

**COUNTDOWN TO THE
CANADA NOT-FOR-PROFIT CORPORATIONS ACT
PRACTICE TIP #4: DISCIPLINE OF MEMBERS AND
NEW REMEDIES UNDER CNCA**

*By Jane Burke-Robertson**

The decisions of not-for-profit organizations involving the expulsion, discipline or suspension of members have resulted in a number of cases over the last several years. In particular, the courts have on numerous occasions considered the application of natural justice rules in membership discipline cases. While historically there has been judicial reluctance to intervene in the affairs of a voluntary association, the courts have rationalized their intervention in membership cases in recent years on the basis of the “contractual” relationship of members to the non-profit corporation. The CNCA now provides a statutory basis for intervention and provides many new remedies previously unavailable to members of federally incorporated not-for-profit organizations.

Section 158 of the CNCA specifically permits the articles or by-laws to address the power to discipline members as long as the circumstances and the manner in which that power must be exercised are also addressed. In this way, the new legislation is permissive where membership discipline is concerned but also mandates organizations to address the particulars regarding the exercise of such powers in their by-laws or articles. This represents a legislative attempt to address one of the common difficulties experienced by organizations that have inadequate provisions in their by-laws relating to the procedures that must be followed in membership discipline, suspension or expulsion. Section 158 provides as follows:

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“The articles or by-laws may provide that the directors, the members or any committee of directors or members of a corporation have the power to discipline a member or to terminate their membership. If the articles or by-laws provide for such a power, they shall set out the circumstances and the manner in which that power may be exercised.”

While the by-laws or articles must set out the circumstances and the manner in which the power may be exercised, the detailed procedural requirements may be set out in a procedures manual of the organization. The new legislation does not set out any minimum procedural threshold, leaving this to organizations to determine on their own. However, at its most basic level, the cases suggest that organizations have a duty of fairness requiring that: (a) those affected by a decision be given prior notice that a decision is about to be made or some action taken; (b) that any case to be met is disclosed to the person affected; and (c) that some reasonable opportunity be provided to the affected person for participation in the decision.

Under the *Canada Corporations Act* and in other jurisdictions where the incorporating legislation contains few or no appropriate membership remedies, the courts are more apt to follow a policy of “non-involvement” in the internal decisions of non-profit organizations to suspend or expel members, though they retain a limited “supervisory” jurisdiction. However, generally the courts will exercise jurisdiction to ensure that the rules and procedures of the organization are properly followed, that the rules of natural justice are complied with and there is no bad faith in decision-making. The courts will not review the merits of a decision and they will not take on the role of an appeal body. But absent express rules within a particular organization, it can be difficult for courts to make a finding that the organization has complied with natural justice requirements. In those circumstances, the courts may impute those safeguards which they consider appropriate having regard to the legal, administrative and factual context of each case. As a result, under both the *Canada Corporations Act* and the CNCA, it is strongly advisable for membership based organizations to establish a set of specific procedures relating to membership discipline so that the rules are clear and easy to follow for both the organization and its members.

The CNCA also gives members many new remedies which may be used in a suspension or expulsion case. These are summarized as follows:

1. Oppression Remedy:

Section 253 allows a complainant (which includes a member or former member) to apply for an oppression remedy on the basis that any act or omission of the corporation, or the exercise of the powers of the directors or officers of the corporation is oppressive or unfairly prejudicial or unfairly disregards the interests of the member. The court may make any order it thinks fit, including an order appointing directors in place of or in addition to the directors then in office, directing a corporation or any other person to pay a member all or part of the amount that the member paid for their membership and compensating an aggrieved person. The court may not make an order under Section 253 if the court is satisfied that the corporation is a religious corporation, the act or omission is based on a tenet of faith held by the member of the corporation and it was reasonable to base the act or omission on the tenet of faith, having regard to the activities of the corporation.

2. Derivative Action:

Section 251 allows a member to apply to the court for an order allowing the member to bring an action in the name of and on behalf of the corporation or to intervene in an action to which the corporation is party. This remedy is similarly not available if the court is satisfied that the corporation is a religious corporation as provided above.

3. Compliance or Restraining Order:

Section 259 allows a member to apply to a court for a compliance or restraining order, directing the corporation or any director, officer, employee, agent or mandatary, public accountant, trustee, receiver, receiver-manager, sequestrator or liquidator or a corporation to comply with the Act, the regulations, the corporation's articles, by-laws or a unanimous member agreement, or restraining any person from acting in breach of them.

Members of federal not-for-profit organizations have greatly enhanced rights, remedies and privileges under the new legislation. Those involved as directors and senior staff of existing not-for-profit corporations should spend the time necessary to familiarize themselves with the new legislation.

