assent on October 25, 2010. The ONCA is now anticipated to be proclaimed in force by January 1, 2013.⁷ Once the ONCA is proclaimed, its provisions will automatically apply to existing not-for-profit corporations, regardless of whether they transition under the ONCA or not. Existing not-for-profit corporations will have three years from the date of proclamation to amend their constating documents so that they conform with the provisions of the ONCA. At the end of that period of time, any documents that have not been amended and which are inconsistent with the provisions of the ONCA will be deemed to be amended to conform with the ONCA.⁸ Although there is no requirement for existing not-for-profit corporations to amend their constating documents, it is nonetheless prudent for them to do so within the three year grace period in order to avoid any uncertainty regarding the validity of the provisions found in the constating documents.

The following is a selective summary of some of the more important aspects of both the CNCA and ONCA.

B. INCORPORATION

Under the CNCA and ONCA, incorporation will be “as of right”, similar to the mechanism used in the CBCA and OBCA, respectively. One or more individuals or corporations may incorporate a not-for-profit

⁵ R.S.C. 1970, c. C-32 [“CCA”].

⁶ R.S.O. 1990, c. C.38 [“OCA”].

⁷ For ease of reference, the author discusses both the CNCA and ONCA in the present tense notwithstanding the pending proclamation of the ONCA.

⁸ For more information, see Kate Lazier, “Transition to Under the Ontario Not-For-Profit Corporations Act” (Paper presented to the Ontario Bar Association, 7 June 2011).

corporation under either statute by filing articles of incorporation.⁹ The CNCA requires that the articles must be accompanied by notices of registered office and of the first directors.¹⁰ The ONCA requires that the articles must be accompanied by “any other prescribed documents or information with the Director in accordance with the regulations.”¹¹ However, no regulations have been released to date under the ONCA. Upon receipt of the articles of incorporation, a certificate of incorporation will be issued.¹² In comparison, incorporation has been subject to the discretion of the applicable Minister under the CCA and OCA. Federal and Ontario not-for-profit corporations will no longer set out their “objects” in letters patent, but instead will set out their “purposes” in the articles of incorporation.¹³ Not-for-profit corporations in both jurisdictions will have the capacity, rights, powers and privileges of a natural person.¹⁴ As well, the doctrine of *ultra vires* will no longer apply to either federal or Ontario not-for-profit corporations. This means that if a corporation acts outside of its purposes, the acts will still be valid. Under both statutes, not-for-profit corporations will not be required to file by-laws at the time of incorporation, although they will be required to do so within a certain period of time under the provisions of the CNCA and ONCA (e.g. 12 months under the CNCA¹⁵ and a time to be prescribed under the ONCA).

C. TYPES OF CORPORATIONS

One of the prominent characteristics of the new not-for-profit legislation is the categorization of different types of corporations and the different provisions that apply to these categorizations. The different types of corporations and provisions that apply are outlined below.

1. CNCA¹⁶

Under the CNCA, corporations are categorized into one of two types: soliciting corporations and non-soliciting corporations. A soliciting corporation is defined in subsection 2(5.1) of the CNCA, with the relevant time periods and prescribed monetary amounts set out in section 16 of the *Canada Not-for-profit Corporations Regulations*.¹⁷ A corporation becomes a soliciting

⁹ CNCA, *supra* note 1, s. 6(1) and ONCA, *supra* note 2, s. 7(1).

¹⁰ CNCA, *supra* note 1, s. 8.

¹¹ ONCA, *supra* note 2, s. 7(1).

¹² CNCA, *supra* note 1, s. 8-9 and ONCA, s. 9(1).

¹³ *Ibid.*, CNCA, s. 7(1)(f) and ONCA, s. 8(1).

¹⁴ *Ibid.*, CNCA, s. 16(1) and ONCA, s. 15(1).

¹⁵ *Ibid.*, CNCA, s. 153 and *Canada Not-for-profit Corporations Regulations*, S.O.R./2011-223 [“CNCR”].

¹⁶ See Theresa L.M. Man, “The Practical Impact of the Canada Not-for-Profit Corporations Act” (Paper presented to the Intensive Short Course on Legal and Risk Management for Charities and Not-for-Profit Organizations, 5 October, 2011) at 7-8.

