

**The Canadian Bar Association/Ontario Bar Association
2011 National Charity Law Symposium**

Toronto – May 6, 2011

**HERE COMES THE CNCA:
ARE YOU READY TO ADVISE YOUR CLIENTS?**

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A. INTRODUCTION

There are approximately 19,000 active not-for-profit corporations incorporated under Part II of the *Canada Corporations Act* (the “CCA”),² about 8,000 of which are registered charities.³ As most people working within the voluntary sector already know, the CCA has not been substantially revised for close to a century and as such, it is both skeletal in terms of the rules it provides and awkward to use. As a result of these inadequacies, those working within the voluntary sector are used to relying on Industry Canada’s policy statements when drafting or amending by-laws, amending objects or undergoing other corporate changes.

The *Canada Not-for-profit Corporations Act* (the “CNCA”)⁴ received Royal Assent on June 23, 2009 and will replace Part II of the CCA. Until recently, it was anticipated that the CNCA would be proclaimed in force in late spring of 2011. However, with the impending federal election, the unofficial best estimate regarding proclamation is the fall of 2011. The CNCA is a modern corporate statute similar to most business corporation legislation across the country.⁵ It provides a clear set of procedural and other rules which apply to federal not-for-profits. Its underlying goals are to promote accountability, transparency, efficiency and sound

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² R.S.C., 1970, c. C-32.

³ Canada Gazette, February 26, 2011, page 790.

⁴ S.C. 2009, c.23.

⁵ For example, the *Canada Business Corporations Act*, R.S.C., 1985 (the “CBCA”), c. C-44 and the *Business Corporations Act* (Ontario), R.S.O. 1990, c. B.16.

corporate governance. In this respect, the CNCA is a welcome relief to most federally incorporated non-share corporations.

This paper will provide practitioners with practical advice and tools to assist them in advising clients wishing to continue under the CNCA. While most of the paper applies to CCA corporations continuing under the CNCA, many of the observations in this paper apply equally to those seeking incorporation under the CNCA. This paper will examine the different approaches to by-law drafting, articles of continuance and a number of issues and considerations that are likely to arise with respect to these topics when the CNCA is proclaimed in force.

B. PRELIMINARY CONSIDERATIONS

There are a number of preliminary considerations that will need to be discussed with clients before drafting articles of continuance and by-laws under the CNCA. In addition to routine questions that lawyers usually ask clients as part of the incorporation process (such as the number of directors, location of registered office and classes of members), the CNCA requires those continuing under the statute to consider the following preliminary issues which are unique to continuance under the CNCA:

PRELIMINARY ISSUES FOR DISCUSSION WITH CLIENTS	
1.	Are there any amendments that should be carried out under the CCA before continuing under the CNCA?
2.	Will the corporation be a soliciting corporation under the CNCA?
3.	What rules will apply to the corporation regarding the appointment of a public accountant and the level of financial review?
4.	Which default rules should be addressed in the by-laws or articles?
5.	Does the client wish to adopt a comprehensive or simple by-law?
6.	How should the different rules regarding approval of by-laws and amendments be addressed in the articles and by-laws?

1. Are there any amendments that should be carried out under the CCA before continuance under the CNCA?

While most by-law changes can easily be made as part of the process of continuance under the CNCA, certain amendments, particularly those affecting members and, in the case of a registered charity, changes to objects, may be more effectively carried out under the CCA before continuance.

Subsection 212(3) of the CNCA provides that members of a corporation who are entitled to vote at a meeting of members may authorize the directors to apply under section 211 for a certificate of continuance and may, by the same resolution, make amendments to the letters patent of the corporation that are permitted under the CNCA. However, the right of members to make amendments is qualified by subsection 212(4) which provides that the members may not make any amendment that affects a particular class of members as provided in section 199 unless the members of that class approve the amendment by way of a separate class vote (whether or not that membership class otherwise has the right to vote). As a result, where a decision has been made to, for example, eliminate a class of members or to change the criteria or conditions for membership in a particular class, the process of amendment under the CCA (approval by two-thirds vote of the membership without a separate class vote) will be simpler to accomplish under the CCA before continuance.

The second main type of amendment that should be considered under the CCA before continuance is an amendment to a registered charity's objects. Currently, Canada Revenue Agency ("CRA") requires registered charities to provide the Charities Directorate with amendments to its governing documents. Some registered charities seek advance approval from CRA before formally amending objects to ensure that the proposed changes are considered charitable by CRA. Others simply provide their supplementary letters patent to CRA after the fact and hope that they will be accepted "as is".

A registered charity that continues under the CNCA will need to provide CRA with its certificate of continuance. Since CRA has not yet released any policy or guidance regarding its requirements for federal charities that wish to continue under the CNCA, it is unknown what type of review process it will carry out. For example, it appears to be a possibility that charities that are amending their objects as part of continuance will be required to seek CRA's advance

approval of these changes (as opposed to the charity simply providing its certificate of continuance to CRA after the fact), thus resulting in the usual delays in getting pre-approval of the revised objects but also in obtaining a certificate of continuance. Those that are not amending objects as part of continuance may be fortunate enough to be streamlined into a different queue resulting in a quicker continuance. As a result, depending on CRA's policy position in this regard, it may be advisable to amend objects under the CCA in advance of continuance.

It is our understanding that CRA will be releasing its position regarding requirements relating to continuance under the CNCA (including what special provisions CRA may require in the articles of a registered charity, if any) after Industry Canada releases its handbook and guidance on the CNCA (expected in the next few months).

2. Will the corporation be a soliciting corporation under the CNCA?

It is important to determine whether a not-for-profit client will be a soliciting corporation under the CNCA since there are certain implications which flow from this finding and which will impact by-law drafting. The CNCA differentiates between two main types of not-for-profit corporations, namely, soliciting and non-soliciting corporations. Whether a corporation is deemed to be a soliciting or non-soliciting corporation could affect the optional provisions that can be included in the articles of continuance and it is therefore necessary to understand the distinction between these two categories of corporations.

The definition of a "soliciting corporation" under the CNCA is based on whether a corporation received in excess of \$10,000 in public money during its last financial year, directly or indirectly, from (i) public donors; (ii) governments or government agencies (whether federal, provincial or municipal); and/or (iii) other entities that have themselves received in excess of \$10,000 in the previous financial year from public donors or from government.⁶ It should be noted that under category (i), 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:

⁶ Subsection 2(5.1) of the CNCA and section 16 of the proposed Regulations under the CNCA published in the Canada Gazette on February 26, 2011 (the "CNCA Regulations").

- (a) a member, director, officer or employee of the corporation or a child, parent, brother, sister, grandparent, uncle, aunt, nephew or niece of such person; and
- (b) a spouse of a member, director, officer or employee of the corporation (including someone cohabiting in a conjugal relationship for at least one year) or a child, parent, brother, sister, grandparent, uncle, aunt, nephew or niece of the spouse.

With regard to the funding source described in category (iii) above, it is important to note that the definition places the onus on a corporation to inquire from other entities from which it receives income 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.

The test for determining whether a corporation is a soliciting corporation is applied on the last day of its financial year-end; however, the corporation becomes a soliciting corporation as of the date of the next following annual meeting of members. Once a corporation is determined to be a soliciting corporation, it remains a soliciting corporation until the third annual meeting of members following the annual meeting at which it became a soliciting corporation. It is also important to note that if a corporation receives in excess of \$10,000 from public donors or government or from other corporations or other entities that have received such amount from donors or government during the three year period that it is a soliciting corporation, the three year time period re-commences.

Non-soliciting corporations are a residual category so that if a corporation does not meet the definition of a soliciting corporation, then it is considered to be a non-soliciting corporation.

It should be noted that subsection 2(6) of the CNCA allows a corporation to apply to the Director appointed under the Act (the “**Director**”) for a determination that the corporation is not or was not a soliciting corporation and the Director may make such a determination as long as it is not prejudicial to the public interest.

