THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Canada Not-for-Profit Corporations Act

CANADIAN BAR ASSOCIATION
CHARITIES AND NOT-FOR-PROFIT LAW SECTION

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66 Slater St., Suite 1200, Ottawa, ON, Canada K1P 5H1
tel/tél. 613 237-2925 • **tf/sans frais** 1-800 267-8860 • **fax/téléc**. 613 237-0185 • cba.org • info@cba.org

PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Charities and Not-for-Profit Law Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Charities and Not-for-Profit Law Section.

TABLE OF CONTENTS

Canada Not-for-Profit Corporations Act

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I. INTRODUCTION

The *Canada Not-for-Profit Corporations Act*[1] (CNCA) came into effect on October 17, 2011. Since then, many corporations formerly under Part II of the *Canada Corporations Act*[2] (CCA) have been continued under the CNCA and there have been many new incorporations. Members of the Charities and Not-For-Profit Law Section of the Canadian Bar Association (CBA Section) have now had eight years' experience of working with the CNCA. During that time, we have become conversant with its strengths and weaknesses, developed procedures to take advantage of any new provisions, and simultaneously attempted to address those situations not permitted or contemplated by the CNCA. The CBA Section prepared this submission in anticipation of the ten-year Parliamentary review of the CNCA required under section 299(1).

The Special Senate Committee on the Charitable Sector considered a number of submissions on the CNCA, and determined that because preparations are underway for the anticipated review of the Act, no additional recommendations by the Committee were necessary.[3]

Before turning to the content of the CNCA, the CBA Section would like to acknowledge the staff at Corporations Canada. They have processed thousands of continuances, while working with members of the profession to minimize disruption to corporations unable to promptly or diligently complete the continuance process, giving prompt responses and service to new incorporations, handling amendments and dealing with other day-to-day matters.

The CNCA was initially received by the charitable and not-for-profit sector, and by the CBA Section, with both approval and disappointment. We welcomed it as a statute that is modern and helpful in some ways but were concerned that it was overly prescriptive and even patronizing. We saw it as philosophically unrelated to the corporate culture and practice that had evolved in the sector over decades and that we believed had served it well.

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1 S.C. 2009, c. C-23.

2 RSC 1970, c. C-32.

3 Senate Committee Report at 119.

The CNCA is modelled after and structured like the *Canada Business Corporations Act* (CBCA). Many CBCA provisions are not relevant to non-share capital corporations. However, the CNCA drafters created a counterpart for each provision of the CBCA, rather than omitting provisions or relying on long-standing practices under the CCA for which no change seemed necessary. As a result, many of the needs and expectations of the sector were not met by the legislation.

Rather than embracing the new legislation and changing their practices and policies to become compliant, many corporations which continued or were subsequently incorporated under the CNCA have been structured to bypass or circumvent provisions they see as objectionable or overly restrictive, and continue practices and procedures developed under the former Act that have worked well. Instead of encouraging more democracy, many corporations have eliminated external members. Some of these developments were seen as necessary to avoid the overly restrictive accounting standards imposed on CNCA corporations. Others were motivated by the robust "corporate democracy" principles embedded in the legislation. Extensive workarounds have been developed to mitigate against these problems and rely instead on existing and preferred corporate practices developed under the former legislation.

In many respects the CNCA is a good and modern corporate statute. The CBA Section does not intend our comments to be critical, but rather to suggest changes to eliminate some problems and make the Act generally more relevant and useful for the sector.

In this submission, we suggest several improvements to the CNCA, and the *Canada Not-for-profit Corporations Regulations* (CNCR). Generally, we follow the sequence in the CNCA, discussing the CNCR to the extent necessary in context.

II. SPECIFIC COMMENTS ON THE CNCA

A. Accounting Issues

Topic: Soliciting Corporation

The concept of "soliciting" and "non-soliciting" corporations, together with the establishment of mandatory class voting and the extension of voting rights to non-voting member classes, have been the major sources of difficulty for those subject to the CNCA. The CBA Section offers our general concerns and then sets out specific issues created by the current provisions.

The accounting requirements are difficult for our clients to understand, expensive to implement, unnecessary to protect members or donors, variable from year to year depending

on revenue and donation levels (the so called "yo-yo effect"), frequently result in exemption applications and often lead to non-compliance. Giving the option to select the required accounting standard, together with allowing external funders to require audited financial statements, would offer adequate protection to both members and third parties.

British Columbia's new *Societies Act*[4] offers a useful alternative. A society:

- must have an auditor if the society is required to have one by its by-laws; and
- may have an auditor in any other case.

In general, corporations should be free to determine what level of financial review best suits them. In many cases, members, donors and third-party funders, including governments, will require an audit. In all other cases, the decision should simply be up to the members.

A second issue is the distinction between soliciting and non-soliciting corporations, with much higher levels of revenue required for non-soliciting corporations before a review engagement or an audit becomes mandatory. The rationale for instituting different financial levels for the appointment of a public accountant and the level of financial review between soliciting and non-soliciting corporations does not appear justified in practice. Members often have an economic stake in non-soliciting corporations that far exceeds the non-financial interest of a member in a registered charity, yet the non-soliciting corporation is entitled to significantly more liberal accounting requirements.

