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How Will the Historical Changes Impact Not-For Profit Corporations?

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HOW CCA CORPORATIONS CONTINUE UNDER THE CANADA NOT-FOR-PROFIT CORPORATIONS ACT

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A. INTRODUCTION

Part II of the *Canada Corporations Act*[1] ("CCA") governs the incorporation and governance of federal non-share capital corporations. This framework has remained essentially unchanged since 1917. The CCA sets out very few rules on corporate governance, and corporations are required to comply with Corporations Canada's policy statements on these matters. After various attempts of corporate reform, the *Canada Not-For-Profit Corporations Act* [2] ("CNCA") was finally enacted by Parliament and received Royal Assent on June 23, 2009. The CNCA is modelled after the *Canada Business Corporations Act*[3] and provides a very detailed set of rules for the governance of federal corporations.

The CNCA has not yet been proclaimed in force. It was originally scheduled to come into force in mid-2011. With the recent federal election in May 2011, it is now anticipated to come into force in the fall of 2011. Draft regulations were released by Corporations Canada on June 25, 2010, and published in the Canada Gazette on February 26, 2011.[4]

The new rules in the CNCA do not apply automatically to corporations incorporated by letters patent under Part II of the CCA. These corporations will be required to continue under the

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[1] R.S.C., 1970, c. C-32.
[2] S.C. 2009, c. 23.
[3] R.S.C., 1985, c. C-44.
[4] Canada Gazette, February 26, 2011, page 790.

CNCA within 3 years of proclamation of the CNCA by completing a continuance process. Failure to continue within this time frame will result in dissolution of the corporation.[5] Once the CNCA comes into force, it will no longer be permissible for corporations to be incorporated under Part II of the CCA.[6]

This paper reviews the steps involved in the process for CCA corporations to continue under the CNCA, including preliminary steps and issues that CCA corporations will need to consider before drafting continuance documents, issues concerning the drafting of articles of continuance and new by-laws that comply with the CNCA, and practical steps that CCA corporations can take in preparing these documents. This paper is not intended to review the rules contained in the CNCA or the incorporation process under the CNCA,[7] unless those rules are relevant in terms of preparing documents for the continuance process.

B. OVERVIEW OF CONTINUANCE PROCESS

Prior to the application for continuance, the CCA will continue to apply to CCA corporations, and they can continue to apply for supplementary letters patent and approval of by-law amendments during that time. Upon the issuance of the certificate of continuance, the CCA will cease to apply to them.

The CCA does not permit Part II letters patent corporations to be exported and continued under another statute or legislation. There is therefore no mechanism under the CCA to allow them to be continued under the CNCA. This is remedied by the transitional provisions in the CNCA, requiring CCA Part II corporations to apply for a certificate of continuance under section 211 of the CNCA[8] and sections 212(3) and 212(7) of the CNCA providing CCA corporations with two

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[5] Section 297(5) of the CNCA. It states that any CCA Part II corporation that does not apply for a certificate of continuance to be continued under the CNCA within 3 years after the coming into force of the CNCA, the Director may dissolve the corporation under section 222 of the CNCA. Transitional provisions of the CNCA (sections 297 and 298) are not contained in the version of the CNCA posted on the Department of Justice's website. Rather, they are contained in the Royal Assent version of the CNCA available on the Parliament of Canada website at http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4015127&Language=E&Mode=1&File=134.
[6] Section 298 of the CNCA.
[7] For a review of those rules, see Wayne D. Gray, A Practitioner's Guide To The New Canada Not-For-Profit Corporations Act, *The Canadian Bar Review*, Vol.89, January 2011 at 141; Clifford S. Goldfarb and David Stevens, "The New Canada Not-For-Profit Corporations Act; What It Will Mean to Your Practice", paper presented at the CBA/OBA 2010 National Charity Law Symposium, April 30, 2010.
[8] Section 297(1) of the CNCA.

mechanisms to approve the continuance process. Further explanation of the approval process is set out in section D4b) of this paper.

Because the rules under the CNCA are very different from the rules under the CCA, what needs to be set out in the articles and by-laws is also different from what is currently set out in the letters patent, supplementary letters patent and by-laws for CCA corporations. This means that the transition process is not simply a matter of transposing the provisions of the letters patent and supplementary letters patent into the articles and using the same by-laws.

The following is an overview of the steps required for the continuance process:

1. Review letters patent, supplementary letters patent and by-laws and consider essential issues;

2. For registered charities, contact the Charities Directorate of Canada Revenue Agency ("CRA") where there are proposed changes to the purposes (objects) (optional step);

3. Prepare articles of continuance and notice of initial registered office address and first board of directors;

4. Prepare new by-laws;

5. Obtain membership approval of the articles of continuance and new by-laws;

6. File articles of continuance and notice of initial registered office address and first board of directors with Corporations Canada;

7. Issuance of certificate of continuance by Corporations Canada;

8. File approved new by-laws within 12 months of adoption (this can be combined with step 6);

9. For registered charities, send certificate of continuance, articles of continuance and new by-laws to CRA; and

10. Update other applicable filings or records.

The above steps are explained in more detail in the balance of this paper.

C. FEDERAL SPECIAL ACT CORPORATIONS

Instead of being incorporated under the CCA, some federal non-share capital corporations are incorporated by special legislation of the Parliament of Canada. A special act corporation is subject to its own special legislation which, together with any by-laws that may have been passed, governs the corporation. In addition, there are a few provisions under the existing Part III of the CCA which apply to special act corporations that are incorporated for the purpose of carrying on "...objects, to which the legislative authority of the Parliament of Canada extends, of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character or the like objects."[9] Upon the CNCA coming into force, Part III of the CCA will be repealed and Part 19 of the CNCA (i.e., sections 294, 295 and 296) will automatically apply to special act corporations.[10] No continuance process or any steps will need to be taken by special act corporations.

Similar to the current mechanism in the CCA allowing special act corporations to continue under Part II of the CCA and become letters patent corporations,[11] CNCA will also permit special act corporations to continue under the CNCA. Once a special act corporation has continued under the CNCA, it will be subject to Parts 1 through 18 of the CNCA, and will no longer be governed by its own special legislation. Any special act corporations desiring to be continued under the CNCA in this manner will need to complete a continuance process under sections 212(2) and 212(6) of the CNCA, The continuance process is essentially the same as that for Part II CCA corporations reviewed in this paper.

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[9] Section 158 of the CCA.
[10] For an overview of the rules in sections in Part 19 that apply to special act corporations, see Jane Burke-Robertson and Theresa L.M. Man, *Charity Law Bulletin* No. 247, "Countdown To The Canada Not-For-Profit Corporations Act Practice Tip #9: Special Act Corporations", March 31, 2011 (online: http://www.carters.ca/pub/bulletin/charity/2011/chylb247.pdf).
[11] Section 159 of the CCA.

D. PRELIMINARY STEPS AND CONSIDERATIONS

Prior to preparing documents for the continuance process, there are a number of steps and issues that would need to be considered. The following is an overview of some of the key steps and considerations.

1. <u>Gather and review current governance structure and practice</u>

Before drafting the continuance documents, it is necessary for corporations to collect and review all of the governing documents for the corporation. These documents include the letters patent and all supplementary letters patent and by-laws. If a corporation is not able to locate these documents or not sure if it has located all supplementary letters patent and by-laws, it can contact Corporations Canada to obtain copies.

For CCA corporations, by-laws are not effective until they have been filed with Corporations Canada and received Ministerial approval. For the charitable and non-profit sector, it is not uncommon to find corporations that have by-laws approved by the board and members, but have not been filed with Corporations Canada. As well, some corporations may attempt to amend their by-laws by board and/or members' resolution, rather than by means of adopting an amending by-law. Such by-laws and by-law amendments are not effective, although the corporation may have been under the erroneous perception that they are and have been operating under them. Even though these by-laws and amendments are not valid, they should be taken into account when preparing the continuance documents, since they reflect how the corporations had intended to modify their by-laws.

As well, some charities and non-profit organizations also set out their objects in their by-laws. This is often done in order to allow members to have easy access to the objects of the corporation in the by-laws, a document that members are more familiar with than the letters patent or supplementary letters patent. However, it is not uncommon to find that the objects set out in the by-laws are not the same as those contained in their letters patent or supplementary letters patent, because the objects may have been amended and up-dated from time to time as part of the by-law amendment process in the past, without the corporation being aware of the need to change their "official" objects in their letters patent or supplementary letters patent. In those situations, the objects contained in their by-laws should also be taken into account when preparing the articles of continuance.

Once all of these documents have been located, they should be reviewed in detail to understand the current governance structure and practice as provided for in these documents.

Consideration must also be given to whether these documents accurately reflect the current governance structure and practice of the corporation. It may be that the corporation has evolved over time since its incorporation and the by-laws no longer reflect the desired governance structure. It may also be that the model by-laws prepared by Corporations Canada was adopted as an expedient means to complete the incorporation process, without much thought to whether the provisions set out in the model by-laws actually reflect the desired corporate governance structure and practice. After incorporation, it is also not uncommon that the by-laws became one of the documents retained in their corporate records, without ever being followed. This is especially the case in the charitable and non-profit sector, which often lacks the means to engage legal advisors for the incorporation process or to retain legal advisors to assist in their corporate proceedings. In these situations, it may be necessary to also review various operational documents, including governance policies, organization chart, etc. These documents may reveal the governance structure and practice that are being followed by the corporation, which should be reflected in the new by-laws to be prepared.

