

Should Ontario non-profits or charities be worrying about the Ontario Not-for-Profit Corporations Act (ONCA)?

By Mark Blumberg (September 27, 2012)

The short answer is: probably not.

The *Ontario Not-for-Profit Corporations Act* (ONCA) will affect over 50,000 *Ontario Corporation Act* (OCA) non-profit corporations. The Ontario government is now targeting to bring the ONCA into force on July 1, 2013, although that target may shift to being later. There has been a lot of attention around the ONCA over the last few years and especially over the last few months. Many non-profits and charities are already feeling anxious about the act. That anxiety may be quite unnecessary.

Right now there are many charities who are attempting to sprint to compliance with the ONCA, which is not even in force. The problem is that it sort of looks like the 100 metre run in the movie "The Dictator", with a lot of people getting hurt unnecessarily!

The Ontario Government has not yet proclaimed the ONCA. The target for proclamation is July 1st, 2013. That is a target date and has not been set in stone.

Existing Ontario not-for-profit corporations will have 3 years from the date that the ONCA comes into effect to make any necessary changes to their corporate documents to bring them into conformity. That means you will have until probably mid-2016 to make any changes. While three years is not an eternity, it is a very long time. To put it another way, three years is like spending a month travelling in a car with two boys in the back fighting with each other! (translation if you don't have children or boys – that is a very, very long time).

To really have a meaningful discussion within a non-profit or charity about the ONCA, there is a lot of material needed that is not out there yet. Soon the Ontario government will release a simplified plain language guide to the ONCA, along with regulations, forms and a draft default by-law. In addition, a more detailed Non-Profit Incorporators Handbook will one day be released. While some matters can be determined by looking at the ONCA legislation, others cannot be known until the regulations and other documents are released. For most organizations, it makes little sense to jump into the finer points of the ONCA at this point in time with so much information still in the pipeline. Having a discussion with only 70% of the information is a recipe for frustration.

If you are antsy (or being forced to be antsy) and want to do something, here are some things that you may wish to consider:

- 1) Are you a federal or Ontario non-profit corporation? Yes, it makes a difference! Check out your letters patent (articles of incorporation) as they would identify whether it is an Ontario or Federal non-profit. If you don't have the letters patent, and don't know which statute you are incorporated under, then try searching the free [Industry Canada database](#). If you are not on the Industry Canada database and based in Ontario, then the likelihood is that, if you are incorporated, you are an Ontario non-profit corporation under the Ontario *Corporations Act*. Some organizations may be trusts or unincorporated associations and the ONCA will not affect them. Unfortunately, there is no facility to do free corporate searches from the Ontario government. At our law firm, and most others, we have the ability to do corporate searches on the Ontario government database. If

you are a Federal CCA or CNCA corporation the ONCA has no applicability to you.

- 2) Ontario corporations may want to consider continuing into the Federal jurisdiction under the *Canada Not-for-profit Corporations Act* (CNCA). The CNCA affects the 19,000 federal non-profit corporations incorporated under the *Canada Corporations Act* (CCA), has been in force since October 17, 2011 and allows for an Ontario non-profit to continue to the federal jurisdiction.
- 3) Do you have copies of letters patent, supplementary letters patent and by-laws? Do you have a minute book? If not, copies, the letters patent or supplementary letters patent, can be obtained from the Ontario government. As well, the Canada Revenue Agency may have copies of some of your documents if you are a registered charity. These documents may not be up-to-date if you have not provided updated copies in the past to the CRA after you achieved charitable status.
- 4) Are your non-profit objects up to date and relevant? Are your objects out of date and/or too narrow for the work of your non-profit? In some cases, it may make sense as part of the corporate changes to update your objects. Keep in mind that, if you are a registered charity, you may need to ask CRA for pre-approval. At times, it can take months for CRA to review the objects and detailed description of activities that CRA requires be filed with the new objects. Therefore, if you think that you will require object changes you may wish to start on this 6 months before you jump into the corporate law changes. Drafting objects can be tricky. Be careful and precise with objects, especially if you are a charity; otherwise the objects may be considered vague or broad and not charitable. CRA will shortly be releasing a guidance on drafting objects that many people will find helpful.
- 5) Is your non-profit's governance structure appropriate? If not, what kind of governance structure do you want? Is it "working board", "policy board", "fundraising board", "deliberately dysfunctional board", etc.? If your board is not working well, or it is ineffectual, then moving over to the ONCA will just mean a bad board under a new act. Consider getting some governance training and advice.

- 6) Do you have a copy of your most recent by-law and are there any particular features of your by-law that need to be kept for the new by-law? Generally, it will be best to start with a new clean by-law under the ONCA and modify as required rather than modifying your current by-law, which is under the 60 year old Ontario *Corporations Act*. Until you have reviewed the Ontario government's draft default by-law, regulations, commentary, and tools such as the "Plain Language Guide", it probably does not make much sense starting to draft a by-law.
- 7) Do you know who your members are? (This is not the same thing as board members!) Members are like shareholders in a for profit company, except that members don't own the corporation, they just control it to use it for its objects. Does the organization require more than one membership class? If so, what attributes will each membership class have (i.e. name, notice, vote, etc.)? Who are your members and do you have an up to date list of members? Are you aware of new member rights and voting by class which in some cases even allow non-voting members to vote. For many non-profits, it will be preferable to move to having one membership class, if they don't have that already. Otherwise, in some cases, a small group of non-voting members may be able to veto the plans of a much larger group of voting members.
- 8) Does the organization want to maintain its current name? If it wants to use a different name, do you have various proposed names, and have you done an Ontario-biased NUANS name search?
- 9) Do you have a current list of directors with their residential addresses, telephone numbers and e-mail addresses? We don't yet know what will have to be provided under the regulations, but, if you don't have current contact information for your own directors, it may be a problem at some point! You can see the sort of matters that may be covered by the regulations at, for example, the Ontario Government's Recent Regulatory Registry for the proposed MCS regulations:
<http://www.ontariocanada.com/registry/view.do?postingId=9947&language=en>

- 10) Do you have a current list of officers – e.g. Chair, President, Secretary, Treasurer etc.?
- 11) What address do you want to use for your corporation under the ONCA? (Registered or head office address, mailing address etc.)
- 12) Are you up to date in corporate filings? If not, you may want to do arrears in filings.
- 13) When is the organization's annual general meeting held? Does the organization wish to obtain membership approval of changes at the AGM, or does it wish to have another Special General Meeting to approve the necessary changes? Knowing when your AGM is typically held may help with planning the process if changes are required and member support needed.

Non-profits and charities don't require legal assistance to make the changes under the new ONCA.. However, some non-profits and charities could benefit from the experience of a non-profit or charity lawyer in order to minimize time, acrimony and aggravation. At Blumbergs, we have 4 non-profit and charity lawyers assisting clients with corporate law changes.

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