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## **COUNTDOWN TO THE CANADA NOT-FOR-PROFIT CORPORATIONS ACT PRACTICE TIP #9: SPECIAL ACT CORPORATIONS**

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

### **A. INTRODUCTION**

Instead of being incorporated under the *Canada Corporations Act* (CCA), some federal non-share capital corporations are incorporated by special legislation of the Parliament of Canada. While there are relatively few of these types of corporations, it is important to be aware of the changes that the new *Canada Not-for-profit Corporations Act* (CNCA) brings to these corporations.

A special act corporation is subject to its own special legislation which, together with any by-laws that may have been passed, governs the corporation. In addition, there are a few provisions under the existing Part III of the CCA which apply to special act corporations that are incorporated for the purpose of carrying on "...objects, to which the legislative authority of the Parliament of Canada extends, of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character or the like objects." These few sections allow, among other things, special act corporations to continue under Part II of the CCA. However, it is important to be aware that Part III of the CCA will be repealed on the date that the CNCA is proclaimed in force (currently anticipated to be June, 2011, but will likely be postponed to the fall in light of the federal election). On that date, Part 19 of the CNCA will automatically apply to special act corporations.

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Once the CNCA is proclaimed in force, a special act corporation will have two options: (1) to continue under the CNCA in which case the corporation will be subject to Parts 1 through 18 of the CNCA, and will no longer be governed by its own special legislation; or (2) to be governed by its own special legislation as well as Part 19 of the CNCA.

The following outlines the key provisions in the CNCA which will apply to special act corporations on proclamation of the CNCA.

## **B. CONTINUANCE OF SPECIAL ACT CORPORATIONS**

For those electing to continue under the CNCA, the process of continuance for special act corporations is essentially the same as for Part II CCA corporations (reviewed in *Charity Law Bulletin* No. 193<sup>1</sup>). In other words, once continuance has been approved, the corporation will be required to apply for a certificate of continuance by filing articles of continuance, a notice of directors and notice of registered office with Corporations Canada. As well, upon continuance, the special legislation ceases to apply to the corporation. By-laws complying with the CNCA should be prepared either at the same time as the articles of continuance or shortly following continuance. The continuance process for special act corporations is governed by section 212. The following provisions would apply:

- a) The voting members of the special act corporation may, by special resolution,<sup>2</sup> authorize the directors to apply under section 211 of the CNCA for a certificate of continuance and by the same resolution, the members may make any amendment to the charter of the corporation that a corporation incorporated under the CNCA may make to its articles.
- b) In authorizing a continuance, the members may not make any amendment of the type described in section 199(1) that affects a class or group of members, unless the members of the class or group approve the amendment by way of class vote or the special legislation of the corporation otherwise provides in respect of an amendment referred to in section 199(1).
- c) The directors of the special act corporation may apply under section 211 for a certificate of continuance (without membership approval) if the articles of continuance do not make any amendment to the charter of the corporation other than an amendment required to conform to the CNCA.

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<sup>1</sup> <http://www.carters.ca/pub/bulletin/charity/2010/chylb193.pdf>.

<sup>2</sup> A resolution passed by a majority of not less than two thirds of the votes cast at a members meeting on that resolution.

- d) A special act corporation that obtains a certificate of continuance is not required to pay any fees in respect of the continuance.

Furthermore, the Governor in Council may, by order, require a corporation without share capital incorporated by or under an Act of Parliament other than the CNCA to apply for a certificate of continuance under section 211 within 15 months, except for the following:

- i) a bank;
- ii) an association to which the *Cooperative Credit Associations Act* applies;
- iii) a company or society to which the *Insurance Companies Act* applies; and
- iv) a company to which the *Trust and Loan Companies Act* applies.

If a corporation does not make an application to obtain a certificate of continuance within the 15 month timeframe, it is dissolved as of the expiry of that time period. It should be noted that a similar provision is contained in the *Canada Business Corporations Act* but has rarely, if ever, been used. As such it is not anticipated that special act corporations will be required to continue under the CNCA under this section in any significant number.

