THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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profession juridique

November 28, 2006

John Twohig, President
Uniform Law Conference of Canada
c/o Ministry of the Attorney General
Government of Ontario
7th Floor, 720 Bay Street
Toronto, ON M5G 2K1

Dear Mr. Twohig:

Re: Proposal for Uniform Provincial Not-for- Profit Statute

I am writing on behalf of the Charities and Not-For-Profit Law Section of the Canadian Bar Association (CBA Section). The Canadian Bar Association is a national association representing approximately 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The primary objectives of the CBA include improving the law and the administration of justice. The CBA Section deals with law and practice relating to the regulation and administration of charities and not-for-profit organizations in Canada.

As we stated in our previous letter of April 10, 2005, the CBA Section strongly supports the August 2005 resolution of the Uniform Law Conference of Canada (ULCC) relating to the *Uniform Charitable Fundraising Act.* In that letter, we recommended that you study uniform investment powers for charities. Another area of law has come to our attention that we believe would benefit greatly from a ULCC study, namely, uniform provincial not-for-profit governance legislation.

There are many inconsistencies amongst the not-for-profit governance statutes in various provinces, and many of these statutes are badly out-of-date. An initiative is underway to revise the federal not-for-profit corporate legislation in this area. Bill C-21, the *Canada Not-for-Profit Corporations Act,* was introduced, but not passed, during the last Parliament and has yet to be re-introduced. The regulatory approach contemplated in Bill C-21 differs significantly from current provincial statutes and contemporary models of not-for-profit governance statutes in

many U.S. jurisdictions. If Bill C-21 is reintroduced and passed in its current form, it will likely cause practitioners to recommend provincial rather than federal incorporation to many clients, for reasons outlined in our October 2006 submission to the federal government (enclosed). In this context, modern and effective uniform provincial legislation is highly desirable.

We believe such a project would complement the on-going work of the Joint Committee of the ULCC and its U.S. counterpart on uniform law for unincorporated associations. As well, it would be topical given that at least two provinces are contemplating or conducting initiatives on not-for-profit governance legislation. The Ontario government has stated its intention to review its legislation, Part III of *The Corporations Act,* and the British Columbia Law Institute has recently commenced a review of British Columbia's not-for-profit incorporation statute, the *Society Act*.

The CBA Section urges the ULCC to consider undertaking a study to determine the need for uniform legislation concerning non-share capital, not-for-profit corporate governance, and if such legislation is found to be required, to develop appropriate draft uniform legislation. The members of our Section executive have indicated they are willing to assist in any study if you would find this to be helpful.

If you wish to discuss our proposal, please do not hesitate to contact me.

Yours truly,

(original signed by James Parks)

James M. Parks
Chair, National Charities and Not-for-Profit Law Section

Submission on Bill C-21: *Canada Not-for-profit Corporations Act*

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

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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 National Charities and Not-for-Profit Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Charities and Not-for-Profit Law Section of the Canadian Bar Association.

EXECUTIVE SUMMARY

The submissions of the National Charities and Not-for-Profit Law Section of the Canadian Bar Association (CBA Section) may be summarized as follows:

1. The CBA Section welcomed the introduction of Bill C-21 and applauds the government's initiative to reform this area of the law. Reform is desperately needed to help facilitate the work of not-for-profit corporations.

2. The CBA Section submits that, by-and-large, the statutory regime proposed by Bill C-21 is a substantial improvement over the existing legislative regime.

3. The CBA Section submits that Bill C-21 does not achieve the hoped-for reform. Further consideration should be given to the following issues before reintroducing a similar Bill in the next Parliament:

    a) removing the regulation of soliciting corporations from the statutory scheme;

    b) lowering the extent to which members' rights and democratic governance norms are imposed on all types of not-for-profit corporations; and,

    c) enhancing the freedom of not-for-profit organizations to choose governance regimes appropriate to their chosen style of operation.

