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The ONCA and Beyond: Governance and Policy Issues to Consider

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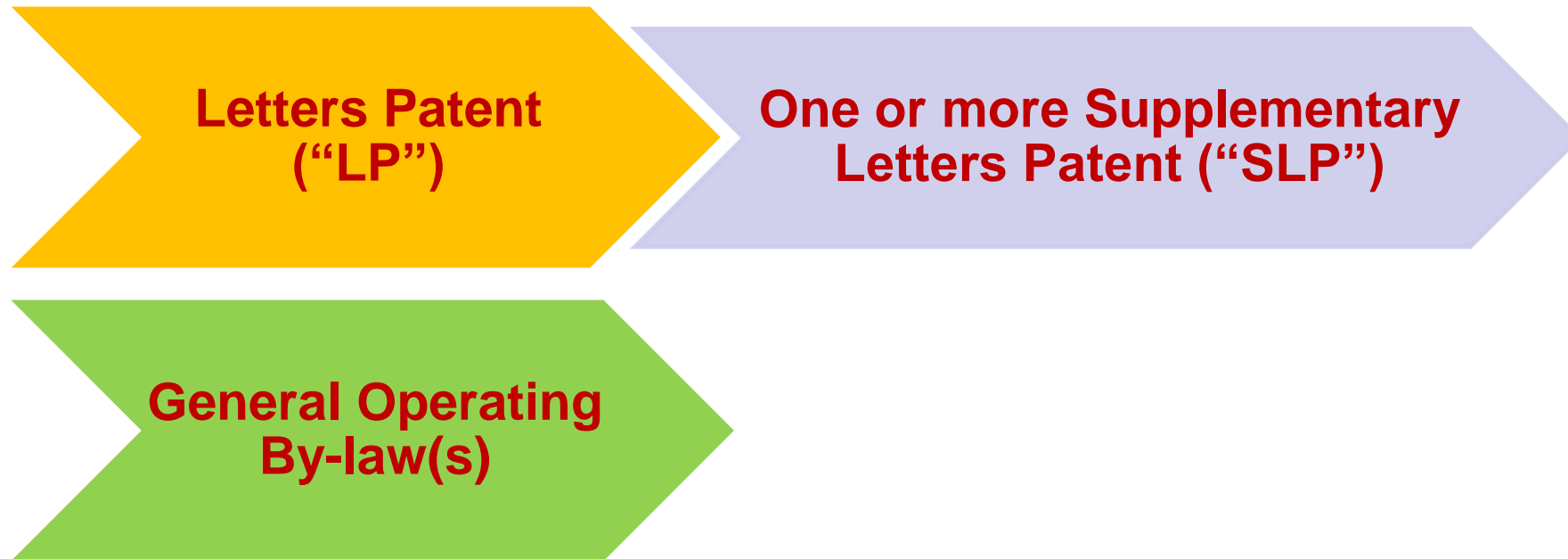
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**PART I:
ONCA TRANSITION
BASICS**

A. SETTING THE STAGE

- Each FOLA Law Association has been incorporated in Ontario under Part III of the Ontario *Corporations Act* (“OCA”)
- They are non-share capital membership corporations
- Governed by LP, possibly one or more SLP(s), and by-laws



- Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) was proclaimed into force on October 19, 2021
- ONCA was amended by Bill 91, in effect October 1, 2023
- ONCA applies to all corporations incorporated under Part III of OCA
- New online Ontario Business Registry (“OBR”) also launched on October 19, 2021
- Today’s presentation
 - General overview of the process to comply with the ONCA – called “ONCA Transition” process
 - Governance and not-for-profit (“NFP”) corporation “basics”
 - Key governance and policy issues for consideration by FOLA Law Associations

B. IMPLICATIONS OF ONCA PROCLAMATION

Automatic application of ONCA

- ONCA applies to all Part III OCA corporations automatically upon proclamation

Effect of doing nothing

- Corporations will not be dissolved
- The following governing documents will continue to govern for 3 years until October 18, 2024, even if inconsistent with ONCA
 - Letters patent (“LP”)
 - Supplementary letters patent (“SLP”), if any
 - By-laws
 - Special resolutions
- Starting October 19, 2024, inconsistent provisions (with a few exceptions) will be deemed to be amended to the extent necessary to comply with the ONCA – will result in uncertainty – complicated guessing game

