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# COUNTDOWN TO THE *CANADA NOT-FOR-PROFIT CORPORATIONS ACT* PRACTICE TIP #7: IMPORTING, EXPORTING, AND AMALGAMATION

***By Jane Burke-Robertson and Theresa L.M. Man****

## A. INTRODUCTION

When the *Canada Not-for-profit Corporations Act* (CNCA) comes into force, charities and not-for-profits will have more flexibility on their fundamental changes as a result of provisions governing the importation, exportation, and amalgamation of corporations under the CNCA.

Under the *Canada Corporations Act* (CCA), there is no provision to permit corporations from another jurisdiction to continue under the CCA (i.e. to be imported into the CCA), to allow a CCA corporation to be continued under another jurisdiction (i.e. to be exported out of the CCA), or to allow two non-share capital corporations to amalgamate. Sections 156 and 159 of the CCA allow a corporation incorporated by Special Act of Parliament to apply to obtain letters patent continuing it under Part II of the CCA as if it had been incorporated under the CCA.

Once the new CNCA is in force, it will replace the CCA. The CNCA contains new provisions which will permit the importation, exportation, and amalgamation of corporations, and will thus provide new options regarding the way not-for-profits and charities structure their organizations.

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## B. IMPORTING UNDER THE CNCA

In order for a corporation incorporated in one jurisdiction to be imported into another jurisdiction, the corporation must be permitted by the law of its home jurisdiction to leave the jurisdiction (the "exporting jurisdiction") and to be continued and governed by the non-profit corporate laws of another jurisdiction (the "importing jurisdiction").

Section 211 of the CNCA permits a corporation incorporated in another jurisdiction to be imported into the CNCA by filing articles of continuance under the CNCA, provided that the originating jurisdiction permits the corporation to be exported and the requirements under the CNCA are met. Together with the articles of continuance, documents required by sections 20 and 128 of the CNCA must also be filed. This would include a notice of registered office and a notice of directors.

Once the continuance is approved, a certificate of continuance under the CNCA will be issued. On the date of the certificate of continuance, the corporation will become a CNCA corporation, the articles of continuance will be deemed to be the articles of incorporation of the continued corporation; the certificate of continuance will be deemed to be the certificate of incorporation of the continued corporation; and the members of the corporation being continued will become members of the continued corporation.

The CNCA also provides that from the date of continuance, the corporation will continue to hold its assets and be liable for its liabilities from before the continuance. The continuance will not affect any existing cause of action, claim or liability to prosecution. Any civil, criminal or administrative action or proceeding pending by or against the corporation may be continued, and any conviction against, or ruling, order or judgment in favour of or against, the corporation may be enforced by or against the continued corporation.

It is important to note that in order to be imported into the CNCA, it will be necessary for the continuing corporation to review, and possibly revise where necessary, its corporate governance structure and prepare new by-laws that reflect compliance with the requirements under the CNCA. As well, the continuing corporation may make other desired changes, even if they may not be required under the CNCA, such as adopting a different membership structure, board composition, etc.

It is interesting to note that a share capital corporation from another jurisdiction can be imported into and be continued as a non-share capital corporation under the CNCA, by establishing the terms and conditions on which it is converted to a non-share capital corporation.

### C. EXPORTING UNDER THE CNCA

Section 213 of the CNCA permits a corporation to be exported into another statute or jurisdiction. In order to continue in another jurisdiction, there must be permission in the governing statute of the new jurisdiction which allows for for the importation of corporations from other jurisdictions. The corporation will have to comply with the requirements of the importing jurisdiction in order to be approved for continuance.

As well, the CNCA requires that to bring an application under section 213 a corporation must have approval by special resolution its members, and it must also establish to the satisfaction of the Director that its proposed continuance in the other jurisdiction will not adversely affect the creditors or members of the corporation. In this situation, each member of the corporation will have the right to vote with respect to a continuance regardless of whether they are otherwise entitled to vote. Once the members have approved the continuance, the directors of the corporation must file the application for permission to continue.

The CNCA requires that a corporation not be continued as a body corporate under the laws of another jurisdiction unless the laws of that jurisdiction provide in effect that the corporation will continue to hold its assets and be liable for its liabilities from before the continuance; the continuance will not affect any existing cause of action, claim or liability to prosecution; any civil, criminal or administrative action or proceeding pending by or against the corporation may be continued; and any conviction against, or ruling, order or judgment in favour of or against, the corporation may be enforced by or against the continued corporation.

Provided that the Director is satisfied with the application, the Director shall issue a certificate of discontinuance upon receipt of notice that the corporation has been continued in another jurisdiction. The CNCA will cease to apply to the corporation on the date shown in the certificate of discontinuance.

