
**OTTAWA FESTIVALS
D'OTTAWA**

October 18, 2011

**Essentials of the New *Canada Not-for-Profit
Corporations Act (CNCA)***

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 BARRISTERS SOLICITORS TRADEMARK AGENTS	OTTAWA FESTIVALS D'OTTAWA Ottawa – October 18, 2011
Essentials of the New <i>Canada Not-for-Profit Corporations Act (CNCA)</i>	
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OVERVIEW	
<ul style="list-style-type: none">• <i>Canada Not-for-Profit Corporations Act (CNCA)</i>• <i>Ontario Not-for-Profit Corporations Act, 2010 (ONCA)</i>• Practical steps to prepare for continuance	
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A. CANADA NOT-FOR-PROFIT CORPORATIONS ACT ("CNCA")	
<ul style="list-style-type: none">• Status of CNCA• Overview of the continuance process• Essentials to know about the CNCA• Considerations when preparing Articles of Continuance• Considerations when preparing new by-laws• See <i>Charity Law Bulletins</i> on "Countdown to the Canada Not-For-Profit Corporations Act - Practice Tips" 1 to 9, Bulletin Nos. 191, 193, 199, 213, 215, 220, 231, 239, 247	
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1. STATUS OF THE CNCA

- On June 23, 2009, CNCA received Royal Assent
- Draft regulations were published by Industry Canada on June 25, 2010, published in Canada Gazette on February 26, 2011
- Proclaimed into force October 17, 2011
- Check Industry Canada's website for updates: <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/home>

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2. OVERVIEW OF CONTINUANCE PROCESS

- The new rules do not apply automatically to CCA corporations
- Existing CCA corporations will be required to continue under the CNCA within 3 years of proclamation
- Failure to continue will result in dissolution of the corporation
- Can make amendments to existing articles, letters patent or memorandum or articles of association at the time of applying for continuance

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- This means you will need to
 - Review your letters patent and by-laws
 - Contact CRA (if a registered charity) where there are proposed changes to the purpose(s)
 - Prepare
 - Articles of Continuance
 - Notice of Directors
 - Notice of Registered Office
 - Create new by-laws
 - Get membership approval - Articles must be approved by 2/3 vote

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- File required documents with Industry Canada
 - Articles of Continuance
 - Notice of Directors
 - Notice of Registered Office
- No filing fee, no need to file by-laws for continuance
- Industry Canada will issue a Certificate of Continuance
- File approved new by-laws within 12 months of adoption
- Charities – send Certificate of Continuance, Articles of Continuance and new by-law to CRA

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- Timing of Continuance
 - Some corporations will want to continue right away, others will wait
 - Revising governance structure to be reflected in new by-law may need some time for directors and members to consider
 - Some considerations
 - Increased director protection
 - Existing by-laws already require amendment
 - Contemplation of fundamental changes
 - Different levels of financial review

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- Transition Process
 - Make sure you have a copy of your current letters patent, supplementary letters patent and by-laws (ask Industry Canada if not sure)
 - Prepare early by carrying out a review of existing by-laws so can anticipate changes that will be needed
 - Industry Canada will have a number of useful transition resources
 - CRA expected to provide guidance for registered charities - amendment of charitable objects on continuance expected to trigger CRA review

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3. ESSENTIALS TO KNOW ABOUT THE CNCA

1. Soliciting and Non-soliciting Corporations
 - Where a corporation receives more than the prescribed amount [\$10,000] in its last financial period from public sources [(a) public donations, (b) federal, provincial and municipal governments or (c) conduit entities], it will become a soliciting corporation
 - Status acquired on the prescribed date [AGM] for a prescribed duration [3 years]
 - Low threshold means most corporations will become soliciting corporations

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- Implications of being a soliciting corporation
 - Must have a minimum of 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates
 - Required to file annual financial statements with the Director under s. 176(1)
 - Audit and public accountant rules more stringent
 - On liquidation, the articles must provide for the distribution of any remaining property on dissolution to qualified donees

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2. Directors – Number and Change
 - Minimum of 1 director (3 for a soliciting corporation, at least 2 of whom are not officers or employees of the corporation or its affiliates)
 - Must file notice of change within 15 days of any change in directors or of a change in a director's address

