

County of Carleton Law Association
**CCLA 16TH EAST REGION SOLICITORS
 CONFERENCE– Montebello
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**Ins and Outs of the *Canada
 Not-For-Profit Corporations Act***

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TOPICS FOR REVIEW

1. Context for Change
2. Overview of the CNCA
3. Soliciting and Non-Soliciting Corporations
4. Public Accountant and Financial Review
5. Continuance under the CNCA
6. A Few Observations

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1. THE CONTEXT FOR CHANGE

- *Canada Corporations Act*
 - Historically, not-for-profit corporations were incorporated by Special Act of Parliament until the *Companies Act Amending Act, 1917*
 - *Companies Act* became the *Canada Corporations Act* by Chapter 52 of the Statutes of Canada 1964-1965
 - Has remained largely unchanged with respect to not-for-profit corporations since 1917

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- CCA provisions skeletal, ill defined and out-dated
- Several attempts at legislative reform
 - Most recently:
 - Bill C-21, *Canada Not-for-Profit Corporations Act* died on the Order Paper November 29, 2005 when 38th Parliament dissolved
 - Same fate with both Bill C-62 and Bill C-4 in 2008

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- *Canada Not-For-Profit Corporations Act*
 - Received Royal Assent June 23, 2009
 - Modeled on the CBCA
 - Not yet proclaimed in force – current estimate January 2011 – June 2011
 - Draft regulations published by IC on February 6, 2009 but in process of revision to take into account changes made to CNCA prior to enactment

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2. OVERVIEW OF THE CNCA

- Simplified Process of Incorporation
 - Incorporation “as of right”
 - One incorporator (individual or corporation)
 - Numbered name permitted and same name clearance rules as CBCA
 - Articles of incorporation submitted along with notice of registered office and notice of directors
 - Results in certificate of incorporation

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- Sections 16 & 17 - Capacity and Powers
 - A corporation has the capacity and rights of a natural person
 - Concept of a corporation's activities being *ultra vires* now eliminated once and for all
 - CNCA does not require the passage of a by-law to confer any particular powers on the corporation or its directors

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- Content of Articles (s. 7(1))
 - Name of corporation
 - Province where registered office is situated
 - Classes or regional or other groups of members that the corporation can establish and if there are two or more classes, any voting rights
 - Number of directors (or minimum and maximum #)
 - Any restrictions on the activities (CRA may require for charities)
 - Statement of purpose
 - Dissolution clause

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- By-laws: Enactment/Amendment/Repeal
 - Effective upon passage by the board (unless an amendment providing for a fundamental change)
 - Must be confirmed by members at next meeting to remain in force
 - Members may also initiate amendment or repeal of by-laws
 - No Ministerial approval of by-laws though must file by-laws with IC within 12 months of membership approval (but failure to file does not affect validity)

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- Special resolution of members required for certain changes to by-laws, i.e.
 - Conditions of membership
 - Transfer of membership
 - Manner of giving notice to members
 - Changing any method of absentee voting

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- Directors – Number and Change
 - Minimum of 1 director (3 for a soliciting corporation at least 2 of whom are not officers or employees of the corporation or its affiliates) (s. 125)
 - Must file notice of change within 15 days of any change or of a change in a director's address (s. 134)

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- Directors Taking Office
 - Elected by members by ordinary resolution at an annual meeting for a term expiring within prescribed period of 4 years
 - May have staggered terms
 - Articles can provide for appointment of directors by board (up to 1/3 of those elected at previous AGM)

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• **Directors – Decision-Making**

- A resolution in writing signed by all directors entitled to vote or of a committee of directors is valid (s. 140)
- By-laws can provide for consensus decision making (s. 137)
- Telephonic or electronic meetings possible as long as all directors consent and the facility permits all participants to communicate adequately with each other (s. 136(7))
- No alternate directors (s. 126(3))

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• **Directors and Officers – Duties**

- CNCA - Every director and officer has a duty to:
 - Act honestly and in good faith with a view to the best interests of the corporation
 - Exercise the care, diligence and skill of a reasonably prudent person (s. 148)

