THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Submission on Bill C-4 – *Canada Not-for-profit Corporations Act*

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

February 2009

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PREFACE

The Canadian Bar Association is a national association representing 37,000 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 Business Law and National Charities and Not-For-Profit Law Sections 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 Business Law and National Charities and Not-For-Profit Law Sections of the Canadian Bar Association,

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I. INTRODUCTION

The National Charities and Not-For-Profit Law Section and the National Business Law Section of the Canadian Bar Association (the CBA Sections) welcome the introduction of Bill C-4, the *Canada Not-for-profit Corporations Act*.

Canadian federal not-for profit (NFP) corporations have long been subject to an antiquated, cumbersome, gap-filled corporate law. A modern governance framework applicable to NFP corporations is long overdue.

Part II of the *Canada Corporations Act*[1] (the CCA) was last revised in 1919. Federal corporate law reform has been in the works for more than a third of a century – since Professor Peter Cumming's 1974 Proposals for a *Not-for-profit Corporations Law for Canad*a.[2] In the intervening years, no less than eight bills for a new NFP corporate statute have been introduced. The last three bills, Bill C-21[3] introduced in 2004, Bill C-62[4] introduced in June 2008, and Bill C-4[5] introduced in December 2008 each died on the Order Paper. The proposed legislation was again reintroduced as Bill C-4 on January 28, 2009.

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1 R.S.C. 1970, c. C-32.

2 (Consumer and Corporate Affairs Canada, 1974).

3 Bill C-21, the *Canada Not-for-Profit Corporations Act* died on the Order Paper on November 29, 2005 when the 38th Parliament was dissolved.

4 Bill C-62, the *Canada Not-for-Profit Corporations Act,* died on the Order Paper on September 7, 2008 when the 39th Parliament was dissolved.

5 Bill C-4, the *Canada Not-for-Profit Corporations Act,* died on the Order Paper on December 4, 2008 when the 40th Parliament was prorogued.

One might be forgiven for surmising from this long history that reform of federal NFP corporate law must be highly controversial or politically charged. Yet, distinctions between soliciting and non-soliciting corporations, designated corporations and audits, transfers of interests in debt obligations or liquidations and dissolutions, amalgamations, continuances, arrangements and reorganizations are not divisive issues. Nevertheless, these are essential components of a framework law governing federal NFP corporations. A vibrant NFP sector is an important part of Canada's economic, social, religious and cultural fabric, and the sector urgently needs new governance legislation.

The time has surely come to set matters right. The proposed Act will finally bring federal NFP corporate law into the 21st century.

Before turning to the specific content of the proposed Act, the CBA Sections wish to acknowledge the tenacity of the officials at Industry Canada in staying the course on this important reform legislation. We applaud their good work in preparing a bill that will serve Canadians well for generations.

Our view is that Bill C-4 is a good starting point for a not-for-profit statute that will be welcomed by the Canadian non-profit sector. However, a number of provisions may impair use of the proposed Act by parts of the sector. If the proposed Act is passed in its present form, a considerable period of time may pass before any amendments see the light of day. It is therefore important to make necessary changes to Bill C-4 before it becomes law. Our recommendations are intended to improve the proposed Act and make it more capable of meeting the needs of the full spectrum of the sector.

In Part II of this submission, we set out our suggested improvements to the proposed Act and to the draft *Canada Not-for-profit Corporations Regulations* (the proposed Regulations).

The CBA made a submission[6] in October 2006 on Bill C-21, a precursor to Bill C-4. Bill C-4 is substantially the same as Bill C-21, so many comments in the earlier submission continue to apply. Some members of the CBA Sections continue to favour a legislative approach that places less emphasis on regulation and prescription and more emphasis on facilitation.[7] As these points have been made in sufficient detail in the previous submission, and there is room for reasonable disagreement on the underlying issues, this submission does not raise them again.

We follow the sequence set out in the proposed Act, discussing the companion Regulations to the extent necessary in context. There are three exceptions to our sequential progression.

First, provisions relating to **holders of debt obligations and registers of debt obligations** are spread throughout the proposed Act and Regulations. As stated more fully in Part II.5 below, we propose the elimination of most of these provisions for several interrelated reasons. One is that the provisions are largely irrelevant to the NFP sector. Their inclusion is confusing and adds to the complexity of the proposed Act. The second reason is that the provisions are unnecessary – as is evident from the omission of most of the new provisions from Parts I and II of the CCA and their complete absence in non-corporate legislation[8].

The final reason is that holders of debt obligations should bargain for any rights and remedies they seek from NFP corporations. There is no evidence to suggest that holders of debt obligations require the legislative assistance that Bill C-4 proposes. While the *Canada Business Corporations Act* (CBCA)[9] serves as a useful model for Bill C-4, there is no reason to adopt copious CBCA provisions that are almost wholly irrelevant in the NFP corporate

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6 http://www.cba.org/CBA/submissions/pdf/06-48-eng.pdf

7 However, other members of the CBA Sections find that Bill C-4 is far more enabling than regulatory and that the enabling/regulatory balance should be considered on a specific issue-by-issue basis rather than in the abstract.

8 Non-corporation legislation includes, for example, the *Partnerships Act*, R.S.O. 1990, c. P.5 and the *Limited Partnership Act*, R.S.O. 1990, c. C.16.

9 R.S.C. 1985, c. C-44.

environment. We consolidate our detailed recommendations on which of these provisions can be deleted in Schedule A.

The second major exception to our sequential progression through the proposed Act relates to **the way the proposed Act and Regulations split various rules between them**. We recognize that this approach has the well-intentioned goal of keeping the law current without unnecessarily consuming Parliamentary time. We agree with the concept but think that the bifurcation of rules between the proposed Act and Regulations has been carried so far as to make the new legislation hard to use – especially for the many lay users who must navigate, interpret and grasp the law. Our suggestion is that at least some of these provisions be reintegrated – especially where the likely benefits from legislative flexibility are remote but the costs in ease of understanding are great. We do not suggest any substantive changes – just that the rules be reconsolidated in the proposed Act rather than split between the proposed Act and Regulations. We consolidate comments on reintegration in Schedule B.

The final exception to our sequential progression relates to Part 14 of the proposed Act. Schedule C does not propose any substantive changes to Bill C-4, but suggests **reordering the provisions in Part 14, which deal with liquidation, dissolution and revival**. As discussed more fully in Part II.14 below, the proposed Act follows the meandering path of Part XVIII of the CBCA. We suggest a more orderly layout with appropriate subheadings to assist users in locating the applicable provisions.

II. SPECIFIC COMMENTS ON BILL C-4

Part 1 Interpretation and Application

2(1) Definition of "Public Accountant"

The definition of public accountant refers to an appointment pursuant to ss. 128(1)(e) or 182(1). However, a public accountant can also be appointed pursuant to ss. 185(2), or 186 or by a court under s. 187(1).

RECOMMENDATION:

The CBA Sections recommend that the definition of "public accountant" in s. 2(1) be amended to add references to subsection 185(2), section 186 and subsection 187(1).

2(1) Definition of "Soliciting Corporation"

To avoid the situation where a corporation may unknowingly fit within the definition of "soliciting corporation" and, therefore, be unwittingly in breach of the Act for failure to adhere to the tougher requirements imposed on soliciting corporations, a knowledge qualifier should be applicable to paragraph (c) of this definition (and the companion provision in s. 236(1)(c)(iii)). The recipient corporation may not necessarily know whether a donor corporation or other entity has itself received income in excess of $10,000 within the previous three years, and may have no reasonable way of making such determination. All corporations should not be forced to adhere to the tougher requirements imposed on soliciting corporations out of abundance of caution. Also, the test for determining whether a corporation is a "soliciting corporation" should be applied not continuously, but once a year. Logically, this determination should be made on the last day of its financial year-end (since every corporation will be required to prepare and circulate annual financial statements) and apply prospectively starting immediately after the close of members. A deferred application is required to enable the corporation to change directors, appoint auditors, approve consequential amendments to its articles and make other changes resulting from its change of status from a non-soliciting corporation to a soliciting corporation.

