
**TRANSITIONING UNDER THE NEW ONTARIO
NOT-FOR-PROFIT CORPORATIONS ACT, 2010:
PRACTICAL CONSIDERATIONS**

*By Theresa L.M. Man**

A. INTRODUCTION

With the Ontario *Not-for-Profit Corporations Act, 2010*¹ (“ONCA”) expected to be proclaimed on July 1, 2013, not-for-profit corporations incorporated under Part III of the Ontario *Corporations Act*² (“OCA”) should begin familiarizing themselves with how the ONCA will change their future corporate structure and governance and how they will need to transition under the ONCA.

Bill 65, *An Act to revise the law in respect of not-for-profit corporations, 2010*, was introduced on May 12, 2010 and received Royal Assent on October 25, 2010. The administration of the ONCA will be shared by the Ministry of Consumer Services and the Ministry of Government Services. The Ministries have not yet released the regulations under the ONCA and are currently finalizing tools to assist not-for-profit corporations complete the transition. In December 2012, the Ministry of Consumer Services released helpful information on their website, including a transition checklist, and a list of frequently asked questions.³ Additional tools that will be available in future include a plain language guide explaining the ONCA’s most significant sections, and default by-laws. Once the ONCA is in force, the OCA, which has not been substantively amended since 1953, will no longer apply to non-share capital corporations incorporated under

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¹ S.O. 2010, c. 15.

² R.S.O. 1990, c. C.38.

³ See http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx.

Part III of the OCA. This Bulletin will review issues that Part III OCA corporations may need to consider in transiting into the ONCA. A review of the key features of the ONCA is outside the scope of this Bulletin.⁴

There are many corporations that do not come under the ONCA, such as non-share capital corporations under the *Co-operative Corporations Act* and insurance companies under Part V of OCA.⁵ As well, the ONCA excludes or limits its application to certain other corporations.⁶ In addition, the ONCA does not automatically apply to share capital social corporations incorporated under Part II of the OCA. These social corporations may continue to operate under the OCA for five years. At the end of the five-year period, the social corporations will have to decide whether to continue under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*.⁷ These corporations are outside the scope of this Bulletin.

B. TRANSITIONING UNDER THE ONCA FOR PART III OCA CORPORATIONS

Transitioning under the ONCA refers to the process by which a Part III OCA corporation amends its constating documents to conform with the ONCA requirements. Since, upon coming into force, the ONCA will automatically apply to all non-share capital corporations incorporated under Part III of the OCA, these corporations will not need to take any action to come under the new legislation. However, if there are any provisions in their letters patent, supplementary letters patent, by-laws or special resolutions that are inconsistent with the ONCA, these documents will be deemed at the end of three years after proclamation to be amended to comply with the ONCA.⁸ The problem with using the deemed amendment approach is that it will be difficult to determine which provisions are deemed to be amended and in what way.

In order to avoid this uncertainty, the ONCA permits Part III corporations to “transition” into the ONCA during the three-year period by amending any provision in its letters patent, supplementary letters patent, by-laws or special resolution that is inconsistent with the requirements of the ONCA.⁹ This approach is advised. In this regard, inconsistent provisions in the letters patent and supplementary letters patent would

⁴ 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>>.

⁵ *Supra* note 1 at ss. 4(2).

⁶ *Ibid.*, s. 212 to 248.

⁷ *Ibid.*, ss. 211(3).

⁸ *Ibid.*, ss. 207(2).

⁹ *Ibid.*, ss. 207(1).

be amended by filing articles of amendment; and inconsistent provisions in the by-laws would also need to be amended. Since the rules in the ONCA and the OCA are so different, most corporations would likely find it easier to adopt a new by-law rather than adopting amendments to their existing OCA by-laws.

C. PRELIMINARY STEPS AND CONSIDERATIONS FOR TRANSITION

The following is an overview of some key steps and considerations that will allow for a smooth transition into the ONCA.

