A. Introduction

With the anticipated proclamation of the Ontario Not-for-Profit Corporations Act, 2010 [ONCA] on July 1, 2013, it is an appropriate time for not-for-profit corporations incorporated under Part III of the Ontario Corporations Act [OCA] to begin familiarizing themselves with the changes that the ONCA will have on their future corporate structure and governance, and to plan towards transitioning under the ONCA.

By way of background, the OCA has not been substantively amended since 1953. Bill 65, An Act to revise the law in respect of not-for-profit corporations, 2010, was introduced on May 12, 2010 and received Royal Assent on October 25, 2010. The ONCA is expected to be proclaimed in force on July 1, 2013. The administration of the ONCA will be shared by the Ministry of Consumer Services and the Ministry of Government Services. Regulations under the ONCA have not been released at the time of writing this article. As well, the Ministries are currently finalizing tools to assist not-for-profit corporations complete the transition. In December 2012, the Ministry of Consumer Services released helpful information on their website, including a transition checklist and a list of frequently asked questions. Additional tools that will be available in the future include a plain language guide explaining the ONCA’s most significant sections and draft default by-laws. The Ministry expects to release these tools this fall. Once the ONCA is in force, the OCA will no longer apply to non-share capital corporations incorporated under Part III of the OCA. This article will review key features of the ONCA and issues that Part III OCA corporations may need to consider in transiting into the ONCA.
There are many corporations that do not come under the OCA, such as non-share capital corporations under the Co-operative Corporations Act and insurance companies under Part V of the OCA. As well, the ONCA excludes from its application to some corporations and limits its application to certain other corporations. In addition, the ONCA does not automatically apply to share capital social corporations incorporated under Part II of the OCA. These social corporations may continue to operate under the OCA for five years. At the end of the five-year period, the social corporations will have to decide whether to continue under the ONCA, the Ontario Business Corporations Act or the Co-operative Corporations Act. These corporations are outside the scope of this article.

B. Transitioning under the ONCA for Part III OCA Corporations

Transitioning under the ONCA refers to the process by which a Part III OCA corporation amends its constating documents so that they conform with the requirements in the ONCA. In this regard, upon the ONCA being proclaimed into force, it automatically applies to all non-share capital corporations incorporated under Part III of the OCA. As such, these OCA corporations do not need to take any action in order to come under the ONCA. However, if there are any provisions in their letters patent, supplementary letters patent, by-laws or special resolution that are inconsistent with the provisions in the ONCA, these documents will be deemed at the end of three years after proclamation to be amended to comply with the ONCA. The problem with this approach is that it will become difficult to determine what provisions are deemed to be amended and in what way.

In order to avoid such uncertainty from arising, the ONCA permits Part III corporations to “transition” into the ONCA during the three-year period by amending any provision in its letters...
patent, supplementary letters patent, by-laws or special resolution that are not consistent with the requirements of the ONCA in order to bring those provision into conformity with it.\textsuperscript{11} If a Part III OCA corporation fails to do so within three years of the date of proclamation of the ONCA, then the provisions of its letters patent and by-laws that do not comply will be deemed to be amended to comply as explained above. Nonetheless, it is generally advisable for Part III OCA corporations to transition under the ONCA during the three-year period in order to avoid uncertainty concerning the interpretation of its constating documents.

C. Overview of the Key Elements of the ONCA

1. Incorporation, Purposes and By-laws

Under the ONCA, incorporation will be “as of right”, similar to the mechanism used in the Ontario Business Corporations Act.\textsuperscript{12} One or more individuals or corporations may incorporate a corporation by filing articles of incorporation and other required documents.\textsuperscript{13} Upon receipt of the articles of incorporation, a certificate of incorporation will be issued.\textsuperscript{14} Incorporation as of right is a welcome development compared to the system under the OCA. Under the OCA, incorporation is subject to the discretion of the Ministry\textsuperscript{15} and often takes six to eight weeks to be completed. In contrast, it is anticipated that incorporation under the ONCA will take only a few days and can be filed online.

Under the OCA, corporations must set out their objects in the letters patent.\textsuperscript{16} Under the ONCA, corporations must set out their purposes in the articles.\textsuperscript{17} Such purposes must be within the legislative authority of the Province of Ontario.\textsuperscript{18} Unlike the OCA, the ONCA permits corporations to have purposes that are of a commercial nature, provided that the articles must provide that the commercial purpose is intended only to advance or support one or more of the non-profit purposes of the corporation.\textsuperscript{19} Notwithstanding this new rule, corporations that are registered charities must still comply with the requirement of the Income Tax Act and Canada Revenue Agency’s administrative policies on related business.\textsuperscript{20} Where the articles are inconsistent with the ONCA or its regulations, the ONCA or its regulations will prevail and the articles will be deemed to be amended accordingly.\textsuperscript{21}

Standard organizational by-laws will be approved and released by the Ministry. If a corporation fails to pass an organizational by-law within 60 days after it is incorporated, it will be deemed to have passed the standard organizational by-laws. Such a corporation may amend or replace the standard by-laws at any time in the future.\textsuperscript{22} This is a welcome change, since it is not uncommon to find OCA corporations that have not adopted any by-laws after incorporation, especially those corporations incorporated without legal assistance.

Under the ONCA, corporations will have the capacity, rights, powers and privileges of a natural person, which is not in itself a new development.\textsuperscript{23} As well, the doctrine of ultra vires will no longer apply to corporations, which means that if a corporation acts outside of its purposes, those acts will still be valid. Practically speaking, this change makes little difference to the directors of charities because they still have the duty to comply with the corporation’s articles, which may limit the purpose of the corporation.

2. Types of Corporations

A significant feature of the ONCA is its categorization of all corporations into two types: public benefit corporations ("PBCs") and non-PBCs. PCB corporations consist of: (i) all charitable corporations; and (ii) all non-charitable corporations that receive more than $10,000 in a financial year from specific public sources.\textsuperscript{24} All other corporations are non-PBCs.
A charitable corporation is defined in the *ONCA* to be a corporation that is incorporated for the relief of poverty, the advancement of education, the advancement of religion or other charitable purposes. Those familiar with the decision in *Special Commissioners of Income Tax v. Pemsel* will note that the definition generally replicates the four heads of charity under the common law. It is important to note that whether or not the corporation is a registered charity is irrelevant. The *ONCA* provides a special exemption of a certain members’ remedy to religious corporations. The term “religious corporation” is not defined in the *ONCA*. Presumably, religious corporations are established for the advancement of religion and, therefore, would be charitable corporations.

A non-charitable corporation is a corporation that does not meet the definition of a charitable corporation referred to above. A non-charitable corporation that receives more than $10,000 in a financial year from any of the following sources will be considered a PBC: (i) donations or gifts from persons that are not members, directors, officers or employees of the corporation; or (ii) grants or similar financial assistance from the federal, provincial or municipal government or government agency.

Generally, higher standards are applied to PBCs because of the public source of their funding. The public interest requires that corporations receiving public funds be subject to tighter regulation and have greater transparency in their operations than those that do not receive public funding. It is important to bear this rationale in mind when grappling with the different treatment of the categories of corporations under the *ONCA*.

### 3. Financial Review and Disclosure

The general rule is that at each annual meeting, the members are required to appoint, by ordinary resolution, an auditor to audit the annual financial statements (or a person to conduct a review engagement where applicable). An ordinary resolution means a resolution that is approved by at least a majority of the votes cast at a members’ meeting or is consented to by each member of the corporation entitled to vote at a members’ meeting. However, if a PBC’s annual revenue is more than $100,000 and less than $500,000 in a financial year, its members may approve by extraordinary resolution to have a review engagement in lieu of an audit. If a PBC’s annual revenue for a financial year is $100,000 or less, then its members may approve by extraordinary resolution to dispense with the appointment of the auditor and not have an audit or review engagement. These two alternatives are not available to a PBC that has $500,000 or more in annual revenue. An extraordinary resolution is a resolution that is approved by at least 80 per cent of the votes cast at a special members’ meeting or is consented to by each member of the corporation entitled to vote at a members’ meeting. An extraordinary resolution is valid only until the next annual meeting of members, which means that the approval of such dispensation must be done on an annual basis.

The monetary thresholds for dispensing with financial review are less onerous for non-PBCs. If a non-PBC’s annual revenue is more than $500,000 in a financial year, then its members may approve by extraordinary resolution a review engagement in lieu of an audit. If a non-PBC’s annual revenue is $500,000 or less in a financial year, its members may decide by extraordinary resolution not to appoint an auditor and to dispense with an audit or a review engagement. It should be noted that the *ONCA* expressly provides that the monetary thresholds for dispensing with financial review in relation to both PBCs and non-PBCs may be amended by regulations.

