
**INSIGHT 10TH ANNUAL
BUSINESS AND SECURITIES LAW AND PRACTICE**

Toronto – February 29, 2012

**Getting Ready for the New
Ontario Not-for-Profit Corporations Act
(ONCA)**

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**INSIGHT BUSINESS AND
SECURITIES LAW CONFERENCE**
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**Getting Ready for the New Ontario Not-For-Profit
Corporations Act “ONCA”**

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OVERVIEW

- Current status of the ONCA
- Overview of the structure and purpose of the ONCA
- Overview of the continuance process
- Practical steps for continuance
- Comparison of the ONCA and the *Canada Not-for-profit Corporations Act* (“CNCA”)
- Practical tips are provided throughout the presentation

Resources

- For more details see *Charity Law Bulletin* No. 262 “The Nuts and Bolts of the Ontario *Not-For-Profit Corporations Act*” on our website at www.charitylaw.ca (see attached)
- To view ONCA in its entirety see:
<http://www.ontla.on.ca/web/bills/bills%20detail.do?locale=en&Intranet=&BillID=2347>

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A. CURRENT STATUS OF ONCA

- The Ontario *Corporations Act* (“OCA”) has not been substantively amended since 1953
- Bill 65 introduced the ONCA on May 12, 2010 to replace 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-law(s) and plain language guides are expected to be released for public comment in early 2012
- Updated Not-For-Profit Incorporator’s Handbook will be updated when the ONCA comes into force

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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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B. OVERVIEW OF THE STRUCTURE AND PURPOSE OF THE ONCA

1. Incorporation and Corporate Powers

- Replaces the letters patent system with a statutory regime similar to Ontario *Business Corporations Act* (“OBCA”)
- Removes ministerial discretion to incorporate, in that incorporation will be as of right (ss.9(1))
- Obtain certificate of incorporation, not letters patent (s.9)
- Only one incorporator is needed (ss.7(1))
- No requirement to file by-laws or financial statements with the Ontario Ministry of Government Services, but default by-law will apply if no by-law adopted within 60 days after the date of incorporation (s.18)
- Import to (ss.114(1)) and export from (ss.116(1)) Ontario

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- A corporation has the capacity, rights, powers and privileges of a natural person (ss.15(1))
- Eliminates the concept of a corporation’s activities being *ultra vires*
 - If the corporation acts outside of its purposes, then it has breached the ONCA but the act is valid
 - Practically speaking, 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 Acts (e.g. *Income Tax Act* (“ITA”))

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- 2. Public Benefit Corporations ("PBC")
 - PBCs include
 - A "charitable corporation" - uses common law definition (ss.1(1), and
 - A non-charitable corporation that receives 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 (ss.1(1))
 - When a non-charitable corporation reaches the \$10,000 threshold in a financial year, PBC status does not attach in that financial year but the non-charitable corporation will be deemed to be a PBC in the next financial year as of the date of the first annual meeting of members that year (ss.1(2))

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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 (ss.23(3)) (discussed below)
 - Higher thresholds for dispensing with the default requirement in s. 68 to appoint an auditor or a person to conduct a review engagement requirements (ss.76(1)) (discussed below)
 - Rationale: The public interest requires that corporations that receive public funds, broadly speaking, be subject to tighter regulation than those that do not receive public funding

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- Upon the liquidation and dissolution of a PBC, any property remaining after the payment of creditors' debts, obligations and liabilities must be distributed in the following manner:
 - If it is a charitable corporation, then to a charitable corporation with similar purposes to its own or to a government or government agency (ss.150(1)(b))
 - If it is a non-charitable corporation, then to a PBC with similar purposes to its own or to a government or government agency (ss.150(1)(b))

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- Upon the liquidation and dissolution of a non-PBC, any residual property must be distributed in accordance with the articles, or if the articles do not address that issue, then rateably to the members (ss.150(1)(b))
- A PBC may not distribute the fair value of a membership to a member upon termination of that member's membership (ss.89(2))

Practical Tip

- *Since a corporation is only deemed to be a PBC for a year, it is possible that some corporations could oscillate between these two statuses*