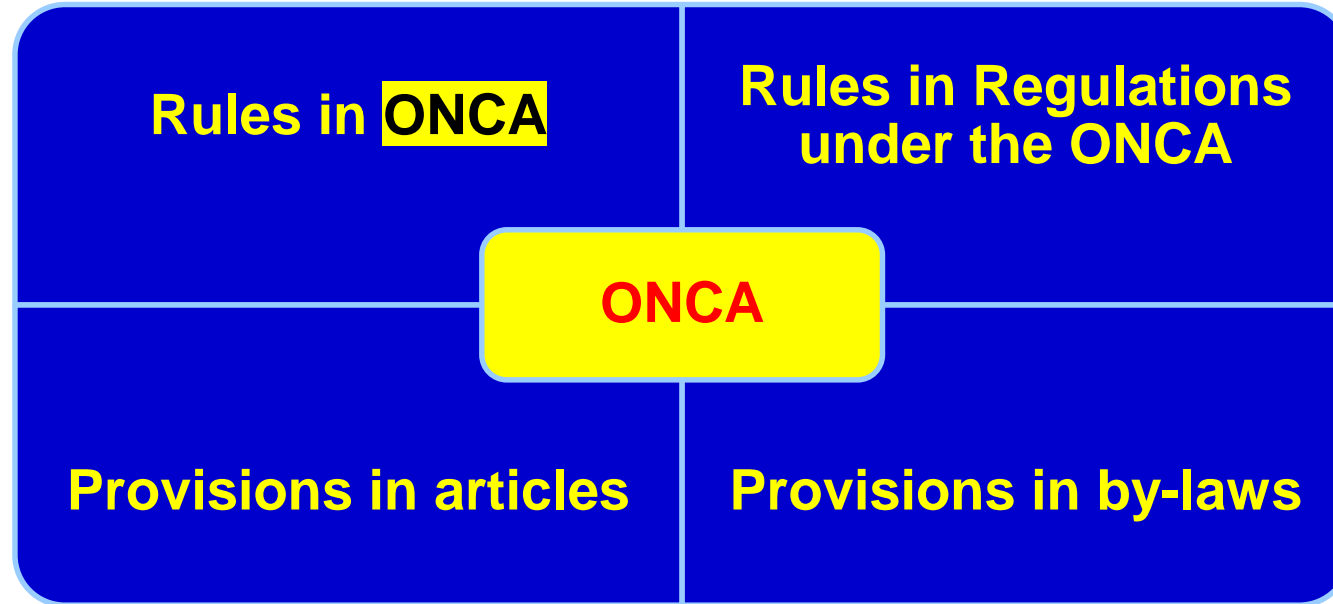
Optional transition process

- Can do ONCA transition within 3 years of proclamation to make necessary changes to current governing documents
- Adopt Articles of Amendment
- Adopt ONCA-compliant by-laws
- Prudent to go through the transition process

End result

- After the transition process, corporation will be governed by LP and SLPs, if any, as amended by Articles of Amendment – consider consolidating them in Restated Articles of Incorporation
- ONCA-compliant by-laws

C. ONCA FRAMEWORK



- ONCA is modeled after rules for public for-profit companies
- Lots of rules in the ONCA that were not in the OCA
- The new rules are complicated
- Need to know and understand how the rules work with each other

Three Types of Rules in ONCA

Mandatory Rules	Cannot be overridden by the articles or by-laws	Corporations must follow these rules
Default Rules	Apply automatically if articles/by-laws silent	Corporations may override the default rules Overriding provisions may be set out in articles or by-laws – depending on the rules in question
Optional Rules	Options for corporations to opt in to have certain optional rules apply	Corporations may opt in to the options available Opt-in provisions may be set out in articles or by-laws – depending on the rules in question

**New documents
required**

So ...

More paperwork?

