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# HEALTHCARE PHILANTHROPY

**JUNE 11, 2013**

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## THORNY ISSUES ARISING FROM THE ONCA/CNCA

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 BARRISTERS SOLICITORS TRADEMARK AGENTS	<b>Carters/Fasken Martineau Healthcare Philanthropy Check-Up 2013</b>  June 11, 2013
<b>Thorny Issues Arising from the ONCA/CNCA</b>	
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<b>TOPICS FOR REVIEW</b>	
<ul style="list-style-type: none"><li>• Status of <i>Canada Not-For-Profit Corporations Act</i></li><li>• Status of Ontario <i>Not-For-Profit Corporations Act, 2010</i></li><li>• General Legislative Framework</li><li>• Selections of "Thorny" Issues</li></ul>	
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<b>A. STATUS OF THE CNCA</b>	
<ul style="list-style-type: none"><li>• <i>Canada Corporations Act (CCA)</i> not updated since 1917</li><li>• New <i>Canada Not-For-Profit Corporations Act (CNCA)</i> enacted on June 23, 2009</li><li>• In force on October 17, 2011</li><li>• Replaced Part II of CCA</li><li>• Up to March 12, 2013, only 763 of approximately 17,000 corporations had continued; 1200 has continued as of now</li></ul>	
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### OVERVIEW OF CNCA 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., by October 17, 2014
- Failure to continue will result in dissolution of the corporation
- Can amend letters patent and by-laws prior to continuance under CCA
- Can amend letters patent and by-laws at the time of continuance

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- CNCA continuance process
  - Review letters patent and by-laws
  - Prepare articles of continuance, notice and new by-law
  - Get membership approval
  - File articles and notice with Corporations Canada, no filing fee
  - Certificate of continuance will be issued
  - File approved new by-law within 12 months of adoption
  - Charities - send certificate of continuance, articles of continuance and new by-law to CRA

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### RESOURCES

- Corporations Canada's website  
[http://strategis.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h\\_cs03925.html](http://strategis.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs03925.html)
  - Transition Guide
  - How to operate under the CNCA
  - Model by-law and by-law builder
- Paper by Theresa Man "Working With The Canada Not-for-profit Corporations Act: Incorporation And Continuance" April 8, 2013  
<http://www.carters.ca/pub/article/charity/2013/tlm0408.pdf>
- *Charity Law Bulletins* on "Countdown to the Canada Not-For-Profit Corporations Act - Practice Tips" 1 to 9, Bulletin Nos. 191, 193, 199, 213, 215, 220, 231, 239, 247

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**B. STATUS OF THE ONCA**

- The Ontario *Corporations Act* (OCA) has not been substantively amended since 1953
- The Ontario *Not-for-Profit Corporations Act, 2010* (ONCA) will apply to OCA Part III corporations
- ONCA received Royal Assent on October 25, 2010
- Ministry of Government Services - responsible for searches and filing
- Ministry of Consumer Services - responsible for remaining areas, including policy and interpretation issues

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- ONCA was expected to be proclaimed in force on July 1, 2013
- Minister announced on March 28, 2013
  - Will delay proclamation of the ONCA to 2014
  - Will review the ONCA after proclamation to determine if amendments are necessary - priority to reviewing enhancement of membership voting rights
  - Exploring the possibility of delaying proclamation of provisions giving voting rights to non-voting members for 3 years after proclamation

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- Bill 85 amendments to ONCA first reading June 6, 2013
  - \$10,000 threshold for public benefit corporations can be changed by regulations
  - Consents to be a director must be in writing
  - Members' right to class vote by non-voting classes is delayed until proclaimed in force at least three years after proclamation of the ONCA
  - Clarification that non compliant provisions of letters patent and bylaws will continue to be in effect until the earlier of the date of amendment and three years from proclamation

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- New requirement that any provision that is required by the ONCA to be contained in the articles must be contained in the articles before the end of the 3 year period, failing which those provisions would be deemed to become invalid at the end of the 3 year period
- To review Bill 85  
[http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&Intranet=&BillID=2812](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2812)
- Check Ministry's website for update  
[http://www.sse.gov.on.ca/mcs/en/Pages/Not\\_For\\_Profit.aspx](http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx)