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- *To avoid oscillation between PBC and non-PBC status, the corporation should confirm whether it will qualify for PBC status by conducting a review of any ongoing or upcoming contracts or relationships with government*
- *If a corporation is concerned about oscillation, then it should voluntarily adopt rules that apply to PBCs in its articles or by-laws, in order to avoid oscillation:*
 - *Ensure that two thirds of directors are not employees (charities cannot have any directors who are employees)*
 - *Ensure that the articles provide that property will be paid to a charity with similar purposes to its own or to a government or government agency upon liquidation*
 - *Comply with financial audit requirement unless waived by extraordinary resolution (See next slide for details)*

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3. Financial Reporting

- Members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting (ss.68(1))
- See Charts below for details

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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4. Number of Directors and Election
- All corporation must have a minimum of three directors (ss.22(1))
 - The articles may provide for a maximum and minimum number of directors (ss.22(2))
 - For PBCs - Not more than one third of the directors may be employees of the corporation or of any of its affiliates (ss.23(3)) (charities can have none)
 - Directors are elected at meetings of members (ss.24(1))
 - The board may appoint additional directors, but only up to one third of the number of directors elected at the previous annual meeting of members (ss.24(7))
 - Unlike the CNCA, the ONCA expressly permits ex-officio directors (ss.23(4))
 - Directors are not required to be members (ss.23(2))
 - Maximum 4 year term for directors (ss.24(1))
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5. Directors and Officers
- Directors' powers have been expanded
 - Under the OCA, the directors had to pass by-laws to borrow money, and those by-laws were not effective until they were confirmed by a special resolution of the members
 - The ONCA allows the directors to borrow money on the credit of the corporation without members' authorization, unless articles or by-laws provide otherwise (ss.85(1))
 - Directors have the right to 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 (s.94)
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- Objective standard of care: Every director and officer in exercising his or her powers and discharging his or her duties to the corporation must:
 - Act honestly and in good faith with a view to the best interests of the corporation (ss.43(1)(a)), and
 - Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (ss.43(1)(b))
- This reflects an objective standard of care that applies to for-profit corporations
- Every director and officer must comply with:
 - Standard of care under ONCA (ss.43(2)(a))
 - The corporate articles and by-laws (ss.43(2)(b))

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- Reasonable Diligence Defence for Directors:
 - Directors (but not officers) have fulfilled their duty if they exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
 - Reasonable due diligence defence includes good faith reliance on financial statements and reports of professionals (s.44)
 - Limited liability protection, as the government rejected the recommendation to include a partial liability shield for directors

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6. Members in General

- Various stages of the relationship between the corporation and its members are regulated by the ONCA
- The by-laws must set out the conditions for membership (for each class, if there are multiple classes) (s.48)
- Default rules to terminate membership and member's rights apply unless articles or by-laws state otherwise
 - Membership terminated upon death or resignation of member, expiry of membership, liquidation or dissolution of the corporation, or expulsion or termination of membership in accordance with the articles or by-laws (ss.50(1))

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- Rights terminated upon termination of membership (ss.50(2))
- Directors may require members to make an annual contribution or pay annual dues and may determine the manner in which the contribution is to be made or the dues are to be paid (s.86)
- Unusual wording concerning extinguishing liability for membership fees

"A corporation may accept a membership in the corporation surrendered to it as a *gift* and may extinguish or reduce a liability respecting an amount unpaid on that membership" (emphasis added) (s.90)

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- Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership (ss.51(1))
 - 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 (ss.51(1))
 - The power must be exercised in "good faith and in a fair and reasonable manner":
 - Must give fifteen days notice of a disciplinary action or termination with reasons; and
 - Opportunity for the member to be heard (ss.51(3))
 - Member may apply for a compliance or restraining order if that power is misused (ss.51(5))
 - Need to review member discipline procedure

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7. Membership Classes

- A corporation must have members
- May have one class of members, in which case all are voting (ss.48(4)), or two or more classes as long as articles give right to vote to at least one class (ss.48(5))
- Where more than one class, the members of each class have certain built in protections (ss.48(3))
- Non-voting members are given voting rights in some limited circumstances:
 - Extraordinary sale (ss.118(4))
 - Amalgamation (ss.111(3))
 - Continuance to another jurisdiction (s.116(3))
 - 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 (ss.105(3))