Upon the completion of that review, it would be helpful to draw up a list of the changes that depart from the current by-laws. This will assist in the preparation of the documents for continuance.

2. Review key features of the CNCA

The next step is for the corporation to have a clear understanding of the rules contained in the CNCA under which the corporation will be required to operate after continuance. This will help the corporation in determining how the new rules will impact the governance of the corporation and what provisions to include in the articles of continuance and new by-laws.

a) Relationship between the CNCA, regulations, articles and by-laws

At the outset, it is necessary to understand the framework of the CNCA. The CNCA is modelled after the CBCA in many respects. The CNCA contains many detailed rules regarding the governance and operation of CNCA corporations, as opposed to the current CCA which contain very few rules.

When reviewing the CNCA, many provisions make reference to certain requirements being "prescribed." The prescribed requirements are set out in the regulations to the CNCA. Other provisions of the CNCA also make reference to certain requirements being set out in the regulations. At this time, only one set of regulations has been released by Corporations Canada. In the future, more regulations will be made.

The CNCA contains many mandatory rules that apply to CNCA corporations which cannot be overridden by including provisions in a corporation's articles, by-laws or unanimous member agreement. For example, CNCA corporations must be membership organizations with both members and directors; ex officio directors are not permitted;[12] it is not permissible to require the removal of directors be subject to a higher approval than an ordinary resolution.[13]

The CNCA also contains a set of default rules, which would apply to CNCA corporations if their articles, by-laws and unanimous member agreement are silent on those issues. It is possible to override the default rules, but the overriding provisions must be set out in the document(s) specified by the CNCA:[14]

i) articles only – For example:
   - the articles can provide for classes of members with different voting rights rather than the default rule of one member one vote;[15]

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[12] Section 128 of the CNCA.
[13] Section 7(5) of the CNCA.
[14] A useful table of the default rules in the CNCA and how they may be overridden is contained in Appendix A of a paper by Jane Burke-Robertson and Linda J. Godel, "Here Comes the CNCA: Are You Ready to Advice Your Clients?", a paper presented at the CBA's and OBA's 2011 National Charity Symposium, May 6, 2011 (online: http://www.carters.ca/pub/article/charity/2011/jbrlg0506.pdf).
[15] Section 154(5) of the CNCA.

- the articles can permit other classes of members to cancel a particular class of members without the approval of the class of members being cancelled;[16]

- the articles can permit the creation of new classes of members with equal or superior rights to an affected class without the approval of the affected class;[17]

- the articles may permit the board to appoint additional directors to hold office until the end of the next annual meeting of members, provided that the number of such appointed directors does not exceed one-third of the directors elected at the previous annual meeting of members;[18]

ii) by-laws only – For example:

- by-laws can provide for other modes of transferability of membership, rather than the default rule of transferring membership back to the corporation;[19]

- the by-laws can prohibit or restrict members' electronic participation at members' meetings, rather than the default rule that permits it;[20]

iii) articles or by-laws – For example:

- the articles or by-laws may provide other mechanisms to override the default rule requiring the rights of a member ceases upon termination of membership;[21]

- the articles or by-laws may provide for another mechanism to override the default rule that directors may meet at any place.;[22]

iv) articles or unanimous member agreement – For example:

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[16] Section 199(1)(a) of the CNCA.
[17] Section 199(1)(e) of the CNCA,
[18] Section 128(8) of the CNCA.
[19] Section 154(8) of the CNCA.
[20] Section 159(4) of the CNCA.
[21] Section 157 of the CNCA.
[22] Section 136(1) of the CNCA.

- the articles or unanimous member agreement can restrict the responsibility of the board for managing or supervising the management of a corporation required as a default provision;[23]

- the articles or unanimous member agreement can require a greater number of votes of directors or members than are required by the CNCA to effect any action (other than to require the removal of directors be subject to approval higher than an ordinary resolution);[24] or

v) articles or by-laws or unanimous member agreement – For example:

- the articles, by-laws or unanimous member agreement can restrict the power of the board to borrow funds without members approval;[25]

- the articles, by-laws or unanimous member agreement can provide for another mechanism to override the default rule that directors can designate, appoint and specify the duties of officers.[26]

Where it is possible to override the default rules, some of the overriding provisions are limited to certain choices (alternate rules) set out in the regulations. For example:

- to override the default rule that members cannot have absentee voting, the by-laws can permit absentee voting by choosing one or more of the 3 methods prescribed in the regulations, namely (a) proxy, (b) mailed-in ballots and (c) telephonic, electronic or other communication facility;[27]

- the by-laws may provide for a different quorum for meeting of members to override the default of a majority, but the quorum must be set out in the manner as prescribed in the regulations, namely a fixed number, a percentage of members, or a number or percentage to be determined by a formula;[28]

[23] Section under section 124 of the CNCA.
[24] Section 7(4) of the CNCA.
[25] Section 28(1) of the CNCA.
[26] Section 142 of the CNCA.
[27] Section 171 of the CNCA.
[28] Section 164 of the CNCA.

Therefore, where it is desirable to override the default rules in the CNCA, it will be necessary to insert the appropriate provisions in the articles, by-laws and/or unanimous member agreement, as appropriate. Where the CNCA requires certain provisions to be included in the by-laws, those provisions may be included in the articles instead, and the CNCA requirement that those provisions are to be set out in the by-laws will be deemed met.[29]

Soliciting corporations (explained below), however, are not permitted to enter into unanimous member agreements and their options to override default rules is limited to including appropriate provisions in the articles or the by-laws.

It is important to understand that it will be necessary to work with at least four or five documents in order to have a complete picture of what rules apply to a corporation, namely the CNCA, the regulations made under the CNCA, the articles, the by-laws, as well as unanimous member agreements in the case of a non-soliciting corporation.

It will therefore be necessary for a corporation to review and determine, at the outset, which default rules that the corporation is prepared to accept, which ones to override, and whether the appropriate overriding provision will need to be included in the articles, by-laws, or unanimous member agreement in the case of a non-soliciting corporation (as explained below) .

b) Key feature of the CNCA - soliciting or non-soliciting corporation

Although this paper is not intended to provide an overview of the rules under the CNCA, the concept of soliciting corporations and non-soliciting corporations is one of the key concepts contained in the CNCA that will affect the drafting of the continuance documents and the operations of CNCA corporations. It is important to review these rules and determine whether the corporation is a soliciting corporation or a non-soliciting corporation before the drafting process is considered.

Under the CNCA, all corporations are divided into two categories, soliciting corporations and non-soliciting corporations. Depending on whether a corporation is a soliciting or non-soliciting, the distinction will affect the type of documents to be prepared for the continuance process, e.g.,

[29] Section 7(3.1) of the CNCA.

the size of the board and the dissolution clause to be included in the articles, the composition of the board to be set out in the by-laws, whether a unanimous member agreement may be utilized and what provisions to be included in the agreement, and whether financial statements will need to be filed with Corporations Canada. As such, a determination early in the process is essential.

A soliciting corporation is defined in section 5(1) of the CNCA, with specific requirements set out in section 16 of the regulations. A corporation becomes a soliciting corporation if, in a fiscal year, the corporation receives more than $10,000 in gross annual revenues, directly or indirectly, from public sources, namely:

(a) requests for donations or gifts from a person who does not fall into any of the following categories:

- members, directors, officers, or employees of the corporation at the time of the request for donation/gifts;

- legal or common law spouse of the above list of persons; or

- children, parents, brothers, sisters, grandparents, uncles, aunts, nephews or nieces of the above list of persons;

(b) grants or other similar financial assistance received from a federal, provincial or municipal government, or agencies of such government; or

(c) donations or gifts received from a soliciting corporation .

A corporation that does not meet the definition for a soliciting corporation is a non-soliciting corporation.

The determination of whether a corporation is soliciting or not is based on the annual gross income as of the fiscal year-end. If a corporation has income over $10,000 in a fiscal year from a public source, it would become a soliciting corporation, but the commencement date for soliciting corporation status only takes effect at its next annual meeting of members. The soliciting status would continue for three years and end as of the third annual meeting of members that follows. If the corporation receives public money in a future fiscal year, the three-year time period for being a soliciting corporation would start again. If the corporation does not receive public funds during the three-year period, it would not affect the three-year soliciting corporation status. The reason why the soliciting corporation status commences and ends at annual meetings of members is because the status will affect the composition of the board (as explained below) and this will give the corporation an opportunity to elect the suitable number of directors at the annual meeting of members at the time when it became a soliciting corporation.

If a corporation is a soliciting corporation, it is required to comply with the following rules:

First, it must have at least three directors (as opposed to non-soliciting corporations, which is only required to have a minimum of one director), and at least two of the directors must not be officers or employees of the corporation or any of its affiliates.[30] This will therefore affect the size of the board to be included in the articles of continuance.

Furthermore, this will affect the composition of the board to be set out in the new by-laws. The term "officer" is defined in the CNCA to mean a person "appointed as an officer under section 142, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager or a managing director of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices."

For soliciting corporations that are also registered charities in common law jurisdictions, it would not be a problem for them to meet the requirement that at least two directors must not be employees of the corporation. This is because at common law, persons receiving remuneration

[30] Section 125 of the CNCA.

directly or indirectly from a charity are prohibited to be directors on the board of the charity.[31] As such, those corporations will not need to adjust their governance structure in this regard. However, other corporations that are not subject to this prohibition and have paid employees sitting on their boards will need to revise their governance structures and consider what provisions to be included in the new by-laws.

For small organizations where volunteer directors also serve as officers, they often have a small board of a few directors, with each person taking on an officer position, such as president, secretary, treasurer. The new rule in the CNCA will require these corporations to change the composition of the board and who may be appointed to be officers of the corporation.

