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**The 2018 Ottawa Region
Charity & Not-for-Profit Law
Seminar
Ottawa – February 15, 2018**

**RECENT CHANGES IN
CORPORATE LAW AFFECTING
FEDERAL AND ONTARIO
CORPORATIONS**

By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.

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OVERVIEW

- New development and interesting rules/processes under federal CCA and CNCA
- Status of ONCA & Bill 154
- OCA amendments pursuant to Bill 154
- ONCA amendments pursuant to Bill 154
- OCA corporations going federal?

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A. FEDERAL – CCA AND CNCA

1. Canada Corporations Act is REPEALED !!

- *Canada Corporations Act* ("CCA") since 1917
 - Part II governs non-share capital corporations
 - Part III governs non-share capital federal statutory corporations
- *Canada Not-for-profit Corporations Act* ("CNCA") enacted to replace Part II and Part III of CCA
- CNCA was enacted on June 23, 2009, in force on October 17, 2011
- Federal statutory corporations automatically governed under Part 19 of CNCA when CNCA came into force
- All Part II CCA corporations were required to continue under the CNCA within 3 years, i.e., by October 17, 2014
- Corporations that failed to continue under the CNCA were to be dissolved

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- There were approximately 17,000 Part II CCA corporations in 2011
- By Dec 31, 2018, all Part II CCA corporations were either transitioned to CNCA or dissolved
- Regulations under the CCA was repealed on Dec 30, 2017
- Remaining provisions in the CCA were repealed on Dec 31, 2017

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2. Revival of Dissolved Part II CCA Corporations

- Part II CCA corporations dissolved for failure to transition to the CNCA can apply to be revived and transitioned into the CNCA in one step
- Use *Form 4032: Articles of Revival (transition)*
- See Corporations Canada's *Revival (transition)* guide - <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06603.html>
- The revival (transition) process involves the following
 - Preparing articles of revival (transition) and new by-laws that complies with the CNCA - and having them approved by members
 - Submitting them to Corporations Canada, which would issue a Certificate of Revival
 - For registered charities, submitting CNCA documents to Canada Revenue Agency for approval

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3. Interesting Rules/Processes Under CNCA

- Restated Articles - to consolidate changes to previous articles into one consolidated version (useful when multiple changes have been made in previous years)
- Certificate of Compliance - to show that a corporation exists under the CNCA, has filed the required annual returns with Corporations Canada, and has paid all required fees
- Certificate of Existence - to show that a corporation exists as of a specified date

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- CNCA corporations may seek approval from Corporations Canada for exemption from specific CNCA requirements (<https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06651.html>)
 1. Deeming a corporation non-soliciting
 2. Restricting access to corporate records
 3. Authorization to extend the time for calling an annual meeting
 4. Authorization relating to method of giving notice of annual meetings
 5. Authorization relating to absentee voting methods
 6. Exemption from financial disclosure requirements
 7. Deeming the gross annual revenues of a soliciting corporation
 8. Exemption from electronic document requirements
 9. Exemption from trust indenture requirements

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B. STATUS OF ONCA & BILL 154 AMENDS OCA AND ONCA

- Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") may finally be proclaimed in early 2020!!
- Ontario *Corporations Act* ("OCA") has not been substantively amended since 1953 - Part III of OCA governs non-share capital corporations
- New ONCA will apply to Part III OCA corporations
- Key timeline of ONCA
 - October 25, 2010 - ONCA received Royal Assent
 - 2013 - Original anticipated proclamation date, later delayed to January 2014
 - June 5, 2013 - Bill 85 introduced, proposing changes to ONCA, with ONCA to be proclaimed 6 months after enactment of Bill 85
 - May 2, 2014 - Ontario Legislature dissolved, Bill 85 died on the Order Paper

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- September 2015 - Ministry announced that the ONCA would come into force after two things have happened
 - Legislature has passed technical amendments to the ONCA and related legislation
 - Technology at the Ministry is upgraded to support these changes and improve service delivery and the Ministry would provide the sector with at least 24 months' notice before proclamation
- Technical amendments
 - Ontario Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, was introduced on September 14, 2017, and received Royal Assent on November 14, 2017
 - Bill 154 introduced changes to the OCA, ONCA and Ontario *Business Corporations Act*

