

	OTTAWA CHAMBER OF VOLUNTARY ORGANIZATIONS (OCVO) Ottawa – February 14, 2012
How Will Changes to the <i>Canada Not-for-Profit Corporations Act (CNCA)</i> Affect Your Organization?	
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TOPICS FOR REVIEW	
<ul style="list-style-type: none">• Status of CNCA <i>Canada Not-For-Profit Corporations Act</i> ("CNCA")• Overview of the continuance process• Key features of the CNCA• Preparing articles, notice and by-law• Practical steps	
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A. STATUS OF THE CNCA	
<ul style="list-style-type: none">• <i>Canada Corporations Act (CCA)</i> not updated since 1917• New CNCA enacted on June 23, 2009• In force on October 17, 2011• Replaced Part II of CCA• See Industry Canada's website for resources: http://strategis.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs03925.html• See paper by Theresa Man "The Practical Impact of the <i>Canada Not-For-Profit Corporations Act</i>" May 2011, http://www.carters.ca/pub/article/charity/2011/tlm1005.pdf• See <i>Charity Law Bulletins</i> on "Countdown to the <i>Canada Not-For-Profit Corporations Act</i> - Practice Tips" 1 to 9, Bulletin Nos. 191, 193, 199, 213, 215, 220, 231, 239, 247	
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B. 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 – i.e., until October 17, 2014
- 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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- All CCA corporations will need to
 - Review its 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 and 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
- 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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C. KEY FEATURES OF THE CNCA

1. Understand 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
 - Articles
 - By-laws
 - Unanimous member agreement

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2. Incorporation and Corporate Powers
 - Replaces the letters patent system with a statutory regime similar to *Canada Business Corporations Act*
 - Incorporation as of right - removes ministerial discretion to incorporate
 - Faster, online (later)
 - Obtain certificate of incorporation, not letters patent
 - Only one incorporator is needed
 - Articles to set out statement of the purpose, any restrictions on the activities, and dissolution clause
 - Corporation has capacity, rights, powers and privileges of a natural person
 - *Ultra vires* doctrine no longer applies
 - May carry on activities outside Canada to the extent that the laws of that jurisdiction permit

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3. Soliciting and Non-Soliciting Corporations
 - Corporations that receive public funding are subject to special requirements
 - All corporations categorized into soliciting and non-soliciting corporations
 - If a corporation receives more than the prescribed amount [\$10,000] in its last financial period from public sources, it will become a soliciting corporation
 - public donations
 - federal, provincial and municipal governments
 - conduit entities
 - Status starts at the AGM in the following fiscal year for 3 years

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- Implications of being a soliciting corporation
 - Must have a minimum of 3 directors, at least 2 directors must not be officers or employees of the corporation or its affiliates
 - No material effect on registered charities due to prohibition on directors receiving remuneration at common law
 - Articles must provide for the distribution of remaining property on dissolution to qualified donees
 - No unanimous member agreement
 - Must file annual financial statements with Corporations Canada
 - Audit and public accountant rules more stringent

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- Low threshold means many corporations will become soliciting corporations
- It is possible that some corporations could oscillate between soliciting and non-soliciting
- Corporations will need to monitor their funding sources and carefully track their soliciting status

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- If a corporation is concerned about oscillation, it can voluntarily be structured as a soliciting corporation
 - Ensure at least 3 directors on the board and at least 2 are not employees (but charities cannot have any directors who are employees)
 - Ensure the articles provide that property will be paid to qualified donees on dissolution
 - Do not enter into unanimous member agreement
- For those years when it exceeds the \$10,000 threshold
 - File annual financial statements with Corporations Canada
 - Follow audit and public accountant rules for soliciting corporations – may not be an issue if the corporation's practice is to have its financial statement audited

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4. Public Accountant and Financial Review

- CNCA divides corporations into two categories for purpose of determining obligation to appoint a public accountant and level of financial review
- Designated corporations
 - A soliciting corporation with gross annual revenues for its last completed financial year that are 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 are 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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5. Directors – Number, Change and Term

- Non-soliciting corporations - minimum 1 director
- Soliciting corporations – minimum 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates
 - But common law rule overrides CNCA - charities cannot have employees as directors
- Articles must specify a fixed number of directors or a minimum and maximum number of directors
- Must file notice of change within 15 days of any change or of a change in a director's address
- Maximum length of term 4 years (but no limit on number of maximum terms)
- May have staggered terms

