



Legislative Changes For Ontario Not-For-Profit Corporations and How it May Affect Ontario Sailing Clubs

John Curtis
Lawyer, Mediator, Olympian
www.johncurtis.ca
john@johncurtis.ca

Caution:

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What is a Not-For- Profit Corporation?

- All Corporations are legal persons
- NFP Corporation has *members* rather than *shareholders*
- Constitutional document = Letters Patent (or Supplementary Letters Patent) v. **Articles of Incorporation**
- By –Laws that govern the the big picture operations
- Members elect the Directors in accordance with the process set out in the By-Laws.
- They do not distribute \$ to their members

“Non-Profit Organization” not defined in Income Tax Act

s. 149(1)(l) of ITA says a tax exempt non-profit organization must be:

- a club, society or association
- in the Opinion of the Minister, not a charity
- Organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit
- No part of the income is ... for the personal benefit of any proprietor, member or shareholder

It's a year by year test

Ontario Yacht Clubs

- Most Clubs represented here will qualify as Non-Profit Organizations and will be covered by the new Legislation

But - this is just a best guess

“Learning the Lingo”

new

- ONCA = Ontario Not-for-Profit Corporations Act

old

- OCA = Ontario Corporations Act (Part III)

It should say what part of the Act in your Letters Patent

Effective dates for the new legislation

- OBCA approved by the Legislature October 25, 2010
- Not yet in force – expected to come into Force on **July 1, 2013** (was going to be January 2013)
- **3 year Transition Period**
- Regulations and technical systems are being prepared – “**don’t hold your breath**”

Policy objectives behind the changes

- Greater alignment with business corporations law
- Improved efficiency and practicality
- Improved transparency
- Improved governance and accountability
- National consistency
- Clarification on permitted commercial activity

Overriding principles:

- **NFP corporations which receive broader public funds should be subject to tighter regulation and greater public scrutiny.**
- **Can become a NFP “as of right” rather than at the discretion of the Minister**

Example of a Change that will make a big difference

Disciplining a Member

Power to discipline or terminate a member

51. (1) The articles or by-laws may provide that the directors, the members or any committee of directors or members have **power to discipline a member or to terminate their membership**. If the articles or by-laws provide for such a power, they must set out the circumstances and the manner in which that power may be exercised.

Good faith requirement

(2) Any disciplinary action or termination of membership must be done in good faith and in a fair and reasonable manner.

Fair and reasonable procedure

(3) For the purposes of subsection (2), a procedure is fair and reasonable if,

(a) a member is given at least **15 days notice** of a disciplinary action or termination with reasons; and
(b) the member is given an **opportunity to be heard, orally, in writing or in another format** permitted by the corporation's articles or bylaws, not less than five days before the disciplinary action or termination of membership becomes effective, by the person with authority to impose or revoke the disciplinary action or termination.

Notice

(4) A notice required under this section may be given by any method reasonably intended to give actual notice.

Application to court

(5) A member of a corporation who claims to be aggrieved because they were disciplined or because their membership was terminated may apply to the court under section 191.

ONCA transitioning for OCA Part III corporations

When the ONCA comes into force:

- Existing Ontario NFP corporations can **do nothing** and will automatically be continued under the ONCA
- OCA Part III automatically repealed
- Valid governing documents remain valid and applicable during 3 year grace period
- 3 year grace period to amend governing documents to conform with the ONCA, or will be deemed amended to conform with Default bylaws – yet to be published ***(good place to start for your new bylaws)***
- All new Ontario NFP corporations must be incorporated under ONCA

Content of the new rules

New Categories of NFP corporations

- Public Benefit Corporations (PBCs) – includes charities
- Non-Public Benefit Corporations – probably includes most Sailing Clubs

ONCA categories of NFP corporations

- **1. Public Benefit Corporations (PBCs)**
- **Charitable PBCs**
- common law definition of “charity”
- charities are always PBCs regardless of amount of funds received
- **Non-charitable PBCs**
- >\$10,000 in revenues per financial year from public sources:
- donations from the public (not members, directors, officers or employees)
- or
- grants or financial assistance from government or government agency
 - might need to look closely at some of the revenue you receive – eg. Trillium, HRDC, etc.
- **2. Non-Public Benefit Corporations (non-PBCs)**
- <\$10,000 in revenues per financial year from public sources
- Generally subject to more lenient requirements

PBC vs. Non PBC -Why Does it Matter?

