
CNCA CONTINUANCE PROCESS - AN UPDATE

*By Theresa L.M. Man**

A. INTRODUCTION

All corporations under Part II of the *Canada Corporations Act* (CCA) have until October 17, 2014, to continue under the new *Canada Not-for-profit Corporations Act* (CNCA). As of the end of February 2014, 2900 of approximately 17,000 Part II CCA corporations had filed for continuance. According to Corporations Canada, the exact number of existing Part II CCA corporations is not available because many of them do not regularly file their annual corporate returns. This leaves approximately 14,100 corporations that still need to apply for continuance by the deadline.

B. DISSOLUTION OF NON-CONTINUED CORPORATIONS

Failure to continue under the CNCA by the October 17, 2014, deadline may result in those corporations being dissolved. Since the October 17, 2014, deadline is mandated by the CNCA, this date cannot be changed without an amendment to the CNCA. However, dissolution of corporations that fail to continue by the deadline is not automatic. Section 297(5) of the CNCA provides that Corporations Canada may dissolve corporations that fail to continue by the deadline. The dissolution process will be in accordance with the process outlined in section 222 of the CNCA. Under section 222, before dissolving a corporation, Corporations Canada will give notice to the corporation and to each director and publish the notice in a

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publication generally available to the public. Unless cause for the contrary has been shown, a certificate of dissolution may be issued after 120 days of giving notice.

According to Corporations Canada, after the October 17, 2014, deadline, they will start sending out dissolution notices to corporations. However, corporations may still file for continuance after having received the notice. At Corporations Canada's Client Outreach Sessions in Ottawa on February 3, 2014, and in Toronto on February 19, 2014, they indicated that Corporations Canada is planning to start dissolving corporations that have not filed anything (such as by-laws, supplementary letters patent, annual summary) for the last 5 years, and many of those corporations may not have filed anything for 10 years. Corporations should therefore ensure that Corporations Canada has their correct address so that notice of dissolution is sent to the right place. Corporations Canada indicated at the Outreach Sessions that, where possible, they do not want to dissolve corporations that are making an effort to continue.

However, once a corporation is dissolved because it has not continued by the October 17, 2014, deadline, they will need to be revived and continued in one step. Section 219 of the CNCA provides that if a corporation is dissolved under Part II of the CCA, Part 14 of the CNCA or a special Act corporation, any interested person may apply to the Director to have the dissolved corporation revived as a corporation under the CNCA. As such, this section essentially provides a two-in-one step process. Corporations Canada is in the process of working on other information to explain this process and it will soon be releasing a communications in this regard. Although a process is available to revive the corporation, it would be prudent to file for continuance before the deadline to avoid the time, costs and hassle (let alone embarrassment to stakeholders, donors and the public) to reviving a dissolved corporation.

C. THE CONTINUANCE PROCESS

The continuance process involves applying for a certificate of continuance by filing articles of continuance and an initial notice of registered officers and directors. Corporations should also prepare and adopt new by-laws that comply with the CNCA. Because the rules under the CNCA are very different from the rules under the CCA, what needs to be set out in the articles and by-laws will also be different from what is set out in the corporations' current documents. This is not simply transposing the provisions from its current letters patent into the articles and using the same by-laws.

The articles need approval from at least a two-thirds resolution of the members and must be filed with Industry Canada. Upon issuance of the certificate of continuance, the articles and the certificate replace the letters patent and any supplementary letters patent. Industry Canada's approval is no longer necessary for by-laws to take effect; however, a corporation must still file its by-laws with Industry Canada within twelve months of adoption by its members.

Registered charities must also file their articles of continuance, certificate of continuance and new by-laws with Canada Revenue Agency. Additionally, charities in Ontario need to file their articles of continuance and certificate of continuance with the Ontario Public Guardian and Trustee, which oversees charities in Ontario.

D. TOOLS FOR THE CONTINUANCE PROCESS

To assist Part II CCA corporations to move forward with the continuance process, Corporations Canada has made a number of useful tools available on its website.¹ As well, Corporations Canada recently posted on its website two informational videos to help not-for-profit corporations complete the transition process.² The first video highlights the key elements of this transition process, while the second video takes the viewer step-by-step through Form 4031-Articles of Continuance. An information sheet was also released by Corporations Canada.³

During Corporations Canada's Client Outreach Sessions, they advised that common transition deficiencies include:

- leaving box 8 blank in relation to the number of classes of membership;
- not setting out the voting rights of membership if there are more than one class of members;
- including conditions of membership in box 8 rather than in box 10 as additional provisions;
- not setting out the full legal names of directors;
- not reconciling the list of directors in Form 4002 with the number of directors set out in box 5 of the articles;

¹ http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs04954.html.

² http://www.corporationscanada.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs03925.html.

³ See copy on our website at http://www.carters.ca/pub/bulletin/charity/2014/CNCA_Info_Sheet.pdf.

- filing inadequate NUANS name search reports; and
- not setting out the same corporate name as set out in their letters patent or supplementary letters patent where a name change is not intended.

E. CONCLUSION

Given the serious consequences associated with failing to continue by the deadline, it is essential that the remaining Part II CCA corporations take appropriate steps to continue under the CNCA as soon as possible. As explained above, the continuance process will require the preparation of articles of continuance and a new by-law which complies with the CNCA. Drafting these documents and having them approved by the board and the members at meetings called for that purpose before filing with Industry Canada can take a number of months, subject to the governance process and policy of the organization.