Submission on Bill C-21: *Canada Not-for-profit Corporations Act*

I. INTRODUCTION

The CBA Section welcomed the introduction of Bill C-21, the *Canada Not-for-profit Corporations Act,* in the last Parliament.

The current federal legislation governing not-for-profit corporations – Parts II and III of the *Canada Corporations Act* (CCA) – is one of the oldest forms of corporations statute still on the books. It is generally considered by lawyers who work in the sector to be wholly inadequate to regulate the day-to-day affairs of the modern not-for-profit organization. Modern legislation is desperately needed to facilitate the work of the sector. The CBA Section therefore applauded the initiative to reform this area of the law and encourages the government to make the passage of new not-for-profit corporation legislation a legislative priority.

A good not-for-profit corporations law facilitates the work of the sector by reducing the time, effort, and financial cost to the statute's users of obtaining and maintaining incorporated status and providing sound default governance rules that are based on an understanding of the diverse types of organization found in the sector (which range from member-owned golf clubs to industry trade associations to congregational churches.)

Although the proposed legislation has been the subject of much study and consultation over the past years, unfortunately, in the CBA Section's submission, it does not deliver the hoped-for modernization of federal not-for-profit corporations law. While it is true that Bill C-21 did contain many very significant improvements in the law, in the final analysis, its failure to incorporate innovations that have been adopted in other jurisdictions in recent years with considerable success render it seriously flawed.

If the Bill is reintroduced in its current form, many professional advisors will be recommending that new incorporations be done under provincial legislation and that existing CCA clients consider continuing under provincial legislation, in order to avoid some of the uncertainties and potential problems described below. This will be of particular importance to religious or quasi-religious organizations, but will also affect any not-for-profits in which the membership does not have a personal economic interest in the activities of the organization. The CBA Section is providing its comments on Bill C-21 in the hopes that the government will make improvements to the Bill before it is reintroduced in Parliament.

II. CRITIQUE OF LEGISLATIVE PHILOSOPHY

Jurisprudence and modern scholarship on the corporation regard it as a largely consensual institution and regard corporations legislation as largely default rules establishing basic governance rules.

Bill C-21 appeared to be based on a number of foundational themes, which for the most part, accord with this scholarship and modern jurisprudence. These include incorporation as of right, abolition of *ultra vires* and the codification of directors' duties. However, there are a number of recurring legislative themes expressed in Bill C-21 which we believe are debatable and which we believe have lead to the introduction of statutory provisions of dubious merit. In particular:

- Governance of not-for-profit corporations is or should be essentially democratic in nature and one role of not-for-profit corporations legislation is to provide imperative rules that enhance the democratic rights of members.

  This proposition is valid only for not-for-profit corporations with members who desire or need strong democratic rights. Typically this will be the case where membership represents a significant economic interest, or where a membership voice is essential to the mission of the organization, such as some advocacy organizations. Democratic rights for members in other types of organizations, however, are not appropriate at all. Large segments of the not-for-profit sector come to the legislative regime with pre-established governance norms which are not democratic or not fully democratic. There is no reason, in our submission, for a corporations statute to impose a single model of corporate governance on all types of organizations, regardless of their mission and pre-established governance norms, or to render the exercise of opting out of these norms

unnecessarily complicated and uncertain. If large segments of the not-for-profit sector prefer less democratic regimes, the corporations statute should anticipate this desire by explicitly recognizing alternative governance structures. Without undue complexity, other jurisdictions have been able to draft legislation that responds to the diverse governance needs of this diverse sector.

- Government should exercise a significant regulatory mandate in the governance of not-for-profit corporations and this regulatory mandate should be expressed in the corporations statute.

  Such a proposition is susceptible to abuse unless government policy makers are absolutely clear as to the regulatory mandate for government intervention in the first place. This needs to be clear so that government actors are not drawn into interventions in the sector that serve no real purpose. In our view, for the regulatory mandate to be clear, the legislation which permits such interventions must be part of a law that is applicable to all not-for-profit organizations, not just not-for-profit corporations.

