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Editor-in-Chief: Gilbert S. Sharpe, B.A., LL.B., LL.M.
Co-Editor-in-Chief: David N. Weisstub, M.A., J.D.

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• GUEST EDITOR'S NOTE •

Elena Hoffstein
Fasken Martineau DuMoulin LLP

A number of significant developments in the Canadian charitable sector took place in the regulatory and case law areas both federally and provincially. These changes will affect the manner in which charities operate. This issue of *Health Law in Canada* and the issue that will follow in February 2013 focus on some of the more important changes that will impact hospitals, foundations, and other charities in the health sector. This newsletter begins with the "Essential Charity Law Update," which summarizes some of the more important developments over the course of the past year.

Significant changes to the corporate statutes that govern non-share capital corporations took place both federally and provincially, as well. Those changes will be summarized in both this and the next newsletter. In this issue, we focus on the new federal statute, the *Canada Not-for-profit Corporations Act* [*CNCA*]. This statute was proclaimed in force on October 17, 2011, and charities that have been governed by the predecessor statute, the *Canada Corporations Act*, have until October 17, 2014, to continue under the *CNCA*.

• SPECIAL ISSUE—PART 1 •

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Please address all editorial inquiries to:

Boris Roginsky, Journals Editor
LexisNexis Canada Inc.
Tel. (905) 479-2665; Fax (905) 479-2826
E-mail: hlic@lexisnexis.ca.

The final article of this issue highlights the major similarities and differences between the *CNCA* and the new provincial corporate statute, the *Ontario Not-for-profit Corporations Act, 2010* [*ONCA*], noting some issues relating to charities that are transitioning to the new regimes. The *ONCA*, which will be discussed in the next newsletter, will replace the *Ontario Corporations Act* that has not been substantially amended since 1953. It is anticipated that the *ONCA* will be proclaimed on July 1, 2013.

In addition to continuing the summary of changes in the governance of charities with the provincial *ONCA*, the second of this two-part series on issues relating to the charitable sector will contain an article reviewing the new Fundraising Guidance recently issued by the CRA, followed by a review of the impact of two recent items of legislation on the ability of hospitals and foundations to engage in fundraising: the Ontario *Personal Health Information and Protection of Privacy Act* [*PHIPA*] and the Bill C-28 or "Fighting Internet and Wireless Spam" bill ("FISA").

The final article of the February issue considers a recent amendment to the Ontario *Human Rights Code*, which aims to prohibit discrimination on the grounds of gender identity or gender expression.

• ESSENTIAL CHARITY LAW UPDATE •

Terrance S. Carter
Carters Professional Corporation and Fasken Martineau DuMoulin LLP

A. Introduction

Over the past year, Canada's charitable sector has experienced a number of important regulatory and common law developments at the federal and provincial level that will significantly impact how charities operating in Canada and abroad. The propose of this article is to provide a brief overview of some of the more important developments in the last year, including changes to the *Income Tax Act*, new publications form the Charities Directorate of the Canada Revenue Agency ("CRA"), and court decisions.

B. Corporate Update

1. New *Canada Not-for-profit Corporations Act*

The *Canada Not-for-profit Corporations Act*[1] [*CNCA*] was proclaimed into force on October 17, 2011, succeeding the *Canada Corporations Act*[*CCA*][2] as the legislation governing Canadian charitable and not-for-profit corporations that are federally incorporated. Existing *CCA* corporations have until October 17, 2014, to continue under the *CNCA* or face dissolution. As part of the continuance process under the *CNCA*, existing *CCA* corporations will need to bring their by-laws up-to-date to meet the requirements of the *CNCA*. As well, charities must obtain the CRA's approval if they are planning to make any change to their charitable objects.

Corporations with multiple membership classes, including non-voting members, may want to consider whether they want to continue with a multi-class structure. This is because, under the *CNCA*, members of all classes, including non-voting members, will have a right of veto over certain fundamental changes, including continuance. Corporations may, therefore, wish to change their membership structure in advance of continuing under the *CNCA* so that there is only one class of members. In this regard, one option is to restructure secondary membership classes into "supporters," "associates," "fellows" or other similar terminology in order to avoid classifying them as members.

2. New Ontario *Not-for-profit Corporations Act, 2010*

The *Ontario Not-for-profit Corporations Act, 2010* [*ONCA*][3] received Royal Assent on October 25, 2010, and was originally expected to be proclaimed in force on January 1, 2013. However, on September 26, 2012, the Ministry of Consumer Services announced that they had delayed the tentative proclamation date to July 1, 2013.

Once the *ONCA* is proclaimed into force, it will automatically apply to all non-share capital corporations incorporated under Part III of the *Ontario Corporations Act* [*OCA*].[4] As such, *OCA* corporations do not need to take any specific action in order to come under the *ONCA*. However, if there are any provisions in their letters patent, supplementary letters patent, by-laws or special resolution that are inconsistent with the provisions in the *ONCA*, these documents will be deemed, at the end of three years after proclamation, to be amended to comply with the *ONCA*.[5] The problem with this approach is that it will become difficult to determine what provisions are deemed to be amended and in what way.

In order to avoid such uncertainty from arising, the *ONCA* permits Part III *OCA* corporations to "transition" into the *ONCA* during the three-year period by amending, by articles of amendment, any provision in its letters patent, supplementary letters patent, by-laws or special resolution that are not consistent with the requirements of the *ONCA* in order to bring those provision into conformity with it.[6] If a Part III *OCA* corporation fails to do so within three years of the date of proclamation of the *ONCA*, then the provisions of its letters patent and by-laws that do not comply will be deemed to be amended to comply as explained above.

Nonetheless, it is generally advisable for Part III *OCA* corporations to transition under the *ONCA* as soon as possible after proclamation of the *ONCA* and before the expiry of three-year period in order to avoid uncertainty concerning the interpretation of its constating documents.[7]

C. Highlights of the Federal Budget 2012

Budget 2012 was introduced on March 29, 2012. Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures*[8] ("Budget 2012") received Royal Assent on June 29, 2012. Budget 2012 does not include any new tax incentives to encourage charitable donations, such as the charitable donation tax credit proposed by Imagine Canada. Instead, Budget 2012 focuses on the perceived lack of transparency and accountability concerning charities that engage in political activities, as well as a number of other *ad hoc* charity issues, including gifts to foreign charitable organizations.

1. New Rules and Sanctions Involving Political Activities

With the recent spotlight by the federal government on foreign funding of political activities by Canadian charities in the 2012 Budget, registered charities may be reluctant to become or stay involved in political activities. While Budget 2012 does somewhat affect the rules regarding political activity, the basic regime for political activities by charities remains largely unchanged. In this regard, Budget 2012 revises the definition of "political activity" in the *Income Tax Act* [*ITA*],[9] creates new sanctions, increases disclosure requirements concerning political activities and enhances enforcement measures. The remaining rules, and therefore, current CRA policy, related to the conduct of political activities by registered charities[10] remain the same.

Registered charities should not necessarily let the changes arising from Budget 2012 deter them from engaging in political activities if they wish to. Charities may become involved in or continue to be involved in political activities as long as they carefully study and follow the applicable rules, as well as carefully document all of their involvement in political activities in order to be able to effectively respond to an audit by the CRA.

a) Revised Definition of Political Activity

Budget 2012 amends the *ITA* by revising the definition of "political activity" under s. 149.1(1) as follows: "… includes the making of a gift to a qualified donee if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee."[11] The focus of this change to the definition of political activities is on the intent of the donor charity as opposed to that of the recipient qualified donee. The amendment will result in a double counting within the allowable limit on resources for political activities, once by the donor charity if the amendment applies and once by the recipient qualified donee when the funds received are eventually expended on permitted political activities. During her speech to the CBA/OBA National Charity Law Symposium, the Director General of the Charities Directorate,[12] Cathy Hawara emphasized that the allowable limit on non-partisan political activities of ten per cent of resources remains unchanged. However, in light of the proposed changes to the definition of "political activity," a charity that funds another qualified donee for the purpose of enabling political activities will be required to count that donation against its own ten per cent limit.

Without further details, the meaning of the phrase "can reasonably be considered" in the proposed definition of political activity is ambiguous. As such, it is likely best for a charity making a gift to a qualified donee to designate, in writing, that the gift is not to be used for political activities. As well, it is likely prudent for charities to avoid multi-purpose gifts, because Budget 2012 refers to "a purpose" as opposed to "the purpose." The lack of any details exposes charities to the risk that any political purpose for any part of the gift could possibly taint the whole gift.

b) New Intermediate Sanctions

Budget 2012 introduces new intermediate sanctions for excessive or unreported political activities. Where a registered charity exceeds the limits in the *ITA* for political activities (generally ten per cent of its total resources a year), the CRA can impose a one-year suspension of tax receipting privileges (in addition to revocation).[13] As well, if a registered charity fails to report any information (not just information on political activities) that is required to be included on a T3010 annual return, the CRA can suspend its tax receipting privileges until the CRA notifies the charity that it has received the required information.[14] Presently, the only sanction provided by the *ITA* for non-compliance in the context of political activities is revocation. According to the Director General, these proposed intermediate sanctions will provide the Charities Directorate with an additional tool to encourage compliance with existing legal requirements.[15]

c) Increased Disclosure Obligations

Budget 2012 states that more disclosure will be required concerning political activities. This requirement will likely be found in the T3010 Annual Information Return (including funding from foreign donors), though the details of what the requirements will be were not specifically addressed in Budget 2012. It is anticipated that the new T3010 will be released in early 2013.

d) Increased Enforcement Measures

Budget 2012 and Bill C-38 will affect charities and registered Canadian amateur athletic associations through increased enforcement measures. In Budget 2012, $8 million was committed to enforcement by the CRA, which includes audits and educational initiatives. In her speech, the Director General outlined the CRA's enforcement plans. The existing compliance continuum of education and outreach, monitoring, and verification and audit activities, which has traditionally been used by the CRA in respect of all enforcement activities, will be applied to the issue of political activities. Simple and practical self-assessment tools will be developed by the CRA to assist charities in better understanding the rules relating to political activities. More proactive monitoring of charities' political activities will occur, and where such monitoring raises concerns, the CRA will use its existing enforcement tools. In addition, the CRA will be conducting more restricted books and records audits.[16]

2. Gifts to Foreign Charitable Organizations

Prior to Budget 2012, the *ITA* recognized as qualified donees, certain registered foreign charitable organizations outside Canada that had received a gift from Her Majesty in right of Canada.[17] However, Budget 2012 modified the rules for the registration of foreign charitable organizations that have received gifts from the Government of Canada, by replacing charitable organizations outside of Canada that have received a gift from Her Majesty in right of Canada with designated foreign organizations. In this regard, Budget 2012 changes the rules such that foreign charitable organizations that receive a gift from the Government of Canada may apply for qualified donee status if they pursue activities

- related to disaster relief or urgent humanitarian aid, or
- conducted in the national interest of Canada.