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6. Election and Appointment of Directors

- Members must elect the directors by ordinary resolution at an annual meeting
- Directors are not required to be members
- Exceptions:
 - Vacancy in office of director - remaining directors may fill the vacancy as long as there is a quorum
 - Articles may permit directors to appoint additional directors between annual meetings
 - Number of appointed directors cannot exceed 1/3 the number elected at the last AGM
- A director not elected for an expressly stated term holds office until the close of the first AGM following his or her election

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7. Ex Officio Directors

- CNCA does not permit having ex officio directors
- Common for operating charities to have a representative sit on the board of its parallel foundation
- Examples of possible workarounds
 - Establish in by-law a special membership class that permits the class to elect a director
 - Have articles provide for the appointment of a director by the board and have a board policy that certain office holders will be appointed as directors
 - Include special qualification requirements for a particular seat on the board
- What would work will depend on the governance of the corporation

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8. Board Meetings

- May be held at the time and place that the board chooses, subject to the by-laws and articles
- Quorum may be set out in the articles or the by-laws; if by-laws are silent, a quorum shall be a majority of the number of directors or minimum number of directors required by the articles
- Directors must receive notice of board meetings as provided for in the by-laws
- Unless the by-laws provide otherwise, directors may participate in board meetings by telephone or electronically, but must comply with regulations to be made under the CNCA in the future
- Written resolutions possible, but must be signed by all directors

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9. Directors and Officers – Duties and Defence

- Directors have duty to manage and supervise the activities and affairs of the corporation
- Both directors and officers have duties 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 person in comparable circumstances
- Objective standard of care, replaced common law subjective standard of care
- Directors and officers also have duty to comply with the CNCA, the regulations, and the articles, by-laws, and any unanimous member agreement

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- Directors and officers will 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 financial statements that are prepared by the corporation's public accountant

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10. Members

- A corporation must have members
- Articles to set out the classes of members
- If only one class of members, all are voting
- If two or more classes, articles must provide voting right to at least 1 class
- By-laws must set out the conditions for membership
- Where more than one class, the members of each class have certain built in protections

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- Separate class votes
 - Certain fundamental changes, such as
 - Amalgamation
 - Continuance
 - Sale, lease or exchange of all or substantially all of the property of a corporation other than in the ordinary course of its activities
 - Certain changes of the rights attached to a class or group of members
- Regardless of whether the membership class is a voting class or non-voting class
- Thus a class of members could reject a change - effectively resulting in a class veto (limited opt-out available)

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- The treatment of members mirrors that in the *Canada Business Corporations Act* in relation to shareholder's rights
- In most circumstances, giving non-voting members the right to vote on fundamental changes may not be desirable
- If corporation wants broad-based community support, may enlist them in some capacity in the corporation, but do not refer to them as "members"

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- Some corporations may want to collapse all membership classes into one class and remove non-voting membership classes
 - Change them into a non-membership category, such as “affiliates”, “associates”, “supporters”
 - May set out their rights and duties as non-members
 - Consider timing for such change
 - But their donations will not be exempt from the \$10,000 threshold
- Right to access corporate records
- Right to submit proposals to amend by-laws, nominate directors or require any matter to be discussed at annual meetings

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11. Members' Meetings

- AGM must be held within 18 months after incorporation
- Thereafter, an AGM must be held within 15 months after the previous annual members' meeting but no later than 6 months after fiscal year
- Must be held in Canada at the place provided in the by-laws, or where no such provision exists, at the place chosen by the directors
- May hold meetings outside of Canada, but that place must be specified in the articles or agreed by all of the members
- Regulations provides a variety of prescribed means of giving notice of members' meetings – must chose one of these means
- By-law can set out any prescribed method of absentee voting (mail in ballot, electronic voting or proxy)

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- Members may participate in a members' meeting by means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately, unless by-law otherwise provide
- By-law may allow a members' meeting be held entirely by means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately
- By-laws can provide for consensus decision making
- Written resolution in lieu of holding a meeting possible, but must be signed by all voting members
- Right to requisition a meeting of members (5% of voting right, or lower if in the by-law)

