
BILL 85 TO AMEND ONTARIO NOT-FOR-PROFIT CORPORATIONS ACT, 2010

By Theresa L.M. Man *

A. INTRODUCTION

Following the announcement by Ontario's Ministry of Consumer Services at the end of March 2013, delaying the proclamation of the Ontario *Not-for-Profit Corporations Act, 2010*¹ ("ONCA") from July 1, 2013, to January 2014 at the earliest, new amendments to the ONCA embodied in Bill 85² were released on June 5, 2013. These new proposed changes to the ONCA will have significant impact on the application of the ONCA to Ontario corporations.

Bill 85 proposes technical amendments to a number of corporate law statutes, including the ONCA and the *Corporations Act*³ ("OCA"), *Business Corporations Act*, the *Business Names Act*, the *Corporations Information Act*, the *Extra-Provincial Corporations Act*, the *Limited Partnerships Act*, as well as 79 other Acts consequential to the ONCA. The majority of the amendments are of an administrative nature or are to ensure consistent wording across the various statutes. Some more substantive amendments are also made,

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¹ S.O. 2010, c. 15. For more information about the ONCA: <http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx>. For an overview of the key features of the ONCA, please see an article by Theresa L.M. Man and Terrance S. Carter, *Charity Law Bulletin* No. 262, "The Nuts and Bolts of the Ontario *Not-For-Profit Corporations Act, 2010*", September 30, 2011, online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2011/chylb262.pdf>>. For a review of the transition process, see an article by Theresa L.M. Man, *Charity Law Bulletin* No. 299, "Transitioning Under the New Ontario *Not-For-Profit Corporations Act, 2010*: Practical Considerations", January 30, 2013, online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2013/chylb299.pdf>>.

² An Act to amend various companies statutes and to amend other statutes consequential to the Not-for-Profit Corporations Act, 2010. For more information about the Bill, please visit the Legislative Assembly of Ontario website at: <http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2812>.

³ R.S.O. 1990, c. C. 38.

including amendments to the OCA that are complementary to the ONCA. The Ministry's June 5, 2013, email announcing the release of Bill 85 states that proclamation of the ONCA cannot proceed without these legislative amendments. It also states that Bill 85 will enable the government to deliver on its commitment to modernize the legal framework that will govern the not-for-profit sector.

This Bulletin highlights key amendments to the ONCA proposed by Bill 85, some of which may prove problematic to not-for-profit corporations in Ontario. Proposed amendments to other statutes are outside the scope of this Bulletin.

B. AMENDMENTS TO THE ONCA

Proposed amendments to the ONCA are set out in Schedule 7 of Bill 85. The following is an overview of some of the key proposed amendments.

1. Threshold to be Public Benefit Corporations

Currently, the ONCA provides that non-charitable corporations that receive more than \$10,000 in a financial year from specific public sources will become public benefit corporations.⁴ The ONCA is proposed to be amended so that the threshold amount may also be prescribed by regulation. This is a welcome approach so that the threshold amount could be adjusted from time to time without the need to amend the ONCA.

2. Consents to be a Director must be in Writing

The ONCA now requires that an individual who is elected or appointed to be a director must consent to hold office within 10 days after the election or appointment; and if consent is provided after 10 days, it must be in writing.⁵ The ONCA is proposed to be amended to require all consent to be in writing. Further, the ONCA is proposed to be amended to require every corporation to keep directors' consents in the 'approved form'.⁶

3. Amendments of Governing Documents during Transition Period

Part III OCA corporations are not required to take any action in order to come under the ONCA. The ONCA will apply automatically to all Part III OCA corporations upon proclamation. However, provisions in their

⁴ Subsection 1(1).

⁵ Subsections 24(8) and (9).

⁶ Subsection 97(1).

governing documents that are inconsistent with the ONCA will continue to be valid for three years after proclamation. These provisions will be deemed at the end of three years to be amended to comply with the ONCA. The problem with this approach is that it will become difficult to determine what provisions are deemed to be amended and in what way.

In order to avoid such uncertainty from arising, Part III OCA corporations may transition into the ONCA during the three-year period by filing articles of amendment and adopting new by-laws to amend any provision in its letters patent, supplementary letters patent, by-laws or special resolution that are not consistent with the requirements of the ONCA in order to bring those provisions into conformity with it. Although this process is optional, it is generally advisable for Part III OCA corporations to transition under the ONCA during the three-year period in order to avoid uncertainty concerning the interpretation of its constating documents. However, amendments proposed by Bill 85 will, in effect, make this process mandatory.

Bill 85 now proposes to include a new requirement that any provision or portion of a provision in a by-law or special resolution that is required by the ONCA to be contained in the corporation's articles must be added to the articles during the transition period, failing which they will become invalid when the transition period ends.⁷ It is still not clear what information will be required to be included in the articles. However, it is clear that, at a minimum, the classes of membership and number of directors on the board will be required to be included in the articles. At this time, this type of information is usually set out in by-laws. Furthermore, OCA corporations are also permitted to change the number of directors by way of special resolutions. If these corporations do not file articles of amendment during the transitional period, it is not clear what impact it may have if these provisions are no longer valid. The practical effect of this new requirement would mean that all Part III OCA corporations would have to file articles of amendment to avoid any such provisions becoming invalid at the end of the transition period. This would seem to defeat the original intent of the ONCA to have the transitional process an optional one in order not to cause hardship to the sector.

