

Update on the Ontario *Not-for-Profit Corporations Act, 2010*

Although the new Ontario *Not-for-Profit Corporations Act, 2010* (the “ONCA”) received Royal Assent on October 25, 2010, it has not yet come into effect. It will only come into effect on a date (known as the “proclamation date”) to be determined by the provincial government. The proclamation date was originally anticipated to be July 1, 2013, but that date has long since passed with no new proclamation date in sight. As a result, Ontario non-share capital corporations continue to be governed by the now antiquated Ontario *Corporations Act* (the “OCA”).

The Ontario Ministry of Government and Consumer Services (the “Ministry”) recently announced on its website that it will provide the non-profit sector with at least 24 months’ prior notice of the proclamation date, but that will only happen once two things occur, namely: (1) the Legislative Assembly passes technical amendments to the ONCA and its related acts; and (2) technology at the Ministry is upgraded to support the changes introduced by the ONCA and improve service delivery. As of the date of this newsletter, the Ministry has not provided any hint of a proclamation date and so it appears that the earliest that the ONCA could come into effect is mid-2018, but it will likely be much later.

Many Ontario non-share capital corporations have been waiting to update their corporate records in anticipation of the coming into force of the ONCA. Almost three years after its original proclamation date and with no real sense of when the ONCA may come into force, these corporations have to decide whether to update their objects and by-laws now or continue to wait for the proclamation of the ONCA before making these changes. None of these options are particularly appealing since the first involves updating the objects and by-laws first knowing that they may have to be updated again in order to comply with the ONCA and the second involves waiting for an indefinite period of time. This has some Ontario non-share capital corporations considering a third option, that is, continuing under the *Canada Not-for-Profit Corporations Act* (the “CNCA”), which was enacted in 2009 and proclaimed into force on October 17, 2011. Before making this move, a number of factors should be carefully reviewed and considered.

First, an Ontario non-share capital corporation considering a move to the CNCA has to determine if such a move is even an option. For some, continuance under the CNCA is not an option. For example, the Ontario *Public Hospitals Act* requires public hospitals in Ontario to be governed by provincial law. As a result, Ontario hospitals cannot continue under the CNCA.

Will the corporation benefit from the national platform offered by the federal jurisdiction? One benefit of the CNCA is that it is federal legislation and, as such, its rules are generally known across the country by lawyers, directors and others conducting business with the corporation. Another benefit is that once the name of a federal non-share capital corporation is approved for use, it provides the corporation with the right to carry on business under that name across the country. Conversely, an OCA corporation has to have its name approved in each province or territory in which it intends to carry on business and it may be disappointed to learn that its name is already in use by another entity in another jurisdiction; which means it has to carry on activities in that jurisdiction under a different name.

Some OCA corporations may be deterred by the financial disclosure they may be required to provide under the CNCA. Specifically, a soliciting corporation (which is a corporation that has received more than \$10,000 in income from public sources, including gifts or donations from non-members, grants from government and funds from another corporation that also received income from public sources, in a single financial year) is required to file its annual financial statements with Corporations Canada. Such financial statements are open to inspection by the public. Conversely, ONCA corporations are not required to file financial statements.

Under both the CNCA and the ONCA, there are circumstances in which a corporation may waive the appointment of a public accountant, but the threshold amounts are different depending on the statute. Under the CNCA, soliciting corporations with annual revenues equal to or less than \$50,000 can elect not to appoint a public accountant, but all members entitled to vote at an annual meeting of members must consent. Conversely, under the ONCA, a public benefit corporation, which is (a) a charitable corporation, or (b) a non-charitable corporation that received external funds (e.g. donations or gifts from non-members or grants or similar financial assistance from government) in excess of \$10,000 in a

financial year, with annual revenues equal to or less than \$100,000 can elect not to appoint a public accountant as long as the members consent by an extraordinary resolution (i.e. the approval of members casting 80% of the votes). We note that the thresholds are different for non-soliciting and non-public benefit corporations.

There also circumstances in which CNCA and ONCA corporations may opt for a review engagement instead of an audit. Again, the monetary values are lower under the CNCA, which means that more non-share capital corporations will be captured by the CNCA. Under the CNCA, a soliciting corporation whose annual revenues are greater than \$50,000 but equal to or less than \$250,000 may opt to have a review engagement instead of an audit as long as its members consent by special resolution (i.e. not less than 2/3rds of the votes cast). Conversely, under the ONCA, a public benefit corporation with annual revenues of more than \$100,000 and less than \$500,000 may elect to have a review engagement instead of an audit if its members consent by an extraordinary resolution. We note that the thresholds are different for non-soliciting and non-public benefit corporations.

In addition, all CNCA corporations must file copies of their by-laws and any by-law amendments with Corporations Canada within 12 months from the date upon which they are confirmed by the members. This requirement can be avoided by ONCA corporations as the ONCA does not require any such filings.

Lastly, a CNCA corporation must file an annual return with Corporations Canada, the cost of which at the time of this newsletter is \$20 if filed online and \$40 in all other cases. Although a small administrative burden, it can be avoided entirely under the ONCA as no such filing or fee is required.

One of the most significant advantages of the CNCA is that it is available now while the date for the coming into force of the ONCA remains in limbo. Still, continuing under the CNCA is not a small undertaking and the immediacy it offers does not necessarily make it the best choice for all OCA corporations. Certain approvals are required and if the corporation is a charity, additional approvals will be required. New by-laws will also be required since the corporation's existing OCA by-laws will not be suitable after continuance.

This newsletter has provided a brief overview of some of the differences between the CNCA and the ONCA that should be considered by an OCA corporation contemplating a move to the CNCA, but there are more. The advantages and disadvantages of each piece of legislation should be carefully weighed before any action is taken. You may wish to consult a lawyer to help you make the best decision for your OCA corporation.



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