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**OSGOODE HALL LAW SCHOOL**  
**CLE Program**  
Legal Risk Management for  
Charities and Not-for-Profit Organizations

**Toronto – October 5, 2011**

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**The Practical Impact of the *Canada Not-for-profit Corporations Act (CNCA)***

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**By Theresa L.M. Man**

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 BARRISTERS SOLICITORS TRADEMARK AGENTS	<b>OSGOODE HALL LAW SCHOOL</b> <b>CLE Program Law</b> Legal Risk Management for Charities and Not-for-Profit Organizations Toronto – October 5, 2011
<b>The Practical Impact of the Canada Not-for-profit Corporations Act ("CNCA")</b>  By <b>Theresa L.M. Man</b> © 2011 Carters Professional Corporation	
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<b>TOPICS FOR REVIEW</b>	
<ul style="list-style-type: none"><li>• Status of CNCA</li><li>• Key features of the CNCA</li><li>• Federal special act corporations</li><li>• Overview of the continuance process</li><li>• Preliminary steps and considerations</li><li>• Drafting the articles of continuance</li><li>• Drafting new by-laws</li><li>• Obtaining membership approval</li><li>• Other consequential filings and records updates</li></ul>	
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<b>A. STATUS OF THE CNCA</b>	
<ul style="list-style-type: none"><li>• On June 23, 2009, CNCA received Royal Assent, but not yet proclaimed in force</li><li>• Draft regulations were published by Corporations Canada on June 25, 2010, published in Canada Gazette on February 26, 2011</li><li>• Originally estimated that CNCA to come into force in mid-2011</li><li>• With the federal election in May 2011, the CNCA is anticipated to come into force in the fall of 2011</li><li>• Check Corporations Canada's website for update: <a href="http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/home">http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/home</a></li></ul>	
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**B. KEY FEATURES OF THE CNCA**

1. Understand the CNCA framework
  - Rules in the Act
  - Details in the Regulations
    - “prescribed”
    - “regulations”
  - Need to refer back and forth between the Act and the Regulations
  - Articles
  - By-laws
  - Unanimous member agreement

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2. Incorporation
  - As of right
  - Faster, online
  - Articles to set out statement of the purpose, any restrictions on the activities, and dissolution clause
  - Corporation has capacity, rights, powers and privileges of a natural person, ultra vires doctrine no longer applies
  - May carry on activities outside Canada to the extent that the laws of that jurisdiction permit

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3. Soliciting and non-soliciting corporations
  - Where a corporation receives more than the prescribed amount [\$10,000] in its last financial period from public sources [(a) public donations, (b) federal, provincial and municipal governments or (c) conduit entities], it will become a soliciting corporation
  - Status acquired on the prescribed date [next AGM] for a prescribed duration [3 years]
  - Status commences and ends at AGM because of its effect on composition of board
  - Low threshold means most corporations will become soliciting corporations

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- Implications of being a soliciting corporation
  - Must have a minimum of 3 directors, at least 2 directors must not be officers or employees of the corporation or its affiliates
    - No material effect on registered charities due to prohibition on directors receiving remuneration at common law
  - Must file annual financial statements with Corporations Canada
  - Audit and public accountant rules more stringent
  - On liquidation, the articles must provide for the distribution of any remaining property on dissolution to qualified donees
  - No unanimous member agreement

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4. Financial review

- CNCA divides corporations into two categories for purpose of determining obligation to appoint a public accountant and level of financial review
- Designated corporations
  - A soliciting corporation with gross annual revenues for its last completed financial year that are equal to or less than \$50,000 or that is deemed to have such revenues under the Act
  - A non-soliciting corporation with gross annual revenues for its last completed financial year that are equal to or less than \$1 million
- Non-designated corporations are soliciting and non-soliciting corporations with annual revenues in excess of these amounts

