Proposed Amendments to the *Not-for-Profit Corporations Act, 2010*

Submitted to: Ministry of Public and Business Service Delivery and Procurement

Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

Since the proclamation of the *Not-for-Profit Corporations Act, 2010* (the "***Act***" or "***ONCA***") on October 19, 2021, and the amendments to the *Act* in October 2023, members of the OBA's Charities and Not-for-Profit section have been working to identify gaps and recommend enhancements to the *Act*. Several issues with the wording of the *Act* have been identified. This submission outlines issues and provides recommended amendments to reduce red tape, increase clarity, and enhance the *Act* for the sector and the public.

Ontario Bar Association (the "OBA")

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared by the OBA's Charity and Not-for-Profit Law section and reviewed by members of the Business Law section. The Charity and Not-for-Profit Law section includes lawyers who serve as external and in-house counsel to not-for-profits and charities of every size and in every sector. These members have extensive experience dealing with all aspects of the *ONCA*. The OBA welcomes, and is extremely supportive of, the government's commitment to ongoing improvements to the *Act*. The OBA provides the following commentary and recommendations to strengthen the *Act*.

Comments & Recommendations

1. Officer Position, Chair of the Board – Subsection 42(2)

Issue:

Currently, the *ONCA* requires the appointment of a chair of the board ("**Chair**"), who must be a director of the corporation. The Ontario Business Registry has been programmed to reject any filing (of an initial notice of directors and officers or a notice of change of directors and officers) in which a Chair is not identified.

The requirement to appoint a Chair is overly prescriptive and should be removed for a few key reasons:

- Many organizations select a Chair through fair and transparent processes outside of a formal board appointment.
- Many Chairs are elected or serve *ex officio*. The requirement for a board appointed Chair creates unnecessary red-tape, and in extreme cases, could permit a board to supersede a duly elected Chair.
- Prior to the *ONCA*, corporations were required to appoint a President – many longstanding corporations presumptively make the President the Chair.
- The requirement is not flexible enough to permit organizations who wish to have non-hierarchical governance structures to do so.
- The change would align with the *Business Corporations Act* (the "***OBCA***"), which does not require a titled officer position.

Recommendation:

We recommend that subsection 42(2) of the *ONCA* be deleted in its entirety. Subsection 42(1) would then be consistent with the current language of section 133 of the *OBCA*. We also recommend a complementary amendment to the definition of "officer" in section 1 of the *ONCA*.

Amendment Language:

The recommended changes shown in blackline are the following[1]:

> **Officers**
>
> 42 (1) Subject to the articles or the by-laws,
>
> > (a) the directors may designate the offices of the corporation, appoint officers, specify their duties and delegate to them powers to manage the activities and affairs of the corporation, except powers to do anything referred to in subsection 36 (2);
> >
> > (b) a director may be appointed to any office of the corporation; and
> >
> > (c) two or more offices of the corporation may be held by the same person.
>
> ~~**Chair**~~
>
> ~~(2) A director shall be appointed chair of the board of directors and shall carry out the duties of the chair in accordance with the by-laws.~~

Recommended changes to the definition of "officer":

The recommended changes shown in blackline are the following:

> "officer", in respect of a corporation, means an officer of the corporation appointed under clause 42 (1) (a), including,
>
> > (a) ~~the~~ **a** chair of the board of directors of the corporation**,** and a vice-chair of the board of directors of the corporation,
> >
> > (b) ~~the~~ **a** president, a vice-president, the secretary, an assistant secretary, the treasurer, an assistant treasurer and the general manager of the corporation, and
> >
> > (c) any other individual who performs functions for the corporation similar to those normally performed by an individual listed in clause (a) or (b); ("dirigeant")

[1] For all recommended changes throughout this submission, text that is struck out indicates it has been removed in the recommendation. Text that is bolded and underlined indicates it has been added in the recommendation.