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• **Due Diligence Defence - Directors and Officers**

- Not liable if exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
- Good faith reliance on financial statements and reports of professionals (ss. 149, 150)

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• **Members' Rights**

- Access to membership lists (s. 23)
- Right to submit proposals to amend by-laws or nominate directors or require any matter to be discussed at annual meetings (s. 152(6))
- Right to access corporate records (s. 22)
- May sign resolutions in writing (s. 166)
- Availability of unanimous members agreement (s. 170)

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• **Members' Remedies**

- Right to seek an oppression remedy against the corporation (s. 253)
- Right to seek a court order to commence a derivative action (s. 251)
- Compliance and restraining orders (s. 259)
- Court ordered wind-up and liquidation on application of a member (s. 224)

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• **Special Exemption for Religious Corporations**

- CNCA precludes a court from issuing an order for an oppression remedy, granting leave to bring a derivative action or an order for wind up and dissolution on application by a member where the court determines that:
 - The corporation is a religious corporation
 - The act or omission, conduct or exercise of powers is based on a tenet of faith held by the members of the corporation; and
 - It was reasonable to base the decision on a tenet of faith, having regard to the activities of the corporation (ss. 251(3), 253(3) and 224)

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- **Members' Meetings**
 - Regulations provides a variety of prescribed means of giving notice of members meetings and by-laws
 - Absentee voting – By-law can set out any prescribed method of absentee voting
 - May participate in members' meetings by electronic means (s. 159(4)(5))
 - By-laws can provide for consensus decision making
 - Right to requisition a meeting of members (s. 167)

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- **Fundamental Changes requiring special resolution of members:**
 - Certain amendments to articles and by-laws
 - Amalgamation (unless short form) (s. 204))
 - Continuance (import and export) from and to other jurisdictions possible (s. 211, 212)
 - Sale of all or substantially all of the assets of the corporation other than in ordinary course of business (s. 214)

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- All classes of members, even non-voting classes of members entitled to vote separately as a class on certain amendments to articles and by-laws, amalgamation, continuance and substantial sales.
- Results in a class veto for fundamental changes (limited opt-out available)

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- **Audit Committee (s. 194)**
 - Where a corporation has an audit committee, it must be comprised of not less than 3 directors, a majority of whom are not officers or employees of the Corporation or an affiliate
 - The audit committee shall review the financial statements before approval by board
 - Public accountant entitled to notice of and to attend audit committee meetings

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3. SOLICITING AND NON-SOLICITING CORPORATIONS

- Where a corporation receives in excess of the prescribed amount [\$10,000] in its last financial period from public sources specified in Section 2(5.1), it will become a soliciting corporation
- Status acquired on the prescribed date [AGM] for a prescribed duration [3 years]
- Low threshold means most charities and non-profits will be soliciting
- Non-soliciting – residual category

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- **Application to be Deemed Non-Soliciting**
 - S. 2(6) allows a corporation to apply to 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 not prejudicial to the public interest
 - Expected that will be available to corporations that experience an aberration in terms of annual revenue in a given year

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- **Implications of Being a Soliciting Corporation**
 - Must have a minimum of 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates (s. 125)
 - Required to file annual financial statements with the Director under s. 176(1) (Note: Application for exemption under s. 173 possible if the harm caused by the requirement outweighs the public interest)
 - Audit and public accountant rules more stringent

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- On liquidation, the articles must provide for the distribution of any remaining property on dissolution to one or more “qualified donees” within the meaning of subsection 248(1) of the *Income Tax Act* (Canada) (s. 235(1))
- The members of a soliciting corporation may not enter into a unanimous member agreement (s. 170(1))

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4. PUBLIC ACCOUNTANT AND FINANCIAL REVIEW

- **Section 179 - “Designated Corporation”:**
 - A soliciting corporation with gross annual revenues for its last completed financial year that are equal to or less than the prescribed amount of [\$50,000] or that is deemed to have such revenues under s. 190(a); and
 - A non-soliciting corporation with gross annual revenues for its last completed financial year that are equal to or less than the prescribed amount of [\$1 million]

