

**COUNTDOWN TO THE
CANADA NOT-FOR-PROFIT CORPORATIONS ACT
PRACTICE TIP #2: CONTINUANCE OF
CCA PART II CORPORATIONS**

*By Jane Burke-Robertson**

Once the *Canada Not-For-Profit Corporations Act* (the “CNCA”) comes into force, corporations incorporated under Part II of the *Canada Corporations Act* (the “CCA”) will have a period of three years within which to comply with the new Act by applying for a certificate of continuance under s. 211 of the CNCA. If a corporation fails to apply for continuance within the three-year time period, s. 297(5) allows the Director to dissolve the corporation.

The CCA does not provide for export continuance of Part II corporations which means that there is no corporate authority for directors or members to approve an application for a certificate of continuance. Subsection 212(3) of the CNCA applies in this instance and provides that the members who are entitled to vote at a meeting of members may authorize the directors to apply under s. 211 for a certificate of continuance and may by the same resolution, make amendments to the letters patent of the corporation that are permitted under the CNCA. Of particular note, s. 212(4) provides that the members may not make any amendment that affects a particular class of members as provided in s. 199 unless the members of that class approve the amendment by way of a separate class vote (whether or not the membership class has the right to vote). Subsection 212(7) allows the board of directors of a CCA corporation to apply for a certificate of

* Jane Burke-Robertson, B.Soc.Sci., LL.B., is a partner of Carters Professional Corporation and practices charity and not-for-profit law in Carters’ Ottawa office.

continuance without a special resolution of members as long as the articles do not make any amendments to the charter of the corporation other than those required to conform with the CNCA.

Once a continuance under the CNCA has been properly authorized, the corporation will need to prepare articles of continuance. The articles are required to set out the following information:

- (a) the name of the corporation;
- (b) the province where the registered office is to be situated;
- (c) the classes, or regional or other groups, of members that the corporation is authorized to establish and, if there are two or more classes or groups, any voting rights attaching to those classes or groups;
- (d) the number of directors or the minimum and maximum number of directors;
- (e) any restriction on the activities that the corporation may carry on;
- (f) a statement of the purpose of the corporation; and
- (g) a statement concerning the distribution of property remaining on liquidation.

As discussed above, corporations filing for articles of continuance may wish to take advantage of the opportunity to make needed corporate changes. In this regard, s. 211(2) of the new Act allows corporations to make any amendments that a corporation incorporated under the new Act can make to its articles at the same time as applying for continuance under the CNCA. Before applying for a certificate of continuance, corporations should review the following matters with their legal advisors:

- Where a corporation has different classes of members, the CNCA provides for certain built-in protections for members of each class, including separate class votes and veto rights (including in some instances, for non-voting members). It is important to consider the impact of the CNCA on the corporation's existing membership structure and, possibly, to change the membership

structure at the time of continuance. For example, it may be desirable to transition to a single class of members or to eliminate non-voting membership classes.

- It may be advantageous for the board to be given the right to appoint up to 1/3 of the directors of the corporation in a given year. This right would provide the board with the ability to add directors during the year with needed skill sets to complement those elected by the members at the previous annual general meeting. If so, the CNCA requires that the power to appoint directors must be set out in the articles and not in the by-laws.
- If a corporation is likely to become a soliciting corporation (discussed in Practice Tip #1), then the articles should provide for a minimum number of three directors. Pursuant to the draft regulations under the CNCA, where a corporation receives in excess of \$10,000 from public sources during its last financial year, it will become a soliciting corporation. Given this low threshold, it should be fairly easy to predict whether a corporation will be subject to the additional requirements for soliciting corporations. In the case of soliciting corporations, at least 2 of 3 directors must not be officers or employees of the corporation.
- The statement of purpose required in the articles of continuance will generally be completed by transcribing the current objects of the corporation into the appropriate section in the articles. If changes are desired to the objects, and the corporation is a registered charity under the *Income Tax Act*, it is important to determine whether advance consultation with CRA will be required before applying for articles of continuance. It is expected that CRA will issue a policy directive over the next several months clarifying whether CRA will be conducting a review of articles of continuance of federally incorporated charities and any other requirements that CRA may have relating to the articles of continuance. In the meantime, it is advisable for federal charities to determine with certainty what objects are on record with CRA since it is likely that the requirements for charities that are retaining the same objects will be different from those that are changing their objects.
- If the corporation is likely to become a soliciting corporation, it is recommended that the articles of continuance contain the required statement to the effect that any property remaining on

liquidation after discharge of liabilities, shall be distributed to one or more qualified donees within the meaning of subsection 248(1) of the *Income Tax Act*.

In addition to the articles, a corporation continuing under the CNCA will be required to file a notice of registered office and a notice of directors. Since there is no government review or approval of by-laws required under the CNCA, it is not necessary to file by-laws with the articles of continuance. However, by-laws should be updated or completely replaced in order to bring them into compliance with the Act at the same time as articles of continuance are prepared. While the new Act requires that by-laws be filed with Industry Canada within 12 months of membership approval, failure to file the by-laws does not affect their validity. There is no fee for a CCA corporation to continue under the CNCA.

Many organizations that are federally incorporated are considering whether to make by-law amendments now (to the extent possible under the CCA) so as to ease the corporation into compliance with the new Act, once it is in force. Since relatively few by-law changes required or permitted under the CNCA are consistent with the CCA and its related policies, it may not be worth amending the by-laws for this purpose alone. Other organizations are proactively making amendments to the membership classes in the by-laws now so that they will not be caught by the class vote requirements of the CNCA when applying for continuance. Many others are simply putting off any by-law amendments until the new Act is in force.

With regard to the timing of continuance once the new Act is in force, each corporation will need to determine whether an early continuance is warranted depending on the particular corporation's structure or needs. Whether an organization should continue as soon as the new Act is in force or delay until the second or third year to file an application for a certificate of continuance will depend on the particular corporation's circumstances and whether the new Act is more or less favorable to a given organization. Some CCA corporations have been waiting for the CNCA to be proclaimed in force so that they can take advantage of some of the fundamental changes not currently available (e.g. amalgamations, continuances). Many others will be attracted by the comprehensive and modern framework for the governance of federal not-for-profit corporations that is provided by the CNCA and want to continue as soon as possible. Corporations with more complex organizational needs will take the time needed to determine how best to fit within its requirements.

Next month's Practice Tip #3 will discuss directors and CNCA requirements relating to their election and appointment.