In addition, the Minister of National Revenue will have the discretionary power, after consultation with the Minister of Finance, to grant qualified donee status to foreign charitable organizations that meet the above criteria. Budget 2012 states that guidance from the CRA will be forthcoming on these measures. These measures apply to applications made by foreign charitable organizations on or after June 29, 2012, when Budget 2012 received Royal Assent.

D. Federal Budget 2011— "Ineligible Individuals"

The 2011 Federal Budget[18] is worth reviewing here because it received Royal Assent within the last 12 months, *i.e.*, on December 15, 2011, and because it included several provisions that will be of great significance to the charitable sector. These provisions, entitled "Strengthening the Charitable Sector," include the introduction of provisions rendering certain individuals ineligible to serve on the board of or in a senior capacity within a registered charity.

The "ineligible individual" provisions came as a result of concerns from the CRA that applications for charitable status were being submitted by individuals who had previously been involved with charities that had their charitable status revoked for serious non-compliance. The concept of an "ineligible individual" enables the CRA to withhold or revoke charitable status of organizations that have "ineligible individuals" on the board or serving as a senior manager in order to better safeguard charitable assets.

As a result of amendments to ss. 149.1(4.1), 149.1(22) and 188.2(2) of the *ITA*, if an "ineligible individual" is a member of the board of directors, a trustee, officer or equivalent official, or any individual who otherwise controls or manages the operation of the charity, then the charity may have its charitable status refused or revoked or may have its authority to issue charitable receipts suspended. "Ineligible individuals" include persons who

- have been found guilty of a "relevant criminal offence" for which a pardon has not been granted—such offences include both offences under Canadian criminal law and similar offences outside Canada relating to financial dishonesty, including tax evasion, theft, fraud or any other criminal offence that is relevant to the operation of the charity;
- have been found guilty of a non-criminal "relevant offence" in Canada or outside Canada within the past five years—such offences relate to financial dishonesty, such as offences under fundraising legislation, consumer protection legislation or securities legislation, as well as any other offence that is relevant to the operation of the charity;
- have been a member of the board of directors, a trustee, officer, or an individual who otherwise controlled or managed the operation of a charity during a period in which the organization engaged in conduct that constituted a serious breach of the requirements for registration for which the charity had its registration revoked within the past five years—such conduct includes improper receipting arrangements, abusive tax shelters, or providing undue private benefit to directors; or
- have been at any time a promoter of a gifting arrangement or other tax shelter in which a charity participated and the registration of the charity has been revoked within the past five years for reasons that were related to participation in the tax shelter.

The CRA has clarified, however, that a charity will not necessarily have its charitable status refused or revoked simply because the CRA has determined that an "ineligible individual" is on the board or manages the operation of the organization. The CRA indicates that a charity will be given an opportunity to address any concerns the CRA may have with an "ineligible individual." The charity might put in place necessary safeguards over financial management, remove the individual in question or explain why it is appropriate for the individual to hold the position in question. The CRA has also indicated that it will be developing detailed administrative guidance on how it will use these new provisions, but this Guidance has not yet been released.[19]

E. Highlights of Recent CRA Publications

1. New Fundraising Guidance

The CRA released its much anticipated new *Fundraising by Registered Charities Guidance: CG-013*[20] (the "New Fundraising Guidance") on April 20, 2012. While the New Fundraising Guidance is much more readable and practical than the previous guidance, it remains a complex document that will require careful reading.

The CRA has advised that the New Fundraising Guidance does not represent a new policy position of the CRA, but rather provides information on the current treatment of fundraising under the *ITA* and the common law. As such, the New Fundraising Guidance will have a significant impact on current CRA audits, not just future audits. As well, the New Fundraising Guidance applies to both receipted and non-receipted fundraising.

The New Fundraising Guidance is intended to provide general advice for charities to follow and is based on the legal principle, established by case law, that fundraising must be seen as a necessary means-to-an-end for a charitable purpose, rather than an end-in-itself. In this regard, it is possible for a charity to engage in fundraising activities, provided that the fundraising is ancillary and incidental to the primary purpose of achieving the charity's purposes.

In addition to complying with the New Fundraising Guidance, charities must continue to meet all other requirements of the *ITA*, including the 3.5 per cent disbursement quota. The fundraising ratio referenced in the New Fundraising Guidance results from data that is included in a charity's T3010 which is made available to the public on the CRA's website. As such, it will be important for the board to review and approve the charity's T3010 before it is filed with the CRA, given that the information contained in it can later be scrutinized by donors, and the press, as well as members of the public.

a) What Is Fundraising?

The New Fundraising Guidance explains that, as a general rule, fundraising is any activity that includes a solicitation of present or future donations of cash or gifts in kind, or the sale of goods or services to raise funds, whether explicit or implied. Fundraising may include a single action, such as an advertisement, or a series of related actions, such as a capital campaign and includes direct activities, such as face-to-face canvassing, or indirect/related activities, such as researching and developing fundraising strategies and plans. Types of fundraising activities include the sale of goods; donor stewardship; membership programs; cause-related marketing/social marketing ventures; planning or researching for fundraising activities; and donor recognition.

Fundraising activities can be carried out by either the registered charity or by another party acting on the charity's behalf, but does not include seeking grants, gifts, contributions or other funding from governments or other registered charities, or recruiting volunteers to carry out the general operations of the charity, or related business activities.[21] This means that not only are the costs associated with such requests not included in the fundraising expenses, but the resulting income from government and other charities is also not included in the income with regards to the fundraising ratio explained below.

b) Fundraising That Is Not Acceptable

The New Fundraising Guidance states that the following conduct is prohibited and is grounds for revocation of a registered charity's status, imposition of sanctions or other compliance actions, or denial of charitable registration: fundraising that is a purpose of the charity; fundraising with a more than incidental private benefit; fundraising that is illegal or contrary to public policy; fundraising that is deceptive; or fundraising that is unrelated business.

c) Allocating Fundraising Expenditures

Registered charities must report fundraising expenditures (all costs related to any fundraising activity) on their annual T3010. Where some fundraising activities include content that is not related to fundraising, some of these costs may be able to be allocated to charitable activities, management or administrative activities, or political activities. However, the onus is on the charity to explain and justify the allocation.

Where 90 per cent or more ("exclusively" or "almost exclusively") of the activity is devoted to fundraising, a charity will have to allocate all of the costs to fundraising. Where it can be demonstrated that an activity would have been undertaken without the fundraising component, then 100 per cent of the costs may be allocated to the applicable expenditure (*e.g.*, charitable, administrative, or political activity). In some cases, a charity may be able to pro-rate the allocation of costs of an activity between fundraising expenditures and charitable, management or administrative, and political activity expenditures.[22] However, the charity must be able to establish that less than 90 per cent of the total content of the activity advances fundraising.

d) Evaluating a Charity's Fundraising

The following are examples of some of the indicators that will generally be considered by the CRA to be evidence of unacceptable fundraising and which are explained in more detail in the New Fundraising Guidance:

- Resources devoted to fundraising are disproportionate to the resources devoted to charitable activities.
- Fundraising without an identifiable use or need for the proceeds.
- Inappropriate purchasing or staffing practices.
- Fundraising activities where most of the gross revenues go to contracted third parties.
- Commission-based remuneration or payment of fundraisers based on amount or number or donations.
- Misrepresentations in fundraising solicitations or disclosure about fundraising costs, revenues or practices.
- Fundraising initiatives or arrangements that are not well documented.
- High fundraising expense ration.

The CRA recognizes that the charitable sector is very diverse and fundraising efforts will vary between organizations. The CRA will look at a number of factors to evaluate a charity's fundraising activity that involves high fundraising costs. Examples of relevant case-specific factors include the size of the charity; the public appeal of the cause; the purpose of the fundraiser, such as a donor development program; and the type of fundraiser, such as a gaming activity. The CRA advises that adopting best practices may reduce the risk of the CRA finding that a charity is engaging in unacceptable fundraising. The New Fundraising Guidance recommends

- prudent planning process;
- adequate evaluation processes;
- appropriate procurement and staffing processes;
- managing risks associated with hiring contracted (third party) fundraisers;
- ongoing management and supervision of fundraisers;
- keeping complete and detailed records relating to fundraising activities;
- providing disclosure about fundraising costs, revenues, practices, and arrangements;
- maintaining a reserve fund policy and ensuring that fundraising is for an identified use or need.[23]

2. New Guidance on Community Economic Development

On July 26, 2012, the CRA released Guidance CG-014, *Community Economic Development Activities and Charitable Registration* (the "New Guidance on Community Economic Development").[24] The New Guidance on Community Economic Development provides parameters in which registered charities may conduct "community economic development" ("CED") activities that "improv[e] economic opportunities and social conditions of an identified community." The New Guidance on Community Economic Development is a welcome improvement over the Former Guidance, expanding the types of CED activities that charities may engage in, especially in the area of program-related investments.

The New Guidance on Community Economic Development points out that the law in Canada does not recognize CED in and of itself to be a charitable purpose. Therefore, in order to be considered "charitable," CED activities must directly further a charitable purpose.[25] In this regard, the New Guidance on Community Economic Development states that CED activities may potentially further the following heads of charitable purposes, namely relief of poverty, advancement of education and benefit the community in other ways the law regards as charitable.[26] It would, therefore, imply (although not explicitly stated in the New Guidance on Community Economic Development) a CED activity cannot be conducted for the advancement of religion. Therefore, religious charities that want to engage in social programs must carefully review whether those programs are within the parameters of practical manifestation of their faith. Also, to be charitable, the New Guidance on Community Economic Development states that CED activities must meet the "public benefit test," which includes not providing any private benefit that is more than incidental. This means any private benefit must be necessary, reasonable, and not disproportionate to the public benefit.[27]

The New Guidance on Community Economic Development states that CED activities "generally" fall into the following five categories: activities that relieve unemployment; grants and loans; program-related investments; social businesses for individuals with disabilities; and community land trusts.[28] The New Guidance on Community Economic Development also sets out parameters for CED activities that promote commerce or industry or improve socio-economic conditions for the public benefit in an area of social and economic deprivation.[29]

a) Activities that Relieve Unemployment

Neither "providing employment" nor "helping people find employment" are charitable activities if the beneficiary group is the general public according to the New Guidance on Community Economic Development.[30] Activities that relieve unemployment or underemployment are only charitable if they directly further one or more of the three recognized charitable purposes (not advancement of religion) as explained above.[31] For example, providing career counseling to people who are unemployed and living in poverty is a charitable purpose.

b) Grants to Beneficiaries—Individual Development Accounts

An individual development account ("IDA") is a savings account that is intended to help an eligible beneficiary to save funds for a specific goal. For every dollar saved by the eligible beneficiary, the charity may make a matching grant at a pre-determined ratio over a specific period of time. For example, a charity and a disabled beneficiary may agree that the charity will deposit two dollars for every dollar that the beneficiary deposits until they have enough money to convert the beneficiary's basement into a home office.