RECOMMENDATION:

The CBA Sections recommend that the definition of "soliciting corporation" be amended so that:

(a) whether a corporation meets the definition of "soliciting corporation" is tested only at the end of each financial period of that corporation;

(b) a change in status from soliciting corporation to non-soliciting corporation, or the reverse, only takes effect at the conclusion of the next ensuing annual meeting of members; and

(c) the following knowledge qualifier apply to receipts of donations or gifts from corporations or other entities that have, in the prescribed period, received income in excess of the prescribed amount from

public donors or government sources (as described at paragraphs (a) and (b) of the definition of "soliciting corporation" in s. 2(1)):

"For the purposes of paragraph (c) of the definition of "soliciting corporation" in s. 2(1) and s. 236(1((c)(iii), the corporation has notice that a donor entity has, in the prescribed period, received income in excess of the prescribed amount from donors referred to in paragraphs (a) and (b) of the definition of "soliciting corporation in s. 2(1) when information has come to the attention of an officer or senior employee of the corporation with responsibility for matters to which the information relates under circumstances in which a reasonable person would take cognizance of it."

Part 2 Incorporation

7(1) Articles of Incorporation

Paragraph 7(1)(c) requires the articles to set out 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 those classes or groups. Some members of the CBA Sections favour adding additional flexibility to the affairs of a corporation so that the classes and voting rights could instead be set out in the by-laws, even if the by-laws can be amended by simple majority vote of members, and even if by-law amendments have interim validity upon adoption by resolution of the directors. However, other members of the CBA Sections believe it is more appropriate to set out members' voting and liquidation rights in the articles rather than in by-laws since by-laws can generally be amended by the directors with immediate effect, whereas articles can only be amended by special resolution (i.e., 2/3 of the votes cast by members). Directors should not be able to unilaterally alter members' existing voting or liquidation rights, even temporarily.

Paragraph 7(1)(f) requires a corporation to include in its articles a statement of the purpose of the corporation. The proposed Act does not make clear, however, what purpose the purpose clause has. Since the corporation has all of the powers and capacities of a natural person, an act beyond the purpose of the corporation will not be *ultra vires*. The purpose is also not the same as a restriction contemplated under s.17(2). The concept is, therefore, a legal orphan and will only confuse. If the concept of "purpose" is needed, it should be integrated with the concept of restricted activities in s. 17(2) so that the consequences

flowing from failure to stick to the stated purpose are clear. The concepts of "restricted activities" and "purpose" appear to be inversely related, but this is not clearly indicated in the proposed Act as drafted.

RECOMMENDATION:

The CBA Sections recommend that s. 7(1)(f) be deleted.[10]

7(3) Additional Provisions in Articles

It should also be made clear that, whenever the proposed Act refers to a provision that may be contained in the by-laws, the provision may also be set out in the articles.

RECOMMENDATION:

The CBA Sections recommend that subsection 7(3) of Bill C-4 be deleted and replaced with the following:

"(3) The articles may set out any provisions that may be set out in the by-laws, and any reference in this Act to a provision that may be set out in the by-laws is deemed to include any such provision whether set out in the articles or the by-laws."

Part 3 Capacity and Powers

No comment other than in Schedule A.

Part 4 Registered Office and Records

22(3) Copies of Corporate Records

Subsection 22(3) deals with a member's right to receive a free copy of articles, by-laws and unanimous member agreements. It follows a provision on filing a statutory declaration to examine the register of debt obligations (s. 22(2)) and precedes a provision on filing the statutory declaration to obtain a list of debt obligation holders (s. 22(4)). Thus, s. 22(3) is confusingly out of order, sandwiched between two provisions that relate to identification of holders of debt obligations. We recommend, for other reasons, that ss. 22(2) and (4) be

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[10] Consequential changes must also be made to the definition of "activities" in s. 2(1) and to s. 198(1)(j).

deleted. If they are not deleted, a more logical sequence would be to reverse the order of ss. 22(2) and (3). See the discussion on debt obligations under Part II.5 below.

RECOMMENDATION:

The CBA Sections recommend that:

(a) ss. 22(2) and (4) be deleted from Bill C-4 for the reasons discussed at Part II.5 under the heading "Debt Obligations under the proposed Act; and

(b) if ss. 22(2) and (4) are not deleted, the order of ss. 22(2) and (3) be reversed.

Part 5 Corporate Finance

Debt Obligations under the proposed Act

The proposed Act and Regulations are replete with provisions dealing with debt obligations issued by federal NFP corporations. These provisions appear to be a demonstration of the inability of the proposed Act to break away from its CBCA heritage even when duplicating CBCA provisions is out of place, undermines coherency and lacks demonstrable need.

NFP corporate legislation is not about holders of debt obligations. Whatever reasons compelled the Dickerson Committee[11] to include holders of debt obligations in the 1971 proposals that informed the original CBCA, they do not compel reiteration in a modern NFP corporate statute – especially in light of the tendency of most provinces and territories to adopt corporate law modeled on the CBCA.[12]

In general, holders of debt obligations should be required to negotiate all their rights in the trust indenture, security agreement or other agreements that they enter into with an NFP corporation. Currently, the legal relationship between a federal NFP corporation and the holders of its debt obligations is a matter of private contract – with limited legislative intervention in the case where the debt obligations are offered to the public or the debt

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11 R.W.V. Dickerson, L. Getz and J. Howard, *Proposals for a New Business Corporations Law for Canada: Commentary and Draft Ac*t, vol. 1 (Ottawa: Information Canada, 1971).

12 The provinces of Alberta (AB), Saskatchewan (SK), Manitoba (MB), Ontario (ON), New Brunswick (NB) and Newfoundland and Labrador (NL), as well as all three territories, have adopted close analogs of the CBCA.

obligations are secured under largely provincial law. There is no compelling reason to clutter the proposed Act with copious provisions with little relevance to all but a tiny minority of NFP corporations. Nor is there evidence that holders of debt obligations are unable to effectively bargain with NFP corporations for the rights that they require.

RECOMMENDATION:

The CBA Sections recommend that the provisions in Schedule A of this submission be deleted from Bill C-4 or modified, as indicated.

Other Comments on Part 5

35(2) Distribution to a Member Entity

The intent of s. 35(2) is unclear. Under s. 35(1), it appears that a corporation could distribute its property, directly or indirectly, to a member in furtherance of its activities. Given the breadth of s. 35(1), s. 35(2) appears redundant.

RECOMMENDATION:

The CBA Sections recommend that s. 35(2) be deleted from Bill C-4.

36 Surrendered Memberships

Section 36 states that a corporation may accept a membership in the corporation surrendered to it as a gift, which will extinguish or reduce a liability respecting an amount unpaid on that membership. This appears to be analog of s. 37 of the CBCA. However, s. 37 of the CBCA relates to shares, whereas s. 36 of the proposed Act relates to a membership interest. The other difference is that s. 37 of the CBCA states that a corporation may not extinguish or reduce a liability in respect of an amount unpaid on any such share, whereas s. 36 of the proposed Act states the opposite. that the corporation may accept the membership interest in extinguishment or reduction of a liability.

Arguably, s. 37 was included in the CBCA to provide a statutory exception to the rule in *Trevor v. Whitworth*,[13] which prohibits corporations from trafficking in their own shares.

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[13] (1887), 12 App. Cas. 709 (H.L.).

Sections 157 and 158 of the proposed Act already have the effect of extinguishing the membership rights of a member whose membership is terminated, subject to any contrary provisions of the articles or by-laws.

We point out that, if a membership interest in the corporation is truly a "gift", then it is conceptually inconsistent to provide that the corporation may, in exchange, extinguish or reduce a liability respecting an unpaid membership.

Section 36 is unnecessary and confusing.