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12. Members' Rights

- Right to requisition a meeting of members (5% of voting right, or lower if in the by-law)
- Right to submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)
- Right to submit proposal to nominate directors (5% of voting right)
- Right to access corporate records, including membership list
- Availability of unanimous members agreement (except for soliciting corporations)

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13. Members' Remedies

- Oppression remedy against the corporation
- Court order to commence a derivative action
- Compliance and restraining orders
- Court ordered wind-up and liquidation
- Special exemption of remedies for religious corporations if
 - 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

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14. Amalgamation, export and import

- Two or more corporations may amalgamate and continue as one corporation
- 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
- 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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15. By-laws

- No Ministerial approval of by-laws needed – by-laws are effective as soon as they are adopted according to the requirements of the CNCA
- By-laws must be filed with Corporations Canada within 12 months of their adoption

16. Special Act Corporations

- Part 19 of the CNCA automatically applies
- No continuance process or any steps needed
- May continue under the CNCA
 - After continuance, special act will cease to apply
 - Continuance process is essentially the same as that for Part II CCA corporations

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17. Conflict of Laws

- CNCA must be read in conjunction with applicable charity law
- Some provisions of the CNCA will not apply to charities

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- CNCA permits directors to fix their remuneration and to receive reasonable remuneration and expenses for any services they provide to the corporation in any other capacity
 - Common law rule overrides the CNCA – prohibits directors a charity to receive direct and indirect remuneration from the charity
 - But directors may be reimbursed out-of-pocket expenses
 - Possible to seek PGT consent court order to permit directors be paid, but generally high threshold for such an order

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- CNCA permits directors and officers to enter into contracts or transactions with the corporation as long as they disclose any conflict of interest that may exist
 - Common law rule overrides the CNCA - prohibits directors of charities to place their personal interests in conflict with their duty to the charity
 - Regardless of whether there is actual loss to the charity
 - Possible to seek PGT consent court order to permit directors be paid, but generally high threshold for such an order

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- CNCA permits a corporation to invest its funds as its directors think fit, subject to its articles or by-laws or any limitations accompanying a gift
 - Section 10.1 of the *Charities Accounting Act* overrides the ONCA - states that s.27 to s.31 of the *Trustees Act* applies
 - Prudent investor rule applies to the directors of charities
 - Directors must consider certain criteria to invest
 - Authorizes delegation to an agent in certain circumstances

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- CNCA permits corporation to indemnify the directors and officers and to purchase insurance
 - For charities in Ontario, this is subject to compliance with the *Charities Accounting Act* and its regulations
 - Regulation 4/01 under the *Charities Accounting Act* requires directors to consider certain factors enumerated in the regulation before they consent to the indemnification of its directors or purchasing D&O insurance
 - The indemnification or the purchase of insurance must not render the corporation insolvent

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D. PREPARING ARTICLES OF CONTINUANCE

- Articles of Continuance will replace LP and SLPs
- Form 4031 – Articles of Continuance (transition)
- When preparing the articles of continuance, should prepare new by-laws at the same time because
 - Need to coordinate the provisions set out in articles and by-laws
 - Need to decide what default provisions in the CNCA to override and whether the overriding provision should be included in the articles or the by-laws; and
 - Even if CNCA requires certain provisions to be set out in the by-laws, it is possible to include them in the articles instead

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- 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
 - 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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1. Current name of corporation
 - First page of letters patent
 - Refer to supplementary letters patent if name was changed
 - May include English and French forms of name
2. Change of name
 - May change corporate name
 - Insert proposed new corporate name, needs NUANS report
 - May use numbered name, number will be assigned by Industry Canada, e.g., 1947393 Canada Association

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3. Corporation Number

- Number assigned when corporation was incorporated
- Can be found from letters patent, supplementary letters patent, correspondence from Industry Canada, Industry Canada website database

4. Province or territory in Canada where registered office is located

- Insert the province or territory
- No municipality and no street address – to be indicated in Notice of Registered Office

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5. Number of directors

- Either
 - A fixed number or
 - A maximum and a minimum range
- Soliciting corporations – minimum 3 directors, at least 2 of whom are not officers or employees
- Non-soliciting – at least 1 director

6. Statement of purpose

- State the purpose of corporation
- See current corporate objects in letters patent, or as amended by supplementary letters patent
- If to be revised, needs CRA approval

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7. Restrictions on activities of the corporation

