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Editor: Terrance S. Carter

COUNTDOWN TO THE *CANADA NOT-FOR-PROFIT CORPORATIONS ACT* PRACTICE TIP #5: DRAFTING BY-LAWS FOR CONTINUANCE UNDER THE CNCA

By Jane Burke-Robertson*

Those involved with federally incorporated not-for-profit corporations are used to having a lot of detail in their general operating by-law. This is because Industry Canada's Policy Statement on by-laws for federal not-for-profit corporations requires the by-laws to include a comprehensive set of provisions on a variety of matters including membership, procedures for members' meetings, manner of election or appointment of directors, number and term of directors, directors' meetings, manner of appointment or election of officers, and the procedure for amending or repealing by-laws. The inclusion of this level of detail in the by-laws of federal corporations is considered a "must" since the *Canada Corporations Act* ("CCA") is largely silent on these matters.

As most people are already aware, the new *Canada Not-For-Profit Corporations Act* ("CNCA") is similar to most modern corporate statutes, in that it provides a clear set of procedural and other 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 be placed in the position of having 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"

* Jane Burke-Robertson, B.Soc.Sci., LL.B., is a partner of Carters Professional Corporation and practices charity and not-for-profit law in Carters' Ottawa office.

provisions from the CNCA and essentially repeating them in the by-laws) or drafting by-laws using a minimalist approach which would involve by-laws addressing only the "essentials."

The first approach has the advantage of continuing a practice that not-for-profits are already familiar with by having a lengthy and comprehensive set of by-laws that include many of the applicable CNCA rules. The by-laws would continue to be the "go to" document in most cases, meaning that organizations would only need to refer to the legislation in limited circumstances. However, while federal corporations are used to referring only to their by-laws (and not to legislation) to determine what the rules are in a given situation, there is a risk that this approach might be followed to a corporation's detriment, particularly where the legislative rules 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, officers and directors may 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 solicitor, the risk of confusion over what can and cannot be changed in the by-laws applies across the board.

To add to the confusion, certain by-law provisions may only be amended or repealed by way of a "special resolution" of members (requiring a resolution passed by a majority of not less than two-thirds (2/3) of the votes cast on the resolution) while others only require a majority vote to be amended or repealed. By-laws that do not clearly make this distinction may mislead the board and membership into adopting a majority vote for all by-law amendments, resulting in by-laws that may not be properly in force with respect to all provisions. This means that any by-law drafted under the CNCA should be very clear regarding the amending formula that applies to the various by-law provisions. Some practitioners have discussed the possibility of placing all by-law provisions that require a special resolution to change into one, separate by-law and leaving the remaining provisions in another by-law which requires only a majority vote to amend. Others favour including all provisions in one general operating by-law but grouping the matters requiring a special resolution into one section so that it is clear that these matters can only be changed by special resolution.

The second approach to drafting by-laws under the CNCA, also referred to as the "minimalist approach", will require corporations to change their practice by developing some familiarity with the CNCA. However, in the long run this choice may be the better one. This approach involves the by-laws being drafted as a

"short form" by-law. The by-law would be restricted to material where a choice needs to be made (otherwise the rule in the CNCA applies) or that must be in the by-laws to deal with procedural matters of importance to the organization. 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;
- Consensus decision-making;
- Appointment and removal of officers.

Those who favour this approach when it comes to by-laws under the CNCA, may already be aware that Industry Canada is in the process of developing a number of tools that will assist organizations 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 organizations and individuals in the transition to the CNCA.