The directors are required to approve the annual financial statements of the corporation and approval of the directors must be evidenced by the signature of one or more directors. The
financial statements cannot be issued, published or circulated unless they have been approved by the directors and accompanied by the audit or review engagement report, if any.\(^{35}\) If a corporation has an audit committee, the audit committee must review the financial statements before they are approved by the directors,\(^ {36}\) and the majority of the committee members must not be officers or employees of the corporation or of any of its affiliates.\(^ {37}\)

As well, the directors must present the financial statements, the report of the auditor or the person who conducted a review engagement, if such financial review was conducted, and any other financial information required by the articles or by-laws, to the members at every annual members’ meeting. If a member requests a copy of these documents, the corporation must provide a copy to the member not less than 21 days before the meeting or the signing of a resolution in lieu of a meeting pursuant.\(^ {38}\)

The financial review requirements for each category of corporations under the ONCA are summarized in the table below:

<table>
<thead>
<tr>
<th>Type of Corp/Gross Annual Revenues (“GAR”)</th>
<th>Requirements for an Auditor</th>
<th>Audit/Review Engagement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Benefit Corporation (“PBC”) with GAR of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$100,000 or less (s. 76(1)(b))</td>
<td>May, by extraordinary resolution (80 per cent), decide not to appoint an auditor</td>
<td>May dispense with both an audit and a review engagement by extraordinary resolution (80 per cent)</td>
</tr>
<tr>
<td>More than $100,000 and less than $500,000 (s. 76(1)(a))</td>
<td>May dispense with an auditor and have someone else conduct a review engagement. This dispensation requires an extraordinary resolution (80 per cent)</td>
<td>May elect to have a review engagement instead of an audit by extraordinary resolution (80 per cent)</td>
</tr>
<tr>
<td>$500,000 or more (by implication of s. 68(1))</td>
<td>An auditor must be appointed annually</td>
<td>Audit is required</td>
</tr>
<tr>
<td>Non-PBC corporation with GAR of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$500,000 or less in annual revenue (s. 76(2)(b))</td>
<td>May, by extraordinary resolution (80 per cent), dispense with an auditor</td>
<td>May dispense with both an audit and a review engagement by extraordinary resolution (80 per cent)</td>
</tr>
<tr>
<td>More than $500,000 in annual revenue (s. 76(2)(a))</td>
<td>May, by extraordinary resolution (80 per cent), dispense with an auditor, and instead appoint a person to conduct a review engagement</td>
<td>May elect to have a review engagement instead of an audit by extraordinary resolution (80 per cent)</td>
</tr>
</tbody>
</table>
4. Number of Directors and Elections

All corporations must have a minimum of three directors. Corporations may provide in their articles a fixed number of directors; or minimum and maximum numbers of directors. The members may amend the articles to increase or decrease the number of directors, or the minimum or maximum number of directors, but a decrease cannot shorten the term of an incumbent director.

Directors may be elected by the members, appointed by the directors, or take office as *ex-officio* directors. Members may elect and remove directors (except for *ex-officio* directors) by ordinary resolution. Directors may only be elected for a term provided for in the by-laws up to a maximum of four years. However, if a class or group of members has the exclusive right to elect a director, then only an ordinary resolution by that class or group of members may remove the director. In addition, the directors may appoint additional directors to hold office until the next annual members’ meeting up to a maximum of one-third of the number of directors elected at the last annual members’ meeting. All directors must be at least 18 years old, not mentally incapable and not bankrupt. Unless the by-laws provide otherwise, there is no requirement that a director be a member of the corporation.

For PBCs, not more than one-third of its directors may be employees of the corporation or of any of its affiliates. This provision may not make much difference to registered charities, since they are prohibited from having paid employees be directors (however, employees of their affiliates are not so prohibited). In this regard, the *ONCA* provides that if there is a conflict between the *ONCA* and any law applicable to charitable corporations, then the latter prevails.

5. Duty of Directors and Officers, Indemnification

The *ONCA* provides that every director and officer has a duty to act honestly and in good faith with a view to the best interests of the corporation. They must also exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. These duties reflect the objective standard of care that applies to for-profit corporations. The *ONCA* also provides directors with a reasonable due diligence defence. This defence applies where a director has exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances. However, in spite of requests by the not-for-profit sector, the *ONCA* does not contain a partial liability shield similar to that which is found under the Saskatchewan *Non-profit Corporations Act, 1995*, that would otherwise limit the liability of directors or officers for non-pecuniary and pecuniary losses stemming from acts or omissions of the corporation or of any of its directors, officers, employees or agents.

Both former and present directors and officers may be indemnified by the corporation, and the latter may purchase insurance for that purpose, subject to the restrictions placed on the directors of charities by the *Charities Accounting Act*. In this regard, charitable corporations are prohibited from purchasing insurance for directors and officers unless the requirements in the *Charities Accounting Act* or its regulations are satisfied, or a court order is obtained. The *ONCA* also permits corporations to advance money to directors and officers for the costs, charges and expenses that they incur in respect of any civil, criminal, administrative, investigative or other action arising out of their association with the corporation, as long as certain conditions are met.
6. Powers of Directors

The powers of the directors have been expanded under the ONCA. For example, directors may borrow money on the credit of the corporation without members’ authorization unless the articles or by-laws provide otherwise.\(^5\) Unless the articles or by-laws otherwise provide, directors may make, amend or repeal any by-law regulating the activities or affairs of the corporation, except in relation to certain amendments to the articles requiring a special resolution by the members.\(^6\) However, similar to the OCA, in the case of by-laws, directors are required to submit a by-law, amendment or repeal to the members for confirmation, rejection or amendment, failing which the by-law will cease to have effect.\(^7\)

7. Members

The ONCA provides extensive rights to members of corporations. In addition to the rights to elect and remove directors, they may make proposals,\(^8\) requisition meetings of members,\(^9\) as well as vote on certain amendments to the articles\(^10\) and fundamental changes. The latter may pose some concern to corporations that have multiple membership classes. In this regard, where there is more than one class of members, each class of members is entitled to vote separately as a class to approve certain changes affecting their class of membership by special resolution (regardless of whether the class of members otherwise has the right to vote). As such, each class of members (including non-voting members) will have a de facto class veto right. Therefore, corporations that currently have multiple membership classes may wish to consider collapsing all of the classes into one voting class.

If there is more than one class of members, the classes must be set out in the articles and the by-laws must provide the conditions for membership in each class.\(^11\) Unless stated otherwise in the articles or by-laws, there are default conditions for the termination of membership and member’s rights.\(^12\) Similarly, the articles or by-laws may provide directors, members or a committee the power to terminate membership or discipline members. However, if the articles or by-law provide for such a disciplinary power, then they must also set out the circumstances and manner in which the power may be exercised. The duty of natural justice applies to the exercise of that power in that the member must receive notice of and be given an opportunity to respond to the proposed disciplinary action or termination.\(^13\) Additionally, the ONCA permits directors to require members to make an annual contribution or pay annual dues, and provides them with control over the manner in which the contribution is to be made or the dues are to be paid.\(^14\)

8. Members’ Remedies

The modelling of the ONCA on the Ontario Business Corporations Act\(^15\) has made available remedies to members that were not available to corporations under the OCA. Compliance or restraining orders and rectification orders are now available in relation to all categories of corporations. A complainant\(^16\) or a creditor may apply for a compliance or restraining order where the corporation or its directors and officers fail to comply with the duties set out in the ONCA, the regulations, or the articles or by-laws of the corporation.\(^17\) If a person’s name is allegedly or has been wrongly inputted or removed from the registers or records of the corporation, then a debt obligation holder, director, officer or member of the corporation or any aggrieved person may apply for a court order that the registers or records be rectified.\(^18\)

There are two other remedies provided for in the ONCA, the availability of which is restricted to particular categories of corporations. The dissent and appraisal remedy is only available to members of non-PBCs to dissent to resolutions on fundamental changes.\(^19\) The right of a
complainant to seek a court order to commence a derivative action is only available in relation to non-religious corporations. A derivative action allows a complainant to bring an action in the name of the corporation to enforce its rights. Without this right, no action could be brought in the name of the corporation, since corporations are legal persons separate from the natural persons that comprise them.

9. **Conflict of Laws**

The ONCA must be read in conjunction with applicable charities law. As mentioned above, the ONCA provides that if there is a conflict between the ONCA and a provision made in any other legislation that applies to non-share capital corporations, then the provision in the other legislation prevails. Similarly, if the conflict is in relation to a charitable corporation, then the legislation applicable to the charitable corporation prevails. The effect is that some provisions of the ONCA will not apply to charities. For example, although the ONCA permits directors to fix remuneration for directors, officers and employees, this provision would not permit ONCA corporations that are registered charities to remunerate their directors for that same reason. Similarly, the ONCA allows directors and officers to enter into contracts or transactions with the corporation as long as they disclose any conflict of interest that may exist. At common law, the directors of incorporated charities cannot place their personal interests in conflict with their duty to the corporation. As such, under the ONCA, the common law applicable to charities would apply and the directors of charitable corporations would not be able to enter into any contracts or transactions where a conflict of interest may exist.