- As much as possible, the new statute should mimic the Canada Business Corporations Act (CBCA) in form and content.

  This proposition, if followed too closely, leads to the adoption of governance norms and remedial regimes which are entirely inappropriate for many not-for-profit organizations. Bill C-21 often fails to recognize the impact of functional differences between for-profit and not-for-profit corporations upon governance, and make appropriate accommodation based on those differences.

- A large number of rules should be expressed as imperative (“must”) and not as permissive (“may”).

  This last proposition overlooks the fact that the purpose of the corporations statute is to facilitate, not regulate, and leads to too many inappropriate imperative rules. It may not be difficult to avoid inappropriate imperative rules in practice. For example, the by-law of a particular not-for-profit corporation might establish a category of “interested party” or “non-member” who would not technically be “members” under the statute, and therefore would not have the imperative or default rights of members. Such a by-law could establish this class of “non-member” and define the entitlements of that class without any regard to the provisions of the statute governing members. To the extent that this sort of ‘work-around’ develops, it would be an indication that the statute’s imperative rules were inappropriate or that the statute did not offer an appropriate variety of default rules. Uncertainty would result if not-for-profit corporations could not predict whether a court would respect such ‘work around’ governance choices. Bill C-21 does not display an adequate understanding of the diversity of governance norms currently used in the sector. The CBA Section believes it inappropriately imposes norms suitable for mutual benefit-type organizations on all types of organizations.

III. SECTION BY SECTION COMMENTARY

Part 1 - Interpretation and Application

A number of terms used in the Bill are not defined, including the concept of "religious corporation" and the concept of "surrender". The latter term is analogous to "purchase for cancellation" in the context of for-profit corporations.

> **RECOMMENDATION:**
>
> **The CBA Section recommends that "surrender" and "religious corporation" should be defined. Alternatively, incorporators should be given the power to self-identify as "religious" in order to attract the application of the rules in the statute governing religious corporations.**

The Bill distinguishes between "soliciting corporations" and corporations which are not. "Soliciting corporation" is defined as:

> …a corporation that has in the current year, or in any preceding period that has been prescribed,
>
> (a) requested donations or gifts of money or other property from the public;
>
> (b) received a grant or similar financial assistance from the federal government or a provincial or municipal government or an agency of such government; or
>
> (c) accepted money or other property from a corporation or other entity that has made a request referred to in paragraph (a) or has received assistance referred to in (b).

The concept is used in the Bill to identify the segment of not-for-profit corporations that are subject to an obligation to account to the regulator.

It appears that in defining the concept "soliciting corporation", the drafters decided that there should be a not-for-profit sector equivalent to the public or offering corporation. Bill C-21 is ambivalent, however, over whether the appropriate analogy to the public shareholder in the not-for-profit context is the not-for-profit corporation's member or its donor. As a consequence, Bill C-21 both enhances democratic accountability to members and it burdens

a large segment of not-for-profit corporations (all those "requesting" public funds) with public financial accountability. Entities not organized as federal non-share capital corporations will, fortuitously, escape these requirements.

This regulation of "soliciting corporations" is problematic in three ways. We question whether:

- the federal government has jurisdiction over the regulation of fundraising, which, in essence, appears to be the regulatory objective of the concept "soliciting corporation" and its associated rules;
- it makes sense to include a fundraising regulatory scheme in a corporations statute in any event; and
- the fundraising regulatory regime in Bill C-21 is a good one.

Even if it is accepted that the federal government should regulate not-for-profit corporations in this way and in this statute, the concept "soliciting corporation", in our submission, does not identify the right set of corporations to be regulated.

As a general comment, we note that many portions of the Bill, including the definition of "soliciting corporation," do not include reference to the territories together with references to the provinces. Bill C-21 should be amended so that reference to the territories and territorial governments are added to references to the provinces and provincial governments.

