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NEW CANADA NOT-FOR-PROFIT CORPORATIONS ACT AND ITS IMPACT ON CHARITABLE AND NON-PROFIT CORPORATIONS

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A. INTRODUCTION

Currently charitable and not-for-profit corporations that wish to be incorporated and governed federally do so under Part II of the *Canada Corporations Act* (the "CCA"). On November 15, 2004, *An Act Respecting Not-for-profit Corporations and Other Corporations Without Share Capital* (Bill C-21) (the "Act" or the "*Canada Not-for-profit Corporations Act*") received first reading in the federal legislature.[1] The Act was subsequently referred to the Standing Committee on Industry, Natural Resources, Science and Technology on November 23, 2004 for public consultation and review. Some of the proposed regulations that will accompany the Act are also available for review from the Industry Canada website.[2]

The *Canada Not-for-profit Corporations Act* will replace Parts II and III of the CCA, a statute that was first enacted in 1917 and has not been substantively changed since that time. The purpose of the Act is to provide a "modern corporate governance framework" for regulating federally incorporated not-for-profit

[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_1/C-21_cover-E.html.

[2] 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

corporations. In order to bring the legislation up to date, the new Act was modelled on the provisions of the *Canada Business Corporations Act* ("CBCA"). As well, it incorporates salient provisions from provincial not-for-profit statutes and was benchmarked against similar legislation in the United States.[3]

The Act proposes many changes over the current governance provisions for not-for-profit corporations under the CCA. While they are discussed in more detail below, and while the Act may be subject to further revisions before it is passed into law, the following are some of the Act's more important provisions:

- A streamlined "as of right" incorporation process is established with incorporation being granted upon the filing of the required forms and payment of the incorporation fee;
- Amended requirements for the articles of incorporation and by-laws of not-for-profit corporations;
- The new office of director of corporations ("Director") is created and provided with expanded regulatory and investigative powers under the Act;
- Directors' duties and responsibilities are outlined, together with the establishment of an objective standard of care and a due diligence defence and other protections for directors and officers;
- The rights of members of not-for-profit corporations are better enhanced and protected;
- Faith-based defences for religious not-for-profit corporations are provided against both derivative actions and claims of oppressive or prejudicial conduct by a corporation;
- In an effort to improve financial accountability, not-for-profit corporations are to be categorized as either soliciting corporations (those which solicit public donations or government funding) or non-soliciting corporations, with graduated levels of financial review being required based on a corporation's category and its gross annual revenue; and
- All not-for-profit corporations will be required to make their financial statements available to members, directors and officers of the corporation, as well as to the Director.

Following its passage by the Parliament and being proclaimed into force, all new not-for-profit corporations will be established under the Act. As well, all existing federal non-share capital corporations subject to Part II of the CCA must apply for continuance under the Act within three years of it coming into force. However, it is important to keep in mind that while the Act is currently expected to be passed by the federal Parliament and receive Royal Assent in the next six to nine months, it will likely not be proclaimed into force until at least March 2006. As well, it is likely that a number of amendments will be made to the current provisions contained in the Act during the intervening period.

[3] See 38th Parliament 1st Session, Edited Hansard, Number 030, available at http://www.parl.gc.ca/38/1/parlbus/chambus/house/debates/030_2004-11-23/toc030-E.htm

However, once the Act is proclaimed into force, it is expected that this continuance process will be a straightforward one with no filing fee required. In order to continue under the Act though, existing corporations will have to demonstrate the compliance of their existing corporate governance provisions with the requirements of the Act. This will necessitate the filing of articles of incorporation under the Act by existing federal not-for-profit corporations, as well as possibly having to amend the corporation's by-laws in order to conform with the requirements of the Act and to obtain the benefit of its new provisions. The completion of the application for continuance under the Act is a very important step for corporations to complete within the three-year transition period because where they fail to do so, they could be dissolved under the Act.

