



## **Options for dealing with ONCA for Ontario non-profit organizations under the Ontario *Corporations Act***

**By Mark Blumberg (February 12, 2018)**

The Ontario *Not-for-Profit Corporations Act* (the "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 over 50,000 non-share capital corporations currently under the Ontario *Corporations Act* (the "OCA"). On December 22, 2017, the Ontario government announced that they are "working to bring ONCA into force as early as possible, with a target of early 2020". This is not a guarantee but a target.

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".

On November 14, 2017 the Ontario government passed a significant act entitled "Cutting Unnecessary Red Tape Act, 2017 (Bill 154)". This act made a number of changes to both the current OCA and the future ONCA.

Ontario non-profit corporations under the OCA have 3 options:

- 1) do nothing now and wait for ONCA to come in and then make the necessary changes (along with tens of thousands of other Ontario corporations);
- 2) make changes now to their OCA structure to update their governance documents and take advantage of the changes to the OCA (especially relating to membership). Further changes will probably be required once further details of ONCA are released and ONCA comes in force.

- 3) Move from Ontario corporate jurisdiction to Federal corporate jurisdiction through a continuance which allows you to avoid having to deal with ONCA completely.

Although some Ontario non-profit corporations may choose to wait for ONCA to come into force in 2020 (at the earliest), 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* (the “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 some 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 which has roots back to 1907.

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 provided by the PGT. Registered charities based in Ontario will still deal with the PGT on some matters (such changing a restricted gift), but will not have to deal with the PGT for corporate changes.

Another advantage of transitioning to federal jurisdiction is that the CNCA is already in effect and is working really well. Under the CNCA, corporate changes can be made almost immediately and will not need to be revisited in two to four years (which cannot be said for those non-profit corporations remaining under Ontario jurisdiction).

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 governance changes. Will the PGT and the Charities Directorate of CRA have the resources to deal with the volume of work this will generate? I fear not (especially late in the three-year

transition period), and I can see significant backlogs for regulatory approvals that may reach up to 2 years or more. This may not be a big deal if the changes are minor, but it could be very frustrating and costly if the changes are substantive or urgent or impact a complicated or significant organization.

### **Some Reasons to Stay Under Ontario Corporate Law**

An advantage of staying in the Ontario jurisdiction is that in some cases Ontario corporations can (in theory) avoid any action until ONCA comes into force. These corporations will then have another 3 years to make the necessary corporate changes. However, for some Ontario non-profit corporations making certain changes now may be more beneficial.

Under 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. However, the current OCA audit exemption is \$100,000 and by the time ONCA comes into force it is possible the CNCA will be adjusted to a higher figure.

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

Finally, some organizations (for various reasons) may wish, or be required, to remain as Ontario non-profit corporations (such as Ontario hospitals). Some entities are established under special acts and have some special privileges that might be lost if they move to the CNCA. Some groups receive certain funds, such as home care funds from the Ontario government that may require staying in Ontario.

### **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 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; those types of issues don't usually get better with time. With significant processing delays at CRA for registered charities, in some cases of over a year, changes to objects should be looked at as soon as possible. It may be beneficial for Ontario non-profit corporations under the OCA to obtain legal advice from lawyers experienced in non-profit and charity law now about their options and how ONCA will affect their current governance structure.

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