2. Members – Subsection 8(1)

Issue:

Subsection 48(3) of the *ONCA* implies that a corporation is only required to establish/create classes of members in its articles if the corporation has two or more classes of members; otherwise, the *ONCA* sets out the main rules relating to members (i.e. if there is only one class of members, each member is entitled to notice of members' meetings, and the right to attend and vote at members' meetings). There are other provisions in the *ONCA* that appear to depart from this 'default class of members' concept. A default class of members is also inconsistent with the *OBCA*, the *Canada Business Corporations Act* (the *"**CBCA**")* in respect of classes of shares, and the *Canada Not-for-profit Corporations Act* (the "***CNCA**")* in respect of classes of members.

Recommendation:

We recommend the Ministry clarify the purported internal inconsistencies in the drafting of various provisions in the *ONCA* that relate to members and clarify either (i) if a corporation only has one class of members, that class does not need to be established/created in the corporation's articles; or (ii) there is no concept of a 'default' class of members and even if a corporation only has one class of members, the class must be established/created in the corporation's articles.

We recommend that the *ONCA*, the regulations to the *ONCA*, the forms and the instructions to the forms be amended to make clear that if a corporation has two or more classes of members, provisions to establish/create the classes of members and to set out the voting rights of such classes of members must be placed in the articles.

In addition, it is recommended that all forms of articles and the instructions to those forms be amended to include a specific section devoted to the establishment or creation of one or more classes of members. This section could be entitled "Class(es) of Members" and the

instruction could read as follows: "Every corporation must be authorized to issue at least one class of members. You must describe the classes of members of the corporation. If the corporation has more than one class of members, you must specify the voting rights for each class."

Amendment Language:

The recommended changes shown in blackline are the following:

> **Form and contents of articles**
>
> 8 (1) Articles of incorporation must set out ~~the name of the corporation, its purposes~~ **the following information**, and any other information required by this Act, the regulations, or by the Director:
>
> **(a) the name of the corporation;**
>
> **(b) the registered office address of the corporation;**
>
> **(c) the classes or groups of members that the corporation is authorized to establish and, if there are two or more classes or groups, any voting rights attaching to each of those classes or groups;**
>
> **(d) the number of directors or the minimum and maximum number of directors;**
>
> **(e) any restrictions on the activities that the corporation may carry on;**
>
> **(f) a statement of the purpose of the corporation; and**
>
> **(g) a statement concerning the distribution of property remaining on liquidation or dissolution after the discharge of any liabilities of the corporation.**

3. Process for Approving & Confirming By-laws – Subsections 17(1) & 103(1)

Issue:

The interrelationship of sections 17 and 103 and perceived drafting omissions have led to uncertainty in the requirements for amending by-laws dealing with the following three matters set out in section 103:

> **Amendment of Articles**
>
> 103 (1) A special resolution of the members is required to make any amendment to the articles of a corporation to, …
>
> > (g) add, change or remove a provision respecting the transfer of a membership; …
> >
> > (k) change the manner of giving notice to members entitled to vote at a meeting of members;
> >
> > (l) change the method of voting by members not in attendance at a meeting of the members; …

In particular, it is unclear whether an amendment of any of those three matters requires approval by a special resolution, while all other amendments require only an ordinary resolution. The absence of the word "by-laws" in section 103 suggests that it was not intended to apply to the amendment of by-laws, but only that certain amendments under section 17 would not come into effect without member approval. We are of the view that the latter is the intention of section 17.

Recommendation:

The *Act* should be amended to clarify that section 17 is a complete code for the amendment of by-laws. We also recommend that subsection 17(3) clarify that the directors have the option to postpone the date of the coming into effect of by-laws not referred to in proposed subsection 17(4).