¹⁷ CNCR, *supra* note 15.

corporation if, in a fiscal year, the corporation receives more than \$10,000 in gross annual revenue, directly or indirectly, from public sources, namely:¹⁸

(a) requests for donations or gifts from a person who does not fall into any of the following categories:

- members, directors, officers, or employees of the corporation at the time of the request for donation or gifts;
- legal or common law spouse of the above list of persons; or
- children, parents, brothers, sisters, grandparents, uncles, aunts, nephews or nieces of the above list of persons;

(b) grants or other similar financial assistance received from the federal or a provincial or a municipal government, or agencies of such government; or

(c) donations or gifts received from a soliciting corporation.

A corporation that does not meet the definition for a soliciting corporation is a non-soliciting corporation.

Depending on whether a corporation is a soliciting or non-soliciting, the distinction will affect its governance structure, e.g., the size of the board and the dissolution clause to be included in the articles, the composition of the board to be set out in the by-laws, whether a unanimous member agreement may be utilized and what provisions are to be included in the agreement, and whether financial statements will need to be filed with Corporations Canada.¹⁹ As such, it is essential to determine the categorization of the corporation.

¹⁸ CNCA, *supra* note 1, s. 2(5.1) and CNCR, s. 16

¹⁹ The details regarding the governance structure of each type of corporation have been omitted from this paper. For more information, see Man, *supra* note 16.

2. ONCA²⁰

Under the ONCA, corporations are categorized into one of two categories: public benefit corporations (“PBCs”) and non-PBCs.²¹ There are two sub-categories of PBC corporations: charitable corporations; and non-charitable corporations that receive more than \$10,000 in a financial year from specific public sources.²² All ONCA corporations that do not fall into any of these three criteria are non-PBC corporations.

A charitable corporation is a corporation that is incorporated for the relief of poverty, the advancement of education, the advancement of religion or other charitable purposes.²³ It is important to note that whether or not the corporation is a registered charity is irrelevant in deciding whether it is a PBC. The ONCA provides a special exemption of certain members’ remedies to religious corporations. The term “religious corporation” is not defined in the ONCA. Presumably religious corporations are established for the advancement of religion and, therefore, would be charitable corporations.

A non-charitable corporation is a corporation that does not meet the definition of a charitable corporation referred to above.²⁴ Those non-charitable corporations that receive more than \$10,000 in a financial year from any of the following sources will be considered a PBC: (i) donations or gifts from persons that are not members, directors, officers or employees of the corporation; or (ii) grants or similar financial assistance from the federal, provincial or municipal government or government agency.²⁵

Generally, higher standards are applied to PBCs because of the public source of their funding. The public interest requires that corporations that receive public funds be subject to tighter regulation and have greater transparency in their operations than those that do not receive public funding. It is important to bear this rationale in mind when attempting to grapple with the different treatment of the categories of corporations under the ONCA.

²⁰ See 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 (30 September 2011) at 3-4.

²¹ For more information on the special features of PBCs, see *ibid.*, Carter and Man.

²² ONCA, *supra* note 2, s. 1(1).

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

D. NUMBER OF DIRECTORS AND ELECTIONS

1. CNCA²⁶

All CNCA corporations, except for soliciting corporations, must have a minimum of one director. Soliciting corporations must have a minimum of three directors, and at least two of the directors must not be officers or employees of the corporation or its affiliates.²⁷ It is necessary to specify in the articles, a fixed number of directors or a minimum and a maximum number of directors.²⁸ When a minimum and a maximum number of directors is chosen, the precise number of directors to be elected may be determined from time to time by “ordinary resolution” of the members. The members may also delegate this power to the directors.²⁹ An “ordinary resolution” is a resolution passed by a majority of the votes cast on that resolution.³⁰

Under the CNCA, directors may be elected by the members or, if the articles of the corporation so provide, a certain portion of the directors may be appointed by the directors.³¹ Directors must be individuals who are at least 18 years of age and are neither bankrupt nor have been declared incapable. Unless the by-laws or articles state otherwise, there is no requirement in the ONCA that a director be a member of the corporation.³² There is no express provision for *ex-officio* directors. A director ceases to hold office when he or she dies, resigns, is removed, becomes a bankrupt or has been declared incapable.³³ Members may remove a director by ordinary resolution at a special meeting. Where a director was elected by a class of members that have the exclusive right to elect the director, only that class or group may remove the director by ordinary resolution.³⁴

²⁶ See Man, *supra* note 16 at 17.