## **C. CNCA PROVISIONS APPLYING TO SPECIAL ACT CORPORATIONS**

For special act corporations choosing the second option, i.e., those that elect not to continue under the CNCA, the following is a summary of the Part 19 of the CNCA provisions (sections 294, 295 and 296) which apply to them on proclamation of the CNCA.

### **1. Capacity and Powers of a Corporation (Sections 16-19)**

The following provisions apply to special act corporations:

- a) Special act corporations will have the capacity, rights, powers and privileges of a natural person. The activities of a special act corporation may be carried out throughout Canada and it has the capacity to carry on its activities outside of Canada to the extent that the laws of that jurisdiction permit.
- b) It is not necessary for by-laws to be passed in order to confer any particular power on a corporation or its directors.
- c) A corporation may not carry on any activities or exercise any power in a manner contrary to its special legislation.

- d) No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its special legislation or the CNCA.
- e) No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the person can examine it under section 279 or at an office of the corporation.
- f) No corporation, no guarantor of an obligation of a corporation and, in Quebec, no surety may assert against a person dealing with the corporation or against a person who acquired rights from the corporation that:
  - i) the special legislation, the by-laws or any unanimous member agreement has not been complied with;
  - ii) the individuals named in the last notice of directors filed by the corporation (in accordance with section 128 or 134) are not the directors of the corporation;
  - iii) the place named in the last notice of registered office filed by the corporation (under section 20) is not the registered office of the corporation;
  - iv) a person held out by a corporation as a director, an officer, an agent or a mandatary of the corporation has not been duly appointed or has no authority to exercise the powers and perform the duties that are customary in the activities of the corporation or usual for a director, an officer, an agent or a mandatary;
  - v) a document issued by any director, officer, agent or mandatary of a corporation with actual or usual authority to issue the document is not valid or not genuine; or
  - vi) a sale, a lease or an exchange of all or substantially all of the property of a corporation other than in the ordinary course of its activities (referred to in subsection 214(1)) was not authorized.

However the above does not apply in respect of a person who has, or ought to have, knowledge of a situation described in that subsection by virtue of their relationship to the corporation.

## 2. Calling Annual Meetings (Section 160(1))

The directors of a special act corporation will be required to call an annual meeting of members in the following manner:

- a) not later than 18 months after the corporation comes into existence; and

- b) subsequently, not later than 15 months after holding the preceding annual meeting but no later than 6 months after the end of the corporation's preceding financial year.

### 3. Meeting Called by Court (Section 168(1))

On the application of a director, a member who is entitled to vote at a meeting of members, Corporations Canada, or a court may order a members' meeting of a corporation to be called, held and conducted in the manner that the court directs, if:

- a) it is not practicable to call the meeting within the time or in the manner in which it is otherwise to be called;
- b) it is not practicable to conduct the meeting in the manner required by the CNCA or the by-laws; or
- c) the court considers that the meeting should be called, held and conducted within the time or in the manner that it directs for any other reason.

### 4. Annual Returns (Section 278)

A special act corporation will be required to send to Corporations Canada an annual return in the form and within the period fixed by Corporations Canada.

### 5. Change of Name (Section 296)

A special act corporation may change its name as long as it follows certain guidelines set out in subsections 296(4) and (5) including:

- ◆ the corporation must have a name that is in an English form, a French form, an English form and a French form, or a combined English and French form, so long as the combined form meets any prescribed criteria; and
- ◆ the corporation is not allowed to change its name to carry on activities or identify itself by a name not permitted under subsection 13(1) (prohibited names).

Once the name change has been approved by a special resolution of the members and is in compliance with the requirements in subsections 296(4) and (5), the corporation may send this change to Corporations Canada. Once Corporations Canada receives the notice of the change, it will issue a certificate of change of name, and provide notice to the public. The change of name is effective on the date shown in the certificate.

Corporations Canada can order a name change if:

- ◆ the name change is not in compliance with the requirements under the CNCA; or
- ◆ the body corporate acquires a name as a result of a person undertaking to dissolve or to change names, and the undertaking is not honoured.

Corporations Canada can revoke the name of a corporation and assign it a name if subsections 296(6) and (7) are not followed.

