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COFFEE TALK - DIRECTORS SERIES

Are You Ready? New Amendments Non-Profit Governance in Ontario

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Where Are We Now?

- *Corporations Act (OCA)* was enacted in 1907 and until recently has not been substantially updated in many years
- Ontario *Not-for-Profit Corporations Act, 2010* (the “New Act”) received Royal Assent in 2010 but the legislation has not yet come into force
- Until the New Act comes into force, the OCA continues to govern
- OCA very recently amended to give flexibility in some areas



AGENDA

1. Amendments to the *Corporations Act* (OCA)
2. Review of key future changes in ONCA
3. Governance action items

Amendments to the OCA Status

- *Cutting Unnecessary Red Tape Act, 2017* came into force on November 14, 2017
- Amends various statutes, including the OCA
- Each amendment with its own in force date



Amendments to the OCA

Key Changes

- Director Members
- Removal of Directors
- Members Meetings
- Standard of Care
- Natural Person Rights
- Audit Exemption



Amendments to the OCA

Key Changes – Director Members

- Previously, Directors were required to become Members within 10 days of being elected as Directors
- Now, Directors not required to be Members if so provided in By-Laws



Amendments to the OCA

Key Changes – Removal of Directors

- Previously, to remove a Director, a vote of 2/3rds of the Members was required
- Now, threshold for Director removal reduced to majority vote of Members
- Persons who are Directors by virtue of their office (*ex-officio*) cannot be removed in this manner



Amendments to the OCA

Key Changes – Members Meetings

- Previously, meetings of the Members (AGM, Special Meetings) had to be held in person
- Now, unless the corporation's By-laws provide otherwise, Members can hold meetings by telephonic or electronic means



Amendments to the OCA

Key Changes – Standard of Care

- Previously, standard of care for Directors established through common law
 - Directors must exercise the level of care, skill and judgment that may reasonably be expected of a person with *their* knowledge and experience
 - Subjective standard – depends on personal knowledge and experience



Amendments to the OCA

Key Changes – Standard of Care

- Now, duties and standard of care expected of Directors and Officers explicitly stated:
 - Act honestly and in good faith with a view to the best interest of the corporation; and
 - Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
 - Objective standard
- Cannot delegate ultimate responsibility for risk

Amendments to the OCA

Key Changes – Natural Person Rights

- Previously, corporations only had powers stated in legislation, constating documents (By-laws/Letters Patent)
- Now, corporations have capacity, rights powers and privileges of a natural person
 - No longer necessary to pass a By-law in order to confer any particular power on the corporation or its Directors
 - Example, no longer necessary to pass a borrowing By-law to borrow funds
 - However, corporations may not carry on activities or exercise any powers prohibited in OCA or constating documents
 - Acts of corporations not invalid only by reason of being contrary to the OCA or constating documents



Amendments to the OCA

Key Changes – Audit Exemption

- Previously, exemption from audit only available if annual income of a corporation was less than \$100,000 *and* all Members consented in writing to the exemption for that financial year
- Now, Members can pass an extraordinary resolution (80%) not to appoint an auditor and not to have an audit in respect of a financial year if annual revenue in that financial year was no more than \$100,000

Amendments to the OCA

- The OCA amendments do not require any By-law changes for compliance
- The purpose of these amendments is to give flexibility to corporations while awaiting the coming into force of the ONCA
- Review governance structure and practices to determine whether or not changes are desired

Status of ONCA

- Royal Assent received October 25, 2010
- Recent update from Ministry of Government and Consumer Services - target in force date for ONCA, early 2020
- Regulations under development



Status of ONCA

- On in force date (to be announced):
 - Apply automatically to all Ontario not-for-profit corporations
 - Three year transition period to amend incorporating documents to conform (if valid now, then continue to be valid until amendment or end of transition period)
 - After transition period, provisions deemed amended to conform



ONCA - Key Future Changes

- Incorporation as of Right
- Public Benefit Corporations
- Director Composition
- Officers
- Conflict of Interest
- Membership
- Membership Rights
- Proxies
- Electronic Voting
- Audit Exemption
- Conflict with other Laws

