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CORPORATE

- *ESTATE ALERT*

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THE NEW ONTARIO *NOT-FOR-PROFIT CORPORATIONS ACT*

By John B. A. Wilkinson

The Ontario *Not-for-Profit Corporations Act, 2010* ("ONPCA") was passed by the Ontario Legislature and received Royal Assent on October 25, 2010 but it has not yet come into force. While there is not a fixed "coming into force" date, the Government of Ontario has indicated that this will likely occur in 2012.

The ONPCA will govern non-share capital corporations, removing them from the governance of Part III of the *Ontario Corporations Act* ("OCA").

The ONPCA distinguishes between "public benefit corporations" ("PBCs") and non public benefit corporations ("Non-PBCs").
PBCs are further divided into:

a) charitable corporations, which are incorporated for the relief of poverty, advancement of education, religion or other charitable purpose; and

b) non-charitable corporations that receive more than $10,000 in a fiscal year in the form of donations or gifts from persons who are not members, directors, officers or employees of the corporation or in the form of grants or other financial assistance from any level of government or a government agency.

If a Non-PBC crosses the $10,000 threshold in a given year, it does not become a PBC immediately, but will become so in the following financial year.

Notable differences between PBCs and Non-PBCs are as follows:

(i) similar to the OCA, a charitable PBC cannot purchase directors' and officers' liability insurance unless it complies with the *Charities Accounting Act* or is authorized to do so by a court;

(ii) members of PBCs are not entitled to receive fair value for their membership interest upon the termination of such membership, and do not receive residual assets upon dissolution of the corporation;

(iii) only members of Non-PBCs have dissent rights to certain fundamental changes and are entitled to receive fair value for their interest in the corporation if the resolution dissented to is adopted by the corporation;

(iv) not more than one third (1/3) of the directors of a PBC may be employees of the corporation or any of its affiliates – subject to common law rules regarding remuneration of directors by a charity on the board of which they sit; and

(v) the financial thresholds regarding possible waiver of the requirement to have an audit or review engagement report differ for PBCs and Non-PBCs.

One of the highlights of the incorporation rules under the ONPCA is that, similar to the mechanism used in the Ontario Business

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Corporations Act (the "OBCA"), incorporation will be "as of right". This means that as long as the articles of incorporation, the required fee and other required documents are filed, a certificate of incorporation will be issued. Under the OCA on the other hand, incorporation is subject to the discretion of the Minister of Government Services.

The ONPCA contains other provisions that differ from the OCA, for example provisions related to incorporation (new efficiencies introduced), not-for-profit corporations having purposes of a commercial nature (subject to specific parameters), and default by-laws if directors do not pass by-laws shortly after incorporation. In addition, the ONPCA provides a number of new rules regarding, for example: a corporation's powers and capacity; number and term of directors; directors' appointment and removal; directors' duties; a director's due diligence defence; and members' rights (for example, voting rights, rights to submit proposals, and rights to trigger investigations).

When the ONPCA is proclaimed into force, not-for-profit corporations without share capital incorporated under the OCA will be governed under the new act.

By articles of amendment, the corporation will have three (3) years to amend any provision in its letters patent, supplementary letters patent, by-laws or special resolution to conform to the ONPCA. Following the third (3rd) anniversary of the day the ONPCA comes into force, non-compliant provisions will be deemed to be amended as required to bring them into conformity.

Due to this deeming provision, an existing Ontario not-for-profit corporation is not required to take any continuance action under section 115 of the ONPCA. Nonetheless, it is advisable to do so and to amend the corporations' governing documents to bring them in conformity with the new Act in order to avoid confusion, delay and additional expense.

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John's practice includes service to the business and the non-profit sectors. His expertise includes law related to business corporations, mergers and acquisitions, shareholder agreements, commercial contracts, employment agreements, risk management, intellectual property (including trade-marks and copyright), non-share corporations, charities, public-private cooperation, sports and Olympic law, franchising and professional regulation. John represents clients involved in manufacturing, consulting, education, health care, social services delivery and sports administration.

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