Amendment Language:

We recommend that section 17 be amended as follows:

> **By-laws**
>
> 17 (1) Unless the articles or the by-laws otherwise provide, the directors may by resolution make, amend or repeal any by-law that regulates the activities or affairs of the corporation~~, except in respect of a matter referred to in clause 103 (1) (g), (k) or (l)~~.
>
> **Member approval**
>
> (2) The directors shall submit the by-law, amendment or repeal to the members at the next meeting of the members, and the members may confirm, reject or amend the by-law, amendment or repeal by ordinary resolution.
>
> **Effective date**
>
> (3) **Subject to subsections (4) and (6),** the by-law, amendment or repeal is effective from the date of the resolution of the directors **or such later date as may be specified in the resolution.** If the by-law, amendment or repeal is confirmed or confirmed as amended by the members, it remains effective in the form in which it was confirmed.
>
> **(4) A by-law, amendment or repeal in respect of a matter referred to in clause 103(1)(g), (k) or (l) is not effective until confirmed by the members by ordinary resolution.**

The remaining subsections under section 17 would need to be renumbered to account for the addition of the new subsection (4). The current subsection 17(4), "Ceasing to have effect", would become subsection 17(5), the current subsection 17(5), "Subsequent resolution" would become subsection 17(6), and the current subsection 17(6), "Member proposal" would become subsection 17(7).

4. Time Period for Annual Meeting of Members – Sections 52 & 190

Issue:

Determining the time period for calling an annual meeting under the *ONCA* is unnecessarily complex. There is no policy rationale for the *ONCA* to be less clear in this regard than its federal equivalent, the *CNCA*. We have received many comments from clients and the sector generally expressing confusion about this matter.

Additionally, the *ONCA* does not provide the Director with the discretion to provide an extension of time to call the annual meeting on a case-by-case basis.

Currently it is necessary to infer from the application of *ONCA* subsections 83(1) and 84(1) that the annual meeting of the members (subsequent to the first annual meeting after the corporation comes into existence) must be within six months of the financial year end. This creates unnecessary confusion. We note that the *CNCA* at subsection 160(1) (with reference to the *CNCA* Regulations at rule 61) contains an explicit timeline that is not contained in the equivalent section of the *ONCA*, subsection 52(1).

Additionally, the *ONCA* does not currently contain an equivalent to *CNCA* subsection 160(2), which provides the Director with discretion to provide an extension of time to call the annual meeting. Access to this discretionary process has proved extremely helpful to many organizations governed by the *CNCA*. As corporations are transitioning under the *ONCA*, they are commenting on the difficulty of complying with the requirements and the need to have access to exemptions.

Because there is no discretionary power for the Director, the *ONCA* also does not contain a corresponding right to appeal the exercise of this discretion. For example, *CNCA* subsection 258(i) provides for the right to appeal a decision of the Director "to grant, or to refuse to grant, an application made under subsection … 160(2)...".

Recommendation:

The current *ONCA* subsections 83(1) and 84(1) state:

> **Approval of annual financial statements**
>
> 83 (1) The directors shall approve annual financial statements of the corporation that relate to the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting or, if the corporation has not completed a financial year, that began on the date the corporation came into existence and ended not more than six months before the annual meeting.
>
> **Presentation of annual financial statements to members**
>
> 84 (1) The directors of a corporation shall place before the members at every annual meeting,
>
> > (a) the financial statements approved by the directors under subsection 83 (1);
> >
> > (b) the report of the auditor or of the person who conducted a review engagement, as the case may be; and
> >
> > (c) any further information respecting the financial position of the corporation and the results of its operations required by the articles or the by-laws.

The current *ONCA* section 52, "Calling meetings of members", states:

> **Annual meeting**
>
> 52 (1) The directors of a corporation shall call an annual meeting of the members of the corporation,
>
> > (a) within 18 months after the corporation comes into existence; and
> >
> > (b) subsequently, not later than 15 months after holding the preceding annual meeting.
>
> **Special meeting**
>
> (2) The directors of a corporation may at any time call a special meeting of the members.

We recommend that subsection 52(1) be amended to more closely align with the clearer language in the *CNCA* at subsection 160(1) (and the *Canada Not-for-profit Corporations Regulations* at rule 61). We also recommend that *ONCA* section 52 be amended to include a provision dealing with extensions of time to call the annual meeting, similar to *CNCA* subsection 160(2). This will require an appropriate application to request the Director's authorization be developed.