The implications of being a soliciting corporation are set forth in the following table:

IMPLICATIONS OF BEING A SOLICITING CORPORATION UNDER THE CNCA	
1.	<i>Number of Directors:</i> 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. A non-soliciting corporation may have one director. ⁷
2.	<i>Financial Reporting Requirements:</i> A soliciting corporation must provide annual financial statements to the Director. A non-soliciting corporation is not required to make this filing (although the Director may request them). ⁸
3.	<i>Distribution of Assets on Dissolution:</i> On dissolution, the remaining property of a soliciting corporation is required to be distributed to one or more “qualified donees” within the meaning of subsection 248(1) of the <i>Income Tax Act</i> (Canada). ⁹
4.	<i>Unanimous Member Agreement:</i> The members of a soliciting corporation may not enter into a unanimous member agreement. ¹⁰

From a practical perspective, since the financial threshold of \$10,000 is so low, the definition of “soliciting corporation” will capture most not-for-profit corporations that are registered charities as well as not-for-profit corporations that are in receipt of government contributions or grants. The prudent course of action for a corporation that may move from one category to another, or for a corporation that wishes to avoid having to make the determination altogether, is to draft its articles and by-laws as though the corporation is a soliciting corporation and to otherwise comply with the requirements of the CNCA (described above) for soliciting corporations.

3. What rules will apply to the corporation regarding the appointment of a public accountant and level of financial review?

The CNCA contains detailed rules regarding the appointment of a public accountant and the level of financial review required. Since these rules are a significant departure from the CCA and its accompanying policies, it is important for clients to understand them at the outset. It should be noted that the by-laws and articles will not generally include any reference to these rules, unless a client decides to include the by-law provision referred to in section (c) “Financial

⁷ CNCA section 124.

⁸ CNCA subsection 176(1) and section 177.

⁹ *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the “ITA”); CNCA section 235.

¹⁰ CNCA section 170.

Statements” below (and in Appendix “A”) which is an alternative to providing financial statements or a summary thereof to members.¹¹

(a) Designated and Non-Designated Corporations

The CNCA divides soliciting and non-soliciting corporations into two further categories (designated and non-designated) for the purpose of determining the obligation under Part 12 of the CNCA to appoint a public accountant and the corresponding level of financial review required.

Designated corporations are described as follows:¹²

- a soliciting corporation with gross annual revenues for its last completed financial year that are equal to or less than \$50,000 or that is deemed to have such revenues under the CNCA;¹³ and
- a non-soliciting corporation with gross annual revenues for its last completed financial year that are equal to or less than \$1 million.

Non-designated corporations are soliciting and non-soliciting corporations with annual revenues in excess of these amounts.

(b) Public Accountant

The CNCA contains rules regarding the appointment of a public accountant by designated and non-designated corporations. A public accountant must:¹⁴

- be a member in good standing of an institute or association of accountants incorporated by or under an Act of the legislature of a province (for example,

¹¹ See CNCA section 175.

¹² CNCA section 179; CNCA Regulations section 80.

¹³ On the application of a soliciting corporation under paragraph 190(a), if Industry Canada is satisfied that doing so would not be prejudicial to the public, Industry Canada may deem the corporation to have the gross annual revenue referred to in paragraph 179(a) for its last completed financial period (equal to or less than \$50,000) or the gross annual revenue for its last completed financial period referred to in paragraph 189(2)(a) (equal to or less than \$250,000).

¹⁴ CNCA subsection 180(1).

chartered accountant, certified general accountant or certified management accountant);

- meet any qualifications under an enactment of a province for performing any duty that the person is required to perform under the CNCA¹⁵ (for example, a provincial licence to conduct audit or review engagements); and
- subject to an order of the court,¹⁶ be independent of the corporation, its affiliates or the directors or officers of the corporation or its affiliates.¹⁷

The CNCA rules relating to the appointment of a public accountant are as follows:

- (i) *General Rule for Designated Corporations* – The members of a designated corporation must appoint a public accountant by ordinary resolution at each annual meeting.¹⁸
 - (ii) *Exception for Designated Corporations* – The members of a designated corporation may pass a resolution to dispense with the appointment of a public accountant as long as the resolution is consented to by all of the members entitled to vote at an annual meeting. The resolution to dispense with the appointment of a public accountant is valid until the next annual meeting.¹⁹
 - (iii) *Non-Designated Corporations* – A non-designated corporation may not dispense with the appointment of a public accountant.
- (c) **Financial Statements**

CNCA corporations must prepare financial statements each year which comply with the requirements of the CNCA.²⁰ The financial statements must be prepared in accordance with

¹⁵ CNCA sections 188 to 191.

¹⁶ CNCA subsection 180(6).

¹⁷ Under subsection 180(6), an interested person may make an application to the court for an order relieving a public accountant from meeting the qualifications described in subsection 180(1). If the court considers that such an order would not unfairly prejudice the members of the corporation, the court may make such an order on such terms as it considers fit.

¹⁸ CNCA subsection 181(1).

¹⁹ CNCA section 182.

²⁰ CNCA subsection 172(1).

Canadian generally accepted accounting principles (GAAP) as set out in the *Canadian Institute of Chartered Accountants Handbook*.²¹

A soliciting corporation is required to provide its annual financial statements to Industry Canada not less than 21 days before the annual general meeting of members or without delay in the event that the corporation's members have signed a resolution instead of holding a meeting, approving the statements.²² A corporation must also send a summary of its annual financial statements or a copy of a document reproducing the required financial information (such as an annual report) to its members not less than 21 days but not more than 60 days before the day on which the annual meeting of members is held, or the day on which a resolution in writing is signed by the members. The only exception to the requirement to send financial statements to members is if the by-laws of the corporation allow the corporation to give notice to the members that the annual financial statements are available for viewing and copying at the registered office.²³

(d) Level of Financial Review

The level of financial review required under the CNCA will depend on whether the corporation is a designated corporation or non-designated corporation. In the case of a designated corporation, the public accountant must conduct a review engagement unless an ordinary resolution is passed by the members requiring an audit engagement.²⁴ Such a resolution is valid only until the next following annual general meeting of members.²⁵ If the members of a designated corporation unanimously decide to not appoint a public accountant (as discussed above), the financial statements must be prepared (that is, compiled), but will not be reviewed or audited.

In the case of a non-designated corporation, the public accountant must conduct an audit engagement.²⁶ By way of exception, the public accountant of a soliciting corporation that is a

²¹ CNCA Regulations section 75.

²² CNCA subsection 176(1); A non-soliciting corporation may be requested to provide Industry Canada with a copy of its financial statements pursuant to section 177 of the CNCA.

²³ CNCA section 175.

²⁴ CNCA subsections 188(1) and (2).

²⁵ CNCA subsection 188(3).

²⁶ CNCA subsection 189(1).

non-designated corporation will conduct a review engagement if:²⁷

- the corporation has gross annual revenues for its last completed financial year that are equal to or less than \$250,000²⁸ or is deemed to have such revenues under paragraph 190(b) of the CNCA; and
- its members pass a special resolution requiring a review engagement.

4. Which default rules need to be addressed in the by-laws or articles?

While there are only two mandatory provisions required to be included in by-laws under the CNCA, there are a number of so-called “default rules” which apply automatically when the by-laws are silent. Appendix “A” provides an explanation of the mandatory rules as well as a chart listing the default rules and permissible alternatives to these rules which can be included in by-laws. It is important to review the default rules with clients in advance of preparing by-laws and articles so that clients are aware of what rules will apply if the by-laws or articles are silent. This exercise will force clients to address these rules up-front and allow them to creatively address the alternatives where permitted by the CNCA.

