

SPEAKING POINTS
(TO ACCOMPANY SLIDE DECK FOR SPEAKERS)

ONTARIO'S NOT-FOR-PROFIT CORPORATIONS ACT, 2010

Delivery time: Approximately 20 minutes

Introduction (Slide 1)

- Thank you for the opportunity to speak to you about Ontario's Not-for-Profit Corporations Act, 2010.

Overview (Slide 2)

- Ontario's Not-for-Profit Corporations Act, 2010 was passed into law on October 25, 2010.
- Amendments to more than 80 statutes, including the Not-for-Profit Corporations Act, 2010 were introduced in the legislature in June 2013.

- It is anticipated that these amendments will be debated in the legislature in fall 2013.
- If the amendments are passed by the legislature, the Act is anticipated to come into force no earlier than six months after passage in order to ensure adequate time for not-for-profit corporations to prepare for transition.
- With few exceptions, the Act will generally apply automatically to not-for-profit corporations that are incorporated under Ontario law.
- Existing Ontario not-for-profit corporations will have a three-year transition period once the Act

comes into effect to make any necessary changes to their incorporation and other documents to bring them into conformity with the Act (e.g., letters patent and any supplementary letters patent, by-laws and special resolutions).

- The Act sets out how Ontario not-for-profit corporations are created, governed and dissolved.
- It provides a modern, legal framework for not-for-profit corporations by ensuring there is greater transparency and accountability in how not-for-profit corporations are governed.

Features (Slides 3 -8)

- These are some of the key features of the Act:
- The Act makes a new distinction between public benefit corporations and other not-for-profit corporations.

A public benefit corporation is defined as a charitable corporation, or a non-charitable corporation that receives more than \$10,000 a financial year in:

- either donations or gifts from persons who are not members, directors, officers or employees of the corporation; or
 - grants or similar financial assistance from government or a government agency
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- The Act makes it mandatory for corporations to make proxies available to members.

However, a not-for-profit corporation may provide in its by-laws other means of voting (by mail, telephone or electronic means) in addition to or in place of voting by proxies.

- The Act clarifies that not-for-profit corporations can engage in commercial activities if the activities advance or support the corporation's not-for-profit purposes.

For example, a corporation can sell t-shirts as long as the profit from the sales is used to support the corporation's not-for-profit purposes.

A not-for-profit corporation may be subject to restrictions on its activities imposed by other legislation such as the Income Tax Act and is encouraged to seek the advice of a tax professional.

- The Act also allows for a simpler process to review the corporation's records in some situations.

For example, a review engagement, instead of an audit, is available depending on the type of corporation and the amount of its annual revenue. And in some cases, both the audit and the review engagement can be waived. A public benefit corporation with annual revenue of \$100,000 or less may be able to do this.

- The Act requires a corporation with two or more classes or groups of members to have the classes or groups set out in the corporation's articles.

Many existing not-for-profit corporations have

these in the by-laws. However, the by-laws must set out the conditions of membership.

- The Act provides clearer rules for corporate governance and increases accountability to members.

For example, a statutory duty of care applies to

directors and officers, requiring them to act

honestly and in good faith with a view to the best

interests of the corporation, and to exercise

reasonable care, diligence and skill.

- The Act sets out a due diligence and good faith reliance defence for directors. This means that a director is not legally liable in certain circumstances if they acted with the care, diligence and skill a reasonably careful person would have acted in similar circumstances.
- The Act also lists specific requirements for directors and officers to report conflicts of interest in certain circumstances.

A conflict of interest may arise where a director sits on the board of two not for profit corporations that intend to enter into a contract with each other or

where a director is an owner of a business that is contracted to perform services for the corporation.

- The Act states that corporations do not always have to include a member's proposal in meeting notices in certain circumstances.

For example, if the proposal does not relate in a significant way to the activities of the corporation, or if the proposal appears to be dealing with a personal claim or personal complaint against the corporation.

- The Act provides members with a number of remedies they can take if they believe directors are not acting in the best interests of the corporation.

For example, members will have access to a broadened compliance remedy and can request the court to order officers and directors to comply with the requirements of the Act, regulations, articles and by-laws of the not-for-profit corporation.

- The Act also gives members greater access to financial records – in addition to seeing the financial statements at every annual meeting,

members can request to receive them no less than 21 days before the meeting.

- For organizations wanting to incorporate as a charitable corporation, the approval of the Office of the Public Guardian and Trustee of the Ministry of the Attorney General is no longer needed. All applications for articles of incorporation will be submitted directly to ServiceOntario.
- It will also no longer be necessary to add the special provisions, which set out some of the duties and obligations of the charity and its directors, to the articles of incorporation of charitable

corporations. But the principles of the special provisions will continue to apply as they reflect aspects of charities law.

- The OPGT will still need to pre-approve applications for articles of amendment, amalgamation and continuation. Applications for articles to change only the name of the charity will now require the approval of the OPGT.
- These organizations will also not need the approval of the Charities Directorate of the Canada Revenue Agency to incorporate. However if applicants are unable to use the OPGT's pre-approved purpose

clauses or the Charities Directorate's model "object" clauses to describe their organization's purposes, applicants should get pre-clearance from the Charities Directorate for tailor-made purpose clauses.

To issue tax receipts to donors, they must make a separate application to the Charities Directorate for a charitable registration number.