Additionally, if *ONCA* section 52 is amended to provide the Director with discretion to provide an extension of time to call the annual meeting as we have recommended, *ONCA* subsection 190(1) should be amended to include an appeal mechanism similar to *CNCA* subsection 258(i).

Amendment Language:

The recommended changes shown in blackline are as follows:

> **Annual meeting**
>
> 52 (1) The directors of a corporation shall call an annual meeting of the members of the corporation,
>
> > (a) within 18 months after the corporation comes into existence; and
> >
> > (b) subsequently, not later than 15 months after holding the preceding annual meeting **but no later than 6 months after the end of the corporation's preceding financial year.**
>
> **Authorization to delay calling of annual meeting**
>
> **(1.1) On application of the corporation, the Director may authorize the corporation, on any terms that the Director thinks fit, to extend the time for calling an annual meeting if the Director reasonably believes that members will not be prejudiced.**
>
> **Special meeting**
>
> (2) The directors of a corporation may at any time call a special meeting of the members.

We recommend amending subsection 190(1) as follows:

> **Appeal from Director's decision**
>
> 190 (1) A person aggrieved by any of the following decisions of the Director may appeal the decision to the Divisional Court by notice of appeal:
>
> 1. To refuse to issue a certificate by endorsing any articles or other document required by this Act to be filed with the Director.
>
> 2. To issue, or to refuse to issue, a certificate of amendment under section 12.
>
> 3. To refuse to endorse an authorization under section 116 or 117.
>
> 4. To issue an order under section 169.
>
> **5. To grant, or to refuse to grant, an application made under subsection 52(1.1).**

5. Audit Committee – Subsection 80(1)

Issue:

Effective October 1, 2023, subsection 80(1) of the *ONCA* was amended to provide that:

> 80 (1) A corporation may have an audit committee comprising one or more directors and the majority of the committee must not be officers or employees of the corporation or any of its affiliates.

This provision formerly provided that:

> A corporation may have an audit committee and, if it does, the majority of the committee must not be officers or employees of the corporation or of any of its affiliates.

This amended wording has caused uncertainty and disputes regarding audit committees because it can be interpreted to mean: (1) that an audit committee must include at least one director; or (2) that an audit committee must be composed entirely of directors.

The use of the word "comprising" is particularly confusing given that it departs from the word "composed" used in other corporate statutes and can be interpreted to have two meanings ("composed of" or "including").

Recommendation:

In our view, it should be clear that non-directors are permitted to be members of an audit committee and we recommend that a majority of an audit committee be directors of the corporation to strike a balance between director oversight and non-director input.

Allowing non-directors to be members of the audit committee is consistent with the independent oversight function of audit committees in the not-for-profit sector, serves as a means to recruit future directors and permits the treasurer of a corporation, who may not be a director, to serve on the audit committee, which is a common practice in the sector.

Amendment Language:

We recommend amending subsection 80(1) as follows:

> **Audit committee**
>
> 80 (1) A corporation may have an audit committee **provided that,**
>
> **(a) a majority of the audit committee are directors; and**
>
> **(b) a majority of the audit committee must not be officers or employees of the corporation or of any of its affiliates.**

6. Voting Methods at Meetings & Proxies – Section 58 & Part VI (Sections 63-67)

Issue:

Effective as of October 1, 2023, section 67 of the *ONCA* was amended to remove what had previously been subsection 67(2). Some confusion remains in the wording of section 67(1). It is not clear if voting by a show of hands is the default method of voting under the *ONCA* or if an alternative default method of voting may be permitted if it is set out in the articles or by-laws.