For those not-for-profit corporations that are or are in the process of applying to become registered charities under the *Income Tax Act* (Canada), it is important to be aware that the Act will not impact their status as registered charities. However, the federal Government is also currently in the process of enacting a number of significant amendments to the *Income Tax Act* (Canada) that will impact charities in a number of different areas. For more information on these proposed amendments to the *Income Tax Act* (Canada), reference should be made to earlier *Charity Law Bulletins* No. 54, 55, 56 and 59, available at http://www.charitylaw.ca/.

This *Charity Law Bulletin* summarizes the proposed changes in the Act in relation to the creation and ongoing governance of federal not-for-profit corporations as compared to the CCA, the process by which existing corporations can continue themselves under the Act and the potential impact of the Act on new and continuing federal not-for-profit corporations.

B. SUMMARY OF THE ACT

1. Incorporation and Powers of the Corporation

   a) "As of right" incorporation process

      Currently under the CCA, in order to obtain Letters Patent (the existing incorporation document), at least three incorporators must apply, with accompanying by-laws, to the Minister of Industry for a charter creating a body corporate in order to be able to carry on a non-share capital corporation's

objects.4 Under the new system being established by the Act, once one or more individuals or bodies corporate5 file an application for articles of incorporation under a specified form and pays the required fees, incorporation will be granted "as of right," thus foregoing the need for ministerial review of the application for articles of incorporation or the corporation's by-laws.6 With the option to file electronically, incorporation will be effected in a shorter time period, will be simpler and will be more efficient than under the CCA.

b) Powers of the corporation

A not-for-profit corporation established under the Act has the capacity, rights, powers and privileges of a natural person,[7] including the right to buy and sell property, make investments, borrow funds and issue debt obligations. In addition, 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.[8] This is a significant and welcome change from the CCA, which currently grants a non-share capital corporation only the powers that are set out in Part II of the CCA, subject to any limitations set out in the corporation's own Letters Patent.[9] The proposed "incorporation as of right" system will allow not-for-profit corporations to assume the new and broader powers of a corporate legal entity unless such powers are limited by or contrary to their articles.[10]

2. Articles of Incorporation

The Act requires that the articles of incorporation (the new incorporation document) are to be in the form fixed by the Director and shall set out the name of the corporation, the province where the head office is located, the membership classes or groups and the voting rights of each class or group, the exact number of directors or the minimum and maximum number of directors, any restrictions on the activities of the corporation, a statement of the mission of the corporation (which is intended to be the

[4] *Canada Corporations Act* s.154(1)
[5] *Supra* note 1 s.6(1)
[6] *Ibid*, s. 9.
[7] *Ibid*, s. 16(1).
[8] *Ibid*, s. 17(1).
[9] *Supra* note 4, ss. 15 and 16.
[10] *Supra* note 1,, s. 17(2).

equivalent of the current corporate objects in Letters Patent) and a dissolution clause.[11] These requirements are somewhat different than the Letters Patent requirements under the CCA, particularly in relation to the inclusion of membership classes and the number of directors. As well, it is no longer necessary for an articulated list of powers to be included in the articles of incorporation, although corporations will likely wish to set out its chosen investment powers, eg. the *Trustee Act* of Ontario or another provincial jurisdiction, in order to ensure consistency of investment decision making, particularly where such corporation is engaged in activities in multiple provinces and therefore possibly subject to such provinces' investment regime.

3. By-laws

The CCA currently requires existing non-share capital corporations, at the time of their incorporation, to create by-laws that specifically address certain corporate governance matters, which by-laws then have to be reviewed and approved by Industry Canada before they become effective. In this regard, Industry Canada required applicant corporations to prepare by-laws that addressed certain basic corporate governance matters, thereby ensuring a certain level of consistency among federal non-share capital corporations. A similar process of review and approval by Industry Canada of subsequent by-law amendments is also in place.

However, under the Act, it will no longer be necessary for applicant not-for-profit corporations to submit their proposed by-laws (or any future amendments to the by-laws) to Industry Canada for review and approval.[12] The Act will only require that the by-laws deal with membership issues, including membership conditions and voting rights of members.[13] It will then be the decision of the corporation as to what other governance matters are to be addressed in their by-laws and in what manner.