Public Accountant, and Availability of Exemptions from Audit and Review Engagement

The current financial reporting requirement revenue levels (set in the CNCR) and problems in accessing an exemption from the appointment of a public accountant under section 182(1) (which requires the annual consent of 100% of voting members for both soliciting and non-soliciting corporations), often imposes a significant hardship on smaller not-for-profits (NFPs). For those organizations, the cost of even a review engagement can be a significant portion of their annual budget. This is further complicated because no exemption order is available from the Director to substitute for the required membership consent. Other NFP statutes either leave the type of financial report up to the members or set higher revenue levels and lower membership approval requirements to access various exemptions. For example, the *Ontario Not-for-Profit Corporations Act* (ONCA) sets the revenue level for a "public benefit corporation"

4 Societies Act, SBC 2015, c 18.

(similar to a soliciting corporation) dispensing with a public accountant at $100,000 and requires approval of 80% of the members voting at a meeting.

RECOMMENDATION

1. **The CBA Section recommends that a mandatory audit be removed from the CNCA and members who wish to appoint a public accountant or require an audit or review engagement be given the statutory right to vote for these options, either at a meeting or through by-laws.**

   In the alternative, the distinction between soliciting and non-soliciting corporations could be removed for accounting purposes and the prescribed revenue limits for dispensing with a public accountant be the same for both. Those limits should be at least double their current levels.

Concerns

If the recommendation to dispense with the difference between soliciting and non-soliciting corporations is not accepted, we raise several technical issues and suggest solutions:

1. **Definition of soliciting corporation:** In section 2(5.1), a corporation becomes a soliciting corporation if it receives the prescribed amount from "any person who is not" (a)(i), "a member, director, officer or employee", etc. Except for "member", the other sources can only be individuals. "Member" is not defined in the CNCA. The other two sub-clauses of (a) refer to spouses or other individuals. It is unclear whether "member" is to be read as meaning an individual, or in the broader sense, including a corporation. If just individuals, a gift of $10,000 from a member which is a non-soliciting corporation would make the corporation soliciting. This was likely not the intent and a definition of "member" to include a non-soliciting corporation for the purposes of this section would be appropriate. Under section 2(5.1)(c), a gift of $10,000 from a corporate member that is also a soliciting corporation would still make the recipient a soliciting corporation.
2. **CNCA vs. other corporations:** The second problem is with section 2(5.1)(c). The definition of “corporation” in section 2(1) is limited to CNCA corporations. That means whenever a corporate gift is received, the donee must first determine whether the donor is a CNCA corporation. This can be done via the Corporations Canada website, but even though the status of a corporation on that website is supposed to include whether it is a soliciting corporation, it would still be advisable to make additional enquiries from the donor as to whether it satisfies the other requirement, that it is also a soliciting corporation. This has been referred to as the “stealth soliciting corporation”. In addition, there is no discernible or legal distinction between donors that are CNCA

corporations and those that are not. As a result, this additional component of the definition adds unnecessary potential status changes for CNCA corporations.

3. **Revolving Door Status:** Another problem is the "yo-yo effect", where a corporation can go back and forth between soliciting and non-soliciting status. This can affect audit requirements, size of board and status of officers, ability to use a unanimous member agreement and the distribution of assets on windup.

RECOMMENDATION

2. **The CBA Section recommends that the distinction between soliciting and non-soliciting corporations be eliminated and a different method, preferably an "asset lock", be offered for ensuring corporate assets intended to be used for public benefit remain in that capacity. At the time of incorporation, the articles would be required to state whether on dissolution the assets can go to the members (so the corporation will be a "soliciting corporation") or to a qualified done (so the corporation will be a "non-soliciting corporation"). This would be fixed and capable of amendment during the lifetime of the corporation only with approval by the court,[5] based on stringent requirements to protect charitable or other public benefit sourced funds. Source and level of revenues would no longer be relevant.**

B. Ex officio Directors

Topic: Inability to have appointed/ex officio directors in a CNCA corporation (section 128)

Concerns

Many in the sector would like to have ex officio or externally appointed directors. This is expressly permitted, for example, in the Ontario *Not-for-Profit Corporations Act,* 2010 (section 23(4)), the Saskatchewan *Non-Profit Corporations Act, 1995* (section 108(2)) and BC's new *Societies Act* (section 42).

Some common examples are:

- the CEO of the hospital/health authority is an ex officio director of a hospital foundation;

5 In Ontario this could be delegated by regulation to an administrative procedure in s.13 of the Charities Accounting Act, where the approval of the Public Guardian and Trustee has the effect of a court order. Other provinces may have analogous procedures.

- the Ministry of Health wishes to appoint a director of a hospital/health care facility/organization;
- the pastor of a religious organization is an ex officio director;
- a national organization with a board composed of the president of each provincial branch.

The policy reason for not allowing these appointments may be that ex officio directors have the same liability as elected directors, but not the opportunity to consent to their automatic appointment. Many in the sector favour these appointments as a way to create a liaison between an organization and its fundraising "sister", to ensure that religious dogma is always taken into account at the Board level, or to ensure that a government or other body has representation that it can itself determine from time to time.

Limiting directors exclusively to those appointed or elected by the membership is too narrow for the broad need in the sector for alternative forms of appointment.

RECOMMENDATION

3. **The CBA Section recommends that ex officio and external appointments of directors by third parties be permitted, with the stipulation that a person who becomes an ex officio director must, within 30 days, consent to being a director, failing which the appointment is deemed not to take effect.**

C. Voting Rights of Non-Voting Members

Topic: Provision of voting rights to non-voting members in matters of serious consequence to the corporation (sections 199(2), 213(3), 214(4))

Concerns

Giving voting rights to non-voting members runs counter to the reasons for creating a non-voting class of members. On incorporation, the creation of this class is based on a fundamental assumption that those individuals are not intended to have a governance role in the affairs of the corporation. There is no need nor will in the sector to provide otherwise. This is a substantial deviation from statutes such as BC's *Societies Act* and Saskatchewan's *Non-Profit Corporations Act*, which both allow for classes of non-voting members that are truly non-voting. Ontario has announced that the ONCA provisions on voting rights for non-voting members will not be proclaimed for at least three years after that Act comes into effect.