10. **Liquidation and Dissolution**

The ONCA provides detailed procedures and processes for the liquidation and dissolution of a corporation. Notably, it permits the members of all categories of corporations to require the corporation to be wound up voluntarily by special resolution. In addition, the members may delegate to any committee of members, persons who are liable to contribute to the property of a corporation in the event of a winding-up or creditors (in the aggregate known as inspectors under the ONCA), the power to appoint a liquidator. With the permission of the inspectors or the members, the liquidator may enter into compromises and arrangements. There are also provisions providing for court-ordered liquidation and dissolution. Upon being liquidated, a charitable corporation must distribute the remaining property to another charitable corporation with similar purposes to its own, a government or a government agency. If the PBC is a non-charitable corporation, then it must distribute its remaining property to another PBC with similar purposes to its own, a government or a government agency. Non-PBCs must distribute their remaining property in accordance with their articles or, if there are no relevant provisions in the articles, then rateably to its members according to their rights and interests in the corporation.

11. **Corporate Finance**

The ONCA provides that none of the corporation’s profits or property may be distributed to a member, a director, or an officer except in furtherance of the corporation’s activities or as permitted by the ONCA. However, a non-PBC may distribute the fair value of a membership to a member upon the termination of the member’s membership, subject to the articles and by-laws of the corporation. Members are not liable, in their capacity as members, for any liability of the corporation or any act or default of the corporation, except as otherwise provided in the ONCA. The ONCA permits a corporation to put a lien on a membership registered in the name of a member for a debt of that member to the
incorporation, including an amount unpaid in respect of that membership.82

12. Export and Import Continuance

Under the ONCA, a corporation may be exported from Ontario to another jurisdiction, provided that the desired jurisdiction of continuance has laws that, *inter alia*, ensure that the property of the corporation remains the property of the corporation and that existing causes of action, claims, or liabilities against the corporation are unaffected. On the other hand, a corporation from another jurisdiction may be imported to Ontario under the ONCA by applying for a certificate of continuance. To apply for a certificate of continuance, the laws of the other jurisdiction must permit continuance to Ontario and the corporation’s articles of continuance must satisfy the incorporation requirements under the ONCA.83

D. Preliminary Steps and Considerations for Transition

In preparation for a smooth transition into the ONCA, the following is an overview of some of the key steps and considerations.

1. Gather and Review Current Governance Structure and Practice

The first step a corporation must take is to collect and review all of the governing documents for the corporation. These documents include the letters patent and all supplementary letters patent and by-laws. If a corporation is not able to locate the letters patent or all supplementary letters patent, it can contact the Ministry of Government Services to obtain copies. However, it is important to note that the Ministry is not a depository for by-laws, so they would not be of any assistance if a corporation cannot locate its by-laws.

Also, it is not uncommon for Part III OCA corporations, especially smaller corporations, to be incorporated without ever having adopted a general operating by-law.84 This arises in situations where individuals completed the incorporation process themselves or with the assistance of other individuals, but without professional legal advice.

As well, some charities and non-profit organizations have set out their objects in their by-laws. This practice is often used to allow members to have easy access to the objects of the corporation in the by-laws, a document that members are more familiar with than the letters patent or supplementary letters patent. However, it is not uncommon to find that the objects set out in the by-laws are not the same as those contained in their letters patent or supplementary letters patent, because the objects may have been amended and updated from time-to-time as part of the by-law amendment process in the past, without the corporation being aware of the need to change their “official” objects in their letters patent or supplementary letters patent. In those situations, the objects contained in their by-laws should also be taken into account when preparing the articles of amendment.

Once all of these documents have been located, they should be reviewed in detail to understand the current governance structure and practice as provided for in these documents.

Consideration must also be given to whether these documents accurately reflect the current governance structure and practice of the corporation. It may be that the corporation has evolved over time since incorporation and the by-laws no longer reflect the desired governance structure. After incorporation, it is also not uncommon that the by-laws became one of the documents retained in their corporate records, without ever being followed. This is especially the case in the charitable and non-profit sector, which often lacks the means to engage legal advisors for the incorporation process or to retain legal advisors to assist in their corporate proceedings. In these situations, it may be necessary to also review various operational
documents, including governance policies and organization charts. These documents may reveal the governance structure and practice that is being followed by the corporation, which should be reflected in the new by-laws to be prepared.

Upon the completion of that review, it would be helpful to draw up a list of the changes that depart from the current by-laws. This exercise will assist in the preparation of the documents for transition.

2. **Review key features of the ONCA**

The next step is for the corporation to have a clear understanding of the rules contained in the ONCA under which the corporation will be required to operate. This understanding will help the corporation in determining how the new rules will impact the governance of the corporation and what provisions to include in the articles of amendment and new by-laws.

3. **Compare the ONCA rules with current governance structure and practice**

Once a corporation has determined its current or desired governance structure and practice and has reviewed the rules in the ONCA, the corporation will then need to review and determine how the new rules will impact how the corporation is to be governed. Examples of questions to be considered include: whether the current by-laws or the desired governance structure and process are inconsistent with ONCA requirements; if they are inconsistent, how will the corporation adjust its governance structure and process in order to ensure compliance. In this regard, the transition checklist released by the Ministry provides a helpful list of key questions that should be considered.\(^{85}\)

4. **Timing of Transition**

Some corporations may want to complete the transition process early during the three-year period, while others may want to wait. Early on, a corporation should decide when to start the by-law review process in order to prepare for transition. The following are some key considerations in this regard:

- **Length of time and complexity of process required in revising the by-laws** — Some corporations may have a very lengthy process in their current by-laws or governance policies/practice in order to revise their by-laws. This process may include constituting a by-law review or governance committee, seeking legal assistance in the review process, a lengthy notice period to hold membership meetings, *etc.* These corporations may want to start their process early in order to take full advantage of the three-year time frame.

- **Nature of changes in the new by-laws** — If compliance with the ONCA requires substantive changes to the by-laws, the corporation may wish to start the by-law review early on so that it can be completed within the three-year time frame. If the changes encompassed in the new by-laws are essentially administrative changes to comply with the ONCA, while maintaining the current governance structure and process (*e.g.*, changing “head office” to “registered office”); the corporation may have the flexibility to wait a while before transitioning. However, such a decision cannot be made until the corporation has completed a review of its current by-laws. As such, it would be prudent for the corporation to conduct a review of its current by-laws early on in order to decide whether it requires changes to its current governance structure and procedure.

- **Size of membership** — A corporation that has a large membership (*e.g.*, a corporation that has many members, or...
has a complicated membership structure involving chapters, divisions across Canada, etc.) will likely require a more extensive consultation in relation to by-law changes, as opposed to a corporation that has only a few members. The corporation will need to factor in the time required to complete an extensive consultation process.

- Board structure — The ONCA continues to permit corporations to have ex officio directors, such as the chair of the hospital board is an ex officio director of the hospital foundation’s board. However, in situations where a corporation’s directors are appointed, nominated or elected by subgroups of members (such as if a corporation’s members consists of geographical divisions across Canada and each division has the right to elect or appoint one director to the board), this may no longer be possible unless each division is made into a separate membership class and therefore, having de facto class veto rights as explained above. In these situations, the corporation will need to decide what mechanism to implement (e.g., by allowing the board to appoint directors to the board who meet certain qualification requirements, imposing a board composition formula, putting in place a nomination procedure, etc.). There is no one-size-fits-all mechanism. What mechanism would work well will depend on many factors, including the constituency of the corporation and the working relationship with the appointing organization. In some cases, corporations may want to take a wait-and-see approach to learn from others who have undergone the transition process.

- Changes to membership structure — In some cases, corporations with different classes of members may want to make changes to their membership structure, e.g., by eliminating non-voting membership classes, eliminating membership classes to end up with only one class, changing the rights of some membership classes, etc.

- Changes of corporate objects — As explained above, some corporations may want to amend their corporate objects for various reasons. It is permissible to amend the objects of the corporation as part of the transition process by including the new objects as purposes in the articles of amendment. The new objects will also be subject to approval by the Ontario Public Guardian and Trustee and scrutiny by Canada Revenue Agency.

E. Conclusion

This brief overview of the ONCA has highlighted some of the more significant aspects of the ONCA and has explained the impact the ONCA will have upon corporations in Ontario. As a result of the sweeping changes the ONCA will bring about, it will be important for boards, executives, staff, and legal counsel of corporations in Ontario to become familiar with the provisions of the ONCA and to begin planning to transition under the ONCA once it is proclaimed in force.

Corporations should also monitor the release of various tools by the Ministry of Consumer Services and the Ministry of Government Services, including regulations, a plain language guide, a transition checklist, and default by-laws. The CRA and Public Guardian and Trustee may also provide guidance for Ontario corporations that are registered charities involved in the transition process.
Corporations will need to keep track of the three-year time frame so that they can ensure that the transition process can be completed within this time. As explained above, the time that a corporation requires to complete this process will depend on the structure and operations of the corporation. As such, it would be prudent for corporations to start preparing for transition as early as possible, by reviewing their existing by-laws and getting familiar with the rules in the ONCA so that they can anticipate the changes that will be required. Engaging a legal advisor to conduct a by-law review and to prepare new by-laws will likely be helpful and time efficient.