Another important change in the Act that, in part, results from Industry Canada no longer being involved in reviewing by-laws, is the directors will now be able to make, amend or repeal any by-laws

[11] *Ibid*, s. 7.
[12] *Ibid*, s. 8.
[13] *Ibid*, s. 154.

of the corporation that regulate the affairs of the corporation, save and except certain matters outlined in section 195 of the Act, which will take effect as of the date of the directors' resolution.[14] However, such by-laws will subsequently have to be submitted for approval by the members of the corporation.

The removal of the requirement for applicant corporations to file and obtain the approval of its by-laws from Industry Canada will obviously result in a more efficient and streamlined process for not-for-profit corporations. However, it can also potentially result in many corporations never preparing corporate by-laws at the time of their incorporation or thereafter, resulting in such corporations never having any kind of governance structure established or a structure that is not properly reflective of its not-for-profit nature. Such a situation has resulted with many not-for-profit corporations established under other provincial regimes that do not require by-laws to be prepared and submitted at the time of incorporation. As a result, such not-for-profit corporations are operated without any kind of by-laws in place, resulting in complicated and costly "clean up" corporate work many years later.

4. Annual and Other Meetings

Under the Act, corporations will be required to hold annual meetings of members and special meetings can be called, as required, from time to time,[15] including on the requisition of the members.[16] New provisions are also included in the Act that permit meetings of members to be held by telephone or electronic means,[17] written resolutions in lieu of meetings,[18] absentee voting by members[19] and decisions by consensus.[20]

[14] *Ibid*, s. 153.
[15] *Ibid*, s. 160.
[16] *Ibid*, s. 167.
[17] *Ibid*, s. 159(4) and (5).
[18] *Ibid*, s. 166
[19] *Ibid*, s. 171.
[20] *Ibid*, s. 138.

5. Office of "Director of Corporations"

Under the Act, a new office of Director of Corporations is established and, in doing so, the current system of ministerial review and discretion is replaced.[21] The Director appointed under the Act will exercise administrative as well as regulatory functions and, therefore, will be empowered to issue incorporation, amalgamation or dissolution certificates, as well as to make inquiries related to compliance and to access key corporate documents such as financial statements and membership lists. As well, the Director will have extensive powers to investigate and dissolve a corporation in the case of a complaint by an interested party and, where deemed appropriate, cancel such corporation's articles.[22]

6. Board of Directors

a) Directors' duties and number of directors

The Act specifically outlines that directors shall manage or supervise the management of the activities and affairs of the corporation, subject to the provisions of the Act, the articles and any unanimous member agreements.[23] The number of directors shall be one or more but, in the case of a soliciting corporation, are not to be less than three, two of whom shall not be officers or employees of the corporation.[24]

b) Election and/or appointment of directors

The Act specifically requires members to elect all of the directors of the corporation, whose term of office is to be no longer than three years,[25] although the staggering of directors' terms is possible.[26] However, despite this restriction on the length of a director's term of office, incumbent directors will continue in office until such time as their successors are elected.[27] In this regard, it is important to note that the Act does not specifically permit *ex officio* directors, although it is anticipated that

[21] *Ibid*, s.279.
[22] *Ibid*, s. 287.
[23] *Ibid*, s. 125.
[24] *Ibid*, s. 126.
[25] *Ibid*, s. 129(3).
[26] *Ibid*, s. 129(4).
[27] *Ibid*, s. 129(6).

corporations will be permitted to draft their by-laws in a manner that could achieve a similar, although not identical, result.