²⁷ CNCA, *supra* note 1, s. 125.

²⁸ *Ibid.*, s. 7(1)(d).

²⁹ *Ibid.*, s. 133(3).

³⁰ *Ibid.*, s. 2(1).

³¹ *Ibid.*, s. 128. The total number of appointed director must not exceed one third of the number of directors elected at the previous annual meeting of members. Appointed directors hold office for a term no later than the close of the next annual meeting of members.

³² *Ibid.*, s. 126.

³³ *Ibid.*, 129.

³⁴ *Ibid.*, s. 130(2).

2. ONCA³⁵

All ONCA corporations must have a minimum of three directors.³⁶ For PBCs, not more than one-third of its directors may be employees of the corporation or of any of its affiliates.³⁷ ONCA corporations may provide in their articles a fixed number of directors; or minimum and maximum numbers of directors.³⁸ The members may amend the articles to increase or decrease the number of directors, or the minimum or maximum number of directors, but a decrease cannot shorten the term of an incumbent director.³⁹ All directors must be at least 18 years old, not incapable and not bankrupt. Unless the by-laws provide otherwise, there is no requirement that a director be a member of the corporation.⁴⁰

Members may elect and remove directors (except for *ex-officio* directors) by ordinary resolution.⁴¹ Directors may only be elected for a term provided for in the by-laws up to a maximum of four years.⁴² However, if a class or group of members have the exclusive right to elect a director, then only an ordinary resolution by that class or group of members may remove the director.⁴³ The directors may appoint additional directors to hold office until the next annual members' meeting up to a maximum of one third of the number of directors elected at the last annual members' meeting.⁴⁴ The by-laws of a corporation may provide for *ex-officio* directors.⁴⁵

E. DUTIES AND DUE DILIGENCE DEFENCE OF DIRECTORS AND OFFICERS

1. CNCA⁴⁶

Directors and officers are required to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill of a reasonably prudent

³⁵ See Carter and Man, *supra* note 19 at 7.

³⁶ ONCA, *supra* note 2, s. 22(1).

³⁷ *Ibid.*, s. 23(3).

³⁸ *Ibid.*, s. 22(2).

³⁹ *Ibid.*, s. 30(1).

⁴⁰ *Ibid.*, s. 23.

⁴¹ *Ibid.*, s. 24(1) and s. 26(1).

⁴² *Ibid.*, s. 24(1).

⁴³ *Ibid.*, s. 26(2).

⁴⁴ *Ibid.*, s. 24(7).

⁴⁵ *Ibid.*, s. 23(4).

⁴⁶ See Man, *supra* note 16 at 22.

person in comparable circumstances.⁴⁷ These duties are judged on an objective standard of care. In other words, in determining whether a director or officer has breached his or her duty to the corporation, the court will test the person's actions against that of a reasonably prudent person. This standard is lower than the common law subjective standard of care, assessing a person's actions against what may reasonably be expected from a person of his or her knowledge and experience.

As well, directors and officers are required to comply with the CNCA and its regulations, the articles, the by-laws and any unanimous member agreement.⁴⁸ Directors (but not officers) are subject to additional duties under the CNCA. For example, directors must be informed about the corporation's activities and to ensure the lawfulness of the articles and the purpose of the corporation.⁴⁹

In meeting their duties, directors and officers would not be liable 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 reports prepared by professionals. Directors (but not officers) may also rely on the corporation's financial statements prepared by the corporation's public accountant.⁵⁰

2. ONCA⁵¹

The ONCA provides that every director and officer has a duty to act honestly and in good faith with a view to the best interests of the corporation. They must also exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, which, like the CNCA, reflects an objective as opposed to a subjective standard of care.⁵² The ONCA also provides directors with a reasonable due diligence defence. This defence applies where a director has exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances.⁵³ However, in spite of requests by the not-for-profit

⁴⁷ CNCA, *supra* note 1, s. 148(1).

