
BILL 154 - PROPOSED AMENDMENTS TO OCA

*By Theresa L.M. Man**

A. INTRODUCTION

After having waited three years since the demise of Bill 85 in May 2014 proposing amendments to the Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”),¹ it is great news that the Ontario government is again moving forward with the corporate reform for the not-for-profit sector. In this regard, Bill 154, *Cutting Unnecessary Red Tape Act, 2017* (“Bill 154”),² was introduced on September 14, 2017, proposing changes to the Ontario *Corporations Act* (“OCA”)³ and the ONCA, as well as other legislation. Proposed changes to the OCA are set out in Schedule 7 of Bill 154, and proposed changes to the ONCA are set out in Schedule 8.

The News Release announcing Bill 154 states that Bill 154 is intended to “build a smarter, more modern regulatory environment by rooting out unnecessary burdens and streamlining regulations” by proposing amendments to more than 40 statutes.⁴ The Backgrounder to Bill 154 indicates that the proposed amendments would “enable the future proclamation” of the ONCA and the proposed amendments to the OCA would “enable Ontario not-for-profit corporations to benefit from some of the ONCA features prior to its proclamation, such as allowing notice of members’ meetings to be sent electronically and members’ meetings to be held electronically.” As well, these proposed amendments would “increase flexibility,

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¹ 2010, SO 2010, c 15.

² Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, 2nd Sess, 41st Parl, Ontario, 2016-17 (second reading 25 September 2017).

³ RSO 1990, c C.38.

⁴ <https://news.ontario.ca/medg/en/2017/09/ontario-introduces-new-measures-to-help-businesses-save-time-and-money.html>.

encourage participation in meetings, provide clarity and reduce burdens and costs for not-for-profit corporations.”⁵

This Bulletin highlights key proposed amendments to the OCA but a detailed review of the proposed changes is outside the scope of this Bulletin. Proposed amendments to the ONCA will be reviewed in a future Bulletin. For details on proposed amendment to the *Charities Accounting Act* concerning social investments, see *Charity & NFP Law Bulletin* No. 407.⁶ This Bulletin does not review proposed amendments to other statutes contained in Bill 154.

Those interested in the proposed amendments in Bill 154 are encouraged to monitor the progress of the Bill at the website for the Legislative Assembly of Ontario.⁷

B. PROPOSED CHANGES TO THE OCA

Notwithstanding the introduction of Bill 154 proposing amendments to the ONCA, it will still be a number of years before proclamation of the ONCA. As such, of immediate interest to Ontario not-for-profit corporations is that Bill 154 also contains proposed amendments to the OCA to allow Part III OCA not-for-profit corporations to enjoy some of the modernized rules contained in the ONCA and other changes that would provide more flexibility to their operations. These are welcome changes because many of the rules in the OCA are obviously outdated, since the OCA has not been substantively amended since 1953. The following are key changes in this regard.

- Special legislation and charity law will prevail over the OCA in the event of a conflict.⁸ (The OCA is currently silent on this issue.)

⁵ <https://news.ontario.ca/medg/en/2017/09/proposed-changes-in-the-cutting-unnecessary-red-tape-act-2017.html>.

⁶ Terrance S. Carter, “Bill 154 – Proposed Amendments to OCA”, *Charity & NFP Law Bulletin* No. 406 (28 September 2017), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2017/chylb406.pdf>>.

⁷ Legislative Assembly of Ontario, “Bill 154, Cutting Unnecessary Red Tape Act, 2017: Current Status”, online: Government of Ontario <http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=5000&detailPage=bills_detail_status>.

⁸ *Supra* note 3, new section 117.1 will be inserted.

