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**LIFE AFTER BILL C-21:
“How will it affect your organization?”**

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A. INTRODUCTION

1. A New Statute

Whether you are a director of a yacht club, a volunteer with a nationally recognized charity or the President of a professional association, if you are currently incorporated under the *Canada Corporations Act*, you already know that some changes are afoot.

Bill C-21, the proposed new *Canada Not-For-Profit Corporations Act*,¹ (“Bill C-21” or the “Bill”) received first reading on November 15, 2004 and will, if it becomes law, replace Parts II and III of the *Canada Corporations Act*² (the “CCA”). The Bill is now subject to the normal requirements of the legislative process and is in the process of public consultation and review by the Standing Committee on Industry, Natural Resources, Science and Technology. It is possible that the Bill will be revised before it passes into law, although this possibility may have been minimized by the fact that Industry Canada engaged in years of policy development, public consultation and legislative drafting before arriving at its content. The earliest the Bill could become law is March, 2006 but of course the timing of its eventual passage is uncertain. In addition, before the new legislation comes into force, the government will have

¹ Bill C-21, *An Act respecting not-for-profit corporations and other corporations without share capital*, 1st Sess., 38th Parl., 2004, (1st reading in the House of Commons 15 November, 2004) available at http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-21/C-21_1C-21_cover-E.html.

² R.S.C. 1970, c. C-32, as am.

to publish regulations to fill in some of the detail in the Act. Draft regulations are currently available for review on Industry Canada's website³.

Most people are aware that the CCA is in serious need of reform. It has remained largely unchanged since 1917 and its provisions are both skeletal and ill defined in terms of any governance regime that it provides. Lawyers and those working in the voluntary sector are used to relying on Industry Canada's policy statements when drafting or amending by-laws, amending objects or when undergoing other corporate changes. Suffice to say that the CCA is inadequate to meet the requirements of Canada's voluntary sector and that a reformulation of the Act is long overdue. As a result, Bill C-21 comes as a welcome relief to most people involved with federal non-profit corporations and their advisors.

But what does Bill C-21 really mean to organizations from a practical perspective? Most people who have been following the Bill's progress, know that there is a process that will have to be followed for existing CCA corporations to continue under the *Canada Not-for-Profit Corporations Act* in order to avoid being dissolved. But if it becomes law with little or no amendment, what factors should a corporation consider in developing an action plan for life after Bill C-21 and how will the governing documents of the corporation change? It is this question that will be the focus of this paper.

2. Scheme of the Bill

The process for reform of the CCA was based on certain fundamental underlying principles. They are: the need for flexibility and permissiveness, transparency and accountability and efficiency and fairness in a new statute. A quick review of Bill C-21 by those who are familiar with the *Canada Business Corporations Act*⁴ ("CBCA"), will reveal that the Bill has been modeled significantly on the CBCA and in so doing, Industry Canada adopted a legislative scheme that is both familiar and user-friendly and eminently workable.

The Bill creates more accountability by non-profit corporations and their directors while at the same time providing for more protection from liability, it enhances members' rights and protections, creates flexibility by providing for many more types of corporate actions and fundamental changes and provides

³ See "Explanatory Note – Regulations Under Canada Not-For-Profit Corporations Act" available at: <http://strategis.ic.gc.ca/epic/internet/incd-dgc.nsf/en/cs02683e.html>

⁴ R.S.C., 1985, c. C-44, as am.

efficiency by streamlining the incorporation process. All of this means some significant changes for federal non-profit corporations in terms of their legal organization, the “corporate options” available to them and to their own responsibilities and reporting requirements.

B. PRELIMINARY CONSIDERATIONS

1. Is the Corporation a “Soliciting Corporation”?

One of the initial determinations that should be made by a CCA corporation continuing under the new statute is whether it is a “soliciting corporation”. This is an important determination to be made because it impacts on some of the corporation’s obligations and some corporate actions that may be taken under the new statute.

“Soliciting corporation” is defined in the new statute as:

“...a corporation that has in the current year or in any preceding period that has been prescribed:

- (a) requested donations or gifts of money or other property from the public;
- (b) received a grant or similar financial assistances from the federal government or a provincial or municipal government or an agency of such government; or
- (c) accepted money or other property from a corporation or other entity that has made a request referred to in paragraph (a) or has received assistance referred to in (b).”

There are two obvious results that flow from this definition. The first is that since the definition is so broad, it will catch a wide array of not-for-profit corporations in its net. This in turn will result in additional accountability for a very broad segment of not-for-profit corporations. Not only does it include any corporation that has received “financial assistance” from government but it extends to any corporation that has received money or other property from a corporation that has received financial assistance from government or that may have solicited donations from the public. The definition appears to place the onus on corporations to inquire from *other* corporations whether *those* corporations have requested funds from the public or received money from government.

The second result of this definition is that its application to corporations from year to year may result in a corporation being considered a “soliciting corporation” in one year but a “non-soliciting corporation” the year following and thus a corporation may change its status for the purposes of the new statute depending on the source of its funding.

From a practical perspective, corporations that are charitable and those that rely on government for any part of their funding will likely be soliciting corporations. The situation becomes less clear in certain other instances. For example, does a church that passes around a collection plate on Sunday become a soliciting corporation as a result (even if it does not “request” any other form of donation from the public)? Can it be assumed that a family that funds a private family foundation is not “the public” for the purposes of the definition? Does a not-for-profit corporation that receives membership fees “turn into” a soliciting corporation or are members of a corporation not considered the “public” for the purposes of the definition? At present the answer to these questions is uncertain. It is expected that further clarification will be provided during the legislative process over the 12 months.

