Recent Amendment to Corporations Act Ontario Provides More Flexibility

May 30, 2018

A recent amendment to the *Corporations Act* (Ontario) (the "Act") has made borrowing by public hospitals more flexible. The Office of the Public Guardian and Trustee ("PGT") has a longstanding requirement that letters patent of charitable corporations include a special provision limiting borrowing. The PGT has imposed this limitation on all Ontario charitable corporations existing under the Act, not just public hospitals (*i.e.*, hospital foundations, auxiliaries, volunteer associations, research institutes, etc.). Many hospitals and other charitable corporations, as a result, will have adopted the "standard" PGT-approved borrowing limitation in their letters patent:

The borrowing power of the corporation pursuant to any by-law passed and confirmed in accordance with section 59 of the *Corporations Act* shall be limited to borrowing money for current operating expenses, provided that the borrowing power of the corporation shall not be so limited if it borrows on the security of real or personal property.

Some hospitals that have recently integrated or otherwise taken the opportunity to modify their letters patent may have the benefit of a more flexible special provision regarding borrowing which has received PGT approval:

The Corporation shall have the power to borrow in accordance with any by-law passed and confirmed in accordance with Section 59 of the *Corporations Act*.

The *Cutting Unnecessary Red Tape Act, 2017*("CURTA"), which received Royal Assent on November 14, 2017, has removed the requirement for corporations subject to the Act (subject to some limited exceptions such as insurance companies) to adopt a by-law to confer a power on a corporation or its directors. Prior to this amendment, Section 59 of the Act required that a by-law be enacted to enable a corporation subject to the Act to have the capacity to borrow. This is why the Ontario Hospital Association prototype corporate by-law included a provision expressly authorizing borrowing.

The legislative change resulting from the CURTA means that hospital corporations subject to the Act are no longer required to adopt a by-law granting the power to borrow.

We have been working with the PGT to determine if, in light of these changes, the PGT would no longer require any reference to borrowing in letters patent.The PGT confirmed

to us on May 5, 2018 that, in light of the recent amendments to the Act, the special provision respecting borrowing that the PGT previously required in letters patent is no longer required for public hospitals.

Note that if your hospital is subject to the "standard" PGT special provision restricting borrowing in your letters patent and your hospital does nothing, your hospital continues to be subject to that special provision restricting borrowing until your letters patent are modified. Section 126.1(4) of the Act expressly prohibits a corporation from exercising any power inconsistent with its instrument of incorporation (*i.e.*its letters patent). Removing the borrowing provision only from your by-laws will not be sufficient.

If your hospital wishes to avail itself of more flexibility regarding borrowing, your hospital must file supplementary letters patent to delete the special provision restricting borrowing. As a reminder, an amendment to letters patent requires corporate approvals (by special resolution passed by the directors and confirmed, with or without amendment, by at least two thirds of the votes cast by members at a special meeting called for that purpose) and the filing of supplementary letters patent with both the PGT and Service Ontario. In addition, you may also wish to review the borrowing provisions set out in your hospital's by-laws to determine if they are still necessary or desirable.

Why does this matter?

If your hospital has adopted the "standard" PGT-approved language noted above, your hospital is only able to borrow for current operating expenses and not for other purposes unless it grants real property security (i.e., a mortgage) or personal property security (i.e., a general or specific security agreement) in favour of a lender. Granting a mortgage on hospital property may also require approval of the Minister of Health and Long Term Care under section 4 of the *Public Hospitals Act*.Eliminating the borrowing restriction will enable more flexibility to borrow on an unsecured basis or on a secured basis for all purposes.

This guidance from the PGT only applies to public hospitals. The PGT has not yet confirmed how the amendments to the Act will be interpreted in respect of charitable corporations generally (such as foundations, research institutes, auxiliaries, etc.). BLG has provided input to the PGT in this regard and has requested that PGT clarify how these legislative changes will impact charitable corporations existing under the Act more broadly. We will update the sector on PGT's response in due course.

By

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