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What's New in the Governance of Not-for-Profit Corporations? (CNCA, ONCA)

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2

A. STATUS AND OVERVIEW OF *CANADA NOT-FOR-PROFIT CORPORATIONS ACT* ("CNCA")

- Enacted on June 23, 2009 and proclaimed in force October 17, 2011
- Replaces Part II of *Canada Corporations Act* ("CCA")
- The new rules under the CNCA 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
- The continuance process will provide an opportunity to update the content of existing letters patent and by-laws

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3

B. STATUS AND OVERVIEW OF ONTARIO NOT-FOR-PROFIT CORPORATIONS ACT, 2010 ("ONCA")

- The Ontario *Corporations Act* ("OCA") has not been substantively amended since 1953
- Bill 65 introduced the new ONCA
- ONCA was enacted on October 25, 2010
- ONCA expected to be proclaimed in force by January 1, 2013
- Regulations under the ONCA have not been released as yet, but an outline of regulations is expected to be released in June 2012

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4

- Unlike the CNCA, under the ONCA:
  - Optional for corporations to file articles of amendment and adopt new by-laws to comply with ONCA requirements in 3 years of ONCA in force
  - If no transition process taken, then
    - Corporation will not be dissolved
    - Letters patent, supplementary letters patent and by-laws will be deemed amended to comply with new ONCA requirements, resulting in non-compliant provisions deemed invalid
    - But will result in uncertainty in relation to which provisions remain to be valid
  - Prudent to complete transition process to avoid uncertainty

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5

C. THE ESSENTIALS TO KNOW ABOUT THE CNCA AND ONCA

1. Incorporation

- Incorporation under CNCA and ONCA will be "as of right" (i.e. no Ministerial discretion)
- Upon filing articles of incorporation (not letters patent), a certificate of incorporation will be issued
- Not-for-profit ("NFP") corporations will have the capacity, rights, powers and privileges of a natural person
- The doctrine of *ultra vires* will no longer apply
- By-laws will not need to be filed with the application for articles of incorporation

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6

2. Types of Corporations

- CNCA - Soliciting and Non-soliciting Corporations
  - Where a corporation receives more than $10,000 in its last financial period from public sources (e.g. public donations, federal, provincial and municipal governments or conduit entities]), it will become a soliciting corporation
  - Status acquired on the annual general meeting for a three year duration
  - Low threshold means most corporations will become soliciting corporations
  - Soliciting corporations must file annual financial statements and have a minimum of 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates

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7

- ONCA - Public Benefit Corporations (PBC)
  - PBCs include
    - A charitable corporation (at common law), or
    - A non-charitable corporation that receives more than $10,000 in a fiscal year in funding from public donations or the federal or provincial governments, or a municipality
  - When a non-charitable corporation reaches the $10,000 threshold, the PBC status won't attach until the first annual meeting of members in the next fiscal year
  - Maximum one-third of the directors of a PBC may be employees of the corporation or of any of its affiliates
  - Higher thresholds to dispense with the auditor and/or review engagement requirements

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8

3. Number of Directors and Elections

- CNCA:
  - Minimum of 1 director (except for soliciting corporations, which require 3 directors)
  - Directors can be elected by members or, if the articles provide, a certain portion of the directors may be appointed by the directors
- ONCA:
  - Minimum of 3 directors
  - Maximum one third of the directors of a PBC may be employees of the corporation or any of its affiliates
  - Directors may be elected by members, appointed by the directors, or take office as *ex-officio* directors

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9

4. Duties and Due Diligence Defence of Directors and Officers

- CNCA
  - Duty to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skills of a reasonably prudent person in comparable circumstances (objective standard of care)
  - Not liable if exercised the care, diligence of a reasonably prudent person would have exercised in comparable circumstances
  - Must comply with CNCA, regulations, articles, by-laws and any unanimous member agreement

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- ONCA
  - Duty to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skills of a reasonably prudent person in comparable circumstances (objective standard of care)
  - Only directors are not liable if exercised the care, diligence of a reasonably prudent person would have exercised in comparable circumstances
  - The provisions are generally similar to that under the CNCA

5. Financial Review and Disclosure

- Different levels of financial review and disclosure apply to different categories of corporations under CNCA and ONCA
- Depending on amount of revenue, possible for members to waive appointment of public accountant (CNCA) or auditor (ONCA) and the completion of an audit or review engagement

6. Member Rights

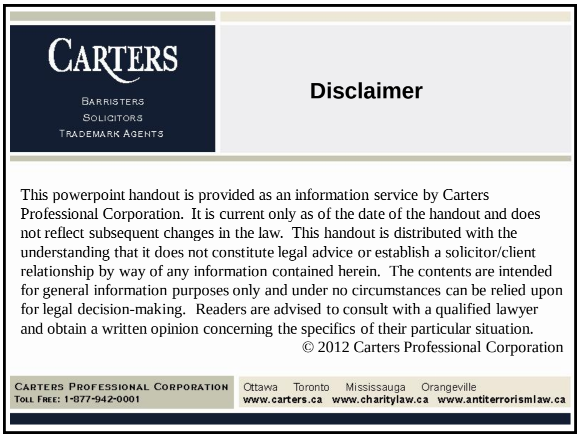
- Similar rules regarding distribution of voting rights under CNCA and ONCA (e.g. 1 class must have the right to vote)
- Similar rights to: elect and remove directors; separate class voting for amendments to articles and fundamental changes; voting members may make proposals; etc.

7. Members Remedies

- CNCA: derivative action (except for religious corporations), oppression remedy (except for religious corporations), compliance or restraining order, etc.
- ONCA: derivative action, compliance or restraining order, rectification order, dissent and appraisal remedy, etc.

8. Liquidation and Dissolution

- Voluntary and court-ordered liquidation and dissolution available under CNCA and ONCA
- Restrictions on the distribution of property for soliciting corporations (CNCA) and PBCs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