

Now in Effect: Amendments to Ontario Charities and Not-For-Profit Laws

Corporate & Commercial | Corporate Law | Non-Profit & Charities | Non-Profit and Charities

19 December 2017

On November 14, 2017, Bill 154, *Cutting Unnecessary Red Tape Act, 2017* ("Act"), received Royal Assent. The Act brings much needed reform to the Ontario *Corporations Act* ("OCA"), the Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") and the *Charities Accounting Act* ("CAA").

The OCA is the governing corporate legislation for Ontario not-for-profit corporations as the charity and not-for-profit sector continues to wait for the proclamation of the ONCA. The ONCA is not expected to be proclaimed into force until 2020 at the earliest. The OCA was last substantially updated in 1953 and does not properly support modern corporate practices. Corporations incorporated under the OCA often do not have either the rights or the guidance given to corporations under more modern statutes, such as the *Canada Not-for-profit Corporations Act* ("CNCA").

The Act offers some interim relief from the outdated provisions of the OCA. The new provisions are a modest attempt to update the OCA to align with more modern corporate practices. Certain sections came into force immediately, while other changes will become effective 60 days later, on January 13, 2018. A third group of changes will come into effect on a date, as yet unknown, to be set by the provincial government.

Changes in force as of November 14, 2017

The following changes to the OCA may require corporations to amend their by-laws if they wish to implement any of them:

- Notice of members' meetings may be given in writing 10 days or more before the date of the meeting, by various methods that include delivery by electronic means such as email or posting on a website where it will be accessible by the member so as to be useable for subsequent reference and capable of being retained by the member. Notice given by mail must be sent by prepaid mail to the member's last address as shown on the corporation's books;
- A corporation may now hold members meetings by telephonic or electronic means, unless its by-laws provide otherwise. This can reduce administrative costs and make it easier for members who are out-of-town or unable to attend in person to participate in a meeting;
- Directors may now be removed by a simple majority vote of members, except those who are directors by virtue of their office (i.e., *ex-officio* directors). Most corporate by-laws require a two-thirds majority membership vote to remove a director. Therefore, a by-law amendment would be needed to rely on this new rule; and
- The by-laws of a corporation may now permit non-members (with their consent in writing) to be elected to the board of directors. Corporations with complicated membership structures may want to amend their by-laws to take advantage of this new rule, but where a corporation has mainly corporate members, this can result in an awkward membership structure.

The following changes will apply automatically and no action need be taken by corporations to put them into effect:

- In the event of a conflict, special legislation and charity law will prevail over the OCA;
- Corporations may adopt contracts entered into prior to incorporation and upon such adoption, are immediately entitled to the benefit of such contracts and the person who purported to act on behalf of the corporation ceases to be bound by or entitled to the benefits under the contract; and
- If a corporation has no directors or members, it is now possible for a court to make an order appointing the required number of directors.

Changes in force as of January 13, 2018

Now in Effect: Amendments to Ontario Charities and Not-For-Profit Laws

The following changes will apply automatically on January 13, 2018 and no action need be taken by corporations to put them into effect:

- There is now a lower approval threshold for members to waive the appointment of an auditor and not have an audit. Previously, all corporations were required to have audited financial statements, except that if all of the members agreed, a corporation with less than \$100,000 of “income” could dispense with an audit. Under the Act, the term “income” has been replaced with “revenue” for greater clarity and members may now, by an extraordinary resolution, decide not to appoint an auditor and not to have an audit in respect of a financial year if the corporation had annual revenue in its last financial year of no more than \$100,000 or such other amount as may be prescribed by regulations under the Act. An “extraordinary resolution” requires approval of at least 80% of the votes cast at a general meeting, or must be consented to in writing by each voting member;
- Corporations will have the full capacity, rights, powers and privileges of a natural person. Therefore a by-law will no longer be needed to confer any particular power on a corporation or its directors. A corporation’s acts will be valid even if the corporation has acted contrary to the letters patent or other instrument of incorporation, by-laws or the OCA. However, such contrary acts can still be challenged by a concerned party and directors may be personally liable for authorizing them;
- Directors and officers will be subject to a statutory objective standard of care – that is, they must act honestly and in good faith with a view to the best interests of the corporation and they must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The OCA was previously silent on the applicable standard of care and the common law subjective standard applied, which held professional directors to a higher degree of accountability based on their particular expertise and experience; and
- A corporation may not export or continue its legal status out of the OCA into the laws of another jurisdiction unless the laws of that other jurisdiction provide appropriate protection for the claims of the members and creditors of the corporation.

What’s Next?

Not all new provisions will be of interest to existing corporations. While a number of the changes will make it easier for corporations to govern themselves and comply with their obligations under the OCA, corporations should consider whether and how much they stand to benefit from some of these new provisions.

If a corporation chooses not to amend its by-laws, any provisions contained in its letters patent, supplementary letters patent or by-laws will continue to be valid until the 3rd anniversary of the ONCA coming into effect. After that date, the applicable ONCA provisions will be deemed to apply and the prior OCA provisions will no longer be effective. The ONCA will permit corporations to amend their by-laws to bring them into effect and it will then be possible to make some minor amendments within the 3-year transition period without triggering the other provisions of the ONCA that would overturn existing valid provisions for the balance of the three years.

Depending on their membership and governance structure, it may be more worthwhile for some corporations to wait until the ONCA comes into effect before amending their by-laws. To determine whether a by-law change is suitable for a corporation, Gardiner Roberts LLP would be pleased to assist.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

Author



Clifford S. Goldfarb

Counsel

416.865.6616

cgoldfarb@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com