Under the *ONCA*, voting by proxy, mail, telephonic or electronic means are all optional. Proxies are only allowed if an entitlement to vote by proxy is included in either a corporation's articles or its by-laws (see section 64(1.1)). However, the current subsection 67(1) implies that voting by mail, telephonic or electronic means may only be used if (1) they are used in addition to proxy vote, or (2) they are used in *lieu* of proxy votes. This reflects the mechanism in the *ONCA* before it was amended by Schedule 8 of Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, which repealed section 65 and mandatory voting by proxy. For these reasons, the words "in addition to or instead of voting by proxy" creates confusion and should be deleted, and references to voting by mail should be moved to section 58 where other methods of voting are listed.

Recommendation:

We recommend that voting by a show of hands be clearly described as the default method of voting and that corporations be permitted to select an alternative default method of voting in their articles or by-laws. Alternative methods of voting will benefit a wide variety of communities, particularly those with members who have different communication abilities, such as the blind community for whom the phrase "by show of hands" may not be relevant. Alternative voting methods that have been added are voting orally or by "another method that adequately discloses the intention of the voting members" which would provide communities the flexibility to hold meetings in a manner that best accommodates their

members' circumstances. We recommend that voting by ballot be available as an option for methods of voting where the number of votes cast for and against is not apparent, such as voting by hand or an oral vote.

Currently, the *ONCA* allows voting by telephonic or electronic means. However, it is not clear if members are *entitled* to vote by telephonic or electronic means at a meeting of members. A situation could arise where a member may demand that a particular telephonic or electronic means of voting be made available for them. Unless the corporation has language in its bylaws expressly limiting the circumstances in which voting by telephonic or electronic means is permitted, it will be unclear of the extent to which a corporation must provide electronic or telephonic voting options to its members. Therefore, we are proposing to clarify that voting by telephonic or electronic means is only permitted when the corporation makes such means available to the members. The directors may approve telephonic or electronic means on behalf of the corporation.

Amendment Language:

The recommended changes shown in blackline are the following:

> ~~**Voting by mail or by telephonic or electronic means**~~
>
> ~~67 (1) A corporation may provide in its by-laws for voting by mail or by telephonic or electronic means, in addition to or instead of voting by proxy.~~
>
> **Default Method of** Voting
>
> **58** (1) ~~Subject to~~ **Unless** the articles or by-laws **provide for an alternative default method of voting**, voting at a meeting of the members shall be by show of hands**,** unless a ballot is demanded by a member or proxyholder entitled to vote at the meeting.
>
> **Ballot**
>
> (2) A member or proxyholder may demand a ballot either before or after any vote by show of hands.

Voting by telephonic or electronic means

(3) Unless the articles or by-laws expressly provide otherwise, a vote at a meeting of the members may be conducted entirely by one or more telephonic or electronic means or by a combination of one or more telephonic or electronic means and voting in person **if the corporation makes such telephonic or electronic means available**.

Other Methods of Voting

(4) A corporation's articles or by-laws may provide for voting to be conducted by oral vote or another method that adequately discloses the intention of the voting members, and a member or proxyholder may demand a ballot either before or after any such vote.

Absentee Voting

(5) A corporation's articles or by-laws may provide for voting by any one or more of the following methods:

(a) by proxy pursuant to Part VI of the Act,

(b) by mail or by telephonic; and

(c) electronic means.

7. Quorum at Director meetings – Subsection 34(2)

Issue:

The current language of subsection 34(2) is:

(2) Subject to the articles or by-laws, a majority of the number of directors or the minimum number of directors required by the articles constitutes a quorum at any meeting of the directors, and, despite any vacancy among the directors, a quorum of directors may exercise all the powers of the directors.

This has caused some confusion in the sector. For example, does the phrase "a majority of the number of directors or the minimum number of directors" mean that it is the minimum number of directors that would be the default quorum, or is it a majority of the minimum

number of directors? For an organization with a range of directors, does "a majority of the number of directors" mean the number of directors elected at the last meeting, the number of directors last set by the members or the board in accordance with the *Act*, the number of directors in office at the relevant time, or something else?

Recommendation:

We recommend clearing up this confusion and aligning with the practice in the sector. If the articles provide a fixed number of directors, quorum would be based on that number. If the articles provide a range of directors, quorum would be based on the number of directors in office at the date of the meeting.