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3. Directors Taking Office

- Elected by members by ordinary resolution at an annual meeting for a term expiring within prescribed period of 4 years
- May have staggered terms
- Articles can provide for appointment of directors by board (up to 1/3 of those elected at previous AGM)

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4. Ex-Officio Directors

- Ex-officio directors not permitted but there may be possible "work arounds"
- For instance, having special membership class of one member, which class would have the right to elect a director
- Or possible for the articles to provide for the appointment of directors by the board and have a board policy that certain office holders will be appointed as directors

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5. Members

- A corporation must have members
- If one class of members, all are voting; or
- Two or more classes, but the articles must give right to vote to at least one class
- Where more than one class, the members of each class have certain built in protections
- All classes of members, even non-voting classes of members, are entitled to vote separately as a class on certain amendments to articles and by-laws dealing with rights and classes of membership
- Thus a class of members could reject a change - effectively resulting in a class veto (limited opt-out available)
- Corporations wanting maximum flexibility will have one class of members

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6. Members' Meetings

- Regulations provide a variety of prescribed means of giving notice of members' meetings
- By-law can set out any prescribed method of absentee voting (mail in ballot, electronic voting or proxy)
- May participate in members' meetings by electronic means
- By-laws can provide for consensus decision making
- Right to requisition a meeting of members

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7. Members' Rights

- Right to submit proposals to amend by-laws or nominate directors or require any matter to be discussed at annual meetings
- Right to access corporate records
- May sign resolutions in writing
- Availability of unanimous members' agreement (except for soliciting corporations)

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8. Members' Remedies

- Right to seek an oppression remedy against the corporation
- Right to seek a court order to commence a derivative action
- Compliance and restraining orders
- Court ordered wind-up and liquidation on application of a member

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9. Special Exemption for Religious Corporations

- CNCA precludes the members' remedies, referred to above, where the court determines that:
 - The corporation is a religious corporation
 - The act or omission, conduct or exercise of powers 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 (ss. 251(3), 253(2) and 224(2))

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10. Due Diligence Defence – Directors and Officers

- Not liable if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances – objective standard of care, replaced common law subjective standard of care
- Good faith reliance on financial statements and reports of professionals

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11. Public Accountant and Financial Review

- CNCA divides corporations into two categories for purpose of determining obligation to appoint a public accountant and the corresponding level of financial review required
- Designated corporations:
 - A soliciting corporation with gross annual revenues for its last completed financial year that is equal to or less than \$50,000 or that is deemed to have such revenues under the Act;
 - A non-soliciting corporation with gross annual revenues for its last completed financial year that is equal to or less than \$1 million
 - Non-designated corporations are soliciting and non-soliciting corporations with annual revenues in excess of these amounts

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Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Soliciting	Designated	\$50,000 or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	More than \$50,000 and up to \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit, but members can pass a special resolution to require a review engagement instead
	Non-Designated	more than \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Non-Soliciting	Designated	\$1 million or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	more than \$1 million	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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12. Amalgamations
- Federal corporations, once continued under the CNCA, will be able to amalgamate with one another
 - Amalgamations between CNCA and ONCA corporations (as well as other jurisdictions) will also be possible
13. Change of Jurisdiction
- Possible for a corporation from another jurisdiction to be imported and continue as a CNCA corporation
 - Possible for a CNCA corporation to be exported and continued as a corporation under another jurisdiction
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4. CONSIDERATIONS WHEN PREPARING ARTICLES OF CONTINUANCE

- What Information must be included in the Articles of Continuance?
 - Corporation's name
 - Province or territory where the registered office is situated
 - Minimum and maximum number of directors or fixed number
 - Statement of purpose
 - Restrictions on activities, if any

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- The classes, or regional or other groups of members that the corporation is authorized to establish
- Statement regarding distribution of property on dissolution
- Any additional provisions that the corporation may want included in the articles

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5. CONSIDERATIONS WHEN PREPARING BY-LAWS

- By-laws will need to be replaced or substantially revised
- CCA contained very few rules so lengthy and detailed by-laws were necessary
- Under CNCA, no Ministerial approval of by-laws needed
- By-law must be filed with Industry Canada within 12 months of membership approval (but failure to file does not affect validity)

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- Understanding the CNCA framework
 - Rules in the Act
 - Details in the Regulations
 - “prescribed”
 - “regulations”
 - Need to refer back and forth between the Act and the Regulations