The term "affiliate" is not defined in the CNCA. For corporations that have a relationship with a related entity, such as an operating charity and a parallel foundation of the charity, they might be caught off-side with the new rule if they have crossover directors, where the crossover director is a paid employee of the other corporation (such as the executive director of the parallel foundation having a seat on the operating charity), if the other corporation is an "affiliate" of the corporation. Depending on the particular circumstances involved, those corporations may need to revise their governance structures and consider what provisions are to be included in the new by-laws in order to comply with the new requirement.

Second, soliciting corporations (as well as registered charities even if they are non-soliciting corporations) are required to provide in their articles that any property remaining on liquidation after the discharge of any liabilities of the corporation shall be distributed to one or more

[31] Ontario follows the common law rule on the issue of remuneration of directors. At common law, directors of a charity are considered to be quasi-trustees for purposes of managing and investing the charitable property of a charity, they are prohibited at common law from receiving any direct or indirect benefit from the charity. As a result, charities cannot pay members of their boards any form of remuneration for services rendered without court approval, even if the services may be provided at a reasonable rate or below market cost. This is because directors of charities are considered to have trustee-like fiduciary obligations placed on them in relation to charitable property and, as a result, it is a conflict of interest, as well as a breach of trust for a charity to pay any monies of the charity to any director as remuneration for any services rendered by the director to the charity, whether it is in his/her capacity as a director or for other services provided to the charity. This prohibition, however, does not prevent directors/trustees from being reimbursed their reasonable out-of-pocket expenses. See for example: *Re French Protestant Hospital*, [1951] Ch. 567; *Ontario (Public Guardian and Trustee) v. AIDS Society for Children (Ontario),* [2001] O.J. No. 2170 (Sup. C.J.); *Re Public Trustee and Toronto Humane Society* (1987), 40 D.L.R. (4th) 111 (Ont. H.C.J.); *Re David Feldman Charitable Foundation* (1987), 58 O.R. (2d) 626 (Surr. Ct.); *Ontario (Public Guardian and Trustee) v. National Society for Abused Women and Children*, [2002] O.J. No. 607 (Sup. C.J.); *McLennan v. Newton* (1927), [1928] 1 D.L.R. 189 (Man. C.A.).

qualified donees, as defined in subsection 248(1) of the *Income Tax Act*.[32] This provision is commonly referred to as the dissolution clause. This requirement applies regardless of whether the soliciting corporation is a registered charity or has other status under the *Income Tax Act*, e.g., non-profit organizations under paragraph 149(1)(l) of the *Income Tax Act*. This requirement should not be a problem for registered charities, since they are already subject to the same requirement under the *Income Tax Act*. However, soliciting corporations that are not registered charities will need to revise their existing dissolution clause and include the required provision in the articles of continuance.

Third, members of a soliciting corporation are not permitted to enter into a unanimous member agreement.[33] Therefore, if it was decided that a corporation is a soliciting corporation, then no consideration will need to be given in the continuance process of whether to prepare a unanimous member agreement and provisions to override default rules will need to be included in the articles of continuance or the by-laws, as appropriate. If it was decided that a corporation is a non-soliciting corporation, it will need to decide whether its members wish to enter into a unanimous member agreement, and decisions will need to be made whether provisions intended to override default rules should be included in the unanimous member agreement, as opposed to the articles of continuance or the by-laws.

Fourth, soliciting corporations are required to file their financial statements, the report of the public accountant, if any, and any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous member agreement with Corporations Canada annually.[34]

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[32] Section 235(1)(b) and 235(2) of the CNCA. *Income Tax Act*, R.S.C., 1985, c.1 (5th Supp). However, pursuant to section 234 of the CNCA, property that was 234, if person has transferred property to a corporation subject to the condition that it be returned on the dissolution of the corporation, the liquidator shall transfer that property to that person, and the property will not be subject to the distribution requirement set out in the dissolution clause.

[33] Section 170(1) of the CNCA.

[34] Section 176(1) of the CNCA. Specifically, a soliciting corporation must provide its annual financial statements to Corporations Canada not less than 21 days before the annual general meeting of members or without delay in the event that the corporation's members have signed a resolution instead of holding a meeting, approving the statements. In any event, a corporation must send financial statements to Corporations Canada within 15 months from the preceding annual meeting (by which time an annual meeting is required to be held under the CNCA or a resolution in writing signed in place of a meeting), but not later than 6 months after the end of the corporation's preceding financial year.

This annual filing requirement does not apply to non-soliciting corporations, but the Director may require them filed.[35] While this requirement does not affect the drafting of the documents for the continuance process, it is important that corporations are aware of it and ensure its compliance.

Fifth, soliciting corporations are subject to higher requirements in terms of the appointment of public accountant[36] and level of review of their financial statements.[37] Again, these requirements are usually not included in by-laws. But some corporations may want to include these obligates in their by-laws to ensure compliance. Therefore, it is important that corporations are aware of these rules. In this regard, all soliciting corporations and non-soliciting corporations are in turn divided into designated corporations and non-designated corporations depending on their income as follows:

- For soliciting corporations, a corporation receiving $50,000 or less in gross annual revenues for its last fiscal year is a designated corporation, a corporation receiving income in excess of this level is a non-designated corporation.
    - Members of a designated soliciting corporation are required to appoint a public accountant by ordinary resolution at each annual meeting. In that case, the public accountant must conduct a review engagement of the financial statements, but the members may pass an ordinary resolution to require an audit instead. It is possible for the members to waive the appointment of a public accountant annually by a

[35] Section 177 of the CNCA.

[36] The CNCA contains rules regarding who are qualified to be a public accountant under the CNCA. In this regard, a public accountant must meet all of the following requirements (see section 180(1) of the CNCA):

- is a member in good standing of an institute or association of accountants incorporated by or under a statute of the legislature of a province (e.g., chartered accountant, certified general accountant or certified management accountant) (i.e., sections 188 to 191 of the CNCA);
- meets any qualifications under an enactment of a province for performing any duty that the person is required to perform under the CNCA (e.g., a provincial licence to conduct audit or review engagements); and
- subject to an order of the court under section 180(6) of the CNCA, is independent of the corporation, its affiliates or the directors or officers of the corporation or its affiliates. (Under section 180(6) of the CNCA, an interested person may apply to the court for an order relieving a public accountant from meeting the qualifications described in section 180(1), if the court is satisfied that such an order would not unfairly prejudice the members of the corporation. The court may make such an order on such terms as it considers fit.)

[37] Part 12 of the CNCA. Specifically, sections 179, 181, 182, 188 and 189.

unanimous resolution. In that case, a compilation of the financial statements would be sufficient.

- All non-designated soliciting corporations are required to appoint a public accountant, which requirement cannot be waived. In terms of the level of review required, it will depend on the income of the corporation. Those corporations that receive more than $50,000 and up to $250,000 in gross annual revenues for its last fiscal year must have the public accountant to conduct an audit, but their members can pass a special resolution to require a review engagement instead. Those corporations that receive more than $250,000 in gross annual revenues for its last fiscal year must have the public accountant to conduct an audit, and it is not permissible for their members to require a review engagement instead.

- For non-soliciting corporations, a corporation receiving $1 million or less in gross annual revenues for its last fiscal year is a designated corporation, a corporation receiving income in excess of this level is a non-designated corporation.

    - Members of a designated soliciting corporation are required to appoint a public accountant by ordinary resolution at each annual meeting. In that case, the public accountant must conduct a review engagement of the financial statements, but the members may pass an ordinary resolution to require an audit instead. It is possible for the members to waive the appointment of a public accountant annually by a unanimous resolution. In that case, a compilation of the financial statements would be sufficient.

    - All non-designated soliciting corporations are required to appoint a public accountant, which requirement cannot be waived. The public accountant must conduct an audit and it is not permissible for their members to require a review engagement instead.

On the one hand, since the $10,000 threshold for soliciting corporations is a very low threshold, it is possible that many, if not most, corporations will become soliciting corporations, and therefore their governance structure and corporate procedure will need to comply with the above requirements.

On the other hand, for corporations that do not receive public funding at all, they will be non-soliciting corporations and their continuance documents will need to be drafted to reflect this.

However, an important issue to keep in mind is that because the threshold is so low and is dependent on its revenue sources from year to year, it is possible that a corporation may move in and out of the soliciting corporation status from year to year. This might not be an issue for a corporation that does not have revenue from public sources, such as a membership recreational club that derives its revenues from membership dues and does not receive public donations or government funding. However, even in this scenario, the corporation may still become a soliciting corporation for three years if, for example, it received a grant from a foundation (which receives public donations) for a special project.

As well, for smaller corporations that receive revenue from public sources in an amount that may be at the $10,000 threshold level, it is possible that the corporation may move in and out of the soliciting corporation status from year to year. An example would be if the corporation received more than $10,000 from public sources in year 1 and became a soliciting corporation at the annual meeting of members in year 2 and continues to have this status until the annual meeting of members in year 5. In this case, even if it received less than $10,000 in public funding in year 2 or 3, this would not change its soliciting corporation status for those years. Whether or not the corporation will continue its soliciting corporation status at the end of the annual meeting of members in year 5 will depend on its income in year 4. If it then received more than $10,000 in year 4, then it will continue to be a soliciting corporation from the annual meeting of members in year 5 for another three years until the annual meeting of members in year 8.

