Five Steps to Transition: the *Canada Not-for-Profit Corporations Act*

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Introduction

The new *Canada Not-for-Profit Corporations Act* (*CNCA*) came into force in the fall of 2011, bringing with it a new framework for the governance and incorporation of associations, charities and other federal not-for-profit organizations. The *CNCA* will replace Part II of the *Canada Corporations Act* (*CCA*), which has set the rules for not-for-profit organizations since 1917.

The new legislation is long and detailed, for a reason. It is intended to provide a comprehensive "rule book" that will, among other things, replace a great deal of the detail that is now required in bylaws, and allow latitude for a corporation to either accept the default requirements in the legislation, or set rules to fit its own circumstances and practices. Overall, the *CNCA* will create a more streamlined framework for Canadian not-for-profit corporations, which should be well worth the initial transition process.

As under the previous legislative regime, the rules respecting corporate governance and the rules respecting registered charities are kept separate. The *CNCA* does not grant registered charity status under the *Income Tax Act*, nor does it directly address any other tax-related issues.

The Transition Period

Not-for-profit corporations currently incorporated under Part II of the *CCA* will have three years to transition to the *CNCA* to avoid dissolution. Please see the "5 Steps to Transition" below.

Bylaws

Industry Canada will no longer review and approve bylaws. Corporations will be required, however, to file bylaws and amendments with Industry Canada within twelve months of member approval. The *CNCA* will give corporations significant latitude to adopt bylaws that suit their specific needs.

Because the *CNCA* sets broadly applicable default rules, a corporation's bylaws can be minimal, containing as little as the conditions for membership and notice of members' meetings.

It will therefore be up to each corporation to decide whether it will simply review and amend its bylaws to ensure compliance, or create new minimal bylaws and rely primarily on the *CNCA* as its legal "rule book". The advantages and disadvantages for each corporation depend on its individual circumstances.

Directors' Fiduciary Duties

Directors will be subject to the same duty and standard of care as directors of business corporations: an explicit duty to act honestly and in good faith, in the best interests of the corporation, and to exercise the care, diligence and skill of a reasonably prudent person in similar circumstances.

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Members

Members will have enhanced rights under the *CNCA*, including:

- the right of voting members to submit **notice of a proposal** to the corporation of a matter to be raised at a members' meeting;
- the right to **requisition a meeting** for a specific purpose;
- the right of **non-voting members to vote separately from voting members** on matters that impact their membership rights, including certain fundamental changes; and
- the right to **access corporate records** to monitor the board's performance.

Remedies are available to members to enforce these rights. These include court-ordered investigations (to review alleged wrongdoing), compliance orders (e.g. to share information with members), and "business-style" derivative action and oppression remedies.

Meetings

Currently, under the *CCA*, directors' and members' meetings cannot be conducted by way of a unanimous written resolution; however such meetings are permitted in certain circumstances under the *CNCA*.

Corporate Obligations

1. Annual meeting

The *CNCA* requires annual members' meetings to elect directors, appoint a corporate accountant and review financial statements. The *CNCA* sets out options for providing notice of members' meetings and for absentee voting.

2. Reporting to Industry Canada

The new reporting obligations are designed to be simpler than the current *CCA* requirements. The most significant of these is the requirement simply to file copies of bylaws, without the need for review and approval by the Minister of Industry. The following are the key ongoing filing requirements for a corporation operating under the *CNCA*:

- annual return;
- changes in directors;
- copies of bylaws/amendments;
- articles and amendments made thereto;
- change of registered office address; and
- financial statements and accountant's report (soliciting corporations).

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Financial Accounting and Disclosure

1. Soliciting or Non-Soliciting Corporation?

A "soliciting corporation" is one that receives more than $10,000 in a financial year, in the form of donations from third parties, government grants or financial assistance, or donations from another soliciting corporation. Once acquired, "soliciting corporation" status lasts for three years. A corporation on the threshold of this status should therefore monitor its revenues annually to determine whether it has become a soliciting corporation, and to determine how long the status will apply to it. A non-soliciting corporation is – quite simply – not a soliciting corporation.