5. Does the client wish to adopt a comprehensive or simple by-law?

CCA corporations are accustomed to having a significant amount of detail in their general operating by-law. The inclusion of this level of detail in the by-laws of CCA corporations is necessary because the CCA is replete with “gaps” regarding important governance and procedural rules. As a result of these omissions, Industry Canada’s Policy Statement on by-laws for federal not-for-profit corporations²⁹ requires by-laws to include a comprehensive set of provisions on a variety of matters.

However, the CNCA provides a clear set of rules which will apply to federal not-for-profits. Relatively few matters are left to be addressed in the by-laws and fewer matters still *must* be contained in the by-laws. As a result, at the time of continuance, corporations will need

²⁷ CNCA subsection 189(2).

²⁸ CNCA Regulations section 84.

²⁹ *Canada Corporations Act* Part II – Incorporating a Not-For-Profit Corporation, Policy Statement 13.2, May 1, 2007 found at <http://strategis.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs03440.html>.

to make what is essentially a philosophical choice: draft new by-laws with the same level of comprehensive detail as they now have under the CCA (which would involve “importing” provisions from the CNCA and essentially repeating them in the by-laws) or draft by-laws using a minimalist approach which would involve by-laws addressing only the “essentials”, including any desired alternatives to default rules. Some compromise between these two approaches may also be found, depending on the needs of the particular client.

(a) The Comprehensive Approach

The comprehensive approach to drafting by-laws has the advantage of continuing a practice that not-for-profits are already familiar with, in other words, having a lengthy and detailed set of by-laws. The by-laws would continue to be the “go to” document in most cases, meaning that corporations would only need to refer to the legislation in limited instances. However, while federal corporations are used to referring only to their by-laws (and not to legislation) to determine what rules apply in a given situation, there is a risk that this approach might be followed to a corporation’s detriment, particularly where the legislative provisions are not reproduced accurately or are incomplete in the by-laws. Further, there is a concern that if CNCA provisions are copied into the by-laws, directors and members may mistakenly believe that those provisions may be amended at a later date, whereas in fact they are required by statute. While these concerns are more likely to apply to corporations that are unable to afford the services of a lawyer, the risk of confusion over what can and cannot be changed in the by-laws applies across the board.

That being said, there are sometimes internal political reasons that exist within a not-for-profit corporation which would dictate that the new by-law resemble the old by-law as much as possible. In this type of case, clients tend to ask that the fundamental structure and appearance of the new by-laws be as close as possible to the old by-law. This is particularly the case where there has been a lengthy governance review and extensive consultations resulting in a product which is finally acceptable to both the directors and members. While it may be difficult to produce a CNCA by-law that has the same or similar appearance to a previous CCA by-law because of the vast differences in the legislation, some kind of compromise is likely possible, depending on the client’s structure under the CCA.

(b) The Minimalist Approach

The second approach to drafting by-laws under the CNCA, also referred to as the “minimalist approach”, will require directors and members to change their practice of referring only to by-laws to developing some familiarity with the CNCA. While, in the long run, this choice may be the better one, the challenge of learning and re-learning the CNCA as staff and volunteers come and go may be daunting. This approach involves the by-laws being drafted as a “short form” by-law. The by-law would be restricted to addressing only the mandatory rules, the default rules and any provisions that must be in the by-laws to deal with procedural matters of importance to the corporation. Examples of the types of by-law provisions that would be included in a short form by-law include:

- Membership conditions;
- Choices for notice of meetings of members;
- Choices for form of absentee voting by members;
- Discipline of members;
- Quorum for members’ and directors’ meetings;
- Directors’ terms;
- Consensus decision-making (if this type of decision making is desired); and
- Appointment and removal of officers.

Clients that opt for a short form by-law may want to move as much into a governance policy manual as possible. This approach is used with increasing frequency even under the CCA where clients wish to simplify their by-laws. While a governance policy manual would typically only require approval by the board, it is also possible to provide for membership approval. Governance policies should not, of course, attempt to address the mandatory or default rules but may include detailed procedural and other rules related to the structure of the corporation (such as operating requirements for chapters, councils and divisions, officer duties and committee terms of reference). They are an effective way of simplifying by-laws and also for moving certain matters that do not technically have to be in articles or by-laws to a document that requires a simplified manner of approval (for example, by directors only). Where a governance

policy manual is used, a section detailing its use and manner of approval should be included in the by-laws.

It should be noted that Industry Canada is in the process of developing a number of tools that will assist corporations and practitioners in moving to a practice of working with by-laws under the new legislation. It is expected that this material will go a long way in helping with the transition to the CNCA.

6. How should the different rules regarding approval of by-laws and amendments be addressed in the articles and by-laws?

At the outset, it is important to explain to clients that by-laws will be subject to two different amending procedures under the CNCA. The general rule for by-law amendments is that unless otherwise provided in the corporation's articles, by-laws or unanimous member agreement, the directors have the power to make, amend or repeal by-laws, as long as they are submitted to the members for confirmation by an ordinary resolution at their next meeting (for convenience, we have referred to this type of by-law, as a "general by-law"). The effective date of a general by-law is the date it is passed by the directors, not the date of confirmation by members. At the meeting, the members may confirm, reject or amend the directors' action. If the members reject the by-law adopted by the directors or if the directors fail to submit the by-law to the members as required by the CNCA, the directors' resolution and the by-law adopted by the directors ceases to have effect on the date it was rejected by the members, or on the date of the members' meeting at which it should have been submitted to the members. In such a case, future by-laws or by-law changes adopted by the directors which have substantially the same effect as the one rejected will not become effective until they are adopted by the members at a members' meeting.³⁰

However, there is a different rule for approving by-laws which address certain matters relating to membership in the corporation.³¹ These "special by-laws" must be approved by

³⁰ CNCA section 152.

³¹ The subject matter of these special by-law amendments are set out in subsection 197(1) of the CNCA and include those which relate to (a) conditions required for being a member, (b) the designation of any class or group of members or adding, changing or removing any rights and conditions of any such class or group, (c) dividing any class or group of members into two or more classes or groups and fixing the rights and conditions of each class or group, (d) transfer of memberships, (e) manner of giving notice to members

special resolution of the members and approval by the board of directors is not required. Special by-laws and their amendments take effect immediately upon passage of the special resolution. These types of changes may also be initiated by way of a member proposal under section 163 of the CNCA. If the subject matter of special by-law amendments addresses matters referred to in subsection 199(1), approval of these special by-law amendments will require a separate class vote. Where a separate class vote applies, members of a class who do not otherwise have the right to vote are permitted to vote separately as a class on this type of by-law amendment.³²

By-laws that do not clearly make a distinction between by-laws that may be passed by the directors and “special by-laws” may mislead the board of directors and the membership into approving all by-law amendments by an ordinary resolution, resulting in by-laws that may not be properly in force with respect to all provisions. This means that any by-laws drafted under the CNCA should be very clear regarding the amending formula that applies to the various by-law provisions. Some options that may be considered to provide clarity are as follows:

- place all by-law provisions that require a special resolution to change into one, separate by-law while leaving the remaining provisions in another by-law which requires only a majority vote to amend;
- have one general operating by-law but place all matters requiring a special resolution into one part so that it is clear that these matters can only be changed by special resolution;
- have one general operating by-law but state in the by-laws on a section by section basis which amending formula applies; or
- provide in the articles that all by-law changes require a special resolution of members in order to be effective.³³

entitled to vote at a meeting of members, (f) method of voting by members not in attendance at a meeting of members (for example, proxy voting) and (g) related definitions and interpretative provisions.

³² CNCA subsection 199(2).

³³ Subsection 7(4) of the CNCA allows the articles to require a greater number of votes of directors or members than are required by the CNCA to effect any action, in which case the articles will prevail.

