

New Act signals fresh start for federal not-for-profits



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The *Canada Not-for-Profit Corporations Act* (CNCA) will at long last modernize the outdated legislation governing federally incorporated not-for-profit corporations (NFPs).

The CNCA received royal assent on June 23, 2009 and when proclaimed in force (expected in early 2011), it will replace the *Canada Corporations Act* (CCA), which has remained largely unchanged since 1917. The CNCA is modeled on the *Canada Business Corporations Act* (CBCA) and so for many, the new legislative scheme is a familiar one. There are, however, some distinctions that are important to understand when working with the CNCA.

The CNCA differentiates between two main types of not-for-profit corporations — soliciting and non-soliciting corporations. The definition of “soliciting corporation” is based on whether a corporation received in excess of \$10,000 in public money during its last financial year from

(a) public donors;

(b) governments or government agencies (whether federal, provincial or municipal); and

(c) other entities that have themselves received in excess of \$10,000 in the previous financial year from public donors or from government.

Under the first category, the donations or gifts that are to be included in the computation must have been “requested” by the corporation and do not include donations or gifts from any donor who is a member, director or employee of the corporation at the time of the funding request or persons who are related by blood, marriage or cohabitation arrangements with any of these persons.

Under the third category, the onus is on the corporation to inquire from the other entities whether those entities have requested funds from the public or received money from government in the last financial year and if so, in what amount.

Non-soliciting corporations are a residual category capturing all other corporations under the Act.



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A soliciting corporation must have at least three directors under the new Act.

Draft regulations to the CNCA are still in progress and will determine the effective date of becoming a soliciting corporation and the other parameters applicable to the definition.

A soliciting corporation must have a minimum of three directors, at least two of whom are not officers or employees of the corporation or its affiliates. In addition, a soliciting corporation must provide annual financial statements to the director under the Act where they are available for public inspection. The remaining property on dissolution of a soliciting corporation is required to be distributed to one or more “qualified donees” within the meaning of subs. 248(1) of the *Income Tax Act* (Canada). There are specific rules applicable to soliciting corporations regarding the appointment of a public accountant and level of financial review. A unanimous member agreement is not available to soliciting corporations.

Since the proposed financial threshold of \$10,000 is so low, the definition will capture most NFPs that are registered charities, as well as NFPs that are in receipt of public funds such as government contributions or grants. In addition, the imposition of a requirement to distribute remaining property on dissolution to “qualified donees” may be troublesome for NFPs that are not registered as charities under the *Income Tax Act*.

The CNCA provides for a system of incorporation “as of right”

and replaces the current system of letters patent. The director under the Act must issue a certificate of incorporation when receiving the required documentation and fee. By-laws will no longer need to be approved by Industry Canada, but must be filed within 12 months of membership approval. However, failure to file the by-laws does not affect their validity.

Consistent with the CBCA, the CNCA abolishes the *ultra vires* doctrine. As a result, the statement of purpose in a corporation’s articles will not operate to invalidate activities carried on by the corporation that are not strictly authorized by the statement of purpose.

Fundamental changes, such as amalgamation and continuance, will finally be available to federal NFPs under the CNCA.

Members under the CNCA will have several new remedies available, including the right to seek an oppression remedy; the right to seek a court order to commence a derivative action; compliance and restraining orders; and court ordered wind-up and liquidation at the instance of a member. These remedies are unavailable if a court determines that the corporation is a religious corporation (not defined), where the act or omission was based on a tenet of faith held by the members of the corporation and it was reasonable to base the decision on the tenet of faith, having

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‘There may be hundreds of such documents’

Retroactive

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legislators that it apply to prior events,” noted Kent.

Certainly there will be less confusion for the registrar of probate, who had declined to issue a grant of probate in common form in relation to this handwritten document because of the defects in its execution. “This decision makes it clear, particularly for registrars of probate, [a holograph will] has to be dated after August 18, 2008, the date of proclamation,” said Foote.

The implications are less clear for individuals with such wills and their executors, noted Kent. “The implication of this decision is that

this much-needed provision, which the legislators intended (according to the Hansard record) to cure technical defects in homemade wills, will not be available for any wills made prior to the statute’s proclamation.”

“There may be hundreds of such documents out there,” he added. “This may have the effect of suspending the application of these important new curative provisions for a generation because many people, young and old, living today with handmade documents made prior to the date the statute was proclaimed and believing they have valid wills are mistaken.” ■

Reasons: *MacDonald v. MacDonald Estate*, [2009] N.S.J. No. 503.

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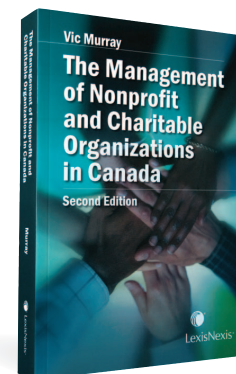
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CRA may plan an audit project aimed at non-profit organizations

Exemption

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the entity seems to be earning income, it must be operated for a profit purpose.

