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Governance Matters Bulletin

Should Your Organization Spend Money Getting Ready for ONCA or Just Take Note of Recent Changes to OCA?

About the Authors:

Adam Bulkiewicz is an Associate Lawyer at Willis Business Law whose practice focuses on labour and employment, not-for-profit and public sector law.

Dana Young is a lawyer of Council at Willis Business Law whose practice focuses on not-for-profit, public sector, procurement and privacy law.

In 2010, the Ontario government passed, but did not bring into force, the Ontario *Not-for-Profit Corporations Act* ("ONCA"). Initially the official word was that it would come into force in 2013 and believing this, many organizations spent money on training sessions and getting ready. However there have been numerous delays and ONCA is still not in force.

The latest official word is that ONCA is now targeted to come into force in early 2020. Upon coming into force, it will repeal the portions of the existing *Corporations Act* ("OCA") relating to non-share capital

corporations. Therefore, it is curious that there have been a number of very recent changes to OCA, the latest of which came into force on January 13, 2018. While unexpected, these changes are welcome. More particularly, these changes modernize OCA and fix a number of associated pesky problems, perhaps reducing the need and likelihood that the official word on ONCA will ever be realized.

So, in answer to the question above, it might be wise to hold on to your money for now and take note of the key changes to OCA, which we summarize below.

Summary of Key Changes to the Existing Ontario *Corporations Act*

Directors Not Required to be Members

- Historically, directors were required to be or become members of a corporation within ten days of taking office.
- Section 286(3)(d) now permits individuals to be directors who are not members, provided provision in this regard is included in the by-laws and provided the incoming director consents in writing.

Notice for Members Meetings May Be Given Electronically

- Previously, unless otherwise prescribed by the by-laws of the corporation, notice of members meetings was required to be given by way of pre-paid mail.
- Section 93(1)(a), made operative by way of section 133, now provides that notice may be given “in writing”, effectively permitting notice to be given by way of e-mail or other electronic means.

Members Meetings May be Held Via Telephone or other Electronic Means

- Previously, it was uncertain if meetings of members held using telephonic or electronic means constituted a proper meeting.
- Now, section 125.1 clarifies this uncertainty and entitles members of the corporation to participate in meetings where a communications link has been established. When participating via telephonic or electronic means, members are deemed to be present at the meeting.

Other Laws Take Precedence Over OCA

- In the past, corporations incorporated under OCA occasionally encountered provisions within OCA that conflicted with provisions contained in other (relevant and applicable) legislation, creating legal uncertainty.
- Section 117.1(1) has now been added to OCA to provide guidance with respect to resolving conflicts of law. To the extent there is a conflict between a provision in the *Corporations Act* or related regulation and any other act or related regulation, the provision in the other act or related regulation will govern.

May Adopt Pre-Incorporation Contracts

- While the Ontario *Business Corporations Act* has long provided for provisions for corporations to adopt and assume pre-incorporated contracts, similar provisions were never expressly provided for in OCA.
- Now, section 126.3(1) has been added to permit a corporation to, within a reasonable time after coming into existence, adopt contracts made in its name or on its behalf prior to coming into existence. In such cases, the corporation will be bound even if it was not in existence at the date of the contract.

Simple Majority Vote For Early Removal of Elected Directors

- Perhaps one of the most significant changes pertains to how elected directors of a corporation can be removed. Previously, early removal of an elected director by the members required members be afforded this power by way of the corporations governing documents, and further, that a vote be passed a two-thirds majority of the members present at a meeting of a members called for that purpose.
- Now, members of a corporation may remove an elected director by way of a majority of votes cast at a meeting of the members called for that purpose, in accordance with section 127.2(1). Further, there is no requirement that these powers be afforded to members by way of the corporation's governing documents.
 - However, it is important to note that the changes prescribed by section 127.2(1) do not apply to corporations with bylaws passed before January 13, 2018.

Extraordinary Resolution For Exemption from Audit Requirements

- Previously, a corporation with revenues less than \$100,000 in a financial year could waive the requirement for an audit with the written consent of 100% of the members of the corporation. Depending on the number of members, this could often prove to be quite difficult.
- Now, OCA permits a corporation to waive the audit requirement by way of extraordinary resolution, passed by 80% of the votes cast at a general meeting of the members.

Objective Standard of Care

- Previously, directors of a corporation were held to a standard of care that was assessed on a subjective basis.
- Section 127.1 now prescribes an objective standard of care for directors of a corporation. In particular, directors must act honestly and in good faith, giving regard to the best interests of the corporation while exercising care, diligence, and skill of a reasonably prudent person in comparable circumstances.

Extraordinary Sale, Lease, or Exchange

- Curiously, section 126.2 was added, permitting a corporation to sell, lease, exchange, or dispose of all of substantially all of the assets of the corporation, and prescribed that such action be undertaken by way of a special resolution passed by the board and confirmed by at least a 2/3rds vote at a meeting of the members.
- This language appears to closely resemble similar language already provided for by way of section 23(1)(m); however, unlike section 23, section 126.2 does not indicate that this particular provision is “incidental and ancillary to the objects set out in the letters patent or supplementary letters patent, power” of the corporation.

Although much of OCA remains the same, the above captioned changes have incorporated some of long awaited provisions contemplated by ONCA.

Adam Bulkiewicz & Dana Young

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