The CNCA already permits the Articles to allow for cancellation of a class or creation of a class having priority without the affected class having the right to vote (section 199(1)).

There are typically two reasons a non-voting class is established:

1. the organization wishes to foster "inclusion" or attachment to the organization for cause awareness, fundraising, or volunteer "raising"; or
2. services are provided to individuals who may wish to be members but whom it would be inappropriate to have as full voting members because they are receiving services from the organization.

This provision has had the opposite effect to the drafters' intention – many organizations have entirely eliminated non-voting members. Others have a single class of membership but have established awkward fee or other structures to ensure that individual members can be treated differently. In some cases, these organizations have unwillingly and unnecessarily become soliciting corporations.

Non-voting members generally do not appreciate that they are, on certain fundamental matters, given a vote. They have no expectation of voting on any issue.

In our experience, giving a vote to non-voting members on fundamental matters is unbalancing for an organization. It is usually unanticipated, both at the Board level and in the non-voting membership. It raises complex governance questions. It could, if the number of non-voting members is large, skew the results of a vote on a fundamental matter where there is no expectation of voting and produce a result contrary to the wishes of the voting members.

Eliminating voting rights of non-voting members would also facilitate delegate voting structures, as discussed further below.

RECOMMENDATION

4. **The CBA Section recommends that non-voting members not be given a vote on any issue, with a possible exception where they have a true economic interest – such as paid-up initiation fees in a golf or other social club. While unlikely that a member with an economic interest would be non-voting, if this were the case, there should be some protection when the proposed vote involves their economic rights – beyond the simple payment of annual dues.**

D. Class or Group of Members

Topic: The CNCA refers to "classes or groups" of members when addressing membership categories.

Section 7(1) of the CNCA says [emphasis added]:

> 7 (1) Articles of incorporation shall follow the form that the Director fixes and shall set out, in respect of the proposed corporation,
>
> [...]
>
> (c) the *classes, or regional or other groups*, of members that the corporation is authorized to establish and, if there are two or more *classes or groups*, any voting rights attaching to each of those *classes or groups*.

The words "class or group" or "classes or groups" are used in other sections of the CNCA[6] and in the CNCR.[7] The words are used together except in section 71(1) of the CNCR which uses the word "group" without the word "class". Specifically, such section provides [emphasis added]:

> 71 (1) For the purpose of subsection 165(3) of the Act, when a vote is to be taken at a meeting of members, the voting may be carried out by means of a telephonic, electronic or other communication facility, if the facility;
>
> [...]
>
> (b) permits the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each member or *group of members* voted.

Concerns

The CNCA does not define the word "class" or for the word "group" and it is unclear whether they have the same or a different meaning.

While some would argue that "class" and "group" are interchangeable and may be used as different ways to describe a class of members, the use of two different words together is confusing and has potential to suggest to NFPs, lawyers or the courts that the words mean different things. The use of the words "groups of members" in section 7(1) of the CNCR further adds to the potential confusion. For example:

- A national NFP corporation has one class of members. The members of the national corporation are the provincial organizations. The provincial organizations pay fees to the national corporation on a sliding scale basis.

6 Sections 130(2); 132(4) and (5); 154(2), (3) and (4); 163(5); 164(5); 197(1); 199(1), (2) and (3); 206(1) and (4); 212(4); 214(5) and (6); 220(2) and (3); 221(3); and 239(6).

7 Sections 2(3); and 6.

The provincial organizations also get a certain number of votes based on that same sliding scale. For example, a provincial organization with 1-500 members pays $10,000 and gets 10 votes, one with 501-1,000 members pays $20,000 and gets 20 votes, and one with 1,001+ members pays $30,000 and gets 30 votes. Would all provincial organizations that pay $10,000 and get 10 votes be a "group" of members?

- Many social clubs, trade organizations and other types of societies have different fee categories for members in a single membership class. Fees might be based on age, professional designation, student status or work status – e.g., discount for retired members. It would cause significant confusion in the sector if a court were to rule that members of a class were in effect split into different groups, each with individual group rights under the various class voting sections of the CNCA.

The CBCA,[8] Ontario *Business Corporations Act* (OBCA),[9] BC *Societies Act*[10] and the Manitoba *Corporations Act*[11] do not use the word "group" for classes of shares or members, as applicable.

RECOMMENDATION

5. **The CBA Section recommends that the words "or group", "or groups" and "or regional or other groups" be deleted from the CNCA. If these terms are in the CNCA because some NFPs insist on using the word "group" rather than "class", we recommend in the alternative that a definition be added to section 2(1) of the CNCA to clarify that "class" and "group" mean the same thing:**

   class or group when used to modify the word "member", whether in the singular or plural, or whether used alone or together, are interchangeable words which refer to a class of members.

E. Directors Elected by Majority Resolution at Annual Meetings

Topic: Election of Directors at an Annual Meeting by Ordinary Resolution

Section 128(3) of the CNCA requires that directors be elected at an annual general meeting (AGM) by ordinary resolution.

8 Section 24(4).
9 Section 22(4).
10 Section 68.
11 Section 24(3).

Concerns

We see no policy reason to require NFPs to elect directors exclusively at AGMs.