> **RECOMMENDATION:**
> **The CBA Section recommends that the regulatory regime based on the concept "soliciting corporation" be removed from the corporations statute, or, at least, the scope of the regime be reduced by narrowing the definition of "soliciting corporation." If the latter approach is adopted, the concepts "requested", "received" and "accepted" should be removed and replaced with more precise descriptions of the types of fundraising not-for-profit corporations whose operations ought to be regulated.**

Part 2 - Incorporation

Paragraph 7(1)(f) requires a statement of the mission of the corporation in the articles of incorporation. "Mission" is not defined. The legal status of the mission statement in the articles of incorporation, or elsewhere, is not clear. Requiring a mission statement in the articles may encourage courts to make associations with objects clauses under the current letters patent legislation and with the associated *ultra vires* doctrine. This would be undesirable. Modern corporate law has abolished the *ultra vires* doctrine because it is fundamentally unsound and because its effects are generally harmful. If there is to be a requirement that the articles of incorporation contain a mission statement, the statute should make the legal function of the mission statement clear.

We recommend, however, that a mission statement not be required in the articles of incorporation. Business corporations are not obliged to state the nature of the business they propose to undertake. There is no need for such a requirement for not-for-profit corporations. Incorporators should be free to incorporate a mission statement in their articles if they so choose.

RECOMMENDATION:

The CBA Section recommends that the requirement for a mission statement be removed, or, in the alternative, that the statute state the legal function of the mission statement.

Part 3 - Capacity and Powers

Section 15 deals with pre-incorporation and pre-amalgamation contracts and is taken word-for-word from section 14 of the CBCA. Canadian jurisprudence and commentary have identified serious problems with section 14 of the CBCA. Section 14 fails to distinguish between three different scenarios:

- where both parties to the contract mistakenly believe that the corporation exists;
- where both parties to the contract know that the corporation does not exist but anticipate that it will be incorporated; and

- where the principals of the purported corporation know that it, in fact, does not exist or should know that it does not exist.

The civil liability arising in these fact patterns should be different. In its attempt to deal with the variety of circumstances in which these types of contracts arise, subsection 14(3) of the CBCA gives wide discretion to courts to impose contracts on parties. This is a weak solution to a difficult problem generated by a poorly drafted section.

RECOMMENDATION:

The CBA Section recommends that section 15 be redrafted based upon the jurisprudence refining the treatment of pre-incorporation contracts under section 14 of the CBCA.

Part 4 - Registered Office and Records

Section 23 provides for the right of a member of a not-for-profit corporation to have access to the corporate records. Members and holders of debt obligations are also entitled to obtain a list of members. The person requesting access must provide a statutory declaration. That person must use the list of members for relevant corporate purposes.

Reasonable people will disagree over the advisability of this type of provision. One of the themes of the proposed legislation is democratic accountability to the membership of the corporation. This rule is intended to enhance the rights of members. We recommend that the rule be permissive, since not all not-for-profit corporations are or should be democratic in the way contemplated by the draft legislation.

RECOMMENDATION:

The CBA Section recommends that section 23 be redrafted to make it permissive, not imperative.

Part 5 - Corporate Finance

All not-for-profit corporations statutes contain a non-distribution constraint that prohibits or restricts distribution of corporate property to members and fiduciaries during the existence of the corporation and on dissolution.

The draft legislation states the first segment of the non-distribution constraint in section 35 as follows:

> … 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.

Subsection 35(2) provides an exception to this prohibition:

> 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.

The formulation of the non-distribution constraint is weak. It is unclear whether the prohibition applies during the existence of the corporation as well as on dissolution. Section 234, in fact, contemplates the possibility of distributions on dissolution to members in the case of non-soliciting corporations. Further, the exception is poorly conceived. For example, it should be possible for a foundation to make grants to its associated operating charity. Such a grant is likely to be prohibited by section 35(2). Whether such a grant is permitted depends on whether the foundation is "authorized to carry on activities" on behalf of the operating charity. This constrain does not make any sense in the case of the typical foundation/operating charity relationship.