The New Guidance on Community Economic Development expands the parameters under which IDAs are permitted, no longer relegating IDAs to the purpose of relieving poverty. However, the New Guidance on Community Economic Development also imposes a new requirement that a charity engaging in an IDA must be able to provide a "policy" showing the criteria used to determine eligibility of an eligible beneficiary, how the amount of an IDA is determined, the acceptable uses of the IDA, and when the eligibility of the beneficiary ceases.

c) Loans and Loan Guarantees to Beneficiaries

The ability of charities to provide loans, micro-loans and loan guarantees is expanded under the New Guidance on Community Economic Development. Under the New Guidance on Community Economic Development these programs are not restricted to the purpose of relieving poverty. They can now be used to advance education or other purposes that benefit the community. For example, the New Guidance on Community Economic Development states that a loan guarantee to an eligible beneficiary to help him or her attend courses to enhance his or her employment-related skills can be charitable.[32]

In addition to reiterating the requirement that a charity be able to provide a policy concerning when a recipient of support services or loans is no longer in need of such support, the New Guidance on Community Economic Development also requires that the policy include criteria for determining who the eligible beneficiaries are for such start up loans[33] and to provide a rationale and justification to show that its loans or guarantees do not exceed the amount needed to achieve its charitable purpose.[34]

d) Program-Related Investments

One of the most significant expansions of the CRA's policy set out in the New Guidance on Community Economic Development is the broader context in which registered charities may engage in program-related investments ("PRIs"). A PRI is not an investment in the conventional financial sense because while PRIs may generate a financial return, they are not made for that reason. As such, a PRI is not required to generate a return, or potential return, of capital (funds or property) for the charity, or to yield additional revenue (such as interest) for the charity at or above market rate.[35] Under the New Guidance on Community Economic Development, the CRA accepts that charities can engage in PRIs that involve loans, loan guarantees, share purchase and leases of land or buildings involving non-qualified donees.

The New Guidance on Community Economic Development stipulates that, when making a PRI in a non-qualified donee, the PRI must be used for a program over which the investor charity maintains ongoing direction and control, so that the program is the investor charity's own activity (*i.e.*, this is the same as the "own activity" test that must be met when charities conduct activities through third party intermediaries).

The New Guidance on Community Economic Development requires charities that conduct PRIs to have appropriate exit mechanisms in place to withdraw from a PRI or convert it to a regular investment. The charity should also have a written policy or other documentation that explains how each PRI furthers its charitable purpose and stipulates the criteria it applies to PRI decisions. If the charity makes a PRI to a non-qualified donee, the charity should maintain books and records evidencing direction and control over the activities. Also, the charity must ensure that its PRIs meet all applicable trust, corporate, or other legal or regulatory requirements.[36]

Charities that engage in loans, loan guarantees and PRIs must be careful to ensure that the assets utilized in these programs are properly accounted for in their financial statements and annual T3010 information returns. In this regard, the assets that have been loaned or used in making PRIs must be included in a charity's T3010 return, either as part of its total assets or accounts receivable.[37] Similarly, all interests and other income generated from a charity's loan or PRI activities must also be reported in the T3010.[38]

The assets of a charity used in making a loan or PRI would not be included in the assets base for the purpose of calculating the charity's 3.5 per cent disbursement quota obligations requirements. This would make sense because these assets are used in achieving their charitable purposes and, therefore, the assets are used in the course of the charities' charitable activities. However, if a portion of any loan is held by the loan recipient for future use, that portion has to be reported as "property not used in charitable activities," and therefore, would be included in the asset base when calculating the 3.5 per cent disbursement quota obligation.[39]

If an investor charity is unable to recover part or all of the principal of a loan, the unrecovered amount is a charitable or other expenditure of the investor charity, depending on the purpose of the loan. In this scenario, this part of the loan can be used to meet its disbursement quota.

e) Social Business for Individuals with Disabilities

Charities may operate social businesses that employ people with disabilities. Social businesses may provide services, sell goods, manufacture articles, or undertake other kinds of work. It may also operate a retail outlet or send products manufactured to be sold at stores. Unlike on-the-job training, social businesses may provide permanent employment.

A social business is required to have the following characteristics: (a) the workforce must consist entirely of individuals with disabilities, with the exception of employees who provide necessary training and supervision; and (b) the work is specifically chosen and structured to take into account the special needs of individuals with disabilities and to relieve conditions associated with those disabilities.

f) Community Land Trusts

Community land trusts ensure that land will remain available for the benefit of a community. Typically, community land trusts operate by developing properties and leasing them to eligible beneficiaries. Operating a community land trust may be a charitable activity if it directly furthers a head of charity.

g) Promotion of Commerce or Industry

CED activities that promote commerce or industry can be charitable by benefiting the public or a sufficient section of the public and not necessarily a specific eligible beneficiary. The New Guidance on Community Economic Development states that these activities may promote a particular industry or trade, as long as they focus on benefiting the public, not the members of the industry. In this regard, the New Guidance on Community Economic Development includes examples of purposes that could enhance an industry while also delivering a charitable public benefit: "promote greater efficiencies within an industry, if those efficiencies benefit the general public," and "promote and facilitate the achievement, preservation and maintenance of high standards of practice within an industry, if doing so benefits the general public." Activities that could further these purposes and result in a tangible benefit are also provided in the New Guidance on Community Economic Development.

h) Activities in Areas of Social and Economic Deprivation

The New Guidance on Community Economic Development states that CED activities may be charitable if they improve socio-economic conditions for the public benefit in an area of social and economic deprivation. The New Guidance on Community Economic Development provides that deprived areas are geographic communities that generally display high rates (at least 1.5 times the national average) of a number of characteristics for four consecutive years. The list includes unemployment for two or more consecutive years; crime (including family violence); health problems (including mental health issues, drug and alcohol addiction, and suicide); and children and youth at risk (taken into care or dropping out of school). As well, the deprived area must be large enough for the beneficiaries to form a sufficient segment of the public.[40]

F. Recent Case Law

1. *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*

In a decision released on September 27, 2011, the Ontario Superior Court of Justice confirmed that a charity that raises property for the benefit of a particular charitable purpose cannot use the property for a different charitable purpose simply by amending its objects through supplementary letters patent. In this case,[41] the applicants, the Victorian Order of Nurses for Canada ("VON Canada") and its Ontario branch ("VON Ontario"), successfully obtained a court order finding that the Greater Hamilton Wellness Foundation (the "Foundation") was in breach of its fiduciary and trust obligations to VON and that, as a result, the Foundation must transfer its assets and income as of December 15, 2009, to VON Ontario in accordance with the Foundation's original charitable purposes. Due to the applicants' complaints of misapplication of charitable funds under the *Charities Accounting Act* [*CAA*],[42] the Public Guardian and Trustee ("PGT") participated in the proceedings to protect the public's interest, and supported VON Canada and VON Ontario's position.

While the court's conclusion is not surprising, given the facts of the case, the decision serves as a reminder to charities that charitable property raised for the benefit of a particular charitable purpose must be applied to that purpose. Otherwise, the charity will need to obtain court approval in order to change the purpose through a *cy-près* order, or in Ontario, the consent of the PGT on a non-contested basis under s. 13 of the *CAA*. In addition, the case also provides useful guidance concerning the interpretation of a charity's purposes as set out in its corporate objects.[43]

2. *St. John's Evangelical Lutheran Church of Toronto v. Steers*

On October 24, 2011, the Ontario Superior Court of Justice certified a class action against The English District Lutheran Church Missouri Synod (Canada) and The English District Lutheran Church Missouri Synod (U.S.A.) in the case of *St. John's Evangelical Lutheran Church of Toronto v. Steers*,[44] the representative plaintiffs included St. John's Evangelical Lutheran Church of Toronto ("St. John's Church") and three of its directors.

The class action arose out of the series of disputes between the leaders and members of the congregation and the defendants regarding the ownership, autonomy, and operation of St. John's Church and its property. Although the parties settled their disputes, without court approval, a settlement would not be binding and all the class members would not be bound by its terms. Accordingly, the class action certification was sought for the purpose of obtaining court approval of the settlement.

The class action was certified for the purposes of the settlement, pursuant to the Ontario *Class Proceedings Act* on the basis of the following common issues: breach of fiduciary duty; violation of the Ontario Human Rights Code; negligent misrepresentation (regarding the defendant's authority and legal status to install their own church council without the approval of the members and to appropriate church property); conversion of church property; conspiracy (to disband and disenfranchise the class members); and damages. The introduction of a class action suit into a church dispute may be the first one in Ontario, if not Canada.

3. *Cannon v. Funds for Canada Foundation*

On January 18, 2012, the Ontario Superior Court granted certification in a class action concerning a charitable donation tax scheme in *Cannon v. Funds for Canada Foundation*.[45] The case is a cautionary tale for donors that are contemplating participating in tax donation arrangements that seem "too good to be true." As demonstrated in this case, participation in tax shelter arrangements can lead to the disallowance of a tax deduction or credit, the reassessment of tax returns by the CRA, and the accumulation of significant interest for unpaid taxes.

To summarize this complex tax scheme, a donor's original donation of $2,500 was purportedly increased to $7,500 through the exchange of sub-trust units between the various trusts involved, therefore making the original donation seem larger than it actually was. However, the charities had entered into an agreement that required them to return 99 per cent of the donations to the promoters in order to use a software program. The representative plaintiff, presumably like the other plaintiffs, had his deductions for his charitable gifts disallowed by the CRA. According to the CRA, his donations were not gifts because they were made in the expectation of a material advantage, namely a charitable donation receipt greater than the value of his donation and as such, no donative intent existed.

The class action was certified pursuant to the *Class Proceedings Act, 1992*, based on several common issues, including breach of contract (between the donors and the promoter); rescission; negligence (including separate allegations against the promoter's lawyers and directors); conspiracy (to cause harm against the donors); fraud; fraudulent misrepresentation; unjust enrichment; and *Consumer Protection Act, 2002* claims (*e.g.*, the Canada Gift Program is a consumer transaction governed by the *Class Proceedings Act*). On May 25, 2012, the court awarded costs of $325,000 for the successful certification motion, plus additional sums for summary judgment motions, motion for documentary production, motion to strike affidavits, disbursements and costs submissions. Given the numerous common issues that arise out of this tax scheme, it will be important to see how the issues in this case are adjudicated.

4. *Robinson v. Rochester Financial Limited*

In *Robinson v. Rochester Financial Limited*,[46] Ontario Superior court approved an $11 million settlement on February 7, 2012, of the class action relating to the "Banyan Tree" tax shelter. The scheme involved small donations purportedly increased through a "loan" to the donor. The complex schemes often left little money in the recipient registered charity or amateur athletic association compared with the fees paid to the promoters, lawyers and others involved. The CRA disallowed the donors' tax credits because the "donations" were not gifts. The defendant was a law firm which provided a legal opinion that the tax shelter complied with applicable tax legislation and that the tax receipts issued by the tax shelter should be recognized by the CRA.