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- Approaches to by-law drafting
 - Minimalist approach
 - CNCA contains detailed rules, so by-laws do not require same level of details
 - By-laws to set out provisions to
 - Deal with issues that the CNCA is silent
 - Override the default rules in the CNCA
 - Utilize optional rules in the Regulations
 - Advantage – no risk of amending by-laws to remove CNCA mandatory requirements or violate CNCA requirements
 - Disadvantage – work with different documents back and forth: articles, by-laws, CNCA, Regulations and know which provisions would take precedence if conflict

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- Detailed approach
 - Detailed by-laws
 - Advantage – no need to work with different documents, only need to work with by-laws
 - Disadvantage – by-laws will need to clearly identify
 - Which provisions reflect mandatory CNCA provisions and cannot be amended
 - Which provisions reflect optional rules of the CNCA and cannot use other alternatives

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- Two types of by-laws: different levels of approval
 - Type 1: “General By-laws”
 - Effective upon passage by the board by ordinary resolution
 - Must be confirmed by members at next meeting to remain in force
 - Type 2: “Special By-laws”
 - For matters affecting member’s rights, e.g. notice of members’ meetings, membership transferability, amendments to membership conditions, absentee voting by members
 - Effective when confirmed by members by special resolution (no need for board approval)

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- By-laws drafted under the CNCA must be very clear about which amending formula applies to various provisions (or risk certain by-law provisions not being legally in force). Some options:
 - Have two by-laws with all by-law provisions requiring special resolution in one separate by-law
 - Have one by-law but place all provisions requiring special resolution in one clearly marked section
 - Have one by-law and place all provisions requiring special resolution in the articles
 - Have one by-law and provide in articles that all by-law amendments require a special resolution

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- CNCA provides both a general framework and sets of rules for corporations to operate
- Three types of rules in CNCA:
 - Default rules - By-laws or articles can override
 - Mandatory rules – Cannot be overridden by the articles or by-laws
 - Alternate Rules – Articles/ by-laws can include certain optional rules provided by CNCA

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- “Default rules” in CNCA – apply automatically where by-law is silent. Examples:
 - Directors can borrow and grant security without members’ authorization
 - Membership can only be transferred back to corporation
 - Participation in meetings by electronic means
 - A majority of members constitutes a quorum
 - Directors may meet anywhere
 - Directors not required to be members
 - A majority of the directors constitutes a quorum
 - Directors can make, amend or repeal by-laws, except those requiring a special resolution of members

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- “Mandatory Rules” - rules that cannot be overridden by the articles or by-laws. Examples:
 - Directors are elected by members
 - Directors can be removed by majority vote of members (or by class vote)
 - By-laws must contain conditions for membership in the corporation
 - Notice of meetings of members - must comply with the regulations

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- “Alternate Rules” - optional rules that are provided by the CNCA. Examples:
 - Consensus decision-making
 - Appointment of directors – (must be in articles)
 - Can send notice to members that financial statements available at registered office (instead of default rule which states that statements be sent to members 21-60 days before the annual meeting)
 - Requisition of meeting – default rule is 5% of members (CNCA permits by-laws to specify a lower but not higher amount)

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- Can specify that absentee voting will be allowed by proxy, mailed in ballot or telephone/electronic means (not permitted unless in by-laws)
- The articles may require a greater number of votes of directors or members to effect any action (except removal of directors)

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B. NOT-FOR-PROFIT CORPORATIONS ACT, 2010 ("ONCA")

- Status of ONCA
- Overview of the continuance process
- Overview of key elements of the ONCA
- For more details see *Charity Law Bulletin* Nos. 210 and 228 on our website at www.charitylaw.ca

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1. STATUS OF ONCA

- The Ontario *Corporation Act* ("OCA") has not been substantively amended since 1953
- Bill 65 introduced the new Ontario *Not-For-Profit Corporations Act, 2010* ("ONCA")
- ONCA introduced on May 12, 2010, and received Royal Assent on October 25, 2010
- ONCA not expected to be proclaimed in force until late 2012
- Regulations have not yet been released

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2. OVERVIEW OF CONTINUANCE PROCESS