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Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Soliciting	Designated	\$50,000 or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	More than \$50,000 and up to \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit, but members can pass a special resolution to require a review engagement instead
	Non-Designated	more than \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Non-Soliciting	Designated	\$1 million or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	more than \$1 million	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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5. Election and appointment of directors
- Members must elect the directors by ordinary resolution at an annual meeting
  - Exceptions:
    - Vacancy in office of director - remaining directors may fill the vacancy as long as there is a quorum
    - Articles may permit directors to appoint additional directors between annual meetings
      - Number of appointed directors cannot exceed one third the number elected at the last AGM
  - A director not elected for an expressly stated term holds office until the close of the first AGM following his or her election
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6. Ex Officio directors
- CNCA does not permit having ex officio directors
  - Common for operating charities to have a representative sit on the board of its parallel foundation
  - Examples of possible “workarounds”
    - Establish in by-law a special membership class that permits the class to elect a director
    - Have articles provide for the appointment of a director by the board and have a board policy that certain office holders will be appointed as directors
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7. Directors – number, change and term

- 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)
- Articles must specify a fixed number of directors or a minimum and maximum number of directors
- Must file notice of change within 15 days of any change or of a change in a director's address
- Maximum length of term 4 years
- May have staggered terms

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8. Board meetings

- May be held at the time and place that the board chooses, subject to the by-laws and articles
- Quorum may be set out in the articles or the by-laws; if by-laws are silent, a quorum shall be a majority of the number of directors or minimum number of directors required by the articles
- Directors must receive notice of board meetings as provided for in the by-laws
- Unless the by-laws provide otherwise, directors may participate in board meetings by telephone or electronically, but must comply with regulations to be made under the CNCA in the future
- Written resolutions possible

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9. Duties – directors and officers

- Directors have duty to manage and supervise the activities and affairs of the corporation
- Both directors and officers have duties to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances
- Objective standard of care, replaced common law subjective standard of care
- Directors and officers also have duty to comply with the CNCA, the regulations, and the articles, by-laws, and any unanimous member agreement

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10. Due diligence defence – directors and officers

- Directors and officers will not be liable if they have exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on reports prepared by professionals
- Directors but not officers may also rely on the financial statements that are prepared by the corporation's public accountant

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11. Members

- A corporation must have members
- Can have one class of members in which case all are voting; or
- Two or more classes as long as articles give right to vote to at least one class
- The articles and by-laws may provide how membership may be issued
- Where more than one class, the members of each class have certain built in protections
- All classes of members, even non-voting classes of members, are entitled to vote separately as a class on certain amendments to articles and by-laws dealing with rights and classes of membership

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- Thus a class of members could reject a change - effectively resulting in a class veto (limited opt-out available)
- Corporations wanting maximum flexibility will have one class of members
- If corporation wants broad-based community support in its purposes, may enlist them in some capacity in the corporation, but do not refer to them as "members"
- Right to access corporate records
- Right to submit proposals to amend by-laws, nominate directors or require any matter to be discussed at annual meetings

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12. Members' meetings

- AGM must be held within 18 months after incorporation
- Thereafter, an AGM must be held within 15 months after the previous annual members' meeting but no later than 6 months after fiscal year
- Regulations provide a variety of prescribed means of giving notice of members' meetings
- By-law can set out any prescribed method of absentee voting (mail in ballot, electronic voting or proxy)
- May participate in and hold members' meetings by electronic means
- By-laws may permit consensus decision-making
- May requisition meeting of members
- Written resolutions possible

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13. Members' remedies

- Right to seek a court order to commence a derivative action
- Right to seek an oppression remedy against the corporation
- Compliance and restraining orders
- Court ordered wind-up and liquidation on application of a member

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14. Special exemption for religious corporations

- CNCA precludes the members' remedies, referred to above, 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

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15. Amalgamation, export and import

- Two or more corporations may amalgamate and continue as one corporation
- Federal corporations, once continued under the CNCA, will be able to amalgamate with one another
- Amalgamations between CNCA and ONCA corporations (as well as other jurisdictions) will also be possible
- Possible for a corporation from another jurisdiction to be imported and continue as a CNCA corporation
- Possible for a CNCA corporation to be exported and continued as a corporation under another jurisdiction

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16. By-laws

- No Ministerial approval of by-laws needed – by-laws are effective as soon as they are adopted according to the requirements of the CNCA
- By-laws must be filed with Corporations Canada within 12 months of their adoption
- CNCA provides two ways for corporations to amend their by-laws, depending on the subject matter of the changes