RECOMMENDATION:

The CBA Section recommends that the non-distribution constraint should be stated more clearly and precisely.

Part 6 - Debt Obligations, Certificates Registers and Transfers

We have reviewed Part 6 (sections 38 to 104) carefully. We are not clear as to why such a detailed regulation of debt obligations is needed in a not-for-profit corporations statute.

RECOMMENDATION:

The CBA Section recommends that Part 6 be removed from the statute.

Part 7 - Trust Indentures

No comment.

Part 8 - Receivers and Managers

No comment.

Part 9 - Directors and Officers

Section 126 states that a soliciting corporation shall have not fewer than three directors, at least two of whom are not officers or employees of the corporation or its affiliates. The Bill permits all other corporations to have just one director. Assuming the statute is correct to regulate soliciting corporations, which we question, it perhaps makes sense that a soliciting corporation should have a more substantial board of directors with a degree of independence from management. In our submission, however, the current definition of soliciting corporation is too broad and too many corporations will be subject to this requirement. As noted above, we recommend that the concept of "soliciting corporation" be removed from the Bill, or at least narrowed.

Section 134 permits the members of a corporation to amend the articles to change the number of directors. Where the members do this, they may elect the number of directors authorized by the amendment. However, where the directors fix the number of directors between an already existing minimum and a maximum, there is no corresponding power to elect directors to fill the additional places. Under subsection 129(8), the directors may appoint additional directors if the articles so provide. It is not clear, however, whether subsection 129(8) would permit the directors to appoint additional directors where the vacancies have been created by a directors' resolution increasing the number of directors.

RECOMMENDATION:

The CBA Section recommends that the Bill should permit members to elect directors when the number of directors is increased by directors' resolution.

Part 10 - By-laws and Members

Section 163 gives voting members a right to submit proposals to the corporation for discussion at a members' meeting, analogous to the shareholder proposal provisions of the CBCA. It is intended to enhance democratic governance. The CBA Section does not object to this requirement.

Section 170 provides for "unanimous member agreements", analogous to the unanimous shareholder agreement under the CBCA. Although the CBA Section does not see any particular problem with providing for such agreements, it is somewhat peculiar when applied in the not-for-profit context. In our collective experience, where a not- for-profit corporation has wanted to simplify its governance structure, the flow of power has been away from the members to the directors. The need, typically, is to do away with members, not directors. An example of this is the self-perpetuating board, a very common governance structure in the sector.

A regime to facilitate self-perpetuating boards would do away with or simplify many of the member democracy rules. The statute does not contemplate this possibility.

RECOMMENDATION:

The CBA Section recommends that there should be a provision that facilitates self-perpetuating boards.

Part 11 - Financial Disclosure

Section 175(1) provides that the financial information prepared by the corporation be distributed to all members except those who inform the corporation in writing that they do not want a copy. Section 175(2) permits corporations to opt out of the distribution requirement if the by-laws so provide. In that case, the corporation must still make the

information available to members on request. We do not have a view as to whether the rule in Section 175(1) is the appropriate default rule. Again, section 175 appears aimed at enhancing democratic accountability. We question whether the default and imperative rules in the Bill have indeed resulted in a workable governance regime for not-for-profit corporations of all types. Section 176 requires soliciting corporations to send the financial information to the Director under the statute. In the CBA Section's view, this requirement is misguided. Even if it is wise for Industry Canada to have a regulatory role for not-for-profit corporations, the concept "soliciting corporation" casts far too wide a net. Our recommendations with respect to the use of this concept are outlined above.

RECOMMENDATION

The CBA Section recommends that Industry Canada study whether Section 175 is an appropriate default rule.

