

Ontario's New Not-for-Profit Corporations Act: An Overview

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Not-for-Profit Corporations Act, 2010

- The *Not-for-Profit Corporations Act, 2010* received Royal Assent on October 25, 2010. It is anticipated it will be proclaimed into force by the end of 2012 or early 2013.
- The new Act will govern the creation, governance, and dissolution of not-for-profit corporations in Ontario.
- It is an enabling, not a regulatory, statute. Enforcement of the rights and duties under the new Act lies primarily with the corporation, its directors, and its members.

Not-for-Profit Corporations Act, 2010

- The new Act will address many of the existing problems with the *Corporations Act*. The new Act will:
 - provide efficient means for incorporation and operation of not-for-profit corporations;
 - provide more flexible and up-to-date rules for directors, officers, and members of not-for-profit corporations;
 - provide improved corporate governance and accountability;
 - address gaps in the current legislation (e.g., provide specific protection from liability for directors);
 - harmonize the law with other Canadian jurisdictions and the U.S.; and
 - provide clearer and more comprehensive rules (e.g., setting out a duty of care for directors in the statute).

Not-for-Profit Corporations Act, 2010

- The new Act is written to apply generally to every type of non-share capital corporation, including corporations incorporated under other general and special Acts, with a few limited exceptions (e.g., such as a non-share capital co-operative corporation incorporated under the *Co-operative Corporations Act*).
- The new Act follows the structure of the Ontario *Business Corporations Act* (OBCA) and is set out in a logical fashion, beginning with incorporation and moving through topics including corporate finance, membership, directors and officers, fundamental changes, and dissolution.

Incorporation

- A main feature of the new Act is a new “as of right” incorporation which will result in an expedited and streamlined incorporation process with a reduced rejection rate of applications. As long as there is compliance with the requirements of the new Act and regulations, a corporation will be allowed to incorporate (s.9(1)).
- A review will be carried out by Ministry of Government Services staff to ensure that certain key requirements are met such as:
 - Ensuring that the corporation does not have only commercial purposes; and
 - Ensuring that the corporation is not given regulatory powers.
- A review of the corporation’s proposed name also takes place.
- Other review requirements will be developed during the implementation process.

For-Profit Activities

- The new Act contains no restrictions on commercial activity which is carried out to achieve the not-for-profit purposes of the corporation as defined in the articles.
- This responds to the uncertainty in the current *Corporations Act* and clarifies that not-for-profit corporations would be permitted to engage in commercial activities that support their not-for-profit purposes (s.8(3)).
- Although commercial activity may be permitted under the new Act, the income generated from such activity may not necessarily be tax-exempt under the Income Tax Act. A corporation would have to demonstrate that such commercial activity is in fact within the scope of its purposes as set out in its articles.

Corporate Powers

- The new Act provides not-for-profit corporations with all the powers of a natural person, with any restrictions on activities and powers to be set out in the incorporating documents (s.15).
- This responds to the legal uncertainty concerning the extent of powers available to a not-for-profit corporation under the current Act in light of conflicting provisions. It ensures corporations have all the necessary powers to fulfil their purposes, and eliminates the risk of liability arising from an inability to carry out certain activities due to insufficient powers (s.16(3)).

Directors and Officers

Statutory Duty of Care

- The new Act sets out a statutory duty of care for directors and officers, which does not exist in the current Act. The new Act clearly sets out that directors and officers have a duty to act honestly and in good faith with a view to the best interest of the corporation. They must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (s.43).

Personal Liability

- The new Act also sets out provisions that will better protect directors and officers from personal liability through the addition of a broad due diligence defence/good faith reliance defence, and indemnification and insurance provisions. This will allow directors and officers to rely in good faith on professional advisors, and advice by management and other employees of the corporation (e.g., reliance on audit reports prepared by independent auditor)(s.44).