2. Review and reporting requirements

Soliciting corporations are subject to different rules for certain key matters. For example, while a non-soliciting corporation is permitted to have only one director, a soliciting corporation must have a minimum of three, two of whom must not be officers or employees of the corporation. Soliciting corporations are also subject to more stringent financial review and reporting requirements.

The level of corporate gross revenues is also relevant to these review and reporting requirements, as the following chart demonstrates. Note, for example, that the first category of corporations set out in the chart (soliciting corporations with less than $50,000 in gross annual revenues, non-soliciting corporations with less than $1 million) is exempt from audits, provided that the members have unanimously voted not to appoint an auditor, unless the articles or bylaws require otherwise.

Type of Corporation /Gross Annual Revenues	**Defaults and Options for Financial Review**
Soliciting corporation <$50,000 Non-soliciting corporation < $IM	Members may unanimously vote not to appoint a public accountant; can have its financial statements reviewed or audited.
Soliciting corporation between $50,000 and $250,000	Must have a financial review by a public accountant; can have its financial statements reviewed or audited.
Soliciting corporation> $250,000 Non-soliciting corporation> $IM	Must have a financial review by a public accountant; must have its financial statements audited.

3. Exemptive Relief

The *CNCA* permits a corporation to apply for exemption from the financial reporting obligations where a case can be made that the potential detriment to the corporation outweighs the benefit to the members or, in the case of a soliciting corporation, to the public.

Fundamental Changes

The *CNCA* sets out specific rules for the directors and members of the corporation to approve "fundamental changes", which include such matters as:

- changing the name of the corporation;
- amending articles and bylaws;
- altering the corporation's activities, or changing its mission statement or "statement of purpose";
- changing conditions of membership, or the rights of any class or group of members; and
- changing the means of giving notice of a members' meeting to voting members.

A director, or a member who is entitled to vote at an annual members' meeting, may make a proposal for a fundamental change.

Five Steps to Transition under the *CNCA*

The approach and the time each corporation takes to fulfill the following transitional steps will depend on factors such as the type, size and complexity of the corporation, how familiar the board and members are with its current procedures, and whether the corporation is combining its *CNCA* transition with an overall governance review. While all corporations will have three years to transition, each one should ensure that its transition plan can accommodate the consultation it will need with members, and legal and financial advisers as may be required.

1. **Review the current Letters Patent and Bylaws**, consider the corporation's current structure and procedures, and determine whether the corporation will either retain or remove the provisions that are no longer required.
2. **Prepare Articles of Continuance (transition)** using Form 4031 to be made available online by Industry Canada.
   - If the corporation is also a registered charity, the draft Articles of Continuance should be sent to the Canada Revenue Agency for pre-approval before filing them with Industry Canada – note that CRA pre-approval can take 6-8 months.
3. **Revise the bylaws** following a review of the new requirements, default provisions, and choices open to the corporation under the *CNCA*.
4. **Obtain member approval** at a members' meeting duly called under the existing rules, with approval by two-thirds of the members.
5. **File with Industry Canada** the Articles of Continuance (transition), Initial Registered Office Address, first board of directors and amended bylaws.

The introduction of the new regime, however, will provide an opportunity for thousands of not-for-profit corporations to revisit their governance structure and make important choices.

Your Choice: Corporate Housekeeping or a "Clean Sweep"

The *CNCA* will affect some 19,000 not-for-profit associations, charities, and professional, cultural, religious and other groups currently incorporated under an Act that is over ninety years old. The old regime has become familiar territory.

The introduction of the new regime, however, will provide an opportunity for thousands of not-for-profit corporations to revisit their governance structure and make important choices. The new legislation is flexible enough to permit corporations to consider the transition as a form of good "corporate housekeeping", to tidy the rules up a bit, but to continue on with many of the rules they are currently accustomed to. On the other hand, some corporations may choose to do a "clean sweep", using the transition as an opportunity to change their names, mandates, and structures.

The entry into force of the *CNCA* this year will start the three-year transition clock. Get ready to review the legislation and ask questions – to get information, opinions, and advice – on how each not-for-profit corporation will respond to the new rules.

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