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FOCUS ON ONTARIO NOT-FOR-PROFIT CORPORATIONS ACT (ONCA)

TRANSITIONING TO THE ONCA

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Introduction

The Ontario government has announced that the Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA" or the "Act"), originally slated to take effect on July 1, 2013, will now come into force no earlier than January, 2014. As noted in our article of March, 2013, the Act is intended to provide a more comprehensive set of rules for Ontario not-for-profit corporations, and to bring more transparency and accountability to their operations, to members, and, in certain cases, to the public. The ONCA will replace Part III of the Ontario *Corporations Act* ("OCA"), which was last substantively amended in 1953. Notwithstanding the targeted entry into force of the ONCA in January 2013, the Minister of Consumer Services recently stated that she would be recommending at least a three-year delay in implementing the ONCA provisions granting limited voting rights to non-voting members (please see "Members: Voting", below). These provisions had created uncertainty and concern among some not-for-profit corporations; the additional implementation time is intended to help smooth the transition for these corporations and their members. Presumably, if this recommendation is approved, further details will be published by the Ontario government.

The Ontario government has not yet published the regulations that will provide the specific requirements for some of the provisions of the ONCA. The government has, however, published a draft default by-law (please see "By-Laws", below). Background documents such as a Transition Checklist and a plain language Guide to the ONCA are also now available on the government website.[1]

Key Changes

Key changes for not-for-profit corporations transitioning to the ONCA include the introduction of: certain obligations for a new category of "public benefit corporations"; a cap of four years on directors' terms; enhanced rights for voting and non-voting members; more focus on "classes" of members; new requirements for member meetings; new requirements for "articles", which will replace a corporation's letters patent; and new financial review options for certain not-for-profit corporations.

The Transition Period

The federal and the Ontario governments have taken different approaches to transition under their respective new Not-for-Profit Corporations Acts. Under the federal regime, there is a mandatory three-year transition process requiring each corporation to file new organizational documents by October, 2014, failing which the corporation risks dissolution.

The Ontario government has instead taken an "assumed transition" approach. Not-for-profit corporations currently incorporated under Part III of the OCA will have three years to bring their letters patent, by-laws and any special resolutions into conformity with the ONCA.[2] On the third anniversary of the date the ONCA enters into force, any provision of those governing documents that does not conform with the provisions of the Act will be deemed to have been amended to conform. Put another way, to the extent that a provision of those governing documents conflicts with the ONCA, that

[1] See http://www.sse.gov.on.ca/mcs/en/Pages/onca1.aspx.
[2] There is a five-year transition period for "companies that have objects in whole or in part of a social nature," such as share capital social clubs (e.g., golf, tennis or country clubs) that are governed under Part II of the OCA.

provision will become ineffective after the three-year transition period. Not-for-profit corporations should therefore make the necessary amendments before that time.

Irrespective of whether a corporation intends to maintain its existing governing documents “as is” during the three-year transition period, it will be important for all not-for-profit corporations to have a good understanding of the key changes coming under the ONCA.

Types of Corporations

Under the ONCA, and effective immediately upon the ONCA coming into force, not-for-profit corporations will be either public benefit corporations (“PBCs”) or non-PBCs. A PBC is either a charitable corporation, or a non-charitable corporation that receives more than $10,000 in a financial year in the form of donations or gifts from third parties, or government grants or similar financial assistance. As we will see below, certain obligations are imposed specifically on PBCs, due to their public funding.

By-laws

A draft default organizational by-law has been published and is now available on the Ontario government’s website.[3] The default by-law will automatically apply to a new corporation formed under the ONCA, unless the organization enacts its own form of general by-law within 60 days of incorporation.

While the default by-law may be used as a template for corporations that do not have by-laws, or for corporations wishing to adopt a basic set of by-laws, many corporations will prefer to revise the by-laws they currently use. This may be the case, for example, for corporations that have either gone through a governance review in the recent past, and want to maintain certain by-law changes that reflect that review, or simply for corporations whose Board, officers, members and staff are familiar with the by-laws they currently use as their ongoing “rule book”.

A by-law review for ONCA compliance will ordinarily require a corporation to consider matters that include:

- director and officer provisions, including term, meetings, indemnification and insurance, conflict of interest;
- member provisions, including the qualifications, categories and rights of voting and non-voting members, meeting requirements, and proxy and alternative means of voting; and
- general provisions, including borrowing powers and audit requirements.

Directors

Number, Election, and Term

Under the ONCA, the minimum number of directors continues to be three, and ex-officio directors are still permitted. No more than one-third of the directors of a PBC may be employees of the corporation or an affiliated corporation; there is no such limit for non-PBCs. Directors’ terms for both PBCs and

[3] See http://www.sse.gov.on.ca/mcs/en/Pages/onca6.aspx.

non-PBCs are subject to a maximum of four years. This may represent a change for certain corporations; however, it should be noted that there is no maximum number of terms for directors.

Duties and Defence

The ONCA codifies an "objective standard of care" in line with the standard applicable to business corporations. Directors and officers must act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The ONCA also stipulates that directors and officers must comply with the ONCA, and the articles and by-laws of the corporation. A "reasonable diligence" defence is available to directors (but not to officers), such that directors will not be liable if they meet the above-noted objective standard of care, which includes good-faith reliance on financial statements, or on professional advice or reports.