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### OVERVIEW OF ONCA TRANSITION PROCESS

- Optional transition process to comply with the ONCA within 3 years of proclamation
- But proposed amendments to ONCA means that articles of amendment would likely need to be filed by most corporations and new by-law will need to be adopted
- If no transition process taken, then
  - Corporation will not be dissolved
  - LP, SLPs, by-laws and special resolutions will be deemed amended to comply with the ONCA, resulting in non-compliant provisions deemed invalid
  - Will result in uncertainty in relation to which provisions remain to be valid
  - Need to file articles of amendment to set out required information, otherwise provision no effect

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- Social clubs with share capital will have 5 years to continue to come under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*
- ONCA transition process
  - Review letters patent and by-laws
  - Prepare articles of amendment and new by-laws
  - Get membership approval
  - File required documents
  - Certificate of amendment will be issued
  - Charities - send certificate of amendment, articles of amendment and new by-law to CRA

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**RESOURCES**

- *Charity Law Bulletin* No. 262 "The Nuts and Bolts of the Ontario *Not-for-Profit Corporations Act, 2010*"
- *Charity Law Bulletin* No. 299 "Transitioning Under The New Ontario *Not-for-Profit Corporations Act, 2010*: Practical Considerations"
  - on our website at [www.charitylaw.ca](http://www.charitylaw.ca)
- To view ONCA
  - [http://www.ontla.on.ca/web/bills/bills%20\\_detail.do?locale=en&Intranet=&BillID=2347](http://www.ontla.on.ca/web/bills/bills%20_detail.do?locale=en&Intranet=&BillID=2347)
- Ministry updates
  - [http://www.sse.gov.on.ca/mcs/en/Pages/Not\\_For\\_Profit.aspx](http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx)
  - key terms, frequently asked questions, transition checklist, default by-laws, plain language guide
  - Regulations to be released

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**C. GENERAL CNCA/ONCA FRAMEWORK**

- Rules in the Act
- CNCA - lots of details in the regulations
  - "prescribed"
  - "regulations"
- ONCA - less details in the regulations
- Need to refer back and forth between the Act and the Regulations
- Articles
- By-laws
- CNCA - unanimous member agreement for non-soliciting corporations

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- CNCA/ONCA provides both a general framework and sets of rules for corporations to operate
- Three types of rules in CNCA/ONCA
  - 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 the Act

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**D. CNCA – SOLICITING VS NON-SOLICITING  
ONCA – PUBLIC BENEFIT**

- Corporations that receive public funding are subject to special requirements
- Issue - who qualifies and low \$10,000 threshold

**CNCA**

- All corporations categorized into soliciting and non-soliciting corporations
- If a corporation receives more than \$10,000 in its last financial period from public sources, it will become a soliciting corporation
- 3 year status - from the AGM in the following financial year until the 3<sup>rd</sup> AGM

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(CNCA cont'd)

- Public sources

(a) requests for donations or gifts from persons who are not

- members, directors, officers, or employees of the corporation at the time of the request
- legal or common law spouse of the above persons
- children, parents, brothers, sisters, grandparents, uncles, aunts, nephews or nieces of the above persons

(b) grants or other similar financial assistance received from the federal or a provincial or a municipal government, or agencies of such government

(c) donations or gifts received from a soliciting corporation

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(CNCA cont'd)

- 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
    - Note that common law prohibits charities to have employees to sit on their board
  - 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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(CNCA cont'd)

- Corporations need to monitor funding sources and carefully track soliciting status
- If a corporation is concerned about oscillating in and out of soliciting status, can voluntarily be structured as a soliciting corporation
  - Ensure at least 3 directors and at least 2 are not officers or employees of the corporation or its affiliates
  - Ensure the articles provide that property will be paid to qualified donees on dissolution
  - Do not enter into unanimous member agreement

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(CNCA cont'd)