- May state restrictions, if any, on the activities that the corporation may carry on
- May state “none”

8. The classes, or regional or other groups of members that the corporation is authorized to establish

- If there is only 1 class of members, state so and list the rights the members are entitled to, e.g. to receive notice of, attend and vote at members meetings
- If there are more than 1 class of members, list the classes and the rights for each class

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9. Statement regarding distribution of property on dissolution

- State how net assets of corporation on dissolution would be distributed
- CNCA requires soliciting corporations to distribute assets to one or more other qualified donee, even if the corporation is not a registered charity

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10. Any additional provisions that Corporation may want in its articles

- Insert optional provisions
 - Override certain default rules in the CNCA; or
 - Provisions that may be included in the by-laws
- For example:
 - Insert provision to require a different membership approval majority greater than the statutory required majority (e.g., 75% approval where the CNCA requires 2/3 or majority approval where the CNCA requires simple majority), but not for removal of directors (ordinary resolution)
 - Foreign form of corporate name

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- Allow the board to appoint additional directors to hold office until the close of the next annual meeting of members, but the total number of directors so appointed may not exceed 1/3 of the number of directors elected at the previous annual meeting of members
- Specify a place outside of Canada where members' meetings may be held
- Require vacancies on the board be filled by members, rather than by a quorum of the board
- Charities - Require directors not receive remuneration
- Charities - Require corporation operated without purpose of gain for its members and profits be used to further corporation's purposes

11. Declaration

- Must be signed by a director or officer of the corporation

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E. DRAFTING INITIAL REGISTERED OFFICE ADDRESS AND FIRST BOARD OF DIRECTORS

- Form 4002 - Initial Registered Office Address and First Board of Directors
- Simple form
- The number of directors listed should be within the range of directors set out in the articles or match the fixed number in the articles
- Municipality and street address of registered office
- Name and residential address of first directors

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F. 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
- Some changes may only be administrative
- Some changes may require detailed considerations and consultation with members

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1. By-law amendment mechanism
 - CNCA provides two ways for corporations to amend their by-laws, depending on the subject matter of the changes
 - Default mechanism
 - Board may adopt by-laws, effective upon passage by the board
 - Must be confirmed by members at next meeting to remain in force
 - Special approval
 - For matters affecting members' rights, e.g., notice of members' meetings, membership transferability and conditions, absentee voting
 - 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) – for example:
 - Have 2 by-laws with all by-law provisions requiring special resolution in a separate by-law
 - Have 1 by-law, and place all provisions requiring special resolution in one clearly marked section
 - Have 1 by-law, and clearly mark throughout by-law which provisions require special resolution to amend
 - Have 1 by-law, and provide in articles that all by-law amendments require a special resolution

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2. Approaches to by-law drafting

- Minimalist approach
 - CNCA contains detailed rules, so by-laws do not require the same level of details
 - By-laws not duplicate mandatory rules or default rules that are not to be overridden
 - By-laws to set out provisions:
 - Mandatory provisions
 - Override the default rules in the CNCA
 - Utilize optional rules in the regulations
 - Important governance procedures
 - Governance policy manual to address issues that do not need to be included in by-laws
 - The minimalist approach will be reflected in model by-laws prepared by Corporations Canada

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- Advantages
 - Simple by-laws
 - No risk of amending by-laws to remove CNCA requirements or violate CNCA requirements
- Disadvantages
 - Have to work with 4 or 5 documents back and forth: CNCA, regulations, articles, by-laws, governance policy manual (and unanimous member agreement for non-soliciting corporation)
 - Need to know where to look for what and which provisions take precedence if conflict
 - May still risk amending by-law provisions that cannot be amended
 - Policy manual does not simplify the process

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- Comprehensive approach
 - The by-laws is the main document for all governance rules of the corporation where possible
 - Detailed by-laws will be a consolidation of mandatory rules, default rules that have not been overridden, overriding provisions, etc.
 - Will still need to work with articles, but limited provisions in the articles
 - Can have governance policy manuals to address other matters, e.g., committee structures (but not audit committee)
 - Helpful tool

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- Advantages
 - One go to place for essential governance procedures
 - Less documents to work with - articles, by-laws, policy manual and unanimous member agreement
- Disadvantages
 - More upfront cost and time to prepare by-laws
 - By-laws to clearly identify which provisions can be amended and which ones cannot and seek legal advice before amending by-laws