- Corporations may hold members' meetings by telephonic or electronic means, unless the by-laws of a corporation provide otherwise.⁹ (Currently, the OCA does not permit members' meetings to be held by telephonic or electronic means.)
- Corporations will have the full capacity, rights, powers and privileges of a natural person; it will not be necessary for a by-law to be passed in order to confer any particular power on a corporation or its directors; and a corporation's acts will be valid even if the corporation acted contrary to its instrument of incorporation, its by-laws or the OCA.¹⁰ (The OCA currently provides that corporations have the capacity of a natural person (*i.e.* the corporation can engage in the same lawful activity as an individual person such as entering into contacts), and may exercise its powers outside of Ontario to the extent permitted by the jurisdiction in which it exercises those powers. The OCA also grants specific powers to not-for-profit corporations.¹¹)
- A corporation may sell, lease or exchange all or substantially all of its undertaking or all or substantially all of a part of its undertaking if authorized to do so by a special resolution.¹² (This provision provides better clarity on when a corporation may sell all or substantially all of its undertaking.¹³)
- Corporations may adopt contracts entered into prior to incorporation and thereby be bound by such contracts and the person who purported to act on behalf of the corporation ceases to be bound by or entitled to the benefits under the contract.¹⁴ (The OCA is currently silent on this issue.)
- Directors and officers will be subject to a statutory objective standard of care, *i.e.* by acting honestly and in good faith with a view to the best interests of the corporation and exercising the care, diligence and skill that a reasonably prudent person would exercise in comparable

⁹ *Ibid*, new section 125.1 will be inserted.

¹⁰ *Ibid*, new section 126.1 will be inserted, and the following provision will no longer apply: clauses 23(1)(a) to (p) and (s) to (v), subsection 23 (2), and sections 59, 274, and 275.

¹¹ *Ibid*, at sections 274, 275, 23(1) and 133.

¹² *Ibid*, new section 126.2 will be inserted and clause 23(1)(m) will no longer apply.

¹³ *Ibid*, at clause 23(1)(m).

¹⁴ *Ibid*, new section 126.3 will be inserted.

circumstances.¹⁵ (The OCA is currently silent on this issue and therefore directors and officers are subject to the subjective standard of care under common law.)

- Directors may be removed by a simple majority vote. However *ex officio* directors may not be removed from office.¹⁶ (The OCA currently requires two-thirds vote to remove a director.¹⁷) A director elected by a group of members that has an exclusive right to elect the director may be removed only by a resolution passed by a majority of the votes cast by the members of that group at a general meeting.¹⁸ (The OCA is currently silent on this issue). However, the new rules would not affect the operation of any provision respecting the removal of directors contained in the letters patent, supplementary letters patent or by-laws in place prior to the proclamation of these amendments to the OCA.¹⁹
- Members may, by an extraordinary resolution (*i.e.* 80% of the votes cast at a members' meeting), decide not to appoint an auditor and not to have an audit in respect of a financial year if the corporation had annual revenue in that financial year not exceeding \$100,000 or a different amount prescribed by the regulations.²⁰ (Currently, an audit exemption requires the consent in writing by all members.²¹ Replacing the word "income" with "revenue" provides greater clarity on its meaning. Permitting the \$100,000 threshold be changed by regulations provides more flexibility.)
- The by-laws of a corporation may permit non-members (with their consent in writing) to be elected to the board of directors.²² (Currently, directors are required to be members of the corporation.²³ However, the following corporations currently may elect non-members to their board if so permitted by their by-laws: hospitals within the meaning of the *Public Hospitals Act*, corporations

¹⁵ *Ibid*, new section 127.1 will be inserted.

¹⁶ *Ibid*, new subsection 127.2(1) and (3) will be inserted, and s. 67 will no longer apply.

¹⁷ *Ibid* at sections 133 and 67.

¹⁸ *Ibid*, new subsection 127.2(2) will be inserted.

¹⁹ *Ibid*, new subsection 127.2(4) will be inserted.

²⁰ *Ibid*, new section 130.1 will be inserted, and section 96.1 will no longer apply.

²¹ *Ibid*, at sections 133 and 96.1.

²² *Ibid*, subsection 286(3) will be amended.

²³ *Ibid* at subsections 286(1) and (2).

that operate recognized stock exchanges, and insurance company under Part V of the OCA (other than a pension fund or employees' mutual benefit society.²⁴)

- If a corporation has no directors or members, the court may make an order appointing the required number of directors.²⁵ (This is not currently permitted under the OCA.)
- Notice of members' meetings may be given by electronic means if conditions specified in the *Electronic Commerce Act, 2000* are met.²⁶ (The OCA currently does not permit notice of members' meeting be given electronically.)
- A corporation may not export out of the OCA (*i.e.* continue from the OCA to another jurisdiction) unless the laws of that other jurisdiction provide that the corporation continues to be liable for its obligations, that any existing cause of action, claim or liability to prosecution is unaffected, that actions and proceedings by or against the corporation may continue to be prosecuted, and that rulings, orders or judgments in favour of or against the corporation may be enforced.²⁷ (The OCA is currently silent on these requirements.)

