Why Wait – Part II? Should Your Ontario Non-Public Benefit Corporations Think About Continuing under the new Federal Act Now?

In a recent Bulletin, we asked: should your Ontario charitable corporation think about continuing under the *Canada Not-for-profit Corporations Act* (the "**CNCA**")?

While the considerations are different, non-public benefit corporations ("**non-PBCs**") formed as non-share capital corporations under Part III of the Ontario *Corporations Act* (the "**OCA**") can ask themselves a similar set of questions, namely: Should we think about continuing under the CNCA now? Or should we wait until late 2012 when the Ontario *Not-for-Profit Corporations* Act, 2010 (the "**ONCA**") is expected to be proclaimed into force.

Like charitable corporations, some Ontario non-PBCs (*e.g.*, member clubs, professional or trade associations or other mutual benefit corporations) may not want to wait. They may want to consider the new federal option now. The OCA permits a Part III corporation to continue to the CNCA.

There are many factors to consider in deciding whether to continue as a federal corporation, and the relevancy and weight to be given to each of the various factors will vary from organization to organization. Nevertheless, some general observations can be made at this preliminary stage.

For those corporations that have a choice of incorporation jurisdiction (including almost all non-PBCs as a result of the now import continuance provisions of the CNCA), the factors differ depending on whether the corporation is, or will be, a PBC (*i.e.*, generally, a corporation that is a registered charity under the *Income Tax Act* (Canada) (the "***Tax Act***") or receives > $10,000 a year in government grants or from donors who are not members, directors, officers or employees) or a non-PBC (*i.e.*, all other corporations). To simplify the analysis that follows, a "non-PBC" means a non-soliciting corporation under the CNCA or a corporation other than a public benefit corporation under the ONCA.

CNCA v. ONCA Choice for a non-PBC		
Factor	**CNCA**	**ONCA**
National Platform	The federal jurisdiction offers the distinct advantages of a national platform, which may be perceived to be more inclusive to members, donors and the general public. The federal platform provides a common set of rules that are known to directors, lawyers and others conducting business with the corporation across the country. As well, federal incorporation offers the right to carry on the corporation's activities across	For many large NFP corporations operating, or with aspirations to operate, on a Canada-wide basis, federal incorporation has these innate advantages that no province can match. For these organizations, the analysis effectively stops there. An ONCA corporation may find to its chagrin that, by the time that it seeks to register to operate in another province/territory, its name is no longer available for use in that jurisdiction.

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	Canada under its federal corporate name.	
Membership Rights	Some non-PBCs that wish to avoid the cost of enabling voting members to exercise their statutory appraisal rights on fundamental changes may prefer federal instead of Ontario incorporation.	The ONCA provides minimum standards for terminating and otherwise disciplining members for which there is no statutory counterpart under the CNCA. On the termination of a membership interest, the ONCA permits the corporation to pay the former member the fair value of his/her membership interest (which the CNCA does not permit). The ONCA also provides for an appraisal right, expressly allowing a voting member of a non-PBC to be paid the fair value of his/her membership interest on certain triggering events that likewise have no counterpart under the CNCA.
Level of Financial Review	Under the CNCA, an audit is mandatory if the non-soliciting corporation's annual revenues ("**AR**") > $1,000,000. Where the AR ≤ $1,000,000, the corporation can waive the appointment of a public accountant ("**PA**")(and have a compilation report) if all members entitled to vote at the annual meeting consent - failing which, the default rule is a review engagement.	A non-PBC may elect to have a review engagement instead of an audit of its annual financial statements regardless of the level of its AR. Where AR < $500,000, the members can by extra-ordinary resolution opt to waive the appointment of a PA and, therefore, have a compilation report.
By-laws	Under the CNCA, all corporations must file copies of their by-laws and by-law amendments with Corporations Canada with 12 months from confirmation by the members.	Under the ONCA, a corporation never files its by-laws. Indeed, an ONCA corporation does not even have to pass by-laws because, by the time the ONCA goes into effect, the Ministry will have developed a default set of by-laws that will apply to fill in any gap (if the corporation does not otherwise adopt by-laws within 60 days of incorporation). The corporation can

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		always replace its default by-laws.
Annual Return	Federal incorporation requires that an annual return be filed with Corporations Canada, the cost of which is small ($20 if filed online; $40 otherwise) but that nevertheless imposes an additional administrative burden on small NFP corporations.	CNCA filing requirement and annual fee are avoided.
Proxies	Proxies are not mandatory. By-laws may provide for proxies or mail-in, telephonic or electronic balloting that meet prescribed requirements. Members can also pass any ordinary or special resolution by unanimous written consent.	Proxy solicitation is mandatory for all *meetings of members* unless by-laws opt for mail, telephonic or electronic balloting. Members can also pass any resolution by unanimous written consent.
Directors	Must have at least one director. No restrictions on appointing officers/employees as directors. *Ex officio* directors not permitted.	Must have minimum of 3 directors. No restrictions on appointing officers/employees as directors. By-laws may provide for *ex officio* directors.

In the fullness of time, the co-existence of the CNCA and the ONCA can be expected to lead to a degree of segmentation or specialization between the federal and Ontario NFP legislation. The CNCA should attract a disproportionate number of large national NFP organizations. The ONCA should continue to appeal to small and mid-size non-PBCs operating in Ontario.