- For those years when it exceeds the \$10,000 threshold
  - File annual financials 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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**ONCA**

- All corporations categorized into public benefit corporations (PBCs) and non-PBCs
- PBCs include
  - "Charitable corporations" - common law definition
  - Non-charitable corporations that receive more than \$10,000 in a financial year from public donations
- 1 year status - from the AGM in the following financial year until the end of that financial year
- Public sources
  - Donations or gifts from persons who are not members, directors, officers or employees of the corporation
  - Grants or similar financial assistance from the federal, provincial or municipal government or government agency

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(ONCA cont'd)

- Consequences of being a PBC
  - Not more than 1/3 of the directors 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
  - Upon liquidation and dissolution
    - If it is a charitable corporation, net assets must be distributed to a charitable corporation with similar purposes or to a government or government agency
    - If it is a non-charitable corporation, net assets must be distributed to a PBC with similar purposes or to a government or government agency

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(ONCA cont'd)

- 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 (PBCs cannot do this)
- Non-charitable corporations will need to monitor level and sources of revenue
- Low threshold of \$10,000 - possible that a non-charitable corporation could move in and out of PBC status depending on its revenue in a year

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(ONCA cont'd)

- If a non-charitable corporation is concerned about moving in and out of PBC status, it can voluntarily be structured as a PBC
  - Ensure 2/3 of directors are not employees (but charities cannot have any directors who are employees)
  - Ensure the articles provide that property will be paid to another PBC with similar purposes or to a government or government agency upon liquidation
- For those years when it exceeds the \$10,000 threshold
  - Follow audit and review rules for PBC corporations
    - may not be an issue if the corporation's practice is to have its financial statements audited

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**E. MEMBERSHIP ISSUES**

**1. Membership Class Votes – De Facto Veto Rights**

- Similar rules in CNCA and ONCA, with minor differences
- 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 - two types of matters
  - (i) 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

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- (ii) Changes of the rights attached to a class or group of members
  - a) exchange, reclassification or cancellation of all or part of the memberships of the class
  - b) add, change or remove the rights or conditions attached to the memberships of the class
  - c) increase the rights of any other class of members having rights equal or superior to those of the class
  - d) increase the rights of a class of members having rights inferior to those of the class to make them equal or superior
  - e) create a new class of members having rights equal or superior to those of the class
  - f) exchange or create a right of exchange of all or part of the membership of another class into the membership of the class
    - Can prevent class votes under (a) and (e) by inserting a provision in the articles

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- 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)
- The treatment of members mirrors that in the *Canada Business Corporations Act* (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 desirable

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- Common examples of having different membership classes
  - Members from different industry sectors
  - Members from different geographical regions
  - Members from different age groups
  - Founders
  - Broad-based community support, donors
  - Honorary members
  - Life members

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- Considerations
  - What is the purpose of having multiple classes?
  - Is the corporation prepared to seek class approval (including the non-voting members) in future?
  - It is possible to group the voting members into one class of members?
  - Would the members be willing to restructure their membership status?
  - What is the likelihood of changing the membership structure or membership rights in any class in the future?
  - What is the likelihood of engaging in fundamental changes (such as amalgamating with another organization with similar visions/missions) in the future?

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- For existing CCA corporations - examples of possible options
  - Status quo - but corporation must be prepared to seek class votes in future when required by the Act
  - Collapse all membership classes into 1 pool of voting members
  - Turn non-voting membership classes into non-membership categories
  - Turn non-voting members into a “designation” for a group of persons

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- For example - collapse membership classes into one class and remove non-voting membership classes
  - If corporation wants broad-based community support, may enlist them in some capacity in the corporation, but do not refer to them as “members”
  - Change them into a non-membership category, such as “affiliates”, “associates”, “supporters”
  - May set out their rights and duties as non-members
  - Fee structure for members and non-members can be set out in policy
  - But their donations will not be exempt from the \$10,000 threshold