RECOMMENDATION:

The CBA Sections recommend that s. 36 be deleted from Bill C-4.

Part 6 Debt Obligations, Certificates, Registers and Transfers

Why Federal Presence in Securities Transfers Should Not Be Expanded

Part 6 of the proposed Act (comprising ss. 38 through 104) sets out an extensive code for the transfer of debt obligations in federal NFP corporations including certificate requirements, registers, limitation of proceedings, delivery requirements and related matters. Part 6 is an analog of Part VII of the CBCA, except that the latter applies to both debt obligations and shares issued by a CBCA corporation. Inexplicably, the proposed Act applies only to debt obligations issued by a federal NFP corporation and not to other securities issued by such an issuer.

Part 6 is incomplete in scope. Part 6 ignores transferable membership interests in federal NFP corporations. Part 6 also ignores the indirect holding system – which is arguably more relevant than the direct holding system to debt obligations issued to the public under a trust indenture. Both transferable membership interests and the indirect holding system are left to provincial and territorial law. The piecemeal nature of Part 6 is antithetical to the legal

certainty that the ongoing adoption of substantially uniform securities transfer legislation[14] was intended to establish.

Part 6 adds much irrelevant new material, generating confusion. As it stands, Part 6 comprises 67 sections. It adds significantly to the length and complexity of the proposed Act. Its arcane subject matter undermines the desirable objective of making the proposed Act comprehensible to lay users who will work with it.

Part 6 does not respect the boundary between corporate law and securities transfer law. Provincial securities transfer legislation does respect that boundary, providing a modern, comprehensive set of rules that link rationally with corporate law and render federal legislation in the area largely redundant. Part 6 blurs that boundary. It treats transfers of interests in debt obligations as a matter of corporate law, where securities transfer legislation correctly recognizes the matter as part of commercial property transfer law.

Securities transfer legislation draws a clear line between corporate law (including the validity of a security and the enforcement of the holder's underlying corporate and contractual rights against the issuer) and securities transfer law (which deals with the effect of registration on the books of the issuer and the associated cut-off rules). For example, s. 44(1) of the Ontario STA governs the validity of the underlying security, which is generally the jurisdiction under which the issuer is incorporated or governed. Subsection 44(2) of the Ontario STA provides that the law of the issuer's jurisdiction governs the rights and duties of the issuer with respect to the registration of title, the effectiveness of registration of transfer, whether the

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[14] Such as the *Securities Transfer Act*, 2006, S.O. 2006, c. 8 (the Ontario STA),in force January 1, 2007. As of the date of this submission, securities transfer legislation is in force in BC, AB, SK, MB, ON and NL. Comparable legislation is in force in QC. See *Securities Transfer Act*, S.B.C. 2007, c. 10 (in force 1 July 2007); *Securities Transfer Act*, S.A. 2006, c. S-4.5 (in force 1 January 2007); *Securities Transfer Act*, S.S. 2007, c. S-42.3 (in force 1 September 2007); *Securities Transfer Act*, C.C.S.M. c. S60 (in force 12 June 2008); and Newfoundland: *Securities Transfer Act*, S.N.L. 2007, c. S-13.01 (in force 1 August 2007). Québec's substantially harmonized legislation came into effect January 1, 2009,. See *An Act respecting the transfer of securities and the establishment of security entitlements*, S.Q. 2008, c. 20. On December 19, 2008, the *Securities Transfer Act*, S.N.B. 2008, c. s-5.8 received Royal Assent (not yet proclaimed in in force). On July 31, 2008, Nova Scotia announced its intent to introduce securities transfer legislation. Securities transfer legislation has not yet been introduced in PEI or any of the territories.

issuer owes any duties to an adverse claimant to a security and whether an adverse claim can be asserted against a person to whom the transfer of the security is registered.

Part 6 creates inconsistency in the law governing debt security certificates. Securities transfer legislation (for example, s. 46 of the Ontario STA) states that the law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim may be asserted against a person to whom the security certificate is delivered. Thus, if a debt obligation certificate of an NFP corporation were delivered to a purchaser or pledgee in Ontario, the Ontario STA would apply. However, Part 6 also purports to apply to the debt obligations of a federal NFP corporation. Hence, a conflict between two laws (federal and local) will inevitably occur where delivery of a debt obligation certificate in a federal NFP corporation is involved. The clash is not necessarily innocuous. For example, "adverse claim" is defined more narrowly under securities transfer legislation than under Part 6 – meaning that transaction finality is less secure under Part 6 than it is under securities transfer legislation.

Part 6 creates duplication and risk of inconsistency. Securities transfer legislation exhaustively covers the applicable law governing the transfer of debt securities of federal corporations. Except for the validity of the security and other rights and obligations between the federal NFP corporation and the registered holder of debt obligations on its books, securities transfer legislation gives federal NFP corporations great freedom to choose the law governing the registration of transfers, the effect of registration and defences of the corporation to the enforcement of a security by a purchaser for value without notice of the defence.

Part 6 is at odds with securities transfer legislation conflict of laws rules in provisions comparable to s. 44 of the Ontario STA. Part 6 sets out a separate regime governing registration of securities transfers, effect of registration, cut-off rules and the effect of defences of a federal NFP corporation against a purchaser of debt obligations for value without notice. While, in most cases, the substantive effect of Part 6 can be expected to produce the same legal result as under securities transfer legislation, it is nevertheless the

source of considerable uncertainty and incoherence to have different federal and provincial and territorial laws covering the same legal issues. For example, s. 88(c) of the proposed Act provides, in effect, for constructive delivery of a security when the "purchaser's broker sends the purchaser confirmation of the purchase and the broker in the broker's records identifies a specific debt obligation as belonging to the purchaser." Like its now repealed counterpart in former s. 78(1)(c) of the *Business Corporations Act*,[15] s. 88(c) cannot be reconciled with the concept of a security entitlement that arises once a financial asset such as a debt obligation is credited to the securities account of the purchaser. Under securities transfer legislation, "delivery" is a concept that applies only in the direct holding system, and the fiction of constructive delivery has been abandoned in the indirect holding system. Thus, s. 88(c) moves in the opposite direction required by the advent of securities transfer legislation.

While, in theory, the transfer rules applicable to debt obligations issued by federal NFP corporations could be conformed to provincial securities transfer legislation, there is no need for legislative duplication. To the extent that Part 6 continues to differ from provincial securities transfer legislation, what justifies that difference and the uncertainty created by maintaining substantively inconsistent and overlapping federal and provincial securities transfer rules – particularly given how rarely Part 6 is likely to be used? If, on the other hand, Part 6 were to provide word-for-word uniformity with provincial direct transfer laws, it would be duplicative – and what is the point of that? Further, could such uniformity be maintained? Coexisting federal and provincial legislation runs the risk of continental drift – creating needless uncertainly and inconsistency. Unless Part 6 is fully harmonized with provincial securities transfer regimes (which is not the case and which would make it, *ex hypothesi*, redundant), it undermines the coherency and certainty of Canada's system of securities transfer laws, which, apart from Part 6, are quickly converging.

Part 6 does not integrate with provincial and territorial PPS laws. It is imperative that the laws governing securities transfers be closely integrated with personal property security (PPS) regimes, which exist at the provincial and territorial level. Provincial and territorial

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15 R.S.O. 1990, c. B.16.

PPS regimes (as amended by securities transfer legislation in most provinces) set out comprehensive, largely uniform provisions governing: (1) what laws apply to the creation and perfection of security interests in investment property such as debt obligations; (2) the basis for such application (location of certificates, jurisdiction or location of issuer and jurisdiction of securities intermediary); (3) the ways for a security interest to attach and be perfected; and (4) the priorities of competing interests in investment property. That security interests in directly held debt obligations are governed by provincial and territorial PPS regimes make a separate federal regime for transfers of debt obligations in the direct holding system awkward and less workable.

