



Transitioning to the New Not-For-Profit Corporations Acts

David J. Mifsud

By now everyone has heard about the new Acts governing non-share capital corporations, the Ontario Not-For-Profit Corporations Act (the “ONCA”) and the Canada Not-For-Profit Corporations Act (the “CNCA”), but they may not know how to safely guide a corporation to its new Act. The following is a brief overview of the transition process for corporations who are currently governed by either the Ontario Corporations Act (the “OCA”) or the Canada Corporations Act (the “CCA”).

ONTARIO NOT-FOR-PROFIT CORPORATIONS ACT

The ONCA received royal assent on October 25, 2010 and it is intended to come into force on July 1, 2013. However, numerous proposed dates for proclamation have come and gone, as we are still waiting for the regulations, a plain language guide, the forms, and a draft default bylaw. The one sign of forward movement is that the Ministry of Consumer Services has published a Frequently Asked Questions and a Transition Checklist. The ONCA will affect (1) non-share capital corporations incorporated by letters patent, (2) non-share capital corporations incorporated by general/special Act, and (3) share capital social clubs.

1. Non-share capital corporations incorporated by letters patent

The ONCA does not require these corporations to take any steps to transi-

tion. If no action is taken to conform to the ONCA within a three year transition period, its provisions will be deemed to supersede existing letters patent, supplementary letters patent, by-laws or special resolutions. We now know that the government is taking the position that provisions of these documents that are valid under the current Act will continue to be valid until the end of the transition period.

A review of the ONCA and a comparison of its provisions to those in existing documents should be conducted and the Boards of such corporations should consider the substantive changes to governance within their organization arising out of the new legislative requirements. This legislation affords corporations a watershed moment in which to modernize their governance framework.

Corporations should amend their letters patent by filing articles of amend-

ment and update their by-laws to bring them into conformity with the ONCA. If the corporation is a registered charity, the Charities Directorate of CRA should be consulted before making any changes to the letters patent which could affect its charitable status.

2. Non-share capital corporations incorporated by general/special Act

These corporations have three options for transition: (a) Seek to amend its general/special Act, (b) Continue under its general/special Act, or (c) Elect to continue under the ONCA.

These corporations should conduct a review of the ONCA and a comparison of its provisions to those of their general/special Act. They will also have to review their bylaws to identify and amend any provisions which are not provided for in their general/special Act and are now in conflict with the ONCA or else they will be subject to the deeming provision.

If the corporation’s general/ special Act is no longer adequate and it does not want to go through the arduous process of amending its Act, the corporation can choose to continue under the ONCA by applying for a certificate of continuance. Unlike a new entity, the by-laws of a corporation continued



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by articles of continuance will still apply to the continued corporation so the Board must review and amend them in the context of the ONCA.

3. *Share Capital Social Clubs*

Share capital social clubs will have 5 years from the date the ONCA comes into force to decide whether to continue (a) as a corporation without share capital under the ONCA, (b) as a cooperative corporation under the Cooperative Corporations Act, or (c) as a corporation under the Business Corporations Act.

Once the options have been reviewed by the Boards of these corporations and a direction has been chosen, they will have to apply for articles of continuance under the newly selected Act. Once continued under the new Act, the corporation will then have to amend its by-laws and any special resolutions to bring them into compliance. After 5 years, if the corporation has not continued under one of the above mentioned Acts, it will be dissolved.

CANADA NOT-FOR-PROFIT CORPORATIONS ACT

The CNCA received royal assent on June 23, 2009 and came into force on October 17, 2011. The CNCA affects (1) without share capital corporations incorporated by letters patent, and (2) without share capital corporations incorporated by special act.

1. *Without share capital corporations incorporated by letters patent*

Unlike the ONCA, the CNCA does not automatically apply to existing federally incorporated non-share capital corporations. Every corporation must replace its letters patent by submitting articles of continuance to obtain a certificate of continuance and create and

file new by-laws which comply with the CNCA. Until such time, the CCA and the letters patent, supplementary letters patent and by-laws of the corporation continue to apply. Corporations must make the transition before October 17, 2014 or they will be dissolved.

The first step in the transition process is to conduct a comprehensive review of the corporation's letters patent, supplementary letters patent, and by-laws with respect to the requirements of the CNCA. Since the continuation process mirrors that of incorporation, this is a perfect time for corporations to examine their operations and take advantage of the modern governance practices that the CNCA provides.

To assist in the transition process, Industry Canada has published a Transition Guide and also provided Model By-laws and an online By-law Builder to assist with by-law drafting. For registered charities, also consult the Charities Directorate's article "Completing Form 4031, Article of Continuance (transition)" and, if the corporation plans to amend its purposes, contact the Charities Directorate before filing the articles of continuance to ensure that its new purposes are charitable.

2. *Without share capital corporations incorporated by special Act*

Without share capital corporations incorporated by special Act of Parliament can continue under the CNCA, even if its special Act does not allow it. Since special Act corporations are not subject to the transition deadline, continuance can occur at any time by applying for a certificate of continuance. If a special Act corporation decides to stay with its current Act, no filings are required. However, the corporation will still be subject to certain provisions of the CNCA.

Conclusion

After numerous delays, we are at least a couple months away from the ONCA being proclaimed into force, so there is currently no urgency to act. As a proactive measure we have a duty to make clients aware of these upcoming changes so they can begin thinking about how they want to be governed in a whole host of areas, however, it is difficult to advise when you don't know the whole framework. Once we have the regulations, guides, forms, and default by-laws from the Ministry, we can provide unqualified opinions to our clients respecting transition, but until that happens we have a huge qualifier in providing any advice.

On the other hand, we are now well on our way to the October 17, 2014 transition deadline under the CNCA, so there is an urgency to act. Save for special Act corporations, clients who have not yet begun the transition process should be warned of their imminent dissolution if action is not taken. We now have all the necessary information from Industry Canada and CRA to properly advise clients in the transition process. It will take time for clients to fully transition to and begin to operate under the new Act, so they should be encouraged to start the process now. ■

David J. Mifsud practices at Ross & McBride LLP (www.rossmcbride.com). David can be reached at:

*Ross & McBride LLP
1 King Street West
P.O. Box 907
Hamilton, ON
L8N 3P6*

*905-667-6402 (direct line)
905-526-0732 (fax)
dmifsud@rossmcbride.com*