

Incorporating and Maintaining a Not-for-Profit Organization

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Learning Outcomes

Following your study of the materials in this chapter, you should be able to:

- describe the process of incorporating a not-for-profit organization under federal and Ontario legislation;
- describe how incorporation of a not-for-profit organization will be different under the new Ontario legislation (ONCA) than under the current Ontario legislation (OCA); and
- given a fact scenario, complete the articles of incorporation for a federal not-for-profit incorporation.

Introduction

Once a decision has been made to incorporate a not-for-profit organization, there are, as in the case of for-profit business corporations, federal and provincial statutes that provide a choice of jurisdiction for incorporators. The federal statute, the *Canada Not-for-profit Corporations Act*¹ (CNCA, sometimes referred to as the CNFPA), has been in effect since October 17, 2011. The CNCA more closely aligns with the *Canada Business Corporations Act*² (CBCA) in its approach to incorporation, modified as needed to consider the principles for not-for-profit organizations and potential registered charities.

The Ontario *Not-for-Profit Corporations Act, 2010*³ (ONCA), designed to more closely resemble the Ontario *Business Corporations Act*⁴ (OBCA) in its approach, also modified as needed to respect the principles for not-for-profit organizations and potential registered charities, received royal assent on October 25, 2010, but it has not yet been proclaimed in force. It is understood that this lengthy delay has transpired because of the need to make technological changes to support 2017 amendments to the ONCA and to improve service delivery.⁵

Until the ONCA is proclaimed in force, the Ontario *Corporations Act*⁶ (OCA), the existing provincial legislation, remains in effect. Even where a new not-for-profit entity is created under the OCA, it can look ahead to the ONCA, as will be outlined below. The Ontario government has undertaken to provide a three-year transition period once the ONCA is in force to permit an OCA corporation make any necessary changes to its governing documents, as well as help to support a transition.

This appendix will discuss incorporation under each of the existing statutes, as well as information about how the ONCA will differ from the OCA.

Methods of Incorporating a Not-for-Profit Organization by Articles of Incorporation

One of the core differences between the OCA and the CNCA is the process of incorporation. A not-for-profit organization is currently incorporated in Ontario under the OCA by letters patent, a process also used historically for business corporations. In a letters patent situation, government officials are much more actively involved in the approval of an application for incorporation.

Under the CNCA and the proposed ONCA, a not-for-profit corporation is formed by **articles of incorporation**, with which you are familiar from business incorporations, although there are some differences befitting the nature of a not-for-profit corporation.

articles of incorporation

the government-issued document that is evidence of the creation of a corporation and contains key information about the corporation, including its name and share structure

1 SC 2009, c 23 [CNCA].

2 RSC 1985, c C-44 [CBCA].

3 SO 2010, c 15 [ONCA].

4 RSO 1990, c B.16 [OBCA].

5 Government of Ontario, "Rules for Not-for-Profit and Charitable Corporations," online: <<https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations>> as at 12 June 2020.

6 RSO 1990, c C.38 [OCA].

Many not-for-profit organizations have already been incorporated under previous versions of federal and provincial statutes, and some even by special statutes of the federal Parliament or provincial legislatures.

We'll begin by taking a look at the process of incorporating by way of articles of incorporation and then turn to incorporation by way of letters patent.

Incorporation Under the CNCA and ONCA: Articles of Incorporation

Because the CNCA is already in force and applications for incorporating a not-for-profit corporation are being dealt with at the federal level by way of articles of incorporation, the discussion here will be based on the CNCA. Detailed and practical information concerning the application for the creation of a not-for-profit corporation may be found at <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04970.html>.

The ONCA has very similar provisions to those of the CNCA, but because changes could be made before the ONCA is proclaimed in force,⁷ in this discussion we will bring to your attention only major areas in which the ONCA may vary from the CNCA.

In a system of incorporation by way of articles, a government official appointed under the relevant statute issues a certificate of incorporation within a relatively short period of time after receiving correctly completed articles of incorporation and other required documents, such as the notice of the first directors and of the registered office of the corporation, the NUANS search (if one is required; see Chapter 6 for details), and the required filing fee.