Subsection 38(1) defines "purchaser" as including not only a buyer but also "a person who takes an interest or right in a debt obligation by ...mortgage, hypothec, pledge..." and any other voluntary transaction. Thus, Part 6 purports to apply to security interests in debt obligations issued by federal NFP corporations. However, neither the proposed Act nor any other federal statute provides for the other rules needed for a reasonably complete regime governing security interests in such debt obligations. In particular, the proposed Act does not contain any attachment, perfection or priority rules. Further, the concepts of "security interest", "control" "perfection" and "priority" in securities transfer and PPS legislation are completely foreign to the proposed Act and, even if they could be duplicated under federal law to harmonize with provincial and territorial regimes, would add nothing. In Canada, a complete set of rules governing security interests in investment property such as debt obligations only exists in provincial and territorial securities transfer and PPS legislation.

PPS legislation in the jurisdictions that have adopted the securities transfer legislation defines "investment property" as including "securities". This would include debt obligations in a federal NFP corporation. Again, it undermines legal certainty to perpetuate two fundamentally inconsistent conflict of laws rules: a federal law that purports to apply the proposed Act to pledges or other security interests in securities issued by federally incorporated NFP issuers; and a provincial law that applies the law of the jurisdiction in which the debt obligation certificates are delivered or the debtor is located. The only way to reconcile this conflict is for Parliament to vacate the field and repeal existing federal laws

dealing with the pledge of, or other security interests in, securities of federal issuers.[16] Certainly, Parliament should not be expanding its occupancy of the field by enacting Part 6.

The advent of Part 6 will inject unwelcome uncertainty into Canada's securities holding system. The coexistence of a federal securities transfer regime undermines legal certainty in the direct holding system. Market participants must first determine which set of rules apply and whether there is a difference in those rules. The coexistence of Part 6 and provincial and territorial transfer rules entails legislative overlap and inconsistency. In effect, there will have to be a federal override or carve-out for debt obligations issued by federal NFP corporations from provincial securities transfer rules. Furthermore, it may not always be obvious to investors which set of rules applies since the investor may not know (and should not care) whether the issuer of the particular debt obligations is incorporated under the proposed Act or a provincial incorporation statute. We are concerned that Part 6 could create a level of uncertainty vastly disproportionate to the share that federal NFP corporations have of the corporate debt securities market.

RECOMMENDATION:

> **The CBA Sections recommend that sections 38 to 104 inclusive be deleted from Bill C-4 so that the transfer of debt obligations of federal NFP corporations is dealt with exclusively under provincial and territorial securities transfer legislation, as is the case at present and as would remain the case under Bill C-4 with respect to transferable membership interests.**

Securities transfer legislation (such as s. 44(5) of the Ontario STA) defines "issuer's jurisdiction", in the case of a CBCA corporation or other federally-incorporated issuer, as the province or territory in which the corporation has its registered office or head office. This gives every federally-incorporated issuer 13 jurisdictions from which to choose. To give even further flexibility, securities transfer legislation contemplates that federal law can simply allow the federal corporation to choose any jurisdiction within or outside Canada and that the "issuer's jurisdiction" can be chosen independently of the province or territory in

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[16] See the Canadian Bar Submission (CBA) submission on "Modernizing Federal Securities Transfer Rules" (Robert M. Scavone, Chair) available online at: http://www.cba.org/CBA/submissions/pdf/07-53-eng.pdf. The CBA submission was in response to a joint Department of Finance and Industry Canada consultation paper on Modernization of the Federal Securities Transfer Rules, which set out as one of the options, vacating the field.

which the federal corporation's registered office or head office is located. The proposed Act ought to embrace such flexibility (particularly given that the securities transfer legislation is not yet enacted and in force in every province and territory). Thus, the proposed Act should be amended to expressly permit federal NFP corporations to select the law of any domestic or foreign jurisdiction (not necessarily limited to the province or territory where the registered office or head office is located) as the law governing the registration of transfer and the effect of registration of debt obligations and transferable membership interests issued by the corporation.

RECOMMENDATION:

The CBA Sections recommend that Bill C-4 be amended to include a provision explicitly enabling a federal NFP corporation to select the law of any domestic or foreign jurisdiction (not limited to the jurisdiction where the registered office or head office is located) as the law governing the registration of transfer and the effect of registration of debt obligations and transferable membership interests. A companion change should also be made to the CBCA. Such a provision might read as follows:

"38. The directors of a corporation may by resolution specify the law of any jurisdiction as the law governing any of the following matters:

(a) the rights and duties of the corporation with respect to the registration of transfer of any securities;

(b) the effectiveness of the registration of a transfer by the corporation;

(c) whether the corporation owes any duties to an adverse claimant to a security; and

(d) whether an adverse claim can be asserted against a person,

(i) to whom the transfer of a certificated or uncertificated security is registered; or

(ii) who obtains control of a certificated security."

Part 7 Trust Indentures

Part 7 of the proposed Act (comprising ss. 105 through 116) is drawn from Part VIII of the CBCA. Like Part VIII of the CBCA, Part 7 has three ostensible objectives: (1) to ensure that holders of debt obligations have the services of a disinterested indenture trustee and that the trustee will conform to the highest standards of conduct observed by conscientious trust institutions; (2) to provide full and fair disclosure, not only at the time of the original issue of

the debt obligation, but throughout the life of such securities; and (3) to provide machinery whereby holders of debt obligations may combine for the protection of their own interests. Part 7, therefore, contains an element of regulatory law – specifically securities regulation.

Part VIII of the CBCA in turn was drawn largely from the United States *Trust Indenture Act* of 1939[17] (the US Act).

According to ss. 105(2), Part 7 applies where debt if issued under a trust indenture is part of a "distribution to the public". As under the CBCA, there is no definition in the proposed Act of what constitutes a "distribution to the public". While the securities laws of some provinces such as Ontario[18], contain a definition, the definition under provincial and territorial law may not be, or remain, uniform.

There is a fundamental conceptual difficulty with Part 7 of the proposed Act, as there is with Part VIII of the CBCA. By its terms, Part 7, like its CBCA counterpart, seeks to regulate certain trust indentures issued by federal corporations. Thus, of necessity, Part 7 treats the matter as one of regulation of "corporate issuers of debt obligations" rather than one of "investor protection".

The equivalent provisions of Part V of the *Ontario Business Corporations Act* (OBCA)[19] and the US Act have a different, and arguably, more logical focus. First, Part V of the OBCA applies to more than just OBCA corporations. It applies to any "body corporate", which is defined under the OBCA as "any body corporate with or without share capital and whether or not it is a corporation to which [the OBCA] applies:" – a definition, despite circularity, that clearly encompasses CBCA corporations, federal NFP corporations and bodies corporate formed under provincial, territorial or foreign law.

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17 15 USC 77aaa.

18 *Securities Act,* R.S.O. 1990, c. s.5, s. 1(1). Not all provinces and territories define the term.

19 R.S.O. 1990, C.B.16.

Second, Part V of the OBCA only applies to a trust indenture where a prospectus or securities exchange issuer bid circular or take-over bid circular has been filed under the Ontario *Securities Act*[20] or predecessor Ontario securities legislation.

The Ontario Securities Commission has the discretion to exempt trust indentures from the application of Part V of the OBCA. The statutory test applied in granting an exemption under the OBCA is whether the exemption "would not be prejudicial to the public interest". For this purpose, the "public interest" means the interests of Ontario investors.

Part 7 of the proposed Act applies to all trust indentures in which the underlying debt obligations are part of a "distribution to the public". It, therefore, includes debt obligations that are never sold to Canadian investors and are not even intended to be sold to Canadian investors. Nor is there any focus under Part 7 on the public interest or any subset thereof.