D. ONCA TRANSITION DOCUMENTS

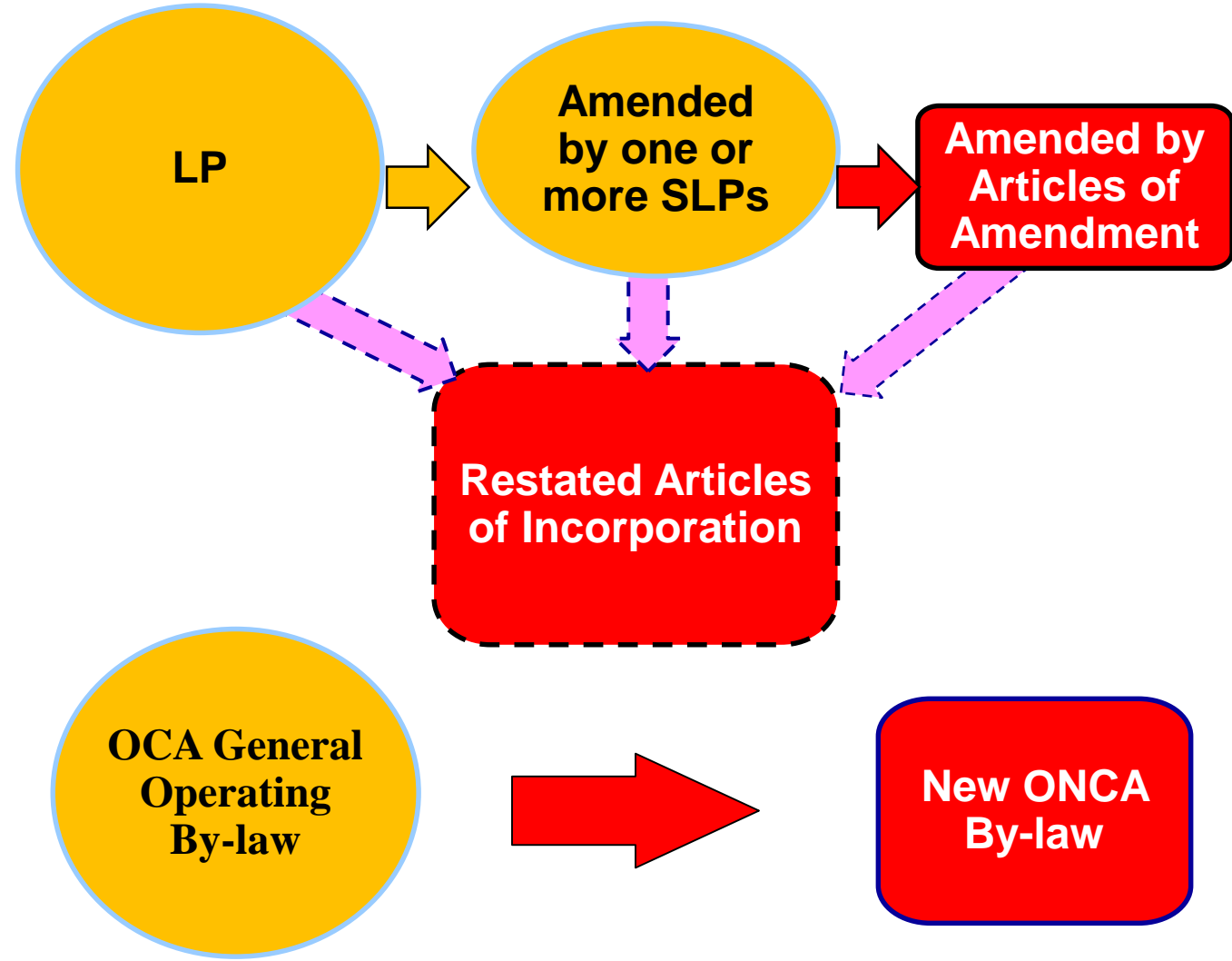
1. Need ONCA-Compliant By-law

- Current OCA by-law
 - Will have provisions that do not comply with the ONCA
 - Will have gaps in the by-law that do not address some of the new ONCA rules
- Need to know how the ONCA rules work in order to understand
 - What rules must be followed
 - What rules may be overridden, how to override, and where to put overriding provisions (articles vs by-law)
 - What rules can be opted in, and where to put the opt-in provisions (articles vs by-law)
 - What else to include in by-law?
- More efficient to draft a fresh by-law than to amend current by-law

2. Articles of Amendment and Restated Articles

- Simply adopting an ONCA-compliant by-law is not sufficient to complete the ONCA transition process
- LP and SLPs also need to be amended to comply with new ONCA requirements – by Articles of Amendment
 - Set out number of directors and membership classes, including voting rights
 - Dissolution clause which complies with the ONCA
 - Add default mandatory “special provisions” and others to co-ordinate with mechanisms in the by-law
- After Articles of Amendment are issued, corporation will need to flip back and forth between LP, as amended by SLP(s), as amended by Articles of Amendment
- Can consolidate all these into Restated Articles of Incorporation
- Complicated, not just filling out forms

ONCA Transition Documents



What **does** my Law
Association need to
DO to **transition**??

E. STEPS TO TRANSITION UNDER THE ONCA

Collect all governing documents

- LP, SLPs, all by-laws still in effect and governance manuals

Review governing documents

- Do they reflect current practices? Are other changes needed?

Study key ONCA features

- Will they impact current governance structure?

Prepare Articles of Amendment and Restated Articles

Prepare ONCA compliant by-laws

Approval and filings

- Need formal board and members' approval of final drafts
- File signed Articles of Amendment and later Restated Articles with the Ministry, but not by-laws

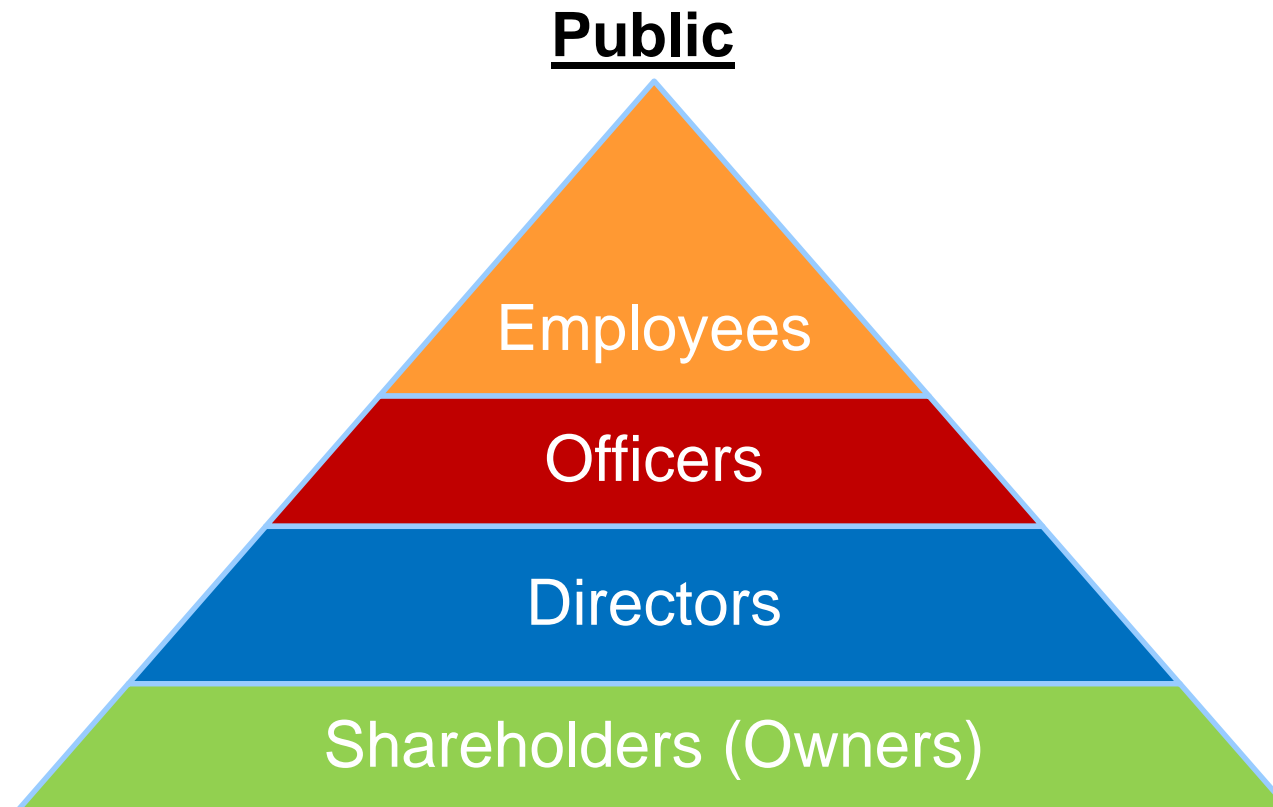
PART II:
**Governance and NFP
Corporation Basics**