The CNCA is modelled after the CBCA and it is understandable that election of directors of a business corporation must occur at the AGM, as that is often the only time when shareholders meet to exercise their rights. However, this same constraint does not apply to the member-based NFP sector, as membership in an NFP is voluntary and members interact and are keenly interested in the wellbeing and operations of the NFP.

Many NFPs hold two members meetings a year, one where members receive the financial statements and a second where members elect directors and approve the budget. While the timing of the first meeting is often tied to the NFPs' financial year end, the election of directors and approval of budget is frequently tied to other operational issues, such as the operational cycle of their funders, chapters, umbrella organization, stakeholders, etc..

RECOMMENDATION

6. **The CBA Section recommends that section 128(3) be revised to make election at AGMs the default election mechanism, except where provided otherwise in the by-laws to allow alternative means of electing or appointing directors, including ex officio, appointment by a third party, resolution at a meeting and alternative voting methods in the CNCA.**

In addition, where corporations have board terms longer than one year, they may not hold an election of directors at each AGM, raising a concern that section 128(8) requires directors appointed by the board to be reappointed following the next AGM, even though the term of the other members of the board is ongoing.

7. **The CBA Section recommends that the words "Subject to the by-laws" be inserted at the beginning of section 162(3) so that it reads as follows:**

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

8. **The CBA Section recommends that section 128(8) be revised to replace "next annual meeting of members" with "next meeting of members where an election is held in accordance with section 128(3)" so that it reads:**

> **The directors may, if the articles of the corporation so provide, appoint one or more additional directors, who shall hold office for a term expiring not later than the close of the next meeting of members where an election is held in accordance with section 128(3), but the total number of directors so appointed may not exceed one third of the number of directors elected at the previous annual meeting of members.**

F. Proxies

Topic: Under CNCA section 171(1), the by-laws of a corporation may provide for any prescribed methods of voting by members not in attendance at a meeting of members and, if the by-laws so provide, they shall set out procedures for collecting, counting and reporting the results of any vote.

Concerns

Many NFPs corporations do not want to permit proxies for the reasons set out below and would not include them in their by-laws.

One prescribed method of absentee voting is voting by proxy in accordance with CNCR section 74(2).

The detailed proxy requirements in the CNCA result in lengthy, complicated proxies that are not always understood by members. Some requirements seem to be unnecessarily prescriptive (for example, the need to bold certain words and include a complicated voting template). Many corporations prefer simpler proxies (in electronic or paper format) that allow members to simply check boxes to indicate their vote and then sign the proxy. This encourages member participation and voting, the ultimate objective of these provisions.

It is our understanding that all Canadian corporate statutes, including section148 (5) of the CBCA, permit the board to fix a cut-off time, not more than 48 hours before the start of the meeting, for delivery of proxies to the corporation. This addresses the concern that a person could arrive at a meeting without prior notice and several proxies to attempt to push through a significant resolution or make changes to the board.

In addition, CNCR section 74(2) provides that a proxyholder is not required to be a member, which is a major concern for many organizations. The ONCA has just been amended to remove

this requirement (ONCA, section 64(1.2): "A proxyholder need not be a member of the corporation unless so required by the articles or by-laws of the corporation".[12]

RECOMMENDATION

9. **The CBA Section recommends that CNCR section 74(2) be changed to encourage corporations to adopt proxies, as follows:**

    - **In the preamble, delete "who are not required to be members" and insert "A proxyholder need not be a member of the corporation unless so required by the articles or by-laws of the corporation".**
    - **Then, add the following to section 74(2)(h):**

      The directors may by resolution fix a time not exceeding forty-eight hours, excluding Saturdays and holidays, preceding any meeting or adjourned meeting of members before which time proxies to be used at that meeting must be deposited with the corporation, and any period of time so fixed shall be specified in the notice calling the meeting.

G. Distributions of Property to Members

Topic: The CCA prohibited pecuniary gain to members, which has been removed from the CNCA, perhaps suggesting that it might be possible to have a for-profit CNCA corporation and that the question of "not-for-profit" status is more a matter of taxation than corporate law.

Concerns

Section 34 says:

> Distribution of property, accretions or profits
>
> 34 (1) Subject to subsection (2), no part of a corporation's profits or of its property or accretions to the value of the property may be distributed, directly or indirectly, to a member, a director or an officer of the corporation except in furtherance of its activities or as otherwise permitted by this Act.
>
> Distribution to member

12 S.O. 2017, c. 20, Sched. 8, s. 16.

> (2) If a member of a corporation is an entity that is authorized to carry on activities on behalf of the corporation, the corporation may distribute any of its money or other property to the member to carry on those activities.

This section seems to prohibit distribution of income or property to a member unless in furtherance of its activities or otherwise permitted by the CNCA. Arguably, the latter permits distributions on dissolution since that is a distribution contemplated by the CNCA. A further problem arises for distributions of income or capital during the life of the corporation. In one situation, members contributed land to the corporation in return for their membership, and cashflow issues arose. It was in the best interests of the corporation to distribute part of the land back to the members, rather than sell it and return proceeds. Because the "activity" of the corporation was stewardship and maintenance of the land, it could hardly be said that the distribution was "in furtherance of its activities."[13]

Corporations Canada has advised that the purpose of the section is to replace the notion of "no pecuniary gain" in the CCA and it is intended to apply to situations where the corporation makes distributions of property as part of its activities. The example offered was a corporation whose activities were to supply wheelchairs to disadvantaged persons – a distribution of a wheelchair to a person who is also a member would not be caught by the section.

