

THE NUTS AND BOLTS OF THE ONTARIO *NOT-FOR-PROFIT CORPORATIONS ACT, 2010*

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A. INTRODUCTION

With the anticipated proclamation of the Ontario *Not-for-Profit Corporations Act, 2010*¹ (“ONCA”) in late 2012, it is an appropriate time for not-for-profit (“NFP”) corporations incorporated under Part III of the Ontario *Corporations Act*² (“OCA”) to begin familiarizing themselves with the changes that the ONCA will have on their future corporate structure and governance, and to plan toward transitioning under the ONCA. This *Charity Law Bulletin* provides a brief overview of some of the key aspects of the ONCA.

By way of background, the OCA has 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 and received Royal Assent on October 25, 2010. The ONCA is expected to be proclaimed in force in late 2012. Prior to proclamation, draft regulations, standard organization by-laws and plain language guides are expected to be released for public comment in late 2012.³ Once the ONCA is in force, the OCA will no longer apply to non-share capital corporations incorporated under Part III of the OCA. There are

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¹ S.O. 2010, c. 15.

² R.S.O. 1990, c. C.38.

³ For more information on the legislative history of Bill 65, see Jane Burke-Robertson & Terrance S. Carter, “Introduction of Bill 65, The Ontario Not-For-Profit Corporations Act” *Charity Law Bulletin No 210* (25 May 2010) online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2010/chylb210.htm>>; Terrance S. Carter & Jane Burke-Robertson, “Changes to Bill 65, The Ontario Not-For-Profit Corporations Act, Pending Third Reading” *Charity Law Bulletin No. 228* (30 September 2010) online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2010/chylb228.htm>>.

many corporations that do not come under the OCA, such as non-share capital corporations under the *Co-operative Corporations Act* and insurance companies under Part V of OCA.⁴ As well, the ONCA excludes from its application to some corporations and limits its application to certain other corporations.⁵ The ONCA does not automatically apply to share capital social corporations incorporated under Part II of the OCA. These social corporations may continue to operate under the OCA for five years. At the end of the five-year period, they will have to decide whether to continue under the ONCA, the Ontario *Business Corporations Act* (“OBCA”) or the *Co-operative Corporations Act*.⁶

B. OVERVIEW OF THE KEY ELEMENTS OF THE ONCA

1. Incorporation, Purposes and By-laws

Under the ONCA, incorporation will be “as of right”, similar to the mechanism used in the OBCA. Like the OBCA,⁷ one or more individuals or corporations may incorporate an NFP corporation by filing articles of incorporation and any other required documents.⁸ Upon receipt of the articles of incorporation, a certificate of incorporation will be issued.⁹ Incorporation as of right is a welcome development compared to the system under the OCA. Under the OCA, incorporation is subject to the discretion of the Minister of Government Services¹⁰ and often takes 6-8 weeks to be completed. In contrast, it is anticipated that incorporation under the ONCA will take only a few days and can be filed online.

Under the OCA, corporations must set out their objects in the letters patent.¹¹ Under the ONCA, NFP corporations must set out their purposes in the articles.¹² Such purposes must be within the legislative authority of the Province of Ontario.¹³ Unlike the OCA, the ONCA permits NFP corporations to have purposes that are of a commercial nature, provided that the articles must provide that the commercial purpose is intended only to advance or support one or more of the

⁴ *Supra* note 1 at ss. 4(2).

⁵ *Ibid.*, s. 212 to 248.

⁶ *Ibid.*, ss. 211(3).

⁷ *Supra* note 2 at ss. 4(1).

⁸ *Supra* note 1 at ss. 7(1).

⁹ *Ibid.*, s. 9.

¹⁰ *Supra* note 2 at s. 118.

¹¹ *Ibid.*, ss. 4(1).

¹² *Supra* note 1 at ss. 8(1).

¹³ *Ibid.*, ss. 8(2).

non-profit purposes of the corporation.¹⁴ Notwithstanding this new rule, NFP corporations that are registered charities must still comply with the requirement of the *Income Tax Act* and Canada Revenue Agency's administrative policies on related business.¹⁵ Where the articles are inconsistent with the ONCA or its regulations, the ONCA or its regulations will prevail and the articles will be deemed to be amended accordingly.¹⁶

Standard organizational by-laws will be approved and released by the Ministry. If an NFP corporation fails to pass an organizational by-law within 60 days after it is incorporated, it will be deemed to have passed the standard organizational by-laws. Where a corporation is deemed to have passed the standard organizational by-laws it may amend or replace the standard by-laws at any time.¹⁷ This is a welcome change, since it is not uncommon to find OCA corporations that have not adopted any organizational by-laws after incorporation, especially those corporations incorporated without legal assistance.