C. CONTINUING UNDER THE CNCA

1. Authorizing Continuance

Once the CNCA comes into force, CCA corporations as well as federal corporations without share capital that were incorporated by a special Act of Parliament (“special act corporations”) (except departmental and parent Crown corporations³⁴) and corporations formed under provincial, territorial or foreign law (if authorized by the laws of their jurisdiction) will be able to continue under the CNCA.³⁵ Those corporations incorporated under Part II of the CCA will have a period of three years within which to comply with the CNCA by applying for a certificate of continuance under section 211.³⁶ The process of continuance for special act corporations is similar to that of Part II CCA corporations.³⁷ In other words, once continuance has been approved by its directors and members, the corporation will be required to apply for a certificate of continuance by filing articles of continuance with Industry Canada together with a notice of directors and notice of registered office. Upon continuance, the special act applicable to these types of corporations will cease to apply to them.³⁸

Accordingly, both corporations incorporated under Part II of the CCA and those otherwise incorporated and eligible for continuance under the CNCA should be familiar with the CNCA requirements for continuance. Since the CCA does not provide for export continuance of Part II corporations, there is no authority under that statute for directors or members of such corporations to approve an application for a certificate of continuance under any other corporate

³⁴ CNCA section 294.

³⁵ CNCA subsections 297(1), 211(1) and 212(2).

³⁶ CNCA subsections 297(1) and (5). The version of the CNCA on the Department of Justice website does not contain the transitional language. To obtain these provisions, reference must be made to the Royal Assent version of the bill which is publically available on the Parliament of Canada website. For ease of reference, subsections 297(1) and (5) of the CNCA are reproduced below:

297. (1) A body corporate to which Part II of the Canada Corporations Act, chapter C-32 of the Revised Statutes of Canada, 1970 (in this section and section 298 referred to as the “Canada Corporations Act”), applies, other than a body corporate that is subject to a winding-up order made under the Winding-up and Restructuring Act before this subsection comes into force, shall apply for a certificate of continuance under section 211.

(5) Despite any provision of the Canada Corporations Act, the Director may, in accordance with section 222, dissolve a body corporate referred to in subsection (1) that does not apply for a certificate of continuance under section 211 within three years after the day on which this subsection comes into force.

³⁷ CNCA section 294.

³⁸ CNCA subsection 212(11).

legislation. However, this particular omission is remedied by the CNCA which provides for two possible mechanisms for approval of continuance by CCA corporations:

- (a) Subsection 212(3) of the CNCA provides that the members who are entitled to vote at a meeting of members may authorize, by special resolution, the directors to apply under section 211 for a certificate of continuance and may, by the same resolution, make amendments to the letters patent of the corporation which are permitted under the CNCA. Of particular note is subsection 212(4) which provides that the members may not make any amendment that affects a particular class of members as provided in section 199 unless the members of that class approve the amendment by way of a separate class vote (whether or not that membership class otherwise has the right to vote).
- (b) Subsection 212(7) of the CNCA allows the directors of a CCA corporation to apply for a certificate of continuance without a special resolution of its members as long as the articles of continuance do not make any amendments to the charter of the corporation other than those required to conform to the CNCA.

2. Timing of Continuance

With regard to the timing of continuance, once the CNCA is in force, each corporation will need to determine whether an early continuance is warranted depending on the particular corporation's structure or needs. Whether a corporation should continue as soon as the CNCA is in force or delay until the second or third year to file an application for a certificate of continuance will depend on the particular corporation's circumstances and whether the CNCA is more or less favourable to a given corporation. Some CCA corporations have been waiting for the CNCA to be proclaimed in force so that they can take advantage of some of the fundamental changes not currently available (for example, amalgamations and continuances). Many others will be attracted by the comprehensive and modern framework for the governance of federal not-for-profit corporations that is provided by the CNCA and will want to continue as soon as possible. Certain corporations may decide to wait until the third year to continue, preferring instead to adopt a "wait and see" approach while others get their feet wet in navigating the new legislation. Whatever the case, corporations with more complex organizational needs should

take the time needed within the three year transition period to determine how best to fit within the CNCA's requirements.

3. Articles of Continuance

Once a continuance under the CNCA has been properly authorized, the corporation will need to prepare and file articles of continuance, a notice of registered office³⁹ and a notice of directors⁴⁰ using the prescribed forms. The articles of continuance will replace the corporation's current letters patent. Under the CNCA, there is no government review or approval of by-laws and it is therefore not necessary to file by-laws with the articles of continuance. Once Industry Canada has received the articles of continuance, a certificate of continuance will be issued.

Articles of continuance must be in a prescribed form fixed by the Director and must contain the information required by subsection 7(1) of the CNCA in relation to articles of incorporation, namely:

- (a) the name of the corporation (*if a corporation will be changing its name as part of the continuance, both the old and new name should be set out on the prescribed form*);
- (b) the province where the registered office is to be situated (*CCA by-laws refer to the "head office"*);
- (c) the classes, or regional or other groups, of members that the corporation is authorized to establish and, if there are two or more classes or groups, any voting rights attaching to those classes or groups (*unless the membership classes will be changing on continuance, most of this information can be derived from the current CCA by-laws*);
- (d) the number of directors or the minimum and maximum number of directors (*this information can be derived from the current CCA by-laws unless the number will be changing*);

³⁹ CNCA subsection 20(2).

⁴⁰ CNCA subsection 128(1).

- (e) any restrictions on the activities that the corporation may carry on (*if there are no restrictions, this section can be marked “N/A”*);
- (f) a statement of the purpose of the corporation (*this provision refers to the objects of the corporation*); and
- (g) a statement concerning the distribution of property remaining on liquidation after the discharge of any liabilities of the corporation (*if the corporation is a charity, the provision set forth in paragraph 9 of the sample articles of continuance in Appendix “B” is required*).⁴¹

While the above provisions are mandatory, a corporation may also include certain optional provisions in its articles under a section entitled “Other Provisions”. The decision as to which other provisions should be included will depend in part on the structure of the membership classes and whether the corporation wishes to take advantage of certain options outlined in the CNCA.

When drafting the membership classes in the articles, it is important to be aware that where a corporation has more than one class of members, the members of each class will have certain built-in protections under the CNCA which provide that members of a class are entitled to vote separately as a class on a proposal to make certain amendments to the articles and by-laws.⁴² Depending on the needs of a given client, some may opt to collapse their membership structure into a single class to avoid the separate class vote. The amendments provided by subsection 199(1) of the CNCA which are subject to a separate class vote are as follows:

- (a) *exchange, reclassify or cancel all or part of the memberships of a particular class;*
- (b) *add, change or remove rights or conditions attaching to memberships of a particular class (including reduction or removal of a liquidation preference or adding, removing or changing prejudicially voting or transfer rights of a particular class);*

⁴¹ CNCA subsection 235(2).

⁴² CNCA subsection 199(1).

- (c) increase rights of any other class having equal or superior rights to those of a particular class;
- (d) increase rights of a class of members having rights inferior to those of a particular class to make the inferior class equal to or superior to the particular class;
- (e) *create a new class having rights equal to or superior to those of a particular class; and*
- (f) exchange or create a right of exchange of all or part of the memberships of another class into memberships of a particular class.

Paragraphs (a) and (e) above (highlighted in italics) are the only optional provisions in subsection 199(1) and accordingly the articles may provide that these rights do not apply to certain membership classes of a corporation (see example in paragraph 1 of Schedule 3 to Appendix “B”). If this option is chosen, then under paragraph (a), other classes of members could cancel a particular class of members without the approval of the class of members being cancelled and under paragraph (e), new classes of members with equal or superior rights to an affected class could be added to the articles without the approval of the affected class.

All of the other amendments referred to above in paragraphs (b), (c), (d) and (f) provide specific class protections (which cannot be removed in the articles) which allow each class to vote separately as a class concerning the matters referred to in those sections. This right to have a separate class vote applies even where a particular class does not otherwise carry a right to vote in the articles.⁴³

It is anticipated that articles of continuance will be similar in form to the draft articles contained in Appendix “B”. These draft articles also contain certain sample provisions in the attached schedules which may be included in the articles.