The section seems to prohibit transactions related to the return of an interest in a corporation, e.g., an equity interest in a golf club. Corporations Canada's view was that this would be permitted so long as the by-laws spelled out the process and terms of any distributions. This suggests that if the by-laws contemplate a distribution, the distribution would be considered by Corporations Canada to be "in furtherance of its activities." In our view, the language does not support this conclusion and creates confusion about the rules applicable to such distributions. While the decision in *Lash*[14] would seem to support the view that distributions in the context of the application of Part 14 of the Act would be permitted, it does not clearly support distribution made in the normal course. As the Act seems to permit a non-share profit-making corporation, as well as member benefit organizations, such as sports and social clubs, trade associations, etc., this section requires clarification.

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13 A comparable situation was considered by the Ontario Superior Court of Justice in Lash v Lash Point Association Corp., 2016 ONSC 6563 (CanLII), http://canlii.ca/t/gvjt4. While the decision largely related to the application of the wind-up and dissolution provisions of the Act, the Court briefly considered the application of subsection 34(1) and determined that an order permitting those members who wished to remain as owners should buy out those who wished to leave, using proceeds of sale of a portion of the lands was held to be made for the purpose of furthering the activities of the corporation by enabling it to continue to own and conserve land for the enjoyment of members and because it was "permitted" by virtue of subsections 224(3), 216(1)(f) and 253(3)(f) of the Act.

14 Lash, ibid.

RECOMMENDATION

10. **The CBA Section recommends that the phrase "or as otherwise permitted by this Act" at the end of section 34(1) be amended to clarify that it will apply to distributions made on dissolution, e.g. pursuant to the operation of section 220(3)(b) of the Act. Also, the Act should be amended to expressly permit social clubs and other organizations to distribute surplus funds or property to their members outside the application of Part 14 in the case of resignation or termination of membership, and consideration be given to an exception specific to social clubs, defined similar to the "member-funded" societies under the British Columbia *Societies Act*, to enable distributions of property in accordance with the by-laws.**

H. Delegate Voting

Topic: The CNCA does not permit delegate voting. The former CCA did.

Concerns

The CNCA is modelled after the CBCA and it is understandable that delegate voting is not applicable in a share capital corporation. However, delegate voting is a common form of voting for NFPs with a large constituency made up of different segments. Each segment selects delegate(s) to represent members of that segment to attend and vote at members' meetings. This type of structure is useful when the NFP has a large membership, in the tens or hundreds of thousands, making a true physical annual meeting impracticable.

NFPs that commonly use delegate voting include religious denominations, professional organizations, and others. For example, a religious denomination could consist of members from each local church, with a total of tens of thousands of members. Each church might appoint, say, two members to attend membership meetings of the denomination as a whole, and vote for all members from that church. Another example would be an umbrella organization with chapters in different geographical locations. Members of the chapters are also members of the umbrella organization and each chapter may choose a delegate to attend membership meetings of the umbrella organization to vote on that chapter's members' behalf.

Under the CNCA, each member has the right to vote and attend membership meetings. Where NFPs are very large, it is impossible and impractical to allow all members to attend

membership meetings. NFPs must restructure their membership under the CNCA using artificial constructs that can be complicated, unsatisfactory, and which may not reflect the nature of these NFPs. For example, an NFP may need to structure delegates into a voting class and all other members in a separate non-voting class of members, or as a non-membership category of affiliates. In the former scenario, the NFP would still need to be prepared for a large membership meeting where the non-voting members have the right to vote under section 199 of the CNCA. The latter approach would practically disenfranchise all current members.

Several large organizations have already deleted significant membership classes to achieve this result, which we suggest goes against the underlying philosophy of the CNCA. British Columbia's new *Societies Act* and Yukon's new *Societies Act* expressly permit membership voting through delegates. Section 85(1)(5(a) of the BC Act expressly permits by-laws of a society to authorize "indirect or delegate voting" or voting by other means (i.e., "voting by mail or another means of communication, including by fax, email or other electronic means"). Section 1 of the BC Act defines "ordinary resolution" and "special resolution" to include a resolution passed by a simple majority or two-thirds majority, respectively, of the votes cast, in accordance with the by-laws where "indirect or delegate voting" is permitted. Section 11(1)(c)(iii) of the BC Act also requires such societies to set out in their by-laws how that voting is to occur.

The Yukon Act (section 12(2)(c)(iii)(A)) expressly permits by-laws of a society to authorize "delegate voting" or "voting, by a member not in attendance at a general meeting, by mail or another means of communication, including by facsimile, email or other electronic means." Section 12(1) of the Yukon Act defines "delegate voting" to mean "a method of voting whereby a delegate is selected from a group of people to represent the group for voting purposes."

As well, non-voting members in a delegate voting system should not have the right to vote at the national level where only delegates have the right to vote.