Directors and Officers

- **Minimum number of Directors**
 - the new Act maintains the requirement to have a minimum of 3 directors (s.22(1)).
 - A public benefit corporation shall have no more than 1/3 of the directors who are employees of the corporation (s.23(3)).
 - A not-for-profit corporation may provide in its articles for a minimum and maximum number of directors (s.22(2)).
- Directors do not need to be members of the not-for-profit corporation unless the by-laws require this qualification (s.23(2)).
- **Term** - Four years is the maximum period for each term of office of a director (s.24(1)).
- The by-laws may provide for ex-officio members and directors (ss.23(4) and 48(2)).
- **Meetings**
 - Notice of meeting provisions are included in the new Act which includes a waiver of notice. The notice does not need to specify the general nature of the business to be transacted at the meeting unless it is a matter than can not be delegated to a managing director or committee of the board (s.34(3) and 36 (2)).
 - A unanimous resolution in lieu of a meeting is permitted (s.35(2)).

Directors and Officers

- **Removal of Directors** - Directors can be removed by ordinary resolution (majority vote) passed by the members (s.26(1)).
- **Resignation of Directors** - Provisions to govern the resignation of directors are now included. A director's resignation becomes effective when a written resignation is received by the corporation or at the time specified in the resignation, whichever is later (s.25(2)).
- Directors who resign or are removed have a right to have their written reasons for resignation or for opposing removal, distributed to the members (s.27).
- Conflict of interest provisions are broadened so that the rules apply to both directors and officers and address situations relating generally to transactions that the corporation enters into rather than being limited to contracts (s.41).

Members

- **Access to membership lists** – access to membership lists is restricted to members and directors, including directors who are not members of the corporation (s.96).
- **Information included in membership lists** - Names and addresses of members are to be included in membership lists and the by-laws may provide for additional information (s.96(2)).
- Membership interests are not transferable unless the articles or by-laws provide otherwise (s.48(8)).
- The new Act provides certain minimum rights in the event of a disciplinary action or termination of membership (e.g a minimum 15 days notice with reasons before the disciplinary action or termination becomes effective; opportunity to be heard)(s.51(3)).

Member Meetings and Proposals

- Members entitled to vote have a new right to submit and discuss proposals at the annual meeting. The proposal together with a supporting statement, which must be submitted at least 60 days before the meeting, is required to be sent with the notice of meeting (s.56).
- A proposal may include nominations for directors if signed by at least 5 per cent of members or such lower percentage set out in the by-laws. Nominations can also be made at the meeting (s.56(5)).
- The proposal must relate in a significant way to the activities and affairs of the corporation (s.56(6)).
- A resolution may be signed by all voting members in place of having a meeting (s.59(1)).
- At least 10 per cent of voting members may requisition a meeting (s.60).

Right of Class of Non-voting Members to Vote

- A class of non-voting members is entitled to vote concerning the following fundamental changes:
 - articles of amendment and articles of continuance (of other Ontario bodies corporate) affecting class or group rights of members (s. 105 (2) and 115 (4))
 - articles of amalgamation (s. 11 (3))
 - articles of continuance to another jurisdiction (s. 116 (3))
 - sale, lease or exchange of all or substantially all of corporation's property not in ordinary course of corporation's activities (s. 118 (4)).

Member Remedies

Members will have increased remedies to ensure directors are acting in the corporation's best interests.

Compliance Order

- A compliance order can be obtained where a corporation, or its directors and officers, fails to comply with the duties set out in the new Act and regulations, the articles or by-laws (s.191).

Derivative Action

- The derivative action gives members the right to bring an action in the name of the corporation (except religious corporations) to enforce one of its rights (s.183).

Proxies

- The basic rule is that every member entitled to vote at a meeting may appoint a proxyholder who does not have to be a member (s.64).
- The corporation is required to send a proxy or make it available to each member entitled to a notice of meeting (mandatory solicitation of proxies) (s.65). This could be done by having an electronic form of proxy on the corporation's web site or sending an electronic form of proxy by e-mail.
- The by-laws may provide for three other methods of voting for persons who can't be present at a meeting in addition to or as an alternative to proxies:
 - by mail
 - by telephone
 - by computer (electronic means) (s.67).