When preparing continuance documents for a corporation, it will be important to review the funding sources of the corporation to determine whether it will become a soliciting corporation all the time, a non-soliciting corporation all the time, or may move back and forth between soliciting and non-soliciting corporation status. It will be necessary to review the past track record of funding sources, and future anticipated funding sources as well. If it was determined that the likelihood of moving in and out of soliciting corporation status is high, then it may be more prudent to structure the board composition in compliance with the rules that apply to a soliciting corporation (i.e., at least three directors and at least two of the directors must not be officers or employees of the corporation or any of its affiliates) and to ensure that the members do not enter into a unanimous member agreement. Then, in the years when it was a soliciting corporation, it will then comply with the applicable financial reporting, appointment of public accountant and level review requirements, and vice versa.

3. <u>Compare the CNCA rules with current governance structure and practice</u>

Once a corporation has determined its current or desired governance structure and practice and has reviewed the rules in the CNCA, the corporation will need to review and determine how the new rules will impact how the corporation is to be governed. Examples of questions to be considered include:

- Are the current by-laws or the desired governance structure and process inconsistent with CNCA requirements?

- If inconsistent with a CNCA mandatory requirement, how will the corporation adjust its governance structure and process in order to ensure compliance?

- If inconsistent with a CNCA default requirement, is the preferred alternative mechanism permitted under the CNCA? Should the overriding provision be set out in the articles, by-laws or unanimous member agreement?

- If different options are prescribed in the regulations,[38] which one should the corporation choose? Should the preferred option be set out in the articles, by-laws or unanimous member agreement?

- Are there provisions that the corporation would like to include in its governing document and the CNCA is silent on those issues? If so, should the provisions be set out in the articles, by-laws or unanimous member agreement?

[38] Such as different means of absentee voting, *supra* note 27.

4. Determine whether changes should be made prior to continuance

Another issue to consider is whether changes should be made to the corporation's governing documents under the CCA prior to continuance under the CNCA. Although it is possible to make amendments to the existing letters patent or supplementary letters patent at the time of applying for continuance,[39] some corporations may wish to make certain changes first under the CCA, such as applying for supplementary letters patent or amending their by-laws even though it will mean additional costs and time. There may be different reasons why a corporation may wish to do so. The following are some examples.

a) Changes affecting membership rights

If a corporation currently has more than one class of members, it is important to be aware that a separate vote by class or group of members will be required under the CNCA if, in the future, the corporation wants to change the rights attached to a class or group of members or for certain fundamental changes, regardless of whether the membership class is a voting class or non-voting class. This means that each class of members (including non-voting members) will have a de facto veto rights for those matters.

Specifically, the CNCA provides that members of each class are entitled to vote separately as a class on a proposal to make certain amendments to the articles and by-laws (regardless of whether they otherwise may have the right to vote).[40] The amendments are:

(a) effect an exchange, reclassification or cancellation of all or part of the memberships of the class or group;

(b) add, change or remove the rights or conditions attached to the memberships of the class or group, including (i) to reduce or remove a liquidation preference, or (ii) to add, remove or change prejudicially voting or transfer rights of the class or group;

[39] Section 211(2) of the CNCA.
[40] Sections 199(1) and (2) of the CNCA.

(c) increase the rights of any other class or group of members having rights equal or superior to those of the class or group;

(d) increase the rights of a class or group of members having rights inferior to those of the class or group to make them equal or superior to those of the class or group;

(e) create a new class or group of members having rights equal or superior to those of the class or group; or

(f) effect an exchange or create a right of exchange of all or part of the memberships of another class or group into the memberships of the class or group.

The only exception to the requirement of a separate class vote is if the corporation's articles provide that a certain membership class does not have the right to vote in respect of changes referred to in (a) and/or (e) above, i.e., changes that effect an exchange, reclassification or cancellation of all or part of the memberships of the class or group; and changes that create a new class or group of members having rights equal or superior to those of the class or group. If the amendments are in relation to (b) to (d) or (f), then a separate class vote will be mandatory, with no exceptions.

As well, separate class votes are also provided in the CNCA with respect to approval of certain fundamental changes, such as amalgamation; continuance; or the sale, lease or exchange of all or substantially all of the property of a corporation other than in the ordinary course of its activities.[41]

For this reason, a corporation may wish to collapse all of the membership classes into one class in order to avoid the requirement of having a separate class vote or include provisions to take advantage of the exceptions referred to in (a) and (e) above. However, if the corporation was to make this change as part of the continuance process by having the articles and new by-laws provide for only one class of members, the approval of the articles of continuance and new by-laws will itself require a separate class vote. This is because section 212(3) provides that voting

[41] Sections 206(4), 212(4) and (5), 214 (5) and (6) of the CNCA.

members may, by special resolution, authorize the directors of the corporation to apply under section 211 for a certificate of continuance; and, by the same resolution, make any amendment to its letters patent and supplementary letters patent that a corporation incorporated under the CNCA may make to its articles. However, if the corporation has more than one class of members, section 212(4) of the CNCA provides that changes to the letters patent, supplementary letters patent or by-laws as part of the continuance process that affects the rights of a class or group of members in the nature referred to in section 199(1) explained above of the CNCA will also require separate class vote of each class of members (regardless of whether they have the right to vote).[42] The only exception to the requirement of a separate class vote is if the corporation's existing governing documents provide that a certain membership class does not have the right to vote in respect of changes referred to in (a) and/or (e) above. If the amendments are in relation to (b), (c), (d) or (f), then a separate class vote will be necessary.

If a corporation wants to avoid votes by separate classes or allowing the membership classes to have a de facto class veto right (including non-voting classes), the corporation may want to amend its by-laws to collapse membership classes, change membership rights, etc. under the CCA first, prior to continuance under the CNCA.

b) Change of corporate objects

There may also be situations where a corporation may wish to change its corporate objects for various reasons, such as up-dating the objects to better reflect and align with current activities or future activities. It is permissible to amend the objects of the corporation as part of the continuance process by including the new objects as purposes in the articles of continuance and seeking approval by the members by a special resolution.

For those corporations that are registered charities, changes of their corporate objects may have an impact on their charitable status if the objects are not exclusively charitable. As such, all registered charities are required to seek approval from CRA for their amended objects. In practice, there are two ways to seek CRA approval. First, some charities may want to revise their objects by applying for supplementary letters patent from Corporations Canada, and then provide

[42] Section 199 and 197(1) of the CNCA.

a copy of the issued supplementary letters patent to CRA for approval. At this time, CRA's usual processing time for such approval is approximately six months. Upon reviewing the new objects, CRA may require the objects further revised, if they find that the new objects do not meet their requirements. In that case, the charity would need to apply for a further supplementary letters patent to revise their objects in accordance with CRA's request, which means additional time and cost for the charity. Second, the other way to seek approval is to submit a draft application for supplementary letters patent to CRA for pre-approval. The charity will then be able to revise the draft objects that meet CRA's requirements before submitting them to Corporations Canada.

As such, if a corporation was to amend their objects as part of the continuance process using the second way by seeking pre-approval from CRA in order to avoid the possibility of applying for articles of amendments to further revise the objects, it will need to factor in the time required by CRA to process the pre-approval procedure so that it would not miss the three-year time frame for the continuance. As well, since CRA has not released its policies on the requirements of federally incorporated charities undergoing the continuance process, it may be possible that it may require charities to seek advance approval from CRA prior to submitting the articles of continuance. It is not clear if CRA would put in place an expedited process for these situations. If not, then the corporation will need to be aware that this pre-approval process may take more than 6 months and it will need to ensure that the articles of continuance are submitted to CRA for processing well in advance of the three-year deadline.

Alternatively, a charity may wish to amend its objects under the CCA prior to the continuance process on a parallel basis when the corporation prepares documents for the continuance. Once approval from CRA is obtained, the approved objects can then be inserted in the articles of continuance for filing.

5. <u>Timing of continuance</u>

All CCA Part II corporations are required to apply for a certificate of continuance within 3 years of the CNCA coming into force. Some corporations may want to continue right away, others may want to wait. Early on, a corporation should decide when an application for continuance should be submitted, or when to start the by-law review process in order to prepare for continuance. The following are some key considerations in this regard:

- Length of time and complexity of process required in revising the by-laws – Some corporations may have a very lengthy process in their current by-laws or governance policies/practice in order to revise their by-laws. This may include constituting a by-law review or governance committee, seeking legal assistance in the review process, lengthy notice period to hold membership meetings, etc. These corporations may want to start their process early in order to take full advantage of the 3 year time frame.

- Nature of changes in the new by-laws – If compliance with the CNCA requires substantive changes to the by-laws, the corporation may wish to start the by-law review early on so that it can be completed within the 3 year time frame. If the changes encompassed in the new by-laws are essentially administrative changes to comply with the CNCA, while maintaining the current governance structure and process (e.g., changing "head office" to "registered office"; the corporation does not have ex officio directors; etc.); the corporation may have flexibility to wait a while before applying for continuance. However, such a decision cannot be made until the corporation has completed a review of its current by-laws. As such, it would be prudent for the corporation to conduct a review of its current by-laws early on in order to decide whether it requires changes to its current governance structure and procedure.

- Size of membership – A corporation that has a large membership (e.g., a corporation that has many members, or has a complicated membership structure involving chapters, divisions across Canada, etc.) will likely require a more extensive consultation in relation to by-law changes, as opposed to a corporation that has only a few members. The corporation will need to factor in the time required to complete an extensive consultation process.