⁴⁸ *Ibid.*, s. 148(2).

⁴⁹ *Ibid.*, s. 148(3).

⁵⁰ *Ibid.*, s.149 and s. 150.

⁵¹ See Carter and Man, *supra* note 19 at 8

⁵² ONCA, *supra* note 2, s. 43(1).

⁵³ *Ibid.*, s. 44.

sector, the ONCA does not contain a partial liability shield similar to that which is found under the Saskatchewan *Non-profit Corporations Act, 1995*,⁵⁴ that would otherwise limit the liability of directors or officers for non-pecuniary and pecuniary losses stemming from acts or omissions of the corporation or of any of its directors, officers, employees or agents.

F. FINANCIAL REVIEW AND DISCLOSURE

1. CNCA⁵⁵

The level of financial review under the CNCA depends upon the sub-category of corporation. All soliciting corporations and non-soliciting corporations are further divided into designated corporations and non-designated corporations, depending on their income.

For soliciting corporations, a corporation receiving \$50,000 or less in gross annual revenues for its last fiscal year is considered to be a designated corporation, and a corporation receiving income in excess of this level is considered to be a non-designated corporation.⁵⁶

- Members of a designated soliciting corporation are required to appoint a public accountant by ordinary resolution at each annual meeting.⁵⁷ 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.⁵⁸ It is possible for the members to waive the appointment of a public accountant annually by a unanimous resolution.⁵⁹ 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

⁵⁴ See s. 112.1(1) of Saskatchewan's *Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2.

⁵⁵ See Man, *supra* note 16 at 12-13.

⁵⁶ CNCA, *supra* note 1, s. 179 and CNCR, *supra* note 15, s. 80(1).

⁵⁷ *Ibid.*, s. 181.

⁵⁸ *Ibid.*, s. 188.

⁵⁹ *Ibid.*, s. 182.

the public accountant conduct an audit, and it is not permissible for their members to require a review engagement instead.⁶⁰

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.⁶¹

- Members of a designated non-soliciting corporation are required to appoint a public accountant by ordinary resolution at each annual meeting. 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. 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.
- All non-designated non-soliciting corporations must appoint a public accountant. The public accountant must conduct an audit and it is not permissible for their members to require a review engagement instead.

2. ONCA⁶²

The general rule under the ONCA is that at each annual meeting, the members are required to appoint by “ordinary resolution” an auditor to audit the annual financial statements.⁶³ However, if a PBC’s annual revenue is more than \$100,000 and less than \$500,000 in a financial year, its members may approve by “extraordinary resolution”⁶⁴ 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

⁶⁰ *Ibid.*, s. 189 and CNCR, *supra* note 15, s. 84.

⁶¹ *Ibid.*, s. 179 and CNCR, s. 80(2).

⁶² See Carter and Man, *supra* note 19, 4-5.

⁶³ ONCA, *supra* note 2, s. 68(1). An “ordinary resolution” is a resolution that (a) is submitted to a meeting of the members and passed at the meeting, with or without amendment, by at least a majority of the votes cast, or (b) consented to by each member entitled to vote at a meeting of the members or the member’s attorney.

⁶⁴ An “extraordinary resolution” means a resolution that is (a) submitted to a special meeting of the members of a corporation duly called for the purpose of considering the resolution and passed at the meeting, with or without amendment, by at least 80 per cent of the votes cast, or (b) consented to by each member of the corporation entitled to vote at a meeting of the members or the member’s attorney.

an audit or review engagement.⁶⁵ These two alternatives are not available to a PBC that has \$500,000 or more in annual revenue. An extraordinary resolution is valid only until the next annual meeting of members, which means that the approval of such dispensation must be done on an annual basis.⁶⁶

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 to have 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.⁶⁷ 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.

