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NEW Canada Not-For-Profit Corporations Act

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On June 23, 2009, the *Canada Not-for-Profit Corporations Act* (the “NPCA”) received Royal Assent heralding a modern governance era for Canadian non-share capital corporations.¹ Government discretion over incorporation and bureaucratic policy on both material and trivial by-law matters has been replaced by a regime more aligned with that which applies to for-profit share capital corporations, a regime that emphasizes members’ rights rather than government rights and which enables not-for-profit corporations to operate as efficiently as their for-profit counterparts.

This bulletin provides a high level summary of the key provisions of the NPCA, pointing out in some cases differences between the current *Canada Corporations Act* (the “CCA”) and the for-profit share capital corporations act, the *Canada Business Corporations Act*

(the “CBCA”). Further details (including statutory citations) regarding the NPCA can be obtained in [this summary](#).

Continuance Under the NPCA

The NPCA is expected to come into force in 2011 or 2012. It will apply to every corporation incorporated under it in the future and to every corporation incorporated under Part II of the CCA prior to that time and continued under the NPCA. Within three years of its enforcement date, all corporations incorporated under Part II of the CCA will be required to apply for a certificate of continuance in order to avoid dissolution. The application must include an officer’s certificate certifying that the members have adopted a new by-law which conforms to the requirements of the NPCA. Federal not-for-profit corporations, particularly those with large membership bases, should now begin to consider the process they will follow to bring their by-laws into compliance with the NPCA.

Terminology

The NPCA contains a number of unique terms that are relevant to its understanding, including the following:

Vancouver

Calgary

Toronto

Ottawa

Montréal

Québec City

London

Paris

Johannesburg

¹ The NPCA applies to corporations considered to be not-for-profit or charitable under the Income Tax Act (Canada). Accordingly, the more appropriate nomenclature for the NPCA would have been the “Canada Non-Share Capital Corporations Act”. For consistency purposes, this summary will, unless otherwise specified, refer to all such non-share capital corporations as not-for profit corporations.

“**soliciting corporation**” being a corporation which received in excess of a prescribed amount (proposed to be \$10,000), during a prescribed period (proposed to be three years)², in the form of donations from third parties, grants or financial assistance from the federal, provincial or municipal government, or donations from other soliciting corporations; and

“**non-soliciting corporation**” being a corporation which is not a soliciting corporation.

Incorporation

Under the NPCA, corporations will be incorporated pursuant to articles of incorporation rather than letters patent. It will no longer be necessary to submit a draft form of the by-laws with the application for articles of incorporation. The corporation will no longer be required to have “objects”; however, if the corporation is a charity, it will likely continue to be desirable to include them. As well, it will no longer be necessary to list the powers of the corporation. The NPCA will allow for the incorporation of a corporation as a numbered company.

Capacity of a Corporation

A corporation incorporated under the NPCA has the capacity, rights, powers and privileges of a natural person, like corporations incorporated under the CBCA, although members may choose to limit a corporation’s powers and activities in its articles.

Registered Office and Records

A corporation is required to maintain a registered office in the province specified in its articles, unless the articles are amended to specify another province. The directors may change the registered office within that province at any time.

The corporation must prepare and maintain specified corporate records. The corporation must also provide most of the corporation’s members (and their representatives), creditors, and directors as well as the Director appointed under the NPCA (the “**Director**”) with easy access to such records. The exception relates to minutes of meetings of directors and committees, to which none of the members, creditors or the Director has a right to access. The NPCA also provides for flexibility in the form of records.

Corporate Finance

A corporation may own property of any kind transferred to it, or otherwise vested in it, and would not be deemed to hold any property in trust unless that property was transferred to it expressly in trust for a specific purpose. Significantly for charities, directors are not, in that capacity, trustees of any property of the corporation, including property held in trust by the corporation.