It would also be a good idea for corporations to designate a particular person or a committee to be in charge of the transition process, to ensure that the project does not get lost among the day-to-day activities of the corporation. It would also be necessary for the board of directors to be engaged early on, such as by having the directors attend seminars and presentations on the ONCA transition requirements; having the person/committee of the corporation in charge of the transition process report to the board on a regular basis; setting target dates to complete various steps; and have the members engaged early as well, especially if key governance structure and/or procedure need to be changed.

[Editor’s note: Theresa L.M. Man is a partner at Carters Professional Corporation, practicing in the area of charity and not-for-profit law. This article is based in part on an article by Theresa L.M. Man and Terrance S. Carter, Charity Law Bulletin No. 262, “The Nuts And Bolts Of The Ontario Not-For-Profit Corporations Act, 2010”, September 30, 2011 online: Carters Professional Corporation <http://www.carters.ca/pub/bulletin/charity/2011/chylb262.pdf>.]

1 S.O. 2010, c. 15.

6 Supra note 1, s. 4(2).
7 Ibid., ss. 212 to 248.
9 Supra note 1, s. 211(3).
10 Ibid., s. 207(2).
11 Ibid., s. 207(1).
12 Supra note 8.
13 Supra note 1, s. 7(1).
14 Ibid., s. 9.
15 Supra note 2, s. 118.
16 Ibid., s. 4(1).
17 Supra note 1, s. 118.
18 Ibid., s. 8(2).
19 Ibid., s. 8(3).
21 Supra note 1, s. 8(5).
22 Ibid., s. 18.
23 Ibid., s. 15(1).
24 Ibid., s. 1(1).
25 Ibid.
27 Supra note 1, s. 1(1).
28 Ibid.
29 Ibid., s. 68(1).
30 Ibid.
31 Ibid., s. 76(1).
32 Ibid., ss. 76(3)–76(4).
33 Ibid., s. 76(2).
34 Ibid., ss. 83(1)–83(2).
35 Ibid., s. 83(4).
36 Ibid., s. 83(3).
37 Ibid., s. 80(1).
38 Ibid., s. 84 and s. 59.
39 Ibid., s. 22(1).
40 Ibid., s. 22(2).
41 Ibid., s. 30(1).
42 Ibid., s. 24(1) and s. 26(1).
43 Ibid., s. 24(1).
44 Ibid., s. 26(2).
45 Ibid., s. 24(7).
46 Ibid., s. 23.
47 Ibid., s. 23(3).
48 Ibid., s. 5.
49 Ibid., s. 43(1).
On April 20, 2012 the Canada Revenue Agency (the “CRA”) released its much anticipated “Fundraising by Registered Charities Guidance”, CG-013 (the “Guidance”). The CRA has indicated that the new Guidance does not represent a departure from existing policy positions but simply provides greater information and guidance for charities. It is noted that the Guidance applies to receipted and non-receipted fundraising.

The Guidance defines fundraising and outlines criteria for distinguishing between fundraising and other activities, such as administrative or political activities. Correctly categorizing activities is important to ensure that both the CRA and the public have an accurate picture of the charity’s fundraising activities as compared to its other activities. The amount spent on fundraising activities is important in calculating a charity’s fundraising ratio, which provides an indicator of when the CRA may seek further scrutiny of fundraising expenditures.

The total amount a charity spends on fundraising activities, as opposed to other activities, must be disclosed in the charity’s Form T3010 which is available for public review and thus it is important that directors of charities carefully review and approve the charity’s T3010 before it is filed with the CRA. Members of the public (donors, the press and others) may also use the fundraising ratio as an indicator of whether their donations are likely to be spent wisely by a particular charity.

The new Guidance is a significant improvement over its predecessor, which had been released June 11, 2009. It is better organized and more detailed. That being said, it is still a complex document which requires careful study. This article highlights some of the Guidance’s main points.

1. What Is Fundraising?

It is important to note that fundraising is not considered a charitable purpose. Rather, it is a means to an end — the end being to achieve a
charitable purpose. It is possible for a charity to engage in fundraising so long as it is ancillary and incidental to achieving the charity’s purposes.

The Guidance defines fundraising as “any activity that includes a solicitation of present or future donations of cash or gifts in kind, or the sale of goods or services to raise funds, whether explicit or implied”.

Several examples of fundraising are provided in the Guidance, including:

- Donor stewardship, which occurs when a charity invests resources in relationships with past donors in the hopes of encouraging future gifts. This is considered fundraising because it involves an implied request for future gifts.

- Donor recognition activities, which are considered fundraising for the same reason. Thank you gifts to donors and other forms of acknowledgment must be reported as fundraising expenses if they exceed a nominal amount. A per-donor cost of $75 or 10 per cent of the value of the donation, whichever is less, is considered nominal.

- Membership fees. Where donating is a condition of membership or where donation incentives and premiums are widely used to promote joining as a member, the membership program will be fundraising.

- Cause-related or social marketing ventures, provided that most of the expenses are covered by a non-charitable partner and the charity’s contribution is the use of its logo or other intellectual property.

- Activities that are related to fundraising efforts, including planning or researching fundraising activities, recruiting volunteers for fundraising efforts and hiring third-parties.

Recruiting volunteers to assist with the general operations of the charity or a related business is not fundraising. For the purposes of the Guidance, fundraising also excludes activities aimed at securing funding from other charities and government organizations.

2. Responsibility for Compliance with the Guidance

Charities are responsible for ensuring that their fundraising activities comply with the Guidance, whether the fundraising is carried out by the charity or by someone acting on the charity’s behalf. The Guidance suggests that fundraising on a charity’s behalf will generally occur pursuant to the terms of a fundraising agreement. Local organizations and individuals that hold fundraising events on their own initiative and later donate the proceeds to the charity are not considered to be fundraising on the charity’s behalf, unless they have entered into a fundraising agreement with the charity. Absent a fundraising agreement, the charity will generally not be responsible for ensuring that fundraising activities carried on by these organizations or individuals comply with the Guidance.

3. Unacceptable Fundraising

Charities engaging in unacceptable fundraising practices risk a range of sanctions, up to and including revocation of charitable status. Fundraising is unacceptable if it

- becomes a non-collateral, non-charitable purpose of the charity or an unrelated business;
- delivers more than an incidental private benefit; or
- is illegal, contrary to public policy or deceptive.
Non-Collateral Purpose or Unrelated Business

As noted above, fundraising is not in itself a charitable purpose or charitable activity in furtherance of a charitable purpose. If fundraising becomes a “focus” of the organization, the CRA may consider the fundraising activity to be an unacceptable, non-charitable collateral purpose of a charity, rather than ancillary and subordinate to the charity’s purposes.

The CRA draws a distinction between operating for the purpose of funding other charities and government organizations and operating for the collateral non-charitable purpose of fundraising. Subject to certain conditions, a foundation or charity may have as a focus, even as its primary focus, fundraising for other charities and government organizations. For this to be the case, the proceeds raised must exceed the cost of the fundraising and no more should be spent on fundraising than required. All other conditions for acceptable fundraising must also be met.

Fundraising that amounts to carrying on a business is unacceptable unless it qualifies as a related business of the charity. A charity is generally considered to be carrying on a business where it engages regularly in a commercial activity with the intention of earning a profit. In order to qualify as a related business, the activity must be operated substantially by volunteers (90 per cent) and be linked and subordinate to the charity’s purpose.

Non-Incidental Private Benefit

Fundraising will be unacceptable if it delivers more than an incidental private benefit. A private benefit will be incidental if it is necessary, reasonable and proportionate to the public benefit achieved.

Where the benefit is conferred upon a party that stands in a non-arm’s-length relationship to a director or trustee of a charity, more stringent requirements apply. The CRA has indicated that such arrangements will nearly always be viewed as providing more than an incidental private benefit. For this kind of benefit to be acceptable, it must be clearly justified. For instance, it might be acceptable for a charity to hire a company owned by a director to carry out fundraising work if the company won the contract as part of a public tender process. Even where the benefit can be justified, charities should be mindful of other legal obligations, like the duty to avoid conflicts of interest, which may impact the proposed arrangement.

Illegal, Contrary to Public Policy, or Deceptive

Illegal fundraising includes activities that are criminally fraudulent, that facilitate terrorism or that violate statutes governing charitable fundraising, gaming, or consumer protection. Fundraising connected to improper receipting practices also falls under this category. Where fundraising is associated with illegal conduct, such as where the charity knows or ought to know that the fundraising will further illegal activities, the fundraising will also be unacceptable. This may be the case where a charity is involved with an abusive tax shelter.1

Fundraising will be contrary to public policy if it fails to respect the policies of a government or regulatory body (e.g., the Canadian Radio-television and Telecommunications Commission telemarketing rules). Fundraising will also be contrary to public policy if it results in harm to the public interest.