Under the ONCA, NFP corporations will have the capacity, rights, powers and privileges of a natural person, which is not in itself a new development.¹⁸ As well, the doctrine of *ultra vires* will no longer apply to NFP corporations, which means that if a corporation acts outside of its purposes, the acts will still be valid. Practically speaking, this change makes little difference to the directors of charities because they still have the duty to comply with the corporation's articles, which may limit the purpose of the corporation.

2. Types of Corporations

A significant feature of the ONCA is its categorization of all NFP corporations into two types, namely public benefit corporations (PBCs) and non-PBCs. There are two sub-categories of PCB corporations: (i) charitable corporations; and (ii) non-charitable corporations that receive more

¹⁴ *Ibid.*, ss. 8(3).

¹⁵ Canada Revenue Agency, Policy Statement CPS-019, "What is a Related Business" (23 March 2003) online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-019-eng.html>>.

¹⁶ *Supra* note 1 at ss. 8(5).

¹⁷ *Ibid.*, s. 18.

¹⁸ *Ibid.*, ss. 15(1).

than \$10,000 in a financial year from specific public sources.¹⁹ All NFP corporations that do not fall into any of these three criteria are non-PBCs.

A charitable corporation is defined in the ONCA to be a corporation that is incorporated for the relief of poverty, the advancement of education, the advancement of religion or other charitable purposes.²⁰ Those familiar with the decision in *Special Commissioners of Income Tax v. Pemsel*²¹ will note that the definition generally replicates the four heads of charity under the common law. 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 a certain members' remedy 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.²² 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.²³

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.

¹⁹ *Ibid.*, at ss. 1(1).

²⁰ *Ibid.*

²¹ [1891] AC 531 (HL (Eng.)).

²² *Supra* note 1 at ss. 1(1).

²³ *Ibid.*

3. Financial Review and Disclosure

The general rule is that at each annual meeting the members are required to appoint by ordinary resolution an auditor to audit the annual financial statements (or a person to conduct a review engagement where applicable).²⁴ An ordinary resolution means a resolution that is approved by at least a majority of the votes cast at a members' meeting or is consented to by each member of the corporation entitled to vote at a members' meeting.²⁵

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 to have a review engagement in lieu of an audit. If a PBC's annual revenue for a financial year is \$100,000 or less, then its members may approve by extraordinary resolution to dispense with the appointment of the auditor and not have an audit or review engagement.²⁶ These two alternatives are not available to a PBC that has \$500,000 or more in annual revenue. An extraordinary resolution is a resolution that is approved by at least 80% of the votes cast at a special members' meeting or is consented to by each member of the corporation entitled to vote at a members' meeting. 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.²⁷

The monetary thresholds for dispensing with financial review are less onerous for non-PBCs. If a non-PBC's annual revenue is more than \$500,000 in a financial year, then its members may approve by extraordinary resolution a review engagement in lieu of an audit. If a non-PBC's annual revenue is \$500,000 or less in a financial year, its members may decide by extraordinary resolution not to appoint an auditor and to dispense with an audit or a review engagement.²⁸ 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.

In terms of financial disclosure, the directors are required to approve the annual financial statements of the corporation and approval of the directors must be evidenced by the signature of

²⁴ *Ibid.*, ss. 68(1).

²⁵ *Ibid.*

²⁶ *Ibid.*, ss. 76(1).

²⁷ *Ibid.*, ss. 76(3)-76(4).

²⁸ *Ibid.*, ss. 76(2).

one or more directors.²⁹ The financial statements cannot be issued, published or circulated unless they have been approved by the directors and accompanied by the audit or review engagement report, if any.³⁰ If a corporation has an audit committee, the audit committee must review the financial statements before they are approved by the directors³¹, and the majority of the committee members must not be officers or employees of the corporation or of any of its affiliates.³²

As well, the directors must present the financial statements, the report of the auditor or the person who conducted a review engagement, if such financial review was conducted, and any other financial information required by the articles or by-laws, to the members at every annual members' meeting. If a member requests a copy of these documents, the corporation must provide a copy to the member not less than 21 days before the meeting or the signing of a resolution in lieu of a meeting pursuant.³³

