



Why you should not be setting up an Ontario non-profit corporation under the OCA today

By Mark Blumberg and Taylor Teasdale (October 29, 2018)

Every week or two we run into a recently incorporated non-profit that is set up under the Ontario Corporations Act ("OCA"). This is unfortunate. With few exceptions, it makes little sense for most non-profits in Ontario to incorporate under the OCA and it could cost them a lot of time and money as a result. It is almost always better to incorporate under the federal *Canada Not-for-profit Corporations Act* ("CNCA").

Our law firm for years has been sending out warnings on Twitter such as:

"Warning: If you are in Ontario and you want to set up a npo or charity, except in rare cases, avoid Ontario corp. Go Federal w/ CNCA".

We see businesses advertising the incorporation of Ontario non-profit corporations. This might be good for their business. It is certainly good for the coffers of the Ontario government as it charges significant fees for an incorporation, and for a review if necessary by the Ontario Public Guardian and Trustee ("PGT"). But the ultimate cost for the organization contemplating incorporation under the OCA can be very high.

Some Background

The OCA has been around as a corporate act for about 110 years. It is a little old! More importantly it is soon going to be replaced. The Ontario government passed the Ontario *Not-for-Profit Corporations Act* (the "ONCA") in 2010 and it was originally expected to come into force in 2013, but unfortunately it has been delayed a number of times. When the ONCA comes into force it will apply to over 50,000 non-share capital corporations formed under and currently governed by the OCA. On December 22, 2017, the Ontario government announced that it is "working to bring ONCA into force as early as possible, with a target of early 2020". This is not a guarantee but a target.

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. It is possible that there will be further changes to the ONCA and it is not certain if it will in fact come into force in 2020.

When establishing a non-profit there are many options, including unincorporated associations, trusts, corporations and cooperatives. In this article we will discuss incorporation, which can be either under a provincial act or the federal act. Each provincial act is different and some are more up-to-date than others. This article is focused on Ontario non-profit corporations under the OCA and why the OCA is typically a poor choice for establishing a new non-profit organization and the CNCA is a better choice.

Some Reasons to Set up a federal CNCA incorporated entity

The main advantage of incorporating under the CNCA is that the CNCA is already in effect, is working well, and no major changes to the CNCA are expected in the foreseeable future. In contrast, a corporation formed under the OCA now will probably have to amend its letters patent and by-laws when the ONCA comes into effect. Depending on the extensiveness of the required changes, hiring a lawyer to make the changes could cost an organization thousands of dollars – only a few years after incorporating under the OCA!

Under the CNCA, corporate changes can be made almost immediately. Directors can be added or removed using an electronic system and the information will be reflected in minutes. The CNCA makes it easy, quick and cheap to obtain your corporate documents; under the OCA if you want a copy of your documents the Ontario government is still sending out microfiche!

In addition, many corporate changes for registered charities formed under the OCA require approval from the PGT, which can significantly slow down the process and create more red tape and costs for charities when they incorporate and if they make subsequent changes, e.g. amend objects. Therefore, another advantage of a charity in Ontario incorporating under the CNCA is that the charity will avoid the extra layer of corporate regulation by the PGT under the OCA. CNCA charities based in Ontario will still deal with the PGT on some operational matters, such as changing a restricted gift, but will not have to deal with the PGT for corporate changes. Most charities find that having one charity regulator, i.e. the CRA, is more than enough, and two would be just too burdensome.

Probably our biggest concern with incorporating under the OCA and then redoing everything under the ONCA is that there will be a very large number of organizations over

the next few years who will be scrambling at the last minute to make governance changes to comply with the ONCA. Will the PGT and the Charities Directorate of CRA have the resources to deal with the volume of work this will generate? We fear not (especially late in the three-year transition period), and we can see significant backlogs for regulatory approvals that may reach up to 2 years or more. This may not be a problem for a corporation that has only minor changes to make, but could be very frustrating and costly if the changes are substantive or urgent or impact a complicated or significant organization.

If an organization intends to be a charity, it is actually cheaper in terms of fees for the organization to incorporate under the CNCA. The basic fee to incorporate under the OCA is \$155 (standard service – processing time 35 business days) or \$255 (expedited service – processing time 7 business days). This fee covers incorporation using standard charitable objects that have already been approved by the PGT. However, if the organization's charitable objects differ from the standard PGT objects, there is an additional fee of \$150 to incorporate. In contrast, incorporation under the CNCA can be done electronically in one day (or perhaps even less) and the cost is \$200 in fees. So, \$200 for a CNCA incorporation and up to \$405 for incorporation under the OCA.

