
BILL 154 - PROPOSED AMENDMENTS TO ONCA

*By Theresa L.M. Man**

A. INTRODUCTION

Charity & NFP Law Bulletin No. 406¹ reviews proposed amendments to the Ontario *Corporations Act* (“OCA”)² contained in Schedule 7 of Bill 154, *Cutting Unnecessary Red Tape Act, 2017* (“Bill 154”),³ introduced on September 14, 2017. This Bulletin reviews proposed amendments to the Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”),⁴ contained in Schedule 8 of Bill 154.

By way of background, changes to the ONCA were first proposed by way of Bill 85, *Companies Statute Law Amendment Act, 2014* (“Bill 85”).⁵ After having waited three years since the demise of Bill 85 in May 2014, it is exciting news that the Ontario government is again moving forward with the corporate reform for the not-for-profit sector in releasing Bill 154, which proposes changes to the OCA, ONCA, and other legislation.

The News Release announcing Bill 154 states that it 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.⁶ The Backgrounder to Bill 154 indicates that the proposed

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¹ Theresa L.M. Man, “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>>.

² RSO 1990, c C.38.

³ Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, 2nd Sess, 41st Parl, Ontario, 2016-17 (referred to Standing Committee on Justice Policy 03 October 2017) [Bill 154].

⁴ 2010, SO 2010, c 15 [ONCA].

⁵ Bill 85, *Companies Statute Law Amendment Act, 2014*, 2nd Sess, 40th Parl, Ontario, 2013-14 [Bill 85].

⁶ Ontario, News Release, “Ontario Introduces New Measures to Help Business Save Time and Money” (14 September 2017), online: <https://news.ontario.ca/medg/en/2017/09/ontario-introduces-new-measures-to-help-businesses-save-time-and-money.html>.

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, encourage participation in meetings, provide clarity and reduce burdens and costs for not-for-profit corporations.”⁷

This Bulletin highlights key proposed amendments to the ONCA but a detailed review of the proposed changes is outside the scope of this Bulletin. Proposed amendments to the *Charities Accounting Act* concerning social investments are reviewed in *Charity & NFP Law Bulletin* No. 407.⁸ 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.⁹

B. PROPOSED CHANGES TO THE ONCA

In general, many changes proposed in Bill 85 are retained in Bill 154. Most of the concerns raised by the sector concerning proposed changes in Bill 85 have been addressed in Bill 154. As well, Bill 154 introduces new changes that were not originally proposed in Bill 85. The following are key proposed changes to the ONCA.

1. Consents to be a director must be in writing

The ONCA originally required 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.¹⁰ Bill 85 proposed to amend the ONCA to require all consent to be in writing in the ‘approved form’ to be kept by the corporation at its registered office. While Bill 154

⁷ Ontario, Backgrounder, “Proposed Changes in the Cutting Unnecessary Red Tape Act, 2017” (14 September 2017), online: <https://news.ontario.ca/medg/en/2017/09/proposed-changes-in-the-cutting-unnecessary-red-tape-act-2017.html>.

⁸ Terrance S. Carter, “Bill 154 to Permit “Social Investments” in Ontario”, *Charity & NFP Law Bulletin* No. 407 (28 September 2017), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2017/chylb407.pdf>>.

⁹ 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>.

¹⁰ *Supra* note 4, subsection 24(8).

continues to propose that all directors' consent be in writing,¹¹ only consents for first directors upon incorporation are required to be in 'approved form' but not subsequent directors.¹² As well (similar to Bill 85), the Ministry may require the consent be filed.

2. Threshold to be public benefit corporations

The ONCA originally provided that non-charitable corporations that receive more than \$10,000 in a financial year from specific public sources will become public benefit corporations. Similar to Bill 85, Bill 154 proposes to amend the ONCA so that the threshold amount may also be prescribed by regulation.¹³ This is a welcome approach so that the threshold amount can be adjusted from time to time without the need to amend the ONCA.

