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Changes to Laws Affecting Ontario Not-For-Profits and Charities Now in Effect

On November 14, 2017, Bill 154, the *Cutting Unnecessary Red Tape Act, 2017*, received Royal Assent. This Act brings about changes that impact the Ontario not-for-profit and charitable sector as it amends the Ontario *Corporations Act* (OCA), the proposed Ontario *Not-for-Profit Corporations Act, 2010* (ONCA) and the *Charities Accounting Act*. For background information on the new Act and the statutes affected, please see our article [Proposed Changes to Laws Affecting Ontario Not-For-Profits and Charities](#).

This article will highlight some of the important changes to the OCA, which is the current governing corporate legislation for Ontario not-for-profit corporations. The new Act modernizes several outdated provisions of the OCA, and implements various changes that Ontario not-for-profit corporations have been waiting to benefit from under the long-awaited ONCA. While the new Act also amends the proposed ONCA, the ONCA is

still not yet in effect. The Ontario Government has maintained that it will provide two years' notice before the ONCA becomes law.

The amendments to the OCA include allowing members' meetings to be held electronically, providing corporations with increased powers and capacity (which are particularly relevant for obtaining funding and financing), no longer requiring that a director must be a member, and codifying that directors and officers are subject to an objective (rather than a subjective) standard of care. Certain sections come into force immediately, while others are delayed for 60 days.

AMENDMENTS IN FORCE NOVEMBER 14, 2017

The following amendments came into force on November 14, 2017, and will continue in effect until the OCA is replaced by the ONCA:

Technological Updates

The OCA is amended to allow for communication using technologies which include “any means that uses the telephone or any other electronic or other technological means to transmit information or data.” This language encompasses communication by e-mail and telephone.

In particular, effective immediately, notice of members’ meetings can be given electronically, members’ meetings can be held electronically or by telephone (unless the by-laws of the corporation prohibit it), and written members’ resolutions can be circulated electronically. These changes will make it significantly easier for corporations to comply with their obligations under the OCA, and can reduce costs and paperwork.

Under the OCA, certain documents may also now be filed, stored and searched electronically. This will cut down on the cost and paperwork required for corporations to meet their record-keeping and filing obligations, and dealings with the Ontario corporate ministry are expected to be expedited and simplified.

Directors No Longer Need to Be Members

Previously, every director of an Ontario not-for-profit corporation was required to be a member of the corporation. Now, the OCA permits corporations to stipulate in their by-laws that a person can be a director even though he or she is not a

member of the corporation. As such, Ontario not-for-profit corporations may wish to reconsider their governance structures and amend their by-laws accordingly.

Removal of Directors

Prior to the amendments to the OCA, the removal of directors by the members was permitted if the letters patent or the by-laws of the corporation so provided and if approved by a 2/3 vote at a special meeting of the members held for the purpose of considering the removal. Now, the members may remove a director (except those who are directors by virtue of their office) by majority vote at a special members’ meeting without the requirement for a provision in the letters patent or by-laws. However, if the letters patent or by-laws of a corporation that were in effect prior to November 14, 2017 provide for removal in accordance with the old provision of the OCA, that provision will still be in effect and the higher threshold for removal will govern.

AMENDMENTS IN FORCE JANUARY 13, 2018

The following amendments to the OCA will come into force on January 13, 2018, and will continue in effect until the OCA is replaced by the ONCA:

Directors’ Duties and Standard of Care

Directors and officers of not-for-profit corporations have duties to the corporation and its members,

which include the duty of care. The OCA was previously silent on the applicable standard of care and therefore, the standard was based on the case law which provided for a subjective standard, that is, directors had to exercise the same degree of skill and care that could reasonably be expected of someone with similar knowledge and experience. As a result, directors who had particular expertise relevant to their roles as directors (for example, accountants, lawyers, etc.) would have been held to a higher standard than other directors. Consequentially, there was a disincentive for those with desirable qualifications and experience to act as directors of OCA corporations as they were potentially subject to increased liability risk.

In the new year, the OCA will be amended to hold both directors and officers to an objective standard of care, which is the same standard required under the federal not-for-profit corporate statute, as well as other corporate legislation. The objective standard requires directors and officers to act honestly and in good faith, with a view to the best interests of the corporation, exercising the skill that a reasonably prudent person would in similar circumstances.

Audit Exemption

The amendments to the OCA will permit the members of a not-for-profit corporation to waive the requirement to appoint an auditor and to have an audit conducted in a particular financial year if the

corporation's annual revenue in that year does not exceed \$100,000. There will also be the ability for the Ontario Government to pass regulations to prescribe another threshold amount. This waiver must be approved by extraordinary resolution of the members (that is, at least 80% of the votes cast at a special members' meeting called for the purpose of considering the resolution) or by the consent in writing of all of the voting members of the corporation. This resolution, passed in either form, will be valid until the next annual members' meeting.

CONCLUSION

The changes to the OCA will provide Ontario not-for-profit corporations with increased flexibility in their governance and operations, and will cut down on administrative and regulatory costs and burdens that previously made it more onerous to achieve compliance with the corporate legislation. Importantly, it is intended that these changes will simplify the transition for Ontario not-for-profit corporations from the OCA to the ONCA once the latter is proclaimed in force.