A corporation will not be permitted to distribute any of its profits, proceeds or property, directly or indirectly, to a member, director or officer of the corporation. However, an exception is made in respect of payments that are in furtherance of the corporation’s activities or as otherwise permitted by the Act (i.e. the payment of a salary to an officer) or where the member is an entity and is authorized to carry out activities on behalf of the corporation.

Generally, members will not be liable for the corporation’s acts or obligations, except to the extent assumed under a unanimous member agreement or to the extent that they receive money or property from the corporation upon its dissolution.

A corporation may create a lien on a person’s membership interest for a debt of that member to the corporation.

² The proposed amounts are based on a draft regulation (Section 16).

Debt Obligations

The NPCA includes an extensive regime regarding debt obligations similar to that contained in the CBCA. The NPCA codifies the responsibilities of holders, brokers, purchasers, transferors and transferees of debt obligations, the methods of ensuring the validity of debt obligations, matters dealing with adverse claims, issuance of debt obligation certificates, deliveries of debt obligations and the role of agents respecting debt obligations, etc.

Directors

Unlike the CCA, the NPCA provides many particulars regarding the composition of a corporation's board of directors. Matters of frequent interest are set out below:

- Minimum number of directors: for soliciting corporations – 3, at least 2 of whom are not officers or employees of the corporation or its affiliates; for non-soliciting corporations – 1
- Staggered terms: permitted, but subject to a maximum year term limit (proposed to be 4 years) although incumbent directors are entitled to continue in office until such time as their successors are elected
- There is no provision for the inclusion of *ex officio* directors
- Directors can fill vacancies on the board so long as a quorum is in existence
- Board can increase the number of directors within the minimum and maximum if the articles so provide and appoint directors to fill such newly created positions, but no such appointment is to be longer than 1 year and the total number of appointed directors so appointed is not to exceed one-third of the number of directors elected at the immediately preceding annual meeting

- Members can remove a director before the end of his or her term by means of an ordinary resolution voted at a special meeting, with the exception of a director elected by a particular class of members, who may only be removed by an ordinary resolution at a meeting of the members of that class
- There is no requirement that a majority of the directors be Canadian residents

Directors will be allowed to receive reasonable remuneration for their services and indemnification for expenses incurred on behalf of the corporation in their capacity as directors.

Directors Meetings

The NPCA includes a number of specifics pertaining to board meetings, including permitting a number of voting conveniences currently prohibited by Industry Canada. See Schedule A.

The mechanism of a “unanimous member agreement” will become available to members under the NPCA. Through this instrument, all members of a non-soliciting corporation can agree, if they so choose, to restrict the powers of the directors to manage or supervise the activities and affairs of the corporation and take on these responsibilities themselves.

Conflicts Of Interest

As under the CBCA, directors and officers are required to disclose the nature and extent of any interest they have in any material contract or material transaction made or proposed to be made with the corporation. The obligation applies as well where the person is a director or officer of the other corporation but has no ownership interest in it.

A director required to make a disclosure is prohibited from voting to approve any such contract or transaction, unless the contract or transaction

relates primarily to his or her remuneration, is for indemnity or insurance, or is with an affiliate.

Officers

Under the NPCA, directors are able to designate the officers of the corporation, appoint any person as an officer of the corporation and determine the duties and powers of the officers according to what the directors can lawfully delegate. Officers may receive reasonable remuneration for their services and indemnification for expenses incurred on behalf of the corporation in their capacity as officers.

Liability Issues

The NPCA sets out the common law duty of directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The common law due diligence defence is also set out in the NPCA. This defence allows a director to avoid personal liability arising out of his or her duties as a director where he or she has acted in accordance with that duty and exercised the care, skill, and diligence of a reasonably prudent person in comparable circumstances, including where the director relied on professional advisors.

Specific potential liabilities of directors are set out in the NPCA, including those relating to: payment or distribution to a member, director or officer contrary to the NPCA; payment of an indemnity contrary to the NPCA; and debts not exceeding six months' wages payable to an employee for services performed for the corporation.

