



Fed up with ONCA yet? Consider skipping it altogether and moving to the Federal CNCA

By Mark Blumberg (March 15, 2017)

The Ontario *Not-for-Profit Corporations Act* ("ONCA") was originally expected to come into force in 2013, but unfortunately it has been delayed a number of times. When ONCA comes into force it will apply to all non-share capital corporations currently under the Ontario *Corporations Act* ("OCA").

In September 2015, the Ontario government announced that ONCA will be further delayed and that the Ontario government "will provide the sector with at least 24 months' notice before proclamation". It has now been over a year and a half and we have not heard anything further so this probably means that ONCA will not come into force until probably mid-2019 or later.

Many Ontario non-profit corporations have been waiting since 2010, when ONCA was passed, for the changes to come into effect. Many of these Ontario corporations have held off on making corporate changes because ONCA is "just around the corner".

Although some Ontario non-profit corporations may choose to wait for ONCA to come into force, another viable option for an Ontario non-profit corporation is to transfer to the federal jurisdiction by continuing under the *Canada Not-for-profit Corporations Act* ("CNCA").

Below we will discuss some of the advantages and disadvantages of an Ontario non-profit moving from the Ontario jurisdiction to the Federal jurisdiction.

Some Reasons to Move to Federal

It is important to consider different variables when deciding whether or not to transition an Ontario non-profit corporation from the OCA to the CNCA. A minor advantage of moving to the federal jurisdiction is that some people perceive that a federal corporation is more prestigious than a provincial incorporation. If an Ontario non-profit corporation's activities and stakeholders are international in scope, it might find that sometimes people outside of Canada have not even heard of "Ontario" but are quite familiar with "Canada".

Also, if an Ontario non-profit corporation has directors from different provinces outside of Ontario serving on its board, the directors may prefer to be working with a corporation that is governed by one federal corporate act rather than a corporation that is governed by a provincial (Ontario) act. Furthermore, if a person is involved with multiple corporations, some federal and some provincial, governance will be more consistent and straightforward if all of the corporations are governed under the same act.

In addition, many corporate changes for registered charities in Ontario require approval from the Ontario Public Guardian and Trustee ("PGT"), which can significantly slow down the process and create more red tape and costs for Ontario non-profit corporations. Therefore, another advantage of moving from the Ontario jurisdiction to the federal jurisdiction is that it allows Ontario non-profit corporations that are also registered charities to avoid the extra layer of corporate regulation for Ontario non-profit corporations provided by the PGT. Registered charities will still be overseen by the CRA, but at least they will no longer need to get approval from 2 charity regulators for a corporate change.

Another advantage is that the CNCA is already in effect, which means there is no need to wait any longer for the ONCA. Corporate changes can be made almost immediately without having to be revisited in two to four years when the ONCA is expected to come into effect. Also, the federal corporate system run by Corporations Canada is working really well.

Probably my biggest concern with waiting for ONCA is that there will be a very large number of organizations who are scrambling at the last minute to make changes. Will the Ontario PGT and the Charities Directorate of CRA have the resources to deal with these issues? I fear not and especially late in the three-year transition period, I can see significant backlogs for regulatory approvals that may reach up to 2 years or more. Not a big deal if the changes are minor, but very frustrating and costly if the changes are substantive or urgent.

Some Reasons to Stay Under Ontario Corporate Law

An advantage of staying in the Ontario jurisdiction is that in some cases a corporation can in theory avoid any action until the ONCA comes into force and will then have another 3 years to make corporate changes. However, for some Ontario non-profit corporations making certain changes now may be beneficial rather than leaving everything till after ONCA comes into effect.

Under the ONCA, the audit exemption will be higher (\$500,000) than the current exemption under the CNCA (\$250,000) and this may help some organizations with higher revenue that want to avoid an annual audit.

Also, if an Ontario non-profit corporation has ex-officio directors on its board, it can maintain the same structure under the ONCA. The CNCA does not allow for ex-officio directors, although there are relatively simple workarounds that may be used.

Lastly, if a person is involved with a large number of Ontario non-profit corporations, to maintain consistency, it may be best to keep them all under the OCA and then transfer them to the ONCA. It is easier to operate and set up governance structures for several organizations under one piece of legislation. Also, some organizations (for various different reasons) may wish to, or a small number may be required to, remain as Ontario non-profit corporations such as Ontario hospitals.

Options, options, options

There are different routes to consider as an Ontario non-profit corporation under the OCA. Some organizations may not be in any rush to transition and may feel that they can deal with the transition to the ONCA when the time comes. Other organizations may want to put this governance purgatory behind them and decide that transitioning to the CNCA is a better option.

Either way, all Ontario corporations should begin wrapping their heads around these kinds of issues in the next year or two in preparation for an inevitable corporate transition. Whether you are staying in Ontario or moving to Federal there are certain vital issues that need to be considered including membership and legal objects and those type of issues don't usually get better with time. It may be beneficial for Ontario non-profit corporations to obtain legal advice now about their options and how ONCA will affect their current governance structure.

Mark Blumberg is a lawyer at Blumberg Segal LLP in Toronto, Ontario. He can be contacted at mark@blumbergs.ca To find out more about legal services that Blumbergs

provides to Canadian charities and non-profits please visit www.canadiancharitylaw.ca, www.globalphilanthropy.ca, or www.charitydata.ca

This article is for information purposes only. It is not intended to be legal advice. You should not act or abstain from acting based upon such information without first consulting a legal professional.