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Historic Changes in Federal, Ontario Laws That Govern Internal Affairs of Non-Share Capital Corporations, Such As Registered Charities, Trade Associations, Taking Effect This Year

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Originally published in *Blaneys on Business* (March 2012)

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Historic changes in the laws governing the internal affairs of both federally-incorporated and, in Ontario, provincially-incorporated non-share capital corporations, which include registered charities and trade associations, are taking place this year.

After many years in the making, the new *Canada Not-for-Profit Corporations Act (CNCA)* has now taken effect. The CNCA replaces the *Canada Corporations Act (CCA)* Part II and eventually will apply to all federally- incorporated non-share capital corporations, which can include federally-incorporated trade associations, religious corporations and registered charities.

Parallel Ontario legislation, the *Ontario Not-for-Profit Corporations Act, 2010 (ONCA)*, concerning provincially-incorporated organizations, is expected to be proclaimed in force in late 2012.

Both the CNCA and the ONCA have been much anticipated as essential updates to the existing statutes, which have not been amended meaningfully in nearly 100 years. This article addresses some of the key features of the CNCA and the transitional process it creates.

As described by Industry Canada, the benefits of the CNCA are that it provides a clear set of rules that govern the internal affairs of federal non-share capital corporations; it reduces red tape, and it simplifies the incorporation and amendment processes. In addition, it permits certain fundamental changes that were not permitted under the CCA, such as amalgamation. It also introduces a more objective standard for directors' duties and responsibilities, and this should reassure individuals who may be hesitant to serve on boards of directors.

One of the major highlights of the new legislation is the differentiation between soliciting corporations (which are regulated more closely) and non-soliciting corporations. Generally, corporations that receive certain public funding during a specified financial period in excess of $10,000 will be considered to be soliciting corporations.

In addition, members of non-share capital corporations governed by the CNCA will enjoy enhanced rights because the CNCA, in many ways, treats members as analogous to shareholders of share corporations. Under the CNCA, members will be able to bring oppression actions and, with leave of the court, derivative actions. (In oppression actions, minorities seek to have their interests incorporated into majority decisions. In derivative actions, shareholders/members sue directors and management for allegedly failing to exercise their authority for the benefit of the corporation and all of its shareholders/members.)

The CNCA also provides certain minority groups in a non- share capital corporation with a veto power on certain fundamental changes. Of much interest is the ability of non-voting member classes to vote separately as a class in respect of certain fundamental changes.

The CNCA was proclaimed in force last October 17. Non-share capital corporations currently incorporated under the CCA were given three years to transition to the CNCA (by October 17, 2014). Corporations that fail to transition by that date will be deemed to be inactive and will be dissolved. Until federal non-share capital corporations have made the transition, the provisions of the CCA will continue to apply to them. (When the Ontario legislation takes effect, those corporations that choose not to file articles of amendment will be deemed to have amended their letters patent and by-laws on the third anniversary date of its coming into force, thereby being brought into conformity with it.)

In order to transition to the CNCA, a federally-incorporated non-share capital corporation will be required to replace its letters patent, supplementary letters patent (if any) and by-laws with new charter documents by submitting articles of continuance and creating and filing new by-laws.

For federal non-share capital corporations that are also registered charities, care is required during the transition process so as not to affect the corporation's registered charity status. Once the transition is complete, the charity must file certain documents with the Charities Directorate of the Canada Revenue Agency.

If a registered charity does not apply for a certificate of continuance by October 17, 2014, and Industry Canada dissolves the charity's corporate status, its charitable registration may also be revoked, resulting in very serious consequences.

The best way to approach the required transition is to review existing letters patent, supplementary letters patent, by-laws and corporate policies. If a corporation cannot locate any of these documents, copies may be obtained from Industry Canada.

When reviewing existing governing documents, one should consider the following: Do existing governing documents accurately reflect the corporation's current governance structure? Will any aspect of the current governing structure be inconsistent with the new legislation? Has the corporation been considering changing its current structure and what changes are desired? Under the CNCA, will the corporation be considered a soliciting corporation and, if it will, what are the implications?

Under the CCA, corporations were required to include a lot of detail in their general operating by-laws. The CNCA does not require the same level of detail since many of the rules are contained in the legislation. Therefore, in many instances, revising a corporation's general operating by-law, for the purpose of transition, will be simplified under the CNCA. With that said, care should be taken in reviewing the "default" rules contained in the CNCA to ensure that default rules not suitable for a corporation are overridden. Care should also be taken in reviewing the few rules that, under the CNCA, apply to all corporations and which cannot be overridden. One of the most important of such rules is the one that provides certain voting rights to otherwise non-voting classes of members in respect of certain fundamental changes.

Clearly the transition to the CNCA raises many questions for existing federally-incorporated non-share capital corporations. Blaney McMurtry is well placed to assist in the transition process and would be pleased to do so. ■