The public is harmed when charities adopt deceptive fundraising practices, such as misrepresenting how donations will be used. Contracts where third-party fundraisers have received 70 per cent or more of the proceeds, without this fact being brought to the attention of the public, have been found by the courts to be contrary to public policy. Charities should also be careful of making claims that 100 per cent of the proceeds will go towards a charitable
cause. Most often, there are at least some fundraising expenses that the charity must cover.2

4. Allocation of Expenditures and the Fundraising Ratio

Calculating the Fundraising Ratio

A charity’s fundraising ratio is a useful self-assessment tool and can be used to determine when the CRA is likely to seek further justification for fundraising expenditures.

The fundraising ratio is calculated over a fiscal period according to the following:

- Revenue from lines 4500 (receipted donations) and 4630 (other fundraising revenue) of the charity’s Form T3010 are added together.
- The charity’s fundraising expenses (line 5020) are divided by the resulting sum.

The value of all receipted donations must be included, and not merely the value of those donations that resulted from fundraising efforts. Donations from other charities and government organizations will not be included, since this income is recorded on line 4310.

Evaluating a Charity’s Fundraising Ratio

If the fundraising ratio is under 35 per cent, the CRA is unlikely to question the fundraising costs. If the ratio is over 35 per cent, the CRA will look at the charity’s fundraising ratio over the years to see whether the charity has a history of high fundraising costs. The higher the ratio is, the more likely the CRA is to question the costs. If the fundraising ratio is over 70 per cent, the CRA will seek further justification. The charity should be prepared to show that it is not engaged in unacceptable fundraising.

Allocating Expenditures

Activities may have charitable, management/administrative, fundraising or political activities components. Where “substantially all” of an activity was devoted to fundraising (i.e., 90 per cent or more), all expenditures should be allocated to fundraising. Where “substantially all” of the activity would have been undertaken without the fundraising component (i.e., 90 per cent or more of the activity), the charity may allocate all costs to other components. For cases falling between these extremes, the charity should prorate the costs of the activity between fundraising and other components, as appropriate. The onus is on the charity to justify its allocations.

In determining how to allocate costs, the charity must consider the importance of the fundraising to the activity; the proportion of charitable, management/administrative, fundraising or political activities components; and the resources devoted to each component. The Guidance provides useful examples of how the above considerations should be applied. For instance, considering the proportion of various components might be useful where the activity is a publication. If 20 per cent of the publication is devoted to soliciting funds for the charity and 80 per cent is devoted to educating the public on taking action to advance a charitable cause, then 20 per cent of the costs should be allocated as fundraising expenditures and 80 per cent as charitable expenditures.

The CRA considers all costs associated with the following activities to be fundraising expenditures:

- activities that involve targeting an audience or selecting participants based on their ability to give;
- activities where participants are encouraged to raise pledges;
- gaming activities;
- activities that are focused on raising awareness about the charity or its cause (unless such information qualifies as charitable content, as discussed in the section below);
infomercials and telemarketing;
branding and promoting the charity through cause-related or social marketing; and
golf tournaments and gala dinners.

Charitable Content
Identifying what qualifies as charitable content can be challenging. Raising awareness about a charity, its programs, or even an issue or cause is not generally considered a charitable activity. Providing information to the public will only be a charitable activity where it informs the public on how to take specific actions to advance a charitable cause other than the advancement of education. The information must be distributed in such a way that it is likely to reach the target audience. The information must be actively disseminated and cannot merely be made available to the public.

Charitable content will generally have been created by the charity. Where a charity has reproduced publically available information it did not originally create, the charity must be able to explain why the recirculation of such material should be considered the charity’s own activity.

Fundraising Content
Fundraising content relates to the solicitation of donations or gifts from non-qualified donees or the sale of goods or services to raise funds for the charity. Securing funds from other charities or government organizations generally relates to management and administrative content. Fundraising content may include

- information about the charity’s programs or services to encourage donations;
- the provision of goods and services to anyone other than the charity’s beneficiaries or which does not directly further the charity’s charitable purpose;

- the management and administration of fundraising activities; and
- information about gift incentives, premiums or other fundraising merchandise.

Managerial/Administrative Content
As mentioned above, securing funds from other charities and government organizations generally relates to management and administrative content. Management and administrative content also includes:

- arranging, holding and reporting on meetings of boards of directors;
- booking, auditing, accounting and other administrative services; and
- purchasing supplies and/or equipment and paying rent.

It is unusual for a fundraising event to have a management or administrative component because the CRA considers the planning, management and administration of fundraising activities to be fundraising.

Political Activities Content
Political activities content relates to any activity which attempts, directly or indirectly, to sway public opinion on social issues or otherwise influence the development of a law or policy in Canada or abroad.

Best Practices
5.1 Planning
Before undertaking fundraising, the charity should, at a minimum, consider

- its fundraising goals, including the use to which proceeds will be put;
- all relevant regulatory obligations;
- the resources devoted to charitable activities and projected fundraising costs for the year;
the costs and anticipated proceeds of the proposed fundraising activity; and
other possible fundraising methods.

It is important that the charity have an identified use or need for the proceeds prior to commencing fundraising. Fundraising without an identified use or need may be an indicator that fundraising has become a collateral purpose of the charity or that a non-incidental private benefit is being conferred.

Creating a reserve fund policy can help to diminish the likelihood that a charity will find itself fundraising without an identified use or need. The appropriate size of the fund will vary depending upon the situation of the particular charity.

5.2 Procurement and Staffing

General

The Guidance contains helpful suggestions on best practices for procuring goods, hiring third parties and managing and supervising ongoing fundraising. The effort and cost that should be devoted to meeting these practices will vary depending upon the nature and scope of the fundraising undertaken by the charity.

Before procuring goods from a supplier or hiring in-house staff or a third party contractor, a charity should conduct research to ensure that it is getting the best value for its money. When entering into a contract with a third party, a charity should protect its interests by carefully reviewing the contract, limiting the contract’s duration and including a provision allowing the charity to terminate the contract if the third party does not act in accordance with the Guidance.

Hiring In-House Staff

Care should be taken in determining the remuneration of staff hired to conduct fundraising activities. The compensation should be based on a salary survey and should be reasonable compared to the compensation received by other employees at the charity, given their roles and responsibilities. The charity must ensure that the staff’s compensation does not exceed the fair market value of the services provided.

Charities should avoid tying employee compensation to fundraising success (e.g., by providing bonuses dependent on raising certain amounts). These kinds of payment structures may indicate that the charity is conferring a non-incidental private benefit and/or acting in a manner that is harmful to the public interest.

Contracting Third Parties

Services should only be contracted out to third parties if they cannot be delivered as effectively using the charity’s resources. Again, where compensation is based on performance, the CRA is more likely to find that a non-incidental private benefit is being conferred. If the charity chooses to hire a contracted fundraiser, it should be able to show that the expenditure is an investment that will result in lower costs for subsequent activities.

When hiring third parties, most of the revenue should go to charitable purposes and not contracted third parties. Fundraising where a high percentage of the fundraising revenues goes to third parties may cause harm to the public interest. In such cases, the charity must be able to show why the private benefit is acceptable.

5.3 Ongoing Management and Supervision of Fundraising

Charities should ensure that oversight measures are in place to monitor fundraising on a regular basis. These measures should include

- establishing fundraising policies that set out acceptable and unacceptable behaviour;
- pre-approving fundraising solicitation scripts and other representations;
- following up with donors;
monitoring the receipting process;

- using internal audits to review revenue and expenditures; and

- exercising contractual rights to review or audit the records of work done by any third party.

Charities should also periodically calculate the ratio of fundraising costs to total resources devoted to charitable activities. Fundraising where the associated costs exceed the resources devoted to charitable activities is a red flag for inappropriate fundraising. The CRA considers this to be “strong indicator” that the charity has a collateral non-charitable purpose or is conferring a non-incidental private benefit. Showing that fundraising costs are reasonable given market rates will not be enough to justify the imbalance.

In calculating the resources devoted to charitable activities and to fundraising, charities should be careful to include any use of non-financial resources, like volunteer time. Volunteer time devoted to fundraising activities will be considered a fundraising cost, while volunteer time devoted to running charitable programs will be considered a resource devoted to charitable activity. Any use of non-financial resources should be reasonable, efficient and carefully documented.

Finally, charities should regularly evaluate their fundraising activities to ensure that they are in line with the Guidance and to evaluate their fundraising success and cost-effectiveness.

### 5.4 Disclosure

The CRA recommends that charities disclose all fundraising costs, revenues, arrangements, and practices, including hiring and procurement processes. Disclosure must be accurate, timely and accessible. Generally, information should be made available to the general public, unless the fundraising efforts have been confined to a clearly defined group. Where further information may be forthcoming, the charity should indicate that the information is not final and should try to update the information as soon as possible.

Disclosure obligations are less onerous for cause-related or social marketing ventures where more than 90 per cent of the costs of the initiative are borne by a non-charitable partner and all the costs and revenues of the charity are adequately disclosed.

The rationale behind the Guidance’s disclosure recommendations is to protect the public from misrepresentations and deceptive fundraising. Charities should be mindful of the many ways in which a misrepresentation can occur. A misrepresentation may arise out of a failure to disclose relevant information and need not be fraudulent, illegal or even intended.