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- Timing to collapse membership classes
  - CNCA
    - If change membership rights as part of the continuance, then articles of continuance and by-laws also require separate class vote
    - Need to change membership classes and rights by amending the by-laws under the CCA first, prior to continuance under the CNCA
  - ONCA
    - Proposed amendments to ONCA to delay class voting rights for non-voting members until end of 3 years, therefore collapsing membership class during the 3 year period will not be subject to class votes by non-voting members

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**2. Termination of Membership / Discipline**

- If articles or by-laws gives the directors, the members, or a committee the power to discipline a member or terminate membership, then must also set out the circumstances and the manner in which a member may be disciplined or membership terminated
- CNCA - Does not set out minimum procedural threshold
- ONCA - 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

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- Statutory response to the courts' reluctance to intervene in the affairs of a voluntary relationship, and inadequate provisions in organizations' by-laws addressing this issue
- Case law suggests that organizations have a duty of fairness, including advising the affected member about the case and the process, and providing him/her an opportunity to be heard
- Fairness process required
- Is fairness process required for termination for objective reasons?
  - Not meeting membership qualification requirements
  - Not paying membership dues

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**3. Members' Rights**

- Members have extensive rights and remedies – e.g.,
  - Right to requisition a meeting of members (CNCA: 5% of voting right, ONCA: 10%)
  - 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
  - CNCA: unanimous members agreement for non-soliciting corporations

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- CNCA only - Oppression remedy, subject to faith-based defence by religious corporations
- ONCA only - Dissent and appraisal remedy for non-PBCs - in relation to fundamental changes
- Derivative action, subject to faith-based defiance by religious corporations
- Compliance and restraining orders
- Court ordered wind-up and liquidation
- CNCA faith-based defence by religious corporations requirements (not for ONCA)
  - The act or omission, conduct or exercise of powers is based on a tenet of faith held by the members of the corporation
  - Reasonable to base the decision on a tenet of faith, having regard to the activities of the corporation

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- Must respect these rights, cannot contract out
- Not just affect corporations with broad based membership, rights also apply to closed membership corporations
- Having a smaller membership may reduce the exposure to these rights

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- Proxy
  - CNCA - optional
  - ONCA - optional if by-laws allows members to vote by mail or by telephonic or electronic means
  - Not possible to require the proxyholder must be a member - if concerned
    - Encourage (not require) members to appoint other members to be proxyholders
    - Include other requirements of who may qualify to be a proxyholder
    - Keep membership small
    - Keep business to be dealt with at members' meeting short

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**F. BOARD ISSUES**

**1. Election and Appointment of Directors**

- Directors are elected by ordinary resolution of the members at AGMs
- 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
  - Appointment of directors - see below
  - Ex officio directors - see below

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**2. Directors Elected by Different Groups of Members**

- Members in the same class have the same rights
- If different groups of members elect x directors to the board, must structure membership as separate classes
- For example
  - Directors elected by different regional representation of membership
  - Directors elected by different sector representation of membership
  - Directors elected by founding members
- Examples of possible workarounds
  - Qualification requirement for candidates
  - Candidate nomination process
  - Appointment of directors
  - Ex officio members and closed membership

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**3. Appointment of Directors**

- CNCA – optional power in articles to permit directors to appoint directors between AGMs
- ONCA – mandatory power
- Limitations
  - Can only appoint up to 1/3 the number elected at the last AGM (not 1/3 of the entire board)
  - Only 1 year term to expire at next AGM
- Need to take into account of rotating term - reduces the number of directors elected at each AGM
- Number appointed is within the max/min or fixed size of the board in the articles
- CNCA - Useful tool to get around prohibition of ex officio director or avoid having multiple membership classes

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- ONCA – how to prevent the board from appointing directors if this is not desirable, e.g.,
  - If fixed number of directors, ensure no vacancy on the board
  - If max/min number of directors, ensure power to fix board size stays with the members (not delegated to the directors) and no no vacancy on the board

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**4. No Ex Officio Directors**

- CNCA – Does not permit having ex officio directors
- ONCA – Can have ex officio directors
- Common for operating charities to have a representative sit on the board of its parallel foundation
- Examples
  - Representation from related charity
  - Past president