G. MEMBERS' RIGHTS

1. CNCA

The CNCA provides a wide array of rights available to members of CNCA corporations, many of which did not exist under the CCA. Where only one class or group of members exists, all of the members of the corporation have the right to vote at any meeting of members.⁶⁸ Where the articles provide for two or more classes or groups of members, then the articles must provide the members of at least one class or group with the right to vote at a meeting of members.⁶⁹ Further, all members are entitled to one vote at a meeting of members unless the articles state otherwise.⁷⁰ Unless stated otherwise in the articles or by-laws, the rights of a member cease to exist upon the termination of membership.⁷¹

⁶⁵ ONCA, *supra* note 2, s. 76(1).

⁶⁶ *Ibid.*, s. 76(3)-76(4).

⁶⁷ *Ibid.*, s. 76(2).

⁶⁸ CNCA *supra* note 1, s. 154(3)

⁶⁹ *Ibid.*, s. 154(4).

⁷⁰ *Ibid.*, s. 154(5).

⁷¹ *Ibid.*, s. 157.

Members possess the traditional rights to elect and to remove directors.⁷² Amongst their new rights, voting members may make proposals⁷³ or, if they possess 5% of the votes, requisition a meeting of members.⁷⁴ It should be noted that *all* members are entitled to vote as a separate class or group on certain amendments to the articles or by-laws⁷⁵ and fundamental changes (e.g. changing the member rights for a certain class or group).⁷⁶

Separate class or group voting may pose some concern to corporations that have multiple membership classes or groups. In this regard, where there is more than one class or group of members, each class or group of members is entitled to vote separately as a class or group to approve certain changes affecting their class or group of membership by special resolution (regardless of whether the class or group of members otherwise has the right to vote). As such, each class or group of members (including non-voting members) will have a *de facto* veto right.

With regards to member discipline and the termination of membership, there are default rules in the CNCA regarding the termination of membership and members' rights which apply unless stated otherwise in the articles or by-laws.⁷⁷ The articles or by-laws may provide directors, members or any committee of directors or members the power to terminate membership or discipline members. If the articles or by-laws provide for such a disciplinary power, then they must also set out the circumstances and manner in which the power may be exercised.⁷⁸ The CNCA does not set out any minimum procedural threshold, though the case law suggests that organizations have the duty of fairness, including advising the affected member about the case and the process, and providing him or her an opportunity to be heard.⁷⁹

2. ONCA

Like the CNCA, the ONCA contains an expanded set of rights for members and provides similar requirements regarding the distribution of voting rights among the classes or groups of members.

⁷² *Ibid.*, s. s. 128(3) and s. 130.

⁷³ *Ibid.*, s. 163.

⁷⁴ *Ibid.*, s. 167 and CNCR, *supra* note 15, s. 72(1) .

⁷⁵ *Ibid.*, s. 197 and s. 199.

⁷⁶ See s. 206(4), s. 212(4), s. 212(5), s. 214 (5) and s. 214(6) of the CNCA.

⁷⁷ CNCA, *supra* note 1, s. 156 and s. 157.

⁷⁸ *Ibid.*, s. 158.

⁷⁹ See Jane Burke-Robertson, "Countdown To The Canada Not-For-Profit Corporations Act Practice Tip #4: Discipline Of Members And New Remedies Under CNCA", *Charity Law Bulletin* No. 213 (27 May 2010), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2010/chylb213.pdf>>.

Where there is only one class or group of members, all members of that class or group must have the right to vote at a meeting of members.⁸⁰ At least one class or group of members must have the right to vote at a meeting of members where multiple classes of members exist.⁸¹ Unless the articles provide otherwise, each member is entitled to one vote at a meeting of members.⁸² The rights of a member cease upon the termination of membership.⁸³

Under the ONCA, all members have the right to elect⁸⁴ and remove the directors⁸⁵, but only the voting members may make proposals⁸⁶, or if they possess 10% of the votes that may be cast at a meeting of members, requisition a meeting of members⁸⁷. Similar to the CNCA, the ONCA poses the similar concern of each class or group of members wielding a *de facto* veto right in the event that certain amendments to the articles or by-laws and fundamental changes are desired due to the explicit requirement for separate class or group voting under those circumstances.⁸⁸

Unless stated otherwise in the articles or by-laws, the ONCA sets out default rules concerning the termination of membership and members' rights which apply unless stated otherwise in the articles or by-laws.⁸⁹ Where the power to terminate membership or discipline members is accorded to the directors, the members or any committee of directors or members in the articles or by-laws, the same must also set out the circumstances and manner in which that power must be exercised. However, unlike the CNCA, the ONCA explicitly requires that any disciplinary action or termination of membership be done in "good faith and in a fair and reasonable manner." The ONCA considers a procedure to be "fair and reasonable" if 15 days notice with reasons is provided to the member regarding the proposed disciplinary action or termination, and the member is given an opportunity to respond.⁹⁰

⁸⁰ ONCA, *supra* note 2, s. 48(4).

