

**COUNTDOWN TO THE  
CANADA NOT-FOR-PROFIT CORPORATIONS ACT  
PRACTICE TIP #3:  
ELECTION AND APPOINTMENT OF DIRECTORS**

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The general rule with respect to the election of directors under the *Canada Not-For-Profit Corporations Act* (the “CNCA”) is found in section 128(3), which provides as follows:

Members shall, by ordinary resolution at each annual meeting in which an election of directors is required, elect directors to hold office for a term expiring within the prescribed period.

The prescribed period provided in the draft regulations is four years. Section 128(4) specifically permits directors to hold staggered terms of office.

There are only two exceptions to the general rule that the members must elect the directors of the corporation: First, Section 132(1) provides that where there is a vacancy in the office of a director, the remaining directors may fill the vacancy as long as there is a quorum. If there is not a quorum, the directors then in office must call a special meeting of members to fill the vacancy. Second, Section 128(8) permits the articles to include a provision allowing the directors to appoint additional directors between annual meetings. In that case, the total number of appointed directors may not exceed one third

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of the number of directors elected at the previous annual meeting. The term of appointed directors must expire no later than the close of the next annual meeting of members.

It will be noted that the general rule respecting election of directors effectively eliminates the use of *ex-officio* directors, a common provision in by-laws of not-for-profit corporations. As a result, organizations with *ex-officio* director provisions in their current by-laws will need to develop a workaround solution to this problem. While there are likely other solutions, a relatively simple solution is for the articles to create a special membership class comprised of one member, which member would have the right to elect a director of the Corporation (for example, in a foundation/operating charity situation, the operating charity could be the sole member of a particular membership class and could appoint its chair to the board of the foundation). Another solution is for the articles to provide for the appointment of directors by the board, as permitted by Section 128(8), in which case board policy could dictate that, for example, the President of ABC Charity shall be appointed as a director of the corporation. Where organizations currently have *ex-officio non-voting* directors, an option is for the by-laws to provide that the individual (i.e. the President of ABC Charity) has the right to attend meetings of the board as an observer. Alternatively, and possibly a better solution, the practice of inviting the President of ABC Charity could be established by way of written policy.

With respect to filling vacancies, it should be noted that under Section 132(4) if a particular class of members has an exclusive right to elect one or more directors, and a vacancy occurs among those directors it may only be filled by the remaining directors elected by that class. However, if there are no remaining directors, the vacancy may be filled by the members of the class. It is also possible for the by-laws to provide under Section 132(5) that only the members may fill a vacancy in the office of director.

Finally, Section 163 allows members to make written “proposals”, which may include nominations for the election of directors. The proposal must be signed by not less than the percentage of members prescribed in the regulations (currently in the draft regulations this percentage is 5%) or a lesser number provided in the by-laws. Organizations with nominating committees should take particular note of this provision. Many organizations function with a nominating committee which takes more or less control over the nominations and election process (the by-laws often require the directors to be elected from the slate of nominees put forward in the nominating committee’s report). In addition, there is explicit

recognition in the section that the ability to submit proposals does not preclude nominations being made from the floor. Depending on the particular situation, it may be desirable for the by-laws to require that all nominees for directors' office meet certain qualifications (in addition to those set out in the CNCA) in order to ensure to the greatest extent possible that the composition of the board meets the needs of the particular organization. In that event, it would be prudent to clearly extend director qualifications to any directors nominated from the floor or received by way of written proposal from the members.