- Existing OCA corporations will be required to continue under the ONCA within 3 years of it coming into force
- Although failure to complete the continuance process within the 3 years' time frame
 - Will not result in corporation being dissolved by the government
 - Its letters patent, supplementary letter patent and by-laws will be deemed to be amended to comply with the new statutory requirements, resulting in non-compliant provisions deemed to become invalid
 - Will result in uncertainty in relation to which provisions remain to be valid

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- Social clubs with share capital will have 5 years to continue
- As part of the continuance process, OCA corporations can, by articles of amendment, amend any provision in its letters patent, supplementary letters patent, by-laws or special resolution to bring the provision into conformity with the ONCA

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- This means you will need to
 - Review your letters patent and by-laws
 - Contact CRA (if a registered charity) where there are proposed changes to the purpose(s)
 - Prepare Articles of Continuance and other required documents
 - Create new by-laws
 - Get membership approval
 - File required documents
 - Certificate of Continuance will be issued
 - Charities – send Certificate of Continuance, Articles of Continuance and new by-law to CRA

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- Timing of Continuance
 - Some corporations may want to continue early on, others may want to wait
 - Revising governance structure to be reflected in new by-law may need some time for directors and members to consider
 - Some considerations
 - Increased director protection
 - Existing by-laws already require amendment
 - Contemplation of fundamental changes
 - Different levels of financial review

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- Transition Process
 - Make sure you have a copy of your current letters patent, supplementary letters patent and by-laws
 - Prepare early by carrying out a review of existing by-laws so can anticipate changes that will be needed
 - The Ontario government will release guide books and standard by-laws
 - CRA expected to provide guidance for registered charities - amendment of charitable objects on continuance expected to trigger CRA review

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3. OVERVIEW OF KEY ELEMENTS OF THE ONCA

1. Public Benefit Corporations (PBC)
 - Public Benefit Corporations (PBC) include
 - A charitable corporation (at common law), or
 - A non-charitable corporation that receives more than \$10,000 in a fiscal year in funding from public donations or the federal or provincial governments, or a municipality
 - When a non-charitable corporation reaches the \$10,000 threshold, the PBC status won't attach until the first annual meeting of members in the next fiscal year

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- Consequences of Being a Public Benefit Corporation (PBC)
 - Not more than one-third of the directors of a PBC may be employees of the corporation or of any of its affiliates
 - Higher thresholds for dispensing with the auditor and/or review engagement requirements

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Audit Requirements

Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation (PBC) with GAR of →	Less than \$100,000 (s.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%)
	Over \$100,000 but less than \$500,000 (s.76(1)(a))	May dispense with an auditor and have someone else conduct a review engagement. This requires an extraordinary resolution (80%)	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)
	Over \$500,000 (s.68)	An auditor must be appointed annually	Audit is required

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Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
NON-PBC corporation with GAR of →	Less than \$500,000 in annual revenues (s.76(2)(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%)
	Over \$500,000 (s.76(2)(a))	May, by extraordinary resolution (80%), dispense with an auditor and have someone else conduct a review engagement.	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)

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- On liquidation, the articles must provide for the distribution of any remaining property on dissolution:
 - If it is a charitable corporation, to a charitable corporation with similar purposes to its own or to a government or government agency,
 - If it is a non-charitable corporation, to another public benefit corporation with similar purposes to its own or to a government or government agency

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2. Number of Directors and Election

- Minimum of 3 directors
- Articles may provide a maximum and minimum range
- For PBCs - Not more than one-third of the directors may be employees of the corporation or of any of its affiliates
- Directors are elected at meetings of members
- The board may appoint one or more additional directors up to 1/3 of the number of elected directors to hold office until the next AGM
- Ex-officio directors continue to be permissible
- Directors are no longer required to be corporate members
- Maximum 4 year term

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3. Directors and Officers – Duties

- Every director and officer has a duty to
 - Act honestly and in good faith with a view to the best interests of the corporation
 - Exercise the care, diligence and skill of a reasonably prudent person
 - Reflects the standard that applies to for-profit corporations

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4. Due Diligence Defence – Directors and Officers

- Not liable if exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances – objective standard of care
- Replaced common law subjective standard of care
- Good faith reliance on financial statements and reports of professionals

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5. Membership Classes

- A corporation must have members
- Can have
 - one class of members in which case all are voting or
 - two or more classes as long as articles give right to vote to at least one class
- Where more than one class, the members of each class have certain built in protections
- All classes of members, even non-voting classes of members, are entitled to vote separately as a class on certain amendments to articles and by-laws dealing with rights and classes of membership

