

## The New Forfeited Corporate Property Act and Amendments to the OBCA - What You Need To Know

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On December 10, 2016, the *Forfeited Corporate Property Act* (the "FCPA") and numerous amendments to the *Ontario Business Corporations Act* (the "OBCA") will come into force. These rules will impose new record-keeping requirements on Ontario corporations, new liabilities on directors and officers, and a shortened timeframe for the recovery of forfeited corporate property. The new and amended legislation will constitute a significant departure from the current law, and as such, it is important that corporate owners, directors, and officers understand how their duties, obligations and liabilities are about to change.

The following article considers four of the major changes resulting from the new and amended legislation and the practical implications these changes may have for corporations and their officers/directors.

### KEY CHANGES TO THE LAW

The amendments to the OBCA and the introduction of the FCPA will result in four key changes:

1. Every Ontario corporation will be required to prepare and maintain at its registered office a register of ownership interests (registered and beneficial) in land located in Ontario.
2. It will be significantly more difficult for dissolved corporations to recover assets that have been forfeited to the Crown upon dissolution. When an Ontario corporation is dissolved, its property immediately and automatically is forfeited to and vests in the Crown. After the law changes, revived corporations will not be able to recover their forfeited corporate property if the revival occurs more than three years after the dissolution, except as subject to certain exceptions. This is a significant departure from the current rules under which a dissolved corporation has 20 years to recover its forfeited corporate property.
3. For clarity's sake, it is important to note that the rules surrounding the recovery of forfeited corporate property will change, but the rules surrounding the *revival* of a dissolved corporation will generally remain the same. Under the current version of the OBCA, the owners of a dissolved corporation have up to 20 years to apply to revive the corporation if it was dissolved pursuant to subsection 241(4) of the OBCA. Subsection 241(4) of the OBCA permits the administrative dissolution of a corporation that failed to remedy a default under nine listed statutes, which include the *Corporations Tax Act*, the *Employer Health Tax Act* and the *Retail Sales Tax Act*. Failure to pay

corporate taxes is not an uncommon ground for dissolution. A corporation that is dissolved pursuant to subsection 241(4) of the OBCA can be revived on application by any interested person. By contrast, if a corporation voluntarily dissolves by filing Articles of Dissolution or if it is more than 20 years after the date of dissolution, it can only be revived by a special act of the legislature. In general, the rules surrounding corporate revival will not be subject to significant change.

4. The former officers or directors of a dissolved corporation can be held personally liable under the FCPA for costs incurred by the Crown in connection with forfeited corporate property. This rule will only apply to individuals who were directors or officers in the two years before the dissolution of the corporation.
5. The Director responsible for administering the OBCA must revoke an order dissolving a corporation under subsection 241(4) if the Director receives notice that the revocation would be in the public interest from the Minister responsible for the administration of the FCPA, the Minister of Northern Development and Mines, or the Public Guardian and Trustee.

Corporate owners, directors, and officers must come to terms with these new requirements, and should begin preparations now. For example, corporations should begin preparing lists of all land holdings as soon as possible. As well, those who wish to revive a dissolved corporation should be aware of the very strict deadlines imposed by the FCPA and the OBCA. Accordingly, any application to revive a dissolved corporation should be done as quickly as possible. Lastly, directors and officers should be aware of the personal liability they may be exposed to by the FCPA.

## **ANALYSIS OF THE CHANGES**

Unless noted otherwise, all the legislation/provisions referred to below will come into force on December 10, 2016.

### **1. Corporations must keep a register of land holdings**

Prior to the following amendment to the OBCA, there was never a requirement that corporations register a list of their corporate real property. The new amendments to the OBCA will require a corporation to prepare and maintain a register of all the land in Ontario in which it has an ownership interest. In effect, subsection 140.1 of the amended OBCA will provide as follows:

- Corporations must keep a register that identifies each parcel of land that it has an ownership interest in and shows the date that parcel of land was bought and sold, if applicable.
- In addition, the corporation must keep with the property register a copy of any deeds, transfers, or similar documents that contain the municipal address, the registry or land titles division, the property identifier number, the legal description, and the assessment roll number, if any.

### Practical implications of subsection 140.1

The implications of this provision may be onerous for corporations. It may be very difficult for a large corporation with many real properties to compile a list of all real property in which it has an ownership interest along with the supporting documentation, not to mention the physical space that may be required for such records.

Additionally, it is important to note that subsection 140.1 requires a corporation to keep a register of all its "ownership interests" in real property. This likely refers to both registered ownership interests and beneficial ownership interests.

There is a two year grace period for existing corporations from December 10, 2016, before the requirement to prepare and maintain the register will come into force. Accordingly, existing corporations with ownership interests in real property should begin preparing the land register as soon as possible so that they will be ready by 2018. However, all corporations incorporated on or after December 10, 2016, need to comply with the obligation to keep a land register from their respective dates of incorporation.

### **2. Dissolved corporations will have three years to recover forfeited corporate property**

When an Ontario corporation is dissolved, its property immediately and automatically is forfeited to and vests in the Crown. Subsequent to the date of dissolution, corporations have 20 years to revive and recover their assets. Amendments to the OBCA will introduce significant changes. In effect, subsections 241(10) and 241(11) will provide as follows:

- A corporation dissolved BEFORE the coming into force of the FCPA will not be able to recover its assets if the revival occurs more than THREE YEARS after the coming into force of the FCPA. Instead, any property that was forfeited to the Crown will remain the property of the Crown.
- A corporation dissolved AFTER the coming into force of the FCPA will not be able to recover its assets if the revival occurs more than THREE YEARS after the date the corporation was dissolved. Instead, any property that was forfeited to the Crown will remain the property of the Crown.

