

---

# THE NFP RULES ARE CHANGING. IS YOUR ORGANIZATION READY?

The **modernization** of provincial and federal **not-for-profit law** and why organizations should think proactively.

---

## **Lisa M. Asbreuk**

Lawyer

Cunningham, Swan, Carty, Little + Bonham LLP

[lasbreuk@cswan.com](mailto:lasbreuk@cswan.com)

613-546-8080

# Most NFP corporations will be affected

- There are over 46,000 NFP corporations in Ontario, and over 19,000 NFP corporations federally. **Most will be affected**, including
  - all OCA Part III NFP corporations**, and
  - all CCA Part II NFP corporations.**
  
- Special transitional rules apply for:
  - Special act / private act NFP corporations
  - Social clubs will have 5 years to elect to either:
    - continue under the OBCA;
    - covert to an ONCA NFP corporation; or
    - convert to a co-operative corporation
  
- Exemptions in Ontario:
  - Co-ops under the Ontario Co-Operative Corporations Act
  - Municipalities
  - Insurance companies incorporated under Part V of the OCA



---

# Know the lingo

new

- ❑ ONCA = Ontario Not-for-Profit Corporations Act
- ❑ CNCA = Canada Not-for-Profit Corporations Act

old

- ❑ OCA = Ontario Corporations Act (Part III)
- ❑ CCA = Canada Corporations Act (Part II)

# Policy objectives behind the changes

- Greater alignment with business corporations law
- Improved efficiency and practicality
- Improved transparency
- Improved governance and accountability
- National consistency
- Clarification on permitted commercial activity

Overriding principle:

NFP corporations which receive broader **public funds** should be subject to **tighter regulation** and greater public **scrutiny**.



Cunningham Swan  
LAWYERS

# Effective dates for the new legislation

- **ONTARIO – expected to be in force by late 2012**
  - OBCA approved by the Legislature October 25, 2010
  - Not yet in force
  - Expected to be proclaimed into force in late 2012
  - Regulations and technical systems are being prepared
  
- **CANADA – now in force**
  - CNCA came into force October 17, 2011
  - Regulations now in force
  - Transitioning information available on Corporations Canada website



# ONCA transitioning

## for OCA Part III corporations

- **When the ONCA comes into force:**
  - Existing Ontario NFP corporations can **do nothing** and will automatically be continued under the ONCA
  - OCA Part III automatically repealed
  - Valid governing documents remain valid and applicable during 3 year grace period
  - 3 year grace period to amend governing documents to conform with the ONCA, or will be deemed amended to conform.
  - Default bylaws
- New Ontario NFP corporations must be incorporated under ONCA



# CNCA transitioning

## for CCA Part II corporations

- **CNCA came into force October 17, 2011**
  - Existing federal NFP corporations **need to act**; must apply for Articles of Continuance under the CNCA within 3 years (by October 17 2014) or may be dissolved.
    - **See Transition Guide (Corporations Canada)**  
**“Bylaw Builder” available online**
  - CCA not automatically repealed
  - CCA applies until a Certificate of Continuance is issued
  - Valid governing documents remain valid and applicable until continued and new governing documents filed
- New Federal NFP corporations must be incorporated under CNCA

# Transition timing and requirements

## Special legislation NFP corporations

- NFP corporations incorporated under special acts or private acts require **specific analysis and advice**.
- The ONCA or CNCA will **generally apply**, but the transitional process may involve **additional steps**.
- In some cases, additional **Ministerial consent** will also be required under the special act or private act.
- Know your transitioning requirements.



# Continuance and choice of jurisdiction

- ONCA
  - can import in
  - can export out
  
- CNCA
  - can import in
  - can export out

# Special comments re charities

- Every charity is a NFP corporation (**ONCA / CNCA apply**)
- **Charities law also applies (ie: CRA requirements)**
- Registered charities must adopt restrictions on their activities to meet and maintain CRA's qualifications for registered charity status.
  - suggestion: include restrictive language in the Articles to limit activities to those now set out in the objects
- CRA (and PG&T) pre-approval required if objects change
- New governing documents must be filed with CRA (and PG&T)



# Content of the new rules...

- New Categories of NFP corporations
  - ONCA
    - Public Benefit Corporations (PBCs) – includes charities
    - Non-Public Benefit Corporations
  - CNCA
    - Soliciting Corporations
    - Non-Soliciting Corporations
- Incorporation + Articles
- Bylaws
- Board of directors
- Members' rights and remedies
- Level of financial review
- Financial reporting requirements
- Residual assets on dissolution/liquidation



# ONCA categories of NFP corporations

## 1. Public Benefit Corporations (PBCs)

### □ Charitable PBCs

- common law definition of “charity”
- charities are always PBCs regardless of amount of funds received