Amendment Language:

The recommended changes shown in blackline are as follows:

> **Quorum**
>
> (2) Subject to the articles or by-laws,
>
> > **(a) if the articles set out a fixed number of directors, a majority of such number constitutes a quorum at any meeting of the directors; and**
> >
> > **(b) if the articles set out a range of directors, a majority of the number of directors in office on the date of a meeting of the directors constitutes a quorum at such meeting. Despite any vacancy among the directors, a quorum of directors may exercise all the powers of the directors.**

8. Appointment of Additional Directors – Subsection 24(7)

Issue:

ONCA subsection 24(7) currently states:

> **Appointment of additional directors**
>
> (7) The directors may appoint one or more additional directors who shall hold office for a term expiring not later than the close of the next annual meeting of the members, but the total number of directors so appointed may not exceed one-third of the number of directors elected at the previous annual meeting of the members.

It is not clear whether this permits a corporation to have more directors in office than the maximum number permitted by the articles. In addition, the similar provision in section 128(8) of the *CNCA* requires this ability to be authorized in the articles, which is preferable as some organizations would prefer that the directors not be given this authority.

Recommendation:

To provide greater flexibility, the option to include or exclude such a provision should be made available in the articles or by-laws.

Amendment Language:

We suggest that the following language be added to the section:

> **Appointment of additional directors**
>
> (7) **Subject to the articles or by-laws, the** directors may appoint one or more additional directors who shall hold office for a term expiring not later than the close of the next annual meeting of the members, but the total number of directors so appointed may not exceed one-third of the number of directors elected at the previous annual meeting of the members; **provided that, following such appointment, the total number of directors shall not exceed the maximum number set out in the articles.**

9. Election of Directors at Meeting other than Annual Meeting and/or Online Voting for Directors in Lieu of Meetings – Subsection 24(1)

Issue:

Subsection 24(1) of the *ONCA* requires directors to be elected at the annual meeting of members by ordinary resolution:

> **Election and term**
>
> 24 (1) At the first meeting of the members and at each succeeding annual meeting at which an election of directors is required, the members shall, by ordinary resolution, elect directors to hold office for a term expiring not later than the close of the fourth annual meeting of the members after the election, as provided in the by-laws.

The requirement to hold elections at an annual general meeting is overly restrictive and excludes election mechanisms that are robust, democratic, and better aligned with the operations of non-profit organizations. Benefits to decoupling the directors' elections from the AGM include:

- Providing more robust and democratic voting mechanisms
- Increasing member engagement and involvement
- Aligning elections with the operations of the organization, rather than the financial year end

Many not-for-profit corporations hold two members' meetings per year, one where members receive the financial statements and a second where members elect directors and approve the budget. While the timing of the first meeting is often tied to the not-for-profit corporation's financial year end, the election of directors and approval of budget is frequently tied to other operational issues, such as the operational cycle of their funders, chapters, umbrella organization and stakeholders.

Recommendation:

We recommend subsection 24(1) be revised to make elections at annual members' meetings the default election mechanism, except where provided otherwise in the by-laws to allow alternative means of electing directors.

Amendment Language:

There are numerous ways to operationalize this change, for example, amending section 24(1) to say:

> 24 (1) ~~At the first meeting of the members and at each succeeding annual meeting at which an election of directors is required~~ **When an election of directors is required**, the members shall, ~~by ordinary resolution~~, **at a meeting of members**, elect directors to hold office for a term ~~expiring not later than the close of the fourth annual meeting of the members after the election~~ **not longer than four years**, as provided in the by-laws.

Further Discussion:

We invite the Ministry to discuss other potential enhancements to this section, including:

Dispensing with the passing of an ordinary resolution to formalize the results

For generations the sector has conducted its elections on the basis of electing the candidates who receive the most votes, whether or not they achieve a majority. If an organization provides a clear, fair and predictable mechanism for elections, the requirement to formalize the results by ordinary resolution is inefficient and introduces the potential to deviate from the election results. Dispensing with this requirement would discourage slates and ensure fairness in elections where three or more candidates are competing with a position, without requiring inefficient run-off ballots. For large organizations, which conduct their voting is advance of a meeting, runoff ballots are practically impossible.