### Practical implications of subsections 241(10) and (11)

Corporations will still have 20 years to seek to revive under the new rules. However, after the FCPA comes into force, revival must take place less than three years after the date of dissolution if any interested person wants to recover any property forfeited to the Crown. After the three year deadline has passed, pursuant to the provisions of the FCPA, the Government of Ontario will be able to use the forfeited property as it sees fit for Crown purposes, sell or dispose of it, and cancel or amend any encumbrances or security interests registered against it.

Additionally, if a corporation was dissolved prior to the coming into force of the FCPA, any interested person will have three years from the date the FCPA comes into force to recover any forfeited corporate property. In other words, the clock to recover forfeited corporate property will start ticking for a dissolved corporation on December 10, 2016.

These rules will apply to both the real and personal property of a dissolved corporation. Moreover, the FCPA states that any personal property left in, on, or under forfeited corporate real property will forfeit to the Crown regardless of who owns the personal property.

The former directors, officers, and former corporate owners of previously dissolved corporations should be aware of these strict deadlines. If the former corporate owners want to recover forfeited property, the application to revive the corporation must be started as soon as possible.

#### Is there any statutory relief from subsection 241(10) and (11)?

As discussed above, once the FCPA and the amendments to the OBCA come into force, the Government of Ontario will have the right to use forfeited corporate property for Crown purposes three years after the corporation was dissolved. However, the FCPA does offer some relief from these new rules. In effect, subsection 26(1) of the FCPA will provide as follows:

- There are circumstances under which the Minister (unless the context requires otherwise, the "Minister" is defined by the FCPA as the Minister of Economic Development, Employment and Infrastructure or such other member of the Executive Council as may be assigned the administration of the FCPA under the *Executive Council Act*) might release, waive, or transfer the Crown's right in forfeited corporate property even after the three year deadline has passed. However, an applicant who desires the Minister to exercise this power must show that the applicant has a legal or moral claim to the corporate property. The facts supporting that claim must have existed before the corporation was dissolved.

#### Practical implications of subsection 26(1)

It is unclear how an applicant might go about satisfying a legal or moral claim to the property. In any event, corporate owners, directors, and officers should maintain all documentation and records that might support a future claim against the Crown to recover forfeited corporate property.

### **3. Former officers and directors may be liable to pay amounts owing to the Crown**

The FCPA imposes liability on the former officers and directors of a dissolved corporation for costs that the Crown may incur in connection with forfeited corporate property. In effect, sections 30-31 of the OBCA will provide as follows:

- The Minister (as defined above) has the power to determine costs incurred by the Crown in connection with forfeited corporate property. Any costs determined by the Minister will become a debt to the Crown. The Minister will have the right to recover

that debt from a former officer or director of the dissolved corporation by applying for an order from the Superior Court of Justice. Only individuals who were directors or officers in the two years before the dissolution of the corporation can be held liable.

#### Practical implications of sections 30-31

Former directors and officers of dissolved corporations can be held personally liable for expenses incurred by the Crown in connection with forfeited corporate property. Accordingly, the directors and officers of corporations that are about to dissolve or that will dissolve should ensure that all corporate property is disposed of adequately prior to dissolution. In doing so, they can avoid being held personally liable for any costs incurred by the Crown in disposing of forfeited corporate property.

#### **4. The Director shall make an order revoking a corporate dissolution if it is the "public interest"**

Subsection 241(4) of the current version of the OBCA provides that the Director responsible for administering the OBCA may by order cancel a certificate of incorporation and dissolve the corporation if it fails to remedy a default under nine listed statutes, which include the *Corporations Tax Act*, the *Employer Health Tax Act* and the *Retail Sales Tax Act*. Two examples of default are the failure to pay corporate taxes, or the failure to comply with a filing requirement under the *Corporations Information Act*. Subsection 241(4) will not be subject to change. However, the newly amended subsection 241(5) of the OBCA mandates that the Director responsible for the administration of the OBCA must revoke a dissolution order given under subsection 241(4) under certain circumstances. In effect, subsection 241(5) will provide as follows:

- The Director shall make an order revoking a dissolution order under subsection 241(4) if the corporation has not been revived, AND if the Director receives notice from the Minister responsible for the administration of the FCPA, the Minister of Northern Development and Mines or the Public Guardian and Trustee that revoking the dissolution order would be in the public interest.
- It is important to note that the Director has no discretion under these circumstances. The legislation clearly states that the Director "shall" revoke the dissolution order if the Director receives notice that it would be in the public interest from the appropriate Minister.

#### Practical implications of subsection 241(5)

The precise circumstances under which the Director might make an order revoking a dissolution order are unclear. The amendments do not discuss an application process, nor do they refer to participation by the former corporate owners, directors, officers or any other persons possibly interested in the revocation of the dissolution order. In any case, it is probable that persuading the Director to make an order under subsection 241(5) will require some action on the part of the former corporate owners, directors, or officers. Accordingly,

corporate owners, directors, or officers should be prepared to explain to the Minister why revoking the dissolution of a corporation would or would not be in the public interest.

## **CONCLUSIONS**

The law dealing with corporate personal and real property will change significantly when the rules discussed above come into force. It is imperative that corporations and their directors and officers are aware of and understand how their duties, obligations, and potential exposure to personal liability is about to change.