The financial review requirements for each category of corporations under the ONCA are summarized in the table below:

Type of Corp/Gross Annual Revenues (GAR)	Requirements for an Auditor	Audit/Review Engagement	
Public Benefit Corporation (PBC) with GAR of	\$100,000 or less (ss.76(1)(b))	May, by extraordinary resolution (80%), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than \$100,000 and less than \$500,000 (ss.76(1)(a))	May dispense with an auditor and have someone else conduct a review engagement. This dispensation requires an extraordinary resolution (80%).	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)
	\$500,000 or more (By implication of ss.68(1))	An auditor must be appointed annually	Audit is required
Non-PBC corporation with GAR of	\$500,000 or less in annual revenue (ss.76(2)(b))	May, by extraordinary resolution (80%), dispense with an auditor	May dispense with both an audit and a review engagement by extraordinary resolution

²⁹ *Ibid.*, ss. 83(1)-(2).

³⁰ *Ibid.*, ss. 83(4).

³¹ *Ibid.*, ss.83(3).

³² *Ibid.*, ss. 80(1).

³³ *Ibid.*, s. 84 and s. 59.

			(80%)
	More than \$500,000 in annual revenue (ss.76(2)(a))	May, by extraordinary resolution (80%), dispense with an auditor, and instead appoint a person to conduct a review engagement	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)

4. Number of Directors and Elections

All corporations must have a minimum of three directors.³⁴ NFP corporations may provide in their articles a fixed number of directors; or minimum and maximum numbers of directors.³⁵ 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.³⁶

Under the ONCA, directors may be elected by the members, appointed by the directors, or take office as *ex-officio* directors. Members may elect and remove directors (except for *ex-officio* directors) by ordinary resolution.³⁷ Directors may only be elected for a term provided for in the by-laws up to a maximum of four years.³⁸ 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.³⁹ In addition, 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.⁴⁰ All directors must be at least 18 years old, are not incapable and are not bankrupt. Unless the by-laws provide otherwise, there is no requirement that a director be a member of the corporation.⁴¹

For PBCs, not more than one-third of its directors may be employees of the corporation or of any of its affiliates.⁴² This provision may not make much difference to registered charities, since they are prohibited from having paid employees be directors (however employees of their affiliates are

³⁴ *Ibid.*, ss. 22(1).

³⁵ *Ibid.*, ss. 22(2).

³⁶ *Ibid.*, ss. 30(1).

³⁷ *Ibid.*, ss. 24(1) and ss. 26(1).

³⁸ *Ibid.*, ss. 24(1).

³⁹ *Ibid.*, ss. 26(2).

⁴⁰ *Ibid.*, ss. 24(7).

⁴¹ *Ibid.*, ss. 23.

⁴² *Ibid.*, ss. 23(3).

not so prohibited). In this regard, the ONCA provides that if there is a conflict between the ONCA and any law applicable to charitable corporations, then the latter prevails.⁴³

5. Duty of Directors and Officers, Indemnification

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.⁴⁴ These duties reflect the objective standard of care that applies to for-profit corporations. 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.⁴⁵ However, in spite of requests by the NFP sector, the ONCA does not contain a partial liability shield similar to that which is found under the Saskatchewan *Non-profit Corporations Act, 1995*,⁴⁶ 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.

Both former and present directors and officers may be indemnified by the corporation, and the latter may purchase insurance for that purpose, subject to the restrictions placed on the directors of charities by the *Charities Accounting Act*. In this regard, charitable corporations are prohibited from purchasing insurance for directors and officers unless the requirements in the *Charities Accounting Act* or its regulations are satisfied, or a court order is obtained.⁴⁷ The ONCA also permits NFP corporations to advance money to directors and officers for the costs, charges and expenses that they incur in respect of any civil, criminal, administrative, investigative or other action arising out of their association with the corporation, as long as certain conditions are met.⁴⁸

⁴³ *Ibid.*, s. 5.

⁴⁴ *Ibid.*, ss. 43(1).

⁴⁵ *Ibid.*, s. 44.

⁴⁶ See ss. 112.1(1) of Saskatchewan's *Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2.

⁴⁷ *Supra* note 1, s. 46(7).

⁴⁸ *Ibid.*, ss. 46(2).