Incorporation under the CNCA (federal legislation)

Incorporation using the federal online filing centre is encouraged. This consists of completing a series of questions online which build the articles of incorporation which are then compiled for review, approval and submission at the end of the process. One starts the process at <https://www.ic.gc.ca/app/scr/cc/Corporation-sCanada/bs/crp-wz.html?lang=eng>. Innovation, Science and Economic Development Canada has provided a model form 4001 for a not-for-profit corporation with two classes of membership at <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05495.html>.

Some of the information requested in the process of creating articles of incorporation for a federal not-for-profit organization differs from that of a business corporation in topic, treatment, or both. For a number of provisions, the applicant is often given the choice of pre-defined statement or to insert its own text to better suit its situation. These are outlined below with reference to the relevant items in the articles:

- *Item 1.* When choosing a name for a federal not-for-profit corporation, the only permissible (but not necessary) legal elements are "Inc." and "Corp." in long or in short. Additionally, a numbered name can be used if followed by "Canada" and one of the following words: "Association," "Center," "Centre," "Fondation," "Foundation," "Institut," "Institute," or "Society." Otherwise,

⁷ Ontario Government, "Guide to the Not-for-Profit Corporations Act, 2010," online: <https://www.ontario.ca/page/guide-not-profit-corporations-act-2010>. The discussion in this chapter describes what we understand of the legislation that has received royal assent.

the considerations of what may and may not be used or included in a name are similar to those for a CBCA corporation, such as being distinctive and not being confusing (for more particulars, refer to Chapter 6). Except in the instance of a numbered company name, a NUANS search that is no older than 90 days must accompany the articles of incorporation, and any letter from Corporations Canada setting out prior approval of the name should be included. For federal corporations, a NUANS search can now be obtained directly from the federal government link to the NUANS system: see <<https://www.ic.gc.ca/eic/site/075.nsf/eng/home>>.

- As with business corporations, the proposed name and NUANS search are examined in detail by Corporations Canada officials upon the submission of the articles to ensure compliance with Corporations Canada's *Name Granting Compendium*.

soliciting corporation

under the federal not-for-profit corporations statute (CNCA), a corporation that receives donations or grants in excess of \$10,000 per year from persons other than members, directors, officers, employees, or their family members

- *Item 3.* There can be as few as one director, but where a **soliciting corporation** is involved, there must be at least three directors, at least two of whom cannot be officers or employees of the not-for-profit organization or any of its affiliates (CNCA, s 125). There can be a fixed number of directors or a range, so long as the required minimum numbers are taken into consideration (CNCA, s 7(1)(d)).
- *Item 4.* The purpose(s) of the corporation should be stated clearly and succinctly to minimize confusion. Incorporation under this statute does not necessarily confer not-for-profit status on the corporation under the provisions of the *Income Tax Act*,⁸ with the organization not paying income taxes on excess revenue over expenses, nor does it create registered charity status. As noted in the portion of this chapter in the printed textbook, such determinations are within the sphere of the Canada Revenue Agency (CRA) and the charitable registration status must be separately applied for; therefore, careful completion of item 4 in the articles is critical to establish the purpose and goals of the organization so that these future determinations will be successful.
 - If registration of the not-for-profit corporation as a charitable organization is desired, a request can be made of the Charities Directorate of the CRA to review the draft articles of incorporation as a prudent step to ensure that appropriate wording is being used, such as correctly describing the entity's purposes to clearly state the charitable activities of the proposed corporation.
 - Where the operations of the not-for-profit organization intended to be a charitable organization will be conducted in Ontario, the Office of the Public Guardian and Trustee (OPGT) may also be consulted before submitting the articles. This step is prudent to seek the OPGT's acknowledgment of the entity's purposes to minimize any later difficulties in an application for charitable status, which might otherwise lead to articles of amendment, requiring an additional expenditure of time and money, including delay and possible discouragement on the part of the potential participants in the organization.
- *Item 5.* It is recommended that the Charities Directorate and the OPGT be consulted concerning any restrictions on the activities that the corporation may

8 RSC 1985, c 1 (5th Supp.)

carry on, because a failure to limit the activities to charitable purposes could result in denial of an application for charitable status.