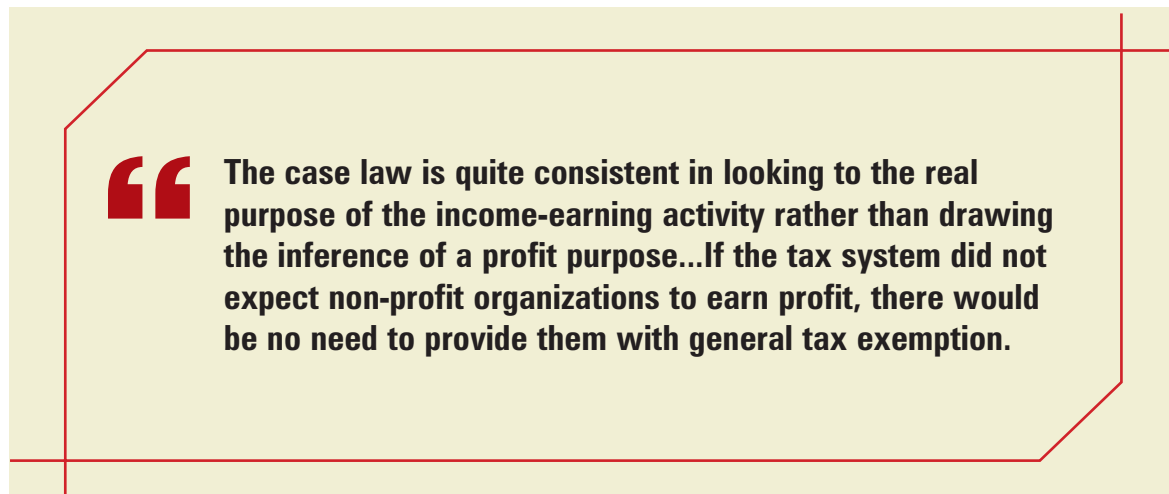
Nonetheless, the case law is quite consistent in looking to the real purpose of the income-earning activity rather than drawing the inference of a profit purpose. Indeed, this should be expected. If the tax system did not expect non-profit organizations to earn profit, there would be no need to provide them with general tax exemption — they are expected to earn profit.

In CRA Document 2009-0337311E5 dated Nov. 5, 2009, the CRA took the position, in response to a taxpayer enquiry, that if an organization intends to earn a profit, even to finance a related non-profit activity or a planned capital expenditure, it will generally not qualify as a non-profit organization.

This is not consistent with case law, which is more lenient and permits a non-profit organization to operate at a planned

profit so long as the profit is for some non-profit purpose. For example, in *Canadian Bar Insurance Association v. R.*, [1999] T.C.J. No. 184, the Tax Court upheld the non-profit status of the Canadian Bar Insurance Association (CBIA) despite its very large surpluses since the profit, although planned, was a required part of the CBIA's non-profit insurance function (being required in order to provide for stable premium costs). The technical interpretations ignore this decision and rely on an earlier decision where an entity with the sole purpose of managing a share sale for the benefit of pensioners was held to have a profit purpose.

In technical interpretation 2009-0348621E5 issued Dec. 15, 2009, the CRA concluded that a condo corporation that rented a suite for more than the operating costs of the suite would thereby endanger its non-profit status, either because it had a profit purpose or because the revenue from the rental would reduce condo fees



and provide a benefit. The CRA takes the position that if any activity of an entity, looked at in isolation, appears to have been budgeted to earn net income, then the entity endangers its tax exemption.

This is a surprising conclusion. While there is caselaw (*Tourbec (1979) Inc. v. M.N.R.*, 88 D.T.C. 1442 (T.C.C.)) which suggests that a discrete activity run as a for profit business (in that case a travel agency) would not be tax exempt because its profits are designed to support

another activity (in that case a student tour operation), this caselaw does not go so far as to suggest that incidental profit from renting out excess capacity (like a condo suite) disqualifies.

The CRA has not been successful in upholding a reassessment of a non-profit organization since 1994. Indeed, in *BBM Canada v. M.N.R.*, [2008] T.C.J. No. 254, the Tax Court of Canada set out a relatively complete synthesis of the 149(1)(1) jurisprudence. Nonetheless, we see in the two technical inter-

pretations described above a continuing attempt by the CRA to narrow the non-profit organization tax exemption.

The CRA may be planning an audit project aimed at non-profit organizations. Given the CRA's restrictive position, any lawyer acting for or volunteering with a non-profit organization should be concerned if CRA seeks to audit the entity. ■

Robert Hayhoe is a charity tax partner with Miller Thomson LLP in Toronto.

'Objective standard of care' adopted

Not-for-profit

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regard to the corporation's activities. The availability of these remedies means that organizations will need to carefully review their membership provisions.

The CNCA provides for an objective standard of care for directors that mirrors the objective standard provided under the CBCA. The CNCA also establishes a due diligence defence and gives directors the right to dissent. However, it does not significantly limit personal liability of directors, unlike Saskatchewan's

modernized *Non-Profit Corporations Act, 1995*.

CCA corporations will have three years after the CNCA is proclaimed in force to file articles of continuance. By-laws will also have to be amended or replaced.

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