A. WHAT IS GOOD GOVERNANCE?

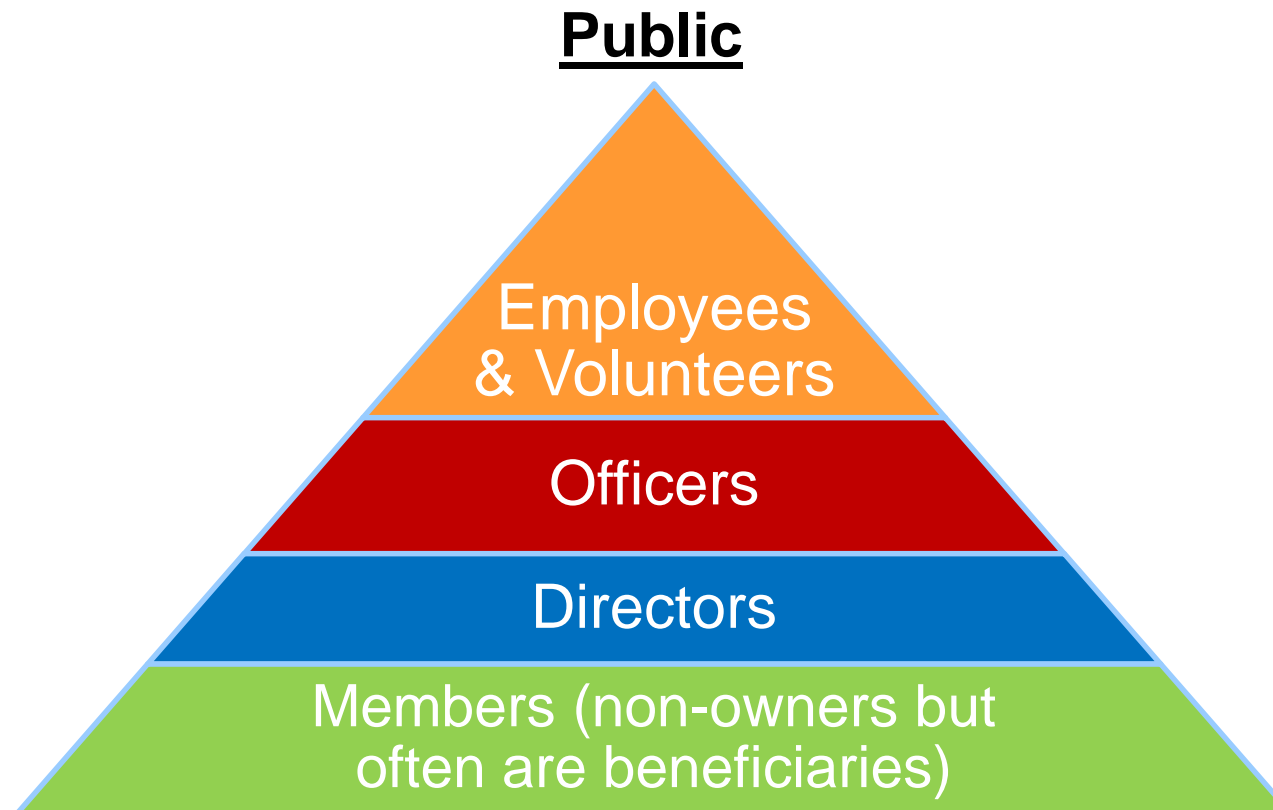
- A corporation is a legal fiction – it only becomes real through the actions of individuals associated with the corporation
- The law and the public look to the corporation's governing body, i.e. the board of directors, to put in place **the rules, processes and structures used to direct and manage the corporation's operations and activities**
- Governance includes having **clear lines of accountability and responsibility and ensuring that the corporation acts in accordance with the law**
- The goal of good governance is **to ensure the effectiveness, credibility and sustainability of the corporation**
- In doing so, the directors and officers of a corporation will be able to **fulfill their duties to the corporation**