- Ex officio directors – A corporation that currently has ex officio directors sitting on its board will be required to decide whether it wants to remove the ex officio director structure or to put in place another mechanism in order to achieve the same result. In the latter scenario, the corporation will need to decide what mechanism to implement (e.g., by allowing the board to appoint directors to the board who meet certain qualification requirements, setting up a separate membership category whereby members from that category can elect directors to the board, etc.). There is no one-size-fits-all mechanism. What mechanism would work well will depend on many factors, including the constituency of the corporation, the working relationship with the appointing organization, the number of ex officio directors on the board, etc. In some cases, corporations may want to take a wait-and-see approach to learn from others who have undergone the continuance process.

- Changes to membership structure – In some cases, corporations with different classes of members may want to make changes to their membership structure, e.g., by eliminating non-voting membership classes, eliminating membership classes ending up with only one class, changing the rights of some membership classes, etc. As explained above, if these changes are to be done by way of the new CNCA by-laws as part of the continuance process, the corporations will be required to hold a separate class vote (including non-voting member classes) under section 212 of the CNCA in order to pass the articles and new by-laws, even if their current by-laws do not require separate class votes. In these situations, the corporations may want to start the by-law review process early, leaving enough time to amend their current CCA by-laws to implement these changes in order to avoid the need to hold a separate class vote, before preparing by-laws under the CNCA. See section D4a)of this paper for a more detailed explanation.

- Changes of corporate objects – As explained above, some corporations may want to amend their corporate objects for various reasons. It is permissible to amend the objects of the corporation as part of the continuance process by including the new objects as purposes in the articles of continuance and seeking approval by the members by a special resolution. Charitable corporations are required to seek approval from CRA if they were to change their objects. In order to avoid CRA's approval process delaying the corporation's continuance process, some corporations may want to amend their objects by applying for supplementary letters patent under the CCA on a parallel basis when the corporation prepares documents for the continuance. Once approval from CRA is obtained, the approved objects can then be inserted in the articles of continuance for filing. See section D4b) of this paper for a more detailed explanation.

E. DRAFTING ARTICLES OF CONTINUANCE

The next step is to draft the articles of continuance. The articles will be attached to the certificate of continuance that is issued to a corporation by Corporations Canada. The certificate of continuance and the articles of continuance together replace the corporation's letters patent and supplementary letters patent.

The articles of a corporation are to be set out in a form that is provided by Corporations Canada. The form to be completed is Form 4031 – Articles of Continuance (transition). It will be available on Corporations Canada's website.

When preparing the articles of continuance, it will be prudent for the new by-laws to be prepared at the same time, because:

- it will be necessary to coordinate the provisions set out in these two documents (e.g., membership classes and board size);

- decisions will need to be made what default provisions in the CNCA to override and whether the overriding provision should be included in the articles or the by-laws; and

- even if the CNCA requires certain provisions to be set out in the by-laws, it is possible to include them in the articles instead.

It is therefore necessary for the corporation to have a clear idea how it wants to operate under the CNCA rules and whether any provisions will need to be or are desired to be included in the articles. As such, it would be a good idea to prepare the articles of continuance at the same time when the by-laws are being prepared.

The following information must be included in the articles of continuance

- Corporate name;
- Province or territory where the registered office is situated;
- Minimum and maximum number of directors or a fixed number of directors;
- Statement of purpose;
- Restrictions on activities, if any;

- Classes, or regional or other groups of members that the corporation is authorized to establish;
- Statement regarding distribution of property on dissolution; and
- Any additional provisions that the corporation may want included in the articles.

Each of the above is reviewed in more detail below.

1. Current name of corporation

The current corporate name will need to be inserted in the articles. Note that if the corporate name had previously been changed, the revised corporate name as shown in the supplementary letters patent will need to be inserted, rather than the original corporate name shown on its letters patent. If the corporate name includes the French form of the name, this will also need to be included.

2. Change of corporate name

It is possible to change the corporate name as part of the continuance process. If no changes are desired, this item will need to be left blank. To change the corporate name, the proposed corporate name will need to be inserted, accompanied by a NUANS Name Search Report. The proposed corporate name must meet the requirements in the CNCA and the regulations.[43]

Under the CNCA, it will be possible to use a numbered name.[44] It is possible to change the corporate name into a numbered name as part of the continuance process. If this is desired, leave a blank space, and Corporations Canada will assign a number to the corporation. The space will need to be followed by the word “Canada” and one of the following words “Association”, “Center”, “Centre”, “Fondation”, “Foundation”, “Institut”, “Institute” or “Society”.[45]

3. Corporation number

The number assigned by Corporations Canada when the corporation was incorporated will need to be inserted. This number can be found on the letters patent, supplementary letters patent,

[43] Sections 11 and 13 of the CNCA and Part 3 of the regulations.
[44] Section 12(2) of the CNCA.
[45] Section 58(2) of the regulations.

correspondence from Corporations Canada, and Corporations Canada website database for federal corporations.[46]

4. Province or territory in Canada where registered office is located

The province or territory in which the registered office will be situated will need to be inserted. Under the CCA, the municipality and province in which the head office is located is to be included in the letters patent. Under the CNCA, the municipality and street address for the registered office is not to be included in the articles, but in the notice of initial registered office address and first board of directors, a separate document to be completed and filed with the articles.

5. Number of directors

The number of directors on the board will need to be inserted in the articles. It is possible to set out a fixed number of directors or a maximum and minimum range of directors. This information is contained in the by-laws of CCA corporations. It is important to keep in mind that if it is anticipated that the corporation will become a soliciting corporation under the CNCA, then it must have at least three directors, so the minimum number to be set out in the articles must be at least three.

If it is anticipated that the corporation will become a non-soliciting corporation, then it is possible for the board to have a few as one director. However, if the articles specified that there shall only be 1 or 2 directors on the board or if the maximum number is 2 directors, then in the event that the corporation is to become a soliciting corporation in a particular year, this will require a change to its articles. To avoid the need to change its articles in the future in that scenario, it might be prudent not to have the articles restrict the board to 1 or 2 directors. An example would be a minimum of 1 and a maximum of 10 directors, and then the precise number of directors to be elected may be determined from time to time by ordinary resolution of the members.[47] This power may also be delegated to the directors.[48]

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[46] https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpSrch.html?locale=en_CA.
[47] Section 133(3) of the CNCA.
[48] *Ibid*.

6. Statement of purpose

The purposes of the corporation will need to be inserted in the articles. Under the CCA, the objects of the corporation are set out in its letters patent or as amended by supplementary letters patent. If no changes to the objects are desired, then the same objects can be inserted in the articles. If the corporation desires to change its objects, the new objects should be inserted in the articles. The new objects are required to be approved by CRA and further explanation is set out in section D4b)of this paper.

7. Restrictions on activities of the corporation

If there will be any restrictions on the activities of the corporation, those restrictions will need to be set out in the articles. Under the CCA, there is no need to set out any such restrictions in its letters patent, supplementary letters patent or by-laws. If there are no such restrictions, insert "none".

8. Classes, or regional or other groups of members that the corporation is authorized to establish

Under the CCA, membership classes are set out in the by-laws. Under the CNCA, the classes, regional or other groups of members that the corporation is authorized to establish must be set out in the articles.[49] If there are more than one class or group of members, then the articles must set out what the classes or groups are, and any voting rights attached to each class or group, provided that the members of at least one class or group must have voting rights.[50] In both cases, the by-laws must set out the conditions required to be admitted into membership, including whether a corporation or other entity may be a member.[51] If there are more than one class or group of members, the by-laws must set out (a) the conditions for membership in each class or group; (b) the manner of withdrawing from a class or group or transferring membership to another class or group and any conditions of transfer; and (c) the conditions on which membership in a class or group ends.[52]

[49] Section 7(1)(c) of the CNCA.
[50] Section 7(1)(c) and section154(4) of the CNCA.
[51] Section 154(1) of the CNCA.
[52] Section 154(2) of the CNCA.

9. Statement regarding distribution of property on dissolution

The articles must state how the net assets of a corporation on dissolution would be distributed. As explained above, all soliciting corporations and registered charities (regardless of whether they are soliciting or non-soliciting corporations) must provide in their articles that any property remaining on liquidation after the discharge of any liabilities of the corporation shall be distributed to one or more qualified donees, as defined in subsection 248(1) of the *Income Tax Act*.[53]

Since this is already an existing requirement for registered charities, the dissolution clause can be the same as the one that is in the CCA corporation's letters patent or supplementary letters patent. For soliciting corporations that are not registered charities, their existing dissolution clause likely does not comply with this requirement and a revised clause that complies with this new requirement will need to be inserted into the articles.

10. Additional provisions

It is permissible to include other provisions that the corporation may want included in the articles. If more space is needed to insert the provisions, schedules may be attached to the articles. These provisions may be:

- provisions required by any other Act of Parliament to be set out in the articles; [54]
- provisions to override default provisions contained in the CNCA as explained above; or
- any other provision that may be set out in the by-laws[55] (and any requirement in the CNCA for provisions to be set out in the by-laws is deemed met by setting them out in the articles[56]).

Examples of these provisions include:

[53] *Supra* note 32.
[54] Section 7(2) of the CNCA.
[55] Section 7(3) of the CNCA.
[56] *Supra* note 29.

