

CONTINUING DILEMMA: ONTARIO CORPORATIONS GOING FEDERAL?

*By: Theresa L. M. Man**

A. CONTINUANCE DILEMMA

THE ONTARIO *Not-for-Profit Corporations Act, 2010* (“ONCA”) was finally proclaimed into force on October 19, 2021.¹ Incorporation as a new not-for-profit corporation in Ontario is now governed under the ONCA. As well, the ONCA automatically applies to all not-for-profit corporations previously incorporated under Part III of the Ontario *Corporations Act* (“OCA”). These corporations have three years from the date of the ONCA’s proclamation to undertake an optional “transition process” to amend their governing documents to comply with the requirements of the ONCA before they are automatically amended to comply with the ONCA on October 19, 2024.

As a result of the repeated delay in the proclamation of the ONCA since its enactment in 2010, Ontario corporations had been left in corporate limbo for 11 years, struggling with whether to update their objects and by-laws under the OCA to further their mission or to wait for the proclamation of the ONCA before making those changes. Many Ontario corporations had to make the difficult decision of whether to give up waiting for the proclamation of the ONCA by continuing under the federal *Canada Not-for-Profit Corporations Act* (“CNCA”). [Charity & NFP Law Bulletin No. 379](#) explained the steps involved and key considerations for such a move.

Now that the ONCA is proclaimed into force, Ontario corporations are faced with the new of dilemma of whether to undertake the transition process to continue to remain under the ONCA, or whether it is time

* Theresa L.M. Man, BSc, MMus, LLB, LLM, is a partner practicing in charity and not-for-profit law.

¹ *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15 [“ONCA”].

to take a second look at whether to go federal under the CNCA. This *Bulletin* reviews some of the key factors that should be considered when deciding which move to make.

B. TRANSITION STEPS TO REMAIN UNDER ONCA

UPON PROCLAMATION of the ONCA, it now automatically applies to all non-share capital corporations in Ontario. Ontario corporations that want to remain in Ontario are *not required* to take any action to come under the ONCA. Any provisions in a corporation's letters patent, supplementary letters patent, by-laws or special resolutions that are inconsistent with the ONCA will continue to apply for three years after proclamation and would take precedence over the inconsistent ONCA requirements. However, at the end of three years after proclamation (*i.e.* October 19, 2024), they will be amended to comply with the ONCA. It may be difficult to determine which provisions are deemed to be amended and in what way.

To avoid uncertainty of documents as a result of the deemed amendment process, it is prudent to undertake the optional "transition process" during the three-year period by amending their governing documents to bring them into compliance with the requirements of the ONCA. This will involve (a) filing articles of amendment to amend provisions in their letters patent or supplementary letters patent; and (b) adopting an ONCA-compliant by-law. As well, a corporation may have its articles restated with board approval, provided that (a) the articles are in conformity with the ONCA and (b) if the articles have been deemed to be amended, the corporation has amended its articles to bring them into conformity with ONCA.

[*Charity & NFP Law Bulletin No. 501*](#) provides a brief outline of the transition process and considerations for the transition process.

C. STEPS TO CONTINUE UNDER CNCA

INSTEAD OF remaining in Ontario, it is possible for ONCA corporations to become federal corporations under the CNCA. However, changing the jurisdiction from the ONCA to the CNCA is not a minor matter. It is a fundamental corporate change. It involves two steps. First, the corporation must leave the Ontario jurisdiction (commonly referred to as exporting out of the Ontario jurisdiction). Second, the corporation must continue under the CNCA (commonly referred to as importing into the federal CNCA).

To export out of Ontario, the ONCA corporation must obtain approval from the Ontario government.² An *Application for Authorization to Continue Out of the NFPCA* (Form 5275) will need to be adopted by a special resolution of the members (*i.e.*, a resolution adopted by at least two-thirds of the votes cast at a special membership meeting or a written resolution signed by all members). The application will then be submitted to the Ontario Ministry of Government and Consumer Services, with the filing fee. For charitable corporations, the approval of the Ontario Public Guardian and Trustee (“PGT”) will only be required if the PGT has notified the Ministry that consent is required under section 26 of the *Names and Filings Regulation*³ under the ONCA. Upon receipt of the required documents, the application will be endorsed by the Ministry and a *Certificate of Authorization* will be issued. The authorization is valid for 6 months and the exporting corporation must file a copy of the CNCA continuance documents issued by the Corporation Canada within 60 days after its issuance.

To import into the federal jurisdiction,⁴ the corporation will need to adopt *Articles of Continuance* (Form 4011) and a new CNCA-compliant by-law. The by-law of the corporation under the OCA or ONCA would not be suitable for use after the continuance. The articles of continuance, notice of registered office address and first board of directors, NUANS name search report and the filing fee must be filed with Corporations Canada. A certificate of continuance under the CNCA will be issued. The corporation will also need to file the authorization from the Ontario Ministry to export out of Ontario. However, a legal opinion is not required to be filed by the exporting Ontario corporation.⁵ Once the continuance is approved, a *Certificate of Continuance* under the CNCA will be issued. On the date of the certificate of continuance, the corporation will become a federal corporation under the CNCA, the *Articles of Continuance* will be deemed to be the *Articles of Incorporation* of the continued corporation; and the members of the corporation being continued will become members of the continued corporation.

The rights of the continuing corporations are preserved so that the property of the body corporate continues to be the property of the continued corporation. The continuance will not affect any existing cause of

² ONCA, s. 116.

³ Names and Filings, O Reg 394/21.

⁴ CNCA, s. 211.