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- Technology - Following the Royal Assent of Bill 154, Ministry's website indicates that it is upgrading technology to support the changes implemented by Bill 154 and to improve service delivery
- 24 month's notice - Ministry's website also states that it is working to bring ONCA into force as early as possible, with a target of early 2020 - thus giving NFP corporations at least 24 months' notice before the ONCA comes into force
- See Ministry's website <https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations#section-1>
- Further details will be provided by the Ministry of Government and Consumer Services closer to when the ONCA comes into force.

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- Once ONCA is proclaimed
 - Part III OCA corporations will have 3 years to transition to the ONCA to make the necessary changes to their governing documents
 - ONCA applies automatically to Part III OCA corporations upon proclamation, except where overridden by existing corporate documents
 - Optional transition process
 - Review LP, SLPs, by-laws
 - Prepare articles of amendment and new by-law
 - Membership approval, filing, issue certificate of amendment
 - Registered charities - file copies with Canada Revenue Agency
 - Share capital social clubs under the OCA will have 5 years to continue under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*

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C. OCA AMENDMENTS (Bill 154)

- Bill 154 (Schedule 7) amends certain provisions in the OCA to allow Part III OCA corporations to enjoy some of the modernized rules in the ONCA and provide more flexibility to their operation
- Bill 154 received Royal Assent on November 14, 2017
- Some key changes to the OCA became effective on Nov 14, 2017, and Jan 13, 2018 - These changes are reviewed in this presentation
- Bill 154 also contains other changes to the OCA that will become effective at a later time
- See *Charity & NFP Law Bulletin* No. 406 and No. 412
<http://www.carters.ca/pub/bulletin/charity/2017/chylb406.pdf>
<http://www.carters.ca/pub/bulletin/charity/2017/chylb412.pdf>

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Summary of key OCA changes (effective Nov 14, 2017 and Jan 13, 2018)

- Audit exemption
 - Members may waive audit by 80% majority vote if annual revenue is less than \$100,000 (or an amount prescribed by the regulations)
 - Previous rules - unanimous membership approval if annual income is less than \$100,000
- Membership issues
 - Notice of members' meetings may be given by electronic means
 - Previous OCA rules - must give notice by mail
 - Members' meetings can be held electronically
 - Previous OCA rules - members' meetings cannot be held electronically (must attend in person or by proxy)
 - The court may make an order appointing the required number of directors if a corporation has no directors and no members

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- Board issues
 - A director may be removed by a simple majority vote of the members, unless corporate documents in place before Nov. 14, 2017, provide otherwise
 - Previous OCA rules - 2/3 majority vote to remove a director
 - New rule does not apply to *ex officio* directors
 - By-laws may provide that non-members may be elected to the board
 - Previous OCA rules - only corporate members may be elected to the board
 - Objective standard of care for directors and officers
 - Previous rules - OCA is silent, directors and officers are subject to common law subjective standard of care
 - The court may make an order appointing the required number of directors if a corporation has no directors and no members

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- General issues of interest
 - Special legislation and charity law will prevail over the OCA in the event of a conflict
 - Contracts entered into before incorporation of a corporation can be adopted by the new corporation, and the person who entered into such contracts would not be liable
 - Corporations will have full capacity, rights, powers and privileges of a natural person
 - OCA corporations may change jurisdictions to outside Canada (export continuance)

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D. ONCA AMENDMENTS (BILL 154)

- Bill 154 (Schedule 8) proposes amendments to the ONCA
- Bill 154 includes substantially similar amendments to the ONCA as those previously in Bill 85, with a few new amendments
- Coming into force date of the ONCA is unknown and these ONCA amendments will take effect on various dates
- See *Charity & NFP Law Bulletin* No. 409
<http://www.carters.ca/pub/bulletin/charity/2017/chylb409.pdf>