It is useful to consider the implications of the definition of “soliciting corporation” in the Bill. The distinction is relevant to corporations with regard to the following matters:

a) Numbers of Directors

Under the Bill, a corporation is permitted to have a minimum of one director unless the corporation meets the definition of “soliciting corporation” in which case it must have a minimum of three directors.⁵ Therefore, the prudent course of action for corporations that may move from one category to another from year to year is to draft the articles and by-laws on the assumption that the corporation is a soliciting corporation. This would mean that the minimum number of directors specified in the articles would be three.

b) Unanimous Member Agreement

The Bill provides for unanimous member agreements but only a non-soliciting corporation may take advantage of this option. A unanimous member agreement may be used in a variety of situations but most commonly with a relatively small membership which plays an enhanced role

⁵ *Supra*, note 1, s. 126

with regard to control and direction over the not-for-profit corporation. Section 170(1) provides as follows:

“An otherwise lawful written agreement among all the members of a corporation that is not a soliciting corporation, or among all the members and one or more persons who are not members, that restricts, in whole or in part, the powers of the directors to manage, or supervise the management of, the activities and affairs of the corporation is valid.”

It should be noted that to the extent that a unanimous member agreement restricts the powers of the directors to manage the affairs of the corporation, parties to the agreement who are given that power have all the rights, powers duties and liabilities of a directors of the corporation.⁶

c) Financial Statements to Director

Under the Bill, a soliciting corporation must provide its annual financial statements prepared in accordance with Section 172(1) to the Director under the new statute⁷. This is on the theory that the directors must account not only to the members but also to a public agency on the theory that the public agency is acting as a proxy for the soliciting corporation’s public purposes. There is no similar obligation for non-soliciting corporations.

The draft regulations⁸ provide that financial statements must be sent to the Director 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 in writing approving the statements under Section 166(1). The Bill requires a corporation in any event, to send financial statements to the Director within 15 months from the preceding annual meeting (by which time an annual meeting was required to be held under the new statute or a resolution in writing signed in place of a meeting), but not later than 6 months after the end of the Corporation’s fiscal year.

⁶ *Ibid*, s. 170(5)

⁷ *Ibid*, s. 176

⁸ *Supra*, note 3, s. 78(1)(2)

d) Appointment of Public Accountant

The audit regime in the Bill divides corporations into two categories: those that are “designated corporations” and those that are not designated corporations. This classification is made in order to determine the obligation under Part 12 of the Bill to appoint a public accountant and the corresponding level of financial review required.⁹ Designated corporations include both soliciting and non-soliciting corporations with annual revenues equal to or less than the prescribed amount:

- (i) Soliciting corporations are considered designated corporations if they have annual revenues equal to or less than the \$50,000.
- (ii) Non-soliciting corporations are considered designated corporations if they have annual revenues equal to or less \$1 million.

Non-designated corporations are soliciting and non-soliciting corporations with annual revenues in excess of the amounts specified above for designated corporations.

The regime prescribed by the Bill for designated corporations is as follows:

- *Dispensing with appointment:* The members of a designated corporation may unanimously resolve not to appoint a public accountant.¹⁰ A resolution to dispense with the appointment of a public accountant is valid until the next annual general meeting. Under the Bill, a public accountant must be a member in good standing of an institute or association of accountants incorporated by or under an Act of the legislature of a province, meet the requirements of the statute for performing any duty required under the statute and be independent of the corporation, its affiliates or the directors or officers of the corporation or its affiliates.¹¹
- *Review engagement – Designated Corporations:* If the members of a designated corporation do not resolve to dispense with the appointment of a public accountant, then the public accountant will conduct a review engagement in the prescribed manner.¹²

⁹ *Supra*, note 1, s. 178

¹⁰ *Ibid.*, s. 181(1)

¹¹ *Ibid.*, s. 179(1)

¹² *Ibid.*, s. 187

- *Audit Engagement – Designated Corporations:* The public accountant of a designated corporation will conduct an audit engagement in the prescribed manner if the corporation's members pass an ordinary resolution requiring an audit engagement. The resolution is valid only until the next following annual general meeting of members.¹³

The regime prescribed by the Bill for corporations that are not designated corporations is as follows:

- *Review engagement – Soliciting Corporation that is not a Designated Corporation:* The public accountant of a soliciting corporation that is not a designated corporation will conduct a review engagement in the prescribed manner if the corporation has annual revenues that are equal to or less than \$250,000. and its members pass a special resolution requiring a review engagement. The resolution is valid only until the next following annual general meeting of members.¹⁴
- *Audit Engagement – Soliciting and Non-Soliciting Corporations that are not Designated Corporations:* The public accountant of a corporation that is not a designated corporation must conduct an audit engagement in the prescribed manner unless the corporation falls within the exception above for soliciting corporations that are not designated corporations.¹⁵

e) Liquidation and Dissolution

Soliciting corporations will be required to include a dissolution clause in their articles which provides that on dissolution, the remaining property of the corporation will be distributed one or

¹³ *Ibid*, s. 187(2)

¹⁴ *Ibid*, s. 188(2), *Supra* note 3 s. 81

¹⁵ *Supra*, note 1, s. 188(1)

more “qualified donees” within the meaning of subsection 248(1) of the *Income Tax Act* (Canada).¹⁶ Corporations caught by this provision are:

- Registered charities
- Soliciting corporations; and
- A corporation that has within the 5 years¹⁷ requested donations from the public or received grants from government, or accepted money from a corporation that has made such requests or received such grants.¹⁸

By including corporations that have requested donations from the public, received grants from government, or accepted money from a corporation that has made such requests or received such grants in the previous five years, the Bill effectively extends the definition of “soliciting corporation” for the purpose of that section. It is debatable whether non-profit organizations that are not registered charities under the ITA should be required to distribute remaining assets on dissolution to “qualified donees” merely because they fall within the definition of “soliciting corporation” for the purposes of a governing corporate statute. This will result in different treatment among federal and many provincial non-profit statutory regimes across the country and could be a deterrent for non-profits considering federal incorporation. Further, it will impact many CCA corporations continuing under the new statute that receive grants from government and that currently have a dissolution clause either naming a specific non-profit organization to receive remaining assets on dissolution or which have the flexibility to provide for a distribution to other organizations carrying on similar activities.