⁵ However, a legal opinion is not required to be filed by the exporting Ontario corporation because Ontario is part of Corporations Canada’s policy to have a more streamlined process for continuance into the CNCA by pre-approving certain provincial legislation for export. See Corporations Canada, “Continuance (export) – Legislation pre-approved by Corporations Canada under the Canada Not-for-profit Corporations Act” online: <https://www.ic.gc.ca/eic/siTe/cd-dgc.nsf/eng/cs05271.html>

action, claim or liability to prosecution. Any civil, criminal or administrative action or proceeding pending by or against the corporation may be continued. And any conviction against, or ruling, order or judgment in favour of or against, the corporation may be enforced by or against the continued corporation.

In order to be imported into the CNCA, it will be necessary for the continuing corporation to review, and possibly revise where necessary, its corporate governance structure and prepare new by-laws that comply with the rules in the CNCA. As well, the continuing corporation may make other desired changes, even if they may not be required under the CNCA, such as adopting a different membership structure, board composition, and revised corporate purposes.

If the corporation is a registered charity, the continuance documents must also be filed with the 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*.⁶ 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.

D. KEY CONSIDERATIONS

BECOMING A federal corporation may not be suitable for all Ontario corporations. There could be many factors at play when determining whether it would be desirable for an ONCA corporation to move into the federal jurisdiction. These factors should be carefully reviewed and evaluated.

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. The following are examples of key differences between the CNCA and ONCA:

- CNCA does not permit having *ex officio* directors, while this is expressly permitted under the 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.

⁶ RSO 1990, c E.27

- 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.
- Under the CNCA, members of separate classes (regardless of whether the membership class is a voting class or non-voting class) will be entitled to vote separately by a class or group of members under two circumstances: (a) if the corporation wants to change the membership class structure or to change the rights attached to a class or group of members; and (b) if corporation wants to make certain fundamental changes (such as amalgamation, or the sale, lease or exchange of all or substantially all of the property of a corporation). Each class must approve the matter in order for it to pass; if one class rejects the proposed changes, the motion fails. As such, each class of members (including non-voting members) will have a *de facto* veto right for these matters. Although the ONCA originally contained similar class voting and veto rights when it was enacted, those rights were removed.⁷
- The ONCA generally contains a lower threshold for audit exemption than the CNCA.
- The concept of “public benefit corporations” under the ONCA is generally easier to understand and work with than the concept of “soliciting corporations” under the CNCA.
- The rules governing the distribution of net assets on dissolution or liquidation are simpler and more flexible under the CNCA than under the ONCA.
- The CNCA expressly allows the use of unanimous member agreements by non-soliciting corporations, while the ONCA does not expressly permit their use.

Other than the differences in the features in the ONCA and the CNCA, the following are some key factors why it may be beneficial for some ONCA corporations to continue under the CNCA:

⁷ The class vote and veto rights were removed when Motion 89 was carried on September 21, 2020, extending the deadline for the ONCA to be proclaimed to December 31, 2021, and further when the ONCA was amended by the *Supporting Recovery and Competitiveness Act, 2021*, SO 2021, c 25.

- Scope of Operations – The best candidates to consider continuing into the CNCA are those Ontario corporations that operate programs and activities on a national basis. These corporations are generally originally incorporated in Ontario 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.
- 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 ONCA.⁸
- 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 continue under the CNCA is to facilitate an amalgamation of an ONCA 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 ONCA corporation would continue under the CNCA, followed by amalgamating the two CNCA corporations. Of course, if the goal is to have the amalgamated corporation be under the ONCA, then the CNCA

⁸ Under the ONCA, 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).

corporation would need to be continued into Ontario under the ONCA, followed by an amalgamation of the two ONCA corporations.

- Jurisdiction of the Ontario Public Guardian and Trustee (“PGT”) – Although the PGT will no longer be involved in most corporate applications by charities under the ONCA, it will continue to be involved when a charitable corporation wishes to change its purposes but does not want to use the “after-acquired clause”. In this regard, charitable corporations that change/update their charitable purposes by Articles of Amendment will automatically be subject to an “after acquired” clause, unless written consent is provided by the PGT to waive it.⁹ As well, the PGT’s consent will be required when the corporation wishes to use the term “Foundation” in its corporate name if the word suggests the corporation is a charity, or the word ‘Charity’ in the corporate name; and the PGT will be involved if it has requested notification of any application for changes with respect to the corporation. 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 changes to its purposes.
- Operational Issues – There could be many operational issues that may drive the need for an Ontario 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 under the ONCA and a parallel foundation under the CNCA, 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, other than the differences in the features in the ONCA and the CNCA, the following are some factors why it may be more beneficial to remain under the ONCA:

- Operational Issues – There could be operational issues that may prevent an Ontario 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

⁹ The “after acquired” clause means that funds and other property acquired *before* the Articles of Amendment can only be used for the purposes before the amendment (will include all income received from a Will, deed or other trust made before the Articles of Amendment became effective, regardless of when the funds or property are received by the charity); and funds and other property acquired *after* the Articles of Amendment can only be used for the purposes as changed by the Articles of Amendment.

would naturally have the umbrella organization incorporated federally with the chapters or branches incorporated under provincial or territorial jurisdiction. Another example would be a network of corporations that are under the ONCA 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 ONCA. 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 under the ONCA or special legislation. Therefore, continuing under the CNCA is not an option.
- Corporate Process – Continuing into the CNCA will require the Ontario corporation to adopt articles of continuance and a new by-law that complies with the rules of the CNCA. The Ontario 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.

E. TAKEAWAY

WHETHER CONTINUING UNDER the CNCA is appropriate for an Ontario corporation will depend on many factors. There is no one-size-fits-all answer. Ontario corporations that are interested in exploring this option should carefully weigh the pros and cons of continuing under the CNCA with their legal counsel before making this move.