

COUNTDOWN TO THE CANADA NOT-FOR-PROFIT CORPORATIONS ACT - PRACTICE TIP #1: TO BE OR NOT TO BE A SOLICITING CORPORATION

*By Jane Burke-Robertson **

This is the first in a series of monthly practice tips for existing federal not-for-profit corporations that will be continuing or those interested in incorporating under the new *Canada Not-for-profit Corporations Act*¹ (the “Act” or the “CNCA”) when it is proclaimed in force, sometime in 2010 or 2011.

The CNCA differentiates between two main types of NFP corporations, namely soliciting and non-soliciting corporations. Non-soliciting corporations are a residual category so that if a corporation does not meet the definition of a soliciting corporation, then it is considered a non-soliciting corporation. The definition of “soliciting corporation” under the Act is based on whether a corporation received in excess of \$10,000 in public money during its last financial year², directly or indirectly, from (a) public donors; (b) governments or government agencies (whether federal, provincial or municipal); and (c) other entities that have themselves received in excess of \$10,000 in the previous financial year from public donors or from government. It should be noted that under category (a), the donations or gifts that are to be included in the computation must have been “requested” by the corporation and do not include donations or gifts from any donor who is

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¹ S.C. 2009, c. 23

² The prescribed amounts and prescribed time periods referred to in the definition of “soliciting corporation” are based on the draft regulations released for public consultation on February 6, 2009. It is suggested that readers consult Industry Canada’s website at www.ic.gc.ca to determine the status of any revised regulations.

- (a) a member, director, officer or employee of the corporation including a child, parent, brother, sister, grandparent, uncle, aunt, nephew or niece of such person; and
- (b) a spouse of a member, director, officer or employee (including 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.

With regard to the funding source described above in category (c), it is important to note that the definition places the onus on the corporation to inquire from other entities whether *those* entities have requested funds from the public or received money from government in the last financial year and if so, in what amount.

The test for determining whether a corporation is a soliciting corporation is applied on the last day of its financial year-end but the corporation becomes a soliciting corporation as of the date of the next following annual meeting of members. Once a corporation is determined to be a soliciting corporation, it remains a soliciting corporation until the third annual meeting of members following the annual meeting at which it became a soliciting corporation. However, if a corporation receives in excess of \$10,000 from public donors or government or from other corporations or other entities described above during the three (3) year period that it is a soliciting corporation, the three (3) year time period re-commences.³

The implications under the CNCA of being a soliciting corporation are as follows:

- *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. A non-soliciting corporation may have 1 director.
- *Financial reporting requirements:* A soliciting corporation must provide annual financial statements to the Director under the Act. A non-soliciting corporation is not required to make this filing.
- *Distribution of assets on 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 the subsection 248(1) of the *Income Tax Act* (Canada).

³ Background Paper for Bill C-4: An Act respecting not-for-profit corporations and certain other corporations, published by Industry Canada.

- *Unanimous member agreement:* The members of soliciting corporation may not enter into a unanimous member agreement.

It should be noted that Subsection 2(6) of the CNCA allows a corporation to apply to the Director under the Act 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 it is not prejudicial to the public interest.

From a practical perspective, since the financial threshold of \$10,000 is so low, the definition of “soliciting corporation” will capture most NFP’s that are registered charities as well as NFP’s that are in receipt of government contributions or grants. The prudent course of action for corporations that may move from one category to another or for those that wish to avoid having to make the determination altogether, is to draft the articles and by-laws as though the corporation is a soliciting corporation and to otherwise comply with the requirements of the Act (described above) for soliciting corporations.

Next month Practice Tip #2 will discuss some important considerations in continuing under the CNCA.