

**CHANGES TO BILL 65, THE ONTARIO  
*NOT-FOR-PROFIT CORPORATIONS ACT, 2010,*  
PENDING THIRD READING**

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

**A. INTRODUCTION**

On September 13, 2010, the Standing Committee on Social Policy (the “Committee”) finished its consideration of Bill 65, The Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”, “Bill 65” or the “Bill”), and sent the Bill back to the Ontario Legislature for third reading. It is anticipated that Bill 65 will receive third reading and Royal Assent soon, but it is likely that Bill 65 will not be proclaimed in force until sometime in 2011. Bill 65 was the topic of a previous *Charity Law Bulletin* in May, 2010.<sup>1</sup> Since then, the Bill has undergone significant changes as it passed through the Committee stage, with many stakeholders in the charities and not-for-profit sector making submissions to the Committee to propose changes to the Bill. Some of these proposed changes were accepted by the Committee and are now included in the legislation. The purpose of this *Charity Law Bulletin* is to highlight some of the key changes proposed to Bill 65.

**B. DEFINITION OF A “CHARITABLE CORPORATION”**

Previously, Bill 65 had used the same definition for “charitable corporation” that is found in subsection 1(2) of the *Charities Accounting Act* (“CAA”). Subsection 1(2) of the CAA states as follows:

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<sup>1</sup> Robertson, J.B. Carter, T.S. Introduction of Bill 65, *The Ontario Not-for-profit Corporations Act*. Available online at: <http://www.carters.ca/pub/bulletin/charity/2010/chylb210.htm>

Any corporation incorporated for a religious, educational, charitable or public purpose shall be deemed to be a trustee within the meaning of this Act, its instrument of incorporation shall be deemed to be an instrument in writing within the meaning of this Act, and any real or personal property acquired by it shall be deemed to be property within the meaning of this Act.<sup>2</sup>

The inherent problem with using the above wording from the CAA to define what constitutes a charitable corporation for the purpose of the ONCA is that the stated intent of section 1(2) of the CAA is simply to identify what corporations are deemed to be trustees for the purposes of the CAA and to ensure that the property acquired by such corporations are deemed to be property within the meaning of the CAA. Using this limited wording as the basis for defining what is a “charitable corporation” for the ONCA would not have been appropriate. In response to suggestions from stakeholders, the Committee recommended changes to the definition of “charitable corporation” in order that it reflect the common law definition of charity that would be consistent with the approach used by Canada Revenue Agency in administering registered charities under the *Income Tax Act*.<sup>3</sup> In this regard, the Committee recommended changing the definition of “charitable corporation” in Bill 65 to read as follows:

“charitable corporation” means a corporation incorporated for the relief of poverty, the advancement of education, the advancement of religion or other charitable purpose, and “non-charitable corporation” means a corporation that is not a charitable corporation.

### **C. PUBLIC BENEFIT CORPORATIONS (PBC)**

In the previous version of Bill 65, a non-charitable corporation that received more than \$10,000 in a year in donations or government grants, gifts or financial assistance would be deemed to have become a Public Benefit Corporation (“PBC”). This would have resulted in some corporations becoming a PBC during their fiscal year. In turn, this would have resulted in compliance challenges for the affected corporations, such as having to make changes to its board of directors and officers during the fiscal year as opposed to an annual general meeting. As a result, the Committee added subsection 1(2) to the definition of a PBC to simplify the process.

(2) Despite the definition of “public benefit corporation” in subsection (1), if a non-charitable corporation that is not a public benefit corporation at the beginning of a

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<sup>2</sup> *Charities Accounting Act*, R.S.O. 1990, c. C.10, s. 1(2). [CAA]

<sup>3</sup> *Income Tax Act*, R.S.C. 1985 (5<sup>th</sup> Supp.), c.1 [ITA]

financial year receives donations, gifts, grants or similar financial assistance as described in that definition in that financial year,

(a) the non-charitable corporation is deemed to not be a public benefit corporation in that financial year; and

(b) the non-charitable corporation is deemed to be a public benefit corporation in the next financial year, as of the date of the first annual meeting of members in that next financial year.

