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## **CERTAIN OCA AMENDMENTS UNDER BILL 154 NOW IN EFFECT**

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*By Theresa L.M. Man\**

### **A. INTRODUCTION**

Following the introduction of Bill 154, *Cutting Unnecessary Red Tape Act, 2017* (“Bill 154”),<sup>1</sup> on September 14, 2017, proposing changes to the Ontario *Corporations Act* (“OCA”),<sup>2</sup> the Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”),<sup>3</sup> as well as other legislation, Bill 154 was passed by the Ontario Legislature at an amazing speed on November 1, 2017, and received Royal Assent on November 14, 2017.

By way of background, changes to the ONCA were first proposed by way of Bill 85, *Companies Statute Law Amendment Act, 2014* (“Bill 85”).<sup>4</sup> After having waited three years since the demise of Bill 85 in May 2014, it is very encouraging that the Ontario government is again moving forward with the corporate reform for the not-for-profit sector in releasing and enacting Bill 154.

Notwithstanding the introduction of Bill 154 amending the ONCA, it is still not known when the ONCA will be proclaimed. Since the Ontario Government continues its commitment to give the not-for-profit

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<sup>1</sup> Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, 2nd Sess, 41st Parl, Ontario, 2017 (assented to 14 November 2017), SO 2017, c 20 [Bill 154].

<sup>2</sup> RSO 1990, c C.38 [OCA].

<sup>3</sup> SO 2010, c 15 [ONCA].

<sup>4</sup> Bill 85, *Companies Statute Law Amendment Act, 2014*, 2nd Sess, 40th Parl, Ontario, 2013-14 [Bill 85].

sector at least 24 months' notice before the ONCA comes into force,<sup>5</sup> the earliest that the ONCA might be proclaimed will be at least 2 years from now.

As such, amendments to the OCA contained in Bill 154 are of immediate interest to Ontario Part III OCA not-for-profit corporations because the changes would allow them to enjoy some of the modernized rules contained in the ONCA and 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 These are welcome changes because many of the rules in the OCA are obviously outdated, since the OCA has not been substantively amended since 1953. In this regard, upon Royal Assent of Bill 154, the changes to the ONCA contained in schedule 8 are not in force yet. However, a number of the changes to the OCA contained in schedule 7 became effective immediately, and other changes will become effective 60 days later (*i.e.*, January 13, 2018). These changes are reviewed in this Bulletin.

Bill 154 also contains other changes to the OCA that will become effective at a later time, such as on the the 25<sup>th</sup> anniversary of proclamation, on the day when the ONCA comes into force, or on the third 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.<sup>6</sup> Similarly, changes to the ONCA contained in Bill 154 also are not in effect at this time. These changes are not reviewed in this Bulletin.

## **B. OCA CHANGES IN EFFECT ON NOVEMBER 14, 2017**

On November 14, 2017, a number of changes to the OCA became effective. The following is an overview of some of these key changes that may be of general interest to Part III OCA corporations. To take benefit of some of these new rules, an amendment of the governing documents may be necessary.

- Notice of members' meetings may be given by electronic means if conditions specified in the *Electronic Commerce Act, 2000* are met.<sup>7</sup> However, if a corporation was to give notice by mail, then the notice must be sent by prepaid mail to the members' last address as shown on the corporation's

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<sup>5</sup> Ontario, Ministry of Government and Consumer Services, "Rules for not-for-profit and charitable corporations" (14 November 2016), online: <https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations>.

<sup>6</sup> *Supra* note 1, section 85 of Schedule 7.

<sup>7</sup> *Supra* note 2, sections 93 and 161 are 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."

books. Similarly, member's resolutions may also be circulated electronically.<sup>8</sup> This would mean that if the by-law of a corporation currently requires 10 days' notice of members meeting be given by mail (in compliance with the rules in the OCA before amendment by Bill 154), a by-law amendment would be necessary to permit giving notice by electronic means.

- Corporations may hold members' meetings by telephonic or electronic means, unless the by-laws of a corporation provide otherwise.<sup>9</sup> This would mean that if the by-law of a corporation currently requires members' meetings be held in person (and by proxy) or prohibits electronic members' meetings (in compliance with the rules in the OCA before amendment by Bill 154), a by-law amendment would be necessary to permit holding members' meetings electronically.
- Directors may be removed by a simple majority vote. However *ex officio* directors may not be removed from office.<sup>10</sup> As well, 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.<sup>11</sup> 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.<sup>12</sup> Therefore, if the by-law of a corporation currently requires directors be removed by a two-thirds majority membership vote (reflecting the rules in the OCA before amendment by Bill 154), a by-law amendment would be necessary to permit the new rules in Bill 154.
- The by-laws of a corporation may permit non-members (with their consent in writing) to be elected to the board of directors.<sup>13</sup> Therefore, if the by-law of a corporation currently requires directors be

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<sup>8</sup> *Ibid*, section 296 is amended.

