

INTRODUCTION OF BILL 65, THE *ONTARIO NOT-FOR-PROFIT CORPORATIONS ACT*

*By Jane Burke-Robertson and Terrance S. Carter**

A. INTRODUCTION

On May 17, 2010, Bill 65, also known as Ontario's proposed *Not-for-profit Corporations Act* (the "ONCA" or the "Bill"), was debated at the second reading stage in the Ontario Legislature. The ONCA previously passed its first reading on May 12, 2010. It will replace the *Corporations Act*, which currently regulates Ontario's not-for-profit corporations. The ONCA represents a significant improvement for Ontario non-share corporations and will, if passed, bring the Ontario non-share corporate laws into conformity with modern corporate statutes across the country.

In a press release issued May 12, 2010, the Ministry of Consumer Services indicates that Bill 65 will provide Ontario's 46,000 not-for-profit corporations with a "modern legal framework to enhance corporate governance and accountability, simplify the incorporation process, give more rights to members, and better protect directors and officers from personal liability."

This *Charity Law Bulletin* provides a glimpse of some of the highlights of Bill 65.

B. HIGHLIGHTS OF BILL 65

The ONCA provides for a system of incorporation "as of right" and replaces the current letters patent system which is subject to the discretion of the Minister. The Bill allows one or more individuals and/or

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corporations to file for articles of incorporation, thus allowing a single charitable corporation, for instance, to be the incorporator for its parallel foundation. Upon receipt of the required documentation and fees, the Director under the ONCA must issue a certificate of incorporation. Instead of the current timing of 6-8 weeks to incorporate a non-share corporation in Ontario, it is anticipated that incorporation under the ONCA will take a matter of a few days.

If a corporation fails to pass organizational by-laws within 60 days after it is incorporated, it will be subject to default organizational by-laws approved by the Director. The corporation may amend or repeal these “default” by-laws at any time.

Under the Bill, corporations are given the capacity, rights and powers of a natural person, subject to any limitation in the ONCA or in the corporation’s articles. For those interested in social enterprise, it is of worth noting that the corporation’s purposes may include those of a commercial nature, but if they do, the articles must state that the commercial purpose is intended only to advance or support the non-profit purposes of the corporation.

Consistent with the current law, a corporation must have a minimum of three (3) directors and the directors must be elected at a meeting of members. However, if the articles permit, the board may appoint one or more additional directors as long as the total number appointed does not exceed one-third of the number of directors elected at the previous annual meeting of members. Of particular note, and unlike the *Canada Not-For-Profit Corporations Act*, the Bill specifically permits *ex-officio* directors or “directors by virtue of their office”. At least 2/3 of the directors must be members of the Corporation, regardless of whether the by-laws otherwise require. This is a change from the current law which requires all directors to be members. The Bill also requires that no more than one-third of the directors of a “public benefit corporation” may be officers or employees of the corporation or its affiliates. A public benefit corporation is defined generally as a charitable corporation or a non-charitable corporation that receives more than \$10,000 in a financial year from public sources, including grants and other assistance from government.

The ONCA provides for an objective standard of care for directors which mirrors the objective standard provided under modern corporate statutes across the country. The ONCA also establishes a due diligence defence and gives directors the right to dissent. However, it does not significantly limit personal liability of directors unlike Saskatchewan’s *Non-Profit Corporations Act, 1995*.

Where membership is concerned, the Bill requires the by-laws to set out the conditions required for being a member. The Bill also specifically permits the by-laws to provide for persons to be members by virtue of office. If the articles provide for two or more classes of members, the by-laws must provide the conditions for membership in each class, the manner of withdrawing or transferring from membership and the conditions on which membership in a class ends. In addition, the articles or by-laws may contain provisions regarding the discipline of members. The ONCA contains detailed provisions relating to membership proposals, members' meetings and voting.

There are a number of remedies available under the Bill. By way of example, the Bill allows a current or former member, officer or director to apply to the court to commence a derivative action where the directors have failed to prosecute or defend an action on the corporation's behalf. In addition, a member who dissents from a decision by the corporation to make a fundamental change is given the right to object to the decision and to have the member's interest terminated on payment of the membership interest in the corporation. Further, a current or former member, officer or director or a creditor may apply to court for a compliance or restraining order where the corporation is not in compliance with the ONCA, the regulations, articles or by-laws.

It should be noted that a special resolution of members is required to authorize most fundamental changes under the ONCA. Where there is more than one class of members, each class of members is entitled to vote separately as a class to approve certain changes affecting their class of membership by special resolution (regardless of whether the class of members otherwise has the right to vote).

The Bill contains comprehensive dissolution and winding up provisions. The rules relating to distribution of remaining property by a corporation on dissolution will depend generally on whether the corporation is a public benefit corporation, a charitable corporation or non-charitable corporation.

Part VII of the ONCA addresses the appointment of the auditor and level of financial review required of corporations under the ONCA. Subject to Section 75, the members are required to appoint an auditor at the annual meeting or a person to conduct a review engagement of the corporation. Section 75 of the ONCA, allows the members of a public benefit corporation to pass an "extraordinary resolution" as explained below to have a review engagement instead of an audit if the corporation had annual revenues in its financial year of more than \$100,000 and less than \$500,000. The members of a public benefit corporation may also pass

an extraordinary resolution to dispense with the appointment of an auditor and to not have an audit or review engagement but only if the corporation had annual revenues in its financial year of \$100,000. Where a corporation is not a public benefit corporation the members may pass an extraordinary resolution to have a review engagement instead of an audit if the corporation had annual revenues in its financial year of more than \$500,000. The members of corporation that is not a public benefit corporation may also pass an extraordinary resolution to dispense with the appointment of an auditor and to not have an audit or review engagement if the corporation's annual revenue in its financial year is \$500,000 or less. Note that the Regulations under the ONCA may prescribe different amounts than those stated in the ONCA.

An extraordinary resolution under this section of the ONCA is one that is approved by at least 80% of the votes cast at a special meeting of members or consented to by each member of the corporation entitled to vote at a meeting of members. An extraordinary resolution only has effect for one year until the next annual meeting of members.

For more information, see Bill 65 available online at http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2347&detailPage=bills_detail_the_bill, Ontario's current *Corporations Act* available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90c38_e.htm, and The Ministry of Consumer Services' Press Release available at http://www.sse.gov.on.ca/mcs/en/Pages/News_12May2010.aspx.