Charities should also be mindful that they may be responsible for misrepresentations made by a third party acting on the charity’s behalf. It is prudent for a charity to include a clause in any contract with a third party prohibiting the third party from making misrepresentations on the charity’s behalf.

### 5.5 Record Keeping

It is important for charities to keep detailed records of their fundraising activities. The onus is on the charity to show that it has complied with the Guidance and the requirements of the *Income Tax Act*. At a minimum, charities should keep records of the following:

- minutes of meetings where fundraising decisions were made;
- records of research conducted in preparation for fundraising, particularly research conducted to determine appropriate costs;
- use of any non-financial resources, such as volunteer time;
- documentation on any procurement processes, including documentation on
the negotiation and approval of the contracts; and

- written copies of all fundraising agreements entered into with third parties.

Failure to keep adequate records is a possible indicator that the charity is conferring a non-incidental private benefit and/or engaging in fundraising that is deceptive or contrary to public policy.

6. Factors That May Influence the CRA’s Evaluation

The CRA recognizes that fundraising effectiveness may vary across charities for legitimate reasons. The Guidance provides four examples of case-specific factors the CRA is prepared to consider when evaluating a charity’s fundraising. These factors are discussed below.

**Small Charity**

Small charities may have difficulties raising funds as efficiently as larger charities. Charities are considered small if they have revenues of under $100,000. In evaluating the fundraising costs of smaller charities, the CRA will consider the profile of the community the charity serves and whether the charity has adequately controlled costs.

**Causes with Limited Appeal**

Charities advancing causes with limited appeal may have more difficulty raising funds from the public. Increased fundraising costs may be acceptable in such cases, provided that the charity can show that

- its cause has limited appeal;
- the higher than average fundraising costs are the direct result of the nature of the cause;
- it considered other fundraising methods and chose the most efficient and effective one; and
- the costs are adequately controlled.

**Donor Development Programs**

Donor development programs are activities a charity undertakes to develop a relationship with donors or potential donors in order to encourage donations down the road. It includes donor stewardship activities, telemarketing campaigns and special events held as a means of recognizing potential donors. Higher fundraising costs associated with donor development programs are acceptable provided that the charity can show that it has paid fair market value or less for any fundraising merchandise or services. The charity must also be able to show that costs were adequately controlled.

**Gaming Activities**

The CRA will accept higher fundraising costs associated with gaming activities so long as they are carried out in compliance with provincial or territorial regulations. The Guidance notes that applicable legislation commonly considers a revenue ratio of 70 per cent or higher to be acceptable for gaming activities.

7. Conclusion

Overall, the Guidance is a welcome clarification of the rules relating to fundraising by registered charities. It provides criteria to assist charities in distinguishing between acceptable and unacceptable fundraising practices and between fundraising and other kinds of activities. For charities looking to assess or improve their own fundraising practices, it offers important information on factors the CRA considers in evaluating fundraising and outlines several best practices.

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1 Illegal fundraising may attract criminal liability, as it did in *R. v. Gour*, [2012] O.J. No. 3655 (S.C.J.), where a third-party fundraiser was convicted of fraud. Although the fact situation was unusual, the case highlights the potential personal criminal liability that can arise from illegal fundraising practices.

2 Directors should be aware that they have a fiduciary obligation to ensure that fundraising costs are not excessive and may be held personally liable for unacceptable fundraising: *Ontario (Public Guardian and Trustee) v. The AIDS Society for Children (Ontario)*, [2001] O.J. No. 2170 (S.C.J.), where the charity and its three directors were found personally liable for unreasonable fundraising costs in the amount of $736,915.71 and a further $50,000 penalty was imposed on the directors of the charity. See also *Ontario Public Guardian and Trustee v. National Society for Abused Women and Children*, [2002] O.J. No. 607 (S.C.J.), where the directors were personally ordered to pay all funds received through unacceptable fundraising to the Public Guardian and Trustee and could only afterwards seek compensation and only to the extent that such claims were well documented and approved by the court.


4 A list of factors a charity should consider in determining the amount of its reserve fund can be found in the Guidance.

5 R.S.C. 1985, c. 1 (5th Supp.).

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**NEW ISSUES IN HEALTHCARE FUNDRAISING:**

**ASSESSING THE IMPACT OF PIPEA AND FISA**

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Foundations are no stranger to the thicket of laws which regulate their activities. With the advent of privacy laws, this thicket has become even denser. In an effort to assist, this article reviews the impact of two recent items of legislation on the ability of hospitals and their foundations to engage in fundraising: the *Ontario Personal Health Information Protection Act, 2004* [PHIPA], and the Bill C-28 or the “Fighting Internet and Wireless Spam” bill [FISA]. In Part I, we review the implication of the PHIPA regime on fundraising activities for health information custodians and their foundations. In Part II, we review the impact of the new anti-spam regime on the same activities.

I. **Fundraising: PHIPA Issues**

a. **When Does PHIPA Apply Generally?**

*PHIPA* establishes rules for the collection, use and disclosure of personal health information ("PHI") that protect the confidentiality of that information and the privacy of individuals with respect to that information, while facilitating the effective provision of health care. The Act generally applies to the collection, use and disclosure of PHI by:

- health information custodians ("HICs");
- "agents" of HICs, each of which is considered to effectively be part of the HIC for the purposes of PHIPA;
- a person who is not a HIC and to whom a HIC disclosed the information.

In understanding how PHIPA applies, it is important to understand the scope of the following two key definitions:

i. **HIC**: is broadly defined to include, among other categories:
   - health care practitioners or persons operating group practices;
   - hospitals;
   - CCACs; [author, what is a short form for?] and other persons/entities as enumerated in PHIPA.
ii. PHI: is also broadly defined to mean identifying information about individuals in oral/recorded form, if the information:

(a) relates to the physical or mental health of the individual, including info that consists of health history of individual’s family, or

(b) relates to providing of health care to the individual, including identification of person as a provider of health care to same; etc.

b. **How Does PHIPA Apply to Fundraising?**

Given that foundations are not HICs, and are in fact separate entities from hospitals for a number of reasons, how could PHIPA be said to apply to foundations? The answer is multi-faceted.

First, the drafters of PHIPA clearly contemplated that PHIPA should apply to hospital fundraising activities, the majority of which are carried out by foundations. Second, a foundation might be characterized as an agent, in that it could be said to “act for or on behalf of the custodian in respect of personal health information for the purposes of the custodian, and not the agent’s own purposes” — that is, the foundation is engaged in fundraising for the eventual purposes of the hospital. If that characterization is accurate, then while no consent is required for disclosure to the foundation acting as an agent, the foundation itself is still required to comply with PHIPA as if it was a HIC. Finally, even if a foundation was found not to be acting as an agent, PHIPA applies to “a person who is not a HIC and to whom a HIC disclosed the information” — in other words, PHIPA follows the PHI, notwithstanding whether or not the foundation can be characterized as an agent. In that case, both consent to disclose to the foundation, and PHIPA compliance by the foundation, will be required. For the purposes of this article, we will assume that the last characterization applies.

c. **PHIPA Special Rules for Fundraising**

The PHIPA rules for fundraising are set out both in PHIPA and in the regulations. In brief, these rules set out preconditions pursuant to which a HIC may collect, use or disclose the PHI of an individual for “fundraising activities”. While “fundraising activities” are not defined in PHIPA, in a 2005 Fact Sheet the Ontario Information and Privacy Commissioner defined fundraising as “any activity undertaken for a charitable or philanthropic purpose related to the operations of the HIC, including contacting patients, or former patients, through mailings”.

To the extent that the activity in question constitutes a fundraising activity, PHIPA sets out specific rules as to which kinds of individual consents are required for the collection, use and disclosure of which kinds of PHI. At a high level, PHIPA is structured on the key principle that only implied consent, rather than express consent, is required for the collection, use and disclosure within the “circle of care”. While the term is not actually used in PHIPA, it is best expressed in s. 20(2) of PHIPA as follows:

> A health information custodian … that receives personal health information about an individual from the individual, the individual’s substitute decision-maker or another health information custodian for the purpose of providing health care or assisting in the provision of health care to the individual, is entitled to assume that it has the individual’s implied consent to collect, use or disclose the information for the purposes of providing health care or assisting in providing health care to the individual, unless the custodian that receives the information is aware that the individual has expressly withheld or withdrawn the consent [emphasis added].

However, a consent to the disclosure of PHI about an individual must be express, and not implied, if a HIC makes the disclosure: (i) to a person that is not a health information custodian, or (ii) to another health information custodian and the disclosure is not for the purposes of providing health care or assisting in providing health care.
There are a few limited exceptions to the foregoing base principles regarding consent. One of those exceptions is in the case of collection, use or disclosure of PHI about an individual, by a HIC, for the purpose of fundraising activities, where the PHI consists of only: (i) the individual’s name, (ii) the individual’s mailing address, and (iii) the name and mailing address of the individual’s substitute decision-maker. In that circumstance, implied consent is sufficient, subject to the following additional requirements:

1. Personal health information held by a HIC may only be collected, used or disclosed for the purpose of fundraising activities undertaken for a charitable or philanthropic purpose related to the HIC’s operations.