- requiring a different membership approval majority greater than the statutory required majority (e.g., requiring 75% approval where the CNCA requires a special resolution, or requiring a special resolution where the CNCA requires an ordinary resolution), except to require a higher level of approval than an ordinary resolution to remove directors[57] (such a provision is a very helpful way of addressing the CNCA requirements that amendments to certain provisions in the by-laws require a special resolution, while others require an ordinary resolution, as explained in section G5 below);

- setting out a foreign form of corporate name in any language to be used outside of Canada (other than English and French forms of the name);[58]

- allowing the board to appoint additional directors to hold office until the end of the next annual meeting of members, provided that the number of such appointed directors may not exceed one-third of the directors elected at the previous annual meeting of members;[59]

- specifying a place outside of Canada where members' meetings may be held;[60] and

- requiring the board to obtain members' approval in order to borrow funds.[61]

For registered charities, the Charities Directorate of CRA may require additional provisions be included in the articles. At this time, CRA has not announced what those provisions might be. Possible provisions might include a provision to require directors to receive remuneration from the charity or a provision to require the corporation be operated without purpose of gain for its members and profits be used to further the corporation's purposes. It is anticipated that CRA will announce what those provisions, if any, might be.

11. Declaration

The articles of continuance must be signed by a director or officer of the corporation.

[57] Section 7(4) and (5) of the CNCA.
[58] Section 11(2) of the CNCA.
[59] Section 128(8) of the CNCA.
[60] Section 159 of the CNCA.
[61] Section 28(1) of the CNCA.

Once the articles of continuance have been prepared, it must be approved by the members of the corporation before it can be filed. The membership approval process is explained in section H of this paper.

F. DRAFTING INITIAL REGISTERED OFFICE ADDRESS AND FIRST BOARD OF DIRECTORS

Other than the articles of continuance, the corporation will also need to complete and file Form 4002 - Initial Registered Office Address and First Board of Directors at the same time as part of the package of continuance application.

The notice is a simple form to set out the name and residential address of the directors of the corporation at the time of the continuance. The number of directors listed should be within the range of directors set out in the articles or match the fixed number in the articles.

In the future, if the name or address of the directors was to change, Corporations Canada must be advised of the change within 15 days of the change by filing the applicable form.[62] If the articles provides for a maximum and minimum number of directors, Corporations Canada must also be notified within 15 days of the change if the corporation elected additional directors within the range specified in the articles, if individuals cease to be directors, or if a new director was elected to replace a retiring director. However, if the corporation wants to change the maximum or minimum number of directors or the fixed number in the articles of continuance, the corporation must amend its articles by applying for articles of amendment.

The notice also sets out the municipality and street address of the registered office in the province or territory set out in the articles of continuance. In future, if the registered office was to be relocated to a different street address in the same province or territory, the corporation must send Corporations Canada a notice of any change to its registered office address. The notice becomes effective when it is accepted by Corporations Canada.[63]

In future, if the registered office is moved to another province or territory other than the one set out in the articles of continuance, the change must be approved by special resolution of the

[62] Section 134(1) and (2) of the CNCA.
[63] Section 20(3) and (4) of the CNCA.

members and the articles must be amended by applying for articles of amendment.[64] The corporation must also file a change of registered office form.

G. DRAFTING NEW BY-LAWS

The next step is the preparation of the new by-laws that complies with the CNCA. Providing a clause by clause commentary on provisions to be included in the new by-law or how by-laws made under the CCA will need to be revised to bring them into compliance with the CNCA is outside the scope of this paper.[65] Instead, this section of the paper reviews key concepts and issues that will need to be addressed when preparing the new by-laws.

1. General issues

Once the certificate of continuance has been issued, the corporation will be governed by the CNCA and the CCA will cease to apply to the corporation. Therefore, before the articles of continuance are filed with Corporations Canada, the corporation must have new by-laws that comply with the requirements of the CNCA prepared in advance, so that these new by-laws will be ready for the governance of the corporation as soon as the certificate of continuance has been issued.

Due to the many differences between the CCA and the CNCA, it is anticipated that simply amending the current by-laws to conform to the CNCA rules will involve amendments to many sections of the by-laws and make the by-laws difficult to work with on a go-forward basis. As such, it would likely be simpler and more cost efficient to have new by-laws prepared.

Under the CCA, all by-laws (including amending by-laws) must be filed with Corporations Canada for Ministerial approval before they come effective. This will lead to a delay in the effective date of by-laws after they have been approved by the members, having to take into account the time required by Corporations Canada to process the approval request. There is no longer any requirement under the CNCA to file by-laws with Corporations Canada for approval. Under the CNCA, by-laws will become effective as soon as they are adopted according to the

[64] Section 197(1)(b) of the CNCA.
[65] For a commentary in this regard, see Burke-Robertson and Godel, *supra* note 14.

requirements of the CNCA. As such, new by-laws prepared as part of the continuance process are not required to be filed with Corporations Canada with the articles of continuance, but it is possible to file them with the continuance package if desired. If the new by-laws are not filed with the continuance package, they must be filed with Corporations Canada within 12 months of its adoption. However, failure to file by-laws with Corporations Canada will not affect their validity.

Corporations Canada is preparing model by-laws and other guides to assist corporations in preparing the new by-laws. At the time of writing this paper, these tools have not yet been released by Corporations Canada.

2. Mandatory provisions that must be included in the by-laws

The CNCA contains very detailed rules that apply to CNCA corporations. As explained above in section D2a) of this paper, some of the provisions are mandatory provisions which must be complied with by all CNCA corporations and cannot be overridden. The CNCA also contains default rules, which would apply to CNCA corporations if their articles, by-laws and unanimous member agreement are silent on those issues. In order to override the default provisions, the overriding provisions must be set out in the document(s) specified by the CNCA (i.e., articles, by-laws or unanimous member agreement). Where it is possible to override the default rules, some of the overriding provisions are limited to certain choices (alternate rules) set out in the regulations.

Under the CNCA, there are two provisions that are required to be included in the by-laws. Namely:

Conditions of membership – Under the CNCA, the by-laws must set out the conditions required to be admitted into membership, including whether a corporation or other entity may be a member.[66] If there is more than one class or group of members, the by-laws must set out (a) the conditions for membership in each class or group; (b) the manner of withdrawing from a class or

[66] Section 154(1) of the CNCA.

group or transferring membership to another class or group and any conditions of transfer; and (c) the conditions on which membership in a class or group ends.[67]

Notice of meeting of members – Under the CNCA, the by-laws must set out the manner in which notice of meetings of members is to be given as prescribed in the regulations.[68] Four options are provided in the regulations and a corporation may choose one or more of the options. The options are:

1. sent by mail, courier or personal delivery, between 21 and 60 days before the meeting;

2. communicated by telephone or other electronic communication means, between 21 and 35 days before the meeting (provided that the by-laws also include one or more means from options 1, 3 and 4 to allow members to request receiving notice by a non-electronic means, and if no alternative is provided in the by-law, the corporation must send a copy of the notice to the member that requests a copy[69]);

3. affixed to a notice board not less than 30 days before the meeting; and

4. if a corporation has more than 250 members, communicated via a publication (a) at least once a week for three weeks prior to the meeting if using a newspaper, or (b) between 21 and 60 days if using a publication of the corporation that is distributed to members.[70]

If the by-laws does not include a valid option or does not contain any provision in relation to the manner in which notice is to be given, it will be required to give notice by option 1.[71]

It is permissible to include these provisions in the articles instead and the requirement that these provisions are to be set out in the by-laws will be deemed met.[72]

[67] Section 154(2) of the CNCA.
[68] Section 162(1) of the CNCA.
[69] Section 63(2) of the regulations.
[70] Section 63(1) of the regulations.
[71] Section 162(1) of the CNCA and section 63(3) of the regulations.
[72] Section 7(3.1) of the CNCA.

3. Other provisions to be included in the by-laws

As explained above, the CNCA contains a set of default rules that apply to CNCA corporations.

Some of the default rules may be overridden, provided that the appropriate overriding provisions are contained in the document specified by the CNCA.

Some of the overriding provisions are required to be included in the by-laws, as opposed to in the articles or unanimous member agreement. See section D2a)ii) above for examples of these types of provisions. If desired by the corporation, these overriding provisions may be included in the articles instead and the requirement for these provisions to be included in the by-laws is deemed met.[73]

The CNCA offers a choice for some other overriding provisions for the corporation to decide whether to include them in the articles or the by-laws; or in the articles or by-laws or unanimous member agreement. See section D2a)iii) and section D2a)v) above for examples. When drafting the new by-laws, care must be taken that the by-laws is the appropriate document to include the desired overriding provisions in that case.

When drafting the overriding provisions, it will be necessary to ensure that these mechanisms are in compliance with the CNCA. For example, some of the overriding provisions are limited to certain choices (alternate rules) set out in the regulations. See section D2a) above for examples. In these cases, care must be taken that the overriding provisions reflect the available alternate rules in compliance with the CNCA.

There are other provisions in the CNCA that provide certain requirements if the corporation was to adopt certain mechanisms. These types of mechanisms may be set out in the by-laws. For example:

- Audit committee - A corporation may have an audit committee. If so, the committee must consist of not less than three directors, a majority of whom are not officers or employees of the corporation or any of its affiliates, the committee must review the financial

[73] Section 7(3.1) of the CNCA.

statements before they are approved by the board, and the public accountant is entitled to receive notice of and attend and speak at committee meetings, the public accountant must attend committee meetings if requested by any committee members, and the public accountant has the right to call a meeting of the committee.[74]

- Consensus decision-making by members - The by-laws may allow the members to make decisions by consensus, including where the CNCA requires a vote to be taken. But this manner of decision-making cannot be used for the required unanimous resolution for a designated corporation to dispense with the appointment of a public accountant referred to in section 182(1) of the CNCA, cannot be used where a special resolution is required under the CNCA, and cannot be used if consensus cannot be reached. If the by-laws allow consensus decision making, they must also include the following information: define the meaning of consensus; provide how to determine when consensus cannot be reached; and establish a manner of referring any matter on which consensus cannot be reached to a vote.[75]

- Discipline of members - The CNCA allows the articles or by-laws of a corporation to provide the directors, the members or any committee of directors or members with the power to discipline a member or to terminate their membership. However, if the articles or by-laws provide for this power, they must also set out the circumstances and the manner in which the power may be exercised. This means that either the articles or by-laws should set out the process to be followed to terminate a membership or discipline a member. Examples include notice to the member; whether the member will be given the right to be heard or provide submissions; how the decision is made by the corporation; and whether the decision is final and binding on the member or subject to appeal.