### □ Non-charitable PBCs

- >\$10,000 in revenues per financial year from public sources:
  - donations from the public (not members, directors, officers or employees) or
  - grants or financial assistance from government or government agency(does not include receipts from an umbrella org that is a PBC)

## 2. Non-Public Benefit Corporations (non-PBCs)

- <\$10,000 in revenues per financial year from public sources
- Generally subject to more lenient requirements



# CNCA categories of NFP corporations

## 1. Soliciting Corporations

- >\$10,000 in revenues per financial year from public sources:
  - donations from the public (not members, directors, officers or employees, or related);
  - grants or financial assistance from government or government agency; or
  - conduit/umbrella org that is a soliciting corporation or that receives its funding from an soliciting corporation

## 2. Non-Soliciting Corporations

- <\$10,000 in revenues per financial year from public sources
- Generally subject to more lenient requirements



# Possibility of alternating status?

(teeter above and below \$10,000/year from public sources threshold)

## ■ ONCA

- NFP corporations anticipating alternating between PBC / non-PBC status may voluntarily adopt rules to comply with the **stricter requirements for PBCs**, ie:
  - Assets transfer to a similar purpose PBC (or charity) on liquidation;
  - 2/3 directors not employees
  - Prohibiting membership reimbursements on membership termination;
  - Require an audit unless the PBC exceptions are met for a lower level of financial review

## ■ CNCA

- NFP corporations anticipating alternating between soliciting/non-soliciting status may voluntarily adopt rules to comply with the **stricter requirements for soliciting corporations**, ie:
  - Residual assets only to be paid to qualified donees on liquidation;
  - Min 3 directors, at least 2 not employees;
  - Appoint public accountant (unless revenues <\$50,000/yr and unanimous member consent to waive)
  - Require audit (unless revenues <\$250,000/yr and special resolution waiving audit)
  - File financial statements with Corporations Canada



# Incorporation and Articles

## ■ Both ONCA and CNCA

- Articles of Incorporated filed → incorporation is as of right
- Letters patent system and discretion abandoned
- Multiple membership classes and voting rights must be set out in Articles
- Statement of purpose now required (not objects)
  - stated purpose will not invalidate actions arguably outside the purpose because a NFP corporation has all the rights, powers and privileges of a natural person

## ■ ONCA

- Articles should state that any purposes of a commercial nature are intended only to advance the not-for-profit purpose(s)
- PBC: Articles must stipulate distribution of residual assets on liquidation (charities still limited to qualified donees)
- Non-PBC: Articles may stipulate distribution of residual assets on liquidation

## CNCA

- SC and non-SCs: Articles must stipulate distribution of residual assets
- Charities and non-charitable SCs: residual assets must go to qualified donees



# Bylaws

## ■ ONCA

- Valid existing bylaws may remain in place during 3 year grace period
  - any amendments must conform with ONCA
  - bylaw review recommended prior to deadline
  - default bylaws deemed to apply at end of grace period
- New corporations must adopt bylaws within 60 days of incorporation or deemed to have adopted default bylaws
- Bylaws do not need to be filed (for non-charitable PBCs)

## ■ CNCA

- Valid existing bylaws may remain in place during 3 year grace period
  - any amendments must conform with CNCA
  - bylaw review required to prepare for continuation process
- New corporations must file bylaws within 12 months (“bylaw builder”)
- Bylaws must be filed, but approval is not required



# Board of Directors

- **ONCA**
  - PBCs: minimum 3 directors
  - Non-PBCs: minimum 3 directors
  
- **CNCA**
  - Soliciting: minimum 3 directors (2 non-management)
  - Non-soliciting: minimum 1 director
  
- **Both ONCA and CNCA**
  - Members may remove directors at any time by ordinary resolution
  - May meet by conference call
  - May adopt unanimous written resolutions in lieu of meeting



# Directors' powers, duties, responsibilities

- Power to borrow and grant security on behalf of the corporation, unless restricted by the Articles or bylaws (may add ease for lenders)
- Conflict of interest disclosure obligations and procedures
- Statutory duties of care and loyalty replace common law duties of care and loyalty.
  - **Duty to act honestly and loyally in the best interests of the corporation.**
  - **Due diligence defense:** D or O not liable if exercised the care, diligence, and skill that a reasonably prudent person would have exercised in comparable circumstances (objective standard), includes good faith reliance on the financial statements and advice of professionals.
- Expanded rights of indemnification (NOTE: limitations for charities)
  - NFP corporation permitted to advance defense costs
  - NFP corporation permitted maintain D&O liability insurance
- Directors' statutory liability for unpaid employee wages, vacation pay, reimbursable employee expenses