As well, the Act permits the directors to appoint other directors if the articles of the corporation so provide. However, the term of office of such appointed officers is not to be longer than one year and the total number of appointed directors on the board is not to exceed one third of the number of directors elected at the immediately preceding annual meeting of members.[28]

c) Other provisions

The Act set out detailed provisions in relation to conflict of interest issues for directors and officers of not-for-profit corporations.[29] There are also other provisions in the Act regarding directors including, but not limited to, qualifications,[30] removal,[31] filling of vacancies,[32] changing the number of directors,[33] meetings of directors,[34] decisions by consensus,[35] written resolutions in lieu of meetings[36] and remuneration.[37]

d) Directors' standard of care

Under common law, in carrying out their duties and responsibilities to the corporation, directors have been held to a subjective standard of care based on their own particular abilities.[38] One of the important changes 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

[28] *Ibid*, s. 129(8).
[29] *Ibid*, s. 142.
[30] *Ibid*, s. 127(1).
[31] *Ibid*, s. 131.
[32] *Ibid*, s. 133.
[33] *Ibid*, s. 134.
[34] *Ibid*, s. 137.
[35] *Ibid*, s. 138.
[36] *Ibid*, ss. 128(5) and 141.
[37] *Ibid*, s. 144.
[38] *Re City Equitable Fire Insurance Company Ltd.*, [1925] 1 Ch. 407 at 428

comparable circumstances as well as complying with the Act, as well as the corporation's articles, bylaws and any unanimous member agreements.[39] This standard of care mirrors the current objective standard required of directors of share capital corporations incorporated under the CBCA.[40]

e) Directors' liability

Directors will need to be mindful that they will continue to attract liability "jointly, severally and solidarily" for up to six months of unpaid employees' wages if the corporation fails to pay these.[41] This obligation continues for as long as they are directors. As well, directors who either consent or acquiesce to any resolution or action that breaches their duty under the Act in certain articulated areas can be held "jointly, severally and solidarily" liable.[42]

f) Protection, indemnification and defences against liability

However, as a means of protection from liability, the Act also establishes a due diligence defence for directors of not-for-profit corporations that is the same as that currently available to directors of share capital corporations under the CBCA. Provided that directors meet the earlier mentioned objective standard of care, they will be protected from liability by a "due diligence" defence. Directors will satisfy the due diligence defence requirements outlined in the Act if "they exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances," including good faith reliance on financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the public accountant of the corporation fairly to reflect the financial condition of the corporation or a report of a person whose profession lends credibility to a statement made by that person.[43] A similar due diligence defence is also available for officers of not-for-profit corporations.[44]

[39] *Supra* note 1, s. 149(1)(2).
[40] *Canada Business Corporations Act* s. 122(1).
[41] *Supra* note 1, s. 147(1).
[42] *Ibid*, s. 146(1).
[43] *Ibid*, s. 150.
[44] *Ibid*, s. 151.

It is important to note that, in addition to the availability of a due diligence defence, the Act also will allow not-for-profit corporations to indemnify a director or officer against liability as long as such director or officers acts honestly and in good faith to the best interests of the corporation.[45] As well, indemnification of a director or officer is possible by a not-for-profit corporation in a criminal or administrative action, where he or she had reasonable grounds for believing that their conduct was lawful. The Act will also protect, indemnify or limit the liability exposure of directors and officers.[46]

In assessing the scope of directors' rights and responsibilities proposed under the Act, it is evident that in tandem with broadening the scope of protections for directors of not-for-profit corporations, the Act will require that directors meet higher diligence standards and increased responsibilities than are currently required under the CCA or at common law. Therefore, while the new rules provide more certainty and protection to current directors, and is likely an impetus to attract potential directors, the new diligence standards as well as the enhanced members' right to access corporate records (as discussed below) means that directors' conduct will likely be exposed to greater scrutiny and directors will be expected to be more astute and to generally exercise a greater level of prudence and vigilance in the way they manage the affairs of the corporation.