4. By-laws

From a procedural perspective, the CNCA’s approach to by-laws is fairly straightforward. However, by-laws will need to be updated or completely replaced in order to

⁴³ CNCA subsection 199(2).

bring them into compliance with the CNCA. Given the interaction between the articles and by-laws, it is advisable to prepare the by-laws at the same time as the articles of continuance are prepared. While the CNCA requires that by-laws be filed with Industry Canada within 12 months of membership approval, failure to file the by-laws does not affect their validity.⁴⁴

The CNCA is similar to most modern corporate statutes in that it adopts a statutory rule-based model that provides a clear set of procedural and other rules which apply to federal not-for-profits. As a result of the difference in approach between the CCA and the CNCA, many of the provisions that were required to be included in the by-laws of a corporation incorporated under Part II of the CCA will no longer need to be in the by-laws of a CNCA corporation.

The process of creating new by-laws under the CNCA can be a lengthy one because of the large number of changes brought about by the CNCA. Clients tend to find the following approach to be helpful in navigating through the changes:

- discuss the preliminary considerations found above in Section B of this paper or provide a memo to the client which addresses these matters and obtain instructions;
- obtain the most recent copy of the client's by-laws as well as the client's letters patent and any supplementary letters patent (in some cases it may be advisable to obtain these directly from Industry Canada);
- review the corporation's existing by-laws and letters patent (including any supplementary letters patent) and highlight all areas that are impacted by the CNCA noting sections which are no longer required or are inconsistent with the CNCA and those which the client may consider moving to a policy document (for example, governance policies); and
- draft both the articles of continuance and new by-laws at the same time (since the content of the by-laws will depend in part on the information contained in the

⁴⁴ CNCA section 153; CNCA Regulations 60.

articles).⁴⁵

We have already referred in Section B of this paper to the “minimalist” approach to drafting by-laws and to the provisions that would be included in a short form by-law under the CNCA. In reviewing existing by-laws of CCA corporations, practitioners should pay attention to the following common sections that are contained in CCA by-laws and that will require removal or amendment once a corporation continues under the CNCA:

- **Definitions:** Some definitions in existing by-laws will require amendment in order to be consistent with the CNCA. In addition, it may be useful to refer to some new definitions such as “ordinary resolution” and “special resolution”.
- **Head Office/Registered Office:** References to the “head office” of the corporation should be removed (the head office is referred to as the “registered office” in the CNCA). The CNCA requires the articles to include the province where the registered office is located.⁴⁶ The specific address is to be included in the Notice of Registered Office filed under the CNCA.⁴⁷
- **Corporate Seal:** There is no requirement under the CNCA to have a corporate seal and as such, references to the corporate seal may be removed if the client prefers not to use a corporate seal.
- **Qualifications of Directors:** This provision in by-laws of CCA corporations may be removed unless there are additional qualifications that the client requires of directors which are not included in section 126 of the CNCA. It is also important to remember that if a client is a soliciting corporation, it must have a minimum of three directors and at least two of them must not be officers or employees of the corporation or its affiliates.⁴⁸

⁴⁵ It should be noted that the requirement to include the mandatory by-law provisions (that is, section 154, conditions for membership, and section 162, the manner for giving notice of members’ meetings) can be satisfied by placing the required information in the corporation’s articles. While most corporations will prefer to have by-laws, technically this means that if a corporation is satisfied regarding the impact of the default rules under the CNCA, by-laws are not even required.

⁴⁶ CNCA subsection 7(1).

⁴⁷ CNCA section 20.

⁴⁸ CNCA section 124.

- **Ex-officio Directors:** Many CCA by-laws include provisions providing for ex-officio directors. However, the CNCA does not permit ex-officio directors. Subsection 128(3) provides that directors are to be elected by the members by ordinary resolution at an annual meeting. There are only two exceptions to the general rule that the members must elect the directors of the corporation. First, the articles may permit the directors to appoint additional directors between annual meetings as long as the total number of appointed directors is not more than one-third of the number of directors elected at the previous annual meeting. The term of any such appointed directors must expire on or before the next annual meeting of members.⁴⁹ Second, a vacancy on the board may be filled by the directors, as long as there is a quorum of directors in office.⁵⁰
- **Election of Directors in Accordance with Nominating Committee Report:** Under the CCA, it is not uncommon to have a by-law provision which requires directors to be elected by the members in accordance with a nominating committee report. This process is often used as a way of securing a certain director composition on the board. Under the CNCA, there is specific recognition that nominations may be made from the floor at a members' meeting and it is also permissible to submit member proposals for the election of directors.⁵¹
- **Directors' Terms:** It is important to ensure that by-law provisions relating to directors' terms are consistent with the CNCA. Subsection 128(3) provides that directors are to be elected by the members by ordinary resolution at an annual meeting for a term expiring within the prescribed period set out in the CNCA Regulations (namely, four years).⁵² In addition, subsection 128(4) of the CNCA allows directors to be elected for staggered terms. The by-laws may specifically provide for staggered terms or the by-laws may be left silent so that the staggered terms are provided by resolution.
- **Number of Directors:** Unlike the CCA where the number of directors is provided in the by-laws, under the CNCA, it is necessary to specify in the articles (not the by-laws) the

⁴⁹ CNCA subsection 128(8).

⁵⁰ CNCA section 132.

⁵¹ CNCA subsection 163(5)

⁵² CNCA Regulations subsection 28(1).

number of directors or a minimum and a maximum number of directors.⁵³ When a minimum and a maximum number is chosen, the precise number of directors to be elected may be determined from time to time by ordinary resolution of the members or the members may delegate such power to the directors.⁵⁴ If a client is a soliciting corporation, it must have a minimum of three directors and at least two of them must not be officers or employees of the corporation or its affiliates.⁵⁵

- **Filling Vacancies on the Board:** Many existing CCA by-law provisions which provide for the filling of vacancies are not consistent with the CNCA. The filling of vacancies must be done in accordance with section 132 of the CNCA which allows a quorum of directors to fill a vacancy, except a vacancy resulting from an increase in the number of directors or the minimum or maximum number of directors provided for in the articles or a failure to elect the number or minimum number of directors provided in the articles. Where there is no quorum of directors or if there has been a failure to elect the number or minimum number of directors required by the articles, the directors must call a special meeting of members to fill the vacancy.
- **Removal of Directors:** Many CCA by-laws provide for the removal of directors by a two-thirds vote of the members. Under subsection 130(1) of the CNCA, directors can be removed by a majority vote of the members at a special meeting. It is not possible to increase the percentage of members required to remove directors.
- **Management of the Affairs of the Corporation:** The CNCA gives directors the responsibility for managing or supervising the management of a corporation. However, this responsibility can be restricted in the articles.⁵⁶ It is not necessary to repeat this power and responsibility in the by-laws of a CNCA corporation.
- **Delegation by Directors:** The by-laws of CCA corporations should be reviewed to ensure that powers of the directors are not improperly delegated for the purposes of the CNCA. In addition to the power of directors to delegate to officers under section 142,

⁵³ CNCA subsection 7(1).

⁵⁴ CNCA subsection 133(3).

⁵⁵ CNCA section 124.

⁵⁶ CNCA section 124.

section 138 of the CNCA allows directors to delegate their powers to a managing director or to a committee of directors appointed by the board. It is not permissible to delegate powers to a committee comprised in whole or in part of non-directors. Subsection 138(2) carves out certain matters that cannot be delegated in providing that no managing director or committee of directors has the authority to: (a) submit to the members any question or matter requiring the approval of members; (b) fill a vacancy among the directors or in the office of public accountant or appoint additional directors; (c) issue debt obligations except as authorized by the board; (d) approve financial statements, (e) adopt, amend or repeal by-laws; or (f) establish contributions to be made or dues to be paid by members under section 30.

