

## Non-Profit and Charity Law

October 2013

### Update on the New Rules for Non-Profits and Charities: What to Do Now

As we advised in our July 2011 newsletter, both the Federal and Ontario governments have enacted new laws that change the way not-for-profit corporations (“NFPs”) are governed. This bulletin provides an update and covers some of the things NFPs should be doing to comply with these new regimes.

Golf Clubs, Sports and Athletic Organizations, Community Groups and Ratepayers’ Associations, Social Clubs, Service Clubs, Religious Organizations, Professional Associations, Long-Term Health Care Facilities, registered charities—there are many non-profit and charities in Ontario and many businesspeople are involved in one way or another with one or more of them.

If you are involved in the governance of an NFP as an officer, director or in some other capacity, you should be thinking about the steps your organization will have to take in order to comply with the new rules. This newsletter will help you understand what you need to do to transition to the new legislation.

The *Canada Not-for-Profit Corporations Act* (the “new Federal Act”) is now in force, so federally-incorporated NFPs can proceed with the required changes (discussed below). In contrast, the Ontario government has recently announced that the *Ontario Not-for-Profit Corporations Act, 2010* (the “new Ontario Act”) will not come into force until after January 1, 2014. As some amending legislation was introduced earlier this summer, mid-2014 may be a more realistic effective date for the new Ontario regime.

The new Federal Act and the new Ontario Act require all NFPs to make the transition to the new rules within three years of the legislation coming into effect.

#### The New Federal Regime

As the new Federal Act has been in force since October 17, 2011, every existing federally-incorporated NFP will have to transition to the new Federal Act by applying for a continuance by October 17, 2014. A federal NFP that fails to do so will be considered inactive and will be dissolved by Corporations Canada.

To make the transition, you must replace your letters patent and by-laws with new governing documents that comply

with the new Federal Act. In most cases, these documents will have to be substantially rewritten to comply with the new rules. In particular, the new Federal Act contains certain mandatory provisions that must be included in the by-laws. You should start the process by reviewing your governing documents. Once the review is complete, articles of continuance and new by-laws must be approved by the NFP’s members and then filed with Corporations Canada.

As the new Federal Act will apply to the NFP as soon as a Certificate of Continuance has been issued, your by-laws should be revised to comply with the new Federal Act **before** the articles of continuance are filed.

If you work with a registered charity (or an organization planning to seek charitable registration) you should be aware that the transition process may affect its registered charity status. The Canada Revenue Agency’s Charities Directorate has published guidance regarding governing documents and the requirements for the number of directors.

Industry Canada recently announced that as of June 2013, the vast majority of the estimated 17,000 federal NFPs required to make the transition still had not applied for continuance. This means that you should proceed with continuance as soon as possible to avoid getting caught by a backlog of applications and face possible dissolution. With the deadline only a little over a year away, now is a good time to start the process.

#### The New Ontario Regime

While the new Ontario Act was passed on October 25, 2010, it will not come into effect until sometime in early to mid-2014. Once the new Ontario Act comes into effect, it will generally apply automatically to all Ontario NFPs. Existing Ontario NFPs will, however, have a three-year transition period to make any required changes to their governing documents, including letters patent, supplementary letters patent (if any), by-laws and special resolutions.

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Ontario NFPs should take advantage of the opportunity to review and prepare for the new rules before the clock starts ticking on the transition period. You should be aware that the new Ontario Act grants voting rights (in certain circumstances) to members who would not have the right to vote on corporate decisions under the existing legislation. You should review your membership structure and decide whether you have non-voting members of various class of members that need to be revised. Note, however, that the Ontario government has now proposed to amend the new Ontario Act so that provisions giving non-voting classes of members the right to vote will not come into effect until after the three-year transition period has expired. Assuming that these amendments are adopted, the issue of unwanted non-voting membership class can likely be addressed during the transition period.

Given that the new Ontario Act is significantly different from the old legislation, your existing governing documents will also need to be reviewed. You may have to amend your letters patent, supplementary letters patent (if any), by-laws and special resolutions. Once the transition period is over, these documents will automatically be considered amended to the extent necessary to conform with the new Ontario Act, with the result that some provisions that conflict with

the new rules will be partly or completely ineffective after the three-year transition period.

NFP corporations with share capital currently governed by the existing legislation and having objects of a social nature will have to pay special attention to the new rules. These types of share corporations with social purposes, such as golf, tennis or country clubs, will have five years after the coming-into-force date to decide whether to continue as a non-share capital corporation under the new Ontario Act, as a co-operative corporation under the *Co-operative Corporations Act* or as a share capital corporation under the Ontario *Business Corporations Act*. These types of NFPs should seek legal and tax advice in deciding how to structure their continuance.

It's not too early to start familiarizing yourself with how the new Ontario Act will change your future corporate structure and governance and how you will need to transition to the new regime. Reviewing your governing documents and the new rules now will help you plan for a smooth transition once the new Ontario Act comes into force.

If you require any assistance in making the transition to either the new Federal or the new Ontario Acts, please contact a member of our Non-Profit and Charity Law Group.

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