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- Thus a class of members could reject a change - effectively resulting in a class veto
- The treatment of members mirrors that in the OBCA in relation to shareholder's rights
- However, it is inappropriate to treat members and shareholders similarly and import a provision used in the business sector where the non-voting members have a financial interest in the corporation
 - e.g. Shareholders are owners of for-profit corporations and have an equity stake, whereas members may have provided money to a corporation, but usually not in expectation of an equity stake in the corporation

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- Since OCA allows non-voting membership without any voting rights, corporations have traditionally used this class for purposes unrelated to corporate governance or economic rights
- In most circumstances, giving non-voting members the right to vote on fundamental changes is not justified
 - e.g. In some churches, the voting members may be limited to religious leaders (i.e. elders and deacons) and the congregation are non-voting members to reflect church polity
 - e.g. In sports organizations there could be a non-voting class for non-resident members so that they can participate in sports events when in town but have no other involvement with the organization

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Practical Tip

A broad based membership corporation may want to consider the following:

1. *The impact of the new member rights on their current membership structure*
2. *Corporations wanting maximum flexibility may opt to have only one class of members*
3. *Consider whether non-voting members really need to be a class of members*
4. *An alternative to a non-voting member, could include "participant", "adherent," "supporter" and other equivalent terms in articles and by-laws and explicitly state that such individuals are not members and not entitled to any membership rights, including but not limited to voting rights on fundamental changes*

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5. *However, financial contributions of such non-members will be counted towards the \$10,000 public funding threshold for triggering PBC status and the attendant onerous requirements*
6. *If planning to remove non-voting members or amalgamate multiple classes by establishing one class of members, then the by-laws and letters patent should be amended while the corporation is still governed by the OCA (i.e. prior to continuance), as this change cannot be made at the same time as continuance (see ss.115(4))*
7. *Need to diplomatically address the issue of the cancellation and conversion of non-voting memberships into a non-membership category for those corporations with longstanding members*

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8. 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 (ss.53(1))
- 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 (ss.53(2))
- No longer requires notice be sent by mail provided that notice is given 10 to 50 days before the meeting (ss.55(1))
- 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 (ss.54(2))

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- Every member entitled to vote at a meeting may appoint a proxyholder who does not have to be a member (ss.64(1))
- Must send a proxy to each member entitled to receive notice of meeting at the same time or before notice is given (s.65)
- By-laws may provide for a choice of three other methods of voting for persons who cannot be present at a meeting in addition to or as an alternative to proxies: by mail, telephone, or electronic means (by computer) (ss.67(1))
- 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 (s.84)

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- 9. Members' Rights
- Members have the right to elect (s.24) and remove (s. 26) directors at anytime (i.e. more accountable directors)
- 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 (ss.56(6))
 - 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 (ss.56(5))
 - Nominations can also be made at the meeting (ss.56(5))
 - Proposal must relate in a significant way to the activities and affairs of the corporation (ss.56(6)(c))
 - Directors can refuse to discuss the proposal if they give at least 10 days notice (ss.56(8)), but a member may appeal their decision to court (ss.56(9))

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- Members who hold at least 10% of the votes that may be cast at a meeting of members sought to be held or a lower percentage that is set out in the by-laws may requisition a meeting of the members (ss.60(1))
- Members or their attorney or legal representative may examine certain corporate records, including the register of members (ss.95(1)(h))
 - To examine the registry of members, members must submit a statutory declaration that states that they will use registry of members for only the following purposes: to influence voting, requisition a meeting of members or another matter relating to the affairs of the corporation (s.96)
 - However, creditors may also examine the register of members, but are not required to submit a statutory declaration (ss.95(1) and s.96)