<sup>9</sup> *Ibid*, new section 125.1 is inserted.

<sup>10</sup> *Ibid*, new subsections 127.2(1) and (3) are inserted, and new subsection 127.2(6) provides that s. 67 no longer applies.

<sup>11</sup> *Ibid*, new subsection 127.2(2) is inserted.

<sup>12</sup> *Ibid*, new subsection 127.2(4) is inserted.

<sup>13</sup> *Ibid*, subsection 286(3) is amended.

restricted to members of the corporation (reflecting the rules in the OCA before amendment by Bill 154), a by-law amendment would be necessary to permit non-members to be elected to the board.<sup>14</sup>

- If a corporation has no directors or members, the court may make an order appointing the required number of directors.<sup>15</sup>
- Special legislation and charity law will prevail over the OCA in the event of a conflict.<sup>16</sup> The OCA was silent on this issue before.
- 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.<sup>17</sup>
- Ontario corporations may be exported to jurisdictions outside of Canada.<sup>18</sup>

### C. OCA CHANGES IN EFFECT ON JANUARY 13, 2018

A number of other changes to the OCA will become effective effective 60 days later (*i.e.*, January 13, 2018). The following is an overview of some of these key changes that may be of general interest to Part III OCA corporations.

- 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.<sup>19</sup> The OCA currently provides that corporations have the capacity of a natural person (*i.e.* the corporation can engage in the same

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<sup>14</sup> However, Bill 154 does not affect the pre-existing rules in the OCA that allow the following corporations to elect non-members to their board if so permitted by their by-laws: hospitals within the meaning of the *Public Hospitals Act*, corporations that operate recognized stock exchanges, and insurance companies under Part V of the OCA (other than a pension fund or employees' mutual benefit society).

<sup>15</sup> *Supra* note 2, new subsection 288(4) is inserted.

<sup>16</sup> *Ibid*, new section 117.1 is inserted.

<sup>17</sup> *Ibid*, new section 126.3 is inserted.

<sup>18</sup> *Ibid*, section 313(1) is amended.

<sup>19</sup> *Ibid*, new section 126.1 will be inserted, and the following provisions will no longer apply: clauses 23(1)(a) to (p) and (s) to (v), subsection 23(2), and sections 59, 274, and 275.

lawful activity as an individual person, such as entering into contracts), 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.<sup>20</sup>

- 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.<sup>21</sup> (This provision provides better clarity on when a corporation may sell all or substantially all of its undertaking.<sup>22</sup>)
- 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 circumstances.<sup>23</sup> The OCA is currently silent on this issue and therefore directors and officers are subject to the subjective standard of care under common law. Corporations may need to update their governance policy to replace reference to the common law subjective standard of care with the statutory objective standard of care.
- 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.<sup>24</sup> (Currently, an audit exemption requires the consent in writing by all members.<sup>25</sup> Replacing the word “income” with “revenue” provides greater clarity on its meaning. Permitting the \$100,000 threshold be changed by regulations provides more flexibility.)
- 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

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<sup>20</sup> *Ibid*, sections 274, 275, 23(1) and 133.

<sup>21</sup> *Ibid*, new section 126.2 will be inserted and clause 23(1)(m) will no longer apply.

<sup>22</sup> *Ibid*, clause 23(1)(m).

<sup>23</sup> *Ibid*, new section 127.1 will be inserted.

<sup>24</sup> *Ibid*, new section 130.1 will be inserted, and section 96.1 will no longer apply.

<sup>25</sup> *Ibid*, sections 133 and 96.1.

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.<sup>26</sup> (The OCA is currently silent on these requirements.)

## D. CONCLUSION

Many of the proposed changes to the OCA are welcome changes. While some of the OCA changes have automatic application to corporations, an amendment of the governing documents may be necessary in order to take benefit of some of the new rules. Other OCA changes may require revisions to governance manuals, such as replacing the reference to the common law subjective standard of care with the statutory objective standard of care. Ontario not-for-profit corporations may wish to review their governance structure and documents with their legal counsel to determine if any amendments may be necessary.



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<sup>26</sup> *Ibid*, new subsection 313(1.0.1) will be inserted.