The intent of this new subsection is to prevent the corporation from being non-compliant with the ONCA between the period from its financial year end to its annual meeting.

#### **D. POWERS OF THE DIRECTORS TO ALTER BY-LAWS**

Subsection 17(1) of Bill 65 deals with the powers of the board to alter by-laws. In the earlier version of the Bill, there was some confusion concerning this subsection because it originally stated that the power of the board to alter by-laws could not be used in respect of matters contained in subsection 102(1). Subsection 102(1) deals with fundamental changes to the corporation. The confusion stemmed from the fact that some of the changes described in subsection 102(1) were matters that fit within the articles of incorporation, not the by-laws. The Committee has now amended subsection 17(1) by specifically applying it to only three of the matters in subsection 102(1). It now only applies to the following changes:

- ◆ add, change or remove a provision respecting the transfer of a membership;
- ◆ change to whom the property remaining on liquidation after the discharge of any liabilities of the corporation is to be distributed; and
- ◆ change the method of voting by members not in attendance at a meeting or the members...<sup>4</sup>

#### **E. MEMBERSHIP REQUIREMENTS OF DIRECTORS**

In the previous version of Bill 65, subsection 23(3) required that at least two-thirds of the corporation's directors had to be members. This would have put the ONCA out of step with the *Canada Not-for-Profit Corporations Act* ("CNCA"), and other more modern corporate statutes, such as the *Saskatchewan Non-profit Corporations Act*.<sup>5</sup> There did not seem to be a discernable public policy rationale for this position. This technical requirement would have created confusion and could have resulted in unintentional non-

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<sup>4</sup> Bill 65, *Not-for-Profit Corporations Act, 2010*, 2d. Sess 39<sup>th</sup> Parl., Ontario. ss. 102(1) (g), (j), (l).

<sup>5</sup> *Non-profit Corporations Act*, S.S. 1995, c. N-4.2.

compliance with the ONCA, especially where there was inadequate corporate records or improper record keeping. This provision also seemed to be at odds with the stated goal of the ONCA to simplify the incorporation process and to bring Ontario into line with jurisdictions with modern statutes. Many stakeholders in the charitable and not-for-profit sector recommended to the Committee that this requirement be deleted in the final form of the Bill, a recommendation of which the Committee has agreed.

## F. APPOINTMENT OF ADDITIONAL DIRECTORS

Subsection 24(7) of Bill 65 had originally followed the wording in the CNCA, which required the power to appoint additional directors between annual meetings to be set out in the articles. This would have entailed additional expense and inconvenience for not-for-profit corporations. The Committee changed the wording in this subsection by striking out the phrase, “if the articles of the corporation so provide.” The subsection now reflects the less cumbersome provision found in the Ontario *Business Corporations Act* (“OBCA”).<sup>6</sup>

## G. DIRECTOR'S CONSENT TO ACT

In the earlier version of Bill 65, subsection 24(8) had omitted provisions similar in nature to subsection 119(10) and (11) of the OBCA. These provisions state that a consent given more than 10 days after the election or appointment of a director retroactively cures a defect in appointment and that a consent is not needed on a re-election or re-appointment. As a result, the Committee added two new subsections after subsection 24(8). They are as follows:

(9) Despite subsection (8), if an individual elected or appointed consents in writing after the period mentioned in that subsection, the election or appointment is valid, and

(10) Subsection (8) does not apply to a director who is re-elected or reappointed where there is no break in his or her term of office.

## H. TIME REQUIREMENT TO HOLD FIRST ANNUAL MEETING

Bill 65 had required that the first annual meeting for a corporation be held within 12 months of incorporation, which created some potential problems. For-profit corporations under the OBCA and not-for-profits under the CNCA all have 18 months in which to hold their first meeting after incorporation. The

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<sup>6</sup> *Business Corporations Act*, R.S.O 1990, c. B.16. [OBCA]

reason for the 18 month window is evident when you consider a corporation that was incorporated on January 1<sup>st</sup> and has a December 31<sup>st</sup> fiscal year end. It would simply be impossible to comply with the 12 month rule and have appropriate reporting completed. At Committee, the 12 month requirement was changed to a more practical 18 month requirement.

