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Update on Continuing under the Canada and Ontario Not-for-Profit Corporation Acts

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A. INTRODUCTION

- Both the Federal and Ontario government enacted new corporate legislation for the non-profit sector
- *Canada Not-for-Profit Corporations Act* (CNCA)
- Ontario *Not-for-Profit Corporations Act, 2010* (ONCA)
- Practical steps to prepare for continuance

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B. STATUS AND OVERVIEW OF CNCA

- Canada Corporations Act since 1917
- Enacted on June 23, 2009, in force October 17, 2011
- Replaced Part II of *Canada Corporations Act* (CCA)
- The new rules do not apply automatically to CCA corporations
- Existing CCA corporations required to continue under the CNCA within 3 years– i.e., until October 17, 2014
- Failure will result in dissolution of the corporation
- 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 *Canada Not-For-Profit Corporations Act"* May 2011, http://www.carters.ca/pub/article/charity/2011/tlm1005.pdf
- See *Charity Law Bulletins* Nos. 191, 193, 199, 213, 215, 220, 231, 239, 247 for practice tips

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- This means all CCA corporations will need to
  - Review letters patent and by-laws
  - Prepare Articles of Continuance, Notice of Directors and Registered Office, and new by-laws
  - Get membership approval - Articles must be approved by 2/3 vote
  - File required documents with Industry Canada, no filing fee
  - 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

C. STATUS AND OVERVIEW OF ONCA

- The Ontario *Corporations Act* (“OCA”) has not been substantively amended since 1953
- ONCA will apply to OCA Part III corporations
- ONCA received Royal Assent on October 25, 2010, expected to be proclaimed in force on July 1, 2013
- Default by-laws and plain language guides will be available
- Outline of proposed regulations released on July 16, 2012 for public comment
- 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

- Unlike the CNCA
  - Optional transition process for corporations to file articles of amendments or adopt new by-laws to comply with ONCA requirements within 3 years of ONCA in force
  - If no transition process taken, then
    - Corporation will not be dissolved
    - LP, SLPs and by-laws will be deemed amended to comply with new ONCA requirements, resulting in non-compliant provisions deemed invalid
    - Will result in uncertainty in relation to which provisions remain to be valid
  - Better to do transition process
- Social clubs with share capital will have 5 years to continue

- *Charity Law Bulletin* "The Nuts and Bolts of the Ontario *Not-For-Profit Corporations Act, 2010"* on our website at www.charitylaw.ca
- To view ONCA in its entirety, see: http://www.ontla.on.ca/web/bills/bills%20_detail.do?locale=en&Intranet=&BillID=2347

- This means that all OCA corporations will need to
  - Review letters patent and by-laws
  - Prepare Articles of Amendment and new by-laws
  - Get membership approval
  - File required documents
  - Certificate of Amendments will be issued
  - Charities – send Certificate of Amendments, Articles of Amendments and new by-law to CRA

D. KEY ESSENTIALS ABOUT CNCA AND ONCA

1. Incorporation as of Right

- Incorporation as of right under CNCA and ONCA
- Simpler and faster process
- Replaces the letters patent system with a statutory regime
- Removes ministerial discretion to incorporate
- Obtain certificate of incorporation, not letters patent
- Corporation has the capacity, rights, powers and privileges of a natural person
- Eliminates the concept of a corporation's activities being *ultra vires*

2. Corporations that Receive Public Funding

- Corporations that receive public funding are subject to special requirements
- Different rules in the CNCA and ONCA

CNCA - 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 starts from the next AGM for 3 years

- 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 Industry Canada
  - 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

ONCA - Public Benefit Corporations (PBC)

- PBCs include
  - Charitable corporations (at common law)
  - Non-charitable corporations that receive 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

- Consequences of being a 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
  - On liquidation, the articles must provide for the distribution of any remaining property on dissolution
    - Charitable corporation - to a charitable corporation with similar purposes to its own or to a government or government agency,
    - Non-charitable corporation - to another PBC with similar purposes or to a government or government agency

- Low threshold means many corporations may become soliciting/PBC corporations
- Solution?
  - Monitor funding sources and quantum
  - Voluntarily be structured as a soliciting/PBC corporation

3. Public Accountant and Financial Review

- CNCA
  - Corporations divided into two categories
  - 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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- ONCA
  - PBCs are subject to higher thresholds for dispensing with the auditor and/or review engagement

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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4. Directors – Number and Change