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3. Two mandatory provisions that must be included in by-laws

- Conditions of membership
- Notice of meeting of members
 - By-laws must set out the manner in which notice of meeting of members is to be given as prescribed in the regulations
 - Four options are prescribed in the regulations
 - May choose one or more of the options
- May include these provisions in the articles instead

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

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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
 - Members' right to submit and discuss proposals
 - Members' right to requisition meeting
 - Corporations must ensure compliance of these rules

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- Default Rules
 - Apply automatically where by-law/articles are 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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- May include provisions to override default rules, some of them
 - Must be in the by-laws (may be included in articles)
 - May be in the articles or the by-laws
 - May be in the articles or by-laws or unanimous member agreement
- When drafting by-laws, must ensure the by-laws is the appropriate document to include the desired overriding provisions
- When drafting overriding provisions, ensure these mechanisms are in compliance with the CNCA

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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 requirement)

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- Absentee voting - by proxy, mailed in ballot or telephone/electronic means
- The articles may require a greater number of votes of directors or members to effect any action (except removal of directors)
- Discipline of members
- Audit committee
- Articles or by-laws must provide for these rules
- Ensure compliance with CNCA

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- CNCA silent
 - Can include provisions on issues that the CNCA is silent, provided that the provisions included do not contravene the CNCA and its regulations – examples:
 - Dispute resolution mechanisms to resolve disputes between members
 - Stewardship provisions dealing with charitable property of the corporation (where it is a registered charity)
 - Statement of faith subscribed to by a faith-based corporation
 - These provisions may be set out in the policies or the by-laws

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G. PRACTICAL STEPS

1. Gather current governance structure and procedure
 - Collect governing documents
 - Letters patent, supplementary letters patent
 - All current by-laws, including amendments
 - Amending by-laws
 - Members and board resolutions?
 - Are by-laws valid? Were they previously filed with and approved by Corporations Canada?
 - Contact Corporations Canada to obtain copies
 - Collect other governance related documents, e.g., organizational charts, policies, manuals

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2. 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?
 - Write them down
 - Come up with a wish list
3. Review the key features of the CNCA
 - This understanding will help the corporation determine how its governance structure and the content of the articles of continuance and by-laws will be impacted

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4. Compare CNCA rules with current governance structure and practice

- Are the current by-laws or the desired governance structure and process inconsistent with CNCA requirements?
- If inconsistent with a CNCA mandatory requirement, how will the corporation adjust its governance structure and process in order to ensure compliance?
- If inconsistent with a CNCA default requirement, is the preferred alternative mechanism permitted under the CNCA? Should the overriding provision be set out in the articles, by-laws or unanimous member agreement?

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- If different options are prescribed in the regulations, which one should the corporation choose? Should the preferred option be set out in the articles, by-laws or unanimous member agreement?
- Are there provisions that the corporation would like to include in its governing document and the CNCA is silent on those issues? If so, should the provisions be set out in the articles, by-laws or unanimous member agreement?

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5. Determine whether changes should be made prior to continuance

- Changes to membership rights
 - Under CNCA - separate vote by class or group of members will be required to change the rights attached to a class or group of members or for certain fundamental changes
 - Regardless of whether the membership class is a voting class or non-voting class.
 - Each class of members (including non-voting members) will have a de facto veto right

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- Some corporations may want to collapse classes into 1 voting class
- If change membership rights as part of the continuance, then articles of continuance and by-laws also require separate class vote
- Consider changing membership classes and rights by amending the by-laws under the CCA first, prior to continuance under the CNCA

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- Changes to corporate objects
 - Purposes of the corporation will need to be stated in the articles of continuance
 - May want to update them to reflect and align with current or future activities
 - If registered charity, needs CRA approval
 - May want to apply for SLP under CCA on parallel basis

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6. Timing of continuance

- Some corporations will want to continue right away, 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
- Considerations
 - Length of time and complexity of process to revise the by-laws
 - Nature of changes in new by-laws – substantive vs administrative
 - Size of membership
 - Ex officio directors
 - Changes to membership structure
 - Changes to corporate objects