7. Enhanced Members' Rights and Protections

a) Overview

Part 10 of the Act and Part 4 of the Regulations have extensive provisions governing conditions of membership, termination of membership rights and notice of members' meetings that mirror provisions under the CBCA. As well, the Act also introduces new rules that will provide members with access to membership lists[47] unless otherwise exempted,[48] the right to seek a court order to commence derivative actions[49] and to seek an oppression remedy against a corporation,[50] the option

[45] *Ibid*, s. 152.
[46] *Supra* note 3
[47] *Ibid*, s. 23.
[48] *Ibid*, s. 173.
[49] *Ibid*, s. 249.
[50] *Ibid*, s. 251(1).

to submit proposals to amend by-laws[51] or to discuss any matter at an annual meeting of members,[52] the right to access various corporate records (including minutes of members' meetings, as well as directors', officers' and members' lists and financial statements),[53] the option to participate in the members' meeting by electronic means,[54] unanimous member agreements[55] and the ability to reject, amend and approve by-laws without ministerial approval by either ordinary resolution (a majority vote) or special resolution (two-thirds vote), as applicable.[56]

b) Input of members

There are a few areas outlined in the Act, including proposed amendments to membership classes, rights and conditions,[57] the sale of assets[58] and the dissolution of the corporation,[59] which require the approval of all the members (both voting and non-voting) of the corporation by resolution. The increased role and input of non-voting members of a not-for-profit corporation on these important matters is a significant change from the CCA and may be of concern to not-for-profit corporations.

c) Financial disclosure

Disclosure of financial records is one of the areas in which members will have new access rights when the Act comes into force. Currently under the CCA,[60] corporations are required to keep financial records and provide audited reports to members at the annual meetings of members but there is no specific allowance for members to access the corporation's financial records. This will change under the new Act and members or their representatives will be able to access these financial statements, on request. [61]

[51] *Ibid*, s. 153(6).
[52] *Ibid*, s. 163(1)(a).
[53] *Ibid*, s. 22(1).
[54] *Ibid*, s. 159(4).
[55] *Ibid*, s. 170.
[56] *Ibid*, s. 153(2).
[57] *Ibid*, ss. 195 and 197.
[58] *Ibid*, s. 212.
[59] *Ibid*, s. 219.
[60] *Supra* note 4, s. 117 (which applies by reference to Part II corporations)
[61] *Supra* note 1, s. 174(1).

The Act also requires corporations to send copies of the annual financial statements to each member, unless he or she has stated in writing that they do not wish to receive such documents.[62] The only way for corporations to avoid this obligation to send copies of these financial documents is to either publish a notice that includes the information required to be set out in the documents or, if the by-laws of the corporation so provide, to publish a notice that the documents are available at the head office of the corporation and can be requested to be send by mail.[63] Accordingly, in order to avoid the costs associated with mailing these financial documents to clients, corporations will need to take steps to amend their by-laws to allow for the publication of the above-noted notice.

d) Derivative actions, oppression remedies and faith-based defences for religious corporations

As indicated earlier, the Act will allow members and others to apply for a court order authorizing them to bring an action in the name of, or to intervene in, an action by or against the corporation.[64] As well, members will be permitted under the Act to seek an oppression remedy against the corporation where an act, omission or conduct of the corporation is oppressive or unfairly prejudicial.[65]

However, the Act will also introduce a new provision – the faith-based defence, which is one of the ways in which the above-mentioned enhanced members' rights under the Act could be restricted.[66] That is, a faith-based exemption to both derivative actions and oppression remedies is allowed for religious corporations' whose decisions are based on a "tenet of faith."[67] This means that a member may not be granted redress from a religious corporation's decision it considers oppressive if the decision was based on the corporation's "tenets of faith" and it was reasonable to base the act, omission, conduct or exercise of power on such tenets of faith.

[62] *Ibid*, s. 175(1).
[63] *Ibid*, s. 175(2).
[64] *Ibid*, s. 249(1).
[65] *Ibid*, s. 251(1).
[66] *Ibid*, s. 251(2).
[67] *Ibid*, ss. 249(3) and 251(2).

While the faith-based defence introduces an important protection for faith-based organizations that were wary of being compelled to potentially compromise their religious principles, the scope of "tenets of faith" is not defined in the Act. As a result, it is unclear how broadly this protection will be interpreted. In addition, the scope of this protection will also depend on what conduct will be considered as a "reasonable" exercise of the religious corporation's "tenets of faith" under any given circumstances.