Subsection 105(3) of the proposed Act is significant because it enables the Director to exempt a trust indenture from the application of Part 7 if the trust indenture and the debt obligations issued under it are subject to the law of a province or country other than Canada that is substantially equivalent to Part 7. Suppose, for example, that an NFP corporation is issuing debt obligations and at least some of the offerees are resident in Ontario. Part V of the OBCA will apply, and an exemption under Part 7 will be available under s. 105(3). Likewise, if the trust indenture is governed by the US Act, an exemption will be available to the corporation under s. 105(3). If, however, English law governs the trust indenture or debt obligations issued under the trust indenture, it is doubtful that an exemption would be available under s. 105(3) because English law does not contain a regulatory regime similar to Part 7 (or similar to the US Act, on which the precursor of Part 7 was modeled).

In these circumstances, it is difficult to see what legitimate role there is for the Director under the proposed Act. At best, Part 7 is duplicative and merely creates a bit of legal work to obtain an exemption order. At worst, it is potentially inconsistent or paternalistic (*i.e.*, as

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20 *Supra,* footnote 18.

in our English example, applying to a federal NFP corporation issuing its debt obligations exclusively to English investors even though English law imposes no obligations comparable to the US Act in such circumstances). The question becomes why the laws of the jurisdictions in which the debt obligations are being offered should not be left to regulate the content, and other aspects, of the issuer's trust indenture.

In most cases, Part 7 will only apply where no provincial securities laws are engaged and the US Act does not apply. This could happen where a federal NFP corporation is issuing the trust indenture in relation to debt obligations, and all of the offerees are outside Ontario, British Columbia (whose law in this respect is comparable to that of Ontario) and the US. In our collective experience, such an issuance would be so rare that it does not warrant specific legislative treatment in a NFP corporate statute of general application.

Arguably, a federal NFP corporation should be free from constraints under its home jurisdiction as long as it complies with the relevant securities and other laws of the jurisdictions where the debt obligations will be offered for sale. Simply put, the investor protection function of Part 7 should focus not on issuers but on investors or, more narrowly, Canadian investors. Canadian investors are, or should be, protected under provincial laws such as Part V of the OBCA. Likewise, foreign investors should be protected by laws where they reside such as the US Act, not by laws applicable to what is, for them, a foreign issuer.

Therefore, Part 7 (as well as Part VIII of the CBCA) should be deleted or repealed as either redundant or devoid of purpose. Deleting Part 7 from the proposed Act will ensure that unnecessary restrictions are not imposed on federal NFP corporations and that confusing clutter in the proposed Act is minimized.

RECOMMENDATION:

> **The CBA Sections recommend that Part 7 (sections 105 to 116 inclusive) be deleted from Bill C-4 in favour of regulating the content of trust indentures and indenture trustees under applicable provincial legislation such as Part V of the OBCA or foreign legislation such as the U.S. *Trust Indenture Act* of 1939. A companion change should be also made to the CBCA.**

Part 8 Receivers and Receiver-Managers

No comments other than as provided for in Schedule B.

Part 9 Directors and Officers

126 Number of Directors

All else being equal, distinctions between soliciting and non-soliciting corporations ought to be minimized, particularly distinctions that could cloud the validity of the corporation's operational activities or affairs. Some members of the CBA Sections believe the distinction in this instance could be eliminated by requiring that all corporations have a minimum of three directors.[21] A one-director rule could be abused especially where directors are allowed to set their own remuneration. There is governance value in requiring pluralistic responsibility and decision-making. For example, conflicts of interest are more easily handled if there are at least some disinterested directors who can approve an interested director contract or set the remuneration payable to director-officers. Others are of the view that a requirement of three directors for all NFP corporations is overly regulatory and, in any event, easily complied with in form but not in substance.

RECOMMENDATION:

The CBA Sections make no recommendation regarding the amendment of s. 126 of Bill C-4.

129(3) Election of Directors

The proposed Act should accommodate the possibility of directors serving *ex officio* as well as by election. It is common in the NFP sector for directors to be appointed *ex officio* and failing to accommodate this particular sector norm would be an enormous change. If Bill C-4 is amended to accommodate *ex officio* directors, other provisions (such as who can remove and replace a director) should be reviewed to determine any consequential amendments

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[21] A recommendation consistent with the American Bar Association, Section on Business Law, Committee on Nonprofit Corporations, Task Force to Revise the *Model Nonprofit Corporations Act*, 3rd Edition (2007).

RECOMMENDATION:

> **The CBA Sections recommend that s. 129(3) be amended to permit *ex officio* directors.[22]**

129(8) Appointment of Directors

The proposed Act should adopt the practice of the OBCA (rather than the CBCA), that members may authorize the corporation's directors to increase the board complement (within the range permitted in the articles) between annual meetings by special resolution rather than only in the articles. Thus, if a special resolution so provides, directors of a federal NFP corporation would be entitled, between annual meetings, to appoint additional directors (not to exceed a further one-third the number of directors elected at the last annual meeting). This would accommodate mergers, expansions or opportunities to add qualified individuals to the board between annual meetings.

To maintain operational consistency between the CBCA and the proposed Act, we recommend a parallel amendment to s. 106(8) of the CBCA. At the same time, we recommend that the CBCA be amended to include as s. 112(3) a counterpart of s. 134(3) of the proposed Act, clarifying that the members may, from time to time, by ordinary resolution, fix the number of directors of the corporation or delegate those powers to the directors.

RECOMMENDATION:

> **The CBA Sections recommend that s. 129(8) be modified so that members may, by special resolution, authorize the directors to appoint one or more additional directors, not to exceed one-third the number of directors elected at the last annual meeting. A companion change should be also made to the CBCA. The CBCA should also be amended to adopt a counterpart version of s. 134(3) of Bill C-4.**

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[22] At least one member of the CBA Sections agrees with this recommendation only if (a) rules relating to the appointment, removal and replacement of directors and to member approval of amendments to articles and by-laws (which prescribe *ex officio* directors) can be satisfactorily accommodated to an *ex officio* director regime and (b) the added complexity does not outweigh the alternative of having the other organization become a special member of the NFP corporation with the right to elect or appoint one or more directors. Indeed, the alternative could prove to be more coherent and simple than adopting an *ex officio* director regime.

135(2) Director's Change of Address

To be consistent with the drafting style of the proposed Act and the CBCA, we suggest that "their" replace "his or her".

RECOMMENDATION:

The CBA Sections recommend that "their" replace "his or her" in s. 135(2) of Bill C-4.

135(3) Application to Court

Subsection 135(3) allows an interested person or the Director to apply to court for an order requiring the corporation to comply with s. 135(1), which requires filing a notice of change of directors. We recommend that the general compliance and restraining remedy in s. 260 be relied on to the exclusion of overlapping, stand-alone mini-compliance remedies (such as s. 135(3).) scattered through the proposed Act.

RECOMMENDATION:

The CBA Sections recommend that s. 135(3) be deleted from Bill C-4.

137(1) Attendance at Meeting

For drafting consistency, delete reference to "articles" providing for the place where the board can meet. As long as s. 135(3) refers to by-laws, our suggested amendment to s. 7(3) of the proposed Act will have the effect of including the articles if the by-law provision is entrenched in the articles pursuant to s. 7(3).

137(2) Quorum

For same reason stated in s. 137(1), delete the reference to "articles".

RECOMMENDATION:

The CBA Sections recommend that the reference to "articles" in s. 137(1) and (2) be deleted from Bill C-4.

138 Decisions Made by Consensus

Section 138 provides for directors and members (the latter is placed in Part 10 rather than in Part 9 which otherwise sets out the rules relating to meetings of members) making decisions

by consensus if the by-laws so provide. There is no definition of "consensus" in the proposed Act. This might make use of the provision confusing. Since s. 138 is permissive and opt-in, it would impliedly rule-out the legitimacy of consensus decision-making unless the corporation explicitly opts in to s. 138 in its by-laws.

RECOMMENDATION:

The CBA Sections recommend that s. 138 be deleted from Bill C-4 as more problematic than helpful.

139(2) Limits to Authority

Even though s. 139(2)(c) of the proposed Act is derived from s. 115(2)(c) of the CBCA, s. 139(2)(c) contains a confusing double-exception. Paragraph 139(2)(c) is in a list of exceptions to the power of the directors to delegate but itself contains a broad exception freely authorizing directors to delegate. Deleting s. 139(2)(c) would eliminate the confusion.