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- 7. Drafting articles of continuance and drafting by-laws
 - See issues above
- 8. Obtain membership approval and filing
 - Need special resolution to approve articles of continuance
 - May require separate class vote of the articles and by-laws if certain membership rights are amended
 - Once approved, file articles of continuance and notice of initial registered office and first board of directors with Corporations Canada
 - Will be issued Certificate of Continuance
 - May file approved by-laws at the same time, or file them later within 12 months

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- 9. Other consequential filings and records updates
 - A) Canada Revenue Agency
 - Registered charities have to file certificate of continuance, articles of continuance and new by-laws with CRA
 - If purposes have been changed as part of the continuance process, the corporation may obtain pre-approval from CRA for new purposes before filing articles of continuance
 - If no pre-approval is obtained, then CRA may require that the governing documents be revised if they do not meet CRA's requirements – need to apply for articles of amendment

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- B) Provincial and territorial filings
 - May need to update provincial or territorial registrations
 - e.g., corporate registrations, business name registrations, fund-raising registrations, etc.
 - Ontario charities – need to provide Public Guardian and Trustee with certificate of continuance and articles of continuance, but not new by-laws

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- C) Other filings
 - May be required to provide continuance documents with third parties, e.g.,
 - Funding organization
 - Umbrella organization
- D) Updating corporate records and procedures
 - Corporate minute book
 - Other documents, e.g., corporate governance policies, manuals, etc.
 - Staff and volunteers will need to be trained and become familiar with the new governance documents

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H. STATUS AND OVERVIEW OF ONCA

- The Ontario *Corporations Act* (“OCA”) has not been substantively amended since 1953
- Bill 65 introduced the ONCA on May 12, 2010 to govern corporations under Part III of the OCA
- ONCA received Royal Assent on October 25, 2010
- ONCA is expected to be proclaimed in force in late 2012
- Draft regulations, default by-laws and plain language guides are expected to be released for public comment in early 2012
- Updated Not-For-Profit Incorporator’s Handbook is expected to be released

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- Part III of the OCA will be repealed upon proclamation of the ONCA and ONCA will immediately apply
- 3 year grace period for OCA corporations to comply
- Failure to continue within the 3 year grace period
 - Will not result in dissolution of the corporation by the government
 - Letters patent, supplementary letters patent and by-laws will be deemed to be amended to comply with the ONCA, non-compliant provisions deemed to become invalid
 - Will result in uncertainty as to which provisions apply
- Prudent for existing OCA corporations to continue under the ONCA sooner as opposed to later within the three year grace period

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- Advisory Committee comprised of industry and government representatives is involved in the ongoing process of implementing the ONCA and relevant documents
- Ministry of Government Services – will be responsible for searches and filing
- Ministry of Consumer Services – will be responsible for remaining areas, including policy and interpretation issues
- Possible developments to watch for
 - New government might amend the ONCA
 - The degree to which the regulations might allow for the exercise of discretion (e.g. change amounts for financial audit)

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1. Incorporation and Corporate Powers

- Replaces the letters patent system with a statutory regime similar to Ontario *Business Corporations Act*
- Removes ministerial discretion to incorporate, in that incorporation will be as of right
- Obtain certificate of incorporation, not letters patent
- Only one incorporator is needed
- No requirement to file by-laws or financial statements with the government, but default by-law will apply if no by-law adopted within 60 days after incorporation

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- Corporation has the capacity, rights, powers and privileges of a natural person
- Eliminates the concept of a corporation's activities being *ultra vires*
 - If a corporation acts outside of its purposes, then it has breached the ONCA but the act is valid
 - Makes little difference since directors have a duty to comply with the articles of the corporation, which may limit the object and purpose of the corporation, and in any event, charities have to comply with the requirements in other statutes e.g. *Income Tax Act*)

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2. Public Benefit Corporations (PBCs)

- All corporations categorized into PBCs and non PBCs
- PBCs include
 - “charitable corporations” - uses common law definition
 - Non-charitable corporations that receive more than \$10,000 in a financial year in funding from public donations or the federal or a provincial or municipal government or an agency of such government
- When a non-charitable corporation reaches the \$10,000 threshold in a financial year, it will become a PBC starting from the first annual members’ meeting in the following financial year for a year