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- Default mechanism
  - Board may adopt by-laws
  - Effective upon passage by the board
  - Must be confirmed by members at next meeting to remain in force
- Special approval
  - For matters affecting members' rights, e.g., notice of members' meetings, membership transferability, amendments to membership conditions, absentee voting by members
  - Effective when confirmed by members by special resolution (no need for board approval)

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- By-laws drafted under the CNCA must be very clear about which amending formula applies to various provisions (or risk certain by-law provisions not being legally in force). Some options:
  - Have two by-laws with all by-law provisions requiring special resolution in a separate by-law
  - Have one by-law, and place all provisions requiring special resolution in one clearly marked section
  - Have one by-law, and clearly mark throughout by-law which provisions require special resolution to amend
  - Have one by-law, and provide in articles that all by-law amendments require a special resolution

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**C. FEDERAL SPECIAL ACT CORPORATIONS**

- Upon the CNCA coming into force, Part III of the CCA will be repealed and Part 19 of the CNCA will apply automatically to special act corporations
- No continuance process or any steps will need to be taken by special act corporations
- Special act corporations may continue under the CNCA
- After continuance, special act will cease to apply
- Continuance process is essentially the same as that for Part II CCA corporations

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**D. OVERVIEW OF CONTINUANCE PROCESS**

- Upon coming into force, the CNCA will not automatically apply to Part II CCA corporations – CCA still applies
- No mechanism under CCA for Part II corporations to continue under CNCA – must apply for certificate of continuance under the CNCA
- Upon issuance of certificate of continuance CCA will cease to apply to Part II CCA corporations
- Existing CCA corporations will be required to continue under the CNCA within 3 years of proclamation
- Failure to continue will result in dissolution of the corporation
- Can make amendments to existing articles, letters patent or memorandum or articles of association at the time of applying for continuance

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- Required steps
  - Review letters patent, supplementary letters patent and by-laws and consider essential issues
  - Contact CRA (if a registered charity) where there are proposed changes to the purpose(s) (optional step)
  - Prepare
    - Articles of continuance
    - Notice of initial registered office address and first board of directors
  - Prepare new by-laws
  - Get membership approval of the articles of continuance and new by-law
    - Articles must be approved by 2/3 vote

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- File required documents with Corporations Canada
  - Articles of continuance
  - Notice of initial registered office address and first board of directors
- Corporations Canada will issue a certificate of continuance
- File approved new by-laws within 12 months of adoption
- For registered charities – send certificate of continuance, articles of continuance and new by-laws to CRA
- Update other applicable filings or records

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**E. PRELIMINARY STEPS AND CONSIDERATIONS**

1. Gather and review current governance structure and procedure

- Collect governing documents
  - Letters patent, supplementary letters patent
  - All current by-laws, including amendments
    - Amending by-laws
    - Members and board resolutions?
    - Are by-laws valid? Were they previously filed with and approved by Corporations Canada?
  - Contact Corporations Canada to obtain copies

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- Collect other governance related documents, e.g., organizational charts, policies, manuals
- Review governing documents and consider
  - Do they reflect current governance structure? If not, what is current governance structure?
  - Are changes desired? What are they?
  - Are there new provisions to be inserted? What are they?
- 2. Review the key features of the CNCA
  - This understanding will help the corporation determine how its governance structure and the content of the articles of continuance and by-laws will be impacted

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- 3. Compare CNCA rules with current governance structure and practice
  - Are the current by-laws or the desired governance structure and process inconsistent with CNCA requirements?
  - If inconsistent with a CNCA mandatory requirement, how will the corporation adjust its governance structure and process in order to ensure compliance?
  - If inconsistent with a CNCA default requirement, is the preferred alternative mechanism permitted under the CNCA? Should the overriding provision be set out in the articles, by-laws or unanimous member agreement?

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- If different options are prescribed in the regulations, which one should the corporation choose? Should the preferred option be set out in the articles, by-laws or unanimous member agreement?
- Are there provisions that the corporation would like to include in its governing document and the CNCA is silent on those issues? If so, should the provisions be set out in the articles, by-laws or unanimous member agreement?