1. Gather and review current governance structure and practice

The first step that a corporation should take is to collect and review all of its governing documents. These documents include the letters patent, supplementary letters patent and by-laws. A corporation that is unable to locate its letters patent or all of its supplementary letters patent can contact the Ministry of Government Services to obtain copies. The Ministry is not a depository for by-laws, however, so it cannot assist a corporation that cannot locate its by-laws.

Also, it is not uncommon for Part III OCA corporations, especially smaller corporations, to be incorporated without ever adopting general operating by-laws.¹⁰ This often arises when individuals complete the incorporation process without professional legal advice.

As well, some charities and non-profit organizations set out their objects in their by-laws so that members can review them without having to obtain a copy of the letters patent or supplementary letters patent. The disadvantage of this approach is that the objects stated in the by-laws are often amended as part of the by-law amendment process without the corporation changing the “official” objects in its letters patent or supplementary letters patent. In these situations, the objects contained in the by-laws should also be taken into account when preparing the articles of amendment.

Once a corporation locates all its documents, it should review them in detail to understand the current governance structure and practice. The corporation should also consider whether these documents accurately reflect its current governance structure and practice. The corporation might have evolved

¹⁰ See *Rexdale Singh Sabha Religious Centre v. Chattha*, [2006] O.J. No. 4698 (C.A.), rev’g [2006] O.J. No. 328 (Ont. Sup. Ct. of Justice). In that case, a by-law was never adopted after incorporation.

since incorporation and the by-laws might no longer reflect the desired governance structure. After incorporation, it is also not uncommon that the corporations retain their by-laws in their corporate records, but do not follow them. This is especially common in the charitable and non-profit sector, which often lacks the means to engage legal advisors for the incorporation process or to assist in their corporate proceedings. In these situations, it may also be necessary to review various other operational documents, including governance policies and organization charts. These documents may reveal the governance structure and practice that is being followed by the corporation, which should be reflected in the new by-laws to be prepared.

Upon completing this review, it would be helpful to draw up a list of the changes that depart from the current by-laws. This exercise will assist in the preparation of the documents for transition.

2. Review key features of the ONCA

The next step is for the corporation to gain a clear understanding of the rules contained in the ONCA under which the corporation will be required to operate. This understanding will help the corporation determine how the new rules will impact the governance of the corporation and what provisions to include in the articles of amendment and new by-laws.

3. Compare the ONCA rules with current governance structure and practice

Once a corporation has determined its current or desired governance structure and practice and has reviewed the rules in the ONCA, the corporation will then need to determine how the new rules will impact its governance. Examples of questions to consider include: whether the current by-laws or the desired governance structure and process are inconsistent with ONCA requirements; if they are inconsistent, how will the corporation adjust its governance structure and process to ensure compliance. Alternatively, the corporation should determine whether they need to change their governance structure in light of the new rules in the ONCA. For example, 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 by special resolution certain changes affecting their class of membership and fundamental changes of the corporation (regardless of whether the class of members otherwise has the right to vote). As such, each class of members (including non-voting members) will have a de facto class veto right in these situations. Therefore, corporations that currently have multiple membership

classes should consider if they are prepared to accept this governance structure, or whether to collapse all of the classes into one voting class. In this regard, the transition checklist released by the Ministry provides a helpful list of key questions that should be considered.¹¹

4. Timing of transition

Some corporations may want to complete the transition process early during the three year period, while others may want to wait. Early on, a corporation should decide when to start the by-law review process in order to prepare for transition. The following are some key considerations in this regard:

- Length of time and complexity of process required in revising the by-laws – Some corporations' current by-laws or governance process may stipulate a lengthy process for revising the corporate by-laws and governance policies and practices. This process may include constituting a by-law review or governance committee, seeking legal assistance in the review process, a lengthy notice period to hold membership meetings, etc. These corporations may want to start their process early in order to take full advantage of the three year time frame.
- Nature of changes in the new by-laws – If compliance with the ONCA requires substantive changes to the by-laws, the corporation may wish to start the by-law review early so that it can be completed within the three year time frame. If compliance with the ONCA only requires administrative changes to the by-laws (*e.g.*, changing the length of notice period for calling members' meetings), the corporation may have the flexibility to wait before transitioning. However, such a decision cannot be made until the corporation has completed a review of its current by-laws. As such, it would be prudent for the corporation to conduct a review of its current by-laws early on in order to decide whether it requires changes to its governance structure and procedure.
- Size of membership – A corporation that has a large membership (*e.g.*, a corporation that has many members, or has a complicated membership structure involving chapters, divisions across Canada, etc.) will likely require a more extensive consultation in relation to by-law changes than a corporation that has only a few members. The corporation will need to factor the time required to complete an extensive consultation process.

¹¹ <http://www.sse.gov.on.ca/mcs/en/Pages/onca4.aspx>.

- Board structure – The ONCA continues to permit corporations to have *ex officio* directors. For example, the chair of a hospital board is still permitted to be an *ex officio* director of the hospital foundation's board. However, in situations where a corporation's directors are appointed, nominated or elected by subgroups of members (such as a corporation's members consisting of geographical divisions across Canada and each division having the right to elect or appoint one director to the board), this may no longer be possible unless each division is made into a separate membership class and therefore has *de facto* class veto rights. In these situations, the corporation will need to decide what mechanism to implement (*e.g.*, by allowing the board to appoint directors who meet certain requirements, imposing a board composition formula, putting in place a nomination procedure, etc.). There is no one-size-fits-all mechanism. The appropriate mechanism depends on many factors, including the constituency of the corporation and the working relationship with the appointing organization. In some cases, corporations may want to take a wait-and-see approach to learn from others who undergo the transition process.
- Changes to membership structure – In some cases, corporations with different classes of members may want to make changes to their membership structure, *e.g.*, by eliminating non-voting membership classes, collapsing the membership classes to end up with only one class, changing the rights of some membership classes, etc.
- Changes of corporate objects – Some corporations may want to amend their corporate objects for various reasons. It is possible to amend the objects of the corporation as part of the transition process by including the new objects in the articles of amendment. The new objects will also be subject to approval by the Ontario Public Guardian and Trustee and scrutiny by Canada Revenue Agency.

D. CONCLUSION

This brief overview of the ONCA transition process is intended to help Ontario corporations transition as smoothly as possible. As a result of the sweeping changes that the ONCA will bring about, it will be important for boards, executives, staff, and legal counsel of corporations in Ontario to become familiar with the provisions of the ONCA and to begin planning to transition under the ONCA once it is proclaimed in force.

Corporations should also monitor the release of various tools by the Ministry of Consumer Services and the Ministry of Government Services. CRA and Public Guardian and Trustee may also provide guidance for Ontario corporations that are registered charities involved in the transition process.

Corporations will need to keep track of the three year time frame so they can ensure they can complete the transition within this time. As explained above, the time that a corporation requires to complete this process will depend on the structure and operations of the corporation. As such, it would be prudent for corporations to start preparing for transition as early as possible by reviewing their existing by-laws and getting familiar with the rules in the ONCA so that they can anticipate the changes that will be required. Engaging a legal advisor to conduct a by-law review and to prepare new by-laws will likely be helpful and time efficient.

It is also advisable for corporations to designate a particular person or a committee to be in charge of the transition process, to ensure that the project does not get lost among the day-to-day activities of the corporation. It is also necessary that the board of directors be engaged early on, such as by having the directors attend seminars and presentations on the ONCA transition requirements; having the person/committee of the corporation in charge of the transition process report to the board on a regular basis; setting target dates to complete various steps; and having the members engaged early as well, especially if key governance structure and/or procedure need to be changed.