

## **Canada and Ontario's New Not-for-Profit Legislation What Changes Should You Expect?**

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The law has drastically changed for the not-for profit ("NFP") corporation with the enactment of the Canada Not-for-Profit Corporations Act ("CNCA") and the passing of the Ontario Not-for-Profit Corporations Act ("ONCA"). CNCA came into force on October 17, 2011 and it affects NFPs incorporated federally. ONCA is expected to come into force on July 1, 2013 and will affect all NFPs incorporated in Ontario.

Prior to the enactment of CNCA, federal NFPs were incorporated under and governed by the Canada Corporations Act ("CCA"). Ontario NFPs are currently incorporated under and governed by the Ontario Corporations Act ("OCA").

ONCA and CNCA are modeled on the Ontario Business Corporations Act ("OBCA") and the Canada Business Corporations Act ("CBCA"), respectively, which govern business corporations. This harmonization of the NFP and for-profit rules will help clarify areas of the NFP legislation that previously lacked certainty, through the reference to settled cases in relation to business corporations.

The following is a selective summary of the more important aspects of both CNCA and ONCA.

Under ONCA regime, once the Act comes into force, there is an automatic continuance of existing corporations. A corporation will have three years to amend its by-laws to conform to ONCA, after which, the by-laws will be deemed to have been amended in accordance with the Minister's template by-law (not yet published). If the corporation is newly formed, it will have 60 days after formation to approve a new form of by-law that conforms with the Act, otherwise the Ministry form will apply.

ONCA corporations may provide in their articles for a minimum or maximum number of directors or a fixed number of directors, but there is a minimum requirement of three directors.

ONCA reflects an objective standard of care as opposed to a subjective standard of care for directors and officers. The OCA does not speak on the subject of standard of care for directors and left the matter to the courts to interpret. This standard of care is now in tune with the standard of care for business corporations found in the OBCA and CBCA.

The enactment of ONCA also brings clarity to several areas of director responsibilities that were not clearly provided for in the OCA. Under ONCA, a director must be appointed as the chair of the board of directors. Also, ONCA specifically disallows a director to send a delegate to a directors' meeting in his or her place.

In addition to the benefits that are afforded to NFP corporations and their officers and directors as a result of ONCA, there are also additional rights and remedies that are available to members. Amongst other provisions, the Act dictates that the by-laws must set out the requirements to become a member of the corporation and also that any termination of such membership must be done in good faith and in a fair and reasonable manner. The OCA did not provide several of the member remedies which are now available through ONCA. These member remedies now include an application for a compliance or a restraining order by a complainant or creditor, an application by an aggrieved party to have the registers or records of a corporation rectified, a dissent and appraisal remedy for certain corporations, the ability of a complainant to seek a court order for the commencement of a derivative action, and the holder of 10% of the votes may requisition a meeting of members.

Under CNCA, every NFP corporation incorporated under the CCA will have until October 17, 2014 to continue under CNCA, failing which, it will be dissolved. Under the CCA, Industry Canada must approve any by-law. A CNCA corporation will now have to file copies of their by-laws with Industry Canada within 12 months of confirmation by the members but these by-laws will no longer need to be approved by Industry Canada.

All CNCA corporations must have a minimum of one director. If however the corporation is a soliciting corporation, as defined in the Act, it must have a minimum of three directors, at least two of which must not be officers or employees. It is also necessary under CNCA for the articles of the corporation to specify a fixed number or a minimum and maximum number of directors. Like ONCA, the CNCA also reflects an objective standard of care as opposed to a subjective standard of care for directors and officers.

While there are many similarities between CNCA and ONCA, there are also several provisions that are different. For example, ONCA specifically permits ex-officio directors<sup>1</sup>, while CNCA disallows this practice and provides that directors must be elected by ordinary resolution of members at the annual general meeting. Also, under CNCA, the by-laws may provide for decisions to be made by consensus as long as this term is defined, while ONCA is silent on this point.

A major difference between ONCA and CNCA is the fact that under CNCA, members may enter into a unanimous members agreement to restrict the powers of the directors, similar to unanimous shareholders agreements under both the CBCA and OBCA. In addition, CNCA provides for a derivative action remedy for members in certain situations. The holders of 5% of the votes may requisition a meeting of members.

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<sup>1</sup> There are complicated mechanisms to "circumvent" this prohibition against ex-officio directors.

## **Conclusions**

1. This brief overview of CNCA and ONCA demonstrates the important changes to the legislative framework of NFP corporations in Canada. With the enactment of these two Acts, there will have been significant harmonization between the for-profit and NFP corporations.
2. Currently, NFP corporations are operating under outdated legislation that does not take into account modern corporate governance practices.
3. Directors, officers and members of NFP corporations should seek advice about the appropriate time for continuance (in the case of CNCA corporations) and start thinking about the changes that are needed to ensure that the corporation's governance arrangements are improved or updated to conform to the new legislation.

Minden Gross LLP can assist corporations to transition under CNCA and ONCA. Contact Hartley R. Nathan, Q.C. (hnathan@mindengross.com) or Aaron Grubner (agrubner@mindengross.com)