Public Benefit Corporations

- The new Act makes a new distinction between public benefit corporations versus other not-for-profit corporations.
- The new Act defines a public benefit corporation as a charitable corporation, or a non-charitable corporation that receives financial benefits from non-members, including government, that exceed \$10,000 in a financial year (s.1).
- Public benefit corporations are held to a higher standard than non-public benefit corporations in terms of being accountable for their financial activities because they receive funding from non-members.

Public Benefit Corporations

- There are three basic rules for public benefit corporations:
 - audit exemption limits are capped at a lower level than for non-public benefit corporations (s.76).
 - no more than one-third of the directors can be employees.
 - remaining assets upon voluntary dissolution must be distributed to another public benefit corporation with similar purposes or government (s.167(1)(d)).
- A corporation is deemed to be a public benefit corporation during the financial year in which it files articles of dissolution if it came within the definition of a “public benefit corporation” in any of the three preceding financial years (s.167(6)).

Audit Requirements

- Another new feature of the new Act is permitting a less costly financial review engagement in specified circumstances instead of a more expensive and onerous full audit.
- A corporation that is not a public benefit corporation may:
 - have a financial review engagement in place of an audit when annual revenue is more than \$500,000.
 - be exempt from the audit requirement or financial review engagement if its annual revenue is \$500,000 or less (s.76(2)).
- A public benefit corporation may:
 - have a financial review engagement in place of an audit when annual revenue is more than \$100,000 but less than \$500,000.
 - be exempt from the audit requirement or financial review engagement if its annual revenue is less than \$100,000 (s.76(1)).
- This will relieve smaller corporations of the higher financial and administrative burdens associated with an audit.
- Members can approve the audit exemption or review engagement option at each annual meeting for the next financial year (s.76(3)).

Corporate Finance

- The corporation's financial statements and auditor's report or financial review shall be given to members upon request at least twenty-one days before the annual meeting (s.84(2)). Members are also entitled to examine and make copies of financial statements at the registered office (s.98 (2)).
- This is an important new member right that provides interested members with the information that would allow them to more fully participate in annual general meetings by holding the directors accountable for the financial management of the corporation.
- The by-laws set out the method by which the financial statements will be made available to interested members.
- The board may exercise borrowing powers without member authorization unless required by the articles or by-laws (s.85).

By-Laws

- The new Act provides for new default organization by-laws (e.g. calling of meetings). In many cases, a lawyer will not be required to prepare by-laws which will result in cost-savings for not-for-profit corporations (s.18).
- The default by-laws will come into effect 60 days after incorporation unless a different by-law is adopted within the 60-day period (s.18(1)).
- The corporation may amend or replace the standard form by-laws at any time.
- It is anticipated that the default by-laws approved by the Director appointed under the new Act will be posted on an Ontario government website (s.18(2)).

Current *Corporations Act*

- After the new Act comes into force, the existing *Corporations Act* will remain in force to govern insurance companies until a different corporate Act is made applicable to such companies (new s.2(1) of the *Corporations Act*).
- Share capital social club corporations will be given five years after proclamation of the new Act to continue under:
 - the Ontario *Business Corporations Act*;
 - the *Co-operative Corporations Act* as a share capital or non-share capital co-operative corporation; or
 - the new *Not-for-Profit Corporations Act, 2010* . (new s.2(1) of the *Corporations Act*).
- There are approximately 160 such corporations and all were incorporated before 1971; most are country clubs, tennis clubs or golf clubs.
- Until share capital social clubs continue under one of the above-stated Acts, they will continued to be governed by the current *Corporations Act*. If one of these corporations fails to continue under another Act by the end of the five year period, it will be dissolved, but can revive by filing articles of continuance under one of the three Acts . (new s.2(1) of the *Corporations Act*).

Transition

- Not-for-profit corporations will be given three years to amend their letters patent, by-laws and special resolutions to conform with the requirements of the new Act. At the end of the three years, such documents will be deemed to be amended to conform with the requirements of the new Act.
- With input from the Ministry of Government Services, the Ministry of Consumer Services will be releasing plain language guides prior to proclamation to assist the sector understand the new rules under the new Act.

Contact Information for Allen Doppelt

I am available to provide advice on corporate governance and all transitional issues related to the new Act, including a review of letters patent and by-laws.

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