

helping those who help others: Bill 65
(Ontario *Not-for-Profit Corporations Act*, 2010)

Less than a year after Parliament enacted the new *Canada Not-for-Profit Corporations Act*, legislation that has not yet been proclaimed in force, Ontario has responded with Bill 65, the Ontario *Not-for-profit Corporations Act*, 2010.

Bill 65 received first reading in the Ontario legislature on May 12, 2010 and second reading, without amendment, on June 2, 2010. Third reading is expected in September 2010. The New Act is not expected to come into force until the Fall of 2012.

Bill 65 draws inspiration from the new federal Act and the Ontario *Business Corporations Act*. When passed, Bill 65 will establish a comprehensive, modern corporate framework for Ontario's 46,000 not-for-profit ("NFP") corporations by replacing Part III of the Ontario *Corporations Act*,¹ which was last substantially revised in 1953.

distinction between public benefit corporations (PBCs) and non-PBCs

Bill 65 distinguishes between public benefit corporations ("PBCs") and corporations that are not PBCs. Non-PBCs are the residual category under Bill 65.

PBCs include charitable corporations (those incorporated for a religious, educational, charitable or public purpose) and non-charitable corporations that receive more than \$10,000 in a financial year either as donations/gifts from persons who are not members, directors, officers, or employees of the corporation, or grants or similar financial assistance from the federal, provincial or municipal government, or an agency of any such government.

tighter regulation of PBCs

PBCs (and especially charitable corporations) are regulated more tightly than non-PBCs.

Upon the dissolution of a charitable corporation, any residual assets (after satisfying the interests of its creditors in all its debts, obligations and liabilities) must be distributed in accordance with its articles to a charitable

corporation with similar purposes to its own (or to a government or governmental agency). If a corporation is or has been a non-charitable PBC in any of the three financial years preceding the financial year of its dissolution, any residual assets must be distributed in accordance with its articles to another PBC with similar purposes to its own (or to a government or governmental agency). Upon the liquidation of any other corporation, any residual assets must be distributed rateably to its members according to their rights and interests in the corporation.

Other notable differences among charitable corporations, non-charitable PBCs and non-PBCs are:

- if there is a conflict between Bill 65 and any other Ontario law applicable to a charitable corporation, the other law applicable to the charitable corporation prevails over Bill 65;
- a charitable corporation cannot purchase directors' and officers' liability insurance without compliance with the *Charities Accounting Act* unless it receives court authorization;
- while all corporations must have a minimum of three directors, to encourage greater independence and accountability, not more than 1/3rd of the directors of a PBC may be officers or employees of the corporation or any of its affiliates;
- the statutory appraisal right only applies to voting members of a non-PBC; and
- financial thresholds below which a corporation's members can waive the requirement to have an audit or review engagement report are lower for PBCs than for non-PBCs.

In addition, religious corporations are exempt from the statutory derivative action.

audits and review engagement reports

Bill 65 provides that, as a general rule, an NFP corporation must appoint an auditor and have an audit annually. However, in recognition that, for smaller NFP corporations, the cost of appointing an auditor and having an audit may outweigh the incremental benefits, various exemptions are available in Bill 65 based on the type of corporation, aggregate revenue in its last completed financial period and annual membership approval. Members of a non-PBC may elect to have a review engagement instead of an audit irrespective of the level of annual revenues.

other modernizing rules applicable to all Ontario NFP corporations

Bill 65 has the following attractive features for various constituents of an Ontario NFP corporation:

- For directors and officers, Bill 65: (i) replaces the common law duties of care and loyalty with statutory duties of care and loyalty and incorporates statutory due diligence and good faith reliance defences; (ii) expands the rights of directors and officers to indemnification; (iii) permits unrestricted liability insurance coverage in favour of directors and officers; (iv) adopts a statutory conflict of interest regime;

(v) allows directors to meet by conference call or teleconferencing and to transact business by written resolution; and (vi) with limited exceptions, gives directors the power to pass by-laws, which take effect immediately and remain in effect unless the members fail to confirm the by-laws at the next ensuing meeting of members.

- For members, Bill C-65: (i) permits membership interests to be transferable if the articles or by-laws so provide; (ii) allows members to seek a compliance or restraining order, apply for a court-ordered winding-up of the corporation if there is unfair prejudice or just and equitable grounds and, except in the case of a religious corporation, seek leave to bring a derivative action; (iii) grants members the power to set the number of directors and to remove directors (including *ex officio* directors) before the expiration of their terms of office by ordinary resolution; and (iv) sets minimum standards that apply to termination of memberships or other disciplinary action taken against members (e.g., requiring good faith and natural justice). While Bill 65 omits a statutory oppression remedy, it achieves much the same effect through an expansion of the court-ordered winding up remedy to include, as grounds, unfair prejudice or unfair disregard of the interests of members and to empower the court to make any order it thinks fit, including the draconian order to wind-up the corporation.
- Founders (or incorporators) of a corporation benefit from (i) incorporation as of right rather than the current letters patent system, which makes incorporation an exercise in Crown prerogative, and (ii) provision of a set of default by-laws, which obviates the need for the founders to craft and present a set of by-laws on their own.
- Corporations enjoy all of the rights, powers and privileges of a natural person, thereby abolishing the *ultra vires* doctrine. Ontario NFP corporations are entitled to engage in any commercial or non-commercial activities, subject only to voluntary restrictions contained in their articles (which will be needed if the corporation is to become or remain a registered charity under the *Income Tax Act* (Canada). As well, if any of the purposes of the corporation are commercial in nature, the articles must state that the commercial purpose is intended only to advance or support one or more of the non-profit purposes of the corporation. Corporations also enjoy access to flexible provisions governing articles of amendment, amalgamations, import and export continuances and arrangements.
- Lenders benefit from the default authority of directors to borrow and grant security on behalf of the corporation (subject to any contrary restrictions imposed by the articles or by-laws).

remaining issues

Bill 65 heralds a significant advance in NFP corporate law in Ontario. That said, Bill 65 contains no limitation of liability regime for directors and officers. Thus, directors of Ontario NFP corporations still face the prospect of misfeasance claims brought against them, the threat of which may continue to inhibit the recruitment of qualified directors to the boards of Ontario NFP corporations.

conclusion

Long the neglected step-child of Canadian corporate law, NFP corporations operating in Ontario have suddenly received significant legislative attention both at the federal and provincial levels. With the enactment of the federal Act in 2009 and the promise of Bill 65, Ontario NFP corporations will have two excellent legislative regimes from which to choose. As well, while there are important differences between the federal Act and Bill 65, there is also a high degree of consistency between these laws that should provide some welcome coherency to the entire NFP sector.

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(Endnotes)

- ¹ Note that the OCA will continue to apply to the limited number of insurance companies incorporated under Part V and, for a 5-year transition period, approximately 160 share capital social clubs incorporated under the Ontario *Corporations Act* before 1971. These incorporated social clubs will have 5 years to elect whether to continue under the New Act, the OBCA or the *Co-operative Corporations Act*, R.S.O. 1990, c. C.35. Failure to continue within the 5-year transition period will result in automatic dissolution (subject to revival).

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a cautionary note

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