Similar to the CCA, the NPCA permits corporations to indemnify directors and officers for losses suffered as a result of third party actions. The NPCA codifies the director's common law dissent rights, which would allow a director to avoid liability arising from matters approved by the board and which that director did not vote for, by requesting his or her dissent to be recorded in the minutes.

Committees

The NPCA permits directors to delegate their powers to a committee of directors or to a managing director; although there are certain powers that cannot be delegated, including the following powers: to change by-laws; to submit a proposal to the members for approval; to appoint an auditor; to approve annual financial statements; to fill a vacancy on the board of directors or to issue debt obligations (unless in the latter case, doing so has been specifically authorized by the board). The directors, however, remain liable for the acts and omissions of those committees to which they have delegated power. The NPCA does not mandate the creation of an audit committee, but where one is formed, it sets out certain requirements regarding its composition and conduct.

By-Laws

In a large departure from the current CCA regime, directors may, unless the articles, by-laws or unanimous member agreement otherwise provide, unilaterally make, amend, and repeal corporate by-laws except those concerning fundamental changes (see the last section of this bulletin), for which a special resolution of members will be required before they can become effective. By-laws created or amended unilaterally by the directors will require confirmation, rejection or amendment by the members at the next meeting of members. Industry Canada will no longer review and approve the by-laws or any amendments, but will keep them on file.

The only matters required to be dealt with in the by-laws are those pertaining to membership issues, including membership conditions, withdrawal rights and voting rights. It will then be the decision of the members as to what other governance matters are to be addressed in the corporation's by-laws and in what manner.

Members’ Rights And Input

Members entitled to vote at an annual general meeting of the corporation are accorded the following rights regarding meetings:

- the right to requisition the directors to call a meeting for the purposes stated in the requisition; and
- the right to submit to the corporation notice of a proposal that they wish to raise at a members’ meeting and to discuss such matter at the meeting. Such proposals can include nominations for election of directors and by-law amendments.

Under the new act, unless the articles otherwise provide, non-voting members will have a right to vote separately from the voting members on special resolutions that have the effect of adversely affecting their membership rights. Regardless of the terms of the articles, non-voting members will also have a right to vote as a separate class on a proposal that would have the effect of permitting memberships of another class being exchanged into memberships of their class. In addition, non-voting members have the right to vote on a resolution authorizing the sale, lease or other disposition of all or substantially all of the corporation’s property and on a resolution authorizing the dissolution of the corporation.

Like the CBCA, the NPCA allows members to apply to the court for an oppression remedy where they

believe their rights have been oppressed; for a derivative action remedy to enforce the rights of the corporation; or to consider any controversy respecting the election or appointment of a director or auditor. On the application of a director, a member entitled to vote, or the Director, a court can order that a meeting be called, held and conducted in a manner that the court directs.

The NPCA introduces a new provision – the faith-based defence – that would place restrictions on the extent to which derivative actions and oppression remedies may be applied to religious corporations where the matter at issue is based on a “reasonable exercise” of a “tenet of faith.” Neither the term “religious corporation” nor “tenet of faith” is defined in the NPCA nor is it known what conduct will be considered to be a “reasonable exercise”.

Frequently asked questions regarding members meetings and their answers are set out in Schedule A.

Financial Disclosure and Public Accountant

The form of the financial statements required to be delivered or made available to members depends on whether the corporation is a soliciting corporation or a non-soliciting corporation, and the level of its annual revenues.

