



## Canada Not For Profit Corporations Act

### NEW GOVERNING LEGISLATION

1. Many charities and not-for-profit organizations with a national focus are currently incorporated under Part II of the Canada Corporations Act ("CCA") by Letters Patent. Charities will also be registered with Canada Revenue Agency ("CRA") and have additional requirements to maintain charitable status.

2. After several attempts at law reform, the new Canada Non-For-Profit Corporations Act (CNCA) was passed in 2009 and will probably come into force in 2011 or 2012.

3. Once the CNCA comes into force, each CCA corporation will have a three year start-up period within which it must perform a corporate "transition" from the old regime (CCA) into the new regime (CNCA). This transition will be accomplished by filing Articles of Continuance with Industry Canada.

4. After the three year transition period has concluded, the CCA will be phased out and any non-transitioned corporate entities will eventually be dissolved.

5. The CNCA harmonizes the non-profit governance regime in many respects with the more modern governance rules applicable to share capital companies, as contained in the Canada Business Corporations Act (CBCA). Share capital companies transitioned out of the CCA into the CBCA in the 1980s. Since that time, incorrect assumptions have sometimes been made about non-profit governance, as non-profits are still regulated under the more antiquated rules of the old CCA.

6. In general, the new rules of the CNCA are beneficial and enabling for non-profits. It can be anticipated that when a CCA entity performs its transition to the CNCA it may wish to make some contemporaneous substantial alternations to its bylaws to take advantage of the new rules.

7. Examples of the modernized CNCA governance rules include a more streamlined process for modifying bylaws, updated communication and meeting requirements, enhanced member rights, flexibility for multiple classes

of members, including multiple voting rights, modernized directors protection with a "due diligence" defence, and better flexibility in reorganizations (e.g., amalgamations will now be permitted).

8. The CNCA will introduce a distinction between "soliciting" and "non-soliciting" corporations. Soliciting corporations will be those which receive government funding and/or public donations over a prescribed amount. Soliciting corporations will be subject to more stringent requirements under the CNCA in the financial, audit and governance areas.

9. The remainder of this article will summarize:

- "Transition" requirements
- Certain aspects of the new governance rules which may be of interest
- the special requirements for soliciting corporations

### TRANSITION REQUIREMENTS

1. A CCA corporation authorizes its transition to the CNCA by a Members' Resolution, instructing the Board to effect the transition. The same resolution may authorize contemporaneous amendments to the bylaws, if permitted by the CNCA.

2. The transition is effected by the Board filing "Articles of Continuance" with Industry Canada in prescribed form. These articles set out:

- Name
- Province in which the registered office is located
- Classes of membership, and their voting rights
- Number of Directors (or minimum and maximum board size)
- Restrictions, if any, on corporate activities

- Statement of objects/purposes
- Liquidation Clause

3. This exercise will involve repackaging certain information from the existing CCA Letters Patent, as well as importing certain information (e.g. Board size) from the existing CCA bylaws.

4. For a registered charity, if the stated purposes in the Articles of Continuance do not mirror the existing objects in the CCA Letters Patent, further analysis is needed to assess whether consultation with CRA is required to verify that the organization will continue to qualify for charitable status, with its amended purposes.

5. There is no government filing fee for the transition.

6. Under the CNCA, bylaws are no longer reviewed or approved by Industry Canada, although reference copies must still be filed on record with Industry Canada. However, at the time of transition, the organization should review its bylaws to assess whether amendments are appropriate, to either:

- (a) Take advantage of the new CNCA provisions;
- (b) Delete CCA provisions now offensive under the CNCA; or
- (c) Delete CCA provisions no longer required under the CNCA and no longer desirable.

7. In revisiting the bylaws, the organization may also wish to consider streamlining the bylaws content to avoid repetition of matters already covered in the CNCA. In such an approach, the CNCA and bylaws together would form the core code of governance. However, many organizations may still prefer to have the bylaws themselves form a more complete code and reference document, even if just repeating in part certain provisions of the governing legislation. There is no one correct approach.

8. The issue of whether to transition early or late in the three year period will be determined by a number of factors. For example, a desire to take advantage of modern governance rules may prompt early transition. However, a desire to postpone "soliciting corporation" status may motivate delay in transition.

#### CERTAIN ASPECTS OF THE NEW GOVERNANCE

1. Written Resolutions. CNCA will expressly permit members and directors to conduct governance business by unanimous written consent resolution. Bylaw provisions may need to be amended to take advantage of this provision.

2. Bylaw Changes. CNCA will permit the Board to pass bylaw changes which are effective immediately; member confirmation need only follow at the next members meeting. Bylaw changes no longer have to be approved by Industry Canada, but must simply be filed for information purposes with Industry Canada within 12 months of member confirmation.