¹⁶ R.S.C. 1985, 5th Suppl., *as amended*. “Qualified donees” are registered charities, registered Canadian amateur athletic associations, registered national arts service organizations, housing corporations resident in Canada constituted exclusively to provide low-cost housing for the aged, the United Nations and its agencies, certain universities outside Canada, charitable organizations outside Canada to which Her Majesty in right of Canada has made a gift during the charity’s fiscal period or in the 12 months immediately preceding the period, municipalities in Canada; and Her Majesty in right of Canada or in right of a province (that is the federal government, a provincial government or their agents).

¹⁷ *Supra*, note 3, s. 37

¹⁸ *Supra*, note 1, s. 233(1)

2. Do Continuing Corporations Require Corporate Objects?

The question of whether objects or corporate purposes are required as part of the articles of continuance (or for that matter, the articles of incorporation) under Bill C-21 has been the subject of some discussion. The inclusion of a requirement to include the “mission” of the corporation has muddied the waters since some have interpreted this to be a form of objects clause under a new name (there being no definition of “mission” in the Bill).

However, the requirement to include any corporate restrictions as well as a mission statement in the articles¹⁹ provides corporations and their advisors with considerable flexibility in establishing or continuing the corporation under the new statute since a combination of approaches may be used in any given corporation. However, it should be noted that this flexibility would be enhanced if the inclusion of a mission statement in the articles were optional as opposed to being mandatory.

It would seem that corporate purposes can be added as either corporate restrictions or as a mission, and that the corporation would be similarly constrained. However, since corporations continued or incorporated under the new statute have full capacity unless there is a restriction in the articles on either activities or corporate powers, any such restriction (in the form of corporate purposes) should be drafted by way of a restriction on corporate capacity and not as a mission. The rationale for this approach can be found in an interaction between the following sections of the Bill:

Subsection 16(1): “A corporation has the capacity and subject to this Act, the rights, powers and privileges of a natural person.”

Subsection 17(2): “A corporation shall not carry on any activities or exercise any power in a manner contrary to its articles.”[emphasis added]

Subsection 7(1): “Articles of incorporation ...shall set out, in respect of the proposed corporation...(e) any restrictions on the activities that the corporation may carry on;” [emphasis added]

Thus, any restriction in the articles with regard to the activities of the corporation should be included under Subsection 7(1)(e) and the corporation will be constrained under Subsection 17(2) to carry on its activities within the limits described in the articles. The approach of providing for corporate purposes by way of a restriction on a corporation’s full capacity was adopted in Saskatchewan’s *Non-Profit*

¹⁹ *Ibid*, s. 7(1)

Corporations Act.²⁰ A sample form of articles of incorporation under the *Non-Profit Corporations Act* is attached as Appendix “A” and provides a useful example of how articles of incorporation/continuance may look under the new statute.²¹

Where a corporation has restricted the activities it may carry on, then the drafting of the “mission” should be done broadly - more as a “vision statement”-(though it is arguable that in that instance, a mission statement should be optional, not mandatory). As a general rule, it could be said that the more specific or constraining the corporate purposes (as restrictions in the articles), the more general the mission statement should be.

CCA corporations that are not registered charities will have at least three options in preparing articles of continuance (with regard to corporate purposes):

- (a) Include no corporate purposes in the articles, which would mean there are no restrictions on the activities that may be carried on by the non-profit (and the section in the form requiring an explanation of any restrictions on the activities would simply be completed by saying “None”). In that event, the mission statement should be drafted so as to confirm the non-profit intention of the corporation.
- (b) Continue with the same purposes as the objects in the corporation’s current letters patent which would form a restriction on the capacity and powers of the corporation. The mission would either reflect the objects or be drafted broadly.
- (c) Prepare new corporate purposes and a corresponding mission. In most cases, new objects should be drafted as broadly as possible so as to restrict the corporation’s powers the least.
- (d) The question of whether non-profit status under the *Income Tax Act*²² (“ITA”) should dictate that corporations include some form of corporate purposes (by restriction on activities) is debatable. Since non-profit status under the ITA is a question of fact which can only be determined by Canada

²⁰ S.S. 1995, c. N-4.2, as amended

²¹ *The Non-Profit Corporations Act, 1995, Incorporation Kit*, Saskatchewan Justice, Corporations Branch, Rev.06/04 available at <http://www.saskjustice.gov.sk.ca/Corporations/pdfforms/NPKit.pdf>.

²² *Supra*, note 16

Revenue Agency upon a review of the purposes and activities of the corporation²³, the inclusion of restrictions in the form of objects would constitute evidence of the non-profit purpose for which the corporation was established. However, a statement regarding “corporate intention” or “purpose” could just as easily be placed in the statement of mission and would similarly constitute evidence of a non-profit intention. Until Canada Revenue Agency’s position is clarified in this respect, some advisors may wish to advise clients to restrict their activities in the articles to those which would suggest an intention which is not profit-making (as opposed to using the mission statement for this purpose).

It should be noted that if a corporation continuing under the new statute is a registered charity under the ITA, no changes to the objects should be made without Canada Revenue Agency’s approval. As a result, the current (CRA approved) objects in the letters patent should be included as a restriction on corporate powers unless a change in objects has been approved by CRA in advance of continuance. The mission statement should not be inconsistent with the corporate purposes which the corporation is restricted by its articles to fulfilling, it should not by its language supplement or broaden the corporate purposes and it should be drafted in a manner that is acceptable to Canada Revenue Agency. In this regard, Industry Canada has consulted with Canada Revenue Agency throughout the process of determining what should be included in the articles. The approach of using corporate purposes as a restriction on corporate powers as well as a mission statement resulted from that consultative process.