G. Conclusion

The complexity and variety of topics discussed in this article underscores the importance of keeping abreast of developments in the law as they affect registered charities in Canada.

[*Editor's note*: Terrance S. Carter, B.A., LL.B., Trade-Mark Agent, is managing partner of Carters Professional Corporation, and counsel to Fasken Martineau DuMoulin LLP on charitable matters. Portions of this article are based on various Charity Law Bulletins available at <charitylaw.ca>, written by the author, as well as Karen J. Cooper, Theresa L.M. Man, and Ryan M. Prendergast.]

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2 R.S.C. 1970, c. C-32.
3 S.O. 2010, c. 15.
4 R.S.O. 1990, c. C.38.
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6 *Ibid*., s. 150(1)(*b*).
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14 *Ibid*., s. 13(2).
15 *Supra* note 12.
16 *Ibid*. For more information, see Terrance S. Carter and Karen J. Cooper, "Playing by the Rules: Political Activities Fair Game for Charities" in Charity Law Bulletin No. 286 (June 28, 2012) online <http://www.carters.ca/pub/bulletin/charity/2012/chylb286.htm>.
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21 For more information on Related Business, see CRA Policy Statement CPS-019, *What is a Related Business?* online: Canada Revenue Agency <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-019-eng.html>.

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26 *Ibid*., para. 11.

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29 *Ibid*., para. 84.

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32 *Ibid*., para. 30.

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35 *Ibid*., para. 40.

36 *Ibid*., paras. 53–54.

37 *Ibid*., para. 61.

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39 *Ibid*., paras. 62 and 65.

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41 *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, [2011] O.J. No. 4938, 2011 ONSC 5684.

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• THE NEW *CANADA NOT-FOR-PROFIT CORPORATIONS ACT* •

Barbara Miller
Fasken Martineau DuMoulin LLP

I. Introduction

The *Canada Not-for-profit Corporations Act*[1] [*CNCA*] received Royal Assent on June 23, 2009. The majority of its provisions and the regulations issued thereunder came into force approximately one year ago on October 17, 2011. The *CNCA* ushered in a long awaited updated governance regime for not-for-profit corporations, akin to the current rules in place for business corporations.

This article provides a high level overview of the *CNCA* and guidance for continuance under the *CNCA* of existing federally incorporated not-for-profit corporations currently governed by the *Canada Corporations Act* [*CCA*].[2] Also addressed are the benefits of the *CNCA* and the notable changes from, and inadequacies of, the *CCA* by which Canadian non-share capital corporations have been regulated for nearly a century.

II. Overview of the *CNCA*

Going forward, the *CNCA* will apply to all federal not-for-profit corporations in Canada, including charities, as well as every corporation incorporated under Part II of the *CCA* that is continued under the *CNCA*. Although corporate matters affecting charities (*i.e.*, soliciting corporations) are discussed below, additional requirements applicable to charitable organizations, including those under the *Income Tax Act* (Canada) [*ITA*] are not the focus of this article.

(1) Inadequacies of the Old *Canada Corporations Act*

By modern corporate standards, the incorporation process under the *CCA* was slow and awkward and the legislation contains many outdated restrictions, including in relation to corporate borrowing and the holding of members' and directors' meetings by way of conference calls, teleconferences and written resolutions. By contrast, the modernized *CNCA*, subject to the corporation's own articles and by-laws, affords the right to directors to borrow money without authorization of the members, and formally allows for alternative means of holding meetings and voting by written resolution signed by all those entitled to vote.[3]

The *CCA* does not enunciate the powers and duties of, and defences available to, directors and officers. The *CNCA* establishes greater certainty by setting out, among other obligations, the common law duty of directors and officers to act honestly and in good faith with a view to the best interests of the corporation in the performance of their duties.[4] The *CNCA* also clearly articulates at ss. 149 and 150 the due diligence defence available to directors and officers, allowing a director or an officer to avoid personal liability arising out of his or her duties where he or she has exercised the care, skill, and diligence that a reasonably prudent person would have exercised in comparable circumstances.

Although changes such as amalgamation and continuances into and out of the federal and provincial jurisdictions are now commonplace for business corporations, the *CCA* does not allow for such fundamental changes. The *CNCA* expressly permits corporations to amalgamate with one or more not-for-profit corporations[5] and it also allows for continuances under the laws of another jurisdiction, subject to obtaining appropriate consents and to the director appointed under the Act being satisfied that the corporation's members and creditors will not be adversely affected.[6]

The *CCA* provides virtually no flexibility on audit requirements, whereas the *CNCA* introduces a graduated audit approach based on a number of factors. (For a review of financial reporting and audit requirements, see s. 5(a) "Financial Review—Annual Revenues" below. The audit exemptions allows a non-soliciting corporation to focus its limited resources on fulfilling its mandate as a not-for-profit corporation rather than needlessly engaging in an expensive financial review.[7]

Finally, by comparison to contemporary corporate statutes, the *CCA* provides insufficient remedies for members and others who believe that the actions of a board of directors of a not-for-profit corporation are oppressive or prejudicial to the best interests of the corporation. As described in more detail below, the *CNCA* addresses these shortcomings by granting to members, as well as other interested parties, a wide variety of rights, such as the ability to apply to a court to restrain an activity that unfairly disregards the interest of members (an oppression remedy) or to allow a member or other "complainant" to take an action in the name, and on behalf, of the corporation to enforce a requirement of the *CNCA* (a derivative action).

(2) Benefits of the *Not-for-profit Corporations Act*

The *CNCA* provides a modernized set of rules to govern the internal affairs of not-for-profit corporations. The simplified processes of the *CNCA* and the greater ease with which fundamental changes may be implemented are better suited to meeting the current needs of the not-for-profit sector.

(3) Notable Changes Implemented under the *Not-for-profit Corporations Act*

(a) Incorporation

Under the *CCA*, not-for-profit companies were required to incorporate by way of letters patent. This method allowed for a degree of ministerial discretion under Crown prerogative and was overly cumbersome and time consuming. Under the *CNCA*, the incorporation of a not-for-profit is "as of right." This means that upon filing the requisite documentation, including articles of incorporation (as they are now called), and payment of the prescribed fee, incorporation is accomplished, subject only to obtaining clearance of the proposed corporate name.

In addition to other basic information, the articles of incorporation must set out a fixed number of directors or a minimum and maximum number of directors, any restrictions on the business that the corporation may carry on, a purpose statement (rather than "objects") and the classes of membership, together with the voting rights associated with each such class.

(b) By-Law Amendment Process

A burdensome requirement under the *CCA* has been that new and amended by-laws had to be approved not only by the directors and members of the corporation, but also by Industry Canada. Under the *CNCA*, a copy of the by-laws must be filed with Corporations Canada, but they need not be approved by it. As well, unless the articles, by-laws or a unanimous member agreement (discussed below) provide otherwise, and subject to s. 197(1) of the *CNCA*, the directors may, by resolution, make, amend or repeal any by-laws with immediate effect, provided they are confirmed by members at their next meeting.

Section 197(1) of the Act enumerates the fundamental changes that require the approval of members by way of a special resolution passed by a majority of not less than two-thirds of the votes cast. In certain instances, as contemplated by s. 199, an additional vote of a particular class or group of members may also need to be sought. For example, a special resolution is required to change the corporation's name or the province in which the corporation's "registered office" is situated (formerly known as the "head office"), to add, change or remove any restriction on the activities that the corporation may carry on, to create a new class or group of members, to change a condition required for being a member, or to alter the statement of the purpose of the corporation.

(c) *Ultra Vires* Doctrine—Permitted Activities

The *CNCA* amends the *ultra vires* doctrine that, under the *CCA*, could invalidate the actions taken by a not-for-profit corporation if those actions fell outside of the objects provided in its letters patent. A significant improvement flowing from the *CNCA* is that not-for-profit corporations now have the capacity and the rights, powers and privileges of a natural person,[8] mirroring the *Canada Business Corporations Act*.[9] This essentially means that a not-for-profit corporation is no longer required to list in its constating documents the countless powers that it wishes to be conferred upon the corporation. Instead only restrictions desired to be imposed on the corporation's powers need to be specified. Corporations intending to be registered charities will still have to voluntarily limit their activities and powers to meet the *Income Tax Act*[10] and other requirements.

(d) Pre-incorporation Contracts

The *CNCA* also recognizes contracts that have been entered into by a person on behalf of a corporation before it comes into existence. Section 15 of the *CNCA* states that a person who enters into, or purports to enter into, a written contract in the name of, or on behalf of, a corporation before it comes into existence is personally bound by the contract and is entitled to its benefits. Once the corporation comes into existence, and if the corporation adopts and ratifies such contract, the corporation is then bound by and entitled to the benefits of the contract as if it had been an original party. The person who originally entered into the contract is subsequently released from, and ceases to be entitled to the benefits of, such contract.

(4) Classification of Corporations

All corporations incorporated under Part II of the *CCA* are treated under the Act in the same way. In contrast, the *CNCA* recognizes three types of corporations, each of which has different rights, powers and obligations. These three classifications are: (a) the soliciting corporation, (b) the non-soliciting corporation, and (c) the religious corporation.

The characterization of a not-for-profit corporation as either "soliciting" or "non-soliciting" has a number of implications, including those relating to the composition of its board, whether the corporation is able to enter into a unanimous member agreement, and the extent of its financial disclosure and applicable financial review requirements. Soliciting corporations are subject to stricter obligations than non-soliciting corporations.

(a) The Soliciting Corporation

A corporation is considered "soliciting" when it has requested and received more than $10,000 in income from public sources in a single financial year. As provided in the regulations under the *CNCA*, once a corporation becomes a soliciting corporation it is considered to remain so for a prescribed period, currently until the third annual meeting of members following the date of the annual meeting held after the relevant financial year end. Public sources include gifts or donations from non-members, grants from government and funds from another corporation that also received income from public sources. It is possible for a corporation to apply to be deemed "non-soliciting" by the director where there would be no prejudice to the public interest in doing so. The *CNCA* outlines the following conditions of "soliciting corporations":

> (5.1) A corporation becomes a soliciting corporation for a prescribed duration from the prescribed date, if it received, during the prescribed period, income in excess of the prescribed amount in the form of
>
> (*a*) donations or gifts or, in Quebec, gifts or legacies of money or other property requested from any person who is not
>
> (i) a member, director, officer or employee of the corporation at the time of the request,
>
> (ii) the spouse of a person referred to in subparagraph (i) or an individual who is cohabiting with that person in a conjugal relationship, having so cohabited for a period of at least one year, or
>
> (iii) a child, parent, brother, sister, grandparent, uncle, aunt, nephew or niece of a person referred to in subparagraph (i) or of the spouse or individual referred to in subparagraph (ii);
>
> (*b*) grants or similar financial assistance received from the federal government or a provincial or municipal government, or an agency of such a government; or
>
> (*c*) donations or gifts or, in Quebec, gifts or legacies of money or other property from a corporation or other entity that has, during the prescribed period, received income in excess of the prescribed amount in the form of donations, gifts or legacies referred to in paragraph (*a*) or grants or similar financial assistance referred to in paragraph (*b*).