Decoupling directors' elections from meetings

While we recommend decoupling elections from AGMs, we would like to discuss allowing by-laws to decouple elections from meetings all together. So long as an organization provides

a clear, fair and predictable mechanism for elections, linking the election to a meeting can reduce robust engagement and decrease member involvement.

We would appreciate the opportunity to meet with the Ministry to discuss operationalizing these ideas while providing a robust process comparable to that when a meeting is held.

10. Dispensing with Audits, Etc. – Subsections 76(1) & (2)

Issue:

Subsections 76(1) and (2) of the *ONCA* provide that:

> **Public benefit corporations**
>
> 76 (1) Members of a public benefit corporation may pass an extraordinary resolution,
>
> > (a) to have a review engagement instead of an audit in respect of the corporation's financial year if the corporation had annual revenue **in that financial year** of more than $100,000 or such other prescribed amount and less than $500,000 or such other prescribed amount; or
> >
> > (b) to not appoint an auditor and to not have an audit or a review engagement in respect of the corporation's financial year if the corporation had annual revenue **in that financial year** of $100,000 or less or such other prescribed amount.
>
> **Other corporations**
>
> (2) Members of a corporation other than a public benefit corporation may pass an extraordinary resolution,
>
> > (a) to have a review engagement instead of an audit in respect of the corporation's financial year if the corporation had annual revenue **in that financial year** of more than $500,000 or such other prescribed amount; or
> >
> > (b) to not appoint an auditor and to not have an audit or a review engagement in respect of the corporation's financial year if the corporation had annual revenue **in that financial year** of $500,000 or less or such other prescribed amount.

The wording in bold has caused confusion regarding when a corporation can pass an extraordinary resolution to dispense with the appointment of the auditor and auditor-related responsibilities. Based on the current wording, the legislation seems to suggest that a corporation's ability to waive an audit or to waive both an audit and review engagement and not appoint an auditor is based on the amount of revenue from the corporation's current financial year. This interpretation is illogical because the financial year would not have ended at the time a corporation would dispense with these activities.

The use of the words "in that financial year" is particularly confusing given that it departs from the words "last completed financial year" used in the *CNCA*.

Recommendation:

Clarifying that the financial thresholds to dispense with an audit, review engagement and the appointment of an auditor are based on a corporation's revenue in the last financial year.

Amendment Language:

We suggest the following revisions to subsections 76(1) and 76(2) of the ONCA:

> **Public benefit corporations**
>
> 76 (1) Members of a public benefit corporation may pass an extraordinary resolution,
>
> > (a) to have a review engagement instead of an audit in respect of the corporation's financial year if the corporation had annual revenue ~~in that financial year~~ **in its last completed financial year** of more than $100,000 or such other prescribed amount and less than $500,000 or such other prescribed amount; or
> >
> > (b) to not appoint an auditor and to not have an audit or a review engagement in respect of the corporation's financial year if the corporation had annual revenue ~~in that financial year~~ **in its last completed financial year** of $100,000 or less or such other prescribed amount.
>
> **Other corporations**

(2) Members of a corporation other than a public benefit corporation may pass an extraordinary resolution,

(a) to have a review engagement instead of an audit in respect of the corporation's financial year if the corporation had annual revenue ~~in that financial year~~ **in its last completed financial year** of more than $500,000 or such other prescribed amount; or

(b) to not appoint an auditor and to not have an audit or a review engagement in respect of the corporation's financial year if the corporation had annual revenue ~~in that financial year~~ **in its last completed financial year** of $500,000 or less or such other prescribed amount.