6. Powers of Directors

The powers of the directors have been expanded under the ONCA. For example, directors may borrow money on the credit of the corporation without members' authorization unless the articles or by-laws provide otherwise.⁴⁹ Unless the articles or by-laws otherwise provide, directors may make, amend or repeal any by-law regulating the activities or affairs of the corporation, except in relation to certain amendments to the articles requiring a special resolution by the members.⁵⁰ However, in the case of by-laws, directors are required to submit a by-law, amendment or repeal to the members for confirmation, rejection or amendment, failing which the by-law will cease to have effect.⁵¹

7. Members

The ONCA provides extensive rights to members of NFP corporations. In addition to the rights to elect and remove directors, they may make proposals,⁵² requisition a meeting of members,⁵³ as well as vote on certain amendments to the articles⁵⁴ and fundamental changes. The latter may pose some concern to corporations that have multiple membership classes. In this regard, where there is more than one class of members, each class of members is entitled to vote separately as a class to approve certain changes affecting their class of membership by special resolution (regardless of whether the class of members otherwise has the right to vote). As such, each class of members (including non-voting members) will have a de facto veto right. Therefore, corporations that currently have multiple membership classes may wish to consider collapsing all of the classes into one voting class.

The ONCA regulates the relationship between the corporation and its members. If there is more than one class of members, the classes must be set out in the articles and the by-laws must provide the conditions for membership in each class.⁵⁵ Unless stated otherwise in the articles or by-laws, there are default conditions for the termination of membership and member's rights.⁵⁶ Similarly,

⁴⁹ *Ibid.*, ss. 85(1). Under the OCA, the directors had to pass by-laws to borrow money and those by-laws were not effective until they were confirmed by a special resolution of the members.

⁵⁰ *Supra* note 1, ss. 103(1).

⁵¹ *Ibid.*, ss. 17(4).

⁵² *Ibid.*, s. 56.

⁵³ *Ibid.*, s. 60.

⁵⁴ *Ibid.*, s. 103 and s. 105.

⁵⁵ *Ibid.*, ss. 48(1).

⁵⁶ *Ibid.*, s. 50.

the articles or by-laws may provide directors, members or a committee the power to terminate membership or discipline members. However, if the articles or by-law provide for such a disciplinary power, then they must also set out the circumstances and manner in which the power may be exercised. The duty of natural justice applies to the exercise of that power in that the member must receive notice of and be given an opportunity to respond to the proposed disciplinary action or termination.⁵⁷ Additionally, the ONCA permits directors to require members to make an annual contribution or pay annual dues, and provides them with control over the manner in which the contribution is to be made or the dues are to be paid.⁵⁸

8. Members' Remedies

The modelling of the ONCA on the OBCA has made available remedies to members that were not available to corporations under the OCA. Compliance or restraining orders and rectification orders are now available in relation to all categories of corporations. A complainant⁵⁹ 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.⁶⁰ If a person's name is allegedly or has been wrongly inputted or removed from the registers or records of the corporation, then a debt obligation holder, director, officer or member of the corporation or any aggrieved person may apply for a court order that the registers or records be rectified.⁶¹

There are two other remedies provided for in the ONCA, the availability of which is restricted to particular categories of corporations. The dissent and appraisal remedy is only available to members of non-PBCs to dissent to resolutions on fundamental changes.⁶² The other remedy is the right of a complainant to seek a court order to commence a derivative action,⁶³ which is only available in relation to non-religious corporations.⁶⁴ A derivative action allows a complainant to bring an action in the name of the corporation to enforce of its rights. Without this right, no action

⁵⁷ *Ibid.*, s. 51.

⁵⁸ *Ibid.*, s. 86.

⁵⁹ Section 182 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."

⁶⁰ *Supra* note 1, s. 191.

⁶¹ *Ibid.*, ss. 186(1).

⁶² *Ibid.*, 187.

⁶³ *Ibid.*, ss. 183(1).

⁶⁴ *Ibid.*, ss. 183(3).

could be brought in the name of the corporation, since corporations are legal persons separate from the natural persons that comprise them.

9. Conflict of Laws

The ONCA must be read in conjunction with applicable charities law. As mentioned above, the ONCA provides that if there is a conflict between the ONCA and a provision made in any other legislation that applies to a body corporate without share capital, then the provision in the other legislation prevails.⁶⁵ Similarly, if the conflict is in relation to a charitable corporation, then the legislation applicable to charitable corporation prevails. The effect is that some provisions of the ONCA will not apply to charities. For example, although the ONCA permits directors to fix remuneration for directors, officers and employees, this provision would not permit ONCA corporations that are registered charities to remunerate their directors for that same reason.⁶⁶ Similarly, the ONCA allows directors and officers to enter into contracts or transactions with the corporation as long as they disclose any conflict of interest that may exist.⁶⁷ At common law, the directors of incorporated charities cannot place their personal interests in conflict with their duty to the corporation. As such, under the ONCA, the common law applicable to charities would apply and the directors of charitable corporations would not be able to enter into any contracts or transactions where a conflict of interest may exist.

