Change is Coming: Highlights of the Ontario *Not-for-Profit Corporations Act*

The ONCA, which will come into effect no earlier than January 2014, will replace Part III of the Ontario Corporations Act. The goals of the ONCA are to increase transparency and accountability of not-for-profit corporations, enhance members' rights, enhance the protection of directors and officers, and make financial auditing more cost-effective. The following outlines some key changes in the Act:

1. Public Benefit Corporations (PBCs) or non-PBCs

Under the ONCA, not-for-profit corporations will be classified as either a PBC or a non-PBC. A PBC is either a charitable corporation or a non-charitable corporation that receives more than $10,000 a year from government grants or from persons who are not employees, directors, officers or members of the corporation.

Certain obligations are imposed specifically on PBCs, such as more strict financial review requirements, restrictions on the distribution of a corporation's property upon winding up, and the composition of the Board of Directors.

The ONCA clarifies that not-for-profit corporations', whether labelled a PBC or non-PBC, may engage in commercial activities that support the corporations' not-for-profit purposes. However, such purposes must be stated in the articles. Care should be taken in engaging in commercial activities if the corporation is a charity.

2. Directors

<u>Duties and Liabilities</u>

The ONCA codifies the standard of care for directors. They must act honestly and in good faith with a view to the best interests of the corporation; and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Directors will be entitled to a "reasonable diligence" defence whereby they may rely on financial statements, reports by officers and employees of the corporation and professional advice. Directors are also entitled to indemnification from the corporation, so long as they acted honestly, in good faith and with a view to the best interests of the corporation.

<u>Composition</u>

Under the ONCA, Directors may not serve for a term of office exceeding four years and PBCs may not have more than one-third of their directors who are employees of the corporation or any of its affiliates.

<u>Borrowing</u>

Unless the articles or by-laws provide otherwise, the ONCA gives directors the power to borrow money without authorization of the members. Previously, the by-laws specifically had to provide for a power to borrow, which was confirmed by the members.

3. Review engagement and audit exemptions

The ONCA introduces exemptions to the audit requirement, and allows for “review engagements”, which are simpler and less expensive than an audit. Members of PBCs may, by extraordinary resolution (i.e. 80% of votes), waive both the audit and review engagement if their annual revenue is less than $100,000; or have a review engagement instead of an audit if the revenue is between $100,000 and $500,000. Non-PBCs may waive both the audit and review engagement if their annual revenue is less than $500,000 and may have a review engagement if the annual revenue exceeds $500,000.

4. Remedies

The ONCA expands members’ remedies. Members can bring derivative actions and seek court-ordered investigations if they believe directors are not acting in the best interests of the corporation. A current or former member, officer, director or a creditor of a corporation may also apply to court for a compliance or restraining order where the corporation is not in compliance with the Act, regulations, articles or by-laws.

5. Members’ Voting Rights

The ONCA gives all members, including those with non-voting rights, the ability to vote on decisions relating to a fundamental change in the corporation. This includes changing the activities the corporation may carry on, an amalgamation, or the sale, lease or exchange of all or substantially all of its property. In non-PBCs, members who disagree with a decision to implement a fundamental change are entitled to be paid by the corporation a fair value of their membership interest. These rights may be modified as the Ministry has indicated that it will be reviewing the ONCA provisions relating to members’ voting rights prior to enacting the new legislation.

When the ONCA comes into effect, not-for-profit corporations incorporated under Part III of the Ontario Corporations Act will have three years to bring their letters patent, by-laws and any special resolutions into conformity with the new Act. Failure to do so means that provisions in the constituting documents and resolutions listed above that conflict with the ONCA, will be ineffective after the three-year period.