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Summary of key ONCA changes

- Consent to be a director must be in writing, and consents for first directors upon incorporation must be in "approved form"
- Threshold to be considered a public benefit corporation would be prescribed by regulation (as opposed to \$10,000 in the ONCA)
- When annual financial statements are to be circulated to members would be prescribed by regulation (as opposed to 21 days before AGM in the ONCA)
- ONCA will not apply to corporations sole "except as is prescribed"
 - Exempting the application of the ONCA to corporations sole had never come up in prior consultations
 - ONCA already has a mechanism dealing with special act corporations

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- Proxy votes will become optional (no longer mandatory right of members to vote by proxy) and articles and by-laws may restrict proxyholders to members only
- Implementation of all membership class votes will be delayed for at least 3 years after proclamation of ONCA
 - ONCA originally provides that members in different classes (voting and non-voting) will have class vote right upon proclamation
 - Bill 85 only delayed class votes of non-voting members
- Transition process from OCA to ONCA is better clarified, including certain provisions in by-laws or special resolutions will continue to be valid indefinitely until articles of amendment are endorsed (e.g., by-law provisions regarding number of directors or membership classes)

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- Distribution of net assets on winding up or dissolution of public benefit corporations is clarified
 - Net assets of a public benefit corporation must be distributed (i) to a Canadian corporation that is a registered charity with similar purposes to the dissolving corporation (instead of “charitable corporations with similar purposes”) or (ii) to the government

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E. OCA CORPORATIONS GOING FEDERAL?

- With the delay of the proclamation of the ONCA, some OCA Part II corporations wonder if they should move its jurisdiction to the CNCA
- It is a fundamental change, not a minor matter, which needs careful consideration whether this is suitable for the corporation in question
- There could be many factors at play when determining whether it would be desirable for an OCA corporation to move into the CNCA - these factors should be carefully reviewed and evaluated
- The convenience of not wanting to wait for the proclamation of the ONCA may not necessarily be a sufficient driving force in and of itself to justify moving into the CNCA

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- Two steps are required
 - Export out of OCA - Need to obtain approval from the Ontario government by filing *An Application for Authorization to Transfer to Another Jurisdiction* (Form 13) after having been adopted by a special resolution of the directors and members. Also need approval from the Ontario Public Guardian and Trustee if the corporation is a charity
 - Import into CNCA - Need to adopt Articles of Continuance (Form 4011) and a new by-law that meets the requirements of the CNCA. The articles, notice of registered office address and first board of directors, NUANS name search report and the filing fee must be filed with Corporations Canada. A certificate of continuance under the CNCA will be issued. The by-law will also need to be filed within one year

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- If the corporation is a registered charity, the continuance documents must also be filed with Canada Revenue Agency for approval
- Other extra-provincially may also be required
- See *Charity & NFP Law Bulletin* No. 379
<http://www.carters.ca/pub/bulletin/charity/2016/chylb379.pdf>

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- The following are some key factors why it may be beneficial to continue under the CNCA
 - Having national scope of operations - These corporations are often originally incorporated under the OCA in the early stage of their establishment, and then have their programs expand over the years to other provinces or nationwide over the years
 - Holding membership meetings in different provinces from time to time - A corporation that has members in different provinces may want to hold members' meetings in different provinces from time to time (rather than just in Ontario if it was to remain under the OCA)
 - Having the right to use corporate name in all provinces - The right of a federal corporation to use its corporate name in all provinces is entrenched under the Constitution of Canada

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- Facilitating amalgamation and other corporate re-organization - For example, in order to “amalgamate” an OCA corporation with a CNCA corporation, need to move the OCA corporation into CNCA first, before amalgamating the two CNCA corporations (because it is not permitted to amalgamate an OCA corporation and a CNCA corporation)
- Being subject to less oversight of the Ontario Public Guardian and Trustee - Charities in Ontario that are CNCA corporations are subject to less oversight by PGT than OCA charitable corporations
- Facilitating operational issues - There could be many operational issues that may drive the need for an OCA corporation to be continued under the CNCA

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