ONCA – Key Future Changes Incorporation as of Right

- Incorporation as of right on submission of Articles, other required information and fees, rather than at the discretion of the Minister of Government and Consumer Services
- If Directors do not pass an organizational By-law within 60 days of incorporation, corporation is deemed to have passed the standard organization By-law approved by the Ministry (default By-law)
- Ministry will approve the standard organizational By-law and make it publically available on its website



ONCA – Key Future Changes Public Benefit Corporations

- New distinction between public benefit corporations and other not-for-profit corporations
- Public benefit corporations subject to more stringent controls
- Charitable corporations automatically considered public benefit corporations
- Non-charitable corporations will be public benefit corporations if receiving \$10,000 (or other prescribed amount) in the form of donations/gifts or government grants/financial assistance



ONCA – Key Future Changes

Director Composition

- Articles may provide for minimum and maximum number of Directors, with the number to be determined by Special Resolution (2/3rds)
- Directors not required to be Members, unless By-laws provide otherwise
- In public benefit corporations, not more than 1/3 of Directors may be employees of the corporation (or its affiliates)
- Maximum term length, reduced from 5 years to 4 years, but no limit on number of terms that can be served



ONCA – Key Future Changes Officers

- Director must be appointed as Chair of the Board
- “President” no longer a required office
- “Secretary” no longer a required office

ONCA – Key Future Changes

Conflict of Interest

- Lists specific requirements for Directors and Officers to disclose conflicts of interest in certain circumstances
 - For example, conflict of interest may arise where a Director/Officer sits on the Board of two not-for-profit corporations that intend to enter into a contract with each other or where a Director/Officer is an owner of a business that is contracted to perform services for the corporation



ONCA – Key Future Changes Membership

- If a corporation has two or more classes of Members, classes must be set out in the Articles (instead of in the By-laws)
- By-laws must set out the conditions of Membership



ONCA – Key Future Changes

Membership Rights

- ONCA grants voting rights to non-voting Members on fundamental changes, for example:
 - Amendments to membership rights of a class or group of members
 - Amalgamation
 - Continuance to another jurisdiction
 - Sale, lease or exchange of all or substantially all property of the corporation
- These provisions will come into force no earlier than 3rd anniversary of the day ONCA comes into force
- Provides corporations with opportunity to evaluate governance structure, if necessary



ONCA – Key Future Changes Proxies

- Proxies not mandatory
- Members can appoint a proxyholder only if the Articles or By-laws allow
- Articles or By-laws can require proxyholder to also be Member of the corporation



ONCA – Key Future Changes

Electronic Voting

- Corporations may provide in By-laws for voting by mail or telephonic/electronic means in addition to or instead of voting by proxy
- Voting by mail or telephonic/electronic means may only be used if:
 - The votes can be verified as having been made by the Member entitled to vote; and
 - The corporation is not able to identify how each Member voted



ONCA – Key Future Changes

Audit Exemption

Type of corporation	Amount of revenue per financial year	Type of financial review
Public benefit corporation	\$100,000 or less	Waive*
Public benefit corporation	More than \$100,000, but less than \$500,000	Review engagement*
Public benefit corporation	\$500,000 or more	Audit
Non-public benefit corporation	\$500,000 or less	Waive*
Non-public benefit corporation	More than \$500,000	Review engagement*

*Approval to waive an audit or to waive both an audit and review engagement requires an **extraordinary resolution** (80%)

Table courtesy of Ministry of Government and Consumer Services
<https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations>



ONCA – Key Future Changes

Conflict with other Laws

- If there is a conflict between ONCA and any other Act, the other Act will prevail
- If there is a conflict between a provision of ONCA that applies to a charitable corporation and any other law relating to charities, the other law prevails, regardless of whether it is found in legislation or is a rule/principle of common law or equity



Governance Action Items

Getting Ready

- Directors have a duty to be educated and informed about changes in governance law
- Board should begin considering the impact of ONCA on the organization's governance model and practices
- Consider proactive amendments to Letters Patent and By-laws, for example, Membership structure



Questions?

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