(b) The Non-Soliciting Corporation

A "non-soliciting corporation" is a corporation that is not a soliciting corporation under the *CNCA*.

(c) Religious Corporation

Religious corporations are not a third category *per se* under the *CNCA* as they can be either soliciting or non-soliciting. However, they are separately mentioned as special rules apply to them. These religious corporations are exempt from derivative actions, the oppression remedy and court-ordered liquidations if the act or omission or conduct complained of was reasonably based on a tenet of faith held by the members of the corporation, having regard to the corporation's activities.[11] Interestingly, neither the term "religious corporation" nor "tenet of faith" are defined in the *CNCA*.

(5) Key Differences between Soliciting and Non-Soliciting Corporations

(a) Financial Review—Annual Revenues

Soliciting Corporations	Non-Soliciting Corporations	Requirement
Annual Revenues of greater than $250,000		Generally a full audit is required. Members must appoint a public accountant who must conduct an audit of the corporation's financial statements.[12]
Annual Revenues of between $50,001 to $250,000		Audit, or a review engagement if members pass a special resolution (2/3 vote) permitting a review engagement. Members must appoint a public accountant and can provide that its financial statements are to either be reviewed or be fully audited.[13]
Annual Revenues under or equal to $50,000		Review engagement or audit required if members pass an ordinary resolution seeking either process. Alternatively, a compilation report in which no public accountant is appointed will suffice if all members who are entitled to vote at an annual meeting consent unanimously to waive the public accounting requirement.[14]
	Annual Revenues of greater than $1,000,000	Full audit required.
	Annual Revenues under or equal to $1,000,000	Review engagement if a public accountant is appointed or compilation report if no public accountant is appointed. The appointment of a public accountant is not required if all members who are entitled to vote at an annual meeting consent unanimously to waive the public accounting requirement.[15]

(b) Filing Financial Statements

Soliciting corporations are required to file annual financial statements with Corporations Canada. These financial statements are of public record and are thus available to be copied by any interested person. Non-soliciting corporations are not required to publicly file annual financial statements; however, the director may require a "private" filing of the financial statements that is not available to the public. A non-soliciting corporation is still required to circulate financial statements to its members in advance of its annual meeting. In addition, the absence of a public filing requirement does not override any requirements of the Canada Revenue Agency relating to the filing of financial statements of charities.

(c) Board Composition

The board composition of soliciting corporations is set at a minimum of three directors, two of whom cannot be employees.[16] Non-soliciting corporations have a board composition requirement of a minimum of one director.[17]

(d) Unanimous Member Agreement

Unanimous Member Agreements are agreements to which all members of the corporation are parties (and, if desired, other persons who are not members) that restrict, in whole or in part, the power of directors to manage or supervise the management of the activities and affairs of the corporation. To the extent that such powers are assumed by the members, the rights, duties and liabilities of the directors are transferred to the members, and the directors are relieved of same to that extent. Unanimous Member Agreements are not permitted for soliciting corporations, but they are allowed for non-soliciting corporations.[18]

(e) Treatment of Residual Assets on Dissolution

Residual assets of soliciting corporations may only be distributed to "qualified donees" under the *ITA*,[19] which, according to the Canada Revenue Agency, include another registered charity (including a registered national arts service organization), a listed charitable organization outside Canada to which Her Majesty in right of Canada has made a gift, Her Majesty in right of Canada or a province, and the United Nations and its agencies.

Non-soliciting corporations do not have such restrictions on the distribution of residual assets. If the articles are silent, the default is a *per capita* distribution to the members of the corporation.[20]

(6) Directors and Officers under the *CCA* and *CNCA*

The *CNCA* departs from the *CCA* substantially in its provisions relating to directors and officers. The *CNCA* provides many particulars relating to the composition of a corporation's board of directors, as set out below:

Changes	***CCA***	***CNCA***
Powers, Duties and Defences	Directors' and officers' powers, duties and defences were not enumerated in the statute. They were drawn solely from the common law and relied on a subjective standard of care.	A statutory duty of care and duty of loyalty is outlined in the *CNCA*—the Act no longer relies on the common law to provide such duty.[21] Directors and officers can also rely on the good faith due diligence defence referenced above, which is based on an objective rather than subjective standard of care. This means that everyone is judged by the same standard: that of a reasonable, informed person, rather than by their respective skill levels.
Directors and Officers Insurance and Indemnification	No provisions for directors' and officers' insurance.	The *CNCA* contains provisions for the purchase of directors' and officers' insurance and expands the corporation's ability to indemnify such directors and officers. There are limits for registered charities.
***Ex officio* Directors**	*Ex officio* directors permitted.	*Ex officio* directors are not specifically permitted under the *CNCA*. (It may be possible to deal with this by including certain qualification requirements in the by-laws.)
Changes to Number of Directors	By-laws could provide for members to remove directors, but this was not required.	Members have the power to remove directors by ordinary resolution voted at a special meeting. This change provides directors of not-for-profit corporations with an increased level of accountability to members.[22] Members have the power to set the number of directors unless the power to fix the number within the minimum and maximum number set out in the articles is delegated to directors by ordinary resolution.[23]

(7) Members and Membership

The transition from the *CCA* to the *CNCA* affects not only directors and officers of the not-for-profit corporation but also its members. Under the *CCA*, among other things, members were not empowered with regard to the addition and removal of directors. Conditions for membership could be set out the by-laws or in a directors' resolution, but this was not a requirement. Under the *CNCA*, members have greater powers generally, including the express authority to remove directors. While the classes of membership are entrenched in the articles, conditions of membership must be set out in the by-laws of the corporation, as well as particulars relating to withdrawal from, and any requirements respecting transfer or termination of, membership.

(8) Fundamental Changes

The *CNCA* sets out certain fundamental changes that may only be approved by way of a special resolution of members. These fundamental changes include amendments to the corporation's articles, changes to, or removing of, any rights and conditions of any class or group of members, or changes to the manner of giving notice to members or voting by members not in attendance at a meeting of members. Either a member entitled to vote at annual meetings of members or the directors may advance the proposal to effect any such fundamental change.

In addition to a special resolution of voting members, if the corporation has more than one class of members, the members of each class specifically affected by certain proposed fundamental changes are entitled (subject, as noted below, to limited "opt out" exceptions if the articles so provide) to also exercise a separate class vote on the matter by special resolution, whether or not such members otherwise have the right to vote.

The *CNCA* also contemplates amalgamations and a full range of continuance options. Not-for-profit corporations may amalgamate with one or more other not-for-profits pursuant to a long-form or short-form amalgamation, and may do so either vertically (with its parent or subsidiary) or horizontally (with its sister affiliate).[24] Continuance from the *CNCA* to a not-for-profit corporation act of another jurisdiction is permitted by s. 213 of the Act unless prohibited by s. 213(10), which states as follows:

> (10) A corporation shall not be continued as a body corporate under the laws of another jurisdiction unless those laws provide in effect that
>
> (a) the property of the corporation continues to be the property of the body corporate;
>
> (b) the body corporate continues to be liable for the obligations of the corporation;
>
> (c) an existing cause of action, claim or liability to prosecution is unaffected;
>
> (d) any civil, criminal or administrative action or proceeding pending by or against the corporation may be continued by or against the body corporate; and
>
> (e) any conviction against, or ruling, order or judgment in favour of or against, the corporation may be enforced by or against the body corporate.

Class voting is also mandatory in respect of the three actions set out below:

(i) amalgamations;[25]

(ii) liquidation and dissolution;[26] and

(iii) disposition of all or substantially all of the assets of the not-for-profit corporation.[27]

Some commentators have expressed concern that such class voting requirements have the potential to give non-voting members a veto right where there are multiple classes of members. As such, not-for-profit corporations need to consider whether to introduce or to continue to maintain multiple classes of members under the new *CNCA* regime.

An alternative to creating multiple classes of members may be to acknowledge certain "members" as patrons, donors, friends, or supporters, and provide recognition of these key contributors in the by-laws or by other means, rather than making them formal "members." Care should be taken not to call these individuals "members" if they are not in fact legal members of the corporation.

Although class votes exist in line with the overarching theme of the *CNCA* to foster member enfranchisement, there exists an option to opt out of certain class voting rights in the articles.

Class Voting (Section 197 *CNCA*)	**Option to Opt Out?**
Exchange, reclassify or cancel of all or part of the memberships of the class or group	Yes
Add, change or remove the rights or conditions attached to the memberships of the class or group (including liquidation preference), or change prejudicially voting or transfer rights of the class or group.	No
Increase the rights of any other class or group of members having rights equal or superior to those of the class or group.	No
Increase the rights of a class or group of members having rights inferior to those of the class or group to make them equal or superior to those of the class or group.	No
Create a new class or group of members having rights equal or superior to those of the class or group.	Yes
Exchange or create a right of exchange of all or part of the memberships of another class or group into the memberships of the class or group.	No

(9) Enhanced Member Rights

Whereas under the *CCA* members were limited to remedies against unjust or inequitable conduct, the *CNCA* provides enhanced rights to its members. As is the case under the *Canada Business Corporations Act*,[28] members may apply to the court for an oppression remedy where they believe their rights have been oppressed,[29] for a derivative action remedy to enforce the rights of the corporation[30] or to determine any controversy respecting the election or appointment of a director or public accountant of the corporation.[31] On the application of a director or a member, a court can order that a meeting be called, held and conducted in such manner as the court directs.

As noted above, the *CNCA* also introduces a new provision—the faith-based defence—that would place restrictions on the extent to which derivative actions and oppression remedies may be applied to religious corporations where the matter at issue is based on a "reasonable" exercise of a "tenet of faith." It is not yet clear how broadly this protection will be interpreted.

III. Continuance under the *CNCA*

(a) Transition to the *CNCA*

The *CNCA* does not automatically apply to existing not-for-profit corporations incorporated under the *CCA*. Until the corporation has transitioned and continued under the *CNCA*, the rules under the *CCA* continue to apply.

Every existing federally incorporated not-for-profit corporation must make the transition to the *CNCA* by **October 17, 2014**. An application for a certificate of continuance is to include articles of continuance and an officer's certificate certifying that the members have adopted a new by-law that conforms to the *CNCA* requirements.

The continuance will entail at least the following steps:

(i) Review of letters patent and by-laws to assess what changes are necessary.

(ii) Preparation of Articles of Continuance (Form 4031).

(iii) Preparation of Initial Registered Office Address and First Board of Directors (Form 4002).

(iv) Preparation of new (conforming) by-laws.

