



Update on the *Ontario Not-For-Profit Corporations Act* January 9, 2013

Karima Kanani & Joshua Liswood

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Agenda

1. Status of new *Ontario Not-For-Profit Corporations Act*
2. Key concepts
3. Implementation of the new Act
4. Getting ready for the new Act
5. Strategic analysis of Membership options

The New Act - Status

Not-for-Profit Corporations Act, 2010

- Royal Assent received October 25, 2010
- In force date has not yet been announced
- anticipated July 2013
- Regulations under development
- Plain language guides to be developed

The New Act - Background

- The existing *Corporations Act* was enacted in 1907 and has not been substantially updated in many many years
- The new Act is intended to modernize the legal framework
- The changes are based on business corporations statutes

The New Act - Application

- Will apply to corporations without share capital and will remove them from the governance of the existing Act
- The existing Act will continue to apply to insurers and for five years to corporations with share capital that have objects of a social nature

The New Act – Key Concepts

- Incorporation as of Right
- Purpose and Capacity
- New Category of "Public Benefit Corporation"
- Director Composition and Standard of Care
- Officer Requirements
- Membership Composition and Rights
- Audit Obligations
- Dissolution
- Applicability of other Acts

Key Concepts - Incorporation as of Right

- Incorporation as of right on submission of articles, other required info and fees, rather than at the discretion of the Minister of Government Services
- If Directors do not pass an organizational by-law within 60 days of incorporation, the corporation is deemed to have passed the standard organizational by-laws approved by the Director under the Act

Key Concepts - Purpose and Capacity

- Must set out purpose in Articles
- Corporation has the capacity, rights, powers and privileges of a natural person
- If any purpose is commercial then must be intended to support or advance the not-for-profit purposes

Key Concepts - Public Benefit Corporation

- Public benefit corporation subject to more stringent controls
- Charitable corporations automatically considered public benefit corporations
- Non-charitable corporation will be public benefit corporation if receive more that \$10, 000 in gifts/donations or government grants/financial assistance

Key Concepts - Director Composition

- Directors not required to be members
- Minimum of 3 Directors required
- In public benefit corporation not more than 1/3 of the Directors may be employees of the Corporation (or its affiliates)
- ex-officio directors permitted

Key Concepts - Director Standard of Care

- Must act honestly and in good faith in best interests of corporation
- Exercise care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
- Reasonable due diligence defence included - may rely on certain financial info and reports of officers, employees, experts
- Corporation may indemnify

Key Concepts - Officers

- President no longer required to be a Director
- Director must be appointed as Chair of the Board

Key Concepts - Membership Composition

- Membership classes to be outlined in the Articles
- Details re: membership requirements set out in By-laws
- Director members not required

Key Concepts - Membership Rights

- Voting rights for ALL members on fundamental changes and membership issues (including those not normally entitled to vote)
- Separate class votes may be required
- Members entitled to vote may submit a proposal of matter to raise at a meeting (there are certain exceptions to guard against abuse)
- Business law concepts of oppression and dissent rights
- Articles/by-laws may provide for Directors/Members to discipline or terminate a member

Key Concepts - Audit Obligations

- For a public benefit corporation:
 - If annual revenue is equal to or less than \$100, 000 may dispense with audit and review engagement
 - If annual revenue greater than \$100, 000 but less than \$500, 000 may use review engagement
 - If annual revenue greater than \$500, 000 then audit required

Key Concepts - Dissolution

- Comprehensive regime related to liquidation, winding-up and dissolution
- Certain liabilities may continue post dissolution

Key Concepts - Applicability of Other Acts

- If there is a conflict between the new Act and another act or regulation, the OTHER act, regulation or law prevails
- *Public Hospitals Act* will prevail

The New Act – Implementation

- An effective date in the future will be set for when the new Act comes into force
- New Act includes transitional provisions - 3 years from the in force date will be deemed to comply

The New Act – Getting Ready

- Ensure the Corporation remains informed about the new Act
- Board to begin considering the impact of the new Act on the organization's governance model and practices
- On coming into force will want to amend/restate letters patent and by-laws
- May want to consider certain changes (e.g. membership) before the new Act comes into force

The New Act – Getting Ready

- Initial questions to ask:
 - Is the organization federally or provincially incorporated?
 - Is the organization a public benefit corporation?
 - Does the organization have multiple classes of members?
 - Does the organization have non-voting members?
 - What are views on retaining director members?
 - Consider any amendments to objects
 - Will audit/review engagement be required?

Members – Current Status

- corporate members are the owner (shareholders)
- Corporations Act provides for more than one class of membership
- the corporate members will:
 - elect the Directors;
 - approve the Financial Statements
 - appoint the auditors of the Corporation;
 - generally approve the actions of the Board,

Members – New Act

- The corporate members:
 - have the ability to nominate and elect directors
 - may propose and amend By-Laws
 - undertake the removal of Directors
 - changing the size of the Board, and create new classes of members

Members – Board Responsibilities

- Board accountable for quality and fiscal management and engagement with respect to decision making
- obligations to government, stakeholders and the community it serves (statutory/common law)
- review Corporate Membership structure in order to ensure that the Board meets its responsibilities (regulation and fiduciary)

Members – Options

- an **open membership** - criteria for the selection and approval by the Board
- a **closed membership** - disenfranchising of the community
- a **restricted membership** - non-Director members from identified diverse constituencies

Members – Risk Analysis

- **Open membership**
 - legal: organize to remove directors and refuse to approve actions requiring approval
 - operational: setting of operating policies and programs through Board selection
 - reputational: minimal; generally seen as fostering transparency and engagement

Members – Risk Analysis

- **Restricted Membership**

legal: little as fixed number of elected directors a minority of the total number of members

operational: no identifiable operational risks

reputational: a strategy to mitigate the risk described for closed membership

Members – Risk Analysis

- **Closed Membership**

- legal: action other than that which is in the best interests of the corporation is eliminated

- operational: removes the potential for operational risk

- reputational: loss of community support, strategies for managing risk - community engagement plan



Questions?

THANK YOU

Karima Kanani
416.595.7908

Josh Liswood
416.595.8525

kkanani@millerthomson.com

jliswood@millerthomson.com

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