## **I. MEMBER APPROVAL OF CONFLICT OF INTEREST DECISIONS**

Subsection 41(7) of Bill 65 deals with situations of directors' decisions and conflicts of interest. This section requires that the members must approve decisions made by the directors when all of the directors are in a conflict of interest situation. There are some situations in which it would not make sense to refer questions to the membership and, as such, the Committee recommended amending the section and limiting the application of this rule to exclude three specific types of transactions from the power of membership approval:

- ◆ those transaction related primarily to remuneration of directors of the corporation or an affiliate;
- ◆ those transactions for indemnity or insurance under section 46; or
- ◆ those transactions with an affiliate

## **J. COURT ORDERED LATE MEETING**

Subsection 52(2) of the earlier version of Bill 65 required Ontario not-for-profit corporations to apply to court for an extension of the deadline to call an annual meeting of the corporation. Placing an additional expense and inconvenience of needing to obtain court authorization to extend time for holding annual meetings for not-for-profit corporations did not make sense when for-profit corporations were not required to do this. As such, the Committee, recommended removing this subsection.

## **K. OTHER CHANGES**

Other changes to Bill 65 made at Committee included improving the court approval of arrangement contained in subsection 119(4). The practicality requirement was dropped and an approach that followed the wording of the OBCA was adopted. The rights of dissenting members, which is contained in section 186, has

been amended by adding a new subsection that applies the right to dissent on conversion to a cooperative corporation.<sup>7</sup>

#### L. RECOMMENDATIONS NOT ACCEPTED BY COMMITTEE

Some of the recommendations submitted to the Committee were not accepted. Most important among these was the recommendation to include a partial liability shield for directors and officers similar to that found in section 112.1 of the Saskatchewan *Non-profit Corporations Act*. The lack of a partial liability shield could hinder the ability of non-profit organizations to recruit leadership to act as directors and officers of the corporation. Most directors and officers of charities and non-profits take on the positions as volunteers. The prospect of personally funding a defence along with the risk of an adverse judgment may deter some individuals from accepting positions as directors or officers.

Bill 65 includes a section (s. 65), which contains a mandatory provision for solicitation of proxies. It had been recommended by some sector stakeholders that a better alternative would have been to provide the option for membership voting by secret ballot. This recommendation was not accepted.

Bill 65 gives voting rights to non-voting members in certain situations.<sup>8</sup> There are circumstances where giving non-voting members a vote may be justified. For example, non-voting members should be allowed to vote on changes that will affect their membership class, or where they have an economic interest at stake. In the vast majority of cases, however, giving non-voting members voting rights is not justified. For example, some sports organizations have a separate non-voting class for non-resident members. This allows those members to participate in the sport when in other towns but outside of this they have no other involvement with the organization. In some churches, the voting members are the religious leaders (i.e., elders, pastors, etc.) and the congregant members are considered non-voting members. These are just two examples of when it would not make sense to give the non-voting members voting rights in the corporation. However, no changes in this regard were recommended by the Committee.

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<sup>7</sup> Bill 65 *Not-for-Profit Corporations Act, 2010*, 2d. Sess 39<sup>th</sup> Parl., Ontario, s.186 (c.1)

<sup>8</sup> For more detailed information on how the power is exercised see subsections 110(3), 115(3) and 117(4) of Bill 65.

## M. CONCLUSION

The much anticipated third reading of Bill 65, as amended by the Committee recommendations, will represent a major improvement to the ONCA as the new corporate statute for charities and not-for-profit organizations in Ontario. While not without flaws, Bill 65 will bring Ontario law in this area into better conformity with other modern corporate statutes across the country. Although there remains some areas of concern, the expected final version of Bill 65, reflecting changes recommended by the Committee, will be a significant and welcome improvement over the earlier version of Bill 65.