Category	Reporting Obligations
Non-soliciting with gross annual revenues less than the prescribed amount (currently proposed to be \$1 million) Soliciting corporation with gross annual revenues less than the prescribed amount (currently proposed to be \$50,000)	Members can choose to appoint a public accountant or not, and can provide its financial statements to be merely reviewed or audited
Soliciting corporations with gross annual revenues that are equal to or less than the	Members must appoint a public accountant and can provide its financial statements to be merely

Category	Reporting Obligations
prescribed amount (currently proposed to be between \$50,000 and \$250,000)	reviewed or audited.
Non-soliciting corporation with gross annual revenue of the prescribed amount (currently proposed to be \$1 million or more) Soliciting corporations with gross annual revenues of the prescribed amount (currently proposed to be more than \$250,000)	Members must appoint a public accountant who must conduct an audit of the corporation’s financial statements

A corporation can avoid the usual obligation to deliver annual financial statements or a summary thereof to the members, in respect of each member who has stated in writing that he or she does not wish to receive them or, subject to the by-laws of the corporation, by notifying its members that the documents are available at the head office of the corporation and can be requested to be sent by mail or by obtaining an exemption to the requirement from the Director. Soliciting corporations are also required to submit their financial statements to the Director.

The public accountant of the corporation is also entitled to receive notice of and to attend meetings. Public accountants must attend if asked by directors or members, and must answer questions.

Fundamental Changes

The NPCA sets out certain fundamental changes that corporations will be authorized to make and how those changes are to be authorized by the directors and members. Fundamental changes include:

- any change to its articles;
- changing or removing any rights and conditions of any class or group of members; or
- changing the manner of giving notice to members or voting by members not in attendance at a meeting of members

Any member who is entitled to vote at an annual meeting of members or a director can make a proposal for a fundamental change to the corporation.

The NPCA expressly permits corporations to amalgamate with one or more other not-for-profit corporations either pursuant to a long-form or short-form amalgamation and either vertically or horizontally and to “continue” under the laws of another jurisdiction, subject in each case to appropriate member consents and satisfying the Director that the corporation’s members and creditors will not be adversely affected.

When it is not practical for a corporation to effect a fundamental change under any other provision of the NPCA, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

For more information on the subject of this bulletin, please contact the authors.

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Schedule A: Meeting Provisions

Query	Directors	Members
Can they act by written resolution signed by all entitled to vote?	Yes.	Yes, except with respect to the resignation or removal of a director or a public accountant, where the director or public accountant has submitted a statement giving reasons for resigning or opposing its removal.
Can they vote by proxy?	No.	Yes, if the by-laws so provide.
What is the required quorum?	Unless the articles or by-laws provide otherwise, a majority of the number or the minimum number of directors.	Unless the by-laws provide otherwise, a majority of the members entitled to vote at the meeting constitutes quorum; and so long as quorum is present at the opening of a meeting, the meeting continues to be valid even if quorum is lost part way through the meeting.
What is the required notice for meetings?	As specified in the by-laws.	Such period as specified in the regulations, currently proposed to be 21 to 60 days before the date on which the meeting is to be held.
Are teleconference meetings permitted?	Yes, subject to the by-laws, if all of the directors consent, meetings can take place by telephonic, electronic or other communication facility that permits all participants to communicate adequately during the meeting.	Same as for meetings of directors, except that no unanimous approval of the members is required and the corporation is required to make the communication facility available.
Must notice of the meeting specify the matters to be discussed?	<p>Unless the by-laws provide otherwise, notice need not specify the business to be attended to, except with respect to the following matters:</p> <ul style="list-style-type: none"> • those to be submitted to the members for approval • to fill a vacancy on the board or appoint additional directors or the auditor • to issue debt • to approve financial statements • to adopt, amend or repeal by-laws • to set membership fees or contributions 	Notice of a meeting must state the nature of all special business to be transacted in sufficient detail to permit a member to form a reasoned judgement on it and must state the text of any special resolution to be submitted to the meeting. All business other than the election of directors, appointment of the incumbent public accountant and consideration of the financial statements, is special business.

The NPCA permits by-laws to provide that the directors or members may make a decision by consensus, except a decision taken (a) to dispense with the appointment of a public accountant; (b) to address a matter which requires a special resolution; or (c) by a vote, if consensus cannot be reached. The by-laws that provide for consensus decision-making must define the meaning of consensus.