# Members' rights and remedies

- ❑ Enhanced **voting rights** re fundamental changes & member rights changes
- ❑ Rights to submit bylaw amendment proposals, to nominate directors, to require a matter be discussed at AGM, to access corporate records, etc.
- ❑ **Dissent and appraisal rights** re certain fundamental changes (only ONCA non-PBCs)
- ❑ Oppression remedy against corporation
  - CNCA only, and n/a for religious corps re tenets of faith acts
- ❑ Derivative action
  - ONCA: n/a for religious corps
  - CNCA: n/a for religious corps re tenets of faith acts
- ❑ Court ordered winding-up and liquidation
  - CNCA: n/a to religious corps re tenets of faith acts
- ❑ Compliance or restraining order
- ❑ Unanimous Members' Agreement (CNCA only)
- ❑ Membership interests may be transferrable if permitted in Articles/bylaws (CNCA only)



# Level of financial review - ONCA

- ❑ Default (do nothing) is that the NFP corporation must appoint an independent auditor. See exemptions.
- ❑ No audit requirement for non-PBCs

Category of Ontario NFP corporation	Annual revenues in the financial year	Lowest level of review available
PBC	\$100,000 or less	<b>Compilation</b> Extraordinary resolution (80% votes cast at special meeting of members) required to waive appointment of public accountant (no audit, no review engagement).
PBC	\$100,000 - \$500,000	<b>Review engagement</b> Extraordinary resolution required.
PBC	more than \$500,000	<b>Audit</b>
Non-PBC	\$500,000 or less	<b>Compilation</b> Extraordinary resolution required.
Non-PBC	more than \$500,000	<b>Review engagement</b> Extraordinary resolution required.

# Level of financial review - CNCA

- Default (do nothing) is that the NFP corporation must appoint an independent auditor. See exemptions.
- Audit for soliciting corporations >\$250,000 (unless Director deems it not required)
- Audit mandatory for non-soliciting corporations >\$1MM

Category of Canada NFP corporation	Annual revenues in the financial year	Lowest level of review available
Soliciting	\$50,000 or less	<b>Compilation</b> , if unanimous member consent (100% of members entitled to vote at annual meeting) to waive public accountant. <b>Review engagement</b> if public accountant is not waived (unless ordinary resolution passed requiring audit).
Soliciting	\$50,000 - \$250,000	* <b>Compilation</b> if Director determines that deeming the revenues <\$50,000 would not prejudice the public interest (see details). Unanimous member consent required waiving public accountant. <b>Review engagement</b> otherwise. Special resolution (2/3 members) required to waive audit.
Soliciting	more than \$250,000	* <b>Compilation</b> if Director determines deeming the revenues <\$50,000 would not prejudice the public interest (see details). Unanimous member consent required waiving public accountant. * <b>Review engagement</b> if Director determines that deeming the revenues <\$250,000 would not prejudice the public interest (see details). Special resolution required to waive audit. <b>Audit</b> otherwise.
Non-soliciting	\$1MM or less	<b>Compilation</b> , if unanimous member consent to waive public accountant. <b>Review engagement</b> if public accountant is not waived (unless ordinary resolution passed requiring audit).
Non-soliciting	more than \$1MM	<b>Audit</b>

- NOTE: \*asterisk means the level is possible but requires government approval

# Financial reporting requirements

- **ONCA**

- PBCs and non-PBCs: financial statements do not need to be filed
  - NOTE: Ontario charities must provide financial statements to PG&T

- **CNCA**

- Soliciting: financial statements must be filed with Corporations Canada (and are posted / made available for public inspection)
- Non-Soliciting: financial statements must be circulated (or available) to members, but do not need to be filed publicly
  - NOTE: Director may require public filing



# Residual assets on dissolution / liquidation

## ONCA

- **PBC which is a charity:** to “qualified donee” under ITA
- **PBC which is not a charity:** to similar purpose PBC or to government
- **Non-PBC:** unrestricted (default = per capita distribution among members)

## CNCA

- **Soliciting corporations:** to “qualified donees” under ITA
- **Non-Soliciting corporations:** unrestricted (default = per capita distribution among members) \*unless a charity, then must go to “qualified donees”



---

# Stepping back.

## What does all of this mean for you?

- The new (CNCA) and pending (ONCA) changes are significant and represent a **complete overhaul** and **modernization** of the federal and provincial NFP regimes.
- As an **Executive Director** or **CEO**, you have a role to play in alerting your board to the changes, understanding the financial review requirements, and in recommending an appropriate transitioning strategy to your board.
- As a **director**, you should understand the new governance and financial reporting requirements, membership voting rights, and conflicts of interest procedures, as well as your overall duties and responsibilities, entitlement to indemnification, and how you can meet the standard for legal defenses.



# Recommendations

**For NFP corporations:** Get familiar with the new rules. It may take time to absorb the new rules and choose the optimal structure for the organization. Particularly for people not familiar with business corporations law, it will involve a steep learning curve. Consider getting professional and practical advice about whether actions or amendments make sense for your organization. There are a multitude of resources available – look around and reach out. Approach this proactively to avoid non-compliance issues or inefficient stumbling through the transition steps and requirements.