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- 4. Determine whether changes should be made prior to continuance
  - Changes to membership rights
    - Under CNCA - separate vote by class or group of members will be required if to change the rights attached to a class or group of members or for certain fundamental changes
    - Regardless of whether the membership class is a voting class or non-voting class.
    - Each class of members (including non-voting members) will have a de facto veto right

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- Some corporations may want to collapse classes into 1 voting class
- If change membership rights as part of the continuance, then articles of continuance and by-laws also require separate class vote
- Consider changing membership classes and rights by amending the by-laws under the CCA first, prior to continuance under the CNCA
  - The approval of articles of continuance and new-bylaw will require a separate class vote under the CNCA

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- Changes to corporate objects
  - Purposes of the corporation will need to be stated in the articles of continuance
  - May want to update them to reflect and align with current or future activities
  - If registered charities, either
    - Provide CRA with copies of SLP after continuance, but may need to apply for articles of amendments if CRA require changes
    - Submit a draft application for SLP to CRA for pre-approval before filing articles - ensure not exceed the 3-year time limit for continuance
  - May want to apply for SLP under CCA on parallel basis

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- 5. Timing of Continuance
  - Some corporations will want to continue right away, others may want to wait
  - Revising governance structure to be reflected in new by-law may need some time for directors and members to consider
  - Considerations
    - Length of time and complexity of process to revise the by-laws
    - Nature of changes in new by-laws – substantive vs administrative
    - Size of membership
    - Ex officio directors
    - Changes to membership structure
    - Changes to corporate objects

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**F. DRAFTING ARTICLES OF CONTINUANCE**

- Form 4031 – Articles of Continuance (transition)
- When preparing the articles of continuance, should prepare new by-laws at the same time because
  - Need to coordinate the provisions set out in articles and by-laws
  - Need to decide what default provisions in the CNCA to override and whether the overriding provision should be included in the articles or the by-laws; and
  - Even if CNCA requires certain provisions to be set out in the by-laws, it is possible to include them in the articles instead

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- Information that must be included in the articles of continuance:
  - Corporation's name
  - Province or territory where the registered office is situated
  - Minimum and maximum number of directors or a fixed number
  - Statement of purpose
  - Restrictions on activities, if any
  - The classes, or regional or other groups of members that the corporation is authorized to establish
  - Statement regarding distribution of property on dissolution
  - Any additional provisions that the corporation may want to include in the articles

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**G. DRAFTING INITIAL REGISTERED OFFICE ADDRESS AND FIRST BOARD OF DIRECTORS**

- Form 4002 - Initial Registered Office Address and First Board of Directors
- Simple form
- The number of directors listed should be within the range of directors set out in the articles or match the fixed number in the articles
- Municipality and street address of registered office
- Name and residential address of first directors

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**H. DRAFTING BY-LAWS**

1. General issues

- By-laws will need to be replaced or substantially revised
- CCA contained very few rules so lengthy and detailed by-laws were necessary
- It is possible to file new by-laws with Corporations Canada with the continuance package
- If new-bylaws are not filed with the continuance package, they must be filed with Corporations Canada within 12 months of their adoption

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2. Mandatory provisions

- Two mandatory provisions
- Conditions of membership
  - By-laws must set out the conditions required to be admitted into membership, including whether a corporation or other entity may be a member
  - If more than 1 class of members, by-laws must set out
    - Conditions for membership in each class
    - How to withdraw from a class or transfer membership to another class and any conditions of transfer
    - Conditions on which membership in a class ends

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- Notice of meeting of members
  - By-laws must set out the manner in which notice of meeting of members is to be given as prescribed in the regulations
  - Four options are prescribed in the regulations
  - May choose one or more of the options
- May include these provisions in the articles instead

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3. Other by-law provisions

- Provisions to override default rules, some of them:
  - Must be in the by-laws (may be included in articles)
  - May be in the articles or the by-laws
  - May be in the articles or by-laws or unanimous member agreement
- When drafting by-laws, must ensure the by-laws is the appropriate document to include the desired overriding provisions
- When drafting overriding provisions, ensure these mechanisms are in compliance with the CNCA

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- Other provisions in the CNCA that provide certain requirements if the corporation was to adopt certain mechanisms – may set them out in the by-laws
- Examples:
  - Audit committee
  - Consensus decision-making by members
  - Discipline of members