RECOMMENDATION

11. **The CBA Section recommends that the CNCA be amended to expressly permit delegate voting. With that amendment, and regardless of the outcome of our suggestion in the section "Voting rights of non-voting members", the Act should be amended to clarify that these voting rights do not apply to votes at delegate meetings.**

RECOMMENDATION

12. The CBA Section also recommends that a new section 171(2) expressly permit delegate voting and that section 171(2) be renumbered as section 171(3):

> **Delegate voting**
>
> **171(2) The by-laws of a corporation may authorize delegate voting. If the by-laws so provide, they shall set out rules respecting how that voting is to occur. Notwithstanding section 199, the members of a class or *group of members* are not, unless the by-laws otherwise provide, entitled to vote separately as a class or group in a delegate voting system.**
>
> **Application for authorization**
>
> **171(3) … [same as current section 171(2)].**

I. Regulations re: Voting & Notices

Topic: Members' Meetings and Remote Participation by Members

The CNCA permits meetings of members in ways that facilitate remote participation via use of technology, including telephonic, electronic or other communication facility, if such facility allows all participants to communicate adequately with one another. Such meetings are colloquially referred to as "virtual meetings" and are viewed as a positive innovation of the CNCA. Permitted formats include partially virtual meetings (where some members are physically attending in person, and others are participating remotely by arranged technological means) under section 159(4), as well as entirely virtual meetings (where all participants are participating via technology and there is no physical "place" where the meeting is held) under section 159(5). Both permitted formats are now widely used in the sector.

Concerns

While we support the CNCA's commitment to facilitating greater member engagement at meetings through use of technology, several sections create inconsistencies in the treatment of meetings, including obligations inconsistent with a meeting held entirely by technology.

Section 159(1) requires that meetings of members be held within Canada at the place provided in the by-laws or, absent a specification, at the place the directors determine. Section 162(1) similarly requires that notice of a meeting of members set out the place where the meeting will be held.

While these requirements are meaningful and appropriate for traditional meetings held entirely in one physical location, they are inconsistent with a corporation's ability to hold a meeting of members partially or entirely by remote technology. Entirely virtual meetings do not occur in a physical "place", but rather by a specified technological means determined by the directors before the meeting. Unless the word "place" is read to include non-physical locations and means of communication, these provisions create obligations that cannot be met by corporations wishing to hold virtual meetings of members.

While partially virtual meetings can be deemed to be held at the physical location where members may attend in person, wholly virtual meetings have no such natural location. It may be necessary for the Act to deem an entirely virtual meeting of members of a corporation to be held in Canada and a deeming rule be added to section 159(1) to accomplish this. To be clear, we are not suggesting virtual participation in members' meetings should be required to be "hosted" by a provider or using technology located in Canada, as this would severely limit the technology platforms available for corporations to use in conducting virtual meetings.

RECOMMENDATION

13. The CBA Section recommends that section 159(1) be amended to read:

> **Meetings of members of a corporation shall be held at the place or by the means provided in the by-laws or, in the absence of such a provision, at a place within Canada or by the means determined by the directors in accordance with the Act and the by-laws. Where a meeting of members is held in accordance with subsection 159(4) or subsection 159(5), the meeting will be deemed to be held at the location of the corporation's registered office in Canada.**

14. The CBA Section recommends that section 162(1) be amended to read:

> **The corporation shall give members entitled to vote at a meeting of members notice of the following details:**
>
> **(a) the date and time of the meeting,**

> **(b) if the meeting will be held at a physical location, the address of that location, and**
>
> **(c) if the meeting will be held to permit remote participation pursuant to subsection 159(4) or 159(5), the means by which members may participate in the meeting.**
>
> **Notice must be provided in accordance with the by-laws and the regulations. The provisions of the by-laws respecting the giving of notice shall comply with any prescribed requirements.**

Sections 159(4) and (5) permit partial and wholly virtual meetings of members, respectively. Two differences in the provisions warrant scrutiny.

Partial virtual meetings under section 159(4) are permitted "unless the by-laws otherwise provide", while section 159(5) requires that the by-laws of a corporation expressly permit entirely virtual meetings to hold such a meeting.

It is unclear whether the requirement for entirely virtual meetings to be expressly authorized by the by-laws is an intentional divergence from the usual discretion of the board of directors to determine, in the normal course, the details of a meeting of members. The policy reason for this requirement may be that entirely virtual meetings represent a significant departure from the traditional norm, so the departure must have the tacit approval of members, as evidenced by an express by-law.

Virtual meetings, including entirely virtual meetings, are becoming increasingly normal among NFP corporations, particularly those with a geographically dispersed membership. The distinction between the requirements for a partially virtual and an entirely virtual meeting may be lost on many NFP corporations.

Also, while section 159(4) states that the corporation must "make available" a communication facility for a partially virtual meeting, section 159(5) suggests that members themselves may call a meeting of members to be held entirely by communication facility. This distinction is puzzling and creates a potential concern for many NFP corporations.

While the use of technology can facilitate engagement in meetings, the technology can be costly, particularly for organizations with large memberships. Suggesting that members can

compel a meeting be held partially or entirely virtually would derogate from the directors' fiduciary responsibility to steward the resources of the corporation.

RECOMMENDATION

15. **The CBA Section recommends that the ability to use technology to facilitate meetings and increase engagement among members should be open to all corporations as a default, with those corporations who wish to prohibit its use being able to do so by enacting a by-law. The decision as to whether a meeting will be wholly physical, partially virtual, or entirely virtual should be a decision for the board of directors. Section 159(5) should read:**

> **Unless the by-laws otherwise provide, the directors of a corporation may call a meeting of members to be held, in accordance with the by-laws and regulations, if any, entirely by means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting.**

J. Electronic Voting Issues

Topic: Sections 165(3) and (4) permit a vote at a meeting of members to be conducted using electronic means. While section 165(3) clearly permits a vote entirely by technology, section 165(4) suggests, less clearly, that mixed voting (show of hands by those physically present, and by technology by those remotely attending) is permissible.

CNCR section 71(1)(b) permits the use of an electronic voting facility at members meetings if the facility "permits the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each member or group of members voted".