- **Indemnification:** This section is commonly found in CCA by-laws. Section 144 of the CNCA permits a director, an officer or an employee to receive indemnification for his/her expenses incurred on behalf of the corporation as a director, officer or employee unless the by-laws provide otherwise.
- **Limitation of Liability:** Any section addressing limitation of liability should be removed from the by-laws. The duty of care of directors and officers (now an objective standard) is provided in section 148 of the CNCA. The CNCA also provides for various due diligence defences and limitations on the liability of directors and officers.⁵⁷
- **Disclosure of Interest:** Any section providing for disclosure of interest in a contract with the corporation should be removed from the by-laws. Section 141 of the CNCA addresses the disclosure requirements for directors and officers and provides that directors and officers must disclose in writing, or by requesting disclosure in the minutes of, any personal interest they may have in a material contract or transaction with the corporation. If a director or officer fails to make such a disclosure, the corporation or a member may apply to a court to request that the contract be set aside and that the director/officer repay any profits or gain realized on the contract.⁵⁸

⁵⁷ See, for example, CNCA subsections 149(1) and 150(1).
⁵⁸ CNCA section 141.

- **Borrowing Power:** Under the CCA, it was necessary to have a borrowing by-law if the directors were to be given the power to borrow on behalf of the corporation. Under section 28 of the CNCA, directors have the default power to borrow and grant security on behalf of the corporation subject to any restrictions imposed by the articles, by-laws, or, in the case of a non-soliciting corporation, a unanimous member agreement. As a result, it is no longer necessary to have a borrowing provision in the general operating by-law or a separate borrowing by-law.
- **Participation in Meetings by Telephone and Other Electronic Means by Directors:** It is possible for directors to participate in a meeting by telephone or electronically, as long as the corporation's by-laws permit it and all participants in the meeting can communicate fully. How these meetings may be held will also need to comply with any requirements set out in the regulations to be made under the CNCA in the future.⁵⁹ At this time, no such regulations have been made.
- **Membership Classes:** Under the CCA, all matters relating to membership conditions are generally set out in the by-laws. Paragraph 7(1)(c) of the CNCA requires the articles to set out the classes or groups of members that the corporation is authorized to establish and, if there are two or more classes or groups, any voting rights attaching to each of those classes or groups. Subsections 154(1) and (2) of the CNCA require the by-laws to set out (a) the conditions required for being a member in each class, including whether a corporation or other entity may be a member; (b) the manner of withdrawing from a class or transferring membership to another class and any conditions for transfer; and (c) the conditions on which membership in a class ends.
- **Transferability of Membership Interest:** Industry Canada's policy on by-laws under the CCA allows membership to be transferable or non-transferable. However, it is important to be aware that subsection 154(8) of the CNCA permits membership interests to be transferable only if the articles or by-laws so provide. If the articles and by-laws are

⁵⁹ CNCA subsection 136(7).

silent, the default rule is that a membership interest may only be transferred back to the corporation.⁶⁰

- **Quorum of Members:** While the quorum provision in most CCA by-laws will likely be capable of being imported into new CNCA by-laws, it is important to be aware that the quorum for members' meetings must meet the prescribed requirements under section 70 of the CNCA Regulations. The prescribed requirements provide for three ways in which the quorum may be expressed:
 - (i) a fixed number of members;
 - (ii) a percentage of members; or
 - (iii) a number or percentage of members that is determinable by a formula.
- **Annual and Special Meetings:** Subsection 160(1) of the CNCA requires the holding of annual meetings of members and by-laws are not required to re-state this requirement. The CNCA also includes various requirements for the holding of special meetings of members which were formerly provided in the by-laws of CCA corporations. They also do not need to be repeated in the by-laws under the CNCA.⁶¹
- **Absentee Voting by Members:** Many CCA by-laws contain absentee voting requirements and these must be brought in line with the CNCA. The CNCA allows the by-laws to include certain methods of absentee voting by members. Subsection 171(1) provides that the by-laws may set out any prescribed methods of voting by members not in attendance at a meeting of members. The methods of voting prescribed by section 74 of the CNCA Regulations are: (a) voting by proxy; (b) voting by mailed-in ballot; and (c) voting by means of telephonic, electronic or other communication facility. If the by-laws prescribe any method of absentee voting, they are also required to set out procedures for collecting, counting and reporting the results of any vote.⁶² The rules relating to absentee voting under the CNCA are as follows:

⁶⁰ CNCA subsection 154(8).

⁶¹ See, for example, section 130 and subsections 132(2), 160(3) and 184(1) of the CNCA.

⁶² CNCA subsection 171(1).

(a) Mail-in Ballots

Paragraph 74(1)(b) of the CNCA Regulations provides that in order to permit mail-in ballots, the corporation must have a system to (a) allow votes to be subsequently verified; and (b) permit the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each member voted.

(b) Telephonic, Electronic or Other Communication Facility

Electronic voting is permitted if the by-laws so provide. Similar to mail-in ballots, paragraph 74(1)(c) of the CNCA Regulations provides that a corporation may permit voting by means of a telephonic, electronic or other communication facility, provided that the corporation has a system to (a) enable the votes to be gathered in a manner that permits their subsequent verification; and (b) permit the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each member voted.

(c) Proxy Votes

Paragraph 74(2) of the CNCA Regulations sets out various requirements on how proxy votes may be exercised. Members not in attendance at a meeting of members may vote by appointing in writing a proxyholder, and one or more alternate proxyholders, who are not required to be members, to attend and act at the meeting in the manner and to the extent authorized by the proxy and with the authority conferred by it, subject to certain requirements including the following:

- A proxy is valid only at the meeting in respect of which it is given or at a continuation of that meeting after an adjournment;
- A member may revoke a proxy by depositing an instrument or act in writing executed or, in Quebec, signed by the member or by the member's agent or mandatary;
- A proxyholder or an alternate proxyholder has the same rights as the member by whom the proxyholder was appointed;

- If a form of proxy is created by a person other than the member, the form of proxy must comply with the detailed requirements set out in the CNCA Regulations, including requiring certain text to be in bold-face type;
- If a form of proxy is sent in electronic form, the requirements that certain information be set out in bold-face type are satisfied if the information in question is set out in some other manner so as to draw the addressee's attention to the information; and
- A form of proxy that, if signed, has the effect of conferring a discretionary authority in respect of amendments to matters identified in the notice of meeting or other matters that may properly come before the meeting must contain a specific statement to that effect.

By application to the Director, a corporation may obtain authorization to use other methods of absentee voting where the Director reasonably believes that the members and the corporation will not be prejudiced.⁶³ It should also be noted that subsection 170(7) of the CNCA provides that members who are party to a unanimous member agreement may not vote in accordance with section 171 when exercising the authority delegated to them under the agreement.

- **Requisition of Meeting:** Section 167 of the CNCA allows members that hold at least five percent of the voting rights to require the directors to call a meeting of members (known as a requisition). While the by-laws may set out a lower percentage, they may not provide a higher percentage. As a result, depending on the number of members that a corporation has, its by-laws may need to address the percentage for a requisition.
- **Notice of Meeting:** The notice periods under most CCA by-laws will need to be redrafted for CNCA by-laws. By-laws must comply with prescribed notice periods under subsection 63(1) of the CNCA Regulations. Subsection 162(1) of the CNCA mandates that a corporation “must give members entitled to vote at a meeting of members notice of the time and place of the meeting in accordance with the by-laws and the regulations.” It

⁶³ CNCA subsection 171(2).

goes on to state that “the provisions of the by-laws respecting the giving of notice shall comply with any prescribed requirements.” Subsection 63(1) of the CNCA Regulations sets out four options for providing notice to members:

(a) Mail, Courier or Personal Delivery

A notice of meeting may be provided by way of mail, courier or personal delivery to each member entitled to vote at the meeting and must be given during a period 21 to 60 days before the day on which the meeting is to be held.