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- Can include provisions on issues that the CNCA is silent, provided that the provisions included do not contravene the CNCA and its regulations – examples:
  - Dispute resolution mechanisms to resolve disputes between members
  - Stewardship provisions dealing with charitable property of the corporation (where it is a registered charity)
  - Statement of faith subscribed to by a faith-based corporation
- These provisions may be set out in the policies or the by-laws of the corporation

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4. Detailed by-laws or simple by-laws

- Minimalist approach
  - CNCA contains detailed rules, so by-laws do not require the same level of details
  - By-laws not duplicate mandatory rules or default rules that are not to be overridden
  - By-laws to set out provisions:
    - Mandatory provisions
    - Override the default rules in the CNCA
    - Utilize optional rules in the regulations
    - Important governance procedures
  - Governance policy manual to address issues that do not need to be included in by-laws
  - The minimalist approach will be reflected in model by-laws prepared by Corporations Canada

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- Advantages
  - Simple by-laws
  - No risk of amending by-laws to remove CNCA requirements or violate CNCA requirements
- Disadvantages
  - Have to work with 4 or 5 documents back and forth: CNCA, regulations, articles, by-laws, governance policy manual (and unanimous member agreement in relation to non-soliciting corporation)
  - Need to know where to look for what and which provisions take precedence if conflict (see example in paper)
  - May still risk amending by-law provisions that cannot be amended, need to seek legal advice
  - Policy manual does not simplify the process
- May work for large organizations, not small volunteer organizations

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- Comprehensive approach
  - The by-laws is the main document for all governance rules of the corporation where possible
  - Detailed by-laws will be a consolidation of mandatory rules, default rules that have not been overridden, overriding provisions, etc.
  - Will still need to work with articles, but limited provisions in the articles
  - Can have governance policy manuals to address other matters, e.g., committee structures (but not audit committee)
  - Helpful tool

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- Advantages
  - One go to place for essential governance procedures
  - Less documents to work with - articles, by-laws, policy manual and unanimous member agreement
- Disadvantages
  - More upfront cost and time to prepare by-laws
  - By-laws to clearly identify which provisions can be amended and which ones cannot and seek legal advice before amending by-laws

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**I. OBTAINING MEMBERSHIP APPROVAL AND FILING APPLICATION OF CONTINUANCE**

- Need special resolution to approve articles of continuance
- May require separate class vote of the articles and by-laws if certain membership rights are amended
- Once approved, file articles of continuance and notice of initial registered office and first board of directors with Corporations Canada
- May file approved by-laws at the same time, or file them later within 12 months

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**J. OTHER CONSEQUENTIAL FILINGS AND RECORDS UPDATES**

1. Canada Revenue Agency

- Registered charities have to file certificate of continuance, articles of continuance and new by-laws with CRA
- If purposes have been changed as part of the continuance process, the corporation may obtain pre-approval from CRA for new purposes before filing articles of continuance
- If no pre-approval is obtained, then CRA may require that the governing documents be revised if they do not meet CRA's requirements – need to apply for articles of amendment

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2. Provincial and territorial filings

- May need to update provincial or territorial registrations
- e.g., corporate registrations, business name registrations, fund-raising registrations, etc.
- Ontario charities – need to provide Public Guardian and Trustee with certificate of continuance and articles of continuance, but not new by-laws

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3. Other filings

- May be required to provide continuance documents with third parties, e.g.,
  - Funding organization
  - umbrella organization

4. Updating corporate records and procedures

- Corporate minute book
- Other documents, e.g., corporate governance policies, manuals, etc.
- Staff and volunteers will need to be trained and become familiar with the new governance documents

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**K. LAST BUT NOT LEAST**

- Corporations Canada will have continuance tools available, e.g., model by-laws, continuance guide, guide on operating under the CNCA after continuance
- CRA will release guidance for registered charities
- Prepare early
- Have someone or a committee be responsible for the process
- Have the board engaged early on
- Seek legal help, conduct legal review, prepare draft by-laws

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BARRISTERS  
SOLICITORS  
TRADEMARK AGENTS

## Disclaimer

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