Part 12 - Public Accountant

The audit regime divides not-for-profit corporations into two categories: designated corporations and corporations that are not designated. Designated corporations include soliciting corporations and non-soliciting corporations with annual revenues up to a prescribed amount. Members of a designated corporation may resolve not to appoint a public accountant. All the members entitled to vote at an annual meeting of members must pass the resolution. The resolution is valid until the next meeting of members. Otherwise, members of both designated and non-designated not-for-profit corporations must appoint a public accountant.

Under section 187, the public accountant of a designated corporation is required to conduct a review engagement in the prescribed manner. The members may pass an ordinary resolution requiring the public accountant to conduct an audit engagement. Public accountants of corporations that are not designated corporations are required to conduct an audit engagement in the prescribed manner. The exception is a corporation that is not a designated corporation that has annual revenues of equal to or less than a prescribed amount or where the members pass a special resolution requiring only a review engagement.

In our view, the requirement to engage a public accountant places an undue burden on many not-for-profit corporations.

RECOMMENDATION:

The CBA Section recommends that the statute should not impose an imperative audit regime on any not-for-profit corporation.

Part 13 - Fundamental Changes

Fundamental changes require the approval of the members by special resolution, and members that otherwise do not have a right to vote, would have a right to vote.

In our view, an imperative rule enfranchising non-voting members where the rights of their membership may be modified is appropriate. This is provided for in section 197. However, we do not think it is appropriate as an imperative rule for fundamental changes such as amalgamations, continuances to other jurisdictions, and extraordinary sales, leases or exchanges of the corporation's property. There are many instances where such a requirement would be unduly burdensome for some types of not-for-profit corporations and where proceeding with the fundamental change without membership approval would not cause any harm to the members. The rules on this issue should therefore be default rules.

As suggested above, a not-for-profit corporation could create a class of "interested person" or "non-member" who would not be a "member", and therefore not be inappropriately enfranchised for the purposes of the fundamental change rule. In our view, forcing

organizations to put in place such work-arounds is not appropriate if the numbers of organizations affected is significant.

RECOMMENDATION:

The CBA Section recommends that the fundamental change regime should operate as default rules.

Part 14 - Liquidation and Dissolution

Section 222 gives the court the power to order the liquidation and dissolution of a not-for-profit corporation if certain conditions are met. Section 222(2) allows the court not to make such an order if it is satisfied that the corporation is a "religious corporation". In that case, the court must be additionally satisfied that the corporate behaviour complained of is based on a "tenet of faith" and that it was reasonable to base the behaviour on the particular tenet of faith.

"Religious corporation" is not defined, although it was in a previous version of the Bill. We think that the court's power in section 222 with regard to religious corporations may cause difficulties. For example, to obtain such an order a member can show that an act or omission of the corporation has been unfairly prejudicial to them or that it is just and equitable that the corporation be liquidated and dissolved. Given the complexity of matters of faith in most religions, it is not difficult to imagine situations where a court might act to dissolve a "religious corporation" in an inappropriate way.

RECOMMENDATION:

The CBA Section recommends that the liquidation and dissolution regime should make more judicious use of imperative rules and more liberal use of default rules and the Bill should not give courts such an expansive jurisdiction over religious corporations.

Subsection 233(2) contains a formulation of the second half of the non-distribution constraint. For certain corporations, the articles must provide that any property remaining

on dissolution shall be distributed to one or more “qualified donees”. The corporations caught by this provision are:

- ·registered charities;
- soliciting corporations; and
- a corporation that has within the prescribed period requested donations from the public or received grants from government, or accepted money from a corporation that has made such requests or received such grants.

All not-for-profit corporations should be required to state clearly in their articles what happens to their property on dissolution. Further regulation on this issue might be provided in other statutes. For example, the *Income Tax Act* will presumably continue to provide that the property of a registered charity on dissolution can only be distributed to a qualified donee. That is a regulatory issue that uses an appropriate regulatory concept - “registered charity” - in the context of a well-developed regulatory regime in the *Income Tax Act*.