11. Oppression Remedy - Sections 136 & 174

Issue:

The *ONCA* does not contain an explicit oppression remedy, unlike section 253 of the *CNCA*. Lawyers who practice in the sector are of the view that the combined operation of sections 136, 138 and 174 added up to an oppression remedy, notwithstanding the lack of a specific title. However, in *York Condominium Corporation No. 76 v. 10 The Marketplace Limited*[2], Papageorgiou J. held that section 174 does not constitute an oppression remedy. The judgment makes no reference to sections 136 or 138 (Note: we have been informed that the decision is not being appealed).

Subsection 253(1) of the *CNCA* reads:

Application to court re oppression

253 (1) On the application of a complainant, a court may make an order if it is satisfied that, in respect of a corporation or any of its affiliates, any of the following is oppressive or unfairly prejudicial to or unfairly disregards the interests of any shareholder, creditor, director, officer or member, or causes such a result:

[2] Ontario Superior Court of Justice, 2024 ONSC 4305, 2024 CarswellOnt 11542, 2024 ONSC 4305

(a) any act or omission of the corporation or any of its affiliates;

(b) the conduct of the activities or affairs of the corporation or any of its affiliates; or

(c) the exercise of the powers of the directors or officers of the corporation or any of its affiliates.

Subsection 136 of the *ONCA* reads in part:

Winding up by court

136 A corporation may be wound up by order of the court if,

(a) the court is satisfied that,

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the activities or affairs of the corporation or of any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of the corporation or of any of its affiliates are or have been exercised in a manner,

that is unfairly prejudicial to or that unfairly disregards the interests of any member, creditor, director or officer; or….

Subsection 138 of the *ONCA* reads:

Powers of court

138 The court may make the order applied for, may dismiss the application with or without costs, may adjourn the hearing conditionally or unconditionally or may make any interim or other order as it considers just, and upon the making of the order may, according to its practice and procedure, refer the proceedings for the winding up to an officer of the court for inquiry and report and may authorize the officer to exercise any powers of the court that are necessary for the reference.

Subsection 174(1) of the *ONCA* reads:

Investigation

174 (1) On the application of a member or debt obligation holder of a corporation, without notice or on any notice that the court requires, the court may direct an

> investigation to be made of the corporation and any of its affiliated corporations and may,…
>
> (l) make any other order that it thinks fit.[3]

Virtually all other modern Canadian corporate statutes, including the *OBCA*, *CBCA* and *CNCA*, contain an oppression remedy. An oppression remedy would be of no less importance for Ontario non-profit corporations.

Part of the problem may be that section 136 is framed as a "winding-up" remedy, which is the classic way that the oppression remedy came into corporate law under the "any other order that it thinks fit" language. Also, section 174 is framed as an "investigation" remedy.

Cases decided under the *OCA* support the argument that sections 136 and 174 of *ONCA* constitute an oppression remedy.[4] It would be contrary to the policy intent of the *ONCA* for there to be a step backward in the equitable remedies available to members. It should not be left to the courts in these circumstances to deny such a remedy to members.

Recommendation:

That section 136 be amended to clarify that it is an oppression remedy, possibly by using language from the *CNCA* or *OBCA*, including an exemption for a religious corporation, equivalent to the exception set out in set in *ONCA* subsection 183(3) in the case of a derivative action. Draft amendment language for this proposal is more complicated than the preceding proposals. If the Ministry is interested in this proposal, we would be happy to provide that.

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[3] The *ONCA* follows the form of sections 243-245 of the *OCA*. The *OBCA* contains an explicit oppression remedy in section 248.
[4] Singh v. Sandhu, 2013 ONSC 3230 (CanLII), <https://canlii.ca/t/fxrxn> See also Malik v. Sabha, 2020 ONSC 5535 (CanLII), <https://canlii.ca/t/jb9rq>, and Noori v. Abdin, [16] 2011 CanLII 91855 (ON SC), para. 23.

Conclusion

The OBA appreciates the opportunity to comment on these matters. The OBA supports the government's continued commitment to improving the *Act* and looks forward to working with the government to realize this goal.

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The OBA would be pleased to discuss this further and answer any questions that you may have.