RECOMMENDATION:

The CBA Sections recommend that s. 139(2)(c) be deleted from Bill C-4.

143 Officers

For the reason stated in s. 137(1), delete the reference to "articles" in s. 143.

RECOMMENDATION:

The CBA Sections recommend that the reference to "articles" in s. 143 be deleted from Bill C-4.

144(1) Remuneration

For the reason stated in s. 137(1), delete the reference to "articles".

RECOMMENDATION:

The CBA Sections recommend that the reference to "articles" in s. 144(1) be deleted from Bill C-4.

146 Directors' Liability

Subsection 146(1) imposes liability on directors analogous to s. 118(1) of the CBCA. The CBCA provision, however, only applies to issuing shares for inadequate non-cash consideration. Since, for the reasons stated in Schedule A, s. 29(1) should be deleted from the proposed Act, the concept of director liability for contravention of s. 29(1) should be deleted. Likewise, s. 146(6) should be deleted.

RECOMMENDATION:

The CBA Sections recommend that ss. 146(1) and (6) be deleted from Bill C-4.

More importantly, the proposed Act fails to implement a liability shield for directors and officers. Liability shields have existed for some time in various U.S. states.

In recent years and after the consultations that ultimately informed Bill C-4, Nova Scotia[23] and Saskatchewan[24] passed legislation to protect directors and officers of voluntary organizations from excess or unwarranted liability. In part, liability shields are intended to remove financial disincentives that discourage strong director candidates from joining the boards of NFP corporations.

In part, the allocation of liability is about striking a fair balance. Voluntary directors of NFP corporations serve the public interest, with little or no prospect of personal gain. To visit such directors with personal liability is unfair. This is in contrast to the situation of directors of publicly-traded corporations or private corporations. Most directors of publicly-traded corporations are protected by directors and officers liability policies, are competitively compensated, may enjoy stock options and have access to public markets for financing. Generally, directors of NFP corporations have none of these advantages. Directors of private corporations are often shareholders and, therefore, have all of the upside potential that entails. Directors of NFP corporations (at least those NFP corporations that cannot distribute

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[23] See *Volunteer Protection Act*, S.N.S. 2002, c.14.

[24] *Non-profit Corporations Act*, 1995, S.S. 1995, c. N-4.2 (the SK Act).

assets to members pursuant to s. 237) are clearly in a different position and not analogous to directors of private corporations.

Section 112.1 of the SK Act provides a particularly attractive model. It seeks to immunize directors and officers of SK Act corporations from personal liability for misfeasance. It does not seek to protect directors and officers from malfeasance, i.e., breach of the duty of loyalty (including self-dealing). It cannot shield directors and officers from federal laws imposing personal liability on directors for withholdings and remittances under income tax, GST CPP and EI legislation. [25]

The SK Act provision represents a deliberate and innovative policy choice:

(a) that the liability shield will have the effect of attracting more and higher quality directors and officers to the NFP sector and they will add incremental value; and

(b) that this added value will outweigh any incremental damage caused by misfeasance where NFP corporations would be able to recover compensable damages but for the liability shield (*i.e.* increased irrecoverable losses).

RECOMMENDATION:

The CBA Sections recommend that a liability shield for directors and officers modeled on s. 112.1 of the SK Act be added to Bill C-4. The provision could read as follows:

"(1) In this section, "loss" means any pecuniary or non-pecuniary loss respecting, arising out of or stemming from any act or omission of:

(a) the corporation; or

(b) any director, officer, employee or agent of the corporation in the exercise or supposed exercise of any of their powers or in the carrying out of supposed carrying out of any of their duties.

(2) Unless another Act expressly provides otherwise, no director or officer of a corporation is liable in any civil action for any loss suffered by any person.

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[25] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supplement), s. 227.1. *Excise Tax Act*, R.S.C. 1985, c. E-15. *Canada Pension Plan Act*, R.S.C. 1985, c. C-8. *Employment Insurance Act*, S.C. 1996, c. 36.

(3) The limitation on liability referred to in subsection (2) applies only if the director or officer was acting in good faith at the time of the act or omission giving rise to the loss.

(4) The limitation on liability referred to in subsection (2) does not apply if:

(a) the loss was caused by fraudulent or criminal misconduct by the director or officer; or

(b) the act or omission of the director or officer that caused the loss constituted an offence against this Act or any other Act.

(5) This section is to be interpreted as not affecting the liability of the corporation for loss suffered by any person.

(6) Without restricting the generality of the subsection (2), if damages are awarded against, or any amount is paid by, a corporation with respect to loss for which the director or officer is not liable pursuant to subsection (2), the corporation has no right of action to recover those damages or that amount against the director or officer.

(7) This section applies to any claim for damages for loss that is filed on or after the coming into force of this Act."

147 Liability of Directors for Unpaid Employee Wages

Director liability for unpaid employee wages has been part of Canadian corporate statutes since before Confederation. Since then, however, federal and provincial employment standards legislation has evolved significantly to provide much more complete and robust liability regimes to protect employees than those that exist under corporate law. In the case of corporations carrying on federal undertakings, the *Canada Labour Code*[26] provides for director liability. In the case of a corporation not carrying on a federal undertaking (the vast majority of corporations governed by the proposed Act), provincial and territorial laws such as the Ontario *Employment Standards Act, 2000*[27] protect employees working in the relevant jurisdiction regardless of the incorporation statute of the employer. Some provinces do not impose liability on directors for unpaid employee wages.[28] That is a policy choice.

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26 R.S.C. 1985, c. L-2., as amended by an *Act to Amend the Canada Labour Code* and the *Public Service Staff Relations Act*, S.C. 1993, c. 42, s. 37, which added s. 2541.18 to the *Canada Labour Code*.

27 S.O. 2000, c. 41, s. 81.

28 Nova Scotia is one such province.

To avoid confusing legislative federal/provincial/territorial overlaps, the liability of directors for unpaid employee wages should not be imposed as a matter of corporate law but rather as a matter of federal, provincial or territorial employment law. Parliament and provincial and territorial legislatures have every right to protect their employees and to impose liability on corporate directors. However, legislative bodies should not impose liability on directors of domestic corporations in favour of *ex juris* employees or attempt to fill gaps assumed to exist in provincial or territorial employment laws affecting employees governed by provincial or territorial law. Also, see the discussion at s. 146 above on the fairness of imposing liabilities on volunteers – such as most directors of NFP corporations.

RECOMMENDATION:

The CBA Sections recommend that s. 148 be deleted from Bill C-4 in favour of applicable federal/provincial/territorial employment law imposing liability on directors for unpaid wages and other debts of a corporation's employees.

149(3) Lawfulness of Articles

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 to an incorrect verification would entail. Obscure provisions should be deleted.

RECOMMENDATION:

The CBA Sections recommend that s. 149(3) be deleted from Bill C-4.

Part 10 By-laws and Members

153(1) By-laws

In general terms, corporate articles and by-laws under the CBCA have important differences in terms of:

(1) how they are amended (in particular, which corporate organ can make an effective amendment and what membership approval threshold is required);

(2) when the amendment comes into effect; and

(3) public filing and fee requirements.

With limited exceptions, an amendment to the articles of a CBCA corporation (1) only requires approval by special resolution of the shareholders (without any required board approval) and (2) takes effect only upon (3) filing with the Director which necessitates payment of the prescribed filing fee.[29] An amendment to the by-laws of a CBCA corporation (1) is made by the directors, is subject to later approval by ordinary resolution of the shareholders, (2) takes effect immediately upon board approval but ceases to be effective if not approved at the next meeting of shareholders and (3) requires no public filing or payment of any fee.[30]

The proposed Act would adopt an awkward bifurcated regime for by-law amendments, which we predict will cause non-experts great confusion. While the proposed Act tracks the CBCA regime for amending articles, it contemplates two applicable regimes governing by-law amendments depending on the subject matter of the by-law. Some by-law amendments will follow the description above for by-law amendments under the CBCA (subject only to a post-member approval filing requirement). However, s. 153(1) read in conjunction with s. 198(1) will create a hybrid category of by-law amendments, which (1) require approval by special resolution of the members presumably without the need for any board approval, (2) presumably take effect immediately on passage of the special resolution (although the proposed Act is silent on the effective time) and (3) only requires a public filing within one-year of such membership approval but no filing fee.