However, even if it is appropriate for a corporations statute to play a regulatory role in this regard, we do not think that section 233 sets out the appropriate rule. In particular, we do not see the basis for requiring soliciting corporations that are not registered charities to provide in their articles that the property on dissolution is to be distributed to one or more qualified donees. This is not the only reasonable distribution and therefore there is no reason to require it.

RECOMMENDATION:

The CBA Section recommends that the mandatory distribution to qualified donees should be removed from subsection 233(2).

Section 234 permits the articles of a corporation to provide for distributions to members. In our view, this is an appropriate rule. However, there is no attempt in the formulation of the rule to make it consistent with the first half of the non-distribution constraint in section 35.

RECOMMENDATION:

The CBA Section recommends that the non-distribution constraint be redrafted so that it is clear and consistent.

Part 15 - Investigation

No comment.

Part 16 - Remedies, Offences and Punishment

Part 15 extends the shareholder remedies of derivative action and action relief from oppression to not-for-profit corporations. Exceptions exist for "religious corporations," which permit a court to refrain from making the relevant order where the relevant corporate decision is based on a "tenet of faith" and in the court's opinion it was reasonable to base the decision on a tenet of faith. These rules exhibit a strong policy choice in favour of a remedial regime substantially the same as for-profit corporations with minor discretionary exceptions. The policy choice is based on the apparent premise that members of a not-for-profit corporation are substantially analogous to shareholders of a business corporation. To the extent that this assumption is not true, the rules of Part 15 will be entirely inappropriate. One important question is whether the discretionary faith-based exemption is a sufficient accommodation of the distinctiveness of religious not-for-profit corporations.

The CBA Section's view is that it is not. There should be stronger exemptions for religious corporations from both the derivative action and the action for relief from oppression. With respect to for-profit corporations, the derivative action is less problematic since whether it succeeds or not turns on whether the fiduciaries of the corporation have breached their fiduciary obligations. It makes sense to put the power to ask that question in the hands of members, and not the fiduciaries themselves. This concession merely reverses the rule in *Foss* v. *Harbottle*,[1] which holds that only the fiduciaries of a corporation – the board of directors – can cause the corporation to sue a fiduciary.

[1] (1843) 2 Hare 461, 67 ER 189.

The action for relief from oppression, however, is more problematic. Making this remedy available to all members of all not-for-profit corporations is not, in our submission, appropriate. Where a member does have an economic or quasi-economic interest (for example, as a member of a golf club) the incorporators and the membership will usually establish or should establish, a detailed contract stating the economic and other rights of the member. These regimes could well be more subtle and detailed than the share terms of a for-profit corporation. The contract will also establish the basis of the members' remedies. It may still make sense for that type of case to provide for a general power of the court to intervene, as the oppression remedy does. Where a member of a not-for-profit corporation does not have such an economic or quasi-economic interest (for example, as a member or director of a foundation or as a director of a self-perpetuating board) the complaint of misbehaviour would typically not be easily described as behaviour that is "oppressive or unfairly prejudicial to or unfairly disregards the interests of" a member. On that basis, the CBA Section's view is that this part of the statute requires a great deal more thought.

RECOMMENDATION:

The CBA Section recommends that the remedies provided for under Part 16 should be redrafted in their entirety.

IV. CONCLUSION

As noted above, Bill C-21 represented an attempt to address the much-needed reforms to the governance of not-for-profit corporations. The CBA Section hopes that the government will re-introduce legislation to effect these reforms, but in a manner that remedies the defects in the Bill highlighted above. Any proposed Bill must recognize the diversity of not-for-profit corporations and that their governance needs may be different from those of for-profit corporations. We hope that our comments provide helpful insight on the kind of legislation that is required to meet the needs of this unique sector.