So, for these reasons alone, it may be preferable for an organization to incorporate under the CNCA instead of the OCA. We have begged the Ontario government to bring the CNCA option to the public's attention, so that they can make a more informed decision. The Non-Profit Incorporators Handbook issued by the Ontario government states, "Not-for-profit corporations are organizations that carry on activities without pecuniary gain. They are incorporated under Part III of the Corporations Act as corporations without share capital.", which suggests that incorporation under the OCA is the only option for an organization in Ontario that wants to incorporate. It is not until about half-way through the handbook that the first (and only) reference to incorporating under the CNCA appears: "Letters Patent can be issued under the Canada Not-for-Profit Corporations Act. For particulars of application procedures, forms and fees applicants should contact Industry Canada, Corporations Canada (see Contacts - Appendix "G")." Actually, under the CNCA it will be articles of incorporation and not letters patent and the link to Corporations Canada provided in the manual does not work. Luckily, around page 70 of the handbook there is the address of Corporations Canada and the link works, but it sends people to the home page for Innovation, Science and Economic Development Canada and not the more specific page for [Not-for-profit corporations](#).

A minor advantage of being a CNCA corporation is that some people perceive federal incorporation as more prestigious than provincial incorporation. If an Ontario non-profit corporation's activities and stakeholders are international in scope, the corporation 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 individuals from different provinces serving on its board, the directors may prefer to work with a corporation that is governed by a modern federal corporate act that has application across the country rather than a corporation that is governed by a provincial (Ontario) act whose roots go back to 1907. For example, what makes more sense for a national organization with 13 provincial and territorial affiliates? To form every affiliate under the non-profit corporation legislation of its home jurisdiction, which may differ greatly from applicable legislation in one or more other jurisdictions, or to form the affiliates under the same national statute?

Some organizations incorporate in Ontario because they think they will only operate in Ontario. That alone is not a good reason for incorporating under the OCA because a CNCA corporation may in fact carry out operations only in Ontario or, indeed, in only one neighbourhood in the province.

Further, an OCA corporation must always maintain an office, or at least a registered address, in Ontario. This may not seem like a problem when the corporation operates only in Ontario. But what if the corporation moves its operations to another province? It will have to continue to maintain a registered address in Ontario, which can be cumbersome, result in additional costs, and expose the corporation to the risk of not receiving important mail.

Some Reasons to Incorporate Under the OCA

Under the OCA a corporation with annual income of less than \$100,000 is exempt from having its financial statements audited. The current audit exemption under the CNCA is \$250,000, but the exemption under the ONCA will be \$500,000. So, incorporation under the OCA, to be followed by incorporation under the ONCA, may help higher income corporations to avoid an annual audit, assuming that the CNCA does not in the future increase its audit exemption to equal or exceed \$500,000.

Ex-officio directors are permitted under the OCA and the ONCA but prohibited under the CNCA. However, we would argue that having ex-officio directors is usually a bad practice, and if a CNCA corporation wants ex-officio directors there are relatively simple workarounds that avoid the statutory prohibition.

Finally, some organizations (for various reasons) may wish, or be required, to remain as Ontario non-profit corporations (such as Ontario hospitals). However, not many new Ontario hospitals have been created in the last 30 years. Some organizations receive certain funds, such as home care funds from the Ontario government, that may require staying in Ontario. On the other hand, Ontario government funding is usually available to both federal and Ontario corporations and, further, a CNCA corporation may be eligible

for government funding in one or more provinces, whereas an OCA corporation may not be eligible.

Notwithstanding these benefits of OCA incorporation, except for situations in which the benefits are very important to an organization, the most Ontario lawyers who practice in the non-profit sector view incorporation under the CNCA as preferable. We recently saw a panel of number of charity lawyers from different firms who all answered “no” when asked whether they had recently formed any corporations under the OCA.

We strongly recommend that a person obtain legal advice before forming a non-profit corporation because there are many more issues to address than whether to incorporate provincially or federally. Membership and control, objects, whether or not to apply for registered charity status, naming and branding rights, the use of multiple entities, and succession planning are only some of the matters that we spend far more time discussing with clients than jurisdiction of incorporation.

If you have been operating under the OCA for a while or were only recently incorporated under the OCA – all is not lost. Here are some resources that you may find helpful and you may even be able to move from the OCA to the CNCA through a process called continuance:

20 Ways We May Be Able To Help You With ONCA

Options for dealing with ONCA for Ontario non-profit organizations under the OCA

The good news for Ontario corporations is that a continuance to the CNCA may actually be easier, quicker and cheaper than making changes to your OCA corporation to fit under the ONCA. If you operate several non-profit corporations, some formed under the OCA and the others under the CNCA, it may be advantageous to have them all governed by the CNCA, and so the OCA corporations are simply continued under the CNCA.

To keep up to date on developments in charity and non-profit law, you can sign up to our Blumbergs' [monthly newsletter](#) or check out our [ONCA directory](#). If you need legal advice relating to incorporation or continuance you can [contact us](#) and we will be pleased to help you.

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