Finally, since the new statute gives corporations the capacity of a natural person, some have questioned whether there can still be liability for carrying out activities that are *ultra vires* the corporation’s objects (as with CCA corporations). Under the current law, directors may be personally liable where they authorize or permit a corporation to carry on activities that are outside the authority contained in the corporation’s objects. While the concept of corporate objects is not found in the Bill, the concept of restrictions on corporate powers and a “mission” coupled with the application of Section 17(2) which prohibits a corporation from carrying on activities or exercising corporate powers in a manner that is contrary to the articles, may have the same or a similar result when tested by the courts. However, directors may be able to take advantage of the defences available to them under the new statute (or exercise the right of dissent) in order to minimize or avoid liability.

²³ Interpretation Bulletin IT-496R, August 2, 2001, Canada Revenue Agency

3. Timing of Continuance

Once the legislation has passed and is proclaimed in force, corporations incorporated under the CCA will have a period of three years within which to comply with the new legislation by way of application for continuance before being dissolved.²⁴ The question is whether corporations should wait until the 3rd year to continue or whether there is any advantage to continuing with more immediacy.

Some factors to be considered are as follows:

a) Director Liability:

One of the important changes in the Bill is the inclusion of an objective standard of care which mirrors the objective standard provided under the CBCA.²⁵ The Bill also provides increased protection from liability by establishing a due diligence defense and other means of reducing liability.²⁶ As a result, continuing under the new statute early will be attractive to directors of not-for-profit corporations concerned with minimizing liability and may be an incentive for directors to join the boards of non-profits that have taken this step.

b) By-laws or Letters patent Require Amendment:

For CCA corporations undergoing governance reviews over the next year (with corresponding by-law changes), consideration should be given to waiting until the Bill passes into law to avoid the necessity of amending the by-laws twice. The new statute may also serve as an impetus to change that is long overdue but which, depending on the culture, directors have been loathe to make. On the other hand, there may be more urgent reasons of a cultural or political nature to amend the by-laws under the CCA and to wait until the third year after the Bill becomes law in order to continue under the new statute.

²⁴ *Supra*, note 1, ss. 209, 295

²⁵ *Supra*, note 4, s. 122(1)

²⁶ *Supra*, note 1, s. 150

c) Availability of unanimous member agreement:

The corporation may be one which is controlled by a small group of directors who are also the members of the corporation. Therefore, a single level of decision-making, being the corporate reality, may be achieved in law through the use of a unanimous membership agreement which restricts the powers of the directors to the fullest extent possible.²⁷ It may also be useful where the members wish to limit only some of the powers of the board and take over certain types of decision-making and responsibility. Some CCA corporations may wish to continue early to take advantage of this option.

d) Enhanced rights/protections to members:

The Bill introduces new rules that will provide members will access to membership lists²⁸ unless otherwise exempted,²⁹ the right to seek an oppression remedy against the corporation³⁰ or to seek a court order to commence derivative actions,³¹ the ability to submit proposals to amend by-laws³² or nominate directors³³ or require any matter to be discussed at annual meetings,³⁴ the right to access corporate records,³⁵ the ability to participate in members' meetings by electronic means,³⁶ the ability to enter into a unanimous member agreement³⁷. In some membership driven organizations, the availability of increased rights and protections for members will be sufficient reason to continue under the new statute at the earliest opportunity.

e) Appointment of Public Accountant and Different Levels of Financial Review:

As noted earlier, depending on whether the corporation is a designated corporation (soliciting or non-soliciting) and the annual revenues of the corporation, the corporation may be able to take

²⁷ *Ibid*, s. 170

²⁸ *Ibid*, s. 23

²⁹ *Ibid*, s. 173

³⁰ *Ibid*, s. 251(1)

³¹ *Ibid*, s. 249

³² *Ibid*, s. 153(6)

³³ *Ibid*, s. 163(5)

³⁴ *Ibid*, s. 163(1)(a)

³⁵ *Ibid*, s. 22(1)

³⁶ *Ibid*, s. 159(4)

³⁷ *Ibid*, s. 170

advantage of the provisions allowing either an exemption from audit or a review engagement.³⁸
This could result in significant cost savings for the corporation.

f) Contemplation of Fundamental Changes:

Some CCA corporations have been waiting for the Bill to become law so that they can take advantage of some of the fundamental changes not currently available (e.g. amalgamations, continuances). Depending on the situation, it may be advantageous to continue under the new statute early in order to take advantage of this opportunity.

C. CONTINUING UNDER THE NEW STATUTE

As noted above, corporations will have to file articles of continuance in order to fall under the new statute within three years of the new statute being proclaimed in force. Lets' look at what this means from the standpoint of the documents that will need to be prepared.

1. Articles of Continuance

Like the CBCA, the form for articles of continuance will likely closely resemble the form for articles of incorporation under the new statute. As such, articles of continuance will be required to contain the information provided under Subsection 7(1) of the new statute. In addition, a corporation continuing under the new statute will be required to file a Notice of Registered Office and a Notice of Directors.³⁹

While corporations making use of the continuance provisions will typically transport much of the current information contained in their letters patent and by-laws into the articles, it is also possible to effect by those articles, any amendment to the letters patent or charter that a corporation incorporated under the new statute can make to its articles.⁴⁰ As a result, corporations filing for articles of continuance may wish to take advantage of the opportunity to make any needed corporate changes.

Consistent with the requirements of articles of incorporation under the new statute, articles of continuance should include the following information:

³⁸ *Ibid*, s. 181(1)

³⁹ *Ibid*, ss. 20, 129

⁴⁰ *Ibid*, s. 209(2)

a) The name of the corporation

The name used in the articles of continuance will generally be the current name of the corporation unless the corporation has decided to change its name. Both the CCA and CBCA and respective regulations under these statutes have similar rules regarding corporate names and it appears that the draft regulations under Bill C-21 generally adopt the current rules. Note that it is also possible to incorporate (or continue) with a numbered name so that the corporation could have a name with a designated number followed by the word “Canada” and a prescribed term under the regulation.⁴¹ Under the draft regulations, the prescribed term is one of the following: Association, centre, center, fondation, Foundation, Institut, Institute and society.⁴²

b) The province where the registered office is situated

The articles will be required to include the province in which the registered office (head office) of the corporation is situated at the time the articles of continuance are applied for, unless the corporation will be changing the location of its registered office by way of the articles of continuance.