- *Item 6.* The classes of membership, including the number of classes and any distinction between the rights of each class, must be set out in this item. If there is only one membership class, each member must receive notice of and entitlement to vote on each matter to be decided at any meeting of members, whether it is annual, general, or special.
- *Item 7.* A statement regarding the distribution of property remaining in the corporation on dissolution is required. Recall that articles of incorporation for a business corporation provide that the holders of at least one class of shares will receive any property belonging to the corporation following its liquidation, after the payment of all debts and liabilities. Consistent with the fact that there are no shares in a not-for-profit organization, and thus no opportunity for shareholders to participate in a distribution of assets, the CNCA articles provide for what will happen to any assets of the corporation following its windup, after the settlement of all liabilities.
 - For a registered charity, distribution of remaining property on dissolution is made to a qualified donee, described earlier in Chapter 16 in the printed text. Where the organization is not a registered charity, the process is not so strict. There may be property, such as a building, a machine, or furnishings, to be returned to a person who lent them to the not-for-profit organization for so long as it was needed; otherwise, there could be distribution to like-minded bodies or occasionally to members themselves. For example, if the organization is a membership-based social club, there may be distributions of property on dissolution among the members as determined in the by-laws of the organization (CNCA, ss 234 – 236), or by a local branch of a not-for-profit corporation to its parent or affiliate organization.
- *Item 8.* Additional provisions, if any, are entered in this item. Some of these clauses, such as a statement that the organization will carry on its activities without a view to profit and that the directors will not be remunerated or compensated in any way for their work as directors, would be important to assist with registering the corporation as a registered charity, if desired. Others, such as being able to increase the number of directors by a modest number between membership meetings (CNCA, s 128(8)), filling vacancies in the board of directors where quorum remains (CNCA, s 128(7)), and specifying provisions regarding the ability to borrow funds in the name of the corporation (CNCA, s 28), are permitted by the CNCA. As with for-profit entities, there are frequently choices as to whether some of these provisions are placed in the articles or in the by-laws, and, if they are placed in the articles, more steps and costs are required to amend them.

A certificate of incorporation of a federal (CNCA) not-for-profit corporation is issued upon the filing online at <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05260.html> of:

- the articles of incorporation (Form 1), as generated by the online process;
- an initial registered office address and first board of directors (Form 2), as generated by the online process;

- a NUANS search for all names other than a numbered name, as indicated above; and
- the fee.

Each director named during the online incorporation process and elected subsequently by the membership must be an individual who is not incapable or currently bankrupt, and aged 18 years or more (CNCA, s 126(1)), as is the case with all of the other corporations we have studied. A director so named holds office from the issue of the articles of incorporation until the first meeting of members (CNCA, s 128(2)).

Incorporation is as of right within a short period of time so long as the forms are correctly completed and submitted. A certificate of incorporation issued by Corporations Canada will be evidence of successful incorporation (CNCA, ss 9 and 276). If an application is being made to register the not-for-profit corporation as a charity, a copy of the certificate of incorporation is submitted as part of the final application to the CRA.

INCORPORATION DETAILS UNDER THE ONCA

The form for incorporation under the ONCA has not yet been made available to the public, but it is anticipated that it will request similar information to that in the CNCA.

The minimum number of directors for an Ontario not-for-profit organization is three, in either a fixed number or a variable range of directors (ONCA, s 22(1)).

The **public benefit corporation (PBC)** is the ONCA's concept most like the CNCA's soliciting corporation (ONCA, s 1(1)). Similar to the case of a soliciting corporation federally, where a PBC is involved, no more than one-third of the directors may be employees of the corporation or any of its affiliates (ONCA, s 23(3)). There are also similar provisions relating to the distribution of net assets of a PBC remaining after payment of all liabilities and debts in the case of the dissolution or windup of such an organization: that is, distribution must be to another PBC with similar purposes to its own or to a government or government agency. If the PBC is also a charitable corporation, there are additional requirements (ONCA, ss 150 and 167).