In practice, it may be difficult for non-experts to correctly categorize which by-law amendments are subject to the hybrid amendment regime and which are subject to the usual or default regime applicable to CBCA corporations. An error will lead to an invalid by-law amendment and may well invalidate all subsequent action authorized in reliance on it. In many cases, it may be difficult to separate specific by-laws into the two types. For example, generally, definitions or interpretation provisions would apply throughout the by-laws. So, a

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29 CBCA, ss. 170, 178 and 179.

30 CBCA, ss. 103(1), (2), (3) and (4).

change to a definition could inadvertently require a different amending process for the two types of by-law provisions contained within the same document.

It will be difficult to administer by-law changes if there are different approval requirements for different by-law provisions that may be contained in an integrated whole. Thus, we favour clear amendment rules based on the corporate document that is subject to amendment, not on characterization of the underlying provisions.

RECOMMENDATION:

> **The CBA Sections recommend that the exception in s. 153(1) be deleted from Bill C-4 and companion changes be made to s. 198(1) so that s. 153 exclusively governs all by-law amendments.**

154 Copies of By-laws to Director

It is unclear what effect failure to submit by-laws to the Director will have or what reliance can be placed on filed by-laws – particularly absent a sanction and the one-year hiatus between confirmation of the by-laws by the members and the filing requirement. Since by-laws can generally be amended by the directors with immediate effect, this filing requirement would not capture amendments made by the directors that have not yet been confirmed by the members and even filed articles may be as much as 27 months out of date. Also, a unanimous member agreement may trump the provisions of the by-laws, and there is no requirement under the proposed Act to file copies of a unanimous member agreement. The requirement under the proposed Act would also be out of step with the CBCA, which does not require that by-laws be filed with the Director. On the other hand, some members of the CBA Sections agree that a government depository of by-laws may assist in some cases identifying existing by-laws where a corporation's own records are unclear. These members believe that may be a sufficient reason to institute the by-law filing requirement, without, however, sanctions affecting validity. Other members of the CBA Sections see the filing requirement as too hit-and-miss to be a reliable source for current by-laws. Even in the rare case where a corporation's by-laws are lost without a trace, there is no assurance that a set will be found filed with Corporations Canada. It would not be difficult for the board or members of such corporation to immediately pass replacement by-laws. Thus, the aggregate costs of a filing requirement for all NFP corporations may outstrip its occasional benefit.

RECOMMENDATION:

The CBA Sections recommend that s. 154 be deleted from Bill C-4.

157 Termination of Membership

For the reason stated in s. 137(1) above, delete the reference to "articles" in s. 157.

RECOMMENDATION:

The CBA Sections recommend that the reference to "articles" in s. 157 be deleted from Bill C-4.

158 Termination of Member's Rights

For the reason stated in s. 137(1) above, delete the reference to "articles" in s. 158.

RECOMMENDATION:

The CBA Sections recommend that the reference to "articles" in s. 158 be deleted from Bill C-4.

159 Power to Discipline a Member

For the reason stated in s. 137(1) above, delete the reference to "articles" in s. 159.

RECOMMENDATION:

The CBA Sections recommend that the reference to "articles" in s. 159 be deleted from Bill C-4.

161(2) Order to Delay Calling of Annual Meeting

Subsection 161(1), read in conjunction with the proposed Regulations, requires the first annual meeting to be held not more than 18 months after incorporation and each subsequent meeting to be held not later than 15 months thereafter but, in no case, later than 6 months after the financial year end. The subsection allows the court to make an extension order.

Instead of putting NFP corporations to the expense of obtaining court-ordered extensions, we suggest that, if s. 161(2) is not deleted, the Director be empowered to grant extension orders.

RECOMMENDATION:

The CBA Sections recommend that either s. 161(2) be deleted from Bill C-4 or, if not, that the reference to "court" in s. 161(2) be deleted and that "Director" be substituted for it.

Part 11 Financial Disclosure

177(1) Copies to Director

If Corporations Canada is to collect financial statements from soliciting corporations as contemplated by s. 177(1), will it be able to staff this mandate so that copies of posted financial statements are easily accessible to the public online? There is no point to the regime if the financial statements are not made readily available. Some members of the CBA Sections question the regulatory utility of this requirement, in light of the already substantial filing and public disclosure requirements applicable to registered charities under the *Income Tax Act* (the ITA).[31] Other members of the CBA Sections make the points that (1) the scope of the obligation would be different under the proposed Act than it is under the ITA because the former applies to all federal NFP corporations raising funds from the public (including by way of government grant) whereas the latter only applies to registered charities and (2) the information content is not the same nor is it communicated in the same way.

Part 12 Public Accountant

Section 180 Definition of "Designated Corporation"

Part 12 sets out a regime for audit exemptions and public accountants that some members of the CBA Sections believe is unnecessarily complex and will pose compliance difficulties for corporations incorporated under the proposed Act and their respective managements. Theproposed Act can and should be simplified to ease the compliance burden on the many NFP corporations that will not have expert advice at their fingertips. In the view of some members of the CBA Sections, NFP corporations should not be subject to a statutorily imposed audit requirement and they would prefer to see the removal of that requirement. Other members of the CBA Sections believe that NFP corporations serve the public interest

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[31] R.S.C. 1985, 1 (5th Supplement).

and that there is governance value in mandating audits and the appointment of public accountants (subject to a size exception where the financial burden outweigh the governance benefits). Appointing independent public accountants and requiring audits are intended to serve as important checks on management, and the ability of rely on accurate financial information forms the backbone of our system of decentralized corporate governance.

Assuming the proposed Act contains mandatory provisions dealing with audits and other reviews of the financial statements of NFP corporations, the CBA Sections are nevertheless of the view that the provisions need to be simplified. The submissions and recommendations that follow assume a default rule that each NFP corporation must have an audit.

A critical first step toward simplification is to apply the same set of rules to soliciting and non-soliciting corporations so that complexity is reduced and a change of status from non-soliciting to soliciting corporation does not cause the corporation to become non-compliant. Other steps toward simplification also follow.

There are three levels of financial review for a corporation, in descending order of rigour and cost:

(a) audit – the most rigorous level, where the independent public accountant expresses an opinion on whether the corporation's financial statements fairly present the financial position of the corporation at the end of a fiscal period and the results of its operations for that period;

(b) review engagement – less rigorous than an audit, where the public accountant must be satisfied that the financial statements are plausible but does not express an opinion thereon; and

(c) compilation report or notice to reader – where the public accountant, if any, assumes no responsibility for the content or accuracy of the financial statements and expressly notifies the reader accordingly in the financial statements and, typically, there are no notes to the financial statements.

Generally, given the public nature of NFP corporations and the important role of an audit in a corporate governance framework, each NFP corporation should be required to appoint a public accountant and obtain an audit except where the costs of the appointment and audit

are disproportionate to the likely benefits. Under the proposed Act, the appropriate default rule is that each corporation must have a public accountant and an audit.

Small NFP corporations should be able to avoid the cost of a full audit and rely on either a review engagement or compilation for its financial statements, but that exemption should be narrow and should defined by gross revenue, not by income or profit.