It should be noted that any change to the location within the province specified in the articles will require only a directors’ resolution.⁴³ A Notice of Change of Registered Office would then be required to be filed with the Director under the new statute. A change in the province in which the registered office is located would require filing of articles of amendment and approval by special resolution.⁴⁴ Unlike the *status quo* under the CCA, there is no corresponding publication requirement in the Canada Gazette.

⁴¹ *Ibid*, s. 12(2)

⁴² *Supra*, note 3, s. 45(2)

⁴³ *Supra*, note 1, s. 20(3)

⁴⁴ *Ibid*, s. 195(1)

- c) The classes or regional or other groups of members and if two or more classes, any voting rights attaching to each of those classes or groups

The articles should contain a brief description of the membership classes and the voting rights attaching to each class and not a detailed description of entitlement, which should be left to the by-laws. For example, the clause in the articles could provide:

There shall be two classes of membership as follows:

- (i) regular membership, the members of which shall be entitled to vote at all meetings of members;
- (ii) honorary membership, the members of which shall not be entitled to receive notice of, attend or vote at any meeting of the members.

All other details regarding persons entitled to membership may be included in the by-laws.

- d) The number of directors or the minimum and maximum number of directors

Under the CCA, only the by-laws are required to specify the number of directors or the minimum number of directors. The Bill requires that the minimum number of directors shall be one or more but, in the case of a soliciting corporation, not less than three, two of whom shall not be officers or employees of the corporation.⁴⁵ The articles are required to specify either a fixed number of directors or a minimum and maximum number. The process for changing the number of directors under the new statute should be borne in mind when considering whether to establish a fixed number of directors in the articles, or a minimum and maximum number.

Where the articles contain a minimum and maximum number of directors, then the members may, from time to time by ordinary resolution fix the number of directors of the corporation or they may delegate that power to the directors.⁴⁶ This is a very flexible approach which allows the members (or the directors if so delegated) to pass an ordinary resolution (usually at the annual general meeting before the election of directors takes place) to increase or decreased the number on the board between the allowed minimum and maximum number provided by the articles.

⁴⁵ *Ibid*, s. 126

⁴⁶ *Ibid*, s. 134(3)

On the other hand, if the articles contain a fixed number (i.e. “There shall be 6 directors”), then in order to change this fixed number, it is necessary to file articles of amendment.⁴⁷ Articles of amendment are also required if the members want to change the minimum and maximum number stated in the articles later on.⁴⁸ Articles of amendment must be approved by special resolution⁴⁹ of the members and must be filed, together with the required fee, in accordance with the requirements of the new statute. As a result, in some cases it will be preferable to state a broad minimum and maximum number in the articles so as to avoid the necessity of applying for articles of amendment later on.

Any change in directors must be reflected in a Notice of Directors to be filed with the Director under the new statute within 15 days after the change becoming effective.⁵⁰

- e) Any restrictions on the activities that the corporation may carry on

Under the new statute, corporations have the capacity and the rights and powers of a natural person.⁵¹ Any restrictions on those powers either for the purpose of maintaining charitable registration or evidencing a non-profit purpose should form a part of the articles of continuance. See the discussion above regarding corporate objects.

As discussed earlier, if corporate purposes are to be included, they should be drafted as restrictions in the articles. This section in the articles would look something like this:

Restrictions, if any, on the activities the corporation may carry on:

Example #1: “The activities of the Corporation shall be restricted to the following:

Carrying out clinical preventive health care programs for the purpose of reducing the incidence of disease, medical complications and death among Canadians.”

⁴⁷ *Ibid*, s. 195

⁴⁸ *Ibid*, 134(1)

⁴⁹ Under Section 2(1), a “special resolution” means a resolution passed by a majority of not less than two-thirds of the votes cast on that resolution.

⁵⁰ *Supra*, note 1, s. 135(1), *supra* note 3, s.29(1)

⁵¹ *Supra*, note 1, s. 16(1)

Example #2: “The activities of the Corporation shall be restricted to the following:

Receiving or maintaining a fund or funds and transferring from time to time all or part thereof or the income therefrom to qualified donees as defined from time to time under the Income Tax Act (Canada).

The sample articles of incorporation from Saskatchewan (attached) also provides an example of purposes in the form of corporate restrictions.⁵²

f) A statement of the mission of the corporation

Unlike the restriction on activities that a corporation may carry on, the statement of mission is generally intended to describe the vision of the corporation in the long term (though some organizations may wish to be as specific as the restrictions on their activities). Non-profit corporations that are non-charitable and that do not include any restrictions on their activities will have another chance in this section to describe the *raison d’être* of the corporation (which can be useful, particularly if evidence of non-profit status is desired).

For example, the mission of a parallel foundation being set up to raise money for an operating charity might say:

The mission of the Corporation is to sustain the charitable programs of ABC charity through long term funding to ABC.