B. UNDERSTANDING DIFFERENT TYPES OF CORPORATIONS

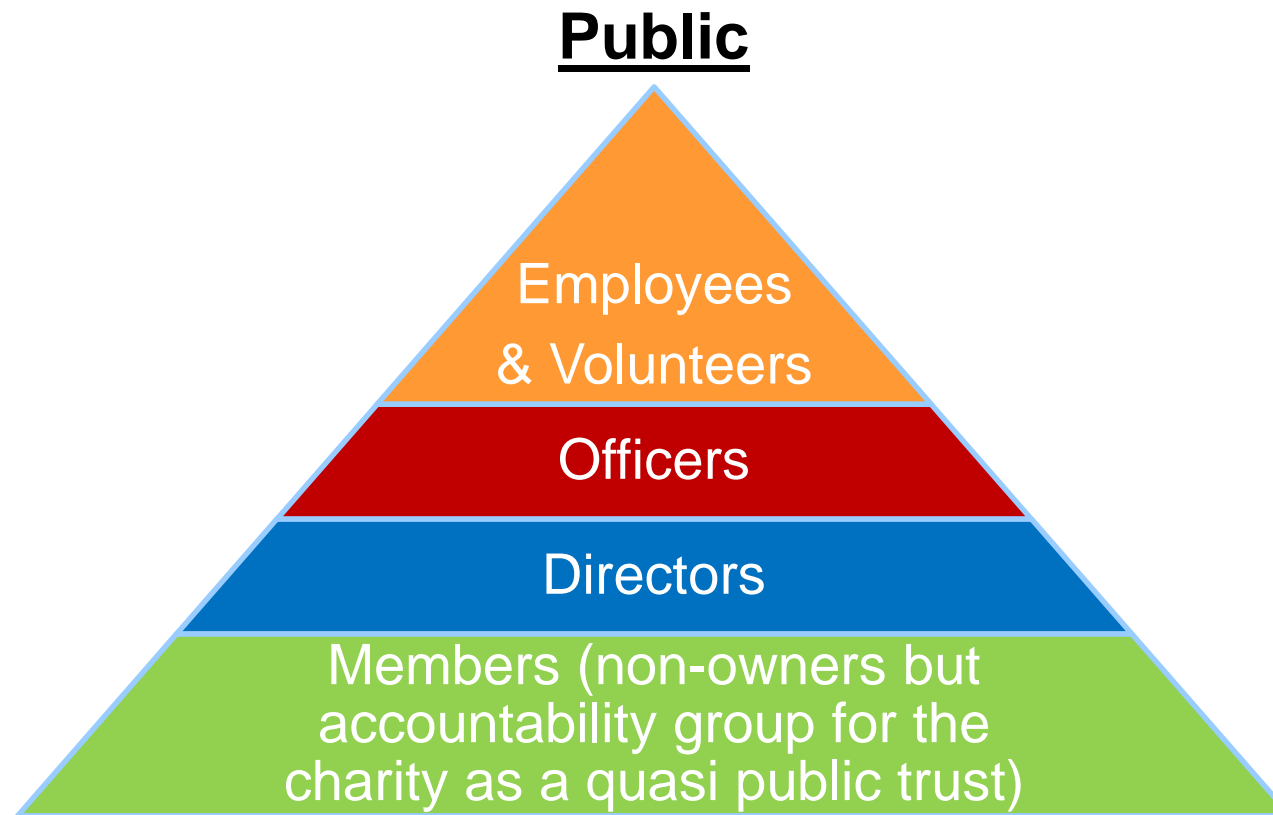
- **Share Capital Corporations**
 - Business purpose to make a profit
 - Pays tax



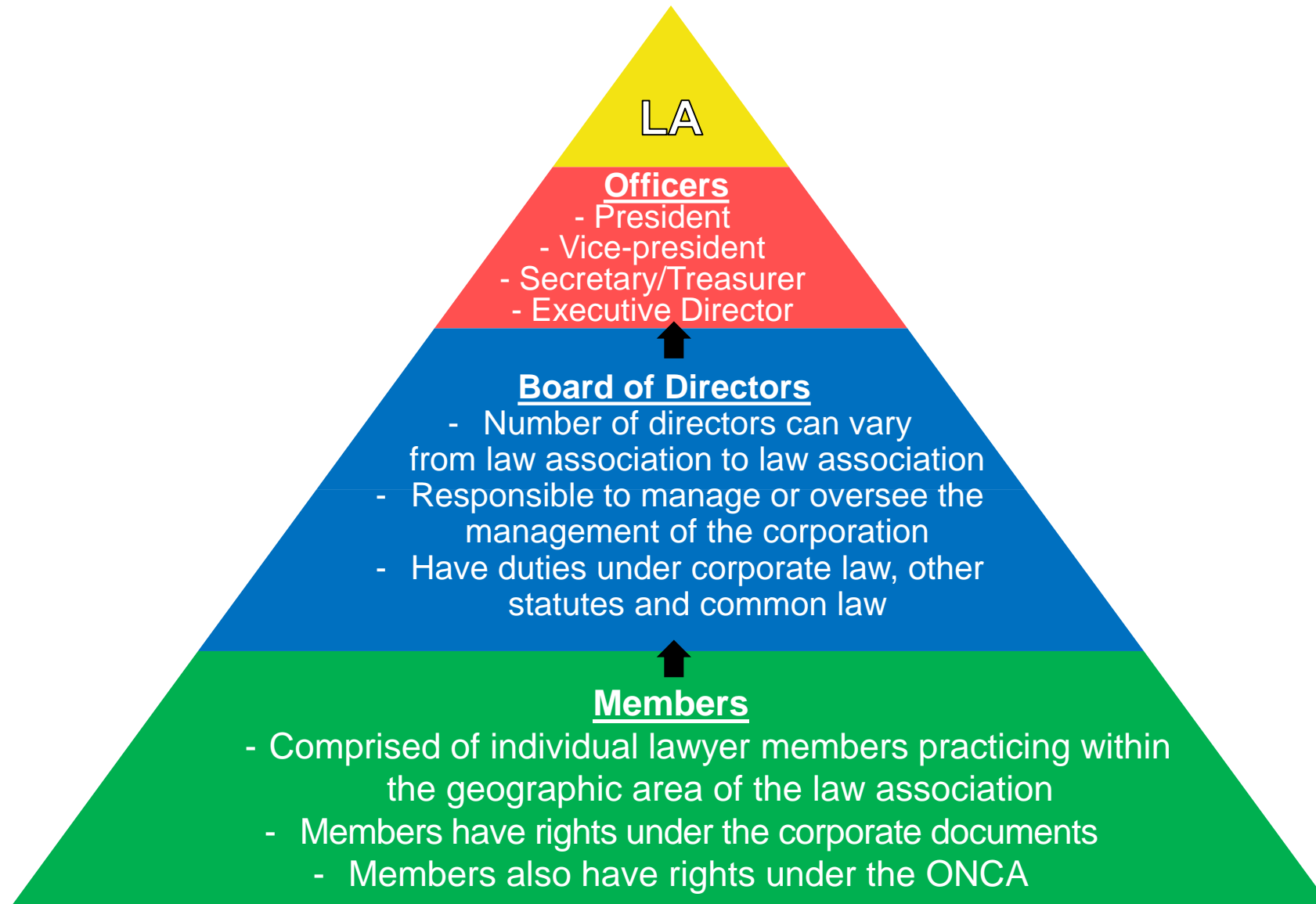
- **Not-for-Profit Corporations (“NFP Corporations”)**
 - Non profit purpose
 - Tax exempt as non-profit organizations under the *Income Tax Act* (“ITA”)