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- The absence of any restrictions on creditors' use of the registry of members may compromise members' privacy or increase the risk of illegitimate use of the registry of members
- There is also no penalty whatsoever for failure to use the registry of members for purposes other than that permitted by the ONCA
- Members have the right to inspect the corporation's articles, by-laws and any amendments to them, minutes of member and committee meetings, resolutions of members and committees, registers of the directors and officers (ss.92(1)), the financial statements of each subsidiary, and the accounts of any body corporate whose accounts are consolidated in the financial statements of the corporation (ss.98(2)), but not the minutes of directors' meetings

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10. Members' Remedies

- Rectification Order – where 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 (ss.186(1))
- Dissent and Appraisal Remedy – the right to the dissent and appraisal remedy (i.e. payment at FMV) in relation to fundamental changes is limited to non-PBCs (ss.187(1))
- Compliance or Restraining 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 may apply for order to comply (s.191)
- Unlike CNCA, there is no “religious corporation” exemption to the compliance or restraining orders dissent and appraisal remedy

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- Derivative Action – Members have a right to seek a court order to commence a derivative action (s.183)
- A derivative action allows members to bring an action in the name of the corporation to enforce one of its rights
 - Exemption for “religious corporation” (ss.183(3))
 - 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
 - “religious corporation” is also not defined in CNCA, although the CNCA does require the court to be satisfied that the decision of the directors is “based on a tenet of faith held by the members of the corporation; and it was reasonable to base [their] decision on a tenet of faith, having regard to the activities of the corporation”

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- Unlike the CNCA, there is no oppression remedy
- However, the ONCA allows a member (or holder of debt) to make *ex parte* or on any notice required by the court, an application for an investigation of the corporation (ss.174(1))
 - One of the grounds listed for an investigation order has similar language to 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*” (emphasis added) (ss.174(2)(b))

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Practical Tip

- It is possible that "supporters" or "participants" that have been eliminated as non-voting members but are still provided for in the by-laws could 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 s.182
- However, lack of economic incentives to invoke these corporate law remedies may mean less member related litigation than shareholder litigation in relation to OBCA and CBCA corporations
- But even a non-member could still allege breach of trust under s.10 of the Charities Accounting Act ("CAA")

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11. Conflict of Laws

- The ONCA must be read in conjunction with applicable charity law
- Section 5 provides that if there is a conflict between the ONCA or its regulation(s) and a provision made in any other legislation that applies to a:
 - Body corporate without share capital, then the provision in the other legislation prevails; and
 - Charitable corporation, then the legislation applicable to charitable corporations prevails
- The effect of s. 5 is that some provisions of the ONCA will not apply to charities

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- Section 47 permits the directors to fix their remuneration and to receive reasonable remuneration and expenses for any services they provide to the corporation in any other capacity
 - However, the common law duty to act gratuitously prohibits directors of charitable corporations from ever receiving any remuneration and takes precedence over the ONCA
 - The rule against remuneration does not apply to out-of-pocket expenses incurred by directors, such as mileage or other reasonable and related travel expenses
 - Directors may legitimately be reimbursed for these items

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Practical Tip

- Some religious charities for doctrinal reasons may find it theologically unacceptable that their minister cannot be a member of the controlling board of the church
- Section 13 of the CAA provides a mechanism to apply to the Public Guardian and Trustee's ("PGT") to obtain consent order to allow directors of charitable corporations to be paid
- However, consent will generally not be available for an employee (including a minister to be on the board), so better to give the minister or executive director of a non-religious charity the right in the by-law to attend and participate at board meeting but not as a member of the board

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- Section 41 allows directors and officers to enter into contracts or transactions with the corporation as long as they disclose any conflict of interest that may exist
 - At common law, the directors of incorporated charities cannot place their personal interests in conflict with their duty to the corporation
 - It makes no difference that there is no actual loss to the incorporated charity
 - It is PGT's position that s. 41 is overridden by the common law and would not apply to the directors of charitable corporations

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- Section 88 provides that the corporation may invest its funds as its directors think fit, subject to its articles or by-laws or any limitations accompanying a gift
 - However, s.10.1 of the CAA takes precedence - that provision states that s.27 to s.31 of the *Trustees Act* applies:
 - The prudent investor rule applies to the directors of incorporated charities (ss.27(1) *Trustees Act*)
 - Directors must consider certain criteria to invest (ss.27(5) *Trustees Act*)
 - Authorizes delegation to an agent in certain circumstances (ss.27.1(1) *Trustees Act*)

