Update on the
Ontario Not-For-Profit Corporations Act
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Agenda

1. Status of new *Ontario Not-For-Profit Corporations Act*
2. Key concepts
3. Implementation of the new Act
4. Getting ready for the new Act
5. Strategic analysis of Membership options
The New Act - Status

Not-for-Profit Corporations Act, 2010

• Royal Assent received October 25, 2010
• In force date has not yet been announced - anticipated July 2013
• Regulations under development
• Plain language guides to be developed
The New Act - Background

• The existing *Corporations Act* was enacted in 1907 and has not been substantially updated in many many years

• The new Act is intended to modernize the legal framework

• The changes are based on business corporations statutes
The New Act - Application

• Will apply to corporations without share capital and will remove them from the governance of the existing Act

• The existing Act will continue to apply to insurers and for five years to corporations with share capital that have objects of a social nature
The New Act – Key Concepts

• Incorporation as of Right
• Purpose and Capacity
• New Category of "Public Benefit Corporation"
• Director Composition and Standard of Care
• Officer Requirements
• Membership Composition and Rights
• Audit Obligations
• Dissolution
• Applicability of other Acts
Key Concepts - Incorporation as of Right

- Incorporation as of right on submission of articles, other required info and fees, rather than at the discretion of the Minister of Government Services.

- If Directors do not pass an organizational by-law within 60 days of incorporation, the corporation is deemed to have passed the standard organizational by-laws approved by the Director under the Act.
Key Concepts - Purpose and Capacity

- Must set out purpose in Articles
- Corporation has the capacity, rights, powers and privileges of a natural person
- If any purpose is commercial then must be intended to support or advance the not-for-profit purposes
Key Concepts - Public Benefit Corporation

- Public benefit corporation subject to more stringent controls
- Charitable corporations automatically considered public benefit corporations
- Non-charitable corporation will be public benefit corporation if receive more than $10,000 in gifts/donations or government grants/financial assistance
Key Concepts - Director Composition

• Directors not required to be members
• Minimum of 3 Directors required
• In public benefit corporation not more than 1/3 of the Directors may be employees of the Corporation (or its affiliates)
• ex-officio directors permitted
Key Concepts - Director Standard of Care

- Must act honestly and in good faith in best interests of corporation
- Exercise care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
- Reasonable due diligence defence included - may rely on certain financial info and reports of officers, employees, experts
- Corporation may indemnify
Key Concepts - Officers

• President no longer required to be a Director
• Director must be appointed as Chair of the Board
Key Concepts - Membership Composition

• Membership classes to be outlined in the Articles
• Details re: membership requirements set out in By-laws
• Director members not required
Key Concepts - Membership Rights

- Voting rights for ALL members on fundamental changes and membership issues (including those not normally entitled to vote)
- Separate class votes may be required
- Members entitled to vote may submit a proposal of matter to raise at a meeting (there are certain exceptions to guard against abuse)
- Business law concepts of oppression and dissent rights
- Articles/by-laws may provide for Directors/Members to discipline or terminate a member
Key Concepts - Audit Obligations

• For a public benefit corporation:
  - If annual revenue is equal to or less than $100,000 may dispense with audit and review engagement
  - If annual revenue greater than $100,000 but less than $500,000 may use review engagement
  - If annual revenue greater than $500,000 then audit required
Key Concepts - Dissolution

- Comprehensive regime related to liquidation, winding-up and dissolution
- Certain liabilities may continue post dissolution
Key Concepts - Applicability of Other Acts

- If there is a conflict between the new Act and another act or regulation, the OTHER act, regulation or law prevails
- *Public Hospitals Act* will prevail
The New Act – Implementation

• An effective date in the future will be set for when the new Act comes into force
• New Act includes transitional provisions - 3 years from the in force date will be deemed to comply
The New Act – Getting Ready

• Ensure the Corporation remains informed about the new Act
• Board to begin considering the impact of the new Act on the organization's governance model and practices
• On coming into force will want to amend/restate letters patent and by-laws
• May want to consider certain changes (e.g. membership) before the new Act comes into force
The New Act – Getting Ready

- Initial questions to ask:
  - Is the organization federally or provincially incorporated?
  - Is the organization a public benefit corporation?
  - Does the organization have multiple classes of members?
  - Does the organization have non-voting members?
  - What are views on retaining director members?
  - Consider any amendments to objects
  - Will audit/review engagement be required?
Members – Current Status

• corporate members are the owner (shareholders)

• Corporations Act provides for more than one class of membership

• the corporate members will:
  - elect the Directors;
  - approve the Financial Statements
  - appoint the auditors of the Corporation;
  - generally approve the actions of the Board,
Members – New Act

• The corporate members:
  - have the ability to nominate and elect directors
  - may propose and amend By-Laws
  - undertake the removal of Directors
  - changing the size of the Board, and create new classes of members
Members – Board Responsibilities

• Board accountable for quality and fiscal management and engagement with respect to decision making

• obligations to government, stakeholders and the community it serves (statutory/common law)

• review Corporate Membership structure in order to ensure that the Board meets its responsibilities (regulation and fiduciary)
Members – Options

• **an open membership** - criteria for the selection and approval by the Board

• **a closed membership** - disenfranchising of the community

• **a restricted membership** - non-Director members from identified diverse constituencies
Members – Risk Analysis

• Open membership
  - **legal**: organize to remove directors and refuse to approve actions requiring approval
  - **operational**: setting of operating policies and programs through Board selection
  - **reputational**: minimal; generally seen as fostering transparency and engagement
Members – Risk Analysis

• Restricted Membership

legal: little as fixed number of elected directors a minority of the total number of members

operational: no identifiable operational risks

reputational: a strategy to mitigate the risk described for closed membership
Members – Risk Analysis

• Closed Membership

- **legal**: action other than that which is in the best interests of the corporation is eliminated

- **operational**: removes the potential for operational risk

- **reputational**: loss of community support, strategies for managing risk - community engagement plan
Questions?

THANK YOU

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