3. Borrowing. Currently, directors only have such borrowing powers as are specified in enabling bylaws. The CNCA establishes universal borrowing powers except as may be specifically restricted by the Bylaws. Therefore, bylaw amendments may be appropriate to take advantage of this.

4. Membership. CNCA will permit multiple classes of members, and classes can be designated as non-voting or multiple voting. Organizations with only one class of members may wish to consider offering non-voting or multiple voting "membership" in the organization to interested individuals and donors, as this may have some strategic and marketing value. However, membership would grant these new members, even if non-voting, certain status and standing (e.g. on windup). The bylaws could also permit membership to be transferable, if desired. Under the CNCA membership can only be conferred by the Board. Therefore, the concept in some existing CCA corporations of new members being admitted by action of the membership itself, as opposed to action of the Board, may need to be reviewed.

5. Directors. The CNCA provides that directors can only be elected by the membership. Certain CCA organizations may currently have a governance structure involving ex-officio directors or external stakeholders having a power to appoint and remove directors directly to and from the Board. That flexibility could only be retained under the CNCA through use of more complex governance structures such as membership class status for external stakeholders, or an indirect nomination and election procedure pursuant to a side agreement.

6. Auditor. Bylaw provisions involving auditors will need to be reviewed in the context of "soliciting corporation" status (see discussion below).

7. Powers. The CNCA enhances corporate power and capacity to that of a "natural person" (similar to business corporations). This eliminates any need for specific enabling statements of power and capacity which are often found in existing CCA Bylaws. While it is not offensive to retain such provisions, they are no longer necessary. Note that any restrictions on corporate power must now be expressed in the Articles.

## SPECIAL REQUIREMENTS FOR SOLICITING CORPORATIONS

1. If a CCA corporation currently has fully audited financials and is prepared to continue to do so, then it meets the highest standard required under the CNCA. However, if an organization currently has or wishes to move to a less rigorous (and less expensive) financial presentation, such as a “review engagement” or “consolidation” financial presentation, then the following discussion of soliciting corporations becomes particularly relevant.

### Is the entity a Soliciting Corporation?

2. A typical charity receives donations from a wide spectrum of individuals and corporations. As well, from time to time and in conjunction with certain programs, both charities and non-charities may receive financial assistance from governments or government agencies. Occasionally, other charitable organizations or foundations might also contribute.

3. As a result, it is possible that an organization falls within the CNCA definition of “soliciting corporation” resulting in a need to consider special requirements that may be applicable to it, including financial reporting duties as a recipient of “public” funds. The analysis regarding soliciting corporations is, unfortunately, quite complex.

4. There are three ways in which an entity might be considered a “soliciting corporation”, and all of them will be affected by regulations to be passed under the CNCA. Draft regulations have been prepared but are not yet finalized.

5. Under the CNCA, an entity will be a soliciting corporation if, over a prescribed period of time, it received income in excess of a prescribed amount in the form of:

- (a) donations or gifts from the public (i.e., arms-length persons);
- (b) grants or similar financial assistance from federal, provincial or municipal governments or an agency of such government; or
- (c) donations or gifts from any entity which itself received during the same prescribed period income in excess of the prescribed amount as public donations or government grants/assistance [i.e., indirect support].

6. It is anticipated the regulations will set the prescribed period as a rolling three year average, and the prescribed amount as \$10,000. Therefore, this can be considered essentially as a “de minimus” threshold.

7. There are additional technical rules concerning the

calculations (e.g., membership fees and bequests are not counted).

8. However, in all the circumstances, most charities (and some non-charities) should anticipate being classed as “soliciting corporations”.

### Implications of Being a Soliciting Corporation

9. The CNCA regulates “soliciting corporations” more stringently than non-soliciting corporations, creating a distinction analogous to the types of differences between private and public share capital companies. Areas affected include board composition requirements, distributions on wind-up, requirements to have a public accountant, requirements to have audited financials, and requirements to file and publicly disclose financial statements. A detailed analysis of the complex provisions is beyond the scope of this article, but further information can be made available on request.

10. Of particular interest are the financial rules. At the highest level of regulation, a non-profit under the CNCA is required to appoint a public accountant and have audited statements (as opposed to review engagement statements). However, various exemptions permitting less onerous financial verification (some of it requiring membership action authorizing lower compliance) may be available, based on revenue volume of the entity. As well, there can be discretionary relief granted under the CNCA. The somewhat complex exemptions will establish arbitrary revenue threshold categories, and will result in CNCA corporations needing to pay close attention to this area.

## CONCLUSION

1. When the new CNCA comes into force, in 2011 or 2012, existing CCA corporations will have a need and an opportunity to revisit their governance structure as they transition into the CNCA. Organizations with a broad constituency and complex timetables for governance action should start planning early to deal with the impending changes.

2. Alexander Holburn Beaudin & Lang LLP is well-equipped to work with CCA organizations to help them review and understand the new rules, and to make specific recommendations customized to the organization.

## END NOTES

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