Concerns

Sections 165(3) and (4) do not seem to contemplate the possibility of a stand-alone vote of voting members, conducted via technology independent from a members' meeting. Section 165(1), referenced in the authorizing sections, refers indirectly to votes at a meeting.

The technology enabling a stand-alone vote is well established and reliable, and some corporations already conduct "referendum" style votes under permissive provisions of the by-

laws. This gives further flexibility for a corporation to make a decision requiring membership approval without requiring a full meeting.

RECOMMENDATION

16. **The CBA Section recommends adding language to section 165 that clearly authorizes a corporation to conduct, at the board's discretion, a vote of members at any time, and not necessarily in connection with a meeting of members. For example, a new section might read:**

    Unless the by-laws otherwise provide, the directors of a corporation may determine to conduct a vote of the voting members at any time, and that vote may be held, in accordance with the regulations, if any, by means of a mail-in ballot or electronic voting.

Topic: CNCR sections 71(1) and 71(2) require that the technology selected to conduct a partially or entirely virtual meeting of members must be capable of presenting the votes to "the corporation" in a manner that maintains complete anonymity. The requirement of general anonymity may be unnecessary as a matter of policy. For example, where a vote is conducted by show of hands or members vote by proxy, there is no anonymity. In addition, a requirement of anonymity from the corporation itself is problematic in practical terms.

First, if the term "corporation" is interpreted broadly to mean the entire entity, including the board of directors, then requiring anonymity is practically impossible, since the technologies to facilitate remote participation and voting in meetings offer, if requested, a voter-by-voter breakdown of all votes called for. The corporation is not obligated to request this report, but the board of directors, being the client that purchased the services, has the right to do so.

Further, a broad interpretation of "the corporation" makes the requirement in section (b) incompatible with the parallel requirement in section (a) of each of the subsections – that the votes be gathered in a way that permits subsequent verification. This seems to mean that it must be possible to show that each vote was a) cast by a person entitled to vote, and b) in fact cast either for or against (to allow for re-counts, etc.). To comply with section 71(1), it must be possible to tell how each person voted and the "corporation", broadly speaking, must be able to know this information.

For the requirements of anonymity and verification to co-exist, the requirement of anonymity must be limited to the voters participating in the meeting or vote, not the corporation as an inclusive whole.

RECOMMENDATION

17. The CBA Section recommends that CNCR sections 71(1)(b) and 71(2)(b) be amended to read:

> **(b) permits tallied votes to be presented without it being possible for any member of the corporation to identify how each member or *group of members* voted.**

K. Directors of a Soliciting Corporation

Topic: The requirement in s. 125 that "a soliciting corporation shall not have fewer than three directors, *at least two of whom are not officers or employees of the corporation or its affiliates*."

Concerns

With smaller boards where there may only be three directors this requirement is so impractical that it is frequently ignored. Most corporations need to have two signing officers, which would necessitate increasing the board. An alternative would be for one director to be appointed as both president and secretary, without other officers, which can be inconvenient. The rationale for including this seems to make it analogous to the CBCA "distributing corporation" provision (CBCA, section102(2)). In our view, it is inappropriate to treat the composition of a charity or NFP board in the same way as the board of a public company.

RECOMMENDATION

18. The CBA Section recommends deleting this requirement. In the alternative, we recommend the ONCA version for "public benefit corporations" (similar to soliciting corporations):

> **Not more than one-third of the directors of a public benefit corporation may be employees of the corporation or of any of its affiliates (ONCA, section23(3)).**

L. Duty to Verify

Topic: Section148(3) of the CNCA imposes on each director a duty to "verify the lawfulness of the articles and the purpose of the corporation".

Concerns

There is no similar provision in the CBCA, ONCA, CBCA, OBCA, BC *Societies Act*, Saskatchewan *Non-Profit Corporations Act*, 1995 or Manitoba *Corporations Act*. This duty is unique to the CNCA. No guidance is offered as to how a director can discharge this duty and what or who that director can rely on to do so. When the CNCA was before Parliament, the CBA Section stated: "It is unclear what verifying the "lawfulness" of the articles and the "purpose" of the corporation entails. It is also unclear what standard applies and what the consequences of an incorrect verification would entail."[15]

RECOMMENDATION

19. The CBA Section recommends that section 148(3) be deleted from the CNCA.

III. CONCLUSION

The CBA Section welcomes the opportunity to comment on this topic. We hope our comments will be useful in preparation for Parliamentary review of the CNCA and would be pleased to elaborate further on any of our suggestions.

IV. SUMMARY OF RECOMMENDATIONS

1. **The CBA Section recommends that a mandatory audit be removed from the CNCA and members who wish to appoint a public accountant or require an audit or review engagement be given the statutory right to vote for these options, either at a meeting or through by-laws.**

   In the alternative, the distinction between soliciting and non-soliciting corporations could be removed for accounting purposes and the prescribed revenue limits for dispensing with a public accountant be the same for both. Those limits should be at least double their current levels.

