

Highlights of the new *Not-for-profit Corporation statutes*

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Introduction

- *Canada Corporations Act (CCA)* governed federally incorporated NFP corps for close to a century
 - About 19,000 CCA corporations
- *Canada Not-for-profit Corporations Act (CNCA)* was proclaimed in force on October 17, 2011
 - Three year transition period started which ends October 2014
- *Ontario Corporations Act (OCA)* in Ontario since early 1900s
 - -about 46,000 OCA corporations
- *Ontario Not-for-profit Corporations Act (ONCA)* expected to be proclaimed next year
 - Jan 1, 2013, July 1, 2013, January 2014, six months after Bill 65



Introduction cont.

- Main features of these new statutes:
 - Modernization of NFP corporate statutes
 - Incorporation as of right, no more Letters Patent
 - Enhanced director responsibilities and liabilities
 - Enhanced member rights and remedies
 - Aligning NFP corporations with business model
- Differences between the federal and provincial statutes
- Focus mainly on ONCA in this presentation



Incorporation As Of Right

- No more Letters Patent
- No PGT pre-approval (Ontario)
- streamlined incorporation process
 - CNCA incorps taking 5 days
- rejection rate of applications will decline
- Review will be for corporate law compliance only, such as name issues, proper information, etc.
- Amendments for charity law compliance will surely rise



Corporate Powers

- Elimination of the *ultra vires* issue
- Common law covered this, now in the statute
- Have all the powers of a natural person (s.15)
- Actions outside of purposes no longer illegal
- Creates commercial certainty



Commercial Activities

- Commercial activity permissible
- Must support not-for-profit purposes (s.8(3))
- Commercial activity may be taxable under the *Income Tax Act*
- Charitable corporations limited to “related business” activity
 - All volunteers
 - Ancillary to charitable purposes



Directors and Officers

- Duty of Care
 - 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
 - better protection for directors and officers from personal liability
 - due diligence defence/good faith reliance defence
 - indemnification and insurance provisions
 - Can 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)



Members Rights and Remedies

- Class voting (including non-voting classes) for fundamental changes
 - articles of amendment
 - articles of continuance
 - articles of amalgamation
 - affecting class or group rights of members
 - sale, lease or exchange of all or substantially all of corporation's property not in ordinary course of corporation's activities



Oppression, Dissent and Appraisal

- Oppression (Section 253 CNCA only)
- Available where there is:
 - Oppressive conduct
 - Unfairly prejudicial
 - Unfairly disregards interests of a member
- To protect financial investment – does this make sense?

- Dissent and Appraisal (s. 187 ONCA only)
 - Dissent to fundamental changes
 - May obtain FMV for membership value
 - Only applies to non-PBC's
 - Solvency test



Derivative Action

- Complainant may bring court action in name of the corporation
- Most often used to address corporate inaction
- Breach of fiduciary duties, negligence, *ultra vires* acts
- 14 day notice/rectification period, good faith defence, acting in interests of corporation



Compliance Orders/Winding Up

- Compliance Orders
 - Compel board to comply with Act, Regs, by-laws, etc. or,
 - Restraining order for breaching Act, Regs, articles, by-laws, UMA
 - Good for member discipline proceedings
- Winding Up
 - Seek order to wind up of corporation
 - i.e. to enforce a UMA



Proposals

- Proposals
 - members may submit proposals regarding any matter at a members meeting
 - Can requisition a members meeting – CNCA 5% of members, ONCA 10% of members
 - Proposal to elect director by 5% of members
 - Remove director (by majority vote)
 - To dissolve corporation (only CNCA s. 221)
- can reject proposal if primary purpose is to enforce a personal grievance or if unrelated to affairs or activities of corporation



Investigations

- Investigation of a corporation
 - Court may appoint an inspector
 - Order to allow inspector to enter premises
 - inspector to make reports to court (interim or final)
- Available where there is evidence of fraud or conduct oppressive, unfairly prejudicial, unfairly disregards interests of member



Financial Accountability

- ONCA creates Public Benefit Corporations (PBC)
 - charitable corporation, or
 - non-charitable corporation that receives income >\$10k/year from non-members/government
- CNCA creates Soliciting Corporations (SC)
 - received >\$10k/year from public sources
 - No reference to charitable corporations as in PBC definition
- Higher standard of financial accountability for PBCs and SCs
- In other words, audits are expected, unless a exemption applies



OCA

Exemption from annual audit

96.1 In respect of a financial year of a company, the company is exempt from the requirements of this Part regarding the appointment and duties of an auditor if,

- (a) the company is not a public company;
 - (b) the annual income of the company is **less than \$100,000**; and
 - (c) all of the shareholders consent, in writing, to the exemption in respect of the year. 1998, c. 18, Sched. E, s. 63; 2006, c. 34, s. 10 (1).
- No exemption if >\$100k
 - ALL members must consent if income <\$100k



ONCA

- s. 76 ONCA Members of a PBC may opt for:
 - No audit, review engagement if annual revenue >\$100k and <\$500k or
 - no auditor , no audit, no review engagement if annual revenue <\$100k

- Non PBC may opt for:
 - No audit, review engagement if annual revenue >\$500k,
 - No auditor, no audit, no review engagement if annual revenue <\$500k



ONCA cont.

- ONCA Must pass "extraordinary resolution" by members
- means a resolution that is,
- (a) submitted to a special meeting of the members of a corporation duly called for the purpose of considering the resolution and passed at the meeting, with or without amendment, by at least **80** per cent of the votes cast, or
- (b) consented to by each member of the corporation entitled to vote at a meeting of the members or the member's attorney



CNCA

Soliciting corporations may opt for:

- No audit, review engagement if annual revenues $>50k$ and $< \$250k$
 - (vs. $>100k$ and $< \$500k$ for PBCs)
- No public accountant (note ONCA), no audit, review engagement if annual revenues $< \$50k$
 - (vs. $< \$100k$ for PBCs)
- Soliciting corporations with annual revenues $> \$250k$ must audit
 - (vs. $> \$500k$ PBCs)
- No extraordinary resolutions



Anybody else?

- Canada Revenue Agency
 - “If the registered charity has income over \$250,000 the Charities Directorate recommends that financial statements be professionally audited, otherwise, the treasurer for the charity should sign them.”
- Public Guardian and Trustee
 - Not-for-profit Incorporators Handbook, section 5.7, Audit Provisions
 - NFP corps with annual income >\$100k must have audit and auditor (no exemption)
 - NFP corps with income <\$100k may waive audit if ALL members consent
- Follows OCA
- Presumably will follow ONCA when proclaimed



Conclusion

- New NFP corp statutes are following business model
- Members looking more like shareholders
- Should be more efficient and less confusing
- Differences between federal and provincial statutes unfortunate
- NFP context is not necessarily the same as the business world
 - Business = return for shareholders
 - NFPs exist for member benefit or public benefit



Questions?

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