## 6. Voluntary Liquidation and Dissolution (Section 221)

The following voluntary dissolution provisions apply to special act corporations:

- a) The board of directors may propose the voluntary liquidation and dissolution of a corporation, or a member who is entitled to vote at an annual meeting of members may make such a proposal in accordance with section 163. Notice of any meeting of members for this purpose shall set out the terms of the proposal.
- b) A corporation may liquidate and dissolve by special resolution of the members or, if the corporation has more than one class or group of members, by special resolution of each class or group whether or not the members are otherwise entitled to vote.
- c) A statement of intent to dissolve must be sent to Corporations Canada. On receipt of a statement of intent to dissolve, Corporations Canada shall issue a certificate of intent to dissolve in accordance with section 276.
- d) On the issuance of a certificate of intent to dissolve, the corporation shall cease to carry on its activities, except to the extent necessary for the liquidation, but its corporate existence continues until Corporations Canada issues a certificate of dissolution.
- e) Subsection 221(7) sets out the obligations of a corporation after the certificate of intent to dissolve is issued, including notice to creditors and doing all acts necessary to liquidate the corporation's property.
- f) On the application of Corporations Canada or any interested person made at any time during the liquidation of a corporation, the court may order that the liquidation be continued under the supervision of the court.
- g) Before the issue of a certificate of dissolution, a certificate of intent to dissolve may be revoked by sending to Corporations Canada a statement of revocation of intent to dissolve, if the revocation is

approved in the same manner as the resolution referred to in (b) above. On receipt of a statement of revocation of intent to dissolve, Corporations Canada shall issue a certificate of revocation of intent to dissolve in accordance with section 276.

- h) If a certificate of intent to dissolve has not been revoked and the corporation has complied with the liquidation provisions in subsection 221(7), the corporation shall prepare and file articles of dissolution. Corporations Canada shall then issue a certificate of dissolution.

## 7. Dissolution by Corporations Canada or Interested Person (Sections 222 and 223)

It is also possible for Corporations Canada to dissolve a corporation under section 222 if the corporation:

- a) has not commenced its activities within 3 years after incorporation;
- b) has not carried on its activities for 3 consecutive years;
- c) is in default for a 1 year period in sending to Corporations Canada any fee, notice or other document required by the CNCA;
- d) does not have any directors; or
- e) is managed or supervised by a person who is deemed to be a director for the purposes of the CNCA if all of the directors have resigned or have been removed without replacement (referred to in subsection 130(4)).

Corporations Canada may not dissolve a corporation under section 222 until Corporations Canada has provided the notice required by that section.

Corporations Canada or any interested person may apply to a court under section 223 for an order dissolving a corporation if the corporation has:

- a) failed for 2 or more consecutive years to comply with the requirements of the CNCA with respect to the holding of annual meetings of members;
- b) contravened subsection 17(2) or sections 22, 23, 174 or 175 of the CNCA,<sup>3</sup> or

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<sup>3</sup> Subsection 17(2) prohibits a corporation from carrying on activities or exercising powers in a manner contrary to the special legislation. Sections 22 and 23 allow members to have access to certain records of the corporation. Sections 174 and 175 require financial statements be kept at the corporation's head office, be available for examination by members and be sent to the members.

- c) procured any certificate under the CNCA by misrepresentation.

An interested person who makes an application under this section must give Corporations Canada notice of the application, and Corporations Canada is entitled to appear and be heard in person or by counsel. The court may order that the corporation be dissolved or that the corporation be liquidated and dissolved under the supervision of the court and may make any other order that it thinks fit. On receipt of an order to dissolve under this section, Corporations Canada shall issue a certificate of dissolution. The corporation ceases to exist on the date shown in the certificate of dissolution.

8. Report listing Acts of Continued or Dissolved Bodies Corporate (Section 295)

The Minister may issue a report before both Houses of Parliament which lists special act corporations that are later continued under section 212 or dissolved under sections 221 to 223. This report must be referred to a committee of each House, or a joint committee of both Houses that is designated or established for the purpose of reviewing it. Each special act that is listed in this report will be repealed on the day that is one year after the later of the day on which the report is laid before the Senate and the day on which it is laid before the House of Commons. The exception to this is if the CNCA is the subject of a resolution to the contrary of any committee to which the report is referred. When a special act is repealed, the Minister must publish this information in the Canada Gazette within sixty days.