15 See, 42nd parliament, proceedings of the Special Senate Committee on the Charitable Sector, December 3rd, 2018.

2. **The CBA Section recommends that the distinction between soliciting and non-soliciting corporations be eliminated and a different method, preferably an "asset lock", be offered for ensuring corporate assets intended to be used for public benefit remain in that capacity. At the time of incorporation, the articles would be required to state whether on dissolution the assets can go to the members (so the corporation will be a "soliciting corporation") or to a qualified done (so the corporation will be a "non-soliciting corporation"). This would be fixed and capable of amendment during the lifetime of the corporation only with approval by the court, based on stringent requirements to protect charitable or other public benefit sourced funds. Source and level of revenues would no longer be relevant.**

3. **The CBA Section recommends that ex officio and external appointments of directors by third parties be permitted, with the stipulation that a person who becomes an ex officio director must, within 30 days, consent to being a director, failing which the appointment is deemed not to take effect.**

4. **The CBA Section recommends that non-voting members not be given a vote on any issue, with a possible exception where they have a true economic interest - such as paid-up initiation fees in a golf or other social club. While unlikely that a member with an economic interest would be non-voting, if this were the case, there should be some protection when the proposed vote involves their economic rights - beyond the simple payment of annual dues.**

5. **The CBA Section recommends that the words "or group", "or groups" and "or regional or other groups" be deleted from the CNCA. If these terms are in the CNCA because some NFPs insist on using the word "group" rather than "class", we recommend in the alternative that a definition be added to section 2(1) of the CNCA to clarify that "class" and "group" mean the same thing:**

   > **class or group when used to modify the word "member", whether in the singular or plural, or whether used alone or together, are interchangeable words which refer to a class of members.**

6. **The CBA Section recommends that section 128(3) be revised to make election at AGMs the default election mechanism, except where provided otherwise in the by-laws to allow alternative means of electing or appointing**

directors, including ex officio, appointment by a third party, resolution at a meeting and alternative voting methods in the CNCA.

7. **The CBA Section recommends that the words "Subject to the by-laws" be inserted at the beginning of section 162(3) so that it reads as follows:**

   > **Subject to the by-laws, members shall, by ordinary resolution at each annual meeting at which an election of directors is required, elect directors to hold office for a term expiring within the prescribed period.**

8. **The CBA Section recommends that section 128(8) be revised to replace "next annual meeting of members" with "next meeting of members where an election is held in accordance with section 128(3)" so that it reads as follows:**

   > **The directors may, if the articles of the corporation so provide, appoint one or more additional directors, who shall hold office for a term expiring not later than the close of the next meeting of members where an election is held in accordance with section 128(3), but the total number of directors so appointed may not exceed one third of the number of directors elected at the previous annual meeting of members.**

9. **The CBA Section recommends that CNCR section 74(2) be changed to encourage corporations to adopt proxies, as follows:**

   - **In the preamble, delete "who are not required to be members" and insert "A proxyholder need not be a member of the corporation unless so required by the articles or by-laws of the corporation".**
   - **Then, add the following to section 74(2)(h):**

     > **The directors may by resolution fix a time not exceeding forty-eight hours, excluding Saturdays and holidays, preceding any meeting or adjourned meeting of members before which time proxies to be used at that meeting must be deposited with the corporation, and any period of time so fixed shall be specified in the notice calling the meeting.**

10. **The CBA Section recommends that the phrase "or as otherwise permitted by this Act" at the end of subsection 34(1) be amended to clarify that it will apply to distributions made on dissolution, e.g. pursuant to the operation of paragraph 220(3)(b) of the Act. Also, the Act should be amended to expressly permit social clubs and other organizations to distribute surplus funds or property to their members outside the application of Part 14 in the case of resignation or termination of membership, and consideration be given to an exception specific to social clubs, defined similar to the "member-funded" societies under the British Columbia *Societies Act*, to enable distributions of property in accordance with the by-laws.**

11. **The CBA Section recommends that the CNCA be amended to expressly permit delegate voting. With that amendment, and regardless of the outcome of our suggestion in the section "Voting rights of non-voting members", the Act should be amended to clarify that these voting rights do not apply to votes at delegate meetings.**

12. **The CBA Section also recommends that a new section 171(2) expressly permit delegate voting and that section 171(2) be renumbered as section 171(3):**

    Delegate voting

    171(2) The by-laws of a corporation may authorize delegate voting. If the by-laws so provide, they shall set out rules respecting how that voting is to occur. Notwithstanding section 199, the members of a class or group of members are not, unless the by-laws otherwise provide, entitled to vote separately as a class or group in a delegate voting system.

    Application for authorization

    171(3) ... [same as current section 171(2)].

13. **The CBA Section recommends that section 159(1) be amended to read:**

    Meetings of members of a corporation shall be held at the place or by the means provided in the by-laws or, in the absence of such a provision, at a place within Canada or by the means determined by the directors in accordance with the Act and the by-laws. Where a meeting

of members is held in accordance with subsection 159(4) or subsection 159(5), the meeting will be deemed to be held at the location of the corporation's registered office in Canada.

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(c) if the meeting will be held to permit remote participation pursuant to subsection 159(4) or 159(5), the means by which members may participate in the meeting.

Notice must be provided in accordance with the by-laws and the regulations. The provisions of the by-laws respecting the giving of notice shall comply with any prescribed requirements.

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Unless the by-laws otherwise provide, the directors of a corporation may determine to conduct a vote of the voting members at any time, and that vote may be held, in accordance with the regulations, if any, by means of a mail-in ballot or electronic voting.

17. **The CBA Section recommends that CNCR sections 71(1)(b) and 71(2)(b) be amended to read:**

    (b) permits tallied votes to be presented without it being possible for any member of the corporation to identify how each member or group of members voted.

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    Not more than one-third of the directors of a public benefit corporation may be employees of the corporation or of any of its affiliates (ONCA, section23(3)).

19. **The CBA Section recommends that section 148(3) be deleted from the CNCA.**