The articles must contain a statement of the purpose(s) of the not-for-profit corporation. As in the case of the CNCA, the Charities Directorate of the CRA and the OPGT should be consulted before the articles are submitted to ensure that the wording of the purposes clause will be appropriate without revision where the corporation hopes to be designated as a registered charitable organization. If any of the purposes of a corporation are of a commercial nature, section 8(3) of the ONCA requires that the articles state that the commercial purpose is intended only to advance or support one or more of the not-for-profit purposes of the corporation. For example, a not-for-profit corporation may operate a social enterprise, such as the sale of products made by a group of people who are the participants in programming run by that not-for-profit corporation, and the revenue from the sale of those products will be used to pay for expansion or enhancements to that programming.

public benefit corporation (PBC)

under the Ontario *Not-for-Profit Corporations Act* (ONCA), a charitable corporation or a non-charitable corporation that receives donations or grants in excess of \$10,000 per year from persons other than members, directors, officers, employees, or their family members

It is planned that the articles and other relevant documents for incorporation under the ONCA, such as a NUANS name search, will be filed online for processing. When found by government officials to be in order, the articles will be endorsed with a certificate of incorporation (ONCA, ss 9(1) and 201). Where a registered charity designation is desired, the certificate of incorporation will be filed as part of that application process.

Post-Incorporation Organization and Maintenance Under the CNCA and ONCA

Following a corporation's incorporation by way of articles of incorporation, organizational by-laws and resolutions are required, similar to those for business corporations, with the following exceptions and additional comments:

1. There are no shares to be issued—only memberships.
2. Particulars of the classes, responsibilities, and rights of membership, to the extent that they are not already elaborated upon in the articles of incorporation, are set out in the by-laws.

A basic right of membership is to vote for the directors of the corporation; this right must be attached to a membership of the only class of members, or to the memberships of at least one of several classes of membership.

Members elect directors by ordinary resolution at each annual meeting at which an election of directors is required (CNCA, s 128(3); ONCA, s 24(1)). Unless the by-laws require otherwise, a director need not be a member of the corporation (CNCA, s 126(2); ONCA, s 23(2)).

3. Unless the articles have already dealt with the term of office of directors, the by-laws should state the term of office within the prescribed possibility of up to four years. They may also provide for the directors having different terms, in effect staggering them, so that not all of the directors end their term of service on the same year, preventing the possibility of a board of only new members (CNCA, ss 128(3), (4); *Canada Not-for-profit Corporations Regulations*,⁹ s 28(1); ONCA, s 24).
4. The by-laws of a federal (CNCA) not-for-profit corporation may provide that decisions of directors and/or members shall be made by consensus, as defined by the by-law (CNCA, ss 137(1), (2)). Exceptions to deciding by consensus arise where a decision must be made by special resolution (as an example, for fundamental changes described in s 197 of the CNCA), where members resolve to dispense with a public accountant (CNCA, s 182(1)), or where a vote that must be held because consensus as defined by the by-law could not be reached. No similar provision regarding decision by consensus exists in the ONCA.

9 SOR/2011-223.

5. In the area of members' meetings, which include annual meetings, the by-laws can specify a broad range of opportunities for absentee voting by members, including mail-in ballots and electronic voting, along with the more traditional proxy (CNCA, s 171; ONCA, s 67 and Part VI) and participation in a meeting by electronic means (CNCA ss 159(4), (5); ONCA, ss 53(4), (5)).

The federal government provides a "by-law building" tool at <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/frm-eng/NGRR-8AFNVX> to assist CNCA corporations to determine what by-law provisions best meet their needs. It also has a model form of by-laws for consideration at <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04999.html>. Additionally, the federal government indicates what default provisions apply to a not-for-profit incorporation under the CNCA, and whether and how these may be varied, if desired: see <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04994.html>.

Of notable difference from a for-profit corporation, the organizational by-laws for a federal (CNCA) not-for-profit corporation must be sent within 12 months of their approval by the corporation's membership to the Director under the statute, whose office is at Corporations Canada within Industry Canada. They may be filed electronically in pdf format with a **corporation key** online at <https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/bs/blw-wz.html>.

Members of a federal (CNCA) not-for-profit corporation may enter into a unanimous member agreement (UMA) under the provisions of section 170 to limit the authority of directors to manage or supervise the management of the activities and affairs of the corporation pursuant to section 124, in a manner similar to the unanimous shareholder agreement (USA) described in the CBCA.¹⁰ There is no provision for a UMA in the ONCA.

corporation key

for a federal corporation, an eight-digit identification number, issued by Corporations Canada, that is used, if requested, to file documents online

ORGANIZATIONAL BY-LAWS UNDER THE ONCA

The ONCA currently provides that if the directors have not passed an organizational by-law within 60 days of the date of incorporation, the corporation is deemed to have passed the standard organizational by-laws approved by its Ministry under the statute (s 18). These standard by-laws, or any particular clauses in them, could later be amended, repealed, or replaced at any time by the corporation. These draft default organizational by-laws may be found online at <https://www.ontario.ca/page/not-profit-corporations-act-default-organizational-law>. As with any draft documents, they should be reviewed carefully by those involved in the not-for-profit corporation and legal and financial advisors to select those provisions that are applicable to the organization and prepare customized clauses as needed.