3. Circulation of annual financial statements to members

The ONCA originally required annual financial statements be circulated not less than 21 days before each annual meeting of the members or before the signing of a resolution in lieu of the annual meeting to all members who wish to receive copies. Bill 154 proposes to amend the ONCA so that the time period may also be prescribed by regulation.¹⁴

4. Corporations sole exempted from application

Bill 154 contains a new provision that the ONCA does not apply to any corporations sole, except as is prescribed by regulation.¹⁵ It is not clear whether the regulation is intended to prescribe which specific provisions in the ONCA are to apply to corporations sole or intended to prescribe that certain corporations sole are to be subject to the ONCA. If the former is the intention, it is not clear which ONCA provisions would be prescribed to apply to corporations sole. If the latter is the intention, it is not clear why corporations sole are to be treated differently from other special act corporations, since all corporations sole are incorporated by special act. Exempting the application of the ONCA to corporations sole had never come up in prior consultations of the ONCA. The ONCA already has a mechanism governing how the ONCA applies to special act corporations. While there could be certain corporations sole that would desire to be exempted from the application of the ONCA, it is not clear

¹¹ *Ibid.*

¹² *Ibid.*, section 97(1) will be amended.

¹³ *Ibid.*, clause (b) of the definition of "public benefit corporation" in subsection 1(1) will be amended.

¹⁴ *Ibid.*, section 84(2) will be amended.

¹⁵ *Ibid.*, new subsection 4(1.1) will be inserted.

what the rationale is in exempting the application of the ONCA to all corporations sole, rather than exempting specific ones that desire to be exempted.

5. Optional proxy votes

The ONCA originally provided that members have the mandatory right to vote by proxy and proxyholders need not be members.¹⁶ However, the ONCA also provides that if the by-laws of the corporation allow for voting by mail or by telephonic or other electronic means, then the corporation may prohibit proxy vote.¹⁷ Bill 154 contains a new proposal to amend the ONCA so that it would be up to corporations to permit proxy voting by provisions in their articles or by-laws and that proxyholders need not be members of the corporation unless so required by the articles or by-laws. As well, it will no longer be necessary to send or make available a form of proxy to members when giving notice of meetings.¹⁸

6. Delay implementation of membership class votes

Bill 154 proposes to delay the implementation of class voting rights (for both voting and non-voting members) for at least three years.

In this regard, the ONCA provides extensive rights to members of corporations. As well, where there is more than one class of members, 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 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.

Bill 85 had proposed to amend the ONCA so that provisions giving non-voting classes of members the right to vote would not come into effect until at least three years after the rest of the ONCA came into effect. The right of voting members to class votes had not been delayed. However, Bill 154 now

¹⁶ *Ibid*, section 64(1) and 65.

¹⁷ *Ibid*, section 67(1).

¹⁸ *Ibid*, section 64(1) will be amended and section 65 will be repealed.

proposes to delay class voting rights altogether (both voting and non-voting) for at least three years after the rest of the ONCA comes into effect.¹⁹ In relation to the transition process, the practical effect of this new 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, and class votes will not be necessary.

7. Clarification of transition from OCA to ONCA

Bill 154 proposes to amend the ONCA to better clarify the process of how Part III OCA corporations transition under the ONCA.²⁰ A number of transition issues caused by the original wording of the ONCA and changes proposed by Bill 85 have been addressed by Bill 154.

Conceptually, 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. Provisions in their governing documents (letters patent, supplementary letters patent, by-laws or any special resolution) 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.

There are certain provisions that Part III OCA corporations now set out in their by-laws or special resolutions that will be required to be set out in the articles once the ONCA is proclaimed (such as the number of directors). However, if a corporation did not move the following provisions from its by-laws or special resolutions to its articles in order to comply with the rules in the ONCA, the following provisions will continue to be valid indefinitely until articles of amendment are endorsed (*i.e.*, the fact that these provisions are in the “wrong” document would not be deemed to be invalid at the end of the three-year transition period):

¹⁹ Section 59 of Schedule 8 of Bill 154, repeals section 249 of the ONCA and replaces 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.

(2) Section 105, subsections 111 (3) and (4), 116 (3) and 118 (4) and (5) 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.

²⁰ *Supra* note 4, section 207 will be repealed and replaced.