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- Non-voting members are given voting rights in some limited circumstances
 - Extraordinary sale (which is defined as a “lease or exchange of all or substantially all of the property of the corporation”)
 - Amalgamation
 - Continuance to another jurisdiction
 - Change to any rights or conditions attached to those non-voting members or a change in the rights of other classes of members relative to the rights of the non-voting members
- Thus a class of members could reject a change - effectively resulting in a class veto (limited opt-out available)
- Corporations wanting maximum flexibility will have one class of members

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6. Members' Meetings

- Every member entitled to vote at a meeting may appoint a proxyholder who does not have to be a member
- Must send a proxy to each member entitled to a notice of meeting (mandatory solicitation of proxies)
- By-laws may provide for three other methods of voting for persons who can't be present at a meeting in addition to or as an alternative to proxies: by mail, telephone, or by computer (electronic means)
- Financial statements and auditor's report or financial review shall be given to members upon request at least 21 days before an AGM

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7. Members' Rights

- A member entitled to vote at an annual meeting may raise any matter as a "proposal" but must give 60 days notice
- A proposal may include nominations for directors if signed by at least 5% of members or such lower percentage set out in the by-laws. Nominations can also be made at the meeting
- Proposal must relate in a significant way to the activities and affairs of the corporation
- 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

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- Members may requisition meetings of the members (but need 10% of the votes to do so, or lower if the by-laws so states)
- Right to access membership lists - to include name and address, by-laws may provide for more information
- Right to inspect financial records
- There are certain minimum rights in the event of a disciplinary action or termination of membership (e.g., a minimum 15 days notice with reasons before the disciplinary action or termination becomes effective; opportunity to be heard)
- Default 1 vote per member, unless articles provide otherwise

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8. Members' Remedies

- Right to seek a court order to commence a derivative action
- Compliance Order - where a corporation, or its directors and officers, fails to comply with the duties set out in the ONCA and regulations, the articles or by-laws
- Derivative Action - gives members the right to bring an action in the name of the corporation (except religious corporations) to enforce one of its rights
- Dissent and Appraisal Remedy - the right to a dissent and appraisal remedy is limited to corporations that are not public benefit corporations

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C. PRACTICAL STEPS

- Collect governing documents
 - Letters patent, supplementary letters patent
 - Locate all copies
 - Amendments made by board or members resolutions alone not valid, must have SLP issued
 - CCA corporations – can contact Industry Canada to obtain copies
 - OCA corporations – can obtain microfiche copies from Ministry

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- All current by-laws, including amendments
 - Amending by-laws
 - Members resolutions?
 - Board resolutions?
 - Are by-laws valid?
 - CCA corporations - Were they previously filed with Industry Canada and approved by Industry Canada? Can contact Industry Canada to obtain copies
 - OCA corporations – No government records, CRA may have copies if previously filed

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- Collect other governance related documents
 - Organizational charts
 - Policies
 - Manuals
- Review governing documents and consider
 - Do they reflect current governance structure? If not, what is current governance structure?
 - Do they reflect current governance process? If not, what is current governance process?
 - Are changes desired? What are they?
 - Are there new provisions to be inserted? What are they?
 - Write them down
 - Come up with a wish list

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- Study the key features of the CNCA/ONCA and consider
 - Are your current by-laws or desired governance structure and process inconsistent with CNCA/ONCA statutory requirements?
 - If inconsistent with statutory mandatory requirement, must comply with them
 - If inconsistent with CNCA/ONCA default requirements, is the preferred option permitted under the CNCA/ONCA? Should the option be set out in the articles or by-laws?
 - If CNCA/ONCA optional requirements provided, may choose one of the permissible options. Should the option be set out in the articles or by-laws?

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- Industry Canada will have continuance tools available, e.g.
 - Model by-laws (minimalist approach)
 - Continuance handbook
 - Sample Articles of Continuance
- Ontario Ministry will have continuance tools available, e.g.
 - Plain language guides
 - Default by-laws
 - Updating the Not-for-Profit Incorporator's Handbook
 - Information sheets

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- Some changes may only be administrative
- Some changes may require detailed considerations and consultation with members
- Have someone or a committee be responsible for the process
- Have the board engaged early on
- Seek legal help, conduct legal review, prepare draft by-laws

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