10. Liquidation and Dissolution

The ONCA provides detailed procedures and processes for the liquidation and dissolution of a corporation. Notably, it permits the members of all categories of corporations to require the corporation to be wound up voluntarily by special resolution.⁶⁸ In addition, the members may delegate to any committee of members, persons who are liable to contribute to the property of a corporation in the event of a winding-up or creditors (in the aggregate known as inspectors under the ONCA), the power to appoint a liquidator.⁶⁹ With the permission of the inspectors or the

⁶⁵ *Ibid.*, s. 5.

⁶⁶ *Ibid.*, s. 47.

⁶⁷ *Ibid.*, s. 41.

⁶⁸ *Ibid.*, ss. 123(1).

⁶⁹ *Ibid.*, ss. 124(1).

members, the liquidator may enter into compromises and arrangements.⁷⁰ There are also provisions providing for court-ordered liquidation and dissolution.⁷¹

Notwithstanding the standardized rules for all corporations, after creditors' claims and the debts, liabilities and obligations of the corporation are satisfied, the remaining property is distributed differently as compared between the ONCA and the OCA and as between PBCs and non-PBCs. Under the OCA, a corporation is currently permitted, but is not required, to pass by-laws that provide that property remaining after the payment of creditors' debts and liabilities will be distributed to the government, charitable organizations (as that term is used under the OCA) or "organizations whose objects are beneficial to the community."⁷² If no by-law is passed, then the remaining property would be distributed equally among the members (assuming that it is not a charitable corporation) or, if the letters patent, supplementary letters patent or by-laws so provide, among the members of a class or classes of members. In comparison, the ONCA imposes mandatory provisions regarding the distribution of property in relation to PBCs.

Upon being liquidated, a charitable corporation must distribute the remaining property to a charitable corporation with similar purposes to its own, a government or a government agency. If the 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.⁷³

11. Corporate Finance

The ONCA provides that none of the corporation's profits or property may be distributed to a member, a director, or an officer except in furtherance of the corporation's activities or as permitted by the ONCA.⁷⁴ However, a non-PBC may distribute the fair value of a membership to a member upon the termination of the member's membership, subject to the articles and by-laws of

⁷⁰ *Ibid.*, ss. 132.

⁷¹ *Ibid.*, ss. 136 to 147.

⁷² *Supra* note 2 at s. 132.

⁷³ *Supra* note 1 at ss. 150(1)(b).

⁷⁴ *Ibid.*, ss. 89(1).

the corporation.⁷⁵ Members are not liable, in their capacity as members, for any liability of the corporation or any act or default of the corporation, except as otherwise provided in the ONCA. The ONCA permits a corporation to put a lien on a membership registered in the name of a member for a debt of that member to the incorporation, including an amount unpaid in respect of that membership.⁷⁶

12. Transitioning Under the ONCA for Part III OCA Corporations

Transitioning under the ONCA refers to the process by which a Part III OCA corporation amends its constating documents so that they conform with the requirements in the ONCA.

In this regard, upon the ONCA being proclaimed into force, it automatically applies to all non-share capital corporations incorporated under Part III of the OCA. As such, OCA corporations do not need to take any positive action in order to come under the ONCA. However, if there are any provisions in their letters patent, supplementary letters patent, by-laws or special resolution that are inconsistent with the provisions in the ONCA, these documents will be deemed at the end of three years after proclamation to be amended to comply with the ONCA.⁷⁷ The problem with this approach is that it will become difficult to determine what provisions are deemed to be amended and in what way.

In order to avoid such uncertainty from arising, the ONCA permits Part III corporations to “transition” into the ONCA during the three-year period by amending, by articles of amendment, any provision in its letters patent, supplementary letters patent, by-laws or special resolution that are not consistent with the requirements of the ONCA in order to bring those provision into conformity with it.⁷⁸ If a Part III OCA corporation fails to do so within three years of the date of proclamation of the ONCA, then the provisions of its letters patent and bylaws that do not comply will be deemed to be amended to comply as explained above.