Furthermore, Bill 85 also proposes to include a new requirement that if a corporation was to file articles of amendment to amend its letters patent during the transition period, it may do so only if it also makes all amendments that may be necessary to bring it into conformity with the ONCA.⁸ Similarly, if a corporation

⁷ New proposed subsection 207(6).

⁸ New proposed subsection 207(2).

was to amend its by-law or special resolution during the transition period, it may do so only if it also makes all amendments that may be necessary to bring the by-law or resolution into conformity with the ONCA, including the removal of any provision required by the ONCA to be contained in the articles and not in the by-laws or special resolution.⁹ This new requirement would mean that corporations will not be able to amend their by-laws or special resolutions a number of times over the transition period to slowly bring them into compliance. It is not clear what the rationale is for this all-or-nothing approach. It is a concern that these new requirements may have an unintended onerous effect on the sector.

4. Membership Class Votes

The ONCA now provides extensive rights to members of corporations. In addition to the rights to elect and remove directors, they may make proposals, requisition meetings of members, as well as vote on certain amendments to the articles and fundamental changes. The latter may pose some concern to corporations that have multiple membership classes. In this regard, where there is more than one class of members, the ONCA provides that each class of members (both voting and non-voting classes) is entitled to vote separately as a class to approve certain changes affecting their class of membership or certain fundamental changes (such as amalgamation) by special resolution. As such, each class of members (including non-voting members) will, in practice, have a *de facto* class veto right. Therefore, corporations that currently have multiple membership classes may wish to consider collapsing all of the classes into one voting class if they want to avoid non-voting members having the right to vote by class or avoid membership classes (both voting and non-voting) having any class veto rights.

The announcement by the Minister of Consumer Services in late March 2013 to delay proclamation of the ONCA was in part, as stated in a memorandum dated March 28, 2013, from the Assistant Deputy Minister, Frank Denton, to the Advisory Committee Members for the ONCA, to allow more time to “[explore] the possibility of holding back from proclamation the provisions of the ONCA giving voting rights to non-voting members in certain limited circumstances.” In a letter dated March 27, 2013, from the Minister of Consumer Services, Tracy MacCharles, to the Ontario Nonprofit Network, she indicated that she will be “recommending that these provisions not come into force for at least three years following proclamation.”

⁹ New proposed subsection 207(4).

The Minister also indicates that she intends to “undertake a thorough consultation across the sector to assess how this issue should be addressed.”¹⁰

The ONCA is now proposed to be amended so that provisions giving non-voting classes of members the right to vote will not come into effect until at least three years after the rest of the ONCA comes into effect.¹¹

The right of voting members to class votes has not been delayed.

The practical effect of this proposed amendment would mean that non-voting members will not have the right to vote during at least the three year transition period for Part III OCA corporations. If these corporations want to adopt articles of amendment or new by-laws during the transition period (to collapse their membership classes, for example), they would not be required to seek class approval of their non-voting members.

However, corporations that have multiple voting membership classes that want to collapse their membership classes (or engage in certain fundamental changes) during the transition period will have to seek class approval of each of their voting membership classes. This is because the right of voting members to vote by classes under the ONCA will come into effect on proclamation of the ONCA and will apply automatically to all Part III OCA corporations. As such, unless their OCA governing documents clearly provide that different voting membership classes are not permitted to vote separately by class or that all voting members must vote together as one pool of members, the class vote provisions under the ONCA will apply to all corporations upon proclamation of the ONCA. Since different voting classes of members did not have the right under the OCA to vote separately by class, it is doubtful whether the required provisions to override the automatic application of class vote rights would be contained in governing documents of existing OCA corporations. The fact that the proposed amendments do not also delay proclamation of class vote rights for voting

¹⁰ The Minister’s announcement is available online at: http://www.theonn.ca/wp-content/uploads/2011/06/Ministers-letter-to-ONN_Mar_28.pdf. The ONCA proclamation date can be monitored at the Ministry website: www.sse.gov.on.ca/mcs/en/Pages/not_for_profit.aspx.

¹¹ Section 249 of Bill 85, repealing section 249 of the ONCA and replacing it with the following:
Commencement

249. (1) Subject to subsection (2), this Act comes into force on a day to be named by proclamation of the Lieutenant Governor.
Same

(2) Subsections 105 (2), 111 (3), 116 (3) and 118 (4) come into force on a day to be named by proclamation of the Lieutenant Governor that is not earlier than the third anniversary of the day subsection 4 (1) comes into force.

members means that corporations that want to collapse their multiple voting membership classes but do not want to seek approval from each voting class will need to do so prior to the proclamation of the ONCA.

C. CONCLUSION

The Ministry's June 5, 2013, email announcing the release of Bill 85 states that stakeholders broadly support the ONCA and the proposed amendments contained are not controversial. It is true that many of the proposed amendments to the ONCA are welcome changes, such as allowing the \$10,000 threshold to be changed by regulation from time to time and delaying class voting rights of non-voting members for at least three years after proclamation of the ONCA. However, not delaying class voting rights of voting members in a similar manner will continue to be problematic for the corporations that currently have multiple voting membership classes. As well, the new requirement on corporations to file articles of amendment during the transition period to include provisions required by the ONCA in the articles and the new prohibition on corporations from amending their constating documents during the transition period unless they also bring those documents into conformity with the ONCA will have significant negative impact on the transition process of Ontario corporations. It is hoped that Bill 85 will be amended to address the concerns.