Governance: Corporations Act Updated

January 23, 2018

In 2010, the Ontario Government passed the *Not-for-Profit Corporations Act*. This Act has not yet been proclaimed in force. When proclaimed in force, the *Not-for-Profit Corporations Act* will replace the *Corporations Act* as it applies to non-share capital corporations incorporated in Ontario. The target date for the new *Not-for-Profit Corporations Act* coming into force is now 2020.

Until the *Not-for-Profit Corporations Act* comes into force, non-share capital corporations incorporated in Ontario remain subject to the *Corporations Act*. The *Corporations Act* has not been significantly modernized in over 40 years.

In December 2017, the Ontario Legislature passed a number of amendments to the *Corporations Act*. These amendments were passed within a Bill that also made some amendments to the *Not-for-Profit Corporations Act* in anticipation of its coming into force.

Amendments to the *Corporations Act*

The recent amendments to the *Corporations Act* have implications for non-share capital corporations incorporated in Ontario. While the Bill that amended the *Corporations Act* was passed in November 2017, some of the amendments contained in that Bill will not take effect until proclamation at a future date. It is expected that some of those amendments will only be proclaimed in force at the same time as the *Not-for-Profit Corporations Act*. Some of the amendments took effect immediately (*i.e.*November 14, 2017) and others took effect 60 days later (January 13, 2018).

The following is a summary of some of the changes to the *Corporations Act* that impact corporate governance and that are now in effect:

1. Directors' Standard of Care

The *Corporations Act* had previously been silent with respect to directors' standard of care. Accordingly, the common law standard of care applied. The recent amendments to the *Corporations Act* have included a standard of care for directors that is in line with the standard of care in the *Business Corporations Act* and the standard of care that will apply when the *Not-for-Profit Corporations Act* is proclaimed in force.

Directors shall:

1. act honestly, in good faith with the best interests of the corporation; and
2. exercise the care, diligence and skill that are reasonably prudent person would exercise in comparable circumstances.

The common law standard required a director with special skill and experience to apply that skill and experience. This created confusion for board members, particularly those with a professional designation, as to whether they were required to exercise more due diligence than another director who lacked that professional designation on a matter where their expertise was relevant.

Most by-laws do not contain a statement of the directors' standard of care and in those cases the provisions of the *Corporations Act* will now automatically apply.

A corporation should review its by-laws and its governance policies to see if there is any statement of the standard of care and update that statement to reflect the language now included in the *Corporations Act*.

2. Corporate Capacity

Corporations are given the capacity, rights, powers and privileges of a natural person. No by-law is required to be passed to confer any particular power on a corporation or its directors. In addition, the Act now expressly provides that a corporation's acts are valid even if the corporation acts contrary to its instrument of incorporation (letters patent), by-laws or the Act. However, despite this provision, it should be noted that directors and officers are required to comply with the Act, the letters patent and the by-laws of the corporation.

A special resolution (majority vote of the board and two-thirds vote of the members voting at a members' meeting) is required to authorize the sale, lease, exchange or disposition of the undertaking of the corporation or any part thereof as an entirety or substantially as an entirety. This provision is not new but the wording has been has been amended.

3. Members' Meetings

Unless the by-laws provide otherwise, meetings of members may be held by "telephonic or electronic means" and a member who, through those means, votes at the meeting or establishes a communications link to the meeting is deemed for the purposes of the Act to be present at the meeting. The Act contains a new definition of "telephonic or electronic means", but it has not yet been proclaimed in force.

The ability for members to participate in a members' meeting by telephonic or electronic means is a welcome change for hospital corporations that have a relatively small membership. Unlike most not-for-profits, members of a hospital corporation are not permitted to appoint a proxy to vote at a members' meeting and accordingly, a member had to be present in person to vote. Now members will be able to participate by phone (or other electronic means). Member participation by such means will likely be impractical for corporations with a large membership and challenges may arise in how

votes are taken and recorded when members are participating by telephone or other electronic means.

The new provisions of the Act with respect to members' participation by telephone are enabling. In other words, no change is required to the by-laws if a corporation wishes to permit this; however, if a corporation wishes to prohibit telephone participation for members, it should add a provision to that affect to its by-laws.

4. Audit Exemption

Although unlikely to be relevant for most health-care provider corporations, there is a new exemption from the requirement to have an annual audit provided that the members have approved the exemption by extraordinary resolution (80 per cent) and the corporation has an annual revenue in a financial year of no more than $100,000.

5. Removal of Directors

Members may now remove a director (other than an*ex officio* director) by a majority vote rather than the two-thirds vote that was previously required. This new provision does not affect the operation of a by-law or a provision in the letters patent with respect to the removal of directors that was passed before November 14, 2017. Accordingly, if the by-laws or letters patent currently provide that a director may only be removed by a two-thirds vote of the members, that higher threshold will continue to apply.

6. Notice by Email

Changes have been made to the provisions with respect to notice of members' meetings to clarify that notice may be provided by email. The notice section of by-laws should be reviewed to ensure that it enables notice by email.

Hospitals should note that they may eventually be able to provide notice of a members' meeting simply by posting a notice on the hospital's website. There are pending changes to the *Public Hospitals Act* which will remove the provision that enables notice to be given by publication in a local newspaper and replace it with the publication on the hospital's website. These provisions are not yet in force and hospitals should continue to follow the provisions of their by-laws with respect to providing notice of a members' meeting.

By

Anne C. Corbett

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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