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- Consequences of being a PBC
 - Not more than one third of the directors of a PBC may be employees of the corporation or its affiliates
 - Higher thresholds for dispensing with the default requirement to appoint an auditor or a person to conduct a review engagement requirements
 - Upon the liquidation and dissolution, its net assets must be distributed in the following manner
 - If it is a charitable corporation, then to a charitable corporation with similar purposes or to a government or government agency
 - If it is a non-charitable corporation, then to a PBC with similar purposes or to a government or government agency

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- Upon the liquidation and dissolution of a non-PBC, its net assets must be distributed in accordance with the articles, or if the articles do not address that issue, then rateably to the members
- A PBC may not distribute the fair value of a membership to a member upon termination of that member’s membership
- Since a corporation is a PBC for a year, it is possible that some non-charitable corporations could oscillate between PBC and non-PBC status
- Non-charitable corporations will need to monitor their funding sources

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3. Financial Review

- Members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting

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 but less than \$500,000 (ss.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%)
	\$500,000 or more (by implication of ss.68(1))	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	\$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 (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%)

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Type of Corp/Gross Annual Revenues (GAR)	Requirements for an Auditor	Audit/Review Engagement	
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 (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%)

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4. Number of Directors and Election

- Minimum 3 directors
- Articles may provide a maximum and minimum range
- For PBCs - not more than 1/3 of the directors may be employees of the corporation or its affiliates (charities can have none)
- Directors are elected at meetings of members
- Board may appoint additional directors up to 1/3 of the number of directors elected at the previous annual meeting of members
- Ex-officio directors continue to be permissible
- Directors are no longer required to be members
- Maximum 4 year term for directors (but no limit on number of maximum terms)
- May have staggered terms

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5. Directors and Officers – Duties and Defence

- Objective standard of care - every director and officer must
 - Act honestly and in good faith with a view to the best interests of the corporation
 - Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
- Every director and officer must comply with the ONCA, the articles and by-laws
- Reasonable diligence defence for directors – not liable if fulfilled their duty if they exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances

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- Reasonable due diligence defence includes good faith reliance on financial statements and reports of professionals
- Weak liability protection, as the government rejected the recommendation to include a partial liability shield for directors

6. Members

- A corporation must have members
- Default 1 vote per member, unless articles provide otherwise
- Articles to set out the classes of members
- If only one class of members, all are voting
- If two or more classes, articles must provide voting right to at least 1 class
- By-laws must set out the conditions for membership
- Where more than one class, the members of each class have certain built in protections

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- 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
- Non-voting members are given voting rights in some limited circumstances
 - Extraordinary sale
 - Amalgamation
 - Continuance to another jurisdiction
 - Change to any rights or conditions attached to non-voting members or change 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

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- The treatment of members mirrors that in the Ontario *Business Corporations Act* in relation to shareholder's rights
- In most circumstances, giving non-voting members the right to vote on fundamental changes may not be justified
- Some corporations may want to collapse all membership classes into one class and remove non-voting membership classes
 - change them into a membership category, such as "affiliates", "associates", "supporters"
 - May set out their rights and duties as non-members
 - Consider timing for such change
 - But their donations will not be exempt from the \$10,000 threshold

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- Default rules to terminate membership and member's rights apply unless articles or by-laws state otherwise
 - Upon death, resignation, expiry of membership term, liquidation or dissolution of the corporation, expulsion, or termination of membership in accordance with the articles or by-laws
 - Rights terminated upon termination of membership

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- Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership
 - If the articles or by-laws provide for this power, then must set out circumstances and the manner in which the power may be exercised
 - The power must be exercised in good faith and in a fair and reasonable manner
 - Must give 15 days notice of a disciplinary action or termination with reasons
 - Opportunity for the member to be heard
 - Member may apply for a compliance or restraining order if that power is misused

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7. Members' Meetings

- Must be held in Ontario at the place provided in the by-laws or, in the absence of such a provision, at the place within Ontario that the directors determine
- May be held outside Ontario if the place is specified in the articles or all the members entitled to vote at the meeting agree that the meeting is to be held at that place
- No longer requires notice be sent by mail provided that notice is given 10 to 50 days before the meeting
- Directors may fix a "record date" of no more than 50 days before a members' meeting to determine who the members are for purpose of calling a members' meeting

