



Options for dealing with ONCA for Ontario non-profit corporations

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The Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) came into force on October 19, 2021. ONCA applies to over 50,000 Ontario non-share capital corporations.

Non-profits that were governed by Part III of the Ontario *Corporations Act* (the “OCA”) before ONCA came into force will have a three year transition period to bring their governing documents into conformity with ONCA. Unlike the transition process for Federal corporations in 2011 when the *Canada Not-for-profit Corporations Act* (the “CNCA”) came into force, an Ontario non-profit that was governed by Part III of the OCA will not be dissolved if it fails to make changes under ONCA. However, as we note below, certain changes will be deemed to be made to a corporation’s governing documents if they are inconsistent with the requirements of ONCA.

Ontario non-profit corporations have two options in dealing with the transition:

- 1) Change governing documents, such as letters patent, supplementary letters patent and by-laws to conform with ONCA; or
- 2) Move from Ontario corporate jurisdiction to Federal corporate jurisdiction through a continuance from ONCA to the CNCA.

We don’t consider it advisable to refrain from updating your governing documents, thereby letting ONCA deem changes to those documents, for the following reasons:

- default provisions of ONCA may be deemed to apply to your organization that could be problematic but not apparent (e.g. quorum for members meetings is a

majority of the members entitled to vote and for organizations with larger membership this may be difficult and very costly to fix later);

- may be difficult for staff and the board to understand and interpret governing documents if what you are reading is not actually what is required since ONCA overrides your corporate documents; and
- changes to objects, membership, etc. may be needed and long overdue and doing nothing does not update your documents.

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

Some Reasons to Stay Under Ontario Corporate Law

As we noted above, refraining from taking action to bring an Ontario organization into compliance with ONCA is quite risky; therefore, for Ontario corporations that wish to stay in Ontario, it is important to make the necessary corporate changes within the next three years.

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 wish to avoid an annual audit. However, we note that the previous OCA audit exemption was \$100,000 and it is possible that the CNCA audit limit may be adjusted to a higher figure in the future.

Also, if an Ontario non-profit corporation has *ex-officio* directors on its board, it can have *ex-officio* directors under ONCA. The CNCA does not allow for *ex-officio* directors (although there are workarounds that may be used). We often have concerns with the use of *ex-officio* directors as they can have unintended consequences including but not limited to having someone join your board when it may not be convenient for your organization or having people on your board who may not wish to be on your board or may not even know they are on your board.

Finally, some organizations 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 certain special privileges that might be lost if they move to the CNCA. Some groups receive certain funds, such as homecare funds, from the Ontario government that may require those groups to remain in Ontario. Some non-profits are part of a large group or organizations that are all under ONCA and it may be beneficial to keep them all under one corporate act.

If you want to stay under ONCA here are some of the documents that will be needed to adjust your governing documents:

- If you are a registered charity, obtain approval from the CRA for your new objects (generally a good idea but may not be required if your objects were approved by CRA after 2012 and your activities have not changed)
- If your corporation would be considered to be a “charity” by the Ontario government either use the after-acquired clause or obtain approval from the Ontario Public Guardian and Trustee (“PGT”) for changes to your objects
- Prepare Articles of Amendment under ONCA
- Prepare By-laws under ONCA
- Prepare notice to directors and to members
- Have directors and members meeting

Some Reasons for an Ontario non-profit to Move to the Federal CNCA

It is important to consider different variables when deciding whether or not to transition an Ontario non-profit corporation from Ontario jurisdiction 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 corporation. 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 a federal corporate act rather than a corporation that is governed by a provincial (Ontario) act.

In addition, some corporate changes for registered charities in Ontario may require approval from the PGT, which can 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 charities to minimize 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 as changing a restricted gift), but will not have to deal with the PGT when making certain corporate changes.

Another advantage of transitioning to federal jurisdiction is that the CNCA, which has been in force for ten years, is working really well, whereas ONCA has just come into force and, as such, there will probably be some growing pains.

Now that ONCA has come into force there will be numerous organizations making various governance changes. 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 in year three of the three-year transition period), and we predict significant backlogs for regulatory approvals. This may not be problematic if the governance changes are minor, but it could be very frustrating and costly if such changes are substantive or urgent or impact a complicated or significant organization.

If your organization wishes to move/continue to the Federal CNCA, here are some of the basic documents that should be prepared:

- Authorization to Continue Out of the NFPCA (i.e. ONCA)
- If you are a registered charity, obtain approval from the CRA for your new objects (generally a good idea but may not be required if your objects were approved by CRA after 2012 and your activities have not changed.)
- Prepare Articles of Continuance under the CNCA
- Prepare By-laws under the CNCA
- Prepare notice of board meeting and notice of meeting of members
- Have directors and members meeting

Options, options, options

There is an important decision to be made: move to Federal or change your documents to conform with the new ONCA requirements.

Either way, all Ontario corporations should begin contemplating these kinds of issues in the next year or two for an inevitable corporate transition. Whether you are staying in Ontario or moving to Federal, there are certain fundamental issues that need to be considered, including membership and legal objects. These types of issues usually do not get better with time.

Unfortunately, the ONCA transition will not be simple for numerous reasons:

- Many staff and board and other volunteers are sick and tired of hearing about ONCA – it has been over 11 years since it was passed;
- Some board members are excited about by-laws and “governance”, but most are not;
- Many stakeholders could have concerns about important corporate changes (e.g. employees, funders, beneficiaries);
- Some organizations will be reluctant to spend money on advisors or grapple with some complexities that they may face;
- Many organizations have issues with membership, governance, objects, etc. that will need to be addressed as part of the transition;
- Multiple regulators may be involved (Ontario Ministry, CRA, PGT, etc);
- There can be lengthy delays by regulators (e.g. CRA – 4-6 months or longer for objects review);
- Some have little understanding of the complete legal regime (only one part of which is the corporate act);
- It may be difficult for some organizations to obtain governing documents and update information; and
- There are few legal advisors in Ontario that focus on non-profits and especially registered charities.

It may be beneficial for Ontario non-profit corporations to obtain legal advice about their options and how ONCA will affect their current governance structure from lawyers who are experienced in non-profit and charity law. Our firm has been working with many Ontario non-profit corporations to determine the best course of action; doing so requires a review of the organization’s current governance documents, an understanding of the operations of the organization, and anticipated changes in operations over the next few years.

While dealing with ONCA is important for Ontario non-profits, it should be dealt with in a way that is expeditious. In other words, do not let the process distract you from other priorities like resource development, program implementation, etc.

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To potentially retain Blumbergs to assist with decision making and/or implementation of corporate changes, please [contact us](#).

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