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- Section 46 permits the corporation to indemnify the directors and officers and to purchase insurance
 - However, ss.46(7) expressly requires that the purchase of insurance be in compliance with the CAA and its regulations (thus avoiding any conflict, though the ONCA provisions on D&O insurance would not apply)
 - Regulation 4/01 under the CAA requires that prior to a charity consenting to the indemnification of its directors or purchasing D&O insurance, the directors must consider certain factors enumerated in the regulation (ss.2(5) of Regulation 4/01)
 - The indemnification of the directors and officers or the purchase insurance must not render the corporation insolvent (ss.2(7) of Regulation 4/01)

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C. OVERVIEW OF CONTINUANCE PROCESS

- Part III of the OCA will be repealed upon proclamation of the ONCA and the ONCA will immediately apply
- Three year grace period for an OCA corporation to comply
- Failure to continue within the three year grace period:
 - Will not result in dissolution of the corporation by the government (unlike the CNCA)
 - However, the letters patent, supplementary letters patent and by-laws will be deemed to be amended to comply with the ONCA, resulting in the invalidation of non-compliant provisions (ss.207(3))
 - Will result in uncertainty as to which provisions apply both during and after the grace period
- It is therefore 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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- As part of the continuance process, OCA corporations may, by articles of amendment, amend any provision in their letters patent, supplementary letters patent, by-laws or special resolution to bring the provision into conformity with the ONCA (ss.207(1))
- However, the members cannot make certain amendments to the charter of a corporation that affect a class or group of members at the same time that they authorize the directors to apply for a certificate of continuance by special resolution, such as:
 - Effect an exchange, reclassification or cancellation of all or part of a membership class
 - Add, change or remove the rights or conditions attached to a certain membership class
 - Increase the rights of a class (ss.115(4))

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- All OCA corporations will need to undertake the following for continuance:
 - 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 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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- Unresolved Issues Regarding Continuance Process
 - What is PGT's position and requirements regarding the approval of charities' objects?
 - It has not been determined if charities incorporated in Ontario will be required to have their articles approved by the PGT
 - CRA has tax jurisdiction over registered charity status
 - Not known what will be the position of CRA on the process of continuance, i.e. will it be the same as CNCA?

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Practical Tip

- *Some corporations may want to continue early on, others may want to wait*
 - *Prudent to plan ahead and continue soon to avoid the imposition of default provisions and avoid confusion*
- *Revising governance structure to be reflected in new by-law may need some time for directors and members to consider, so start the process early*
- *Some issues to consider*
 - *The effect of increased membership rights*
 - *Eliminating non-voting members*
 - *Existing by-laws will require amendment*
 - *Contemplation of fundamental changes*
 - *Different levels of financial review may be required*

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D. PRACTICAL STEPS FOR CONTINUANCE

1. Document Collection and Review

- 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
 - OCA corporations – can obtain microfiche copies from Ministry
 - Collect other governance related documents
 - Organizational charts
 - Policies
 - Manuals

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- 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?
 - Come up with a wish list
- Draft articles of continuance
- Draft new by-laws – will need to be replaced or substantially revised because the ONCA differs from the OCA

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2. Approaches to by-law drafting

- Minimalist approach
 - ONCA contains detailed rules, so by-laws do not require the same level of detail
 - By-laws to set out provisions to
 - Deal with issues that the ONCA is silent on, and
 - Override the default rules in the ONCA
 - Advantage – no risk of amending by-laws to remove ONCA mandatory requirements or violate ONCA requirements
 - Disadvantage – work with different documents back and forth: articles, by-laws, ONCA, 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 as everything in them
 - Disadvantage – by-laws will need to clearly identify which provisions reflect mandatory ONCA provisions and cannot be amended
- Consider whether current by-laws reflect desired governance structure:
 - Is consistent with the ONCA?
 - If inconsistent with the ONCA default requirements, is the preferred option permitted under the ONCA?
 - Should the option be set out in the articles or by-laws?