There is not presently a requirement in the ONCA that the by-laws be sent to the Director.

¹⁰ See Chapter 9 for a discussion of the unanimous shareholder agreement (USA) for business corporations.

By-laws are passed under either statute initially by the directors and then submitted to the next meeting of the members for confirmation, amendment, or rejection. If a by-law is amended or rejected, any actions taken under it to the date of this determination are valid.

A not-for-profit corporation under the CNCA carrying on its activities in Ontario must file an Initial Notice (Form 1) under the *Corporations Information Act*¹¹ (CIA) (see Figure 9.10 in Chapter 9). Recall that this form contains, in its upper-right corner, boxes for not-for-profit corporations. No doubt a not-for-profit corporation under the ONCA will be required to do so as well.

A notice of any changes in directors, officers, or the registered office of a CNCA not-for-profit corporation must be filed within 15 days of the change; this filing is most easily accomplished online at <<https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/bs/chngDrctrs.html>> and <<https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/bs/chngRgstrdcdrsWz.html>>, respectively.

These same types of changes in a federal (CNCA) not-for-profit corporation carrying on its activities in Ontario must also be reported to the Ontario government by filing a Notice of Change using Form 1 under the CIA.¹²

In addition, every CNCA corporation must file an annual return within 60 days of its anniversary date, as is the requirement for CBCA corporations.

As with for-profit corporations, changes to a CNCA corporation's articles may be made by articles of amendment and, should the corporation eventually wind up, it must file articles of dissolution. Changes in matters dealt with by by-laws or resolutions are generally made by the passage of new by-laws or resolutions, as appropriate.

Voting members must hold annual meetings at which financial statements approved by the directors are presented to the membership and directors are elected for subsequent terms of service. Minutes of these meetings must be retained. There may also be special meetings from time to time.

The federal government has provided an online guide to required corporate records and filing obligations for CNCA corporations at <ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05007.html>.

The T1044 tax return is to be filed with the CRA by non-charitable not-for-profit organizations within six months of their fiscal year-end, and, as was noted in the printed text portion of this chapter, the T3010 charitable return is to be filed by charitable not-for-profit organizations within the same period. Financial statements, reviewed or prepared by a public accountant or auditor, depending on the type of corporation, must be prepared both for the annual meetings and for the returns for the CRA and with government offices.¹³ In general, the principle is that not-for-profit and particularly charitable corporations that receive a substantial level of donations from a broad range of contributors or have a significant general revenue are required to have their financial statements audited to ensure transparency and compliance with regulations in order to provide an additional level of protection to donors and grantors and to the intended beneficiaries of those organizations' activities.

11 RSO 1990, c C.39.

12 See Chapter 10 for a greater discussion of extra-provincial corporations and related requirements.

13 A detailed discussion of these requirements is beyond the scope of this text, but an interested reader may consult ss 172 to 196 of the CNCA and ss 68 to 84 of the ONCA.

Current Ontario Not-for-Profit Incorporation Under the OCA: Letters Patent

Background

The present manner of incorporating an Ontario not-for-profit organization under Part III of the Ontario *Corporations Act* (OCA) provides insight into what incorporating in the past has been like (and still is at the time of writing) for a not-for-profit organization in Ontario. Prior to the enactment of the Ontario *Business Corporations Act* (OBCA), all corporations in Ontario, for-profit and not-for-profit, with share capital and not, were incorporated by way of letters patent under the OCA or its predecessor legislation. Once the OBCA came into effect, only a few types of corporations were exempted from its provisions and continue to be dealt with by the OCA. Our focus will be on those non-share capital corporations to which Part III of the OCA applies;¹⁴ it should be noted, however, that Part VII of the OCA applies as well to Part III OCA corporations. Some of the points to be noted in incorporating under this regime include the following:

