
ONTARIO OCA CORPORATIONS GOING FEDERAL: ISSUES TO CONSIDER

*By Theresa L.M. Man**

A. INTRODUCTION

As a result of the repeated delay in the proclamation of the Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”), some Ontario not-for-profit corporations under Part III of the *Corporations Act* (“OCA”) are considering whether to give up waiting for the proclamation of the ONCA by continuing under the federal *Canada Not-for-Profit Corporations Act* (“CNCA”). The CNCA was enacted in 2009 and proclaimed on October 17, 2011. Is it suitable for an OCA corporation to do so?

Ever since the enactment of the ONCA in 2010, OCA corporations have been waiting for the proclamation of the ONCA. The Ontario Ministry of Government and Consumer Services announced on September 17, 2015, that the ONCA will not come into effect for at least another two years until two things have happened: (a) the Legislature has passed technical amendments to the ONCA and related legislation; and (b) technology at the Ministry is upgraded to support these changes and improve service delivery. Once the ONCA is proclaimed, existing OCA corporations will have three years to transition under the ONCA.

Ontario not-for-profit corporations have been left in corporate limbo for six years since 2010, having to make the difficult decision whether to update their objects and by-laws to further their mission or to wait for the proclamation of the ONCA before making those changes. The problem with waiting is that they do not know how long the wait might be. On the other hand, the problem with updating the objects and by-laws first is that those updates would have to be made under the rules in the OCA and they may have

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to be updated again after proclamation to comply with the new rules in the ONCA. The question is whether continuing into the CNCA is a suitable solution to avoid these difficulties.

Another issue to consider is whether it would be desirable for OCA corporations to move into the federal jurisdiction for other reasons. This question is worth asking since this option was not available under the *Canada Corporations Act*, the predecessor to the CNCA, which did not permit corporations from another jurisdiction to continue under the Act.

This Bulletin reviews some of the key factors that should be considered when deciding whether to make the move.

B. WHAT DOES CONTINUING INTO THE CNCA INVOLVE?

Changing the jurisdiction from the OCA to the CNCA is not a minor matter. It is a fundamental corporate change. It involves two key steps, i.e., the corporation must leave the Ontario jurisdiction (commonly referred to as exporting out of the Ontario jurisdiction), and continue under the federal jurisdiction (commonly referred to as importing into the federal jurisdiction).

To export out of Ontario,¹ the OCA corporation must obtain approval from the Ontario government. An *Application for Authorization to Transfer to Another Jurisdiction* (Form 13) will need to be adopted by a special resolution of the directors and members.² The application will then be submitted to the Ontario Ministry of Government and Consumer Services, with the filing fee, for approval and issuance. If the corporation is a charity, the approval of the Ontario Public Guardian and Trustee will also be required before the application can be submitted to the Ontario Ministry.

To import into the federal jurisdiction,³ the corporation will need to adopt *Articles of Continuance* (Form 4011) and a new by-law that meets the requirements of the CNCA. The by-law of the corporation under the OCA would not be suitable for use after the continuance. The articles of continuance, notice of

¹ OCA, s. 313.

² A “special resolution” means a resolution passed by the directors and confirmed with or without variation by at least two-thirds of the votes cast at a general meeting of the shareholders or members of the corporation duly called for that purpose, or, in lieu of such confirmation, by the consent in writing of all the shareholders or members entitled to vote at such meeting.

³ CNCA, s. 211.

registered office address and first board of directors, NUANS name search report and the filing fee must be filed with Corporations Canada.⁴ A certificate of continuance under the CNCA will be issued.

If the corporation is a registered charity, the continuance documents must also be filed with Canada Revenue Agency for approval. The corporation (now under the CNCA) may also need to file extra-provincially in Ontario if it meets the requirements of the Ontario *Extra-Provincial Corporations Act*. Depending on the operations of a particular corporation, other filings and updates may be necessary, such as filing copies of the continuance with funders, umbrella organization that the corporation operates in subordination to, banks, etc.

C. KEY CONSIDERATIONS

For some OCA corporations, continuing into the CNCA is attractive because it would allow the corporation to update its corporate documents (such as corporate objects, board composition, membership structure, etc.) once and for all without waiting for the proclamation of the ONCA. This would avoid the need to update the documents under the OCA, and then again under the ONCA. However, this convenience may not necessarily be a sufficient driving force in and of itself to justify moving into the CNCA. There could be many factors at play when determining whether it would be desirable for an OCA corporation to move into the federal jurisdiction. These factors should be carefully reviewed and evaluated.

The following are some key factors why it may be beneficial to continue under the CNCA:

- **Scope of Operations** - The best candidates to consider continuing into the CNCA are those OCA corporations that operate programs and activities on a national basis. These corporations are generally originally incorporated in Ontario under the OCA in the early stage of their establishment, and then have their programs expand over the years to other provinces or nationwide. For public perception reasons, it may not be palatable for the corporation to remain as an Ontario corporation. An example would be a church that was originally incorporated in Ontario as a standalone organization, but later on set up satellite churches in various provinces across Canada.

⁴ *Ibid*, at s. 211(3). See Corporations Canada, “Continuance (import) of a Not-for-profit Corporation”, online: Industry Canada <<http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05200.html>>.