**For directors:** Seek more detailed information on how the changes will impact your role, responsibilities and any potential liability in the context of how your board typically functions. Think about what you must do comply with your ongoing obligations (ie: conflicts of interest) and how you can meet your statutory obligations, including acting in the best interests of the organization.



# Strategic thinking about jurisdiction

## ■ ONCA

- Likely preferable for small local NFPs (do not have to file bylaws or annual returns) and mid-sized mutual benefit NFP corporations, universities, colleges, hospitals, airports
- Easier to waive appointment of public accountant and audit requirements
- Advantages for PBCs:
  - <\$100,000 ability to waive RE and audit (CNCA <\$50,000)
  - <\$500,000 ability to waive audit and elect RE (CNCA <\$250,000)
- Advantages for non-PBCs:
  - no mandatory audit (CNCA >\$1MM mandatory audit)
  - minimum standards for disciplining / terminating members

## ■ CNCA

- National platform/name (members, donors, public recognition)
- Common rules for directors, members, advisors, etc. across Canada
- Mandatory financial disclosure for soliciting NFPs (transparency)
- Avoid membership appraisal rights on fundamental changes, particularly for large mutual benefit NFPs

**Thinking through the transition requirements.**

**A couple examples...**

# Example # 1 (Fedco)

- Federally incorporated CCA Part II
- registered charity
- 9 directors (3 are ex-officio directors)
- <20 members; members must be approved by board; members all have voting rights
- bylaws in good shape
- raising \$500,000-\$1,000,000 per year from wide variety of donors and grants

## Action plan:

- CNCA is now in force and applies.
- Must file new Articles of Continuation before October 17, 2014, or face dissolution. Valid existing governing documents apply during 3 year grace period until new Articles of Continuation.
- Review bylaws to determine whether to file as-is or to use the “bylaw builder” to redraft. Approve and file approved bylaws within 12 months.
- CRA pre-approval if objects (purpose) changing.
- Must update CRA with new governing documents.



# Example # 2 (Provincialco)

- Provincially incorporated OCA Part III
- registered charity
- 13 directors
- >200 members; few members having voting rights, other members do not (sports players)
- have been meaning to review and upgrade bylaws
- raising \$20,000-\$30,000 per year from members, community sponsors and fundraisers

## Action Plan:

- ONCA will apply when it comes into force (likely late 2012).
- Will automatically be continued under ONCA on day it comes into force. (Can do nothing.) Valid existing governing documents apply during 3 year grace period, then deemed amended to conform with ONCA.
- Review bylaws to determine whether to keep or whether to adopt default bylaws. No need to file bylaws.
- CRA and PG&T pre-approval if objects (purpose) changing.
- Must update CRA and PG&T with new governing documents.

# Cheat sheet

	Ontario – once ONCA comes into force (late 2012?)	Canada – CNCA is now in force
Existing NFP corporation	<p>Will be continued automatically under the ONCA once it comes into force (you can do nothing).</p> <p>Valid existing documents are given a 3 year grace period. 3 years to amend documents to conform to ONCA, or deemed amended.</p> <p>ONCA replaces old Part III of the <i>Ontario Corporations Act</i>.</p>	<p>Must continue under CNCA within 3 years, or will be dissolved.</p> <p>Valid existing documents given a 3 year grace period. Must file Articles of Continuance under CNCA within 3 years.</p> <p>Old <i>Canada Corporations Act</i> continues to apply until continuation complete.</p>
New NFP corporation	<p>May only incorporate under the new ONCA.</p> <p>Bylaws must be adopted within 60 days of incorporation, or deemed to have adopted default bylaws.</p>	<p>May only incorporate under the new CNCA.</p> <p>Must files bylaws with Corporations Canada within 1 year (no default bylaws but “bylaw builder” online).</p>

---

**Thank you.**

**Lisa M. Asbreuk**

Lawyer

Cunningham, Swan, Carty, Little + Bonham LLP

[lasbreuk@cswan.com](mailto:lasbreuk@cswan.com)

613-546-8080



**Cunningham Swan**  
LAWYERS

# Cunningham, Swan, Carty, Little & Bonham LLP

A full service law firm serving the Kingston area

- Business Law
- Wills & Estates
- Family Law
- Litigation
- Real Estate Law
- Labour & Employment Law
- Municipal Law
- Education & Health Law
- Land Use Planning, Development & Environmental Law

1473 John Counter Blvd.  
City Place II, Suite 201  
Kingston, ON K7M 8Z6

**(613) 544-0211**

**[www.cswan.com](http://www.cswan.com)**



**Cunningham Swan**  
LAWYERS