Note that the mission should always be consistent with and complement any corporate purposes included in the articles.

g) A statement concerning the distribution of assets on the dissolution of the Corporation

This requirement was discussed earlier in the context of the determination of whether a corporation is a “soliciting corporation” for the purposes of the Bill. Registered charities, soliciting corporations and corporations that have requested donations from the public, received grants from government, or accepted money from a corporation that has made such requests or received such grants in the previous five years, must include a dissolution clause providing that of remaining

⁵² *Supra*, note 18

assets will be distributed to “qualified donees” (as defined under the *ITA*)⁵³. All other corporations have the flexibility to choose how the clause should be drafted (i.e. distributions to named non-profits, other non-profits carrying on similar activities, the members on a *pro rata* basis, and so on).

h) Other provisions, if any

The articles may include any provision that may be set out in the by-laws. This may be desirable for organizations wishing to make it more difficult to change certain governance features or wishing, for example, to establish an investment power nationally which will flow through to its chapters and not change depending on the laws in a particular province.⁵⁴

The articles may also increase the number of votes of directors or members required by the Act to effect any particular action (other than a removal of directors).⁵⁵

Certain provisions in the Act also allow certain corporate actions but only if they are included in the articles. For example, the Bill provides that if the articles so provide, directors may appoint directors to the board but the total number may not exceed 1/3 of the number of directors elected at the previous annual meeting of members.⁵⁶

An example of what special provisions might look like under the new statute is as follows:

- The bylaws may not require less than a majority of members to constitute a quorum at any meeting of members.
- The directors shall serve as such without remuneration and no director shall directly or indirectly receive any profit from the director’s position as such, provided that directors may be paid reasonable expenses incurred by them in the performance of their duties.
- The directors may appoint one or more directors, who shall hold office for a term expiring not later than the close of the next annual general meeting, but the total number of directors may

⁵³ Supra, note 1, s. 233(1)

⁵⁴ *Ibid* s. 7(3)

⁵⁵ *Ibid*, s. 7(4)

⁵⁶ *Ibid*, s. 129(8).

not exceed one-third of the number of directors elected at the previous annual general meeting of members.

- Any repeal, enactment or amendment of by-laws relating in any way to the corporation or to the conduct of its affairs, shall require the approval of the vote of at least two-thirds (2/3) of the votes cast at a meeting of the members duly called for the purpose of considering same.

2. Process

Both the process of continuance and incorporation under the new statute will involve the filing of articles (of continuance or incorporation, as the case may be), a notice of directors and a notice of registered office as well as the appropriate filing fee. There is no government review or approval of by-laws required under the new statute. The filing fee in the case of CCA corporations being continued under the new statute within the first three years will be forgiven.

The directors listed in the Notice of Directors will hold office immediately upon issuance of the certificate of continuance or certificate of incorporation. The certificate of incorporation or certificate of continuance will issue “as of right”. In the case of incorporation, an incorporator need not be a director and may be either an individual or a body corporate.⁵⁷

It is anticipated that it will be possible to incorporate on-line, in much the same manner as business corporations are incorporated under the CBCA. If so, incorporation of federal non-profits would likely take place on the same day that the articles are filed or if not, at least within 48 hours of filing. The efficiency of this process should be contrasted with the current timing to incorporate federal non-profit corporations (2-4 weeks) and the even longer time required for incorporation of non-profit corporations under Ontario’s *Corporations Act*.⁵⁸

3. By-law Changes

Although by-laws will not be required to be submitted for review and approval, corporations should amend their by-laws to comply with the new statute at the time that they file for articles of continuance.

⁵⁷ *Ibid*, s. 6(1)

⁵⁸ R.S.O. 1990, c. C.38

While some provisions do not strictly need to be included in by-laws (since the “rules” are already provided in the new statute), to the extent that the statutory rules relate to matters of corporate governance, the by-laws should repeat those rules in order to provide a complete governance system for directors and members to follow.

Some of the main by-law areas impacted by the Bill are as follows:

a) Corporate Seal

While all corporations incorporated under the CCA are required to have a corporate seal, the Bill does not appear to make this a requirement. Section 27 provides that a document executed on behalf of the corporation is not invalid merely because there is no corporate seal affixed to it. This position is consistent with requirements under the Saskatchewan *Non-Profit Corporations Act*.⁵⁹

All by-laws under the CCA currently make reference to the corporate seal and the Secretary’s obligation to have custody of the seal. Some organizations may wish to change this by-law provision when the bill passes into law.

b) Registered Office

While in practical terms there has been no significant change relating to the head office of the Corporation, there has been a change in terminology (to “registered office”). Accordingly, reference would likely be made in the by-laws to the registered office being “situated in the province specified in the articles, subject to change by special resolution.”

c) Directors

There are a number of potential changes regarding directors that should be considered when amending the by-laws of a CCA corporation for the purpose of continuance. These are as follows:

⁵⁹ *Supra*, note 20, Section 24

i) Number of directors:

Since the number of directors or the minimum and maximum number must be included in the articles, the by-laws should cross-reference the articles and depending on the corporation, may need to reference its possible categorization as a “soliciting corporation”. Such a clause could provide:

Until changed in accordance with the Act, the board shall consist of the number of directors specified in the articles, provided that in the case of a soliciting corporation the minimum number of directors may not be fewer than three (3), at least two of whom are not officers or employees of the Corporation or its affiliates. If the articles specify a minimum and a maximum number of directors, subject to the requirements regarding the minimum number of directors for soliciting corporations referred to in this paragraph, the board shall be composed of the fixed number of directors as determined from time to time by the members by ordinary resolution or, if the ordinary resolution empowers the directors to determine the number, by resolution of the board.

ii) Appointment of directors:

The by-laws may repeat or cross-reference any provision in the articles allowing the board to appoint up to 1/3 of the directors in accordance with Section 129(8) of the new statute.

iii) Ex-officio directors:

In the case of corporations that currently have ex-officio directors, it should be noted that the new statute does not contemplate the possibility of ex-officio directors, there being a requirement in the Bill that directors be elected by the members.⁶⁰ However, creative drafting of the by-laws can likely achieve a similar result.

iv) Term of office:

By-laws should be drafted to ensure that the maximum term of office of directors is three years. Note that successive terms are not prohibited and directors remain in office until their successors are appointed.⁶¹

⁶⁰ *Supra*, note 1, s. 129(3)

⁶¹ *Ibid*, s. 129(6)

v) Removal of Directors:

Most CCA by-laws currently provide for members to remove directors by a vote of 2/3 of the members. It should be noted that the Bill provides that members may remove directors by ordinary resolution except if the director was elected by a class of members that had the exclusive right to elect the director, in which case such a director would only be able to be removed by the class that elected him or her.⁶² The Bill specifically provides that the number of member votes may not be increased in this instance.⁶³

vi) Electronic Participation in Meetings:

The Bill provides that subject to the by-laws, a director may, if all directors are in agreement and have provided their written consent, participate in a board meeting using telephonic, electronic or another communication facility that permits all participants to communicate adequately with each other during the meeting.⁶⁴ While it is not strictly necessary to include this provision in the by-laws (it being in the new statute), it would be necessary to specify if the power to participate in meetings in this manner is being withheld or modified in some way.

vii) Written Resolutions:

The Bill allows written resolutions to be signed by all of the directors in lieu of holding directors' meetings.⁶⁵ It is recommended that this be included in the by-laws.

viii) Consensus Decision-Making:

The Bill allows by-laws to provide for consensus decision-making by directors except with respect to a decision to dispense with the appointment of a public accountant under section 181(1), a decision by special resolution or by a vote if consensus cannot be reached. The by-laws are required to define the meaning of consensus and to provide the means of determining when a consensus cannot be reached and of referring the matter to a vote.⁶⁶

⁶² *Ibid*, s. 131

⁶³ *Ibid*, s. 7(4)

⁶⁴ *Ibid*, s. 137(9)

⁶⁵ *Ibid*, s. 141

⁶⁶ *Ibid*, s. 138

ix) Duty of Care:

The Bill codifies an objective standard of care for directors and sets out the duties of directors. It is recommended that the standard of care and associated duties be included in the by-laws so that directors are aware of the new law.⁶⁷

x) Indemnification and Insurance:

The Bill permits corporations to indemnify directors and officers and other individuals and to purchase and maintain directors and officers' liability insurance. This power may or may not be included in the by-laws.⁶⁸

d) Officers

The Bill adopts a permissive approach to the appointment of officers, allowing the directors to appoint officers and determine the duties and powers of officers subject to the articles and by-laws and any unanimous member agreement.⁶⁹ Some CCA corporations prefer to have their members appoint the officers. This appears to be permitted as long as it is specified in the articles, by-laws or any unanimous member agreement.

e) Members

There are a number of potential changes relating to members that should be considered when amending the by-laws of a CCA corporation for the purpose of continuance. These are as follows:

i) Classes of Membership:

Since a brief description of the classes of membership must be provided in the articles, the by-laws must be consistent with the articles and may provide further information regarding the criteria for membership in the corporation. At least one class must be voting.⁷⁰

⁶⁷ *Ibid*, s. 149(1)

⁶⁸ *Ibid*, s. 152.

⁶⁹ *Ibid*, s. 143

⁷⁰ *Ibid*, s. 154(4)

ii) Voting Rights of Non-Voting Members:

Under the Bill, there are various corporate actions, including proposed amendments to membership classes, rights and conditions,⁷¹ the sale of assets,⁷² amalgamation of corporations⁷³ and dissolution⁷⁴ which require the approval of all members, whether specified to be voting or not. Many CCA non-profit corporations have one or more classes of non-voting members (i.e. honorary members). Depending on the particular corporation, it may be desirable to remove all non-voting membership classes from the by-laws and to give non-voting members some other recognition (i.e. circle of friends, honorary contributors etc...).other than non-voting membership, to avoid being caught by this provision.

iii) Unanimous Membership Agreement:

Where there is a unanimous members agreement, there are a number of by-law provisions that should be made subject to the provisions of the agreement (i.e. execution of documents, powers of directors, election of directors, appointment of officers and so on).

iv) Discipline of Members.

A corporation's articles or by-laws may provide that the directors, members or any committee of directors or members shall have the power to discipline a member or terminate a member's interest. If they do, the circumstances and manner in which this power is to be exercised would be required to be included in the by-laws or articles.⁷⁵

v) Approval of By-law Changes.

The by-laws will need to be amended to provide for a new system of enacting, amending and repealing by-laws. Under the new statute, by-laws (amendments and repeals) are effective upon the directors' resolution approving them but they must be submitted to the members at the next meeting of members at which time the members may by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal.⁷⁶ As such, the relevant by-law provision may simply provide: "This by-law shall come into force when enacted, subject to the

⁷¹ *Ibid*, ss. 195 and 197

⁷² *Ibid*, s.212

⁷³ *Ibid*, s. 204(1)

⁷⁴ *Ibid*, s. 219

⁷⁵ *Ibid*, s. 158

⁷⁶ *Ibid*, s. 153

provisions of the Act.” Certain other by-law changes provided in Section 195(1) require approval by special resolution, although most of these matters will be found in the articles. Note that it is possible to increase the number of membership votes that are required to approve by-laws under Subsection 7(4) of the Bill.

vi) Approval of Changes to Articles.

The by-laws may reflect that certain corporate changes may only be made by way of articles of amendment requiring a special resolution.⁷⁷

vii) Member Proposal.

A member entitled to vote at an annual meeting of members will be entitled to make a proposal to amend, repeal or enact by-laws.⁷⁸ This is an important new membership right which should be stated in the by-laws.

viii) Notice of Meeting.

Notice of a meeting of members must be provided in accordance with the by-laws to the members, directors and auditor. Any manner of giving notice may be provided in the by-laws.⁷⁹ If the by-laws do not provide any manner of giving notice, the corporation must send the notice to members within the prescribed period. The Regulations prescribe different time periods (i.e. not less than 21 days for notice by mail, not less than 14 days and not more than 35 for electronic notice) for sending notices to members of members meetings depending on the type of notice being used. 21 days is the longest minimum notice prescribed by the Regulations.

ix) Resolutions in Writing.

With certain noted exceptions, the Bill allows members who are entitled to vote at a meeting of members to sign a resolution in writing and this will satisfy all of the requirements of the

⁷⁷ Ibid, s. 195

⁷⁸ Ibid, s.163

⁷⁹ Ibid, s. 162

Act relating to members' meetings.⁸⁰ This section will be of most benefit for small membership organizations and should be included in the by-laws.

x) Participation in Meeting by Electronic Means.

