

UPDATE ON ONTARIO NOT-FOR-PROFIT CORPORATIONS ACT, 2010

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New Proclamation Date

The Ontario *Not-For-Profit Corporations Act, 2010* (the “ONCA”), which was passed in 2010, was originally scheduled to come into effect on January 1, 2013. However, the new proclamation date was extended to July 1, 2013, and on March 28, the Ministry of Consumer Services (“MCS”) announced that the Act will now not be proclaimed before January 1, 2014 at the earliest:

The government will delay proclamation of ONCA to provide additional time for not-for-profit corporations to prepare for transition. The Act is now targeted to be proclaimed no earlier than January 2014. An update on proclamation will be made available on the Ministry's website at <http://www.sse.gov.on.ca/mcs/en/Pages/Not For Profit.aspx>.

I am pleased to advise that the Minister of Consumer Services has approved a grant to Community Legal Education Ontario (CLEO) to develop and deliver a program that will build awareness about ONCA and provide a variety of supports to not-for-profit corporations as they make the transition to the new Act. This grant is being funded through contributions by the Ministry of Consumer Services, the Ministry of Citizenship and Immigration, and the Ministry of Tourism, Culture and Sport.

In addition to the grant to CLEO, MCS and the Ministry of Government Services are continuing to finalize tools to support implementation (e.g., plain language guide, draft default by-law, electronic toolkit). Additional tools (e.g., transition checklist) and information can be found on MCS' website.

The government is committed to reviewing the Act following proclamation based on experience in the sector, including the issues that the ONN [Ontario Non-Profit Network] has raised on behalf of its members. The government is exploring the possibility of holding back from proclamation the provisions of the Act giving voting rights to non-voting members in certain limited circumstances, which is a key sector concern. Where the case for amendments to improve the Act is made, the Ministry will seek to bring reforms forward for consideration.

A number of non-profit organizations, including ONN (and some individual non-profits, had written to MCS expressing concern about the provisions of the ONCA extending voting rights to non-voting members and to separate membership classes. On March 27th the Minister wrote to ONN to deal with this issue, in slightly different language than the letter on the MCS website:

- I understand that enhancements to members' voting rights are of particular concern, and I have asked my ministry to put a priority on reviewing these provisions.

- With respect to the ONCA's extension of limited voting rights to non-voting members, I will be recommending that these provisions not come into force for at least three years following proclamation of the Act. I intend to undertake a thorough consultation across the sector to assess how this issue should be addressed to serve the interests of corporations, their boards and their members.

Companies Statute Law Amendment Act, 2013 (Bill 85)

On June 5, 2013, Minister of Consumer Services tabled Bill 85, which proposes technical amendments to a number of corporate law statutes, including the ONCA and the *Corporations Act* (“OCA”), in preparation for a new electronic registration and information system. The most important of these is that the definition of “telephonic or electronic means” has been expanded from the version in the ONCA to apply to current and future technologies and will now be identical in all Ontario corporation law statutes.

Schedule 7 – ONCA

Schedule 7 of Bill 85 proposes a number of significant amendments to the ONCA transitional provisions, as well as one or two which will impose additional requirements on corporations.

The Bill proposes additional subject matter which may be dealt with in regulations. It also provides that the Director appointed under the Act may establish additional requirements for filing articles, certificates and other documents, and may provide “approved” documents to be used for various purposes, e.g., the form of written director’s consent required to be provided under s.24(8) of the ONCA.

In recognition of the concerns about non-voting members being given voting rights under ss. 105(2), 111(3), 116(3) and 118(4), new s.249 delays the coming into force of these sections until proclamation, which cannot be earlier than the third anniversary of the date of proclamation of the ONCA. No change is proposed to s.105 of the ONCA giving class voting rights in certain circumstances. They will be in effect on proclamation.