(v) Obtain board approval.

(vi) Obtain member approval.

(vii) Apply for Certificate of Continuance. The Application must include

- The Articles of Continuance;
- The by-law or officer's certificate attesting to the adoption of a conforming by-law;
- The Notice of Initial Registered Office and First Board of Directors; and
- Name approval, if the corporation's name is being changed on continuance.

(viii) Issuance by Industry Canada of Certificate of Continuance.

(ix) Filing of new by-laws with Corporations Canada (within 12 months of adoption).

(x) Updating of records, corporate governance policies and manuals and staff training for familiarity with new documents/requirements.

(b) Effect of Non-Continuance under the *CNCA*

If a not-for-profit corporation does not make the transition prior to the deadline on October 17, 2014, Corporations Canada has stated that it will be assumed to be inactive and the corporation will be (involuntarily) dissolved. For registered charities, dissolution could lead to revocation of charitable status.

IV. Conclusion

Although federally incorporated not-for-profit corporations have until October 17, 2014, to continue under the *CNCA* many organizations are undertaking this task sooner rather than later in order to take advantage of the new statute's more favourable provisions. In any event, corporations should begin to plan for the transition as soon as possible. Depending on the complexity of the entity's corporate structure and the size of its membership, the continuance can take a fair bit of time and careful advance planning is recommended. Among other steps, the directors and management should establish the respective roles to be played by staff, the governance committee, if any, the Board and legal counsel. Existing documentation should be reviewed to determine what changes are required to comply with the *CNCA*, and consultations with the various stakeholders should be commenced in advance of director's and member's meetings with a view to facilitating approval of the new articles, by-laws and corporate policies. Corporations will no doubt also wish to consider its ideal governance structure and take advantage of this opportunity to make other beneficial changes to its corporate constitution in addition to those revisions that are necessitated by the *CNCA*.

[*Editor's note*: Barbara Miller is a Partner at Fasken Martineau DuMoulin LLP who has a broadly based and multifaceted corporate and commercial practice, with particular expertise in, among other areas, corporate governance matters for both the for-profit and not-for-profit sectors, mergers and acquisitions and communications law.]

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1 S.C. 2009, c.23.
2 R.S.C. 1970, c. C-32.
3 *Supra* note 1, s. 136.
4 *Ibid*., s. 148.
5 *Ibid*., ss. 204–207.
6 *Ibid*., s. 213.
7 *Ibid*., s. 175(1).
8 *Ibid*., s 16(*a*).
9 R.S.C. 1985, c. C-44.
10 R.S.C. 1985, c. 1 (5th Supp.).
11 *Supra* note 1, s. 224(2) (liquidation); s. 250(3) (derivative action); s. 253(3) (oppression remedy).
12 *Ibid*., s. 189(1).
13 *Ibid*., s 189(2).
14 *Ibid*., s 182(1) and s. 188.
15 *Ibid*., s 189(1).
16 *Ibid*., s. 125.
17 *Ibid*., s. 125.
18 *Ibid*., s. 170(1).
19 *Ibid*., s. 235.
20 *Ibid*., s. 236.
21 *Ibid*., ss. 148(1)–(3).
22 *Ibid*., ss. 130 (1) and (2).
23 *Ibid*., s. 133.
24 *Ibid*., ss. 204–207.
25 *Ibid*., s. 210.
26 *Ibid*., ss. 220 and 221.
27 *Ibid*., s. 214.
28 *Supra* note 9.
29 *Supra* note 1, s. 253.
30 *Ibid*., s. 251.
31 *Ibid*., s. 169.

• COMPARISON OF THE FEDERAL AND PROVINCIAL *NOT-FOR-PROFIT CORPORATIONS ACTS* AND ISSUES FOR CHARITIES •

Elena Hoffstein and Katie Ionson
Fasken Martineau DuMoulin LLP

Look out, charities, there's a new Act in town. The federal *Canada Not-for-profit Corporations Act* [*CNCA*][1] came into force on October 17, 2011, and replaces the *Canada Corporations Act* as the governing legislation for federal not-for-profit corporations. Change is also on the horizon for Ontario not-for-profit corporations. The *Ontario Not-for-profit Corporations Act, 2010* [*ONCA*][2] is expected to be proclaimed into force on July 1, 2013, and will replace Ontario's current *Corporations Act*.

Although the *CNCA* and the *ONCA* have many similarities, there are also differences. These differences matter to charities in two situations: first, when deciding whether to continue under the new federal or Ontario legislation and second, when looking to incorporate federally or provincially. This article compares some of the more significant aspects of the Acts and highlights issues your organization may face as it begins transitioning to the new federal or Ontario legislation.

Continuance

CNCA

Not-for-profits incorporated prior to October 17, 2011, under the *Canada Corporations Act* have until October 14, 2014, to continue under the *CNCA*. The application for continuance must include an officer's certificate certifying that the members have adopted a new by-law which conforms to the requirements of the *CNCA*. The consequences of failing to continue are serious: the corporation will be assumed to be inactive, may be dissolved and could face revocation of its charitable status. Federal not-for-profit corporations, particularly those with large membership bases, will want to begin the process of bringing their by-laws into compliance with the new Act as soon as possible. Until the application for continuance is filed, the *Canada Corporations Act* will continue to apply to the corporation.

ONCA

Not-for-profit corporations currently incorporated under Ontario's *Corporations Act* do not need to take active steps to continue under the *ONCA*. Such corporations will have three years from the date that the *ONCA* is proclaimed in force to amend governing documents, after which time any non-conforming provisions will be deemed to be amended in order to conform. Different rules apply to share capital social clubs, such as golf clubs and cottager associations. These organizations will have five years to determine whether to incorporate under the *ONCA*, the Ontario *Business Corporations Act*,[3] or the *Co-operative Corporations Act*,[4] but will need to apply for continuance pursuant to a special resolution or apply to the court for an order waiving the need for such a resolution.

Incorporation

Under both Acts, applicants may incorporate as of right upon filing articles of incorporation, rather than at the discretion of the Minister upon the issuance of letters patent.[5] The corporation will no longer be required to have "objects," although it must set out purposes in the articles of incorporation.[6]The *ONCA* explicitly permits commercial purposes if the articles state that such commercial purposes are to support one or more of the not-for-profit purposes of the corporation.[7] Although the *CNCA* does not expressly permit commercial activities, corporations under the Act may be able to engage in commercial activities that further their not-for-profit purposes without endangering their tax-exempt status. The *CNCA* expressly prohibits corporations from carrying on the business of banks, insurers or trust and loan companies.[8]

Corporations under the new Acts will have the rights, powers and privileges of a natural person, although a corporation may choose to restrict its activities in its articles of incorporation.[9] Not-for-profit corporations planning to restrict their activities should note that both the *CNCA* and the *ONCA* abolish the *ultra vires* doctrine, so acts undertaken by corporations acting contrary to their articles will still be valid.[10]

Filing of By-Laws

Although neither Act requires the filing of by-laws at the time of incorporation, the *CNCA* requires that by-laws and any amendments to by-laws be filed within 12 months of their confirmation by members of the corporation.[11] Industry Canada has published a By-Law Builder tool on its website as a guide for corporations in creating by-laws under the new Act. The *ONCA* has a default by-law that corporations which delay filing by-laws for a period of more than 60 days after incorporation will be deemed to have accepted.[12] A target date of February 2013 has been set for the release of the regulations to the *ONCA* and a copy of the default by-law.

Classification

It is essential that not-for-profit corporations determine which of the categories below they fall under. The categorization as a soliciting or non-soliciting corporation, under the *CNCA*, or as a public benefit or non-public benefit corporation, under the *ONCA*, impacts corporate obligations, including requirements respecting the minimum number of directors and financial disclosure, by way of example.

CNCA

The *CNCA* distinguishes between two types of corporations: soliciting corporations and non-soliciting corporations. A soliciting corporation is one that received amounts in excess of $10,000 over the last financial year in the form of

- donations or gifts requested from third parties who are not members, directors, officers or employees of the corporation at the time the request was made, or a relative or spouse of such person;
- grants or financial assistance from federal, provincial or municipal governments; or
- donations or gifts from another soliciting corporation.[13]

The *CNCA* permits soliciting corporations to apply to the Director to be deemed to be non-soliciting corporations. The Director has the discretion to grant such an application where he or she is satisfied that the grant would not be prejudicial to the public interest.[14] Any corporation that does not meet the definition of a soliciting corporation is a non-soliciting corporation.

ONCA

The *ONCA* uses the concepts of public benefit corporation and non-public benefit corporation to distinguish between corporations. A corporation is a public benefit corporation if it is either a charitable corporation or a non-charitable corporation that received in excess of $10,000 in the last financial year from arm's length donors or the government.[15] A corporation may qualify as a charitable corporation under the *ONCA* even if it is not a registered charity for the purposes of the *Income Tax Act*.[16] A charitable corporation is any corporation incorporated for the relief of poverty, the advancement of education, the advancement of religion or any other charitable purpose, regardless of its charitable registration status. Any corporation that is not a public benefit corporation is a non-public benefit corporation.

The definition of a public benefit corporation is slightly broader than that of a soliciting corporation. Under the *ONCA*, any donation or gift from an arm's length party counts towards the $10,000 threshold. Under the *CNCA*, only donations and gifts (other than those received from soliciting corporations) that were requested count towards the threshold.

Duration of Classification

Another important difference between the Acts is the period of time for which classification as a soliciting corporation or public benefit corporation applies. Once a corporation is classified as a soliciting corporation, it will continue to be classified as such until it has failed to meet the qualifications of a soliciting corporation for three consecutive years.[17] By contrast, under the *ONCA*, a public benefit corporation will cease to be classified as such if it fails to satisfy the requirements of a public benefit corporation in any given financial year.[18]

Reporting and Financial Disclosure

Filing of Financial Statements and Annual Returns

Under the *ONCA*, there is no requirement to file financial statements with the government; however, statements must be placed before members.[19] There is also no obligation to submit an annual return. Under the *CNCA*, non-soliciting corporations do not need to file financial statements, although they must prepare and present financial statements to their members and file an annual return with the government.[20] Soliciting corporations must file financial statements with the government, present them to members and file an annual return with the government.[21]

Ability to Waive the Appointment of an Auditor

Both Acts create a general requirement that members at each annual meeting appoint an auditor who is independent of the corporation, its affiliates and the directors and officers of the corporation and its affiliates to conduct an audit or review engagement. As explained below, in certain circumstances, this requirement may be waived.