Members

Classes

Under the ONCA, the corporation's classes of members must be set out in the articles, whereas most not-for-profit corporations would currently set these out solely in their by-laws. Where a corporation has more than one class of members (for example, full members and "associate members"), the articles must provide voting rights for at least one class, and the by-laws must set out the conditions for membership in each class.

Voting

There is a default of one vote per member, unless the articles provide otherwise. Not-for-profit corporations with "associate" or other non-voting member categories should note that under the ONCA[4], these members will be entitled to vote separately on certain matters, including:

- certain changes that affect a class of members (e.g. a proposal to increase the rights of any class or group of members);
- amalgamating with another corporation; or
- selling, leasing or exchanging all or mostly all of a corporation's property.

Member Meetings

The ONCA expressly permits a "resolution in lieu of a meeting": a member resolution signed by all the members entitled to vote on that resolution is as valid as if it had been passed at a meeting. Corporations must send or make proxies available to members prior to members meetings, and may provide for alternative means of voting (e.g. phone or electronic means), either in addition to or as an alternative to proxy voting.

Other Member Rights

Members will have important new or enhanced rights under the ONCA. These include voting members' right, subject to the exceptions set out in the ONCA, to raise any matter as a "proposal" at an annual meeting of members, or, with the support of at least 10% of membership votes (or a lower percentage that is set out in the corporation's by-laws), to requisition meetings of members. Any

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[4] See above regarding the recommendation of the Minister of Consumer Services to defer certain voting provisions for at least three years.

member may access membership lists and financial statements. Furthermore, members' remedies include compliance or restraining orders, rectification orders, and investigation orders; dissent and appraisal (for members of non-PBCs) in respect of certain fundamental changes; and derivative action (an action taken in the name of the corporation to enforce a right).

In view of the changes to member entitlements under the ONCA, corporations may wish to review categories of "associate" or other non-voting members, and consider whether to convert these groups to non-member status, for example as "affiliates", "friends", or "supporters".

Financial Accounting

The type of corporation and its level of revenues will dictate whether audit and review options are available to it under the ONCA, and what those options are. The following charts illustrate the differences applicable to non-PBCs and PBCs, at their respective levels of gross annual revenues. In the charts, an "extraordinary resolution" means one passed by at least 80% of the votes cast at a special meeting of the members, or one consented to by each member entitled to vote at a meeting of the members.

Non Public Benefit Corporation	
Gross Annual Revenues	Audit / Financial Review
More than $500,000	Members may pass an *extraordinary resolution* to appoint someone to conduct a review engagement, instead of having an audit.
$500,000 or less	Members may pass an *extraordinary resolution* to dispense with both audit and review engagement.

Public Benefit Corporation	
Gross Annual Revenues	Audit / Financial Review
$500,000 or more	An audit is required. Must appoint an auditor annually.
Less than $500,000 but more than $100,000	Members may pass an *extraordinary resolution* to appoint someone to conduct a review engagement, instead of having an audit.
$100,000 or less	Members may pass an *extraordinary resolution* to dispense with both audit and review engagement.

5 Steps to Transition under the ONCA

The approach and time each corporation takes to fulfill the following transitional steps will depend on the type, size and complexity of the corporation, how familiar the Board and members are with its procedures, and whether or not the corporation is combining its ONCA transition with an overall governance review. While all corporations will have three years to bring organizational documents into compliance with the ONCA, as explained above, some ONCA provisions will apply immediately. Each corporation should therefore ensure that its transition plan can accommodate the consultation it will need with members, the Board, and legal and financial advisors as may be required.

1. Review the current letters patent and by-laws, consider the corporation's current structure and procedures, and determine whether the corporation will either retain or remove the provisions that are no longer required.

2. Consider the default standard organizational by-laws. Consider the mandatory and optional provisions of the ONCA and regulations.

3. Prepare the corporation's Articles of Amendment, if required, and revise the by-laws following a review of the new requirements, default provisions, and choices open to the corporation under the ONCA and regulations.

    If the corporation is also a registered charity, consider consulting with a tax expert on the articles and by-laws, as required, and send the Articles of Amendment and revised (or new) by-laws to the Canada Revenue Agency for pre-approval.

4. Obtain board of directors and member approval for articles of amendment and by-laws at duly called meetings.

5. File documents with the Ministry (process and forms remain to be determined).

Your Choice: Corporate Housekeeping or A "Clean Sweep"

The ONCA will affect thousands of not-for-profit corporations, including associations, charities, and professional, cultural, and religious and other groups currently incorporated under Part III of the OCA. While the old regime may have become familiar territory, the introduction of the new regime provides an opportunity for not-for-profit corporations to revisit their governance structure and make important choices.

The new legislation is flexible enough to permit corporations to consider the transition as a form of good "corporate housekeeping", to tidy the rules up a bit, but to continue on with many of the rules they are currently accustomed to. On the other hand, some corporations may choose to do a "clean sweep", using the transition as an opportunity to more fundamentally change their governance structure. Get ready to review the legislation and ask questions – to get information, opinions, and advice – on how your not-for-profit corporation will respond to the new rules.

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