1. Incorporation is not “as of right”; that is, incorporation is not achieved automatically upon presenting correctly completed documentation, along with name clearances and the required fee. Rather, the process is one in which government officials read deeply into the documentation and determine whether the purposes or objects qualify for the distinction of incorporation under the legislative provisions. This discretionary and subjective process can lead to administrative appeals and concerns and reworking of the objects of the organization. It also takes considerably more time to accomplish.
2. The corporation has the ability to operate within the mandates and purposes that are specified in its application (its objects). The application for letters patent must therefore anticipate and include everything considered feasible and desirable for the entity, or a revision of the documentation will be required in the future. More about these objects will be discussed below.
3. The document that is awarded by the government at the successful conclusion of the inspection process is called the corporation’s letters patent.
4. There must be at least three individuals who apply for incorporation (OCA, s 283(2)), each of whom are at least 18 years of age and are not undischarged bankrupt individuals (OCA, ss 286(4), (5)), from whom will be named the first directors of a fixed board of no less than three individuals to manage the corporation. A director must be a member of the corporation at the time of becoming a director or within ten days thereafter, unless running a public hospital, stock exchange, or insurer (OCA, s 286 (1) – (3)).
5. With the exception of a director in place by virtue of their office (OCA, s 127) and initial directors named in the application for letters patent, directors are

¹⁴ There are also share capital corporations created for social purposes to which Part II of the OCA continues to apply. In these corporations, there are shareholders, possibly along with members, and some of these larger entities, such as golf, ski, or other recreational clubs, may have more than 50 shareholders.

elected by members (OCA, s 287(1)). Generally, directors have a term of one year unless the by-laws provide otherwise, but are eligible for re-election (OCA, s 287(2)). Directors may also be elected on a rotational basis, but, in that case, may not be elected for a term of more than five years, and at least three directors must retire each year of a rotational election of directors (OCA, s 287(5)).

Classes of memberships are set out in the letters patent or by-laws (OCA, s 120), and voting rights are one vote per member unless otherwise specified in the letters patent or by-laws (OCA, s 125).

6. Members are specifically declared not to be personally liable for acts of the corporation (OCA, s 122); on the other hand, the corporation is not to utilize any of the proceeds of its activities for the gain of its members (OCA, s 126).
7. At least ten percent of the voting members may requisition a membership meeting (OCA, s 295), and directors must circulate to members a resolution of no more than 1,000 words drafted by no less than five percent of the voting members, unless the statement is defamatory or clearly intended primarily for securing needless publicity (OCA, s 296).
8. In choosing a name for the new not-for-profit entity, it is not necessary to have a legal element but, if one is chosen, it must be "Inc." or "Corp.," in short or in long form, and cannot be "Ltd." or "Limited." A numbered name is not permitted.

An excellent resource called the *Not-for-Profit Incorporator's Handbook* (the Handbook) is available through the Ontario government's website and will assist with the incorporation and maintenance of a not-for-profit organization under the OCA. It can be found at https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/nfpinc/Not_for_Profit_Incorporators_Handbook_EN.html.

Application for Incorporation of an Ontario Corporation Without Share Capital

The required form for this purpose is the Application for Incorporation of a Corporation Without Share Capital (Form 2 under the Ontario *Corporations Act*), found online at the following site: < <http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?openform&ENV=WWE&NO=007-07109>>. While the result of a successful application is the issue of letters patent, the term "without share capital" reminds us that there are no shares to be sold and issued, consistent with the not-for-profit principle that there are members, and not shareholders.

Objects

As noted above, an OCA not-for-profit corporation has the authority to conduct itself in accordance with the purposes and powers set out in its **objects** that are enumerated in item 4 of the application for incorporation.

Appendix A of the Handbook contains a number of sample objects clauses for not-for-profit entities of a wide variety of aims and purposes. Note that these are

objects

concise statements of the purposes or mandate of the corporation

samples and may be varied as appropriate to suit the organization involved, setting out its primary undertaking in a concise, broad, but sufficiently specific manner.

If the creators of the not-for-profit corporation also intend to apply for registered charity status, the item 4 objects in the application are subject to an even higher degree of scrutiny, in Ontario by the Office of the Public Guardian and Trustee (OPGT), described earlier in the printed portion of this chapter, as well as by the Ministry of Government and Consumer Services and, federally, by the Canada Revenue Agency (CRA). Appendix C of the Handbook sets out a number of pre-approved objects clauses for use in incorporating a charity. If any of these objects clauses are relevant and satisfactory to an incorporating entity, their use, with no variation, will permit the application to be submitted directly to the Ministry, eliminating the objects review by the OPGT as well as the time required for such review.