(b) Telephone or Other Electronic Communication

A notice of meeting may be provided to each member entitled to vote at the meeting by way of telephone, electronic or other communication facility 21 to 35 days before the day on which the meeting is to be held.

(c) Notice Affixed to a Notice Board

In order for a notice affixed to a notice board to be sufficient notice of a meeting of members, the CNCA Regulations state that the notice must be affixed no later than 30 days before the day on which the meeting is to be held. The CNCA Regulations also require that the notice board be one upon which information respecting the corporation’s activities is regularly posted and be located in a place frequented by members.

(d) Publication in a Newspaper Where More than 250 Members

For corporations with more than 250 members, notice of a members’ meeting can be provided by way of publication if such notice is published:

- at least once in each of the three weeks immediately before the day on which the meeting is to be held in one or more newspapers circulated in the municipalities in which the majority of the members of the corporation reside as shown by their addresses in the register of members; or

- at least once in a publication of the corporation that is sent to all its members, during a period of 21 to 60 days before the day on which the meeting is to be held.

It is important to note that subsection 63(2) of the CNCA Regulations states that in the event that a corporation opts for electronic notification of meetings, it is required to select one of the other three options listed above as a non-electronic alternative for members who request non-electronic notification. In the event that the corporation's by-laws do not set out a non-electronic alternative, the corporation must only send a copy of the notice to those members who request a copy 21 to 60 days before the day on which the meeting is to be held.

- **Resolution in Lieu of Meetings (directors and members):** Any provision in CCA by-laws dealing with resolutions in lieu of meetings should be removed. The CNCA specifically allows directors and members to sign resolutions in lieu of holding meetings.⁶⁴
- **Membership Discipline:** Some CCA by-laws provide for the power to discipline members. It is important to ensure that any existing provisions meet the requirements of the CNCA.⁶⁵ The CNCA specifically allows the articles or by-laws of a corporation to provide the directors, the members or any committee of directors or members with the power to discipline a member or to terminate a membership. However, if the articles or by-laws provide for this power, they must also set out the circumstances and the manner in which the power may be exercised. By-laws may include such matters as:
 - notice to the member;
 - whether the member will be given the right to be heard or provide written submissions;
 - how the decision will be made by the members/directors; and

⁶⁴ CNCA subsections 127(5) and 166(1).

⁶⁵ CNCA section 158.

- whether the decision is final and binding on the member or subject to appeal.
- **Appointment of Auditors and Level of Financial Review:** Since the rules regarding the appointment of the public accountant and the level of financial review are contained in the CNCA,⁶⁶ any existing CCA by-law section on the appointment of auditors is not required.
- **By-law Approval and Effective Date:** This section should be deleted from all CCA by-laws since the CNCA provides for different rules for by-law approval and effective dates.⁶⁷

D. CONCLUSION

The CNCA is modelled significantly on the CBCA and as a result it will be somewhat familiar turf to many general practitioners. However, there are many important considerations involved in transitioning a client from the CCA to the CNCA and practitioners need to pay close attention to the rules set out in the new legislation and take the time necessary to discuss these considerations and rules with clients. While the CNCA may cause some clients to change their existing governance structures to conform with the legislation or lessen the impact of the legislation, overall it is anticipated that the CNCA will be a welcome relief to federal not-for-profit corporations.

⁶⁶ CNCA sections 172 and 179.

⁶⁷ CNCA section 152

Appendix “A”

Canada Not-for-profit Corporations Act (“CNCA”)

Mandatory and Default Rules Including Alternatives

A. MANDATORY RULES: There are only two by-law provisions that are mandatory under the CNCA. A corporation is required to have by-laws addressing the following:

1. **Conditions required for membership.** Section 154 of the CNCA requires the by-laws to set out conditions for being a member including whether a corporation or other entity may be a member. If there is more than one class of members, the by-laws must set out the conditions for membership in each class, the manner of withdrawing or transferring to another class and the conditions on which membership in a class ends.
2. **Notice of Meeting of Voting Members.** Subsection 162(1) of the CNCA requires by-laws to set out the manner of giving notice for members’ meetings which must be in accordance with the CNCA Regulations.

Note: Subsection 7(3.1) provides that a requirement under the CNCA to include a provision in the by-laws is deemed to be met by including the provision in the articles.

B. DEFAULT RULES AND ALTERNATIVES: Where by-laws are silent, the default rules set out in the CNCA will apply. These default rules and permissible alternatives to these rules are set out below:

PROVISION	DEFAULT RULE	ALTERNATIVE
Right of members to vote (Subsection 154(5))	Each member is entitled to one vote at a meeting of members.	Articles may provide for classes of members with different voting rights, including non-voting members.
Manner of voting by members (Section 165)	Voting is by a show of hands or electronically (unless by-laws restrict electronic voting). A member that is	By-laws can specify another manner of voting.

PROVISION	DEFAULT RULE	ALTERNATIVE
	entitled to vote at the meeting can demand a ballot.	
Absentee voting by members (Section 171)	Not permitted.	By-laws can specify that absentee voting will be allowed by the following prescribed methods: proxy, mailed-in ballot, or telephonic, electronic or other communication facility. The procedures for collecting, counting and reporting the results of any vote must also be set out.
Transfer of membership (Subsection 154(8))	Membership must be transferred back to the corporation.	By-laws may specify different rules regarding transferability (for example, between classes or otherwise).
Place of meeting of members (Section 159)	Meetings of members must be held in Canada.	A meeting of members can be held outside of Canada if the place is specified in the articles or if all of the voting members agree.
Requisition of meeting by members (Section 167)	Members holding 5% of the votes can requisition the directors to call a meeting of the members for the purpose set out in the requisition.	By-laws can set percentage as lower than 5% but not higher.
Electronic participation at members' meetings by a person entitled to attend the meeting (Subsection 159(4))	Electronic participation at meetings is permitted.	By-laws can prohibit or restrict electronic participation at meetings.
Meeting held entirely by electronic means (Subsection 159(5))	Not permitted.	By-laws may permit directors or members to hold a meeting entirely by electronic means as long as all participants can communicate adequately with each other and the meeting is

PROVISION	DEFAULT RULE	ALTERNATIVE
		held in accordance with the CNCA Regulations.
<p>Quorum for meetings of members (Section 164)</p>	<p>A quorum is a majority of members entitled to vote. If quorum is present at the opening of a meeting but not throughout the meeting, business may still proceed.</p>	<p>By-laws may provide for a different quorum, but it must be set out as a fixed number of members, or a percentage of members or a number or percentage of members that is determinable by a formula. Can also provide that an opening quorum at a meeting is not sufficient where there is a loss of quorum later in the meeting.</p>
<p>Termination of membership (Section 156)</p>	<p>Membership is terminated when the member dies or resigns, when the member is expelled, when the member's term of membership expires, or the corporation is liquidated or dissolved under Part 14 of the CNCA.</p>	<p>Articles or by-laws can provide otherwise.</p>
<p>Rights on termination of membership (Section 157)</p>	<p>Upon termination of membership, the rights of a member cease to exist.</p>	<p>Articles or by-laws can provide otherwise.</p>
<p>Providing annual financial statements to members (Section 175)</p>	<p>Annual financial statements must be sent to the members 21-60 days before the annual meeting.</p>	<p>By-laws can provide that instead of sending financial statements to members, that notice will be sent to members that financial statements are available at the registered office.</p>
<p>Annual Contributions or Dues (Section 30)</p>	<p>Directors can require members to make an annual contribution or pay annual dues and can determine the manner in which the dues or contributions are to be paid</p>	<p>By-laws, articles or any unanimous member agreement can provide otherwise.</p>