- CNCA
  - Minimum 1 director
  - For soliciting corporations – minimum 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates
  - Articles may provide a maximum and minimum range
- ONCA
  - Minimum 3 directors
  - For PBCs - not more than one-third of the directors may be employees of the corporation or of any of its affiliates
  - Articles may provide a maximum and minimum range

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5. Directors Taking Office

- CNCA
  - Elected by members by ordinary resolution at an annual meeting
  - Maximum 4 year term (but no limit on number of maximum terms)
  - Ex-officio directors not permitted, need to find “work arounds”
  - 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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- ONCA
  - Elected at meetings of members
  - 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 (but no limit on number of maximum terms)

6. Directors and Officers – Powers, Duties and Defence

- Similar rules in CNCA and ONCA
- Directors may borrow money on the credit of the corporation without members' authorization, unless articles or by-laws provide otherwise
- Directors may view certain corporate records that the corporation is required to prepare and maintain (e.g. meeting minutes, accounting records, members' resolutions, etc.) and receive free extracts of them
- Objective standard of care for directors and officers to
  - 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

- Directors and officers must comply with the ONCA, the articles and by-laws
- Reasonable diligence defence for directors (not officers)
  - 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
  - Defence includes good faith reliance on financial statements and reports of professionals

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7. Members

- Both CNCA and ONCA provide the same principles but different detailed rules
- A corporation must have members
- Can have
  - One class of members in which case all are voting
  - 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, e.g.,
  - Extraordinary sale
  - 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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- Some corporations may want to collapse all membership classes into one class and remove non-voting membership classes
- 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
- ONCA - Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership

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8. Members' Meetings
- CNCA
  - Regulations provide a variety of prescribed means of giving notice of members' meetings
  - Default rule is to vote in person, unless participate in meeting electronically
  - 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 (5% members)

- ONCA
  - Every member entitled to vote at a meeting may appoint a proxyholder who does not have to be a member
  - 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)
  - Right to requisition a meeting of members (10% members)
  - No longer requires notice be sent by mail, provided that notice is given 10 to 50 days before the meeting
  - May participate in members' meetings by electronic means

9. Members' Rights
- CNCA
  - Right of any member to submit proposals to amend by-laws, or require any matter to be discussed at annual meetings, or nominate directors (5% member) [nominations can also be made at the meeting]
  - Right to access corporate records
  - May sign resolutions in writing
  - Availability of unanimous members' agreement (except for soliciting corporations)

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- ONCA
  - 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
- 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
- Default 1 vote per member, unless articles provide otherwise

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10. Members’ Remedies

- CNCA
  - 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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- ONCA
  - 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

11. 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
- ONCA
  - Broader faith base defence for religious corporations

12. Amalgamations

- CCA 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 or ONCA corporation
- Possible for a CNCA/ONCA corporation to be exported and continued as a corporation under another jurisdiction

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14. By-laws
- CNCA - by-laws no longer require to be approved by Industry Canada, but must be filed with Industry Canada within 12 months, but failure to file will not affect validity
- ONCA – no need to file by-laws with the Ministry

15. Audit Committee
- Special rules about committee members, right of public accountant to attend or call committee meetings

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16. Conflict of Laws
- ONCA must be read in conjunction with applicable charity law – explicit concept in ONCA
- 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

- 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

- 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

E. TIMING OF CONTINUANCE

- Some corporations will want to continue right away after the applicable legislation becomes effective, 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

F. PRACTICAL STEPS

1. 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
- All current by-laws, including amendments, corporate minutes
- Other governance related documents: organizational charts, policies, manuals

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? What are they?
- Write them down
- Come up with a wish list

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3. Understanding the CNCA and ONCA Framework
- Rules in the Act
- Details in the Regulations: "prescribed" vs "regulations"
- CNCA also permits unanimous member agreement for non-soliciting corporations
- Need to refer back and forth between the Act, the Regulations, articles, by-laws and unanimous member agreement

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4. 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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5. Draft Articles of Continuance and New By-laws
- By-laws will need to be replaced or substantially revised because the old and new rules are very different
- Minimalist approach by-laws
  - Rationale: CNCA & ONCA contains detailed rules, so by-laws not to duplicate mandatory rules or default rules that are not to be overridden
- Comprehensive approach by-laws
  - One stop approach - consolidation of all applicable rules
  - No need to flip back and forth between articles, but limited provisions in the articles
  - Can have governance policy manuals to address other matters, e.g., committee structures (but not audit committee)

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6. General Points
- Industry Canada have continuance tools available, e.g.,
  - Model by-laws (minimalist approach) and by-law builder
  - Guides for transition, operation and incorporation
  - 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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