⁷⁵ *Ibid.*, ss. 89(2).

⁷⁶ *Ibid.*, s. 91.

⁷⁷ *Ibid.*, ss. 207(2).

⁷⁸ *Ibid.*, ss. 207(1).

Nonetheless, it is generally advisable for Part III OCA corporations to transition under the ONCA as soon as possible after proclamation of the ONCA and before the expiry of three-year period in order to avoid uncertainty concerning the interpretation of its constating documents.

13. Continuance Under the ONCA for Part II OCA Social Clubs

Part II OCA share capital social clubs may continue under the ONCA through a continuance process. In this regard, share capital social clubs may continue to operate under the OCA for five years after the proclamation of the ONCA, but they must, at the end of the five-year period, continue under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*.⁷⁹ The shareholders must approve the continuance by special resolution.⁸⁰

If a social club is not able to obtain a special resolution to authorize the continuance, it may apply to the court for an order waiving the requirement for a special resolution. The court order may be granted on such terms and conditions that the court considers appropriate in the circumstances if the court is satisfied that the corporation has made reasonable efforts to locate shareholders and serve them with a notice of meeting. A social club that is continued under the Ontario *Business Corporations Act* or the *Co-operative Corporations Act* is required to file with the Minister a copy of its certificate of continuance within 60 days after that certificate has been issued to it.⁸¹

A social club that fails to continue by the deadline date will be dissolved.⁸² Nevertheless, a corporation is deemed to exist after its dissolution for the following purposes: to hold a meeting of the members in order to pass the special resolution to authorize the continuance; to apply to court for an order waiving the requirement for a special resolution; or to file articles of continuance.⁸³

In order to continue under the ONCA from the OCA, a social club must follow the process provided for in the ONCA to obtain a certificate of continuance. To obtain a certificate of continuance, the members of a social club who are entitled to vote at annual meetings may authorize the directors by special resolution to apply for a certificate of continuance under the

⁷⁹ New section 2.1 of the OCA, *supra* note 2, as amended by section 210(3) of the ONCA.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, s. 2.1(4), (5) and (6).

⁸² *Ibid.*, s. 2.1(7).

⁸³ *Ibid.*, s. 2.1(8).

ONCA.⁸⁴ By that same resolution, the members may also amend the charter of the corporation, subject to a prohibition on amendments that would affect a class or group of members.⁸⁵ However, an amendment that would add, change or remove the rights or conditions attached to a certain membership class cannot be authorized by the members at the same time that they authorize the directors to apply for a certificate of continuance unless (a) the charter of the social club provides otherwise in respect of those amendments, or (b) the members of the class or group approve the amendment separately by class.⁸⁶ Upon receipt of the articles of continuance and any required documents, a certificate of continuance will be issued.⁸⁷

14. Export and Import Continuance

The ONCA provides that a corporation may be exported from Ontario to another jurisdiction, subject to the satisfaction of certain requirements. A corporation that wishes to continue to another jurisdiction will not be allowed to do so unless the desired jurisdiction of continuance has laws that, *inter alia*, ensure that the property of the corporation remains the property of the corporation and that existing causes of action, claims, or liabilities against the corporation are unaffected. All members are entitled to vote in respect to export continuance to another jurisdiction. If the members approve continuance by special resolution, then the corporation may file an application for authorization to continue.

An NFP corporation incorporated or continued under the laws of another jurisdiction other than Ontario may be imported to Ontario under the ONCA by applying for a certificate of continuance. To apply for a certificate of continuance, the laws of the other jurisdiction must permit continuance to Ontario and the corporation's articles of continuance must satisfy the incorporation requirements under the ONCA.⁸⁸

⁸⁴ *Ibid.*, s. 115(1).

⁸⁵ *Ibid.*, ss. 115(2).

⁸⁶ *Ibid.*, ss. 115(4).

⁸⁷ *Ibid.*, ss. 115(5).

⁸⁸ *Ibid.*, s. 114.

C. CONCLUSION

This brief overview of the ONCA has highlighted some of the more significant aspects of the ONCA and has explained the impact the ONCA will have upon NFP corporations in Ontario. As a result of the sweeping changes the ONCA will bring about, it will be important for boards, executives, staff, and legal counsel of NFP corporations in Ontario to become familiar with the provisions of the ONCA and to begin planning for transitioning under the ONCA once it is proclaimed in force.