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- **Appointment of Public Accountant**
 - **S. 182(1) Designated Corporations:** The members may unanimously resolve not to appoint a public accountant (soliciting [\$50,000] and under and non-soliciting equal to or less than [\$1 Million])
 - **S. 181 Non-Designated Corporations:** The members must appoint a public accountant

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- **Deemed Revenue (s. 190)**
 - **On application by a soliciting corporation, the Director may, if satisfied that doing so would not be prejudicial to the public interest, deem a corporation to have:**
 - (a) revenues that are equal to or less than the prescribed amount of [\$50,000]; or
 - (b) if not a designated corporation, revenues that are equal to or less than the prescribed amount of [\$1 million]

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Type of Corp/Gross Annual Revenues (GAR)		Requirements for Public Accountant (PA)	Review/Audit
SOLICITING corporation with GAR of	Less than \$50,000 ('designated corporation as per s.179(a))	A PA must be appointed annually (s.181) <i>or</i> members can waive appointment of PA but waiver must be done unanimously and done annually (s.182)	If PA is appointed, review engagement is required (s.188(1)) but members can vote by simple majority to require an audit instead (s.188(2))
	Between \$50,000 and \$250,000	PA must be appointed annually (s.181)	Audit is required (s.189(1)) but members can agree by 2/3 majority to have a review engagement instead (s.189(2))
	Over \$250,000	PA must be appointed annually (s.181)	Audit is required (s.189(2))

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Type of Corp/Gross Annual Revenues (GAR)		Requirements for Public Accountant (PA)	Review/Audit
Non-Soliciting corporation with GAR of	Less than \$1M (aka 'designated corporation as per s.179(a))	A PA must be appointed annually (s.181) <i>or</i> members can waive appointment of PA but waiver must be done unanimously and done annually (s.182)	If PA is appointed, review engagement is required (s.188(1)) but members can vote by simple majority to require an audit instead (s.188(2))
	Over \$1M	PA must be appointed annually (s.181)	Audit is required (s.189(1))

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<p>5. CONTINUING UNDER THE CNCA</p> <ul style="list-style-type: none"> • All existing CCA corporations will be required to continue under the new Act within 3 years of it coming into force (or face possibility of dissolution) (S. 297) • Content of articles of continuance similar to articles of incorporation under Section 7 • Can make amendments at same time as apply for continuance (S. 211(2))
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<p>(a) Effect of Continuance</p> <ul style="list-style-type: none"> – Articles and certificate of continuance deemed to be the articles and certificate of incorporation (S. 211(6)) – Members cease to be members of the “old corporation” and become members of the continued corporation (unless otherwise stated in articles)
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(b) Rights Preserved

- Property of the body corporate continues to be property of continued corporation
- Existing causes of action, claims or liability to prosecution unaffected
- Any action or proceeding pending by or against the body corporate may be continued against the corporation
- Any conviction or order in favour of or against the body corporate may be enforced

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(c) Timing of Continuance

- Corporations may wish to continue early or delay until the last possible moment depending on circumstances
- Some considerations:
 - Increased director protection
 - Enhanced rights/protections to members
 - By-laws or letters patent require amendment

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- Different levels of financial review and appointment of public accountant
- Contemplation of fundamental changes
- Availability of unanimous member agreement

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6. A FEW OBSERVATIONS

- Definition of soliciting corporation - 10K threshold too low?
- Directors must be elected - No provision for ex-officio directors
- Non-profits that are soliciting – predicament on dissolution
- Different approval requirements for by-laws may be difficult to administer

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- Impact of membership rights on broadly based membership organizations
- Non-voting members have right to vote to approve certain fundamental changes
- Filing of financial statements by soliciting corporations with Director and level of financial review imposes an increased burden on soliciting corporations

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- Amendment of objects on continuance – expected to trigger CRA review
- CRA to develop policy on requirements for charities continuing under the CNCA (current estimated number about 7600 federally incorporated charities)

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