The New FCPA — Changes to Ontario's Corporate Record-Keeping Requirements And Corporate Forfeiture Regime

December 20, 2016

Introduction

On December 10, 2016, the *Forfeited Corporate Property Act, 2015* ("FCPA") came into force in Ontario. The FCPA has the effect of amending the *Ontario Business Corporations Act* ("OBCA") and the *Corporations Act*. There are also similar amendments made to the *Ontario Not-for-Profit Corporations Act* ("ONPCA"), but they have not yet come into force. The legislation effects changes to forfeiture of corporate real estate and corporate record-keeping requirements. These changes were enacted in order to better manage forfeited corporate property upon the dissolution of Ontario corporations. In doing so, they present new obligations for corporations and narrow the potential for revival of forfeited corporate assets post-dissolution.

Background

When an Ontario corporation is dissolved, real property owned by that corporation that has not been transferred out of the corporation's title automatically forfeits to and vests in the Crown. It occasionally occurs that a corporation "loses track" of a piece of property in its name and fails to dispose of it prior to dissolution. Before the FCPA legislation came into force, there was no notification process that property had forfeited to the Crown. The new Act aims to avoid such forfeitures in the first place, in addition to making it easier for the Crown to track forfeited property when forfeiture does occur. This is done by requiring every Ontario corporation to maintain a register of its ownership interests in land in Ontario.

Corporate Record-Keeping Requirements

Contents of Corporate Register

Borden Ladner Gervais LLP's bulletin from November 29, 2016 outlines the reporting requirements of the corporate register.

At the corporation's registered office, a corporate register must be maintained that identifies each property in which the corporation has an ownership interest. It must also indicate the date on which the corporation acquired the property and, if applicable, the date on which it disposed of it. In addition, the register must contain copies of any deeds, transfers or similar documents that contain any of the following information:

- the municipal address;
- the registry or land titles division;
- the property identifier number (PIN);
- the legal description; and
- the assessment roll number, if any.

These record-keeping requirements apply only to ownership interests in land in Ontario and only to Ontario corporations incorporated under the OBCA, the *Corporations Act* or the ONPCA. They do not apply to land owned outside of Ontario. However, the term "ownership interest in land" is not defined and can be interpreted expansively to include both registered and beneficial interests in land.

Compliance Dates

All Ontario corporations incorporated on or after December 10, 2016 will have to comply with the new record-keeping requirements immediately. Corporations incorporated before December 10, 2016 will have until December 10, 2018 to comply.

Consequences of Non-Compliance

Failure to comply with the new registry requirements under the FCPA constitutes an offence and can entail fines of up to $25,000. Fines of up to $5,000 per day can also be levied against corporations which fail to provide the Crown information relating to forfeited corporate property when requested.

Changes to Corporate Property Forfeitures

Applicable Legislation

Along with the incoming FCPA legislation, there is also a change of the legislation that applies with respect to escheats. The *Escheats Act, 2015* — enacted in tandem with the FCPA and replacing the now-repealed, older *Escheats Act* — will *not* apply to property forfeited by a dissolved corporation governed by the OBCA, the *Corporations Act* or the ONPCA. Instead, only the FCPA will apply. For all other entities, the *Escheats Act, 2015* will govern, essentially creating a dual system to deal with escheated or forfeited property.

Timelines

Forfeited corporate property vests in the Crown immediately upon dissolution. Previously, a corporation could recover its assets if the corporation was revived within twenty years after dissolution. Under the FCPA, a corporation will now have only three years to revive and recover its assets.

Deletion of Encumbrances

Under section 18 of the FCPA, the Minister of Economic Development, Employment and Infrastructure is given the authority to remove encumbrances from forfeited corporate real or personal property after the three-year anniversary of dissolution. To do so, the Minister must first provide 90 days' notice and an opportunity for interested parties to respond. This could potentially pose major issues for creditors as it limits the availability of corporate property to satisfy an order, judgment or decision against the applicable corporation.

Conclusion

The changes ushered in by the FCPA are significant. They demand a thorough approach to the way corporations manage their property records, as well as impacting revival considerations and creditor arrangements. Corporations incorporated prior to December 10, 2016 should begin preparing their real property registers in order to allow plenty of time for the cumbersome process prior to the December 10, 2018 deadline. BLG is looking forward to working with its clients to assist them in meeting these new requirements.

By

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