⁸¹ *Ibid.*, s. 48(5).

⁸² *Ibid.*, s. 48(6).

⁸³ *Ibid.*, s. 50(2).

⁸⁴ *Ibid.*, s. 24(1).

⁸⁵ *Ibid.*, s. 26.

⁸⁶ *Ibid.*, s. 56(1).

⁸⁷ *Ibid.*, s. 60(1).

⁸⁸ *Ibid.*, s. 103 and s. 105.

⁸⁹ *Ibid.*, s. 50(1).

⁹⁰ *Ibid.*, s. 51(2)-(3).

H. MEMBERS' REMEDIES

1. CNCA⁹¹

The CNCA provides three major remedies for members, none of which were available under the CCA. First, a member may apply to a court for an order granting it leave to bring a derivative action in the name of and on behalf of the corporation, or to intervene in an action to which the corporation is party.⁹² The complainant must satisfy the court that it is bringing the derivative action in good faith and that the action is in the interests of the corporation.⁹³ This remedy is not available to religious corporations where the decision of the directors in question is based on a tenet of faith held by the members of the corporation, and it was reasonable to base the decision on a tenet of faith, having regard to the activities of the corporation.⁹⁴

Second, a member may use the oppression remedy on the basis that: any act or omission of the corporation; the conduct of the activities or affairs of the corporation; or the exercise of the powers of the directors or officers of the corporation, is oppressive or unfairly prejudicial or unfairly disregards the interests of the member.⁹⁵ The court may make any order it thinks fit, including compliance, restraining and compensation orders. This remedy is not available with a religious corporation for similar grounds of faith-based defence against a derivative action explained above.⁹⁶

Third, a member may apply for a compliance or restraining order to direct the corporation or any director, officer, employee, agent or mandatary, public accountant, trustee, receiver, receiver-manager, sequestrator or liquidator or a corporation to comply with the CNCA, the regulations, the corporation's articles, by-laws or a unanimous member agreement, or restraining any person from acting in breach of them.⁹⁷

Aside from these three major remedies, there are various other remedies that can be used to enforce specific rights enumerated in the CNCA. For example, if a corporation fails to comply

⁹¹ See Man, *supra* note 16 at 28-29.

⁹² CNCA, *supra* note 1, s. 251 and s. 252.

⁹³ *Ibid.*, s. 251(1)-(2).

⁹⁴ *Ibid.*, s. 251(3).

⁹⁵ *Ibid.*, s. 253.

⁹⁶ *Ibid.*, s. 253(2).

⁹⁷ *Ibid.*, s. 259.

with the requirements regarding the holding of annual members' meetings, then an interested person may apply for an order for the liquidation and dissolution of the corporation. A member may apply for an order to liquidate and dissolve a corporation if: the corporation oppressed the member; a unanimous member agreement entitles the member to demand dissolution upon the occurrence of a condition precedent; or it is considered just and equitable to do so.⁹⁸ An additional remedy is available for a member who is aggrieved by a corporation's refusal to include his or her proposal by applying for a court order to restrain the holding of the meeting at which the proposal is sought to be presented.⁹⁹

2. ONCA¹⁰⁰

There are four major remedies available to members under the ONCA, none of which were previously available under the OCA. First, a complainant¹⁰¹ or a creditor may apply for a compliance or restraining order where the corporation or its directors and officers fail to comply with the duties set out in the ONCA, the regulations, or the articles or by-laws of the corporation.¹⁰² Unlike the CNCA, the ONCA expressly allows a member who claims to be aggrieved because they were disciplined or because their membership was terminated may apply for such an order.¹⁰³

Second, where the name of a person is alleged to be or has been wrongly inputted or removed from the registers or records of the corporation, a director, officer, member or debt obligation holder of the corporation or any aggrieved person may apply for a court order that the registers or records be rectified.¹⁰⁴

There are two other major remedies provided for in the ONCA, the availability of which is restricted to particular categories of corporations. A dissent and appraisal remedy is only available to members of non-PBCs to dissent to resolutions on fundamental changes.¹⁰⁵ The other remedy

⁹⁸ *Ibid.*, s. 224.