However, a not-for-profit entity intending to register as a charitable organization may not find its objectives, goals, and intended programs directly within any of these pre-approved objects. Where the not-for-profit corporation's goals and mandate need to be customized, the OPGT must approve documents before they can be sent to the Ministry. This review requirement brings with it additional time and fees.

Incorporation and Post-Incorporation

The Handbook contains information related to the considerations for incorporation, including details regarding the proposed corporate name. It notes that, once the needed documentation, including a NUANS search and required fees, are submitted, the process of incorporation may take six to eight weeks, unless a fee is paid for an expedited consideration of seven business days.

Following incorporation, the corporation must be organized using by-laws and resolutions, and an Initial Return (Form 1 under the CIA) must be filed. Annual filings with the Ontario government and with the CRA are also required. Consult the Handbook for detailed information in this regard, as well as for the procedures needed to effect amendments and dissolution, if needed.

Because of the detail provided by the Handbook and the anticipated new ONCA legislation, the information provided in this chapter regarding this statute is less comprehensive than it is for others. You may observe, by looking at an online copy of the OCA, particularly in Part III, that most of its provisions are scheduled for repeal at the same time as the ONCA goes into effect.¹⁵

Transition of OCA Not-for-Profit Corporations into the ONCA

For the law clerk, familiarity with the ONCA will be needed not only to incorporate new entities under that statute, but also to assist existing OCA corporations in

¹⁵ Companies that have a purpose that is partly or wholly social in nature, such as social clubs with share capital, that may, for example, own buildings and property for their activities, such as private golf, tennis or squash clubs, fall under a different part (Part II) of the OCA. Within five years of the ONCA coming into force, these companies (if they were incorporated or continued under the *Corporations Act*) must continue as one of a non-share capital corporation under the ONCA, a co-operative corporation under the *Co-operative Corporations Act*, or a share capital corporation under the OBCA, or face automatic dissolution, from which they may file articles of revival. (See <<https://www.ontario.ca/page/not-profit-corporations-act-transition-considerations>>.)

transitioning into the ONCA once the ONCA is proclaimed in force, which may occupy a good amount of their time.

An Ontario not-for-profit corporation that has been incorporated under the OCA will have a period of three years from the effective date of the ONCA to transition to the new statute. The corporation may need to file articles of amendment and/or amend its by-laws in order to meet the new statutory requirements. If the corporation fails to do this within the three-year period, all letters patent, supplementary letters patent, by-laws, and special resolutions will be deemed to have been amended to comply with the new Act (ONCA, s 207). However, because the question of what specific provisions apply in such a circumstance may create uncertainty, it is best to proactively make needed amendments, including filing articles of amendment where appropriate, within that three-year time period to ensure that transitioned Ontario not-for-profit corporations go forward with the appropriate provisions and rules desired for their operations.

If an OCA not-for-profit corporation has provided for more than one class of membership in its by-laws, but not in its letters patent, it must file for articles of amendment to specify the various classes of membership and the rights and conditions attached to each class of membership (ONCA, s 103).

As noted earlier in this appendix, the Ontario government has prepared and posted a draft default organizational by-law form that it proposes for possible use by a not-for-profit corporation; the standard organizational by-laws will be deemed to apply if no other by-law is filed with the Ministry within 60 days of incorporation under the ONCA (ONCA, s 18). This draft default by-law may be found online at <https://www.ontario.ca/page/not-profit-corporations-act-default-organizational-law>. Because an existing OCA corporation will already have passed its organizational by-laws, the draft organizational by-law should be viewed as a useful document to review and will help in considering what clauses of the ONCA would be of benefit to, or indeed what provisions must now be incorporated into, the by-laws of the transitioning corporation, ensuring at the same time that its provisions are sufficient for the not-for-profit corporation's needs and circumstances. As with any other by-law or amendment, it would be valid from the date of passage by the directors and must be presented to the members for approval, amendment, or repeal at the next membership meeting.