Bill 154 also amends various sections of the OCA in order to accommodate the filing, keeping and searching of documents in electronic format. As well, Bill 154 expands the Minister's regulation-making powers in respect of the content, form, format and filing of various documents. The Minister, or a person designated by the Minister, will have the power to enter into agreements authorizing a person or entity to provide business filing services. The OCA will be amended to give various administrative powers under the OCA to the Director who is appointed under the Ontario *Business Corporations Act* and transfers a number of powers from the Lieutenant Governor to the Minister. The Minister and the Director will have

²⁴ *Ibid* at subsection 286(3).

²⁵ *Ibid*, new subsection 288(4) will be inserted.

²⁶ *Ibid*, sections 93, 161 and 296 will be amended such that notice must be given "in writing". Section 6 of the *Electronic Commerce Act, 2000* (SO 2000, c 17) provides, with limited exceptions in section 31, that documents in writing can be in electronic form where they are (a) accessible by the other person so as to be usable for subsequent reference; and (b) capable of being retained by the other person."

²⁷ *Ibid*, new subsection 313(1.0.1) will be inserted.

the power to delegate their respective duties and powers under the OCA to any person, subject to any restrictions set out in the delegation.

Companies that have objects in whole or in part of a social nature that are incorporated under the OCA will have 5 years to continue by special resolution under the ONCA, the *Business Corporations Act*, or the *Co-operative Corporations Act*, otherwise they will be dissolved. If a social company has more than one class of shareholders, the continuance must be approved by each class of shareholders by a separate vote. Twenty-five years after this new provision comes into force, the OCA will no longer apply to social companies that are incorporated by or under a general statute but will continue to apply to social companies incorporated by or under a special statute.²⁸

There are also other proposed amendments to the ONCA that are complementary to or consistent with the ONCA. These include: only insurance companies under Part V of the OCA may be incorporated under Part II or III of the OCA²⁹; companies will no longer be permitted to apply for supplementary letters patent to convert into corporations with or without share capital³⁰; only insurers may apply for supplementary letters patent to convert a company into a public company, a private company or a corporation without share capital³¹; and the Minister may cancel under subsection 317(1) of the OCA for sufficient cause certain orders and other documents.³²

Bill 154 also proposes to amend nine other statutes as a consequence of the amendments being made to the OCA. In the case of some of the corporations governed by those statutes, it is necessary to provide clarity on the application of the OCA to them or on their powers.

Lastly, a word of caution to those who are interested in reading the proposed OCA amendments contained in Schedule 7 of Bill 154 in relation to when which provision would take effect. Schedule 7 contains 85 sections. Different sections come into force on different dates, with section 85 listing which sections would come into force on the 25th anniversary of the said proclamation, on the day when Bill 154 receives Royal

²⁸ *Ibid*, section 2 will be amended and new section 2.1 will be inserted and re-enacted.

²⁹ *Ibid* at sections 17 and 118.

³⁰ *Ibid* at clause 34(1)(q).

³¹ *Ibid* at subsection 34(10).

³² *Ibid* at subsection 317(1).

Assent, on the 60th day after Bill 154 receives Royal Assent, on the day when the ONCA comes into force, or on the 3rd anniversary after Bill 154 receives Royal Assent; with the balance of sections coming into force on a day named by proclamation of the Lieutenant Governor.³³

C. CONCLUSION

Many of the proposed changes to the OCA are welcome changes. Ontario not-for-profit corporations have been left in corporate limbo for seven years since 2010, having to make the difficult decision whether to update their objects and by-laws to further their mission or to wait for the proclamation of the ONCA before making those changes. While it is still not known when the ONCA would be proclaimed, at the very least Ontario not-for-profit corporations would soon be able to enjoy relief to a number of the out-dated provisions in the OCA that are long overdue to be up-dated.

³³ *Ibid* note 2 at section 85 of Schedule 7.