- **Charitable Corporations**
 - Charitable purpose akin to a public trust
 - Tax exempt under the ITA
 - Can issue tax receipts for donations and receive gifts from other qualified donees



C. BASIC STRUCTURE OF A LAW ASSOCIATION AS A NFP CORPORATION



D. WHAT ARE THE BASIC COMPONENTS OF NFP CORPORATIONS?

1. NFP Corporations Must Have Members

- NFP corporations, such as those incorporated under the ONCA, are required to be membership based
- They must have both corporate members, as well as a board of directors and officers
- Members and directors have different duties, rights and obligations in their respective roles
- Directors are elected by the members and are responsible to manage or supervise the management of the corporation's affairs
- Members have statutory protection from liability, whereas directors have exposure to liability under some situations

- Members of the corporation have the power to elect the board of directors, receive the financial statements and appoint the auditor each year
- Other Member rights/powers under the ONCA include:
 - The right to receive notice of members meetings and to vote
 - The right to nominate candidates for directors
 - The right to remove directors by simple majority vote
 - The right to requisition a members' meeting based on 5% of voting rights
 - The right to submit a proposal to the corporation to discuss a matter at AGM
 - Member approval required for certain fundamental changes, like amendment of articles or by-laws
 - The right to obtain certain types of court orders, like oppression and derivative orders, as well as compliance and restraining orders
 - The right to access corporate records and obtain membership lists

- However, members do not own the corporation and have no proprietary rights to any of the assets of the NFP Corporation
- Membership can be open or closed
 - Open – broad-based or narrow in scope
 - Closed – the members and directors are the same individuals, so that the membership is restricted to directors
- In corporations that are closed membership, the members will need to wear a “different hat” in their roles as members and directors
- For corporations that have an open membership, it will be important that the directors be mindful of the statutory rights that members of the corporation can exercise

2. Who is a Director of a NFP Corporation?

- In general terms, a director of a NFP Corporation includes:
 - Anyone who takes on the role of the directing mind of the corporation
 - Can be known by different names, such as director, council member, governor, board member, trustee or elder
 - The name given to a director is not what is important
 - Instead, it is the authority that the person exercises that determines whether that person is a director
 - However, a director has no power to act on his or her own
 - Rather, the power under the ONCA to “manage or supervise the management of the Corporation” lies with the board of directors as a collective

3. Who is an Officer of a NFP Corporation?

- In general terms, an officer of a NFP Corporation includes:
 - The individuals (whether they be directors or not) who carry out the operative functions of the corporation at the direction of the board
 - Normally includes president, vice-president, secretary, treasurer, and CEO/executive director
 - Has fiduciary obligations to the corporation but not to the same degree as directors
- An officer can be a director but not necessarily
- An officer could become a *de facto* director if the officer takes on the functions and decision making of a director or is appointed as the “managing director” under the ONCA

E. SUMMARY OF COMMON LAW FIDUCIARY DUTIES OF DIRECTORS

Duty to act in good faith with honesty and loyalty

Duty of diligence

Duty to exercise power

Duty of obedience

Duty of confidence

Duty to avoid conflict of interest

Duty to continue to act

F. UNDERSTANDING THE LIABILITIES OF DIRECTORS AND OFFICERS OF NFP CORPORATIONS

1. Common Law Liabilities

Liability for Breach of Fiduciary Duty

Liability for Breach of Corporate Authority

Liability Risk for Negligent Mismanagement (Tort)

Liability Risk in Contract

PART III:
**Key Governance and
Policy Issues for
Consideration**

A. CORPORATE PURPOSES (FORMERLY OBJECTS)

- A Law Association's current objects may be outdated
- Even if they generally reflect the Law Association's main purposes, the objects may not provide full corporate authority for all current programs and activities
- If this is the case, then it is important for the Board to address this issue:
 - To ensure fulsome corporate authority
 - To satisfy section 43(2) of the ONCA which requires directors/officers to comply with the Act, its regulations and the corporation's own articles and by-laws
- May be necessary for current objects to be deleted and replaced, or supplemented, with new updated purposes set out in the Articles of Amendment, not the by-laws

B. MEMBERSHIP

- May have multiple member “classes”
 - If rights in one member class differ from those in another class, e.g. voting, then there could be multiple member classes which must be listed in Articles of Amendment
- Qualifications may include the location of a member’s “principal” or “dedicated” place of practice, office location and/or personal residence
- Each term’s meaning must be clear and consistently applied to determine who belongs in each class – this could impact who can vote at members’ meetings, is eligible for election as a director and/or has library privileges
- Need to monitor members’ status with the Law Society of Ontario, whether their dues are paid and when their membership term expires
- Suspension and termination of membership now subject to detailed ONCA requirements to provide procedural fairness
- May be better to use admission/renewal process with “difficult” members
- Could also have non-members, e.g. “Friends of”, Honoraries, etc.

