

Ontario Corporations Beware: Changes to the Law Regarding Record Keeping and Forfeiture of Corporate Property



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Corporations incorporated under the Ontario *Business Corporations Act* (the "OBCA") need to be aware of some important changes to the law regarding record keeping and forfeiture of corporate property which will come into force on December 10, 2016. These changes have not been well publicized, so corporations and their legal advisers should start planning for some of these changes as soon as possible. The changes will require corporations to maintain a new record called a "register of ownership interests in land in Ontario". The changes will also affect the law relating to a corporation's personal and real property that is forfeited to the Crown (i.e., the Province of Ontario) following the dissolution of the corporation (for example, on account of failure to pay Ontario Corporations Tax).

Forfeited Corporate Property Act, 2015

On December 10, 2015, the Ontario Government passed Bill 144, the *Budget Measures Act, 2015* to implement measures contained in the 2015 Ontario Budget, including

the enactment of a new statute called the *Forfeited Corporate Property Act, 2015* (the "FCPA"). The FCPA makes changes to the existing law regarding what happens when a corporation's personal and real property is forfeited to the Crown following the dissolution of the corporation. As part of these changes, the FCPA also makes certain amendments to the OBCA, which governs business corporations in Ontario, and to the Ontario *Corporations Act* and the Ontario *Not-for-Profit Corporations Act*, which govern other kinds of corporations. This paper will focus on the amendments to the OBCA and all references are to a corporation incorporated, amalgamated, or continued under the OBCA. The FCPA and the related amendments to the OBCA come into force on December 10, 2016.

Ontario law provides that, upon the dissolution of a corporation, all of its personal and real property is forfeited to and becomes the property of the Crown. Under the current provisions of the OBCA, the owners of a dissolved corporation have up to 20 years following the

date of its dissolution to apply for the revival of the corporation and to recover its property. After the FCPA comes into force, the owners of the dissolved corporation will still have 20 years to apply for its revival following its dissolution, but they will not be entitled to recover its personal and real property if the revival takes place more than three years after the date of its dissolution (subject to certain exceptions).

The FCPA provides that, starting three years after the date of dissolution, the Province of Ontario can use the forfeited assets for Crown purposes, sell them, remove any encumbrances registered on title to the forfeited real property, and remove any security interests registered against the forfeited personal property under the *Personal Property Security Act*.

The FCPA states that forfeited real property and interests in real property include:

1. a charge under the *Land Titles Act* or a mortgage; and
2. a building or structure that is owned separately from the land on which the building or structure is located or an interest in such building or structure.

The FCPA also states that forfeited personal property and interests in personal property are forfeited to the Crown if one of the following circumstances applies:

1. as a result of the dissolution of the corporation, they are

forfeited to or have become the property of the Crown and the personal property is:

- (a) located in, on or under forfeited real property; or
- (b) not located in, on or under forfeited real property, but the Minister of Economic Development, Employment and Infrastructure, after consulting with the Public Guardian and Trustee, is of the opinion that control over the personal property is necessary for the purposes of:
 - (i) administering forfeited real property; or
 - (ii) managing on forfeited real property, the ongoing operations or business of the prior corporate owner of the forfeited real property; or
2. the personal property is left in, on or under forfeited real property, regardless of who owns the personal property.

New Record Keeping Requirements Under The OBCA

In connection with the introduction of the FCPA, there are related amendments to the OBCA which impose new record keeping requirements for a corporation. A new Section 140(1)(e) has been added to the OBCA, which provides that a corporation shall prepare and maintain a register of ownership interests in land complying with Section 140.1 of the OBCA. The

new Section 140.1 states that a corporation shall prepare and maintain at its registered office a register of ownership interests in land in Ontario which shall:

1. identify each property; and
2. show the date the corporation acquired the property, and, if applicable, the date the corporation disposed of it.

As supporting documents for this new register, Section 140.1(3) states that the corporation shall cause to be kept with the register a copy of any deeds, transfers or similar documents that contain any of the following with respect to each property listed in the register:

1. the municipal address, if any;
2. the Registry or Land Titles Division and the Property Identifier Number;
3. the legal description; and
4. the assessment roll number, if any.

As to the form of the above records, Section 139(1) states that where the OBCA requires a record to be kept by a corporation, it may be kept in a bound or a loose leaf book or may be entered or recorded by any system of mechanical or electronic data processing or any other information storage device.

The new amendments to the OBCA specify that the register of ownership interests in land must be maintained at the corporation's registered office. If the registered

office is at a location other than the corporation's place of business (such as the office of the corporation's lawyer or accountant), then the register must be maintained at that location. If so, then the corporation will need to provide on a timely basis to its lawyer or accountant (as the case may be) all of the information required to maintain its register of ownership interests in land.

According to the new Section 140(4), if a corporation was incorporated before December 10, 2016, then the corporation has two years to comply with the new record keeping requirements, that is, until December 10, 2018. However, according to the new Section 140(5), if a corporation is incorporated on or after December 10, 2016, then the real property register requirements apply to it commencing on the date of its incorporation.

The OBCA does not define the term "ownership interest in land in Ontario". It has been suggested that this phrase includes both beneficial interests in land, as well as registered interests in land. Assuming that this interpretation is correct, this means that the corporation's register must list and contain the necessary information for each property with respect to which the corporation is the registered owner on title and also those properties, in which the corporation has a beneficial ownership interest. For example, if a corporation is a bare trustee or

nominee which holds the registered title to land in trust for another corporation as the beneficial owner, then the subject lands should be listed in the registers maintained by both the bare trustee/nominee corporation and the beneficial owner corporation, together with all the required supporting documents.

What else could be regarded as an "ownership interest in land in Ontario"? As noted above, the FCPA states that forfeited real property and interests in real property include a charge under the *Land Titles Act* or a mortgage. Assuming that an "ownership interest in land" as referred to in the OBCA has the same interpretation, then a corporation which holds a charge or mortgage over land in Ontario would be required to list the subject lands in its register together with copies of the supporting documents including the charge or mortgage.

Presumably, these amendments to the OBCA are intended to make it easier for the Province of Ontario to locate the assets of dissolved corporations and to make it easier for the Province to use or sell any forfeited corporate property. However, these new requirements impose a burden on many corporations, especially ones that have extensive real estate holdings. Not only are corporations required to keep a list of their real estate holdings, but they are also required to record all dispositions of their properties. For example, a

corporation which is a real estate developer that sells properties on a regular basis will need to keep its register up-to-date regarding all of its dispositions.

Although it is highly unlikely that the Ontario Government will enforce these record keeping requirements, problems may arise if the corporation is not in compliance with these requirements. For example, many loan agreements contain covenants, representations and warranties by a corporate borrower that it is in compliance with all applicable laws. If a corporation is not maintaining its register of land ownership as required by the OBCA, then the corporation may be in breach of its loan agreement. If so, then its lawyers may not be able to provide the necessary legal opinion to the corporation's lender, unless the lender is willing to accept a qualification relating to these requirements.

In view of the fact that these changes to the OBCA affect so many corporations, it is surprising that the Ontario Government has done so little to inform the general public and the legal profession about these new record keeping requirements. It is now too late to do anything except get ready to comply with the new legislation.

For more information on these changes or related topics, please contact Jeffrey Alpert at 416 777 5418 or jalpert@torkinmanes.com