- **Membership Meetings** – A corporation that has members in different provinces may want to hold members’ meetings in different provinces from time to time (for example, it may want to hold an annual meeting in British Columbia this year and hold the next annual meeting in Ontario in the following year). It would be easier to do so if the corporation was under the CNCA than if the corporation was under the OCA or ONCA.⁵
- **Right to Use Corporate Name** - Another potential reason to move into the CNCA is that a federal corporation’s right to use its corporate name in all provinces is entrenched under the Constitution of Canada. Being under the federal jurisdiction would mean that a corporation would be better able to ensure that it can use its current corporate name as it expands its operations into other provinces. Otherwise, the corporation might be forced to adopt another name (often referred to as “assumed name”) when it operates its programs in those provinces where there is a name issue (such as in the event there is another existing corporation that has been set up under the same or similar name in that province).
- **Amalgamation and other corporate re-organization** - Another common reason to have a continuance is to facilitate an amalgamation of an OCA corporation with a CNCA corporation resulting in the amalgamated corporation being under the CNCA, since all amalgamating corporations must be subject to the same corporate statute. This means that the OCA corporation would continue under the CNCA, followed by amalgamating the two CNCA corporations. Of course, if the goal is to have the amalgamated corporation to be under the OCA, then the CNCA corporation would be continued into Ontario under the OCA, followed by an amalgamation of the two OCA corporations.
- **Jurisdiction of the Ontario Public Guardian and Trustee (“PGT”)** – Corporate changes of charitable OCA corporations are subject to approval by the PGT, such as changes to the corporate objects,

⁵ An OCA corporation is required to hold members’ meetings at its head office (in Ontario), but the by-law may allow members’ meetings to be held at any place in Ontario. If the corporation wishes to hold members’ meetings outside of Ontario, such place must be specifically designated in the letters patent of the corporation. Once the ONCA is effective, physical members meetings must be held in Ontario at the place provided for in the by-laws or, if there is no by-law provision, at a place the directors determine. Members’ meetings may only be held outside of Ontario if the place is specified in the articles or all members entitled to vote at the meeting agree to hold the meeting at that place. However, a CNCA corporation may hold members meetings in any place in Canada (or outside of Canada if the place is specified in the articles or all members entitled to vote at the meeting agree to hold the meeting at that place).

dissolution clause, etc. However, corporate changes for CNCA corporations do not need to be approved by the PGT. CNCA corporations that operate in Ontario only need to file copies of their articles of amendment with the PGT for their records. Thus, it would be simpler and faster for CNCA corporations to adopt these changes.

- Operational Issues – There could be many operational issues that may drive the need for an OCA corporation to be continued under the CNCA. For example, a network of related corporations that were incorporated under different jurisdictions, such as an operating charity incorporated under the OCA and a parallel foundation incorporated federally, may wish to have both corporations operate under the same rules by having the operating charity continue under the CNCA as well.

On the other hand, the following are some factors why it may be more beneficial to remain under the OCA (and continue to wait for the proclamation of the ONCA):

- Attractive Features of the ONCA – Both the ONCA and CNCA are modelled after modern corporate legislation and the two acts are very similar in many respects. However, there are some key differences that tend to make the ONCA be perceived as “friendlier” and more sensitive to the charitable and non-profit sector than the CNCA. For example, CNCA does not permit having *ex officio* directors, while this is expressly permitted under both the OCA and ONCA. Although it may be possible to include a governance mechanism as a workaround of the prohibition under the CNCA, such a mechanism sometimes may be awkward. Similarly, there are more filing requirements under the CNCA (such as by-laws must be filed within 12 months of adoption by the members, financial statements must be filed by soliciting corporations); but there are no such requirements in Ontario. Another key feature is that the ONCA contains a lower threshold for audit exemption than the CNCA.
- Operational Issues – There could be operational issues that may prevent an OCA corporation from continuing under the CNCA. For example, a structure involving an umbrella organization that operates federally with incorporated chapters or branches in the various provinces or territories would naturally have the umbrella organization incorporated federally with the chapters or branches incorporated under provincial or territorial jurisdiction. In this case, the chapter in Ontario would have to remain as an OCA corporation. Another example would be a network of

corporations that are incorporated under the OCA may not want any corporation to be continued under the CNCA in order to continue to have all corporations operated under the same rules under the OCA. A further example would be the occasion that a funder (from which an organization intends to see funding) only funds corporations established in Ontario.

- **Legislative Prohibitions** – Some organizations are required to be incorporated provincially in Ontario. For example, public hospitals in Ontario are required to be incorporated either under the OCA or ONCA or by special legislation. Therefore, continuing under the CNCA is not an option.
- **Corporate Process** – Continuing into the CNCA will require the OCA corporation to adopt articles of continuance and a new by-law that complies with the rules of the CNCA. The OCA corporation will have to assess whether it is possible to obtain the necessary approval from its members to effect such as a fundamental corporate change.

D. CONCLUSION

Whether continuing under the CNCA is appropriate to an OCA corporation would depend on many factors. There is no one-size-fits-all answer. Even if the wait for the proclamation of the ONCA may cause hardship to an OCA corporation, to continue under the CNCA simply to avoid the wait may not, in and of itself, justify the corporation taking the drastic steps of changing jurisdiction. OCA corporations that are interested to explore this option should carefully weigh the pros and cons of continuing under the CNCA before making this decision.