Members of a NFP corporation whose annual revenues in the previous fiscal year[32] do not exceed $100,000 should have the right to resolve to waive a public accountant, only have a compilation (not an audit or review) or both in the ensuing fiscal year provided the waiver is by special resolution (i.e. consent of at least 2/3rds of the members voting thereon). To keep the threshold current with price escalation generally and audit costs specifically, the $100,000 threshold should be subject to periodic review and increase in the proposed Regulations. This represents an increase from $50,000 in the case of soliciting corporations and a decrease from $1,000,000 in the case of non-soliciting corporations. The approval threshold in both cases is decreased from unanimity to 2/3rds of the members entitled to vote at the annual meeting.

Members of an NFP corporation whose annual revenues in the previous fiscal year exceed $100,000 but do not exceed $1,000,000 would be permitted to resolve by special resolution to waive the audit in favour of a review engagement (but not a compilation report). This would be an increase from $250,000 for soliciting corporations but no change for non-soliciting corporations. Again, these thresholds should be subject to periodic review and increase in the proposed Regulations. The appointment of a public accountant would be mandatory at that revenue level.

The following table summarizes the proposed public accountant and audit exemption regime for NFP corporations under the proposed Act:

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32 Since a public accountant is appointed or waived by the members at an annual meeting, the thresholds should be determined by reference to the previously completed fiscal year rather than the then current year.

PROPOSED AUDIT/REVIEW ENGAGEMENT EXEMPTION REGIME

Annual Revenue (AR) Threshold	**Minimum Member Approval Threshold**	**Options**
AR < $100,000.01	2/3rds of members (special resolution); must be annual.	Can elect review engagement or compilation; otherwise, audit requirement applies. If compilation applies, public accountant need not be appointed.
$100,000 < AR < $1,000,000.01	2/3rds of members (special resolution); must be annual.	Can elect review engagement; otherwise, audit requirement applies. Appointment of public accountant is mandatory.
$1,000,000 < AR	N/A	Mandatory audit and appointment of public accountant.

Even where the corporation otherwise qualifies to waive the audit or a review engagement, a member or the Director should have the right to apply to court to compel an audit along the lines of the court's power to appoint a public accountant. Since not all members may have approved the waiver of an audit or review engagement, the court should have overriding discretion to appoint a public accountant if it believes there is cause even where the corporation otherwise qualifies for an exemption.

RECOMMENDATION:

The CBA Sections recommend that s. 180 be deleted from Bill C-4 so that the rules respecting the appointment of a public accountant and exemptions from audit and review engagements are the same for soliciting corporations and non-soliciting corporations. The default rules would remain the requirement to appoint a public accountant and have an annual audit. However, depending on the annual revenue threshold, an audit or review engagement and the appointment of a public accountant could be waived by special resolution. In exchange, a court, on the application of a member, a director or the Director, would be could require an audit where that appears to be in the public interest.

181(1) Qualification of Public Accountant

Paragraph 181(1)(c) requires the public accountant to be independent of certain persons. However, the requirement is cast disjunctively, which does not work. We suggest recasting this provision conjunctively:

RECOMMENDATION:

The CBA Sections recommend that s. 181(1)(c) in Bill C-4 be replaced with:

"(c) subject to subsection (6), be independent of the corporation, each of its affiliates, each of the directors and officers of the corporation and each of the directors and officers of its affiliates."

183(1) Dispensing with Public Accountant

Subsection 183(1) provides that a designated corporation (a non-soliciting corporation whose annual revenues are less than $1,000,000.01 and, in the absence of a special dispensation from the Director, a soliciting corporation whose annual revenues are less than $50,000.01) may waive the requirement to appoint a public accountant. In addition, the waiver must be made unanimously by all members entitled to vote at an annual meeting. Again, a special resolution should suffice for a waiver. A unanimity requirement may encourage small NFP corporations to disenfranchise a portion of its membership to avoid the appointment of a public accountant – a counterproductive result.

RECOMMENDATION:

The CBA Sections recommend that s. 183(1) of Bill C-4 be deleted and that the following be substituted for it:

"(1) Members of a corporation whose revenues are less than the prescribed amount may resolve by special resolution not to appoint a public accountant."

186(3) Members Filling Vacancy

To increase flexibility in who fills in the office of public accountant, substitute "by-laws" for "articles".

RECOMMENDATION:

The CBA Sections recommend that "articles" be deleted from s. 186(3) and that "by-laws" be substituted.

187(2) Court-Appointed Public Accountant

As discussed in connection with s. 180, in exchange for reducing the membership waiver threshold from unanimity (including non-voting members) to two-thirds of the members voting at an annual meeting, the court should be able to appoint a public accountant and require an audit on the application of any member or the Director.

RECOMMENDATION:

The CBA Sections recommend that s. 187(2) in Bill C-4 be deleted.

189(1) and (2) Audit or Review Engagement for Designated Corporations

As part of overall simplification of Part 12, the provisions setting out special rules for designated corporations can be simplified.

RECOMMENDATION:

The CBA Sections recommend that ss. 189(1) and (2) of Bill C-4 be simplified so that corporations are required to conduct an audit or review engagement in accordance with the proposed Act, as applicable.

190(1) and (2) Audit and Review Engagements for Non-Designated Corporations

The comments at s. 189 above apply equally here.

RECOMMENDATION:

The CBA Sections recommend that ss. 190(1) and (2) of Bill C-4 be simplified so that corporations are required to conduct an audit or review engagement in accordance with the proposed Regulations, as applicable.

191 Deemed Revenues

Under s. 191, the Director has the power to deem a soliciting corporation's revenue to be under the applicable thresholds. The function of the deeming is to exempt a soliciting corporation from the requirements to appoint a public accountant and to have either an audit or a review engagement. A more straightforward way to achieve the same result would be to

state in s. 191 that the Director has the power to grant exemptions from these requirements on terms if (a) satisfied that doing so would not be prejudicial to the public interest and (b) the annual revenues of the corporation do not exceed $1,000,000.

RECOMMENDATION:

The CBA Sections recommend that s. 191 of Bill C-4 be simplified by replacing the concept of deeming revenues with reference to the requirements, that otherwise apply to:

(a) appoint a public accountant; and

(b) have either:

(i) an audit if the annual revenues are less than the prescribed amount (initially, $100,000.01); and

(ii) a review engagement if the annual revenues are less than the prescribed amount (initially, $1,000,000.01).

195(1) Audit Committee

It is illogical to make the audit committee optional but then to mandate three directors if there is an audit committee. An audit committee of one or two directors may be better for a corporation than no audit committee whatsoever.

RECOMMENDATION:

The CBA Sections recommend that a minimum number of directors on the audit committee, if any, be deleted from Bill C-4.

197 Qualified Privilege – Defamation

Section 197 uses different words to achieve the same legal result described in s. 194(4). Given that users of the proposed Act who are not legally trained may not know what "qualified privilege" is, the approach in s. 194(4) seems preferable to that in s. 197. The same applies to s. 170(3) and s. 172 of the CBCA from which s. 194(4) and s. 197 of the proposed Act are derived.

RECOMMENDATION:

The CBA Sections recommend that language of s. 197 of Bill C-4 track that of s. 194(4) thereof and, similarly, that the language of s. 172 of the CBCA track that of s. 170(3) thereof.

Part 13 Fundamental Changes

198(1) Amendment of Articles or By-laws

As discussed with s. 153(1), s. 198(1) departs fundamentally from its CBCA counterpart, s. 173(1). Subsection 173(1) only applies to amendments to articles not by-laws. However, s. 198(1) of the proposed Act lumps amendments of articles and certain amendments to by-laws together despite significant differences between these two documents. See comments under s. 153(1) for the case to apply consistent rules to the amendment of by-laws irrespective of their content.

One way to avoid the practical difficulties with a bifurcated regime for amending articles is to delete some of the clauses in s. 198(1). First, s. 198(1)(e) can be deleted. If a condition required for being a member is in the by-laws, the normal by-law amendment rules would apply. If that same provision is entrenched in the articles, then s. 198(1)(n) (and possibly s. 200(1)) will apply (requiring a special resolution and filed articles of amendment). In either case, members will know what