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- If ONCA optional requirements provided for, may choose one of the permissible options
 - Should the option be set out in the articles or by-laws?
- May want to revise the by-laws under the OCA first before continuance under the ONCA to deal with more urgent issues, e.g.,
 - Membership structure, such as removing one or more membership classes (e.g. non-voting members)
 - Board structure
 - Other key governance issues

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3. Practical Steps for Drafting By-Laws

a) Members

- If want to retain different membership classes under the ONCA, then must set out rights of each membership class in the articles
 - Remember that each class will be entitled to vote on fundamental changes and will thus have a veto right
 - May remove non-voting membership class but retain their involvement in organization
 - Change them into a non-membership category, such as “supporter”, “participant”, etc.
 - Draft new by-law to set out their rights and duties as non-members

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- Timing to change membership class structure
 - Consider whether non-voting members whose membership is being cancelled might be able to challenge the changes
 - Consider revising the by-law under the OCA first before continuance into ONCA
- Directors as corporate members
 - No requirement for directors to be a separate class of members under ONCA (ss.23(2))
 - If remove this class, then the directors may attend, but not vote at members' meetings

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- Voting at members' meetings by electronic means
 - Unlike OCA, ONCA permits by-laws to allow voting by mail, telephone or electronic means, in addition to voting by proxy (ss.67(1))
 - If they are desirable, then the new by-law will need to include provisions to allow such means of voting
- Attendance at members' meetings by electronic means
 - Unlike OCA, ONCA permits members entitled to attend members' meetings to participate by telephonic or electronic means, unless the by-laws state otherwise (ss.53(4))
 - If an organization prefers members to attend in person only, then their new by-law will need to prohibit participation by electronic or other means

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- Holding members' meetings electronically
 - Unlike OCA, ONCA provides that if permitted by by-laws, the board or the members may decide whether to hold a members' meeting entirely by telephonic or electronic means (ss.53(5))
 - If an organization does not wish to hold members' meetings by such means, then the new by-law will need to ensure that those means are not permitted
- Notice of members' meetings
 - Notice must be given not less than ten days and not more than fifty days before the meeting (ss.55(1))
 - The new by-law will need to set out how notice is to be given in compliance with the ONCA requirements

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- Delegates system
 - If a member is a corporation or other entity, that member may authorize an individual to represent it at members' meetings and exercise all of its rights (ss.48(7))
 - New by-law will need to reflect desired practice
- Discipline of members
 - The articles or by-laws may allow the directors, members or committees to discipline or terminate members, and if so, the by-laws must set out the circumstances and manner in which this power may be exercised (s.51)
 - Consider whether the current discipline mechanism is to be retained, if so, whether amendments are required to comply with the ONCA

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- Record date for members' meetings
 - ONCA permits the directors to fix a "record date" of no more than fifty days before a members' meeting to determine who the members of an organization are for purpose of calling a members' meeting (s.54)
 - If an organization desires to have this mechanism reflected in the new by-laws, then a provision will need to be included
- Notice of adjourned members' meetings
 - If adjournment of a meeting of members is less than thirty days, a fresh notice is not required to be sent, unless the by-laws require otherwise (ss. 55(5))
 - ONCA's provision involves less administration, unless there is a policy reason for an organization not to adopt the ONCA's default provision

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- Proposal by members
 - ONCA allows any voting member to submit a proposal for discussion at a members' meeting, including nominations to elect directors if the proposal is signed by at least 5% of voting members, although the by-laws may provide a lower percentage (ss.56(5))
 - ONCA contains a detailed process on how a proposal may be submitted by a member
 - Better for the new by-law to be silent on this issue in order not to draw attention to this right and let the members interested in bringing a proposal rely on the ONCA, instead of the by-laws

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- b) Board issues
- Number of directors
 - OCA currently requires a fixed number of directors not fewer than three directors (ss.283(2))
 - ONCA will permit flexibility by providing a range of directors in its articles
 - e.g. a minimum of 3 and a maximum of 15
 - Members can elect a number of directors within that range without having to amend its articles - all that is required is a special resolution confirming the number of directors (ss.22(2))
 - Consider if flexibility is desirable

