THE NEW NOT-FOR-PROFIT CORPORATIONS ACTS

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The increased focus on governance in the corporate world has resulted in new regulations in the nonprofit sector. One of the major changes is occurring in the area of corporate law. Federally, the *Canada Not-for-profit Corporations Act*[1] (CNCA) was proclaimed in force on October 17, 2011, and will replace Part II of the *Canada Corporations Act*[2] (CCA). All federal non-share capital corporations (charitable and other nonprofits) incorporated under the CCA now have three years to continue under the CNCA through the filing of articles of continuance. Corporations that fail to file by October 17, 2014, could face dissolution.

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In Ontario, following an exhaustive review of the *Corporations Act*[3] (OCA) by the corporate ministry, the new *Not-for-Profit Corporations Act, 2010*[4] (ONCA) received Royal Assent on October 25, 2010. Current indications are that the ONCA will be enacted in late 2012. Once that happens, corporations incorporated under the OCA will have a three-year grace period within which to bring themselves into compliance with the ONCA. During this period, any provision in a corporation's articles or by-laws that was valid immediately prior to proclamation of the ONCA will continue to remain in effect. At the end of the three years, any provision of a corporation's articles or by-laws that is not in compliance with the ONCA will be deemed to be amended in a manner that conforms to the ONCA. While Ontario corporations will not be required to file articles of continuance or amend their by-laws, it would be prudent for them to do so in order to avoid confusion down the road as future readers of these documents will not know what provisions are valid or invalid without referring back to the ONCA.

It is interesting that both the new federal and Ontario statutes contain "not-for-profit" in their titles (although not in the body of either Act). That term has become the new corporate moniker in place of "corporations without share capital" and "non-share capital corporations."

The CNCA and the ONCA are significantly different from the previous or existing legislation, as applicable. Some of the changes are consistent in both new Acts and others are unique to the specific statute.

One of the key differences from the CCA and the OCA respectively is that non-voting members will have voting rights in certain circumstances. In addition, in some situations, a class of members will have the right to vote separately as a class, whether or not the class otherwise has voting rights. A corporation can opt out of class voting in limited circum-

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stances but only if the corporation's articles so provide. Therefore, it is important for corporations to consider, prior to continuance (or, in the case of the ONCA, before the new Act is proclaimed in force), how they wish to deal with their non-voting classes of members.

Another new addition in both the CNCA and the ONCA is the authority given to directors to appoint additional directors in between annual general meetings (AGM), if the articles of the corporation permit them to do so. However, the directors can only appoint up to one-third of the number of directors elected at the previous AGM and any directors so appointed will only hold office until the next AGM.

As well, both new Acts provide that the members can remove a director by ordinary resolution, that is, by a resolution passed by a majority of the members in attendance at a meeting at which a quorum is present. This threshold cannot be overridden in the articles or by-laws and may be a surprise to many corporations that currently require a two-thirds vote of the members to remove a director.

All that being said, one of the biggest changes in the new legislation is the introduction of different classifications for corporations. Unfortunately, the terminology is not consistent as between the two new Acts. In Ontario, there is a distinction between public benefit and non-public benefit corporations and federally, the categories are soliciting and non-soliciting corporations. Different rules apply depending upon these classifications.

Under the CNCA, a soliciting corporation is defined as a corporation that receives more than $10,000 per year of (a) requested donations or gifts from persons who are not members, directors, officers, or employees or their close family members (Public Donors), or (b) grants or financial assistance from government or an agency of government, or (c) donations or gifts from other entities that received, upon request, more than $10,000 in the previous financial year from Public Donors or government grants. A determination will need to be made annually on the last day of a corporation's financial year to see if it meets the criteria for a soliciting corporation. If it does, it will be so classified effective at the next AGM until the third following AGM.

The CNCA also introduces the concepts of designated and non-designated corporations. A designated corporation is (a) a soliciting corporation with gross annual revenues of less than or equal to $50,000, or (b) a non-soliciting corporation with gross revenues of less than or equal to $1,000,000. A corporation that does not meet the criteria for a designated corporation will be classified as a non-designated corporation.

Under the ONCA, every charitable corporation is a public benefit corporation (PBC) as well as every non-charitable corporation that receives more than $10,000 per year of (a) donations or gifts from Public Donors, or (b) grants or financial assistance from government or an agency of government. Like the CNCA, a determination will need to be made annually on the last day of a corporation's financial year to see if it meets the criteria for a PBC. If it does, it will be so classified effective for one year starting at the next AGM.

The classification of a corporation under the CNCA or the ONCA will have an impact on the corporation's level of financial review and disclosure. For example, under the

CNCA, the members of a designated corporation may dispense with the appointment of a public accountant but the members of a non-designated corporation may not. Under the ONCA, the default rule is that a corporation must annually appoint an auditor or person to conduct a review engagement by ordinary resolution (that is, a majority vote) although various exemptions are available.

The clear message from the CNCA and the ONCA is transparency and accountability. Although the new corporate governance requirements will differ depending upon the applicable legislation and the corporation's classification, boards and nonprofit leaders will need to evaluate the governance structures of their organizations and ensure that they are compliant with the new corporate regimes.

Notes

1. S.C. 2009, c.23 and the corresponding Regulations (SOR/2011-223).

2. R.S.C. 1970 c. C-32.

3. R.S.O. 1990, c. C.38.

4. S.O. 2010, c. 15. Draft Regulations not yet available.