⁹⁹ *Ibid.*, s. 163(9).

¹⁰⁰ See Carter and Man, *supra* note 19 at 10.

¹⁰¹ Section 182 of the ONCA defines a "complainant" as including former and present members, directors, officers of the corporation or any of its affiliates, and any person who "in the discretion of the court, is a proper person to make an application."

¹⁰² ONCA, *supra* note 2, s. 191.

¹⁰³ *Ibid.*, s. 51(5).

¹⁰⁴ *Ibid.*, s. 186(1).

¹⁰⁵ *Ibid.*, 187.

is the right of a complainant to seek a court order to commence a derivative action,¹⁰⁶ which is only available in relation to non-religious corporations.¹⁰⁷

There are additional remedies that are available to members to enforce specific rights, many of which are also found in the CNCA. Specifically, the ONCA permits a member to apply for an order to wind-up a corporation under certain circumstances, such as oppressive conduct by corporation against a member.¹⁰⁸ As well, an aggrieved member whose proposal is refused by the corporation may apply to a court to restrain the holding of a meeting at which the member's proposal is sought to be presented.¹⁰⁹

I. LIQUIDATION AND DISSOLUTION

1. CNCA

There are multiple ways by which the liquidation and dissolution of a not-for-profit corporation under the CNCA may occur. First, a corporation may be dissolved before commencing any activities. Specifically, where no memberships have been issued as yet, the directors may resolve to dissolve the corporation at any time. Where memberships have been issued, a special resolution of all the members, including those not entitled to vote, can dissolve the corporation.¹¹⁰

Second, the directors or a member entitled to vote at annual meetings may propose the voluntary liquidation and dissolution of the corporation.¹¹¹ Third, the Director may dissolve a corporation for a number of reasons, including failure to commence its activities or to send any fee, notice or other document required by the CNCA.¹¹² A fourth way is for the Director or any interested person to apply for a court order to dissolve the corporation for failing to hold annual meetings within the prescribed time period; contravention of specific provisions of the CNCA; or the procurement of any certificate under the CNCA by misrepresentation.¹¹³ As discussed above, the CNCA also permits members to apply for a court order for the liquidation and dissolution for the

¹⁰⁶ *Ibid.*, s. 183(1).

¹⁰⁷ *Ibid.*, s. 183(3).

¹⁰⁸ *Ibid.*, s. 136 and s. 137.

¹⁰⁹ *Ibid.*, s. 56(9).

¹¹⁰ CNCA, *supra* note 1, s. 220.

¹¹¹ *Ibid.*, s. 221.

¹¹² *Ibid.*, s. 222.

¹¹³ *Ibid.*, s. 223.

corporation where the corporation oppressed the member; a unanimous member agreement entitles the member to demand dissolution upon the occurrence of a condition precedent; or it is considered just and equitable to do so.

2. ONCA

The ONCA sets out separate rules and procedures for both the voluntary and court-ordered liquidation and dissolution of a not-for-profit corporation. To voluntarily wind up a not-for-profit corporation under the ONCA, the members may require the corporation to do so by special resolution at a meeting of the members. At that meeting, the members must appoint a liquidator to wind up the corporation's activities and distribute its property.¹¹⁴ In the alternative, a committee of members (referred to as inspectors) can be delegated the power to appoint the liquidator or enter into an arrangement with the corporation's creditors with respect to the powers to be exercised by the liquidator and the manner in which they are to be exercised.¹¹⁵

As mentioned above, a court-ordered winding up of a not-for-profit corporation under the ONCA may occur where: the corporation or its directors have unfairly prejudiced or unfairly disregarded the interests of a member; court supervision of a voluntary winding up is necessary; or the members by special resolution authorize a court application to wind up the corporation.¹¹⁶ Under these circumstances, the court may appoint the liquidator as well as remove its appointee.¹¹⁷

Upon the activities and affairs of the corporation being fully wound up, the court may order that the corporation be dissolved.¹¹⁸ The alternative to a court-ordered dissolution is a voluntary dissolution that is authorized by a special resolution of the members at a meeting called for that purpose or by the consent of all voting members.¹¹⁹

¹¹⁴ ONCA, *supra* note 2, s. 123.