C. DIRECTORS

- Review size of the board of directors – Too small, too large or just right?
 - Large board may make discussion of key operational issues challenging and impact directors' ability to fulfill their fiduciary duties
 - 3 directors minimum with no maximum number requirement under the ONCA – ideal size is a minimum of 5 to a maximum of 9 to 12
- Consider directors' term and maximum term of office – Are changes required? Any exceptions for directors who are elected as officers?
- Board composition – elected directors vs. ex officio directors
- Be aware of members' rights under the ONCA to nominate directors from AGM floor – consider use of advance notice by-law provisions
- Director consents – Required under ONCA/use to address various issues
- (New) – ONCA requires that members be permitted to remove a director for any reason at any time by Ordinary Resolution (majority vote) at properly called members' meeting
 - Many by-laws have 2/3rd vote requirement to remove a director

D. EXECUTIVE COMMITTEE

- May be time to revisit current executive committee (“EC”) provisions
- ONCA permits board of directors to appoint an EC and delegate to the EC any board powers, except for specific matters in section 36(2), ONCA
- The role of an EC can vary:
 - Option 1 (at one end): EC exercises all board powers between board meetings except for the section 36(2) matters in the ONCA
 - Option 2 (at other end): Limit EC to carry on well-defined duties set by the board and/or only deal with emergency or time-sensitive matters between board meetings, with option of subsequent board ratification
 - Option 3 (middle ground): EC exercises all board powers between board meetings except for ONCA requirements, plus any other actions which the board excludes from being delegated through board policy
- Who will be EC members? Usually the officers but could be other directors

E. OFFICERS

- Traditional officers: president, vice-president(s), secretary, treasurer
- Others: asst. secretary, asst. treasurer, exec. director, past president
- Review how officers are elected/appointed, qualification requirements, term of office and maximum term, and removal if not performing well
- If EC nominates officers, consider having a policy setting out how nominations are brought to and voted on by the board of directors
- Consider officer succession “ladder” – one director is nominated for appointment to first “rung”, e.g. secretary, and then moves up ladder each year, *i.e.* treasurer, then vice-president, president and past president
- Advantages: Good training ground, provides broad experience for person who will ultimately be president, helps with succession planning
- Disadvantages: Very time consuming for these officers, may miss out on good candidates who cannot commit for extended terms of office

F. BOARD MEETINGS

Issues to Consider:

- Notice for Board meetings
- Who can attend the meetings
- Ok to participate by phone / electronically but everyone must be able to communicate with each other simultaneously and instantaneously
- Directors cannot appoint proxies – must attend themselves!
- (New under ONCA) – Dissent obligations for directors at meeting and absent directors
- Meetings best for fulsome discussions but consider written directors' resolutions in lieu of a meeting, e.g. important and urgent matters
- Need to coordinate ONCA disclosure of interest (conflict) rules with existing conflict of interest policy – likely need to update existing policy
- Need to ensure directors keep all matters of the corporation confidential – build into director's consent

G. MEMBERS' MEETINGS

- Annual general meetings (AGM): Must hold within 6 months of year end
- Mandatory business includes: (1) receiving the financial statements, (2) electing directors as required and (3) appointing the auditor
- Special meetings called by the Board or requisitioned by Members (10%)
- Notice period: 10 to 50 days before meeting
- Record date: Can be helpful to “cut off” new memberships within designated time period before members’ meeting
- Quorum: Can be high or low but consider impact of either approach
- Voting: By show of hands, ballot at chair’s initiative or upon member request, telephone or electronic means, or absentee voting
- Proxies: Optional under ONCA but very complicated – if offer proxies, must follow all ONCA rules and ensure use of ONCA-based proxy form

H. REMUNERATION OF DIRECTORS AND OFFICERS

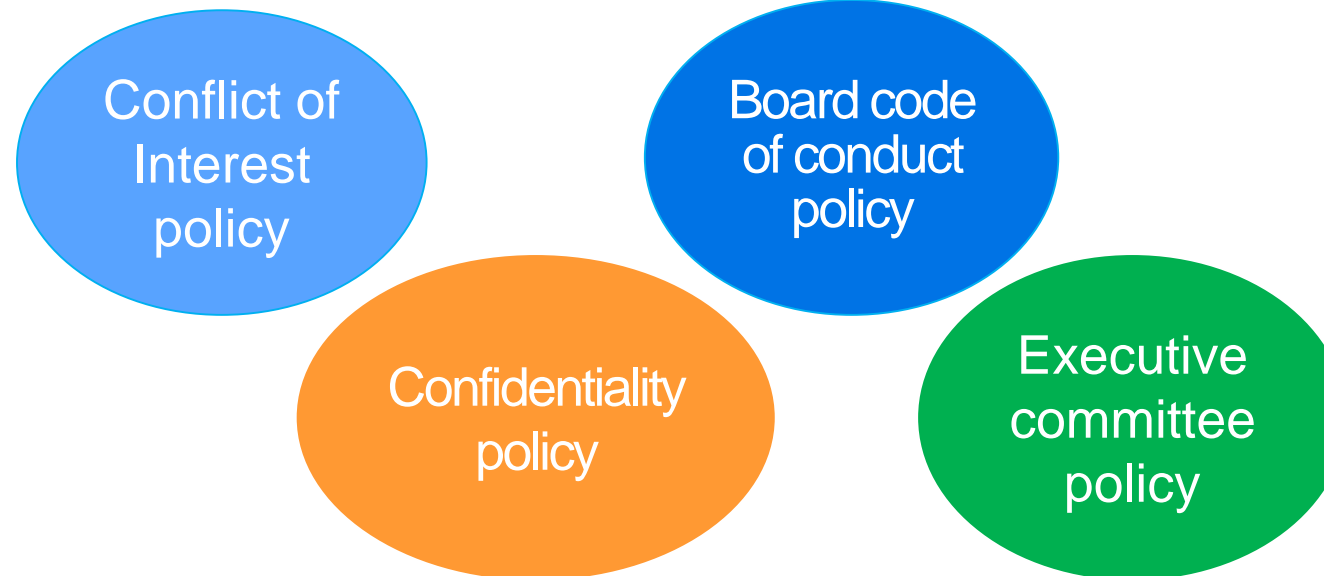
- Some Law Associations remunerate their officers
- As NFP Corporations, Law Associations may remunerate officers, e.g. the president who has extensive responsibilities within a time-consuming role
- However, not the norm for officers within not-for-profit professional associations to receive remuneration
 - Most people serve as officers as a form of service to their profession and/or for the associated prestige
 - Paying a person to serve as an officer may change nature of their relationship with the Law Association
 - Shift from volunteer doing act of service over to staff person
 - Best to have officers serve without any self interest in carrying out their responsibilities within the professional association