CNCA

Soliciting corporations with annual revenues not exceeding $50,000 in the last financial year and non-soliciting corporations with annual revenues not exceeding $1 million in the last financial year, may dispense with the appointment of an auditor and the need for an audit or review engagement if all of the members entitled to vote at the annual meeting of the members so resolve.[22]

ONCA

Public benefit corporations with annual revenues not exceeding $100,000 (or another prescribed amount) in the last financial year and non-public benefit corporations with revenues not exceeding $500,000 in the last financial year may dispense with the appointment of an auditor and the need for an audit or review engagement where members agree to do so by "extraordinary resolution."[23] An extraordinary resolution requires a vote at a special meeting of the members called for the purpose of considering the resolution where 80 per cent of votes cast are cast in favour of the resolution. An extraordinary resolution will also be passed where all of the members entitled to vote at a meeting of the members consent to the resolution.[24]

Ability to Conduct a Review Engagement instead of an Audit

In certain circumstances, the members of a corporation may elect to conduct a review engagement instead of an audit, or vice versa. These circumstances are explained below.

CNCA

Soliciting corporations with annual revenues in the last financial year not exceeding $50,000 are normally required to conduct a review engagement, but members may, by ordinary resolution, elect to conduct an audit instead.[25] Soliciting corporations with annual revenues in the last financial year of greater than $50,000 but not exceeding $250,000 may conduct a review engagement instead of an audit if the members elect to do so by special resolution.[26] Soliciting corporations with annual revenues of more than $250,000 must appoint a public accountant and conduct a full audit.[27] Non-soliciting corporations may have annual revenues in excess of $1 million before an audit becomes unavoidable.[28] Non-soliciting corporations with revenues not exceeding $1 million are normally required to conduct a review engagement, but members may, by ordinary resolution, elect to conduct an audit instead.[29]

The financial review requirements under the *CNCA* are summarized in the table below.

	Gross Annual Revenue	Type of External Financial Review	Type of Resolution required to avoid Full Audit
Soliciting	$250,001+	Full Audit	N/A
	$50,001 to $250,000	Review Engagement	Special, must be renewed annually
	$0 to $50,000	Review Engagement or Compilation Report	None. Consent of all members is required to dispense with the review engagement, must be renewed annually
Non-Soliciting	$1,000,001+	Full Audit	N/A
	$0 to $1,000,000	Review Engagement or Compilation Report	None. Consent of all members is required to dispense with the review engagement, must be renewed annually

ONCA

The *ONCA* has higher thresholds for audit requirements for public benefit corporations than the *CNCA* has for soliciting corporations. Both public benefit corporations and non-public benefit corporations need only conduct a full audit if annual revenues in the financial year exceed $500,000.[30] Where revenues do not exceed $500,000 the members may elect, by extraordinary resolution, to conduct a review engagement instead of an audit.[31]

The financial review requirements under the *ONCA* are summarized in the table below.

	Gross Annual Revenue	Type of External Financial Review	Type of Resolution required to avoid Full Audit
Public Benefit Corporations	$500,001+	Full Audit	N/A
	$100,001 to $500,000	Review Engagement	Extraordinary (80%), must be renewed annually
	$0 to $100,000	None Required	Extraordinary (80%), must be renewed annually
Non-Public Benefit Corporations	$500,001+	Review Engagement	Extraordinary (80%), must be renewed annually
	$0 to $500,000	None Required	Extraordinary (80%), must be renewed annually

Directors and Officers

Number of Directors

CNCA

The minimum required number of directors varies under the *CNCA* depending on the category of corporation. Non-soliciting corporations must have a minimum of one director, who can be an employee or member of the corporation.[32] Soliciting corporations require a minimum of three directors, at least two of whom are not officers or employees of the corporation or its affiliates.[33] An important difference between the *CNCA* and the *ONCA* is that there is no express provision for *ex officio* directors in the *CNCA*.

ONCA

Any corporation incorporated under the *ONCA* must have a minimum of three directors, two-thirds of whom must not be employees of the corporation or its affiliates, although they may be officers.[34] The requirement that the President of a corporation be a director no longer exists. As noted above, the *ONCA*, in contrast to the *CNCA*, expressly permits *ex officio* directors.[35]

Term and Appointment of Directors

Both Acts allow directors to serve a maximum term of four years.[36] If a director is not elected to an express term in office, he or she will hold office only until the close of the next annual meeting.[37]

Existing directors may also appoint additional directors within the limits on the minimum and maximum number of directors set out in the articles of incorporation. The number of directors so appointed must not exceed one-third of the number of directors elected at the immediately preceding annual meeting. Under the *CNCA*, such appointment may not be for longer than one year. Under the *ONCA*, such appointment is valid until the close of the next annual meeting.[38]

Under both Acts, members may elect and remove directors by ordinary resolution; however, if a class or group of members has the exclusive right to elect a particular director, only an ordinary resolution passed by members of that class can remove the director.[39]

Officers

ONCA

Subject to the articles or by-laws, directors under the *ONCA* may designate offices, appoint as officers people of full legal capacity, specify their duties and delegate powers to them, subject to certain limitations. A director may be appointed to any office of the corporation and two or more offices may be held by the same person.[40]

CNCA

The rules governing the appointment of officers are the same under the *CNCA*, except that the directors' ability to appoint officers is also subject to any unanimous member agreement.[41] A unanimous members' agreement is a written agreement among all the members of a non-soliciting corporation. The *ONCA* does not provide for unanimous member agreements.

Powers and Duties of Directors

Directors may be given the power to terminate or discipline a member under both the *CNCA* and the *ONCA*. Under the *CNCA*, this power may be granted through the articles. Under the *ONCA*, it can be granted through either the articles or the by-laws, but any disciplinary action must be undertaken in good faith and procedural fairness must be maintained.[42]

Directors under both Acts also have the power to make, amend and repeal by-laws with immediate effect, subject to later ratification by members, except respecting fundamental changes.[43] The *CNCA* contains a more extensive list of the actions that constitute fundamental changes than that which appears in the *ONCA*. Under the *ONCA*, only a transfer of members, distribution of residual property on liquidation or change in the method of voting of members not in attendance at a meeting of the members qualify as fundamental changes.[44] By contrast, under the *CNCA*, a change in the corporation's name or the creation of a new class of member or new conditions for membership also constitutes a fundamental change.[45] As a result, directors are permitted to make more significant changes with immediate effect under the *ONCA* than they are under the *CNCA*.

The *CNCA* and *ONCA* both place directors and officers under a duty to avoid conflicts of interest. Directors and officers are required to disclose the nature and extent of any interest they have in any material contract or material transaction made or proposed to be made with the corporation.[46] The obligation also applies where the person is a director or officer of the other corporation but has no ownership interest in it. The director required to make a disclosure is prohibited from voting to approve the contract or transaction, unless the contract or transaction relates primarily to his or her remuneration, is for indemnity or insurance or is with an affiliate.[47]

Both Acts also set out a statutory fiduciary duty for directors and require directors to comply with the relevant Act and the corporation's articles and by-laws.[48] Directors under the *CNCA* face two additional duties that do not exist under the *ONCA*: the duty to "verify the lawfulness of the articles and the purpose of the corporation" and the duty to comply with any unanimous member agreement.[49]

Liability and Indemnification

Both Acts set out the standard of care by which directors and officers are to abide in exercising their powers and carrying out their duties. They must act honestly and in good faith with a view to the best interests of the corporation and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[50] A reasonable due diligence defence is included in both Acts. Under the *CNCA*, the due diligence defence entitles directors to rely in good faith on financial statements presented by officers and persons whose professions lend credibility to their reports.[51] The defence under the *ONCA* is slightly broader, entitling directors to rely in good faith on interim financial statements and on the advice or reports of employees or officers of the corporation as well as on financial statements presented by officers and persons whose professions lend credibility to their reports.[52]

These due diligence defences do not immunize directors from liability. Corporations under the *CNCA* may indemnify directors and officers by purchasing insurance.[53] The ability to purchase indemnity insurance is also provided for under the *ONCA*; however, charitable corporations may only purchase such insurance if they comply with the *Charities Accounting Act* or a regulation thereunder or if there is a court order permitting the purchase.[54]

Member Rights

One of the most significant differences in member rights under the two Acts is the ability of members of non-soliciting corporations under the *CNCA* to use unanimous member agreements to take over powers of the directors. There are also slight differences in the rules relating to annual meetings. Under both Acts, directors must call an annual general meeting ("AGM") within 18 months of the corporation coming into existence and no later than every 15 months thereafter. However, the *CNCA* additionally requires that the AGM be called no later than six months after the end of the corporation's preceding financial year.[55] Notice requirements for AGMs and special meetings also differ slightly for corporations with 250 members or more. The *CNCA* deems publication to be sufficient notice of meetings in such cases, whereas the *ONCA* requires that notice be actively given to all members, even where their number exceeds 250. Deadlines for providing notice also differ slightly between the two Acts.[56]

Proxy solicitation is another area of difference. Proxy solicitation is not mandatory under the *CNCA*, although the by-laws of a *CNCA* corporation may provide for proxies or voting by mail. Proxies may not be used in exercising delegated authorities under a unanimous member agreement.[57] Under the *ONCA*, a form of proxy must be made available to each member of the corporation who is entitled to receive notice of a meeting of the members, unless the by-laws of the corporation allow for voting by mail, telephone or electronic means.[58]

Both the *CNCA* and the *ONCA* give certain members the right to requisition a meeting of the members for purposes stated in the requisition. Under the *CNCA*, members must hold five per cent or more of the votes that may be cast at such a meeting, or a lower percentage as set out in the by-laws, in order to requisition the meeting.[59] Under the *ONCA*, members may requisition a meeting if they hold at least ten per cent of the votes that may be cast at a members meeting, or such lower percentage as set out in the by-laws.[60]

Any member under either Act has the right to submit to the corporation notice of a proposal that he or she wishes to raise at a members' meeting and to discuss the matter at the meeting. Such proposals can include nominations for election of directors, provided that the proposal is signed by at least five per cent of the voting members, or such lower percentage as set out in the by-laws.[61] Nominations for directors may still be made by members at meetings, without the requirement of support from five per cent of voting members.

Significantly, both Acts give voting rights to non-voting members in certain situations. Non-voting members under both Acts have an irrevocable right to vote in respect of any amalgamation, continuance or extraordinary disposition of the assets of the corporation.[62] In addition, all members, including non-voting members, have the right to vote as a separate class on fundamental changes having the potential to adversely affect their class.[63] In many cases, this right to a class vote is absolute and cannot be removed by the articles. These rules essentially create a class veto power, which may be of concern to corporations that currently have more than one class of member.

Dissent rights are also provided to members of non-public benefit corporations under the *ONCA* where a fundamental change is proposed. In such cases, dissenting members can force the corporation to buy out a dissenting member's interest.[64] No such dissent rights are provided to members under the *CNCA*.

