

Ontario's Not-for-Profit Corporations Act, 2010

Date

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- Received Royal Assent on October 25, 2010
- Amendments to more than 80 statutes, including the Act 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.
- Will generally apply automatically to all Ontario not-for-profit corporations
- There will be a three-year transition period for existing not-for-profit corporations once the Act comes into effect
- Sets out how Ontario not-for-profit corporations are created, governed and dissolved
- Provides a modern legal framework for not-for-profit corporations by ensuring greater transparency and accountability in how not-for-profit corporations are governed

Features

- Makes a new distinction between public benefit corporations and other not-for-profit corporations
 - A public benefit corporation is a charitable corporation, or a non-charitable corporation that receives more than \$10,000 a financial year in:
 - donations or gifts from persons who are not members, directors, officers or employees of the corporation; or
 - grants or similar financial assistance from federal, provincial or municipal governments or a government agency
- 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

Features (Cont'd)

- Clarifies that not-for-profit corporations can engage in commercial activities if the activities support the corporation's not-for-profit purposes. There may be restrictions on activities imposed by other legislation (e.g. Income Tax Act)
 - E.g., the corporation can sell T-shirts as long as the profit from sales is used to support the corporation's not-for-profit purposes
- Allows for a simpler process that may be used in place of an audit for reviewing a corporation's financial records in some situations
 - E.g., a review engagement, instead of an audit, is available depending on the type of corporation and the amount of its annual revenue
 - In some cases, both an audit and review engagement can be waived

Features (Cont'd)

- Requires a corporation with two or more classes or groups of members to have the classes or groups set out in the articles (instead of in the by-laws)
 - The by-laws must set out the conditions of membership
- Provides clearer rules for corporate governance and increases accountability
 - E.g., 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

Features (Cont'd)

- Sets out a due diligence and good faith reliance defence for directors
 - 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
- 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

Features (Cont'd)

- States that corporations do not always have to include a member's proposal in meeting notices in certain circumstances
 - E.g., the proposal does not relate in a significant way to the activities of the corporation, or the proposal appears to primarily be dealing with a personal claim or personal complaint against the corporation
- Provides members with actions they can take if they believe directors are not acting in the best interests of the corporation
 - E.g., 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

Features (Cont'd)

- Provides members with greater access to financial records
 - E.g., upon request, a member is entitled to receive financial statements no less than 21 days in advance of an annual meeting
- Streamlines incorporation as a charitable corporation – no longer requires Office of the Public Guardian and Trustee (OPGT) approval
 - All applications will be submitted directly to ServiceOntario
 - It will no longer be necessary to add the special provisions, that set out the duties and the 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
 - OPGT will still need to pre-approve applications for articles of amendment, amalgamation and continuation, as well as to approve changes to the charitable corporation's name

Who is Affected?

- Generally, it will apply automatically to all Ontario Not-for-Profit Corporations
 - i.e. every corporation without share capital incorporated under an Act of the Ontario Legislature, including the current Corporations Act (CA)
- Exceptions include:
 - Companies that have objects in whole or in part of a social nature, such as share capital social clubs governed under Part II of the CA (i.e. some golf, tennis or country clubs), will continue to be governed by the CA for a period of five years. After that, they must continue as:
 - A non-share capital corporation under ONCA; or
 - A co-operative corporation under the Co-operative Corporations Act, or
 - A share capital corporation under the Ontario Business Corporation Act
 - Insurance corporations under Part V of the CA will continue to be governed by that Act
 - Corporations without share capital to which the Co-operative Corporations Act applies
 - If a statute expressly provides otherwise

Transition

- Existing not-for-profit corporations will have a three-year transition period once the Act comes into effect to make any necessary changes to their incorporating and other documents (letters patent and any supplementary letters patent, by-laws and special resolutions) to bring them into conformity with the Act
- On the third anniversary of the date the Act comes into effect any provision in these documents that is valid under the Corporations Act, but does not conform with ONCA will be considered amended to the extent necessary to conform
- Existing corporations are encouraged to review their documents before the end of the transition period

Transition Items to Consider

- Letters patent and supplementary letters patent
 - Review the corporation's purposes to make sure they reflect current or proposed future activities and are consistent with other laws or court decisions which may govern the corporation
 - Review special provisions such as the number of directors, powers of the corporation and the corporation's membership structure
 - If the corporation has two or more classes or groups of members, at least one class or group needs to be given the right to vote at member meetings, and this must be set out in the articles (letters patent and supplementary letters patent are articles under the Act). Many existing not-for-profit corporations have these in their by-laws

Transition Items to Consider (Cont'd)

- By-laws
 - Review director and officer provisions, for example, to make sure a director's maximum term of office is in line with the Act
 - Review member provisions
 - Review borrowing powers. Under the new Act, a not-for-profit corporation does not need to pass a by-law for borrowing powers
 - 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
 - Check whether conditions required for being a member are set out in the by-laws
 - Consider whether or not to add a provision allowing membership transfers

Transition Tools

- A transition checklist that existing not-for-profit corporations can use as a reference to ensure compliance with the Act
- A plain language guide that explains the sections of the Act that will likely have the most impact
- A draft default by-law:
 - Existing not-for-profit corporations can use the draft default by-law to help review and make any necessary changes to their by-laws during transition
 - 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)

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

Questions?

- More information is available online at www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx
- Check regularly for updates, support tools and to confirm the Act's effective date