I. FUTURE AMENDMENTS OF CORPORATE DOCUMENTS

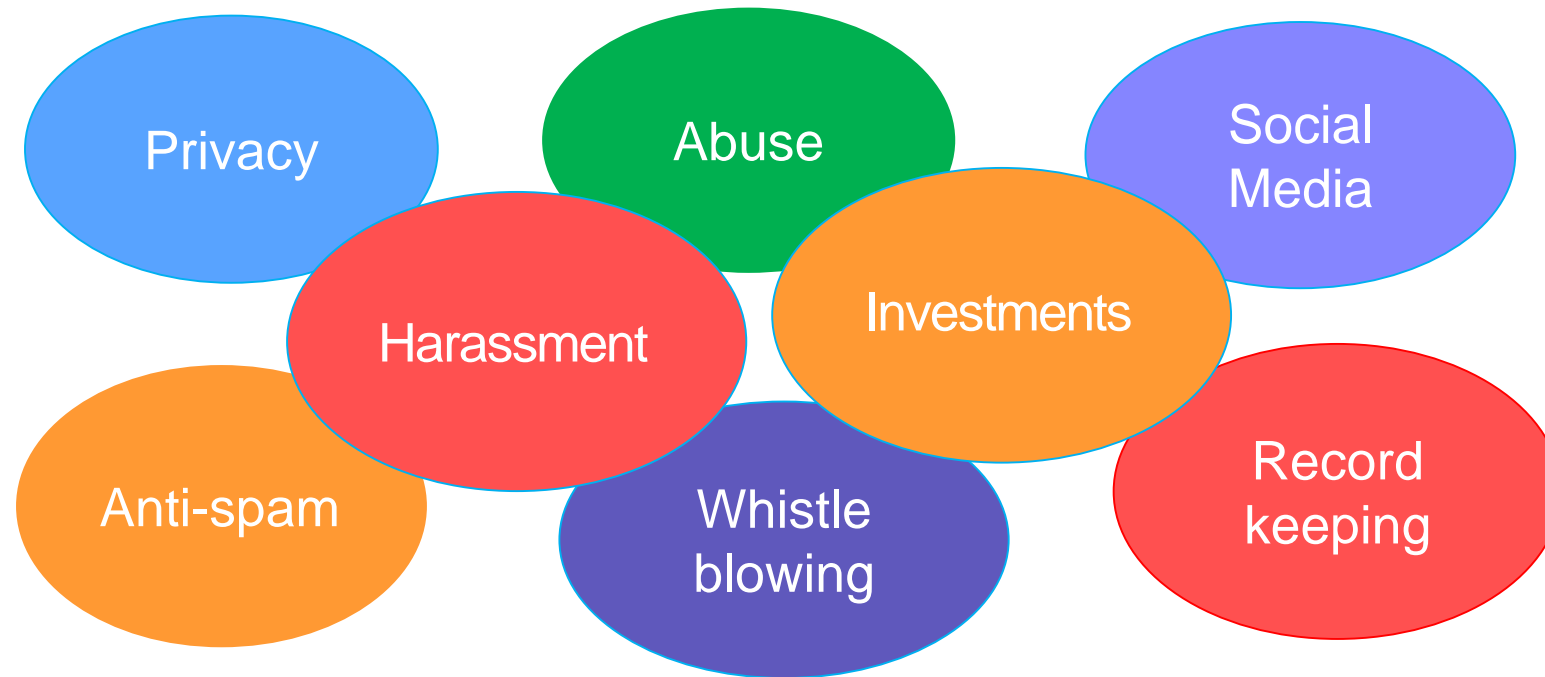
- Articles of Amendment – Can only be amended if sanctioned by a special resolution of members at duly called meeting
- Amendment of by-laws – Two options:
 - Option 1: Board adopts new by-law, effective immediately, provided the board submits the said by-law to the members at next meeting to confirm, reject or amend by ordinary resolution
 - With this option, the ONCA requires certain by-law sections must be approved by the members by special resolution (see ONCA, sections 103(1)(g),(k) and (l))
 - Option 2: Board adopts new by-law, but it is not effective until sanctioned by a special resolution of members at next meeting
 - ONCA requires that this option be set out in the Articles

J. MANAGING POTENTIAL RISK - POLICIES AND OTHER MEANS

- Understand the role of the board
 - Continually educate board members on legal duties of being a director
 - Prepare and regularly update board manual with key legal documents
- Development of governance policies, *e.g.*



- Development of operational policies, *e.g.*



- Corporate indemnity, *e.g.* the corporation indemnifies
 - Directors
 - Officers
 - Others

Establish committees and advisory boards, as needed

- Can be an effective means of attracting members to participate without the risk of being directors
- Committees are accountable to the board of directors

Establish effective risk management in operations

- Develop and implement a legal risk management checklist, see sample checklist at: [https://www.carters.ca/pub/checklist/NFP Checklist.pdf](https://www.carters.ca/pub/checklist/NFP%20Checklist.pdf)
- Establish a legal risk management committee, either on its own or in conjunction with another committee to oversee legal risk compliance issues



[Jacqueline M. Demczur](#), B.A., LL.B. – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations*, and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity & NFP Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Charity & Not-for-Profit Law Seminars*.

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