Any person entitled to attend a meeting of members may participate in the meeting using telephonic, electronic or other communications means permitting all participants to communicate adequately with each other during the meeting if the Corporation makes available such a communication facility.⁸¹ A person attending the meeting may vote electronically unless the by-laws otherwise provide.⁸²

xi) Voting.

Unless the by-laws otherwise provide, voting at a meeting of members will be by show of hands, except if a ballot is demanded by a member entitled to vote.⁸³ The Regulations provide for various means of absentee voting including voting by proxy, voting by mail-in ballot, voting by telephonic, electronic or other communication facility.⁸⁴ A corporation should include all means of voting that may be used in its by-laws.

xii) Quorum.

If the by-laws do not set out the quorum requirement for members' meetings, the Bill provides that a quorum shall be a majority of members entitled to vote at a meeting of members.⁸⁵

xiii) Nominating Committee.

It is currently possible for CCA corporations to include a provision which effectively requires the members to elect directors in accordance with a slate of directors prepared by a nominating committee. However, the Bill now allows voting members to submit proposals including nominations for the election of directors as long as they are signed by not less than 5% of the members of a class of members entitled to vote at the meeting at which the proposal

⁸⁰ *Ibid*, s. 166

⁸¹ *Ibid*, s. 159(4)

⁸² *Ibid*, s. 165(3)

⁸³ *Ibid*, s. 165(1)(2)

⁸⁴ *Supra*, note 3, section 74

⁸⁵ *Ibid*, s. 164

is to be presented or some lower number of members provided by the by-laws. As such, the by-laws will no longer be able to prohibit additional nominations for the election of directors from members.⁸⁶

xiv) Requisition of Meeting.

Members holding the prescribed percentage of votes (5%) will be able to requisition the directors to call a meeting of members. The by-laws may provide for a lower percentage of members required to requisition a meeting but not a higher percentage.⁸⁷

4. Appointment of Public Accountant

The discussion above regarding the appointment of a public accountant and the various rules associated therewith apply to the proper drafting of the by-laws. The by-law provision for a “designated corporation” may be similar to the following:

Appointment of Public Accountant – Subject to the Act, unless the members have resolved not to appoint a public accountant, the members of the Corporation shall, by ordinary resolution at each annual meeting, appoint a public accountant to hold office until the next following annual meeting. The directors may appoint a public accountant at the first organizational meeting following incorporation to hold office until the first annual meeting of members and may also fill any casual vacancy in the office of the public accountant. The remuneration of the public accountant may be fixed by ordinary resolution of the members, or if not so fixed, shall be fixed by the board of directors.

⁸⁶ *Ibid*, s. 163(5), Regulations s. 65

⁸⁷ *Supra*, note 1, s. 167(1), Regulations, s. 72(1)

D. CONCLUSION

Bill C-21 provides a comprehensive and user friendly legislative scheme that is sufficiently flexible to respond to the individual needs and social reality of a variety of types of not-for-profit corporations.

Continuing under the new statute will be a relatively straightforward process and it appears that the forms to be prepared by the government for continuance, incorporation and other corporate actions will be simple to use. While the anticipated progress of the Bill is an unknown in terms of its timing and other less predictable factors, it is to be hoped that the voluntary sector will be able to take advantage of this modern and flexible legislation within the earliest possible timeframe.

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**Saskatchewan
Justice**
Corporations
Branch

Articles of Incorporation
The Non-profit Corporations Act, 1995
(section 6 of the Act)

Form 1

1. Name of corporation:

Viscount Recreation Association Inc.

2. The municipality in which the registered office is to be situated:

Town of Viscount

3. The classes of membership:

The annexed schedule I is incorporated in this form

4. Right, if any, to transfer membership interest:

None

5. Number (or minimum and maximum number) of directors:

Minimum of 3 and Maximum of 12

6. The corporation is: a membership corporation or a charitable corporation

7. Restrictions, if any, on activities the corporation may carry on or on powers the corporation may exercise:

The activities of the corporation are restricted to providing facilities, recreation, social and other like services to the residents of Viscount and area.

8. Persons to whom remaining property is to be distributed in the course of liquidation and dissolution of the corporation:

Upon liquidation and dissolution, any remaining property of the corporation shall be transferred to the Town of Viscount.

9. Other provisions, if any:

The annexed Schedule II is incorporated in this form.

10. Incorporators:

George Black	100 Anywhere Street, Viscount	“George Black”
John White	200 Any Avenue, Viscount	“John White”

Name in full

Residential or business address, giving street and number or R.R. number and post office

Signature

***If you state a Schedule is attached, be sure to attach the schedule and mark it Schedule I or Schedule II, as the case may be.**

SCHEDULE 1
Classes of Membership

There shall be two classes of membership as follows:

- (a) regular membership, the members of which shall be entitled to vote at all meetings of members;
- (b) associate membership, the members of which shall be entitled to the same rights as regular members, but shall not be entitled to be elected as directors.

SAMPLE

SCHEDULE II
Other Provisions

1. A director is required to be a member of the corporation.
2. The bylaws may not require more than a majority of members to constitute a quorum at a meeting of members.
3. The directors shall hold their meetings in Viscount or district upon notice sent to each director at least 5 days prior to the date of the meeting; provided that the directors may meet on regular dates without notice or may, by unanimous consent, meet at any time or at any place without notice.
4. A meeting of directors may be called at any time by the president or by a vice-president and the secretary shall, when directed by any of the foregoing, call the meeting.
5. No director shall be a salaried employee of the corporation.
6. No director shall receive any remuneration for acting as such. However, a director may be indemnified for his/her expenses incurred on behalf of the corporation as a director.
7. Except in the case of first bylaws after incorporation, all bylaws shall be made, amended or repealed by the members in general meeting. First bylaws shall be substituted at the first meeting of members and may by ordinary resolution be confirmed, rejected or amended.