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# **20<sup>TH</sup> ANNUAL CHURCH AND CHARITY LAW SEMINAR**

**Mississauga – November 14, 2013**

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## **Unique CNCA Issues for Churches and Charities**

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**THE 20<sup>TH</sup> ANNUAL  
CHURCH & CHARITY LAW<sup>TM</sup> SEMINAR**  
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**OVERVIEW**

- Status and Overview of CNCA
- Basic Framework of CNCA
- Review of Unique CNCA Issues
  - Identification of Potential Problems
  - Explanation of CNCA Requirements
  - Review of Practical "Work Arounds"

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**A. STATUS AND OVERVIEW OF THE CNCA**

- *Canada Corporations Act* (CCA) not updated since 1917
- New *Canada Not-For-Profit Corporations Act* (CNCA) enacted on June 23, 2009
- Proclaimed in force on October 17, 2011
- Replaced Part II of CCA
- As of October 31, 2013, only 2,100 of approximately 17,000 federal corporations in existence had continued
- Approximately 15,000 corporations still need to continue

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## B. OVERVIEW OF CNCA CONTINUANCE

- New CNCA rules do not automatically apply to CCA corporations
- Deadline of October 17, 2014 to continue or face possible dissolution
- Need to prepare new corporate documents - Articles and By-laws ("GOB")
- Need board and membership approval (at least 2/3<sup>rd</sup> for Articles/check current corporate documents for possible higher approval)

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- File required documents with Industry Canada, no fee
- IC will issue Certificate of Continuance
- Need to file approved GOB within 12 months of adoption
- Charities - Send Certificate, Articles and GOB to CRA and PGT (if in Ontario)
- If do not continue by October 17, 2014, IC to send out Notices of Intention to dissolve and will have 120 days after date of notice to continue
  - Note: Must have up-to-date information for your corporation in the IC database or you will not receive this notice

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## RESOURCES

- Corporations Canada's website  
[http://strategis.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h\\_cs03925.html](http://strategis.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs03925.html)
  - Transition Guide
  - How to operate under the CNCA
  - Model by-law and by-law builder
- Paper by Theresa Man "Working With The Canada Not-for-profit Corporations Act: Incorporation And Continuance" April 8, 2013  
<http://www.carters.ca/pub/article/charity/2013/tlm0408.pdf>
- *Charity Law Bulletins* on "Countdown to the Canada Not-For-Profit Corporations Act - Practice Tips" 1 to 9, Bulletin Nos. 191, 193, 199, 213, 215, 220, 231, 239, 247

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## C. BASIC FRAMEWORK OF THE CNCA

- The CNCA is conceptually structured on a business corporate model which gives enhanced rights of members
- Necessary to know the rules in the Act
- CNCA - lots of details in the regulations with reference to "prescribed"
- Need to refer back and forth between the CNCA and the regulations
- Articles - similar to birth certificate
- By-laws - operating structure



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- CNCA provides both a general framework and a set of rules for corporations to operate
- Three types of rules in CNCA
  - Mandatory Rules - Cannot be overridden by the articles or by-laws
  - Default Rules - By-laws or articles can override
  - Alternate Rules - Articles/by-laws can include certain optional rules provided in the Act



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## D. DRAFTING NEW BY-LAWS

- By-laws will need to be replaced or substantially revised because the old and new rules are very different
- Minimalist approach by-laws
  - Rationale: CNCA & ONCA and regulations contains detailed rules, so by-laws not to duplicate mandatory rules or default rules that are not to be overridden
- Comprehensive approach by-laws
  - One stop approach - consolidation of all applicable rules
  - No need to flip back and forth between articles, but limited provisions in the articles
  - Can have governance policy manuals to address other matters, e.g., committee structures (but not audit committee)



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**E. REVIEW OF UNIQUE ISSUES – ARTICLES OF CONTINUANCE**

- 1. Objects**
  - Now called purposes
  - Review and consider updating
- 2. Statement of Faith**
  - Review and determine if it needs updating
  - Add one into the Articles if not already there
  - If not added in, at least include reference to it in purposes to ensure exemption from HR Codes and Marriage Act for certain discriminatory practices

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- 3. Rights of Members**
  - If voting is not one member, one vote, then need “weighted voting” provision
- 4. Board to Appoint Directors**
  - If want this option, need to include provision in Articles
- 5. Amendment of Corporate Documents**
  - Need provision if members’ approval of amendments of Articles more than 2/3rds
  - Need provision if members’ approval of GOB amendments more than majority

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**F. REVIEW OF UNIQUE ISSUES – BY-LAWS**

- 1. Membership Classes**
  - Potential Problem:
    - Most churches have single membership class
    - However, other possible classes may exist, e.g. members without right to vote (i.e. those under 18), adherents, suspended members, etc.
  - CNCA Requirements:
    - If there is one class, all members in the class must have same rights, including right to vote
    - If more than one class of members, then all members (including non-voting) have automatic rights, including right to vote as separate class on changes to members’ rights and other fundamental matters