Synonymous to shareholders of a share capital corporation who, in exercising their rights, are able to oversee the operations of the corporation, members of not-for-profit corporations will likely be empowered to play a pivotal role in monitoring the corporation's operations based on the enhanced members' rights and protections proposed in the Act. This expanded role that members of not-for-profit corporations will be empowered to play will likely be a major component in acquiring and maintaining public confidence in the integrity of not-for-profit corporations that are primarily dependent on raising public funds or acquiring government funding in order to carry out their activities and programs.

8. Financial Review and Disclosure

a) The soliciting versus the non-soliciting corporation

The Act establishes two different types of not-for-profit corporations: soliciting corporations and non-soliciting corporations, with different duties and obligations being ascribed to each. Soliciting corporations are those that solicit donations from the public or receive government funding, while non-soliciting corporations are those that are member-funded.

This distinction in the Act then result in the establishment of varying standards of financial disclosure and financial accountability based on the corporation's categorization as a soliciting or non-soliciting corporation, as well as on its gross annual revenues. With regards to financial accountability, based on the graduated revenue thresholds specified in the proposed regulations under the Act, corporations will be able to determine whether they are required to undertake a full

audit or, instead, a less intrusive and less expensive review engagement, in order to satisfy their financial disclosure requirements as described in more detail below.

b) Graduated levels of review for non-soliciting and soliciting organizations

The Act establishes a direct correlation between the gross revenue a corporation earns and the type of financial report that must be filed with Industry Canada. In this regard, the Regulations will establish five graduated categories of corporations that will determine the permissible levels of financial scrutiny.[68] The level of financial reporting that will apply is either an audit engagement, a review engagement, or no financial scrutiny.

Non-soliciting corporations with gross annual revenues of less than $1M will be required to undertake a financial review of their financial statements. Members could opt to raise the level of review to an audit engagement or unanimously resolve not to appoint a public accountant or undertake any external review. Non-soliciting corporations with gross annual revenues equal to or exceeding $1M must undertake an audit engagement.

Soliciting corporations with gross annual revenues of less than $50,000 will be required to undertake a financial review of their financial statements. Members could opt to raise the level of review to an audit engagement or unanimously resolve not to appoint a public accountant or undertake any external review. For soliciting corporations with annual revenues between $50,000 and $250,000, an audit engagement will be required unless the members resolve by special resolution to instead undertake a review engagement. Soliciting corporations that have revenues exceeding $250,000 must have their financial records audited. All soliciting corporations shall forward copies of their annual financial statements to Industry Canada, which will then be available to the public for review.[69]

The graduated levels of financial scrutiny based on gross annual revenue are examples of how the Act is geared towards balancing transparency and protection of the public interest versus the limited

[68] *Supra* note 2.
[69] *Supra* note 1, s. 176.

resources of some not-for-profit corporations. The underlying assumption is that these categories are fluid and corporations have the option to change each year as circumstances dictate. The rationale behind this graduated approach allows the smallest category of non-soliciting corporations to focus their limited resources on fulfilling their mandate instead of expending considerable monies on having their financial books audited or reviewed. This flexibility, however, means that there will be instances in which some corporations' financial records may not be audited or reviewed.

C. CONCLUSION

Overall, the Act, as it currently exists, appears to be on the right track in providing the "modern corporate governance framework" for regulating federally incorporated not-for-profit corporations that Industry Canada has indicated it is trying to achieve. However, there are a few provisions in the Act that may be of concern for not-for-profit corporations, as were outlined in more detail in this *Charity Law Bulletin*.

Going forward, it will be imperative for existing federal not-for-profit corporations to apply for continuance under the Act during the transition period, i.e. within three years of the Act coming into force, or risk being dissolved under the Act. In completing this continuance under the Act, corporations will also need to ensure that their constating corporate documents are in compliance with the new requirements of the Act, as well as achieve the benefit of the Act's new provisions. However, given that the Act will not likely be proclaimed into force until at least March 2006, likely with amendments in the interim as it proceeds through the Parliament, not-for-profit corporations should have sufficient time to become familiar with the Act and achieve compliance therewith.

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