CHAPTER APPENDIX SUMMARY

As with the for-profit corporations we have been dealing with elsewhere in this text, incorporators of a not-for-profit corporation have the choice of incorporating under a federal statute (in the case of not-for-profits, the CNCA) or the provincial statute (the OCA). The CNCA approach will grant a certificate of incorporation, attached to the articles submitted by the incorporators, while the OCA approach will grant letters patent after a lengthier review by government officials. The ONCA, an Ontario statute that has received royal assent but awaits proclamation before coming into force, will replace those portions of the OCA that deal with not-for-profit organizations having memberships and will issue, like the CNCA, a certificate of incorporation, attaching articles of incorporation for the applicants.

Not-for-profit corporations created under any of these statutes have directors, officers, by-laws, resolutions, and regular meetings and government filings. However, their purposes must be substantially for the benefit of society in some aspect or another and not be for the purposes of making a profit for their members. In recognition of this, they have members, rather than shareholders, memberships rather than shares, and different types of forms to file with the CRA, even if they are not required to pay tax on any income they may receive by donation, fundraising, or interest they may be paid on invested funds.

A not-for-profit corporation incorporated under the provincial OCA will have a period of three years to

transition to the provisions of the ONCA, making any changes to articles or by-laws needed to comply with the ONCA, or desired to take advantage of the additional options provided by the ONCA for the not-for-profit corporation, failing which it will be deemed to have incorporated standard provisions of the ONCA for its articles and by-laws. As not every one of these provisions may be desirable for certain not-for-profit corporations, these entities will look to their lawyers for advice as to how and what changes should be made to articles and by-laws. Law clerks may be given a significant role in summarizing the not-for-profit corporation's current provisions and proposing to the lawyer changes to be made, and then preparing any desirable changes for the lawyer's review with clients.

Where those involved in the not-for-profit corporation wish it to have charitable status, primarily so that the corporation may receive donations from the public for which they may issue charitable donation receipts, or certain types of grants from foundations, an additional application for charitable registration must be made to the CRA, enclosing the corporation's documents with the application form. It is prudent, then, to seek out comments to draft incorporation documents from the CRA before submitting them for incorporation, so that amendments will not be required soon after incorporation to obtain charitable registration status.

KEY TERMS

articles of incorporation, **16:2**
corporation key, **16:8**

objects, **16:11**
public benefit corporation (PBC), **16:6**

soliciting corporation, **16:4**

REVIEW QUESTIONS

1. a. Prepare draft articles of incorporation for a federal not-for-profit corporation for the following situation:

Chantel Knight and Trevor James seek to establish what they aim to have as a registered charity to offer service opportunities in the arts to youth in the Nightingale neighbourhood of Toronto. The programming would develop and increase participants' skills in various artistic fields, including visual and performing arts, who would then teach others their skills and give showings and performances to the community with a view to inspire and uplift spirits.

The registered office would be at a community centre at 392 Gale Crescent, Toronto, Ontario, M6B 1D9. Chantel's address is 82 Crown Crescent, Toronto, Ontario, M6B 2N5 and Trevor's is 18 Davenport Way, Toronto, Ontario, M6B 9E4. Both Chantel and Trevor are Canadian citizens and residents.

The proposed name of the new corporation is NIGHTINGALE ARTS IN ACTION, and there would be one class of membership, carrying one vote per share, obtained by an annual fee determined by a board of directors of between one and nine members, beginning with Chantel and Trevor. Chantel will be president and Trevor will be secretary.

- b. Prepare the Notice of First Registered Office and First Directors for this federal not-for-profit corporation.
- c. NIGHTINGALE ARTS IN ACTION was incorporated under the CNCA on March 1, 2021. Because it is carrying on its activities in Ontario, it will need to file the appropriate form with the Ontario government. Prepare the Initial Notice form.
- d. THE NIGHTINGALE ARTS COUNCIL, a charitable organization formed in 1971, has expressed concern about confusion in the eyes of the public concerning the operational purposes of NIGHTINGALE ARTS IN ACTION, with a resulting confusion regarding which organization to make charitable donations to. Look up THE NIGHTINGALE ARTS COUNCIL and comment as to the validity of its concern.

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Statutes

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Canada Business Corporations Act, RSC 1985, c C-44.

Canada Not-for-profit Corporations Act, SC 2009, c 23.

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Income Tax Act, RSC 1985, c 1 (5th Supp.).

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