PROVISION	DEFAULT RULE	ALTERNATIVE
Lien on membership (Subsections 36(2) and (3))	The corporation does not have a lien on memberships for debts owing by members.	Articles can provide that the corporation has a lien on any membership registered in name of member for a debt of that member to the corporation, including unpaid membership fees. By-laws can include provisions for enforcement of the lien.
Management of Affairs of Corporation (Section 124)	The directors shall manage or supervise the management of the affairs of the corporation.	Articles or any unanimous member agreement can provide otherwise.
Qualification of Directors (Subsection 126(2))	Directors are not required to be members.	By-laws can require directors to be members.
Appointment of directors (Subsection 128(8))	All directors must be elected by the members.	Articles (but not the by-laws) may permit the directors to appoint additional directors to hold office until the next annual meeting of members, but no more than a third of the total number of directors can be appointed.
Quorum of directors (Subsection 136(2))	A majority of the number of directors or minimum number of directors required by the articles constitutes a quorum.	By-laws can provide otherwise.
Filling vacancies among directors (Subsection 132(5))	Directors have limited rights to fill vacancies on the board.	By-laws can provide that a vacancy shall only be filled by the members, or by a class of members that had the exclusive right to elect one or more directors.
Place of meeting of directors (Subsection 136(1))	Directors may meet at any place.	By-laws or articles can provide otherwise.

PROVISION	DEFAULT RULE	ALTERNATIVE
Notice of meeting of directors (Subsection 136(3))	The notice is not required to set out the purpose of the meeting or the business to be transacted unless it relates to a matter specified in subsection 138(2).	By-laws can require notice to specify purpose or business of meeting.
Director participation in meetings by electronic means (Subsection 136(7))	Directors can participate in a meeting by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately if all of the directors consent.	By-laws can provide otherwise.
Borrowing powers (Subsection 28(1))	Directors may (without member authorization) borrow money and grant security on property of the corporation.	By-laws, articles or any unanimous member agreement can restrict this power.
Delegation of borrowing powers (Subsection 28(2))	The directors can delegate borrowing powers to a director, a committee of directors or an officer.	By-laws, articles or any unanimous member agreement can provide otherwise.
Remuneration of directors etc. (Section 143)	Directors can fix the reasonable remuneration of directors, officers and employees.	By-laws, articles or any unanimous member agreement can provide otherwise.
Indemnification (Section 144)	A director, officer or employee can receive indemnification for expenses incurred on behalf of the corporation.	By-laws can provide otherwise.
Appointment of officers (Section 142)	Directors can designate, appoint and specify the duties of officers.	By-laws, articles or any unanimous member agreement can provide otherwise (i.e. that members may appoint

PROVISION	DEFAULT RULE	ALTERNATIVE
		officers).
By-laws (Section 152)	Directors can make, amend or repeal by-laws except those for which a two-thirds vote of members is required. The by-law, amendment or repeal is effective until the next meeting of members when members confirm, amend or reject it.	By-laws, articles or any unanimous members' agreement can restrict the power of directors to make, amend or repeal by-laws.
Investments by corporation (Section 33)	A corporation may invest its funds as its directors think fit.	This rule is subject to limitations accompanying any gift or provisions to the contrary in the articles or by-laws.
Electronic documents (Section 267)	A requirement under the CNCA or the CNCA Regulations that information, including information in a notice, be created or provided is satisfied by provision of an electronic document as long as the CNCA Regulations are complied with.	Articles or by-laws can provide otherwise.
Statement of director (Subsection 131(1))	A director is entitled to submit a written statement giving reasons for resigning or for opposing the removal or replacement of the director if a meeting is called for that purpose.	By-laws can provide otherwise.
Consensus Decision-making (Section 137)	Decisions under the CNCA are made by ordinary or special resolution.	By-laws may provide that directors or members shall make decisions by consensus except for decisions that are required to be made under subsection 182(1), by special resolution, or by a vote if consensus cannot be reached.

PROVISION	DEFAULT RULE	ALTERNATIVE
<p>Special majorities (Subsections 7(4) and (5))</p>	<p>Decisions under the CNCA are made by ordinary or special resolution.</p>	<p>Articles or unanimous member agreement can require a greater number of votes of directors or members to effect any action except cannot require a greater number of votes to remove a director than required by section 130.</p>
<p>Adjournment of meeting of members (Subsection 162(7))</p>	<p>If a meeting is adjourned for less than 31 days, it is not necessary for any member to be notified of an adjourned meeting other than by announcement at the earliest meeting that is adjourned.</p>	<p>By-laws can provide otherwise.</p>
<p>Fundamental Changes (Section 199)</p>	<p>Members of a class or a group of members are entitled to vote separately as a class or group on a proposal to make an amendment referred to in subsection 199(1) whether or not members otherwise have the right to vote.</p>	<p>Articles can provide otherwise in the case of an amendment referred to in paragraphs 199(1)(a) and (e).</p>

APPENDIX “B”

Sample Articles of Continuance

1. Current name of the Corporation:

XYZ Foundation

2. If a change of name is requested, indicate proposed corporate name:

ABC Corporation

(optional)

3. Corporation number:

12346-7

4. The province or territory in Canada where the registered office is to be situated:

Ontario

5. Minimum and maximum of directors (or fixed number):

Minimum: 3 Maximum: 10

6. Statement of the purpose of the Corporation:

The annexed Schedule 1 is incorporated into this form.

(See annexed Schedule 1)

7. Restrictions on the activities that the Corporation may carry on, if any:

None

8. The classes, or regional or other groups, of members that the Corporation is authorized to establish:

The annexed Schedule 2 is incorporated in this form.

(See annexed Schedule 2)

9. Statement concerning the distribution of assets on dissolution of the Corporation:

Any property remaining on liquidation of the Corporation after discharge of any liabilities, shall be distributed to one or more qualified donees within the meaning of subsection 248(1) of the *Income Tax Act*.

(Required, if a soliciting corporation)

10. Other provisions, if any:

The annexed Schedule 3 is incorporated in this form.

(See annexed Schedule 3)

11. Declaration:

I hereby certify that I am a director or an authorized officer of the Corporation continuing under the CNCA.

Name: Jane Doe

Address: Any street, city

Signature: "Jane Doe"

Phone number: (555) 555-5555

SCHEDULE 1

[Unless the objects are being amended as part of the continuance, list corporate objects/purposes from letters patent or supplementary letters patent where there have been changes to the objects.]

SCHEDULE 2

(SAMPLE ONLY)

The Corporation is authorized to establish Class A members, Class B members and Class C members as follows:

1. The Class A members shall be entitled to receive notice of and to attend all meetings of the members of the Corporation and each Class A member shall have one (1) vote at each such meeting, except for meetings at which only members of another class are entitled to vote separately as a class.
2. The Class B members shall be entitled to receive notice of and to attend all meetings of the members of the Corporation and each Class B member shall have two (2) votes at each such meeting, except for meetings at which only members of another class are entitled to vote separately as a class.

Except as otherwise provided by the *Canada Not-for-profit Corporations Act* S.C. 2009, c.23 the Class C members shall not be entitled to receive notice of, to attend or to vote at meetings of the members of the Corporation.

SCHEDULE 3

(SAMPLE PROVISIONS ONLY)

1. The members of the Corporation are not entitled to vote separately as a class, upon a proposal to amend the articles to:
 - (a) effect an exchange, reclassification or cancellation of all or part of the memberships of the class; or
 - (b) create a new class of members having rights equal or superior to those of the class.
2. The directors may appoint one or more additional directors who shall hold office for a term expiring not later than the close of the next annual meeting of members, but the total number of directors so appointed shall not exceed one-third (1/3) of the number of directors elected at the previous annual meeting of members.

The enactment, amendment or repeal of by-laws of the Corporation shall require a special resolution of the members in order to be effective.