1. Financial reporting requirements are different Audit vs. review engagement vs. compilation
2. A Non PBC can distribute its assets to members on dissolution – PBC must give them to another similar purpose PBC or government

Content of Changes Con't

- Incorporation + Articles
- Bylaws
- Board of directors
- Members' rights and remedies
- Level of financial review
- Financial reporting requirements
- Residual assets on dissolution/liquidation
- AGM's and Meetings

Incorporation and Articles

- Articles of Incorporated filed incorporation is “as of right”
- Letters patent system and discretion abandoned
- Multiple membership classes and voting rights must be set out in Articles not just Bylaws
- Statement of purpose now required (not objects)
- stated purpose will not invalidate actions arguably outside the purpose because a NFP corporation has all powers of a natural person.
- Articles should state that any purposes of a commercial nature are intended only to advance the not-for-profit purpose(s)
- PBC: Articles must stipulate distribution of residual assets on liquidation (charities still limited to qualified donees)
- Non-PBC: Articles may stipulate distribution of residual assets on liquidation

Bylaws

- Valid existing bylaws may remain in place during 3 year grace period
- any amendments must conform with ONCA
- bylaw review recommended prior to deadline
- default bylaws deemed to apply at end of grace period
- New corporations must adopt bylaws within 60 days of incorporation or deemed to have adopted default bylaws
- Bylaws do not need to be filed (for non-charitable PBCs)

Much of what is now in your Bylaws will be in the New Ac or in the Articles of Continuance you will file

Board of Directors

- PBCs: minimum 3 directors
- Non-PBCs: minimum 3 directors
- Members may remove directors at any time by ordinary resolution
- May meet by conference call and email
- May adopt unanimous written resolutions in lieu of meeting

Directors

- All corporations must have minimum of 3
- PBC: no more than 1/3 may be employees
- Not required to be members
- Sets out a statutory duty of care and procedure for conflict of interest
- Due diligence defence and statutory indemnification/insurance provisions
- Can borrow money without approval
- Maximum term = 4 years

Ex- Officio and Appointed Directors

- Can have a provision in by-laws for “ex-officio” directors, including Past Presidents.
- Allows directors to appoint up to 1/3 of the total number of directors elected at a previous meeting. (s.24(7))

Members – Rights and Remedies

- Enhanced **voting rights** re fundamental changes & member rights changes
- Rights to submit bylaw amendment proposals, to nominate directors, to require a matter
- be discussed at AGM, to access corporate records, etc.
- **Dissent and appraisal rights** re certain fundamental changes (only ONCA non-PBCs)
- Oppression remedy against corporation
- Court ordered winding-up and liquidation
- CNCA: n/a to religious corps re tenets of faith acts
- Compliance or restraining order
- Unanimous Members' Agreement (CNCA only)
- Membership interests may be transferrable if permitted in Articles/bylaws (CNCA only)

Members Rights

- More remedies if believe directors not acting in best interest of organization
- Greater access to corporate records and membership lists
- Non-voting Members can vote on 'fundamental changes' that affect their rights.
- Vote by proxy (mandatory rule)
- Remove directors by ordinary res.



Financial Reporting

Non-PBC

- waive appointment of public accountant **and** have review engagement vs. audit if annual revenue $> \$500,000.00$ – need to vote on this or default to the higher standard of review (eg. audit)



Residual assets on dissolution /liquidation

- **PBC which is a charity:** to “qualified donee” under ITA
- **PBC which is not a charity:** to similar purpose PBC or to government
- **Non-PBC:** unrestricted (default = per capita distribution among members) –most YC’s

AGM's

- Must be held within 6 months after fiscal year end and no later than 15 months after previous AGM.
- May be a problem for many summer sport organizations with March 31st year end
- Audited financials must be provided to members at least 21 days before AGM
- Must send form of proxy to each member with notice of meeting

50,000 Foot Level

What does all of this mean for you?

- The new ONCA changes are significant and represent a **complete overhaul** and **modernization** of provincial NFP regime.
- As Commodore or Board Member, you have a role to play in alerting your board to the changes, understanding the financial review requirements, and in recommending an appropriate transitioning strategy to your board.
- As Board Member you should understand the new governance and financial reporting requirements, membership voting rights, and conflicts of interest procedures, as well as your overall duties and responsibilities, entitlement to indemnification, and how you can meet the standard for legal defenses.
- Ensure default by-laws do not conflict with the way your organization operates

Think of this like a replacement of your Junior Club fleet or a new roof for the Club – You need to address it or it could lead to bigger problems down the road, but it is entirely manageable.

Next Steps

- Review your letters patent and bylaws
- Prepare Articles of Continuance to replace letters patent
- Create new bylaws to comply with Act's mandatory provisions
- Get members' approval at meeting held in accordance with existing by-laws
- Submit required documents

Check List

- Great website resource

<http://www.sse.gov.on.ca/mcs/en/Pages/onca4.aspx>

