New *Ontario Not-for-profit Corporations Act*

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Overview

The *Ontario Not-for-profit Corporations Act, 2010* (the ONCA) establishes a new set of modern rules for provincially incorporated not-for-profit corporations. The ONCA replaces Part III of the *Ontario Corporations Act* (the OCA). This alert will focus on some of the key implications related to its implementation.

Timeline

The ONCA is scheduled to come into effect no earlier than January 1, 2014. All not-for profit corporations incorporated under Part III of the OCA will have a three-year transition period once the ONCA is proclaimed. Once the ONCA comes into effect, it will apply to all non-share capital corporations incorporated under Part III of the OCA, whether or not a formal transition process is followed by the corporation. If the corporation has any letters patent, by-laws or special resolutions that are inconsistent with the ONCA, these documents will automatically be deemed to be amended to comply with the ONCA at the end of the three-year transition period. This could result in uncertainty and confusion over which provisions have been deemed to be amended under the ONCA. It is therefore recommended that all corporations go through a transition process, and amend any letters patent, by-laws or special resolutions to be consistent with the ONCA.

Corporations governed under Part II of the OCA , namely share capital social clubs, are required to be governed by the current OCA for a transition period of five years, after which they must continue under one of three acts—the ONCA, the Ontario Business Corporations Act, or the Co-operative Corporations Act. Failure to continue under one of these acts after the fifth anniversary of the proclamation of the ONCA will automatically result in the dissolution of the corporation.

Transition to the ONCA

There are six general steps a corporation should follow:

1 Review and revise your existing letters patent

The ONCA provides significantly more detailed rules than those contained in the OCA. This makes the transition process an opportune and efficient time to re-evaluate letters patent and supplementary letters patent to ensure they reflect the corporation's current and proposed future activities and governance structure, and that they are in compliance with the ONCA.

2 Review and revise your existing by-laws

When the ONCA comes in to effect, if the corporation does not pass an organizational by-law in compliance with the ONCA, a default by-law will automatically apply. As a result, by-laws should be reviewed in conjunction with letters patent to ensure compliance with the ONCA. The ONCA includes three types of rules which can be incorporated into the corporation's by-laws and letters patent:

- mandatory rules – cannot be overridden by articles or by-laws;
- default rules – articles or by-laws can override, however default rules apply automatically where by-laws are silent; and
- alternate rules – set of options outlined by the ONCA, which articles or by-laws must explicitly provide for one of the options.

A draft default organizational by-law is available on the Ministry of Consumer Services website which can be used to help review and make changes to existing by-laws.

3 Membership classes

The ONCA provides for rights to members of not-for-profit corporations, including the right to vote on certain amendments to the articles and other fundamental changes to the corporation. This may result in concerns for corporations with multiple classes of membership (including voting and non-voting) as each class of membership will be entitled to vote separately as a class, including voting to change the rights attached to each class of members.

As a result, corporations which have multiple membership classes may wish to collapse the various categories to one voting class. Consideration should also be made to removing non-voting membership categories. These changes should be completed prior to transitioning to the ONCA.

4 Member provisions

A special resolution must be passed by membership in order to approve any articles of amendment.

For share capital corporations, the ONCA requires that the Articles of Continuance be approved by special resolution of eligible members.

Corporations may want to consider whether disciplinary provisions concerning members, notice periods and voting methods need to be amended in light of new rights given to members in the ONCA.

5 Director and officer provisions

In light of various provisions in the ONCA, corporations should consider reviewing existing director and officer provisions to determine if changes should be made to maximum directors' terms, board composition, meetings, indemnification and insurance and conflict of interest provisions.

6 Submit the required documents

Any articles of amendment and other documents must be filed with the Ministry of Government Services. There is no need to file approved by-laws with the Ministry. Registered charities will also be required to file articles of amendment and new by-laws with the Canada Revenue Agency.

Involvement of a public accountant

The ONCA specifies the type of financial engagement required. The type of engagement varies depending on whether the corporation is a "public benefit corporation" (PBC) or a "non-public benefit corporation" (Non-PBC).

A PBC is a charitable corporation or a corporation that receives in excess of $10,000 in public donations, government grants or funding, or donations from other soliciting corporations in a single fiscal year. The following table summarizes the applicable financial reporting requirements. Other requirements affecting soliciting corporations are identified in the ONCA.

Type of corporation	Annual revenues	Engagement
PBC	$100,000 or less	Review* – default Audit* – optional
PBC	More than $100,000 and less than $500,000	Review – optional** Audit – default
PBC	$500,000 or more	Audit – mandatory
Non-PBC	Less than $500,000	Review* – default Audit* – optional
Non-PBC	More than $500,000	Review – optional** Audit – default

*both may be waived by extraordinary resolution
**if audit is waived by an extraordinary resolution

Action required

- Non-share capital corporations that do not formally transition by the three- year deadline will automatically continue under the ONCA with all letters patent and by-laws deemed to be adjusted to comply with the ONCA.
- Share capital corporations not continued by the five year deadline will be dissolved. Given that member approval is required, this will require appropriate planning.
- There are special considerations for registered charities and certain restrictions will apply in order to ensure that charitable status is maintained under tax legislation.
- If a corporation is incorporated under a special Act (including charities law), and the Act conflicts with the ONCA, the terms of the special act will prevail.
- The Ministry of Consumer Services has released a guide, transition checklist as well as other resources to assist with the transition process. This can be found on the Government of Ontario's website.

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