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- Board appointed directors
 - ONCA provides the board with the power to appoint additional directors, up to one third the number of directors elected at the previous annual meeting of members (ss.24(7))
- Removal of directors
 - ONCA permits the members to remove directors by ordinary resolution, except for ex-officio directors (ss.26(1))
- Consider whether these mandatory features are desired to be included in the by-law

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- Disclosure of conflict of interest
 - ONCA sets out detailed conflict of interest provisions modeled after OBCA (see s. 41)
 - Must include the ONCA requirements in the new by-law
- Standard of Care
 - ONCA contains a new objective standard of care
 - Must include ONCA requirements in the new by-law (but subject to common law rule for charities)
- Indemnity of directors and officers
 - Must revise by-law to comply with the new requirements in the ONCA (but subject to common law rule for charities)

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E. COMPARISON BETWEEN THE ONCA AND CNCA 61

- Pros of the ONCA:
 - Specifically permits ex-officio directors (ss.23(4)) and ex-officio members (ss.48(2)) (unlike CNCA)
 - Broad “religious corporation” exemption (no three part test like that provided in the CNCA)
 - Unlike CNCA, ONCA sets minimum standards for the termination of membership or use of discipline against members
 - Will appeal to small or mid-sized local corporations operating locally in Ontario
 - No annual filing requirements to the Director (this requirement in the CNCA is discussed later)
 - Default by-law if organizational by-law not passed within 60 days after incorporation

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- No oppression remedy
- Less onerous requirements to waive appointment of public accountant and have an audit
- Cons of ONCA
 - Does not significantly limit personal liability of directors like Saskatchewan’s *Non-profit Corporations Act, 1995* (see s.112.1 – will limit liability of directors and officers for pecuniary and non-pecuniary losses) but neither does the CNCA
 - Mandatory rights to appoint a proxy
 - Does not provide for unanimous member agreements
 - Requires a minimum of three directors
 - Members allowed to dissent and force an appraisal

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- Comparison to CNCA
 - “Soliciting corporation” means a corporation in receipt of public funding that it requested in excess of \$10,000 during a three year period (ss.2(5.1) CNCA)
 - Designated corporations are:
 - Soliciting corporation with gross annual revenue for its last completed financial year equal to or less than \$50,000; and
 - Non-soliciting corporation with gross annual revenues for its last completed financial year equal to or less than \$1million (s.179 CNCA)
 - Non-designated corporations are soliciting and non-soliciting corporations with annual revenues in excess of the above amounts (s.179 CNCA)

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- Only non-soliciting corporations may have a unanimous member agreement (s.170 CNCA)
- All CNCA corporations must have at least 1 director, but a soliciting corporation must have at least three directors, two of which are not officers or employees of the corporation or its affiliates (s.125 CNCA), unlike the minimum of three directors for all corporations required by the ONCA
- "Religious corporations" are exempt from oppression remedy – must meet 3 part test (ss.253(2) CNCA)
- Articles of soliciting corporations, registered charities, and corporations with the prescribed amount of public funding must provide that property remaining after liquidation is distributed to a "qualified donee", as defined in ss.248(1) of the ITA (ss.235(2) CNCA)

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- All CNCA corporations must file the following with the Director when requested: annual financial statements, the report of the public accountant, if any, and any further information on the corporation's financial position and the results of its operations, as is required by the articles, by-laws and any unanimous member agreement (s.177 CNCA)
- However, soliciting corporations must always file the above documents with the Director (s.176 CNCA)

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- Similarities:
 - PBCs (ONCA) and soliciting corporations (CNCA) are subject to higher thresholds for dispensing with financial review than non-publicly funded corporations
 - Similar duties and defences for officers and directors
 - Non-voting members may vote on fundamental changes
 - Have default rules (e.g. qualification of directors, appointment and removal of directors, method of holding meetings, provision for quorum etc.)
 - Provide that the corporation has the capacity and rights of a natural person (s.16 CNCA)

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