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- Every member entitled to vote at a meeting may appoint a proxyholder who does not have to be a member
- By-laws may allow voting by telephone or electronic means, in addition to voting by proxy
- Members are entitled to attend members' meetings by telephonic or electronic means, unless the by-laws provide otherwise
- If permitted by by-laws, the board or the members may decide whether to hold a members' meeting *entirely* by telephonic or electronic means
- Financial statements, the auditor's report or report of person who conducted a review engagement, and any further information required by the articles or by-laws must be given to members upon request at least 21 days before an AGM

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8. Members' Rights

- Members may elect and remove directors at anytime
- A member entitled to vote at an annual meeting of members may raise any matter as a "proposal" but must give at least 60 days notice
 - A proposal may nominate directors for election if it is signed by at least 5% of voting members or such lower percentage set out in the by-laws – but this does not preclude nominations 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 their 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)
- Members may examine certain corporate records – articles, by-laws, the minutes of meetings and resolutions of members and committee of members, registers of directors, officer and members
- Right to access membership lists - to include name and address – only for the purpose of influencing voting, requisitioning a members' meeting or other matters relating to the affairs of the corporation
- Right to financial statements

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9. Members' Remedies

- Compliance or restraining order – if 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
- Rectification order – if the name of a person has been wrongfully entered, retained, deleted or omitted from the registers or records of a corporation, that person may apply to a court for an order rectifying the registers or records
- Dissent and appraisal remedy for non-PBCs - in relation to fundamental changes
- Unlike CNCA, there is no "religious corporation" exemption to the compliance or restraining orders dissent and appraisal remedy

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- Derivative action
 - Allows members to bring an action in the name of the corporation to enforce one of its rights
 - Exemption for “religious corporation” - e.g. Cannot bring derivative action to recover misappropriated church property
 - Lack of definition for “religious corporation” means that the courts will have to define that term

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- Unlike the CNCA, there is no oppression remedy
- Investigation order
 - A member (or holder of debt) may apply to the court for an investigation of the corporation
 - One of the grounds listed for an investigation order tracks the language of the oppression remedy - “the activities or affairs of the corporation or of any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a member”

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- Possible that non members may still qualify as “complainants” for the purpose of compliance or restraining order or derivative action (except a religious corporation) based on the broad scope of the definition of “complainant” in the ONCA
- However, lack of economic incentives to invoke these corporate law remedies may mean less member litigation than shareholder litigation in relation to OBCA and CBCA corporations
- But even a non-member could allege breach of trust under s.10 of the *Charities Accounting Act* in the case of charities

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10. Conflict of Laws

- ONCA must be read in conjunction with applicable charity law
- If there is a conflict between the ONCA or its regulations and a provision made in any other legislation that applies to the following
 - A non-share capital corporation, then the provision in the other legislation prevails
 - A charitable corporation, then the legislation applicable to charitable corporations prevails
- Some provisions of the ONCA will not apply to charities

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- ONCA permits directors to fix their remuneration and to receive reasonable remuneration and expenses for any services they provide to the corporation in any other capacity
 - Common law rule overrides the ONCA – prohibits directors a charity to receive direct and indirect remuneration from the charity
 - But directors may be reimbursed out-of-pocket expenses
 - Possible to seek PGT consent court order to permit directors be paid, but generally high threshold for such an order

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- ONCA permits directors and officers to enter into contracts or transactions with the corporation as long as they disclose any conflict of interest that may exist
 - Common law rule overrides the ONCA - prohibits directors of charities to place their personal interests in conflict with their duty to the charity
 - Regardless of whether there is actual loss to the charity
 - Possible to seek PGT consent court order to permit directors be paid, but generally high threshold for such an order

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- ONCA permits corporation to invest its funds as its directors think fit, subject to its articles or by-laws or any limitations accompanying a gift
 - Section 10.1 of the *Charities Accounting Act* overrides the ONCA - states that s.27 to s.31 of the *Trustees Act* applies
 - Prudent investor rule applies to the directors of charities
 - Directors must consider certain criteria to invest
 - Authorizes delegation to an agent in certain circumstances

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- ONCA permits corporation to indemnify the directors and officers and to purchase insurance
 - ONCA expressly requires that the purchase of insurance be in compliance with the *Charities Accounting Act* and its regulations
 - Regulation 4/01 under the *Charities Accounting Act* requires directors to consider certain factors enumerated in the regulation before they consent to the indemnification of its directors or purchasing D&O insurance
 - The indemnification or the purchase of insurance must not render the corporation insolvent

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