Member Remedies

Both Acts allow members to apply to the court for a derivative action remedy to enforce the rights of the corporation.[65] The *CNCA*, but not the *ONCA*, also sets up a statutory oppression remedy, which is available to any member, director, officer or creditor of the corporation if its directors or officers act in a way that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of the complainant.[66]

Religious corporations may take advantage of a faith-based defence to these remedies set out in both Acts. Under the *CNCA*, this defence prevents derivative actions and oppression remedies from being brought against religious corporations where the action at issue was reasonably based on a tenant of faith.[67] Neither the term "religious corporation" nor "reasonable exercise" is defined in the *CNCA*. The application of the defence is potentially broader under the *ONCA*, which prevents derivative actions from being brought by members against any religious corporation.[68]

Additional remedies are available to members under both Acts. Both Acts allow members to apply for a compliance order forcing a director, officer, employee or agent of the corporation, among other people, to comply with the Act itself, the corporation's articles or by-laws or, in the case of a federal corporation, any unanimous member agreement. A restraining order may also be obtained to restrain such a person from acting in breach of those documents.[69] The Acts also allow members to apply for an order for the dissolution and liquidation of the corporation where a member's interest has been unfairly disregarded and where it is just and equitable to grant such an order.[70] The *ONCA* also provides a rectification remedy whereby the corporation or its members, directors, officers, creditors or any other aggrieved person may apply for an order rectifying the corporation's records or registers where the name of a person has been wrongly inputted or removed.[71]

Treatment of Residual Assets on Dissolution

The *CNCA* and *ONCA* contain similar rules regarding the treatment of residual assets on dissolution. Soliciting corporations must distribute residual assets to a qualified donee, as defined in the *Income Tax Act*.[72] Public benefit corporations must distribute residual assets to a similarly purposed corporation or to the government.[73] Both non-soliciting corporations and non-public benefit corporations must distribute residual assets on a prorated basis among members, unless the articles provide otherwise.[74]

Issues for Charities

In some cases an entity may not have the choice of which statute to continue or incorporate under. Universities, colleges, professional governing bodies and hospitals may need to be incorporated under provincial law. In other cases, a primary funding agent may dictate the choice of incorporating jurisdiction. For those corporations with the ability to choose between jurisdictions, some of the major considerations include

1. The importance of a national platform—The *CNCA* is more inclusive to members, donors and the general public. It provides a common set of rules for organizations operating out of more than one province and the ability to carry on activities across Canada under a single federal name; and
2. Financial Transparency—as mentioned above, a soliciting corporation under the *CNCA* must file annual financial

statements with Corporations Canada, as well as an annual return. These documents can be inspected by the general public. The *ONCA*, by contrast, has no such filing requirements.

If the formal purposes or objects of a charity are amended as part of the continuance process, it will be necessary to consider the following to maintain and retain charitable registration status:

1. The charitable purposes must be exclusively charitable.
2. It is advisable to seek the consent of the Charities Directorate prior to amending charitable purposes.
3. If the charitable purposes are amended, the charity will need to provide the Charities Directorate with a statement of the activities to be carried out in furtherance of the new charitable purposes.

In addition, registered charities continuing under the *CNCA* must advise the Charities Directorate after completion of the continuance process. Documents to be filed with the Charities Directorate include

1. A copy of the Certificate of Continuance;
2. A copy of Form 4031, Articles of Continuance (transition);
3. A list of current directors (if amended);
4. A copy of the current by-laws (if amended); and
5. A statement of current activities (if the purposes have changed and have not been previously reviewed by the Charities Directorate).[75]

Charities continuing under the *CNCA* should also include a clause in the Articles of Continuance stating that the corporation is to be carried on without the purpose of gain for its members and that any profits or other accretions of the corporation shall be used in furtherance of its charitable purposes. Although the *CNCA* allows for the remuneration of directors, directors of federal charitable corporations are not permitted to receive remuneration. Although provincial laws vary with respect to whether a director of a charitable corporation can receive compensation for services provided to the corporation in another capacity, the Ontario Public Guardian and Trustee ("PGT") takes the position that a director of a charitable corporation cannot receive compensation as a director or for services provided to the corporation in another capacity.

The requirements surrounding continuance applications for Ontario charities, including whether the articles must be approved by the PGT, are not clear at this time. More information on the role of the PGT with respect to charities under the *ONCA* is expected to be forthcoming.

Conclusion

The *CNCA* and *ONCA* are significantly changing the legal landscape for charities and not-for-profits. In some cases, the choice of whether to continue under the *CNCA* or the *ONCA* will be determined by considerations that are external to the Acts themselves. Not-for-profit corporations with the freedom to choose between jurisdictions will want to carefully consider the consequences of continuing under both Acts. In light of the new requirements and member rights and remedies imposed by the Acts, all not-for-profit corporations should review governing documents, membership structures and continuance obligations to avoid unpleasant surprises.

[*Editor's note*: Elena Hoffstein is a Partner at Fasken Martineau DuMoulin LLP practicing in the areas of Personal Tax Planning and Wealth Management, Estate Litigation, Estate Planning and Tax. Katie Ionson is an Associate at Fasken Martineau DuMoulin LLP practicing in the area of Personal Tax Planning and Wealth Management.]

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1 S.C. 2009, c. 23 [*CNCA*].
2 S.O. 2010, c. 15 [*ONCA*].
3 R.S.O. 1990, c. B.16.
4 R.S.O. 1990, c. C.35.
5 *Supra* note 1, s. 6(1); *supra* note 2, s. 7(1).
6 *CNCA*, *ibid*., s. 7(1)(f); *ONCA*, *ibid*., s. 8(1).
7 *ONCA*, *ibid*., s. 8(3).
8 *Supra* note 1, s. 3(3).
9 *Ibid*., s. 16(1); *supra* note 2, s. 15(1).
10 *CNCA*, *ibid*., s. 16(3); *ONCA*, *ibid*., s. 15(3).
11 *CNCA*, *ibid*., s. 153 and the *Canada Not-for-profit Corporations Regulations*, S.O.R./2011-223 [*CNCA* Reg.].
12 *Supra* note 2, s. 18(1).
13 *Supra* note 1, s. 2(5.1).
14 *Ibid*., s. 2(6).
15 *Supra* note 2, s. 1(1).
16 R.S.C. 1985, c. 1 (5th Supp.).
17 *Supra* note 1, s. 2(5.1) and *supra* note 11, s. 16.
18 *Supra* note 2, s. 1(1) and s. 1(2).
19 *Ibid*., s. 84.
20 *Supra* note 1, s. 175 and s. 278.
21 *Ibid*., s. 175 and s. 176.
22 *Ibid*., s. 182.
23 *Supra* note 2, s. 76.
24 *Ibid*., s. 76(4).
25 *Supra* note 1, s. 188(2) and *supra*, note 11, s. 80(1) and s. 83(1). As explained above, members may also elect to dispense with the review engagement or audit altogether where all members consent. In such a case, a compilation report must be prepared.
26 *CNCA*, *ibid*., s. 189(2) and *CNCA* Reg., *ibid*., s. 84.
27 *CNCA*, *ibid*., s. 189 and *CNCA* Reg., *ibid*., s. 80(1) and s. 83(2).
28 *CNCA*, *ibid*., s. 189 and *CNCA* Reg., *ibid*., s. 80(2) and s. 83(2).
29 *CNCA*, *ibid*., s. 188(2); *CNCA* Reg., *ibid*., s. 80(2) and s. 83(1). As explained above, the members may also elect to dispense with the review engagement altogether where all members consent. In such case, a compilation report must be prepared.
30 *Supra* note 2, s. 76(2).
31 *Ibid*., s. 76(2). As discussed above, members of non-public benefit corporations may dispense with the requirement of conducting a review engagement or audit altogether by extraordinary resolution. Public benefit corporations with annual revenues of less than $100,000 also have this option.
32 *Supra* note 1, s. 125.
33 *Ibid*., s. 125.
34 *Supra* note 2, s. 22(1) and s. 23(3).
35 *Ibid*., s. 23(4).
36 *Supra* note 1, s. 128(3) and *supra*, note 11, s. 28(1); *ibid*., s. 24(1).
37 *CNCA*, *ibid*., s. 128(5); *ONCA*, *ibid*, s. 24(4).
38 *CNCA*, *ibid*, s. 128(8); *ONCA*, *ibid*, s. 24(7).
39 *CNCA*, *ibid*, s. 128(3) and s. 130; *ONCA*, *ibid*., ss. 24–25.
40 *ONCA*, *ibid*, s. 42.
41 *Supra* note 1, s. 142.
42 *Ibid*., s. 158; *supra*, note 2, s. 51.
43 *CNCA*, *ibid*., s. 152(1); *ONCA*, *ibid*., s. 17(1).
44 *ONCA*, *ibid*., s. 103(1).
45 *Supra* note 1, s. 197(1).
46 *Ibid*., s. 141(1); *supra*, note 2, s. 41(1).
47 *CNCA*, *ibid*, s. 141(5); *ONCA*, *ibid*., s. 41(5).
48 *CNCA*, *ibid*., s. 148(1) and s. 124; *ONCA*, *ibid*., s. 43(2) and s. 43(1).
49 *CNCA*, *ibid*., s. 148(3).
50 *Ibid*., s. 148(1); *supra*, note 2, s. 43(1).
51 *Ibid*., s. 149.
52 *Supra* note 2, s. 44.
53 *Supra* note 1, s. 151(6).
54 *Supra* note 2, s. 46(6) and s. 46(7).
55 *Supra* note 1, s. 160(1) and *supra*, note 11, s. 61; *ibid*., s. 52(1).
56 *CNCA*, *ibid*., s. 63; *ONCA*, *ibid*., s. 55.
57 *CNCA*, *ibid*., s. 171 and s. 170(7).
58 *Supra* note 2, s. 65.
59 *Supra* note 1, s. 167 and *supra*, note 11, s. 72(1).
60 *Supra* note 2, s. 65.
61 *Supra* note 1, s. 163(1) and s. 163(5); *ibid*., s. 56(1) and s. 56(5).
62 *CNCA*, *ibid*., s. 206, s. 213(4) and s. 214(4); *ONCA*, *ibid*., s. 111, s. 116(3) and s. 118(4).
63 *CNCA*, *ibid*., s. 197, s. 199, s. 206(4), s. 212(4) and s. 214(5); *ONCA*, *ibid*., s. 103, s. 105, s. 111(4) and s. 118(5).

[64] *ONCA*, *ibid*., s. 187.
[65] *Supra*, note 1, s. 251; *ibid*., s. 183.
[66] *CNCA*, *ibid*., s. 253.
[67] *Ibid*., s. 251(3).
[68] *Supra* note 2, s. 183(3).
[69] *Supra* note 1, s. 259; *ibid*., s. 191.
[70] *CNCA*, *ibid*., s. 224, *ONCA*, *ibid*., s. 136.
[71] *ONCA*, *ibid*., s. 186.
[72] *Supra* note 16; *supra*, note 1, s. 235.
[73] *Supra* note 2, s. 167(1)(*d*)(i).
[74] *Supra note* 1, s. 236; *supra*, note 2, s. 167(1)(*d*)(ii).
[75] A helpful resource is the Canadian Revenue Agency's Continuance Checklist: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/nfpc/cntnnc-chcklst-eng.html>.