## D. AMALGAMATING CORPORATIONS UNDER THE CNCA

Section 204 of the CNCA permits the amalgamation of two corporations. The two corporations will also need to enter into an amalgamation agreement that complies with section 205 of the CNCA, consisting of the following terms:

- the provisions that are required to be included in the articles of incorporation under section 7 or in the by-laws under section 154 of the CNCA;
- the name and address of each proposed director of the amalgamated corporation;
- the manner in which the memberships of each amalgamating corporation are to be converted into membership of the amalgamated corporation;
- whether the by-laws of the amalgamated corporation are to be those of one of the amalgamating corporations and, if not, a copy of the proposed by-laws; and
- details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated corporation

Section 206 of the CNCA requires that each corporation submit the amalgamation agreement for approval by its directors and each class or group of members. Section 206 also has specific requirements on how the members meetings are to be held. For example:

- Notice of the members meeting must be given in accordance with section 162 of the CNCA and the specific notice of meeting requirements in the Regulations to the CNCA. The draft Regulations released to date contain specific requirements regarding these matters, such as the method of giving notice and the length of the notice period. The notice shall also include within the notice a copy or summary of the amalgamation agreement

- All members of the corporation will have the right to vote in respect of the amalgamation agreement whether or not they otherwise carry the right to vote (i.e. even non-voting members will have the right to vote).

- The members of a class or group of members of each corporation are entitled to vote separately as a class or group in respect of the amalgamation agreement if the amalgamation agreement contains a provision that, if contained in a proposed amendment to the articles, would entitle the members to vote as a class or group, as long as such a vote complies with section 199 of the CNCA (which sets out the circumstances under which members from different classes are entitled to vote separately as a class).

- Approval of the amalgamation agreement will be by a special resolution, i.e. approved by at least two thirds of the votes cast on that resolution at a meeting.

Once approval from the members has been obtained, section 208 of the CNCA requires that articles of amalgamation be filed with the Director. The articles must be accompanied by a statutory declaration of a director or an officer of each amalgamating corporation, indicating that:

- there are reasonable grounds for believing that each amalgamating corporation and the amalgamated corporation will be able to pay its liabilities as they become due, and the realizable value of the amalgamated corporation's assets will not be less than the aggregate of its liabilities; and

- there are reasonable grounds for believing that no creditor will be prejudiced by the amalgamation, or adequate notice has been given to all known creditors of the amalgamating corporations and no creditor objects to the amalgamation otherwise than on grounds that are frivolous or vexatious.

Section 207 of the CNCA also permits vertical short form amalgamations where a parent holding corporation and one or more of its subsidiaries amalgamate, as well as horizontal short form amalgamations where the proposed amalgamation is between two or more wholly-owned subsidiaries of one corporation.

A vertical short form amalgamation does not require either an amalgamation agreement or membership approval. Instead, the amalgamation is approved by resolution of the directors of each corporation. The board of each amalgamating corporation must pass a resolution to the effect that the membership of each amalgamating subsidiary corporation is cancelled without any repayment of capital and except as may be prescribed, the articles of amalgamation shall be the same as the articles of the amalgamating parent corporation. Note that if it is the intention that the articles will be different from the parent's, a short form amalgamation alone cannot be used. Instead it would be necessary to amend the articles of the parent before amalgamation, amend the articles of the amalgamated corporation afterwards or use a long form amalgamation.

The process for approval for horizontal short form amalgamations is the same as above for a vertical short form amalgamation and no amalgamation agreement or membership approval is necessary. The amalgamation must be approved by resolution of the directors of each amalgamating corporation and the resolutions must provide that the memberships in all but one of the subsidiaries will be cancelled without repayment of capital in respect of those memberships and that the articles of amalgamation will be the same as the articles of the amalgamated subsidiary corporation whose memberships were not cancelled. As a

result, if changes to the articles are needed, it will be necessary to consider one of the options described above for vertical short form amalgamations.

Section 208 and the draft Regulations of the CNCA also contain specific requirements relating to what constitutes "adequate notice" to creditors, namely:

- a written notice is sent to each creditor having a claim against the corporation that exceeds $1,000;
- a notice is published once in a newspaper in the place where the corporation has its registered office and reasonable notice is given in each province where the corporation carries on activities; and
- each notice states that the corporation intends to amalgamate with another corporation in accordance with the CNCA and that a creditor of the corporation may object to the amalgamation within 30 days.

On receipt of articles of amalgamation, the Director will issue a certificate of amalgamation. Section 209 provides that the amalgamation of the amalgamating corporations and their continuance as one corporation become effective on the date shown in the certificate of amalgamation. The amalgamated corporation thereafter possesses all of the property, rights and privileges and is subject to all of the liabilities, contracts and disabilities of the amalgamating corporations.