CNCA vs. ONCA: Similar but not the same

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This article is part of a series on the new Ontario *Not-for-Profit Corporations Act, 2010* (ONCA), which will replace the current Ontario *Corporations Act* (OCA) in governing charities and not-for-profits as of October 19, 2021.

Background

When the ONCA comes into force, Ontario will finally come in line with its federal counterpart, the *Canada Not-for-profit Corporations Act* (CNCA). Like the CNCA, the ONCA will harmonize not-for-profit legislation with its for-profit equivalent and modernize the legal framework to meet Ontario's current charity and not-for-profit (CNFP) needs.

What you need to know

It is important to note that rights and responsibilities vary between the ONCA and the CNCA. Understanding these nuances is essential to knowing where to incorporate your CNFP or, perhaps, whether to move your CNFP to the CNCA or the ONCA. Here is what you need to know:

1. **Incorporation**. Both the CNCA and ONCA permit one or more individuals or corporations to incorporate a NFP corporation under either statute by filing articles of incorporation. An ONCA corporation must also have a registered office in Ontario while a CNCA corporation's registered office must be in a Canadian province specified in the corporation's articles.
2. **Types of organizations.** NFP corporations are categorized differently under the ONCA and CNCA.
    a. Under the CNCA, corporations are categorized as either **soliciting corporations** or non-soliciting corporations. Corporations that indirectly or directly receive more than $10,000 in gross annual revenue from public resources are soliciting corporations. NFPs that do not meet this definition are non-soliciting corporations. Depending on the organization type, the NFP's governance structures, board composition, option for a unanimous member agreement and requirement to file financial statements will vary.
    b. Under the ONCA, NFPs are either **public benefit corporations** (PBCs) or non-PBCs. PBCs are further subdivided into charitable corporations and

non-charitable corporations. Charitable corporations are PBCs that are incorporated to relieve poverty or to advance education, religion or other charitable purpose. Non-charitable corporations are PBCs that receive more than $10,000 from specific public sources. If ONCA corporations do not meet this definition, they are non-PBCs. Generally, PBCs are subject to higher regulatory standards for greater transparency in their operations because their funding source is public.

3. **Number of Directors.** The CNCA requires all non-soliciting corporations to have at least one director. All soliciting corporations must have at least three directors with a minimum of two directors as non-executives or employees of the corporation or its affiliates. In contrast, all ONCA corporations must have at least three directors, with PBCs prohibiting greater than one third of its directors as employees of the corporation or its affiliates.
4. **Type of Directors.** Both the CNCA and ONCA do not require directors to be members of the NFP unless the bylaws or articles state otherwise. However, the CNCA disallows *ex-officio* directors unlike the ONCA. *Ex-officio* directors are non-elected directors who sit on the board by virtue of their position. If an NFP has *ex-officio* directors, it can maintain this same structure under the ONCA.
5. **Voting Rights for non-voting members**. The ONCA will take effect without non-voting members having the right to vote on fundamental changes to the NFP. This differs from the CNCA, where non-voting members and membership classes hold these rights.
6. **Audit exemption**. Under the CNCA, all soliciting corporations with gross annual revenues over $250,000 and all non-soliciting corporations with revenues over $1 million must complete an audit. In contrast, under the ONCA, non-PBCs with gross annual revenues over $500,000 and PBCs with gross annual revenues of $100,000 to $500,000 must complete an audit.
7. **Dissolution.** When a soliciting corporation under the CNCA dissolves, the CNCA mandates that its assets go to a “qualified donee” under the *Income Tax Act* (such as registered charities in Canada and government entities). However, under the ONCA, a charitable PBC must give its assets to a government body or another charitable PBC with a similar purpose. Similarly, a non-charitable PBC must give its funds to a government body or another ONCA non-charitable PBC with a similar purpose.

The ONCA and CNCA provide for greater transparency and accountability in the not-for-profit sector. However, their nuances create certain advantages and disadvantages for federal or provincial incorporation or continuance. If your organization needs to determine between incorporating or continuing under the ONCA or the CNCA, the lawyers in our Charities & Not-For-Profit group can help.

BLG’s ONCA series

To assist in considering the impact of the ONCA on your organization, BLG has prepared a series of articles that will be linked below as they are released.

If you have any questions about the transition process or would like to learn more about the ONCA, please email any of the authors or key contacts listed below, or any other member of our Charities & Not-For-Profit group.

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