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- CNCA - Examples of possible workarounds
  - Establish the appointing body/person to be a separate membership class to elect a director - but will have multiple class vote issues
  - Have provision in articles to allow the board to appoint a director - by-law or policy can provide who would qualify to be appointed - but subject to an act of the board
  - Establish qualification requirements for candidate - but subject to election by the membership

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**5. Directors Ceasing to Hold Office / Removal**

- Director ceases to hold office when the director dies, resigns, is removed (CNCA s.130, ONCA s.26), or becomes disqualified (CNCA s.126. ONCA s.23)
- CNCA s.126. ONCA s.23 - the following persons are disqualified - under 18 years old, mentally incapable, a person who is not an individual (such as a corporation), and a person who is bankrupt
- If the by-law requires a director to be a member, then the person would also be disqualified if he/she is no longer a member

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- CNCA s.130, ONCA s.26 - Directors can be removed by majority vote of members (or by class vote if elected by a particular class)
  - Cannot be subject to higher vote (e.g., 2/3 vote)
  - Cannot be removed by the board
- Not clear whether possible for a director to cease to hold office for other reasons without being removed by the members
  - Objective criteria - e.g., failing to attend 3 consecutive meetings
  - Subjective criteria - e.g., conduct brings disrepute to the corporation

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**G. OFFICER ISSUES**

**1. Soliciting Corporations – Small Boards**

- CNCA - Soliciting corporations must have at least 3 directors, at least 2 directors must not be officers or employees of the corporation or its affiliates
- ONCA - PBCs cannot have more than 1/3 of directors who are employees of the corporation or its affiliates
- Prohibition of employees - No material effect on registered charities due to prohibition on directors receiving remuneration at common law
- CNCA prohibition of officers - problem for small boards - e.g., board of 3 directors to be chair, secretary, treasurer
- Examples of possible workarounds
  - 1 director holds all officer positions, leaving 2 at large directors
  - Expand size of the board
  - Appoint non-directors to be officers

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**2. Officers to Sit on the Board Ex Officio**

- Members elect officers who sit on the board ex officio
- But CNCA does not permit ex officio directors
- Example of possible workarounds
  - Members elect directors to certain seats on the board who are required to fill certain officer functions - become officers ex officio

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**H. BY-LAW ISSUES**

**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, by-law must be confirmed by members at next meeting
  - Special approval - Require special resolution of members (no need for board approval) for matters affecting members' rights, e.g., notice of members' meetings, membership transferability and conditions, absentee voting

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- CNCA by-laws 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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- ONCA also 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, by-law must be confirmed by members at next meeting
  - Ordinary approval - Require ordinary resolution of members (no need for board approval) for matters affecting members' rights, e.g., membership transferability and conditions, absentee voting
- ONCA by-laws may require similar approach as CNCA by-laws

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### 2. Approaches to By-law Drafting

- 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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### 3. Rules on Public Accountant/Auditors and Financial Review

- CNCA/ONCA provides complex rules on when a public accountant (auditor) may be waived and level of financial review
- How much detail to include in the by-law
  - Include applicable detailed rules
  - Corporations that may flip in and out of soliciting status - include both sets of rules or states that the corporation will comply with the rules and then set out the rules in policy
  - Corporations that want to have an audit in any event - by-law can state that the financials will be audited, subject to the Act

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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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- I. PRACTICAL STEPS FOR CONTINUANCE OR TRANSITION**
1. Gather current governance structure and procedure
  2. Review governing documents and consider
  3. Review the key features of the CNCA/ONCA
  4. Compare CNCA/ONCA rules with current governance structure and practice
  5. Determine whether changes should be made prior to continuance
  6. Timing of continuance/transition
  7. Drafting articles and drafting by-laws
  8. Obtain membership approval and filing
  9. Other consequential filings and records updates
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**CONCLUSION**

- Application of some of the rules is not clear
- Some corporations may need to consider workarounds in order to comply with the CNCA/ONCA while maintaining its desired governance structure
- Do not miss the 3 year time frame

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