As it can be difficult to draft purpose clauses which legally qualify as charitable, the OPGT suggests applicants continue to use the pre-approved purpose clauses to describe the purposes of the

corporation. These are available on the Attorney General's website.

Who is Affected (Slide 9)

- The new Act affects every corporation without share capital that has been incorporated under an Act of the Ontario Legislature, including the current Corporations Act.
- The following types of corporations will NOT be governed by the new Act:
 - Companies with social purposes, which are referred to in the Corporations Act as

companies that have objects in whole or in part of a social nature.

These are share capital social clubs governed under Part Two of the Corporations Act, such as some golf, tennis or country clubs. They will continue to be governed by that Act for a transition period of five years beginning the day the Not-for-Profit Corporations Act, 2010 comes into force.

By the end of the five years, they will need to continue as one of the following types of corporations:

- Non-share capital corporations under the Not-for-Profit Corporations Act, 2010
- Co-operative corporations under the Co-operative Corporations Act
- Share capital corporations under the Ontario Business Corporations Act

It is recommended that these companies get tax and legal advice to determine which of the three Acts they should continue under.

- Insurance corporations are also an exception.

They come under Part Five of the Corporations

Act, and will continue to be governed by that Act.

- Corporations without share capital that are

already governed by the Co-operative

Corporations Act will continue to be governed under that Act.

- There will also be exceptions that are determined by legal statute.

Transition (Slide 10)

- As mentioned, existing Ontario not-for-profit corporations will have a three-year transition period

once the Act comes into effect to make any necessary changes to their incorporation and other documents to bring them into conformity with the Act.

- These documents include letters patent and any supplementary letters patent, which are now articles under the Act, by-laws and special resolutions.
- On the third anniversary of the day the Act comes into effect, any provision of these documents that are valid under the current Corporations Act but do

not conform with the Act will be considered to be amended to the extent necessary to conform.

- This means that some provisions that conflict with the Act may be partially or completely ineffective if not amended before the end of the transition period.
- For example, a corporation's by-laws may require that elected directors serve for five years. Under the Act, a director may only serve a term of up to four years.
- If this by-law is not amended, at the end of the three-year transition period, the maximum term for

the elected directors will be deemed to be four years. If there are other portions of the by-law that conform to the Act, those portions will continue to remain valid.

- Existing not-for-profit corporations are encouraged to review and make any necessary amendments to their documents before the end of the three-year transition period.

Transition Items to Consider (Slide 11)

- In making the transition, these are some items that the existing not-for-profit corporations should consider.

- It is strongly recommended corporations consult a lawyer and/or other appropriate advisors for advice on how the new Act will apply to their individual circumstance.
- Corporations should review the corporation's purposes in the letters patent and supplementary letters patent to make sure they reflect current or proposed future activities and that they are consistent with other laws or court decisions that may govern the corporation.

It is recommended that not-for-profit corporations get professional advice regarding tax requirements.

- Corporations should review any special provisions such as the number of directors, powers of the corporation, and the corporation's membership structure.
- If a corporation has two or more classes of members, this must be set out in the articles. As mentioned earlier, many existing not-for-profit corporation that have these in their by-laws.

Transition Items to Consider (Slide 12)

- When reviewing the by-laws:
- Corporations should check director and officer provisions, such as whether or not directors are members of the corporation, terms of office, director's meetings, and any existing indemnification and insurance, and conflict of interest provisions.
- They should check member provisions such as conditions for each class or group of members, membership qualifications, disciplinary provisions, member's meetings and procedure for requests for

financial statements. Corporations must set out

the conditions for membership in their by-laws.

- Corporations should also review any existing borrowing powers to determine if they should be changed or deleted. Under the new Act, a not-for-profit corporation does not need to pass a by-law for borrowing powers.
- They should consider whether any changes should be made to voting methods in light of the new requirement for mandatory proxies or alternative means of voting at members' meetings, such as mail-in ballot, telephone or by electronic means.

- They should also consider whether or not to add a provision allowing membership transfers otherwise membership may only be transferred to the corporation.

All other by-law provisions should be checked to make sure they are up-to-date and meet the requirements of the new Act.

Transition Tools (Slide 13)

- The Government of Ontario has prepared some tools to help existing not-for-profit corporations

make the transition to the new Act. You will want to check the ministry's website for these tools.

- A transition checklist is available that existing not-for-profit corporations can use as a reference to ensure compliance with the Act. It goes into more detail about the transition items we just discussed.
- Other tools include:
 - A plain language guide that explains the sections of the Act that will likely have the most

impact. The guide is in a question and answer format.

- A draft default by-law that reflects organizational matters dealt with in the new Act.

Existing not-for-profit corporations can use this by-law during the transition period to help review and make any necessary changes to their by-laws.

The default by-law will apply automatically to newly-incorporated not-for-profit corporations that do not pass an organizational by-law within 60 days after the date of incorporation.

Transition Tools Cont'd (Slide 14)

- The government has given a grant to Community Legal Education Ontario (CLEO) to support not-for-profit corporations during the transition period, and will continue to work closely with the Ontario Nonprofit Network (ONN) and sector partners on ways to smooth the transition.

Conclusion (Slide 15)

- More information about the Ontario Not-for-Profit Corporations Act, 2010 is available online at the website address shown.
- Check the website regularly for updates, support tools and to confirm the Act's effective date.