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## **TRANSITION TO THE NEW CANADA NOT-FOR-PROFIT CORPORATIONS ACT**

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The new *Canada Not-for-Profit Corporations Act* comes into force on October 17, 2011. This new legislation is the most comprehensive revision to the Canada Not-for-Profit Corporations regime in over 90 years. The purpose of the Act is to provide a “modern corporate governance framework” for federally incorporated not-for-profit corporations and is modelled on the provisions of the *Canada Business Corporations Act*.

Every not-for-profit corporation currently governed by the *Canada Corporations Act* has until October 17, 2014 to formally make the transition to the new Act. After that time, any corporation that has not made the transition will be dissolved.

The transition process involves filing articles of continuance and most likely amending the corporation's by-laws to conform to the new regulations. The corporation will be issued a certificate of continuance to replace the current letters patent.

This article provides a brief overview of some of the most significant changes under this new legislation.

### **Types of Not for Profit Corporations**

The Act differentiates between two major types of not for profit corporations, being soliciting and non-soliciting corporations. The definition of “soliciting corporation” under the Act is based on whether a corporation received in excess of \$10,000 in public money during its last financial year, directly or indirectly, from public donations, governments or government agencies (whether federal, provincial or municipal) or other entities that have themselves received in excess of \$10,000 in the previous financial year from public donors or from government. This \$10,000 threshold does not include donations from members, directors, officers or employees of the corporation or individuals who are related to such persons.

Any corporation that is not a soliciting corporation fits into the non-soliciting category.

The test for determining whether a corporation is a soliciting corporation is applied on the last day of its financial year-end but the corporation becomes a soliciting corporation as of the date of the next following annual meeting of members. Once a corporation is classified as a soliciting corporation, it remains a soliciting corporation until the third annual meeting of members following the annual meeting at which it became a soliciting corporation.

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The financial threshold of \$10,000 is quite low and will most likely capture most corporations that are registered charities as well as not-for-profit entities that are in receipt of government contributions or grants. Therefore, for those corporations that may move from one category to another or for those that wish to avoid having to make that determination altogether, it may be wise to draft articles and by-laws as though the corporation is a soliciting corporation and to otherwise comply with the requirements of the Act pertaining to soliciting corporations.

The major differences between a soliciting corporation and non-soliciting corporation can be summarized as follows:

- a) Board of directors: A soliciting corporation must have a minimum of 3 directors, at least 2 of whom are not officers or employees of the corporation. A non-soliciting corporation may have only 1 director and there are no prohibition against having a board comprised entirely of officers and employees of the corporation.
- b) Dissolution and liquidation of assets: On dissolution, the remaining property of a soliciting corporation is required to be distributed to one or more “qualified donees” within the meaning of the *Income Tax Act*. A non-soliciting corporation can distribute its remaining property to qualified donees or anyone else (i.e. to its members).
- c) Financial reporting: A soliciting corporation must file annual financial statements with Corporations Canada. Such statements will be available to the public. A non-soliciting corporation is not required to make this filing.
- d) Audit requirement: A soliciting corporation with annual revenues greater than \$50,000 must conduct an audit engagement, although members of a soliciting corporation that has revenues of \$250,000 or less can rather request a review engagement, by way of a resolution passed by a majority of not less than two thirds of the votes cast. A non-soliciting corporation with annual revenues of more than \$1,000,000 must conduct an audit.
- e) Unanimous member agreement: The members of a soliciting corporation may not enter into a unanimous member agreement that restricts, in whole or in part, the powers of the directors to manage, or supervise the management of the corporation, whereas members of a non-soliciting corporation may do so.

### **Incorporation “as of right”**

Another major difference under the new Act is that it allows for a system of incorporation "as of right" to replace the existing system of letters patent. This means that there is minimal discretion on the part of Corporations Canada to determine what organizations can be incorporated. Corporations Canada must issue a certificate of incorporation if the required documents are filed, are in conformity with the Act, and the required fee is paid.

### **Powers of the Corporation**

Under the Act, it will not be necessary for a by-law to be passed in order to confer any particular power on a corporation or its directors. This is a significant change from the old regime which granted a non-share capital corporation only the powers that are set out in Part II of the current legislation, subject to any limits in the corporation’s Letters Patent. The new Act will allow not-for-profit corporations to assume new and broader powers of a corporate legal entity unless such powers are limited by or contrary to their articles.

## **By-laws**

The new Act also replaces the cumbersome procedure for adopting or amending by-laws, which under the former legislation, required approval by the directors, members and Corporations Canada. Under the new Act, directors will have the residual power to pass by-laws and amending by-laws. With some exceptions, the board may pass by-laws or amending by-laws that take effect immediately and will remain in effect unless the members fail to confirm these by-laws at the next meeting of members. In addition, while by-laws or amending by-laws must be filed with Corporations Canada within 12 months from confirmation by the members, they no longer require Industry Canada approval.

## **Directors' Duty of Care**

Under common law, directors, in carrying out their duties and responsibilities to the corporation, have been held to a subjective standard of care based on their own particular abilities. Another important change in the new Act is the inclusion of an objective standard of care for directors. Under this new objective standard of care, in discharging their duties and exercising their powers, directors will have to act honestly, in good faith, with a view to the best interest of the corporation, exercising the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances while complying with the Act, as well as the corporation's articles, bylaws and any unanimous member agreements.

## **Conclusion**

The introduction of the *Canada Not-for-profit Corporations Act* is a significant and overall very positive advancement for not-for-profit entities. Federal not-for-profit corporations should start preparing to make the change to the new regime as soon as possible. This is a good time to thoroughly review the corporation's By-laws as changes are likely to be needed. A meeting of members will generally need to be held to approve the new documents needed for the transition process. Despite any rules in the existing By-laws of a corporation, the new Act provides that the articles of continuance must be approved by at least two-thirds of the members.

It should also be noted that the Province of Ontario has also been working on an overhaul of its not-for-profit legislation which will be very similar to the new federal regime and is anticipated to be proclaimed into force in late 2012.

We would be pleased to meet with you to discuss how this Act will affect your not for profit corporation and assist you in making a seamless transition to this new regime.

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