
**THE 2009 ANNUAL
CHURCH & CHARITY LAW™ SEMINAR**

Toronto – November 10, 2009

**The Ins and Outs of the *Canada
Not-for-Profit Corporations Act***

By Jane Burke-Robertson

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OVERVIEW OF TOPICS

- Context for Change
- Highlights of the CNCA
- Implications of being a “Soliciting Corporation”
- A Few Observations
- Applying to Continue under the CNCA

1. THE CONTEXT FOR CHANGE

(a) *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

– 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**

4

Change long over-due:

- **CCA provisions skeletal, ill defined and out-dated**
- **Limited number of corporate actions available**
- **Reliance on IC policy to fill in legislative gaps**
- **Cumbersome process for change (SLP & by-laws)**

5

(b) *Canada Not-For-Profit Corporations Act*

- **Introduced on January 28, 2009**
- **Went through second and third reading and received Royal Assent June 23, 2009**
- **Modeled on the CBCA**
- **Not yet proclaimed in force – current estimate June 2010 – June 2011**
- **Draft regulations still undergoing amendment**

6

2. HIGHLIGHTS OF THE CNCA

(a) Simplified Process of Incorporation

- Incorporation “as of right”
- One incorporator (individual or corporation)
- Numbered name permitted
- Faster and more efficient
- By-laws not to accompany articles

7

(b) By-laws

- No Ministerial approval
- Must file by-laws with IC (within 12 months of membership approval)
- By-laws may be simplified due to comprehensive statutory framework
- Members may make proposals for by-law amendments (s.152(6))

8

- By-laws, amendment or repeal effective upon passage by directors (unless an amendment providing for a fundamental change)
- Directors must submit the by-law, amendment or repeal to the members at the next members meeting
- Membership approval is by ordinary resolution unless a fundamental change (2/3 vote of members)

9

(c) 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 by the Act
- The Act does not require the passage of a by-law to confer any particular powers on the corporation or its directors

10

(d) 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)
- Currently no requirement to notify IC re. change in directors other than in annual summary
- CNCA corporations must file notice of change within 15 days of any change or of a change in a director's address (S. 134)

11

(e) Directors – Decision-Making

- A resolution in writing signed by all directors entitled to vote or of a committee of directors is valid (S. 140)
- Consensus decision making permitted (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))

12

(f) Directors and Officers – Duties

- CCA contains no standard of care as a result common law subjective standard applies
- 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)

13

(g) 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 (S. 149, 150)

14

(h) Religious Corporations

- CNCA precludes a court from issuing an order under the oppression remedy or derivative action where the court determines that:
 - The corporation is a religious corporation
 - The decision of the directors 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 (s. 251 and 253)

15

(i) Membership Rights Enhanced

- Access to membership lists (S. 23)
- Right to seek an oppression remedy against the corporation (S. 253)
- Right to seek a court order to commence a derivative action (S. 251)
- Right to submit proposals to amend by-laws or nominate directors or require any matter to be discussed at annual meetings (S. 152(6))

16

- Right to access corporate records (S. 22)
- May participate in members' meetings by electronic means (S. 159(4)(5))
- May sign resolutions in writing (S. 166)
- Right to requisition a meeting of members (S. 167)
- Availability of unanimous members agreement (S. 170)

17

(j) More Corporate Actions Possible

- Under CCA - little authority for fundamental changes (only SLP)
- Amalgamation of federal not-for-profit corporations possible (S. 204))
- Continuance (import and export) from and to other jurisdictions possible (S. 211, 212)

18

(k) Financial Review

- Graduated levels of financial review depending on a corporation’s category and gross annual revenue

19

3. SOLICITING CORPORATION

A corporation becomes a soliciting corporation for a “prescribed duration” from the “prescribed date” if it has received during the “prescribed period” income in excess of the “prescribed amount”:

Category A:

- In the form of donations or gifts or other property requested from the general public (“insiders” are not included)

20

Insiders are:

- A member, director, officer or employee of the corporation including a child, parent, brother, sister, grandparent, uncle, aunt, nephew or niece of such a person; and
- A spouse of a member, director, officer or employee (includes someone cohabiting in a conjugal relationship for at least one year) including a child, parent, brother, sister, grandparent, uncle, aunt, nephew or niece of the spouse

21

Category B:

- In the form of grants or similar financial assistance from the federal government, provincial or municipal government, or an agency of such a government; or

Category C:

- In the form of donations or gifts or other property from a corporation or other entity that has received income in excess of the “prescribed amount” in one of the forms referred to in categories A and B

22

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

23

Implications of Being a Soliciting Corporation

(a) Number of Directors

- 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)

24

(b) Filing of Financial Statements

- A soliciting corporation to provide annual financial statements to the Director (S. 176(1))

(c) Unanimous Member Agreement

- The members of a soliciting corporation may not enter into a unanimous member agreement (S. 170(1))

25

(d) Liquidation and Dissolution

- On dissolution, the remaining property of a soliciting corporation is required to be distributed to one or more “qualified donees” within the meaning of subsection 248(1) of the *Income Tax Act* (Canada) (S. 235(1))

26

- **Other corporations caught by this requirement:**
 - Registered charities
 - A corporation that has within the last 5 years requested donations from the public or received grants from government, or accepted money from a corporation that has made such requests or received such grants

27

(e) Public Accountant & 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 (Draft Regs:\$50,000) or that is deemed to have such revenues under paragraph 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 (Draft Regs: \$1 million)

28

Appointment of Public Accountant

- **Designated Corporations:** The members of a designated corporation may unanimously resolve not to appoint a public accountant (S. 182(1))
- **Non-Designated Corporations:** Must appoint a public accountant (S. 181)

29

Level of Review and Public Accountant

Type of Corp.	Gross Annual Revenue*	May Dispense with Public Accountant	Review Engagement	Audit
Designated Soliciting	Equal to or less than \$50K	Yes - with approval of all members	Default review	If required by members (ordinary resolution)
Designated Non-soliciting	Equal to or less than \$1M	Yes - with approval of all members	Default review	If required by members (ordinary resolution)
Non-Designated	Over the above amounts	No	No	Mandatory
Exception: Non-Designated Soliciting	Equal to or less than \$250,000	No	If required by members (special resolution)	Default review

* Amounts based on draft regulations under CNCA

30

4. A FEW OBSERVATIONS

- **Definition of soliciting corporation - a “trap for the unwary”?**
- **Directors must be elected - No provision for ex-officio directors**
- **Different approval requirements for by-laws may be difficult to administer**

31

- **Non-voting members have right to vote to approve certain fundamental changes - time to re-think non-voting by-law categories**
- **Financial statements of soliciting corporations to Director**

32

5. CONTINUING UNDER THE NEW STATUTE

- **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 that of articles of incorporation under Section 7**
- **Can make amendments at same time as apply for continuance (S. 211(2))**

33

(a) Effect of Continuance

- 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

34

(b) Rights Preserved

- Property of the body corporate continues to be property of continued corporation (S. 211(8))
- 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

35

(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

36

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

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