Finally, where the CNCA is silent on a particular issue, a corporation may include provisions in the by-laws to govern that issue, provided that the provisions included do not contravene the CNCA and its regulations. Examples include dispute resolution mechanisms to resolve disputes

[74] Section 194 of the CNCA. Although the CNCA does not specify whether the provision establishing the audit committee must be included in the articles or by-laws, it is common practice to include such provisions in the by-laws, although it is possible to include them in the articles.
[75] Section 137 of the CNCA. .

between members, stewardship provisions dealing with charitable property of the corporation (where it is a registered charity), statement of faith subscribed to by a faith-based corporation, etc. Although these provisions may be set out in policies of the corporation, some corporations may find it helpful or necessary to include them in the by-laws.

4. <u>Detailed by-laws or simple by-laws</u>

There are in general two approaches for drafting the new by-laws under the CNCA, i.e., the minimalist approach and the comprehensive approach.

a) Minimalist approach

The rationale for the minimalist approach is based on the fact the CNCA provides for a very detailed set of rules. As a result, there is no need to duplicate all of the mandatory rules in the by-laws, neither is there any need to duplicate any of the default rules in the by-laws if they are consistent with the governance structure and practice of the corporation. As such, the by-laws could be a very simple one, containing only the two mandatory provisions as required by the CNCA to be included in the by-laws as explained above; overriding provisions that the corporation wants included to override default provisions in the CNCA; and important procedural matters of importance to the corporation.

The minimalist approach also contemplates the corporation adopting the use of a governance policy manual as much as possible by moving provisions into the governance policy manual that do not need to be included in the by-laws. It is thought that this is an effective way of simplifying the by-laws. However, it is not intended that the governance policy manual would duplicate any of the mandatory or default rules either. This means that the only place that those rules would be set out are in the CNCA and the regulations themselves.

Proponents of this approach acknowledge that the initial process of the corporation having to develop some familiarity with the CNCA and the challenge of learning and re-learning the CNCA and the regulations as staff and volunteers come and go may be a daunting one, but the benefits in the long run outweigh the disadvantages of working with detailed by-laws. One of the advantages with the minimalist approach is that the corporation will end up having a simple by-law. The other intended advantage of this approach is that by not duplicating the mandatory CNCA requirements and default rules (those that the corporation does not wish to override), it will avoid the corporation running the risk of amending them in the future, not knowing that they cannot be changed.

It should be noted that the model by-laws that is being prepared by Corporations Canada adopts the minimalist approach. Corporations wanting to adopt the model by-laws will need to be aware of the pros and cons of such an approach. As well, as noted above, many corporations, especially the smaller ones, adopted Corporation's Canada's CCA model by-laws at the time of incorporation often as an expedient means to complete the incorporation process, without much thought to whether the provisions set out in the model by-laws actually reflect the desired corporate governance structure and practice. This time, if corporations were to adopt the model by-laws as an expedient means to undergo the continuance process, they will have to operate under the minimalist approach.

While this approach may be a workable one for large organizations, it may not be an effective approach for small and medium size volunteer organizations for the following reasons:

- The corporation will have to constantly work with 4 to 5 documents, namely the CNCA, regulations, articles, by-laws, and governance policy manual, if any. For a non-soliciting corporation, it may also need to work with a sixth document, i.e., the unanimous member agreement if the members choose to enter into one. The task of being able to work with so many legal documents in order to determine the governance procedure for a corporation is not easy. In working with the various documents, the corporation will have to have a clear understanding of what the mandatory and default rules are under the CNCA; what information is prescribed in the regulation when reference is made to it in the CNCA; what default rules have been overridden by the corporations and whether the overridden provisions are contained in the articles, by-laws or unanimous member agreement; what provisions in articles, by-laws and unanimous member agreement are intended to override which provisions in the CNCA, and what provisions are intended to adopt non-mandatory mechanisms set out in the CNCA, and what provisions are intended to address issues that the CNCA is silent on; and what to do in the event of a conflict between these documents. With the charitable and non-profit sector having a high turnover rate of directors, officers, members and volunteers, it will be difficult for them to be able to develop and maintain a sufficient level of proficiency in working with these documents.

- Even if a corporation has developed the necessary proficiency in working with these documents, the need to constantly refer to all these documents whenever it needs to address a governance procedural issue may be difficult to work with. For example, if a corporation wants to do the simple task of holding an annual members' meeting, it will have to refer to the CNCA to determine when an annual meeting has to be called; refer to the regulations to determine the prescribed periods for calling such a meeting; refer to the by-laws to determine how notice to members is to be given; refer to the regulations on what to do if the by-laws only provide for electronic means of giving notice and a member requests to receive notice by non-electronic means; refer to the articles to determine if they can hold a members' meeting outside of Canada; refer to the CNCA to determine the quorum requirements for members' meetings if both the articles and the by-laws are silent on that issue; refer to the CNCA to see if electronic participation at meetings is permitted if the by-laws are silent; refer to the by-laws to determine if absentee voting is permitted; refer to the CNCA to see if a notice of meeting is required if the meeting was adjourned (if the by-law is silent) and refer to the regulation to see what the prescribed period is that may require a notice of the adjourned meeting; etc.

- When a particular issue is silent in the by-laws, the corporation will have to review the CNCA, regulations, the articles, unanimous member agreement and governance policy manual before it can decide if it is an issue that is outside the CNCA that the corporation can adopt by-laws to address them.

- It may not be possible to fully prevent the corporation from amending mandatory rules that apply to them by not duplicating them in the by-laws. A corporation adopting this approach will still be required to set out in its by-law certain provisions in compliance with the CNCA. For example, it must set out in the by-laws one or more of the prescribed manners of giving notice of members' meetings, and one of the prescribed means of absentee voting. These provisions also cannot be changed, other than choosing another option prescribed in the regulations for these issues. As such, the corporation will continue to run the risk of amending the option set out in their by-laws in a manner that is not permitted under the CNCA, and they will have to seek legal advice in order to ensure what they intend to do is permissible under the CNCA.

- The use of a governance policy manual would not be of help to ease the complicated process explained above, since it is intended that that this approach will not have the mandatory or default rules duplicated in the manual. As such, the manual is only intended to provide for other matters not regulated by the CNCA.

b) Comprehensive approach

The comprehensive approach, on the other hand, is intended to have the by-laws as the main document for all of the governance rules of the corporation where possible. This approach is familiar to CCA corporations, since it has been necessary for those corporations to have detailed by-laws under the CCA, because the CCA only has a few rules that govern CCA corporations. The detailed by-laws will be a consolidation of all of the mandatory rules and default rules (that are not to be overridden) that apply to the corporation; overriding provisions that are permitted to be set out in the by-laws, and any other provisions that the corporation desires to be included in the by-laws. Of course, the detailed by-laws will only include provisions that are relevant to the day-to-day governance issues (such as the conduct of members' and board meetings; membership issues qualification requirements, admission procedure, term, termination criteria, etc.; directors qualification requirements, term, election, termination, filling of vacancies, etc.), but not other issues regulated by the CNCA, such as maintenance of corporate records, access to records by members, fundamental changes, etc.

Since the CNCA now requires many more provisions (as compared to the CCA) to be included in the articles, the corporation will nevertheless have to work with the articles as well. It is also possible to use a governance policy manual for matters that do not have to be included in the by-laws, such as committee structure (except audit committee due to the requirement to comply with the specific rules in the CNCA[76]), directors nominations procedure, etc. The end result is that the corporation will have to work with the articles, the by-laws, and governance policy manual, as well as unanimous member agreement in the case of a non-soliciting corporation. But they will not need to also review the CNCA and the regulations for most governance issues.

In order to avoid the corporation unintentionally changing by-laws provisions that cannot be changed, or to ensure that by-law changes desired are permissible under the CNCA, safeguards will need to be put in place. One way is to clearly mark in the by-law what provisions can be amended and what provisions cannot. In addition, the corporation can seek legal advice before it amends the by-laws in order to ensure what the corporation intends to do is permissible under the CNCA, which is also a necessary step for corporations that adopt the minimalist approach.

Obviously, such by-laws will require careful drafting and the assistance of legal advisors in preparing it is necessary, which in turn means additional cost for the corporation at the outset. However, once prepared, it will be a very helpful tool for the corporation and will ease the administrative burden in that it will not need to struggle with 5 or 6 documents every time a governance issue arises.

5. By-laws approval

The CNCA provides two ways for corporations to amend their by-laws, depending on the subject matter of the changes.