2. For PHI collected on or after November 1, 2004, such implied consent may only be inferred where,
   - the HIC has at the time of providing service to the individual, posted or made available to the individual, in a manner likely to come to the attention of the individual, a brief statement that unless he or she requests otherwise, his or her name and contact information may be disclosed and used for fundraising purposes on behalf of the HIC, together with information on how the individual can easily opt-out of receiving any future fundraising solicitations on behalf of the HIC.

Note that as PHIPA already requires all HICs to make available to the public, in a manner that is practical in the circumstances, a written statement that provides a general description of the custodian’s information practices, such a fundraising statement may be easily incorporated in such broader HIC privacy statement; and
   - the individual has not opted out within 60 days of when the fundraising statement referenced above was made available to him or her.

3. For PHI collected before November 1, 2004, a HIC is entitled to assume that it has the individual’s implied consent to use or disclose the individual’s name and contact information for the purpose of fundraising activities, unless the HIC is aware that the individual has expressly withheld or withdrawn the consent.

4. All solicitations for fundraising must provide the individual with an easy way to opt-out of receiving future solicitations.

5. A communication from the HIC or a person conducting fundraising on its behalf to an individual for the purpose of fundraising must not include any information about the individual’s health care or state of health. Note that the latter requirement can be tricky — it means that the communication cannot reference the fact that the solicited individual recently received treatment at the hospital and, therefore, might wish to contribute.

Note that the impact of the November 1, 2004 date is that each foundation will need to “tag” the information in their fundraising databases by when that information was collected, and then use it accordingly.

d. Conclusion

In summary, to the extent that the information in question is the individual’s name and mailing address, the obligations regarding the use of that information for fundraising are not overly onerous. However, to the extent that any information, such as an email address or a telephone number, are used for the purpose of fundraising, express consent for the collection,
use and disclosure of same must be obtained under \textit{PHIPA}. We will explore the additional restrictions on the use of email solicitation which are imposed by the new anti-spam regime, in Part 2 of our article.

\textbf{II. Fundraising: FISA Issues}

\textbf{A. Introduction}

On December 15, 2010 Canada signed into law Bill C-28 or the “Fighting Internet and Wireless Spam” bill [FISA]. By doing so, it joined a number of other jurisdictions already legislating against the problem of unsolicited electronic communication (\textit{i.e.}, “spam”). However, the delay in finally enacting a legislative response permitted the Canadian government to study other predecessor legislation. The result is a comprehensive legislative scheme that is significantly broader in coverage than either its U.S. or European counterparts.

Canada was particularly concerned about enacting FISA for a number of reasons. First, unsolicited electronic communications, or “spam” are now a major burden on time/resources of those who receive it. Second, by the time FISA passed Third Reading and received Royal Assent,\textsuperscript{8} Canada was the only G8 country that did not have this type of legislation, and one of only four OECD countries without it. Finally, this legislative gap between Canada and its contemporaries was long-standing, given that the United States had enacted \textit{Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003}, in 2003, and the European Union had issued its counterpart, Directive 22/58/EC, on July 12, 2002.

\textbf{B. When Does FISA Apply Generally?}

FISA sets out detailed rules for anyone sending a “commercial electronic message”, where same is sent or accessed from a computer system in Canada, including what types of electronic communications are permitted; the information such communications must include, and mechanisms to investigate any contravention and enforce an appropriate penalty.

The key principle of FISA is that anyone sending an “electronic message” that is either \textit{sent} or \textit{accessed} from a computer system in Canada, must comply with the obligations under FISA. Therefore, electronic communications sent from computer systems located and controlled from outside of Canada may come under the jurisdiction of FISA if, for example, a computer system located in Canada accesses the message.

\textbf{C. How Does FISA Apply to Fundraising?}

One can best navigate FISA by understanding whether the communication in question is a “commercial electronic message”, as described below. If it is, consent is required to send such communication unless either an exemption applies, or deemed consent can be said to apply.

\textbf{1. Is the Communication an “Electronic Message”?}

FISA is triggered by the type of communication being made — more specifically, FISA applies generally to “electronic messages”, broadly defined as messages sent by any means of telecommunication, including text, sound, voice or image messages. Note that telephone calls that result in: (a) voice mails, and (b) faxes, given that in each case such communications would result in messages that are text and/or image messages, would therefore not only trigger Canada’s “do not call” (“DNC”) legislation, but also FISA.\textsuperscript{9}

\textbf{2. Is the Communication a “Commercial Electronic Message”?}

Note, however, that only “commercial electronic messages” are subject to the restrictions imposed by FISA. A “commercial electronic message” is defined as an electronic message which, having regard to

• the content of message,
it would be reasonable to conclude has as its
purpose, or even one of its purposes, to
encourage participation in a “commercial
activity”.

As examples of commercial electronic
messages, FISA lists the following:

• offers to purchase, sell, barter or lease a
  product, goods, a service, land or an
  interest or right in land;
• offers to provide a business, investment
  or gaming opportunity;
• advertises or promotes anything referred
  to above; or
• promotes a person, including the public
  image of a person, as being a person who
does anything referred to in above, or
who intends to do so.

Note also that an electronic message that
contains a request for consent to send a message
described above is, in itself, also considered to
be a commercial electronic message.

3. Is the Activity Being Encouraged a
   “Commercial” Activity?

FISA has a circular, but unfortunately typical,
definition of “commercial activity”, as follows:

[A]ny particular transaction/act/conduct or any regular
course of conduct that is of a commercial character,
whether or not the person who carries it out does so in
the expectation of profit...other than any transaction, act
or conduct that is carried out for the purposes of law
enforcement, public safety, the protection of Canada, the
conduct of international affairs or the defence of Canada.

Also, unfortunately, the legislative history of
FISA, together with what limited secondary
commentary is available, and the absence of
judicial interpretation, provide no additional
clarity as to the scope of this key definition.

However, the federal private sector privacy
legislation, the Personal Information Protection
and Electronic Documents Act® [PIPEDA], for
which there is more interpretative material
available, also includes “commercial activity” as
a key element in the application of the
legislation. Specifically, PIPEDA includes the
following, somewhat circular, but nearly
identical definition:

‘commercial activity’ means any particular
transaction/act/or conduct or any regular course of
conduct that is of a commercial character, including the
selling, bartering or leasing of donor, membership or
other fundraising lists. [author - the emphasis added by
you?]

The federal Privacy Commissioner has issued
the following clarification as to the scope of this
definition:

Most non-profits are not subject to the Act because they
do not engage in commercial activities...typically the case
with most charities, minor hockey associations, clubs,
community groups and advocacy organizations.
Collecting membership fees, organizing club activities,
compiling a list of members’ names and addresses, and
mailing out newsletters are not considered commercial
activities. Similarly, fundraising is not a commercial activity. However, some clubs, for example many golf clubs
and athletic clubs, may be engaged in commercial activities
which are subject to the Act.¹¹ (emphasis added)

D. Case Study: Would a Hospital
Foundation Newsletter with
Advertising Constitute a
“Commercial Electronic Message”? [should the ‘d’ in the heading not be
‘a’?]

Notwithstanding such PIPEDA analysis,
however, advertisements raise three key issues
which appear in aggregate to effectively refute
any interpretation that advertisements associated
with email fundraising are somehow exempt
from the scope of the FISA requirements.

1. Advertising as Enumerated Example

While it seems a truism, one purpose of any
newsletter with advertising is necessarily to
transmit such advertising. Under FISA, the
definition of “commercial electronic message” specifically includes electronic messages which advertise or promote offers to sell, etc.

2. Plain Language Interpretation

Based on a plain language understanding of the nature of advertising, it would be difficult to argue that an advertisement is not a “transaction”/“act” “of a commercial character”.

3. Only One of its Purposes

It is true that the distribution of advertising is not the primary purpose of each hospital newsletter, but is rather an ancillary purpose only. The difficulty is that the FISA definition of “commercial electronic message” identifies the application threshold as being where even only “one of its purposes” encourages participation in a commercial activity.

Further, the fact that the definition references “hyperlinks in the message” as being evidence that “one of its purposes” is a commercial activity, supports the interpretation that the analysis does not require any assessment of, for example, the relative proportion of advertising content to non-advertising content. More specifically, the reference to hyperlinks suggests that a newsletter could contain no “direct” (or “non-linked”) advertising content — that is, it could contain 100 per cent non-advertising content — and still be considered to have advertising constitute one of its purposes if the newsletter contains one or more advertising hyperlinks (for example, where the newsletter states that “X Foundation would like to thank Y sponsoring organization (link) for their support”.

E. The role of the “existing non-business relationship” [again, should this not be ‘a’?]

The concept of an existing business relationship under FISA is critical, in that it has two implications for the application of FISA.

First, though not express, the concept implicitly informs certain exemptions which allow a sender to send a commercial electronic message without consent. More specifically, where one of an enumerated list of certain business relationship—“type” activities is the sole purpose of the message (for example, a communication to provide a quote/estimate for a product/service requested by recipient) the sender is not required to obtain consent from the recipient in order to send same.