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- Possible Workarounds:
  - Permit all members (including those under 18) to vote or limit membership (and voting) to those 18 or older
  - Stop any references to adherents as non-voting members and instead treat as stand-alone group separate and distinct from members
  - Change concept of “inactive member” (suggesting possible separate class) to “suspension” of membership (being a change in status only)

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## 2. Discipline and Termination of Members

- Potential Problem:
  - Many churches have discipline process which can lead to member's termination, but process may not be set out in corporate documents
  - May be good time to revisit this process to ensure natural justice and legal compliance (e.g. privacy) and/or to streamline steps involved

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- CNCA Requirements:
  - Default rules to terminate membership and members' rights unless set out in articles or by-laws
  - Gives power, through the board, members or a committee, to discipline or terminate members, but details must be set out in articles or by-laws
- Possible Workarounds:
  - Include entire discipline process in the articles, by-laws or separate policy statement cross-referenced in the by-laws
  - Review the details of the process itself to determine if it still “works” for your Church and whether amendments required, i.e. which group carries out discipline, limiting members' involvement etc.

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### 3. Meetings of Members – Annual Meeting vs. Special Election Meeting/Timing

- Potential Problem:
  - Many churches have two regular meetings of members each year: one to deal with financial matters and appoint nominating committee; and the other to elect members to various positions, including the governing board
  - These meetings often take place at opposite ends of the year depending on fiscal year end and start date of programming year, e.g. May/June and October/November

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- CNCA Requirements:
  - Requires the following business to be done at the annual meeting of members: consideration of the financial statements, public accountant's report, election of directors and appointment of the public accountant
  - Requires the annual meeting of members to be held within six months of fiscal year end

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- Possible Workarounds:
  - Need to rearrange business to be done at the two meetings so that all CNCA mandated business is done at one meeting and that meeting is called the "annual meeting of members" in the by-laws
  - Need to ensure that this annual meeting takes place within six months of year end, but if not possible, need to consider changing fiscal year end, seeking exemption from Industry Canada or possibly adjourning the annual meeting to conduct all required business

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#### 4. Meetings of Members – Other Issues

- Calling of Special Meetings
  - By the board or by minimum of 5 percent of members
  - Can lower the 5 percent number but not raise it
- Notice of Meetings
  - Most churches give two weeks' notice via weekly bulletin and the pulpit
  - CNCA has 4 different methods for notice
  - More appropriate method for churches is likely posting, 30 days before meeting, a notice on Church bulletin board frequented by members
  - Provided this is done, then the existing notice provisions for meetings could still continue
  - Notice to be given to directors and public accountant

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- Quorum
  - Default is majority of members if by-laws silent
  - Can set own number if included in by-laws
  - Can set different quorum requirements for various meetings or decisions, as well as structure quorum to be a percentage of total membership versus those in attendance
- Proxies
  - Optional under CNCA
  - However, if give right to vote by proxy, then cannot limit proxy holder to a member
  - Instead, consider detailed qualification requirements for proxy holders to effectively limit proxy holders to existing members

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- Proposals
  - CNCA provides each member with right to make proposal of any matter to be raised at meeting of members
  - A proposal for nomination of directors can also be submitted if signed by at least 5 percent of members
  - This is mandatory rule so it is applicable even if not set out in the by-laws
  - This may be something the church may not want to call attention to this mechanism

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- Participation at Meetings
  - The CNCA has default rule requiring members to be able to participate in meetings electronically unless the by-laws specifically prohibit the same
  - Churches may wish to add this prohibition to their by-laws
- Voting by Mail-in Ballot or Electronically
  - The CNCA allows by-laws to set out any prescribed form of absentee voting (mail-in ballot, electronic voting or proxy)
  - However, if this is done, then by-laws must set out the procedures for collecting, counting and reporting the results

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## G. Board of Directors – Composition

- Potential Problem: Many churches have boards of directors composed, in whole or in part, of individuals who are not directly elected by the members, but rather are directors ex officio, i.e. by virtue of holding another office in the Church
- CNCA Requirements: Ex officio directors are not permitted

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- Possible Workarounds:
  - Elect individuals directly to the board of directors, but impose additional qualification requirements on those individuals who are to be elected or hold other positions in the Church at the same time as being elected as a director, e.g. officer-directors
  - Once elected as an officer-director by the members, the person will be appointed to corresponding other position following the meeting

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## H. Board of Directors - Election of Director/Term/Consent

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- Potential Problem: Some churches set higher approval requirements to elect directors to the board, e.g. two-thirds and higher
  - While not common, some churches have lengthy terms of office for directors
- CNCA Requirements: Directors to be elected by majority vote only (ordinary resolution) of members
  - Term of office cannot exceed four years, although re-election possible and no maximum term
  - Staggered terms for directors also possible
  - CNCA now also requires directors to be present when elected or sign consent after meeting
- Possible Workarounds: Need to adjust by-law provisions to reflect CNCA requirements

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## I. Board of Directors – Removal of Directors

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- Potential Problem: Many churches have provisions to remove directors for various reasons, including immoral conduct, and in various ways, e.g. by the board, by the members, or both, with varying levels of approval
- CNCA Requirements: Members have right to remove any director by a majority vote only
  - This is a mandatory rule and the percentage cannot be increased in the by-laws
  - The only other way by which a director can be removed is his/her death or being disqualified under the Act (under 18, bankrupt or declared incapable)

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- Workaround: The grounds to remove a director will need to be adjusted in the by-laws to reflect only those set out in the CNCA
  - This means that the board cannot on its own remove a director for immoral conduct, etc. or any other "subjective" criteria
  - Only exception may be inclusion of additional "objective" grounds, e.g. missing a number of meetings without good reason, etc.