In general, the directors may, by resolution, make, amend or repeal any by-laws that regulate the activities or affairs of the corporation, unless the articles, the by-laws or a unanimous member agreement otherwise provides. However, the directors must submit the by-law, amendment or repeal to the members at the next meeting of members. At that meeting, the members may, by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal. The effective date of the by-law, amendment or repeal is the date when the directors approved it, not when the members confirmed it. If the members reject the by-law, it will immediately cease to have effect on the date of the members' meeting. If the directors fail to submit the by-law to the members, it

[76] *Supra* note 74

will also cease to have effect on the date of the members' meeting when it should have been submitted to the members. If a by-law, an amendment or a repeal ceases to have effect, a subsequent resolution of the directors that has substantially the same purpose or effect must be confirmed or confirmed as amended by the members before it can be effective.[77]

The above mechanism does not apply to by-law amendments for matters referred to in section 197(1) of the CNCA. These provisions are in relation to membership of the corporation that are to be set out in the by-laws.[78] These by-law amendments must be approved by special resolution of the members and these changes are effective only upon members' approval. If any of these matters also relate to those membership issues set out in section 199(1), approval of these by-law amendments will require a separate class vote (regardless of whether the class is a voting or non-voting) as explained above.[79]

It is therefore important that by-laws clearly indicate that these types of changes require a special resolution of the members and are not effective until the members have approved them. Examples of options include:

- adopt two by-laws, one would contain all by-law provisions that require a special resolution to change and all remaining provisions would be included in another by-law which requires only an ordinary resolution to amend;

- adopt one by-law, and group all matters requiring a special resolution into one clearly marked section which would require a special resolution to change, with the balance requiring an ordinary resolution;

- adopt one by-law, but clearly mark through-out the by-laws which provisions require special resolution to amend; or

[77] Section 152 of the CNCA.
[78] These provisions are 197 (e) change a condition required for being a member; (f) change the designation of any class or group of members or add, change or remove any rights and conditions of any such class or group; (g) divide any class or group of members into two or more classes or groups and fix the rights and conditions of each class or group; (h) add, change or remove a provision respecting the transfer of a membership; (l) change the manner of giving notice to members entitled to vote at a meeting of members; and (m) change the method of voting by members not in attendance at a meeting of members.
[79] Section 199(1) of the CNCA.

- adopt one by-law, but include a provision in the articles requiring by-law changes be subject to a special resolution of members (in other words, remove the general default mechanism for by-law amendments).[80]

H. OBTAINING MEMBERSHIP APPROVAL AND FILING APPLICATION OF CONTINUANCE

The continuance process will require the filing of articles of continuance and notice of initial registered office address and first board of directors with Corporations Canada using the prescribed forms. Once Corporations Canada has received these documents, the certificate of continuance will be issued. The articles of continuance will replace the corporation's previously issued letters patent and all supplementary letters patent. There is no filing fee for these documents.[81]

Prior to filing the articles of continuance with Corporations Canada, they must be approved by the members of the corporation. Sections 212 (3) and 212(7) of the CNCA provides CCA corporations with two mechanisms to approve the continuance process.

Section 213(3) of the CNCA provides that voting members may, by special resolution, authorize the directors of the corporation to apply under section 211 for a certificate of continuance; and, by the same resolution, make any amendment to its letters patent and supplementary letters patent that a corporation incorporated under the CNCA may make to its articles. As explained above, if the corporation has more than one class of members, section 212(4) of the CNCA provides that changes to the letters patent, supplementary letters patent or by-laws as part of the continuance process that affects the rights of a class or group of members in the nature referred to in section 199(1) of the CNCA must be approved by separate class vote of each class of members (regardless of whether they have the right to vote).[82] The changes may include changes that:

(a) effect an exchange, reclassification or cancellation of all or part of the memberships of the class or group;

[80] Section 7(4) of the CNCA.
[81] Section 297(4) of the CNCA.
[82] Section 199 and 197(1) of the CNCA.

(b) add, change or remove the rights or conditions attached to the memberships of the class or group, including

(i) to reduce or remove a liquidation preference, or

(ii) to add, remove or change prejudicially voting or transfer rights of the class or group;

(c) increase the rights of any other class or group of members having rights equal or superior to those of the class or group;

(d) increase the rights of a class or group of members having rights inferior to those of the class or group to make them equal or superior to those of the class or group;

(e) create a new class or group of members having rights equal or superior to those of the class or group; or

(f) effect an exchange or create a right of exchange of all or part of the membership of another class or group into the membership of the class or group.

The only exception to the requirement of a separate class vote is if the corporation's existing governing documents provide that a certain membership class does not have the right to vote in respect of changes referred to in (a) and/or (e) above, i.e., changes that effect an exchange, reclassification or cancellation of all or part of the memberships of the class or group; and changes that create a new class or group of members having rights equal or superior to those of the class or group. If the amendments are in relation to (b) to (d) or (f), then a separate class vote will be necessary.

Alternatively, instead of a special resolution of the members, section 212(7) provides that the directors of the corporation may apply under section 211 for a certificate of continuance if the articles of continuance do not make any amendment to the charter of the body corporate other than an amendment required to conform to the CNCA.

Once the articles of continuance and new by-laws have been approved by the members, the application for continuance will need to be filed with Corporations Canada for processing.

I. OTHER CONSEQUENTIAL FILINGS AND RECORDS UP-DATES

Following the issuance of the certificate of continuance, the corporation will be governed by the CNCA. There will be a number of following matters to attend to.

1. Canada Revenue Agency

Registered charities are required to provide CRA with a copy of their governing documents if they were to be changed. Federal corporations that have continued under the CNCA will therefore be required to provide CRA with copies of the certificate of continuance, articles of continuance and new by-laws.

As explained above, if their corporate objects were to be changed as part of the continuance process, the corporation may wish to seek pre-approval from CRA prior to submitting them to Corporations Canada for processing. If no prior approval was obtained from CRA, submitting the new governing documents to CRA after the issuance of the certificate of continuance may result in CRA requiring changes to the purposes stated in the articles if CRA was not satisfied with them. This will result in the corporation having to apply for articles of amendments to have the purposes revised.

2. Provincial and territorial filings

Once a corporation has been incorporated federally, it may have obtained different registrations in the province(s) or territory(ies) where the corporation carries on activities. There are different types of registrations, such as extra-provincial corporate registrations, business name registrations, fund-raising registrations, etc. If so, a review of the requirements of each registration is necessary in order to determine whether the corporation is required to file the certificate of continuance, articles of continuance and/or the new by-laws with the applicable government offices.

For example, federal corporations that are registered charities that operate in Ontario are subject to the oversight of the Ontario Public Guardian and Trustee's office. Upon commencing operations in Ontario, they are required under the *Charities Accounting Act* (Ontario)[83] to notify the PGT by providing them with, *inter alia*, a copy of their letters patent and supplementary letters patent. Thereafter, PGT will also need to be provided with a copy of any issued supplementary letters patent. Therefore, upon the issuance of the certificate of continuance, registered charities in Ontario will need to be provided with a copy of the certificate of continuance and articles of continuance. The new by-laws do not need to be filed with the PGT.

3. <u>Others filings</u>

Depending on the operations of a particular corporation, it may be required to provide copies of the certificate of continuance, articles of continuance and/or the new by-laws to third parties. For example: a corporation that receives funding from another organization may be required to provide the funding organization with the new governance documents; a corporation that operates in subordination to an umbrella organization may need to provide these new documents to the umbrella organization; the financial or banking institution with which the corporation is negotiating a loan may want to be provided with copies of these new documents, etc. As such, it will be necessary to review the operations of the corporation to determine whether any filings in this regard are required.

4. <u>Up-dating corporate records and procedures</u>

After continuance, the corporation will need to up-date its corporate minute book by inserting the certificate of continuance, articles of continuance and the new by-laws in the minute book. Correspondence with CRA will also need to be filed with the corporate records, including letters to CRA providing them with copies of the new governance documents, letter from CRA granting pre-approval of the documents; and letter from CRA approving the draft purposes, etc.

Other corporate documents should also be up-dated. The type of documents that will need to be up-dated will vary, depending on their operations. These documents may include updating

[83] R.S.O. 1990, Chapter C.10

corporate governance policies, manuals, etc. Staff and volunteers will also need to be trained and become familiar with the new governance documents.

J. LAST BUT NOT LEAST

Corporations Canada is now working on other documents, including model by-laws, a transitional guide on how to continue under the CNCA, a guide on incorporation, and a guide on operating under the CNCA after incorporation or continuance. It is anticipated that these documents will become available approximately at the same time as the coming into force of the CNCA or shortly thereafter. Updates of when the CNCA will come into force as well as these transitional tools will be available on Corporations Canada's website.[84]

CRA is also expected to provide guidance for federal corporations that are registered charities involved in the continuance process. Up-dates will be available on CRA's website.[85]

CCA corporations will need to keep track of the three year time frame so that they can ensure that the continuance process can be completed within this time. As explained above, the time that a corporation requires to complete this process will depend on the structure and operations of the corporation. As such, it would be prudent that CCA corporations start preparing for continuance as early as possible, by reviewing their existing by-laws and getting familiar with the rules in the CNCA so that they can anticipate the changes that will be required. Engaging a legal advisor to conduct a by-law review and to prepare new by-laws will likely be helpful and time efficient.

It would also be a good idea for corporations to designate a particular person or a committee to be in charge of the continuance process, to ensure that the project would not get lost among the day-to-day activities of the corporations. It would also be necessary for the board of directors to be engaged early on, such as having the directors attend seminars and presentations on the CNCA continuance requirements; having the person/committee of the corporation in charge of the continuance process report to the board on a regular basis; setting target dates to complete various steps; have the members engaged early as well, especially if key governance structure and/or procedure need to be changed.

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[84] http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/home.
[85] http://www.cra-arc.gc.ca/chrts-gvng/menu-eng.html.