Second, an “existing business relationship” serves as one circumstance where required consent is considered deemed — for example, where there is an existing business relationship which arises from the purchase or lease of products or services from the sender within the two-year period immediately prior to the send date of the communication.

From the perspective of fundraising, however, the most relevant concept mirrors that of the existing business relationship: that is, the “existing non-business relationship”, defined as a non-business relationship between a recipient and any sender which arises from

- a donation/gift made by the recipient to the sender within a two-year period immediately before the day of sending, if sender is a registered charity, a political party or organization, or a person who is a candidate for publicly elected office;
- volunteer work performed by the recipient for the sender, or attendance at a meeting organized by the sender, within the two-year period immediately before the day on which the message was sent, if the sender is a registered charity, a political party or organization, or a person who is a candidate for publicly elected office; or
- membership, as defined in regulations, by the recipient, in any of those senders, within the two-year period immediately before the day on which the message
Health Law in Canada  

was sent, where that other person is a club, association or voluntary organization, as defined in the regulations.

Where any of these above non-business relationships exist (and for the purposes of fundraising, the first relationship relating to a past donation or gift will be the most relevant), the recipient is deemed to have provided their consent to receive commercial electronic messages.

F. Other forms of deemed consent

In summary, if a sending company is required to obtain consent prior to sending a commercial e-message, the sender can rely on deemed consent where the sender has an existing business relationship, or an existing non-business relationship, with the person to whom it is sent. However, the sender may also rely on deemed consent where

- the recipient has both: (i) conspicuously published their electronic address, and (ii) not accompanied the publication with the statement that the recipient does not want unsolicited commercial electronic messages at such address, and the message is relevant to the recipient’s business/official role/functions; or

- the recipient has disclosed to the sender their electronic address, without indicating a wish not to receive unsolicited commercial electronic messages at such address, and the electronic message is relevant to the recipient’s business/official role/functions (i.e., effectively the same as the circumstances above, except applicable where the electronic message is disclosed rather than published).

G. Requirements if express consent is mandated ['c’?]

Where express consent is required, in order to obtain such consent the sender must set out clearly and simply

- the purpose(s) for which the consent is being sought;
- the identity of the sender;
- the name of the person seeking consent (and if consent is sought on behalf of another person, statement of which person is seeking consent and which person on whose behalf consent is sought);
- if the above carry on business by different names, the name by which those persons carry on business;
- the following contact information:
  - physical and mailing address,
  - telephone number providing access to agent/voice messaging system,
  - email address,
  - web address of the person seeking consent, and any other electronic address used by that person;
- a statement indicating that recipient can withdraw their consent.

H. Content Requirements ['d’?]

It is important to note that in addition to the minimum content requirements for obtaining consent, if a message is subject to FISA — whether or not exempt from the consent requirements — then it will, in any case, also have to meet specified content requirements.

These content requirements are very similar to those required to obtain consent, namely

- information that identifies the sender, and if acting as an agent, their principle;
• information enabling the recipient to readily contact the sender;
• an unsubscribe mechanism;
• the name of the person sender, and if acting as agent, their principal; and
• if the message is being sent by an agent on behalf of a principal, a statement indicating which person is the actual sender and which person is the principal.

I. Consent/content requirement: the unsubscribe mechanism [‘e’?]

The noted unsubscribe mechanism must also meet certain requirements. First, it must allow the recipient to indicate to the sender or their agent, at no cost to the recipient, that they no longer wish to receive any commercial electronic messages, or any specified class of such messages; and to so indicate by using either the same electronic means by which the message was sent, or if using those means is not practicable, any other electronic means that will enable the person to so indicate. In addition, it must specify the electronic address, or the link to the webpage, to which such indication should be sent, and such address and link must be valid for at least 60 days from the time the message was sent. Finally, any request to unsubscribe must be processed within ten business days from the time a person indicates that they wish to unsubscribe.

J. Enforcement [‘f’?]

In brief, under FISA, administrative authorities are primarily responsible for enforcement — i.e., the Canadian Radio-television and Telecommunications Commission (“CRTC”).

If found guilty of a contravention of FISA, the sender is liable for: (i) an administrative monetary penalty of a maximum of $1 million in the case of an individual (i.e., personal liability), and (ii) $10 million in the case of any other person (i.e., corporate liability). If, prior to an investigation, a sender wishes to make voluntary disclosure, they are required to both make an undertaking to identify every act/omission committed, and pay a set fine agreed upon by the CRTC.

In the event of an investigation, the CRTC serves the sender with a notice of their violation, and such sender may either pay the fine stated in notice, or make representations regarding the amount or substance of the allegations. If the sender chooses to make representations, the CRTC then decides on a balance of probabilities whether the violation was committed. If found guilty, the respondent then has the statutory right to appeal to Federal Court of Appeal.

K. Conclusion [‘g’?]

In short, hospital fundraisers should ask the following questions.

First, does FISA apply to their electronic messages? Note again that the definition of commercial electronic message is broad, such that — depending on the specific content of each message — communications soliciting donations may be caught by FISA.

Second, is consent required to send their messages? Recall that one of the most significant deemed consent provisions is where there was a donation or gift made by the recipient to registered charity sender within the two-year period immediately before the day of sending.

Finally, fundraisers should recall that the FISA content requirements apply for all such messages, whether consent is required or not.

III. Conclusion

In conclusion, hospital fundraisers should be aware that both PHIPA and FISA, for different reasons and in different contexts, will impose certain consent and other requirements on their use of an individual’s information for the purpose of fundraising. Fundraisers are advised to develop fundraising plans which take these requirements into account, in order to ensure...
that in their zeal to raise funds for worthy causes, those fundraisers do not breach the law.

[Editor’s note: John Beardwood is a Partner at Fasken Martineau DuMoulin LLP practicing in the areas of Privacy and Information Protection, Outsourcing, Information Technology and Corporate/Commercial.]

1 S.O. 2004, c. 3, Schedule A [PHIPA].
2 PHIPA, s. 2: “Agent” means a person that, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian, and not the agent’s own purposes, whether or not the agent has the authority to bind the custodian, whether or not the agent is employed by the custodian and whether or not the agent is being remunerated.
3 PHIPA, s. 6(1) For the purposes of this Act, the providing of personal health information between a health information custodian and an agent of the custodian is a use by the custodian, and not a disclosure by the person providing the information or a collection by the person to whom the information is provided.

HR SPACE: THE EVOLUTION OF HUMAN RIGHTS PROTECTION
GENDER IDENTITY AND GENDER EXPRESSION

Alix P. Herber
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On June 19, 2012, the Ontario legislature, with the support of all three parties, amended the Ontario Human Rights Code1 [Code] to prohibit discrimination on the grounds of gender identity or gender expression.

Bill 33, known as Toby’s Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression), 2012, provides that every person has the right to equal treatment without discrimination because of gender identity or gender expression in the provision of services, goods and facilities, accommodation, contracting, employment and membership in a trade union.

The Bill specifically amends the Code to ensure that every person in Ontario is free from harassment because of sexual orientation, gender identity or gender expression with respect to accommodation and employment.

This is the next step in the evolution of the Code, which was last amended in the mid-1980s to prohibit discrimination on the basis of “sexual orientation”. These recent amendments come soon after the April 2012 decision of the Human Rights Tribunal of Ontario in XY v. Ministry of Government and Consumer Services, which found that legislation requiring a person to have “transsexual surgery” before they can change the sex designation on their birth registration is discriminatory.

What is yet unknown is how the terms “gender identity” and “gender expression” are to be defined. The Bill does not define these terms. Generally, gender identity is understood to mean an individual’s intrinsic sense of self and, particularly the sense of being male or female. Gender identity may or may not conform to a person’s birth-assigned sex. A person’s gender identity is different from their sexual
orientation. The personal characteristics that are associated with gender identity include self-image, physical and biological appearance, expression, behaviour and conduct, as they relate to gender. Issues around gender identity or transgendered persons are apparent when a person cross dresses.

**What Does This Mean for Employers and Service Providers?**

Employers will have to learn and understand the role of gender identity and gender expression in the workplace, and ensure their existing policies and procedures are updated to reflect the new protections, including those policies relating to appearance and dress code. Employers will also need to ensure that their hiring policies do not create any barriers to the hiring of transgendered persons. Employers will be responsible for ensuring that transgendered employees fully participate in the workplace. Furthermore, employers will need to meet their duty to accommodate, including considering the impact to transgendered persons regarding workplace attire and/or uniforms, change rooms and bathroom facilities.

Ontario is the first province (outside of the Northwest Territories) and indeed the first jurisdiction in North America to have expanded protections in this area to specifically include gender identity and gender expression. This was the fourth attempt to put in these amendments. Already, in British Columbia, a similar Bill was introduced in May 2011, but did not make it past first reading. It is likely this issue will be brought forward again in the future. We anticipate similar protections to be enshrined in the law of the various provinces in Canada in the future.


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