¹¹⁵ *Ibid.*, s. 124(1).

¹¹⁶ *Ibid.*, s. 136.

¹¹⁷ *Ibid.*, s. 139-140.

¹¹⁸ *Ibid.*, s. 147(1).

¹¹⁹ *Ibid.*, s. 166.

The ONCA imposes mandatory provisions regarding the distribution of property in relation to PBCs. If a PBC is a charitable corporation it must distribute the remaining property to a charitable corporation with similar purposes to its own, a government or a government agency upon being liquidated. If a PBC is a non-charitable corporation, then it must distribute its remaining property to another PBC with similar purposes to its own, a government or a government agency. Non-PBCs must distribute their remaining property in accordance with their articles or, if there are no relevant provisions in the articles, then rateably to its members according to their rights and interests in the corporation.¹²⁰

J. CONTINUATION UNDER THE CNCA AND TRANSITION UNDER THE ONCA

1. CNCA

Since the CNCA was proclaimed in force on October 17, 2011, existing CCA corporations have until October 14, 2014 to continue under the CNCA, failing which they may be dissolved by the Director.¹²¹ Until then, the CCA will continue to apply to those corporations that have not yet continued under the CNCA. Upon the issuance of the certificate of continuance, the CCA will cease to apply to them.

Because the rules under the CNCA are very different from the rules under the CCA, what needs to be set out in the articles and by-laws under the CNCA is also different from what would be currently set out in the letters patent, supplementary letters patent and by-laws for CCA corporations. This difference means that the transition process is not simply a matter of transposing the provisions of the letters patent and supplementary letters patent into the articles and using the same by-laws. Instead, careful consideration needs to be given to the various mandatory, optional and default provisions contained within the CNCA when drafting articles of continuance and new by-laws. However, the details of those considerations are beyond the scope of this paper.

2. ONCA

As mentioned previously, the ONCA is anticipated to be proclaimed in force by January 1, 2013. Once the ONCA comes into force, it will automatically apply to existing not-for-profit

¹²⁰ ONCA, *supra* note 2, s. 150(1)(b).

¹²¹ CNCA, *supra* note 1, s. 297(5).

corporations. Existing not-for-profit 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, although the corporation will not cease to exist at the end of this period, as is the case under the CNCA. Although there is no requirement to transition under the ONCA, The deemed amendment provision will no doubt result in considerable confusion concerning which provisions of the constating documents are valid subsequent to the expiration of the three year grace period.

While there is no express requirement for Part III corporations under the OCA to transition under the ONCA, it is advisable for them to do so, since Part III of the OCA will be repealed upon the proclamation of the ONCA.¹²²

In order to transition under the ONCA from the OCA, a Part III OCA corporation must follow the process provided for in the ONCA in order to obtain articles of amendment. In this regard, the members of a Part III OCA corporation who are entitled to vote at annual meetings may, if authorized by the corporation's charter (e.g., letters patent, supplementary letters patent¹²³), authorize the directors by special resolution to apply for articles of amendment under the ONCA.

K. CONCLUSION

This brief overview of selective aspects of the CNCA and ONCA illustrates the significant changes involving the new legislative framework concerning not-for-profit corporations. The modelling of the new not-for-profit legislation on pre-existing for-profit legislation will provide valuable opportunities for interpretation by analogy between them. An interesting debate may ensue concerning whether the CNCA or the ONCA is the better corporate statute to incorporate under. No matter the outcome of that debate, it will be important for corporate lawyers to become familiar with both of these important statutory developments involving not-for-profit corporations.

¹²² ONCA, *supra* note 2, s. 211.

¹²³ *Ibid.*, ss. 115(1).