1. A provision respecting the number of directors of the corporation.
2. A provision providing for two or more classes or groups of members.
3. A provision respecting voting rights of members.
4. A provision respecting delegates made pursuant to section 130 of the OCA.
5. A provision respecting the distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution.

In order to avoid such uncertainty from arising, Part III OCA corporations may transition into the ONCA during the three-year period by (a) filing articles of amendment to amend provisions in its letters patent or supplementary letters patent; and (b) amending, removing or replacing provisions in the by-laws or special resolutions (including to revoke provisions required by the ONCA to be contained in the articles and not in the by-laws or special resolution). 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. Lastly, a corporation may have its articles restated (which only requires board approval, not members' approval) provided that (a) the articles are in conformity with the ONCA and (b) the corporation has amended its articles if they have been deemed to be amended at the end of the three-year transition period.²¹

Bill 154 does not contain the following requirements proposed by Bill 85 which would have caused hardships to corporations in the transition process: (a) 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; (b) 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; and (c) if a corporation 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

²¹ *Ibid*, section 109 (1), (2) and (3) will be repealed and replaced.

removal of any provision required by the ONCA to be contained in the articles and not in the by-laws or special resolution.

8. Distribution of net assets on winding up or dissolution of public benefit corporations

The ONCA originally provided that on winding up or dissolution of a public benefit corporation that is a charitable corporation, it must distribute its net assets to another charitable corporation with similar purposes to its own or to a government or government agency. However, “charitable corporation” is defined to mean “a corporation incorporated for the relief of poverty, the advancement of education, the advancement of religion or other charitable purpose”; and “corporation” is defined to mean “a body corporate without share capital to which [the ONCA] applies.” As such, the ONCA limits the recipient organization to another ONCA corporation, and therefore net assets cannot be distributed to another unincorporated association, trust, federal corporation, corporation in another province or special act corporation to which the ONCA does not apply. Bill 154 proposes to amend the ONCA to broaden the eligible recipient organizations by replacing “charitable corporation with similar purposes to its own” with “a Canadian body corporate that is a registered charity under the *Income Tax Act* (Canada) with similar purposes to its own” and replacing “government or government agency” with “the Crown in right of Ontario, the Crown in right of Canada, an agent of either of those Crowns or a municipality in Canada.”²² However, it would still not permit net assets to be distributed to be an unincorporated association or a trust.

For public benefit corporations that are not charitable corporations, they are still restricted to distribute their net assets to another public benefit corporation with similar purposes to their own. As well, they are also permitted to distribute their net assets to “government or government agency” which Bill 154 proposes be replaced with “the Crown in right of Ontario, the Crown in right of Canada, an agent of either of those Crowns or a municipality in Canada.”²³

9. By-law amendments by directors

Bill 154 proposes to amend the ONCA to correct a drafting error in section 17(1) of the ONCA. The ONCA originally permits the directors to make, amend or repeal any by-law that regulates the

²² *Ibid*, section 105(1)(b)(i) and section 167(1)(d)(i) will be amended.

²³ *Ibid*.

activities or affairs of the corporation, except in respect of a matter referred to in clause 103(1)(g) [transfer of membership interest], 103(1)(j) [dissolution clause], or 103(1)(l) [absentee voting], provided that the by-law, amendment or repeal must be submitted to the members for approval at the next meeting of the members. However, the reference to clause 103(1)(j) [dissolution clause] is not correct. Bill 154 proposes to amend the ONCA by replacing it with clause 103(1)(k) [manner of giving notice to members].

10. Other changes

Bill 154 also amends various other sections of the ONCA, such as expanding the Minister's regulation-making powers, accommodating the filing, keeping and searching of documents in electronic format; as well as giving the power to the Minister, or a person designated by the Minister, to enter into agreements authorizing a person or entity to provide business filing services. Bill 154 also amends more than 80 statutes in consequence of the ONCA.

C. CONCLUSION

Many of the proposed changes to the ONCA contained in Bill 154 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 of 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. It is hoped that the ONCA will be proclaimed as soon as possible.