The new s.207 has been extensively redrafted with a view to clarifying the effect of the transitional provisions, including the three-year period during which non-conforming provisions in the letters patent, by-laws and special resolutions will remain in effect. However, it would be preferable if the language of proposed s.207(1) could be slightly amended to ensure that existing membership classes will not have a separate class vote during the transition period if they did not vote separately as classes under the existing letters patent or by-laws. More problematic is the proposed new s.207(6), which states:

- (6) Any provision or portion of a provision in a corporation’s by-laws or special resolution that is required by this Act to be contained in the corporation’s articles must be contained in the articles before the third anniversary of the day this section comes into force, failing which those provisions or portions of them become invalid on the third anniversary of the day this section comes into force.

The result of this section would appear to make otherwise compliant provisions invalid unless they have been incorporated into articles of amendment during the transition period, including special resolutions fixing the size of a board and by-law provisions establishing different classes of members. This could result in serious disruption to the governance of many corporations that have not filed articles of amendment during the transitional period. The section would appear to conflict with the existing s.207(5) – formerly s.207(2) – which will deem articles and by-laws to be amended to bring them into conformity with the ONCA at the end of the transitional period. This section could have been expanded to provide that conforming provisions in by-laws or special resolutions will be deemed to be in the articles.

New ss.207(2) and (4) will also prevent corporations from changing their articles, by-laws or special resolutions during the transitional period unless they also make all changes required to bring them into conformity with the ONCA. The net result of these changes will be to force many corporations to file articles of amendment or amend their by-laws, or both, during the transition period.

Schedule 3 – OCA

Schedule 3 of Bill 85 proposes amendments to the OCA to clarify the process for continuance of share capital social clubs under other corporate statutes. Most notably, s.2.1 will be revised by adding a new s.2.1(2), which provides that a separate class vote of each class of shareholders will be required to approve the continuance. Section 2.1(4), formerly 2.1(3), will prevent such corporations from amending their letters patent after proclamation – assumed to be January 1, 2014 – to bring them into compliance with the Act under which the corporation is applying to be continued. This will require share capital social clubs to address any shareholder issues prior to the end of this year. A complementary amendment to the ONCA adds s.1(9) to clarify that, for the purposes of the ONCA, corporations incorporated under Part II of the OCA are not incorporated under a “predecessor act” to the ONCA. Accordingly, if social clubs choose to continue under the ONCA the provisions of s.115 will clearly apply.

Schedule 8 – Other Acts

Schedule 8 contains amendments to 79 acts, mainly in order to replace references to the OCA with references to the ONCA. However, some of these corporations have provisions which will allow for the application of specific provisions of the ONCA to be established by regulation. It will be necessary for these corporations to request a new regulation for this purpose. In addition, there may still be a number of special act corporations not covered in Bill 85 which will need to apply for amending legislation to replace references to the OCA.

Regulations

Responsibility for implementation of the legislation rests with MCS and the Ministry of Government Services (“MGS”), each of which is to prepare regulations relating to their respective areas of responsibility. A summary of both sets of proposed regulations was posted on the Regulatory Registry website on July 17, 2012. A draft of the MCS regulation was provided on a confidential basis to the Advisory Group in December 2012 and we were given the

opportunity to make submissions. We have not yet seen a revised draft MCS regulation. In addition, we have not seen a first draft of the proposed MGS regulation, which will mainly deal with corporate names and the procedures for incorporation and subsequent filings. We expect to see the draft regulations in the reasonably near future. We are hopeful that, once both sets of regulations are released, there will be time during which submissions may be made to the two Ministries. Once this period ends, MCS and MGS will make the regulations, which will be published on e-Laws and in the Ontario Gazette.

Default Organizational By-law

On April 22nd MCS posted a revised draft of the default organizational by-law which, in accordance with s.18 of the ONCA, will automatically apply to a corporation if it does not adopt a by-law within 60 days of incorporation. The by-law may be found at http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx. We are pleased that many of the changes to the original draft which were suggested in a joint submission of our Section and the Business Law Section have been incorporated in this draft.

Plain Language Guides

A revised version of the Plain Language Guides was posted on the MCS website on May 8, 2013.

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