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## J. Board of Directors Meetings – New Provisions in the CNCA

- Notice – Regularly scheduled meetings are permissible, but where a board meeting is to deal with the matters in section 138 of the CNCA (some listed below), special notice is to be provided:
  - Any question requiring members' approval
  - Approving financial statements
  - Adopting, amending or repealing by-laws
- No alternate directors permitted

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- New dissent provisions - If not in agreement with any board resolution or action taken, a director must dissent at the meeting or, if not at the meeting, place a dissent in the minutes of the meeting or send it in writing to the registered office, failing which he/she will be deemed to have agreed to the resolution or action
- Written resolutions in lieu of meeting now permitted
- Revised disclosure of interest provisions

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## K. Officers

- Potential Problem: Some churches have officer positions which are exclusively filled by directors
- CNCA Requirements: At least two officer positions must be filled by non-directors
- Possible Workarounds: Adjust qualifications to have certain officer positions filled by non-directors, e.g. secretary and treasurer perhaps
- Alternatively, add in new officer positions which are held by church employees, e.g. the Pastor as President or CEO, or other church members, e.g. assistant treasurer

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## L. Committees

- Where a church has either an executive committee or an audit committee (or has another committee responsible for audit functions), then there are mandatory CNCA provisions to be aware of and include in these committee provisions
- While not a CNCA issue, churches often have extensive committee provisions in their by-laws
- It is becoming more standard for churches to move these provisions out of the by-law and into a separate policy

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## M. Amendment of Corporate Documents

- Under CNCA, need special resolution (2/3rds) of members to approve articles of amendment
- This approval level could be increased, e.g. 75 percent or higher, if it is also set out in the Articles
- Also consider increasing quorum requirements and notice requirements for any meeting at which amendments to the Articles are presented

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- Re by-laws, CNCA requires ordinary resolution (majority vote) of members to approve certain by-law provisions and a special resolution (2/3rds) for others, e.g. changes to member classes
- Given this, general approach being taken by many churches is to require special resolution (or even higher) for all by-law amendments, which will need to be set out in the Articles
- Increasing quorum and notice requirements also possible

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**N. Other By-law Provisions to Consider (non-CNCA related)**

- Policy Statements
  - Some churches considering dividing policy statements between those dealing with board and operational matters ("Board Policies") and those dealing with by-law and spiritual matters ("By-law Policies")
  - Board Policies to be approved by board alone and By-law Policies to be approved by the board and members, although other variations possible

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- Pastor/Associate Pastors
  - Some churches considering amendments to by-law provisions for ministry staff, e.g. raising or lowering approvals required to hire or remove pastors, revising removal process to allow board alone to remove a pastor given legal implications
  - Also need to ensure that the pastor is not a director as this is offside of prohibition on director remuneration
  - However, the pastor could be given other rights in the by-laws, e.g. attend, participate in and even chair board meetings, be an officer, etc.

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- Staff
  - Should revisit where by-laws impose requirements on church staff that are potentially offside of human rights legislation
  - Can only impose requirement to be a practicing Christian and be subject to church lifestyle/conduct policies if staff member is involved in religious ministries
  - The imposition of such requirements on non-ministry staff is potentially problematic

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**O. NEXT STEPS**

**1. Collect Governing Documents**

- Letters patent, supplementary letters patent
  - Locate all copies
  - Amendments made by board or members resolutions alone not valid, must have SLP issued
  - CCA corporations - can contact Industry Canada to obtain copies
- All current by-laws, including amendments, corporate minutes
- Other governance related documents: organizational charts, policies, manuals

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**2. Review Governing Documents and Consider**

- Do they reflect current governance structure? If not, what is current governance structure?
- Do they reflect current governance process? If not, what is current governance process?
- Are changes desired? What are they?
- Are there new provisions to be inserted? What are they?
- Write them down
- Come up with a wish list



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**3. Study the Key Features of the CNCA and Consider**

- Are your current by-laws or desired governance structure and process inconsistent with CNCA statutory requirements?
- If inconsistent with statutory mandatory requirement, must comply with them
- If inconsistent with CNCA default requirements, is the preferred option permitted under the CNCA? Should the option be set out in the articles or by-laws?
- If CNCA optional requirements provided, may choose one of the permissible options - Should the option be set out in the articles or by-laws?

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#### 4. START THE PROCESS ASAP

- Set up a committee to be responsible for the process
- Get the board engaged
- Seek legal help, conduct legal review
- Start drafting process
- Be mindful of deadlines
  - October 17, 2014 - Filing deadline
  - Need time for multiple drafts, as well both board and membership approval of final CNCA documents

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