

Social Clubs with Share Capital and the ONCA

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Transition Requirements for Share Capital Social Clubs Under the Ontario *Corporations Act* on Proclamation of the Ontario *Not-for-Profit Corporations Act, 2010*

There are 148 share capital social clubs currently in existence in the province of Ontario[1]. These are non-profit companies with share capital incorporated under Part II of the Ontario *Corporations Act* (the “OCA”). These clubs include golf, tennis and social clubs in which the members, or some of them, hold shares in the company. Many of these clubs have letters patent issued many decades ago. In some cases we are aware of, the original share structures included both common and preferred shares, as well as voting and non-voting shares. Some of these were issued to the club’s founders so long ago that it is no longer possible to determine who holds the shares that were originally issued. Often it is these “founders’ shares” which have the right to participate in the distribution of the assets of the club when it is wound up. In some cases the shares held by the current members do not have the right to participate beyond their paid-up amount, usually \$1.00 per share.

Transition when the Ontario *Not-for-Profit Corporations Act, 2010* (the “ONCA”) comes into effect

In 2010, as part of the process required to facilitate the proclamation of the ONCA, the OCA was amended to provide transitional provisions for “a corporation with share capital that has objects in whole or in part of a social nature”, described in the header as “share capital social clubs”[2]. The OCA was again amended on 14 November 2017 as part of the process to facilitate proclamation of the ONCA[3]. Included in these amendments is a new term, “social company”, defined as “a company that has objects in whole or in part of a social nature”[4]. A “company” is defined as a corporation with share capital. Accordingly, the transitional provisions described below will still apply only to social clubs with share capital[5].

When the ONCA comes into effect, anticipated to be in 2020, social clubs without share capital which were incorporated or continued under Part III of the OCA will be automatically continued under the ONCA without any further action being required on their part. However, the OCA, unless otherwise provided, will continue to apply to share capital social companies incorporated under the OCA, as well as to those incorporated under a special act of the Ontario legislature, or under any general or special corporate legislation of pre-Confederation Ontario or the former Province of Canada (i.e., the combined former Colonies of Upper Canada and Lower Canada between 1841-1867), with a head office and business activities in Ontario[6].

How the OCA will apply to share capital social companies after the ONCA comes into effect

Share capital social companies will automatically be dissolved five years after the ONCA is proclaimed unless, prior to that date, they have applied to be continued under one of three Ontario statutes:

- ONCA;
- *Co-operative Corporations Act*; or
- Ontario *Business Corporations Act*[7] (the “OBCA”).

In order to continue, they will have to pass a special resolution, which is one passed by the board of directors and confirmed, with or without variation, by a two-thirds majority of the votes cast at a duly called special or general meeting of the shareholders, or signed by 100% of the voting shareholders[8].

If a social company has more than one class of shareholders, each class must approve the continuance by a separate special resolution, thereby giving each class a veto[9]. Unfortunately, the section simply refers to “class of shareholders” and does not make it clear whether non-voting shareholders will be given a vote in this situation. The section of the ONCA which allows non-Ontario corporations to be continued under it refers only to voting shareholders[10]. Possibly this

anomaly will be clarified by further amendment to the OCA or the regulations or forms put in place to implement it.

If the company is unable to obtain a quorum for each class of shareholders, it can apply to a court for an order waiving shareholder approval[11]. The court may make the order if it is satisfied that reasonable efforts have been made to locate shareholders and notify them of the meeting. The order may be subject to appropriate terms and conditions in the circumstances[12]. This procedure will be helpful where the founding shareholders and their heirs no longer have a connection to the club and can't be found.

A company must file a copy of any certificate of continuance with the Ontario Companies Branch within 60 days after issuance[13].

Despite any other legislation, no governmental consent will be required for the continuance[14].

During the five-year period until continuance, the company may not amend its letters patent under the OCA to bring them into compliance with the Act under which it proposes to be continued[15]. Any such amendments would have to be made on continuance to the new Act.

Consequences of failure to continue

Failure to continue under one of the three Acts will result in the company being automatically dissolved one day after the expiry of the five year period[16].

Social companies dissolved on this basis will be deemed to continue to exist for the sole purpose of holding a meeting of members to pass a special resolution to continue under one of the three Acts, to apply to a court for an order waiving the requirement for a special resolution and to file articles of continuance under one of the three Acts[17]. In that case the company would be revived on the date a certificate of continuance is issued and is deemed for all purposes to have never been dissolved – subject to any conditions imposed by the Director under the OCA and to the rights of any person acquired during the period of dissolution[18]. The period of time during which a dissolved social company can apply to continue will expire 20 years after the original five-year period has run (i.e., 25 years after the ONCA comes into effect), after which the provisions relating to revival will be repealed[19].

Steps to consider in preparing for the transition

Share capital social clubs that have not already done so should now begin to prepare for the new corporate regime. While they will have up to five years after the ONCA comes into effect before being required to continue, there are a number of issues that should be reviewed, and action taken, if desirable, prior to proclamation of the ONCA:

- Institute a process to review the corporate structure, locate missing shareholders and eliminate their right to expropriate the value of the club's assets on winding-up.
- Make necessary and desirable changes to the letters patent and by-laws to facilitate continuance to the statute of choice.
- Clubs which continue under the ONCA will be required to eliminate their share capital on continuance. The ONCA currently does not require this, but it is provided for when a non-Ontario share capital corporation applies to continue[20], and it is likely that the regulations and forms under the ONCA will contain a similar provision. This could result in a windfall for the holders of the "founders shares", underscoring the necessity of analyzing their existence and development of a plan to minimize their effect.
- Many clubs will likely find it appropriate to continue as non-share corporations under the ONCA, rather than under the OBCA or the *Co-operative Corporations Act*. However, that decision is subject to a number of tax and other considerations beyond the scope of this article, including whether or not to continue as a for-profit or not-for-profit corporation.
- Clubs which have decided to become non-share capital corporations should consider transitioning from Part II of the OCA to Part III prior to the ONCA coming into effect.
- It is possible for an OCA company to continue under the *Canada Not-for-Profit Corporations Act* now[21]. The process is similar to that which will apply to continuance under the ONCA.
- Clubs which intend to remain as share capital corporations should consider continuing to the OBCA now.

[1] Communication from Service Ontario, 27 April 2018.

[2] New s.2.1(1). It is intended that these provisions would only come into effect simultaneously with the proclamation of the ONCA.



[3] S.O. 2017, c.20, Sched. 7

[4] OCA, s.1

[5] OCA, s.1.

[6] OCA, s.2.1(a)

[7] OCA, s.2.1(1)

[8] OCA, s.1

[9] OCA, s.2.1(4)

[10] ONCA, s.115(2)-(3)

[11] OCA, s.2.1(7)

[12] OCA, ss.2.1(4) and (5)

[13] OCA, s.2.1(6)

[14] OCA, s.2.1(2)

[15] OCA, s.2.1(3)

[16] OCA, s.2.1(7)

[17] OCA, s.2.1(8)

[18] OCA, s.2.1(9)

[19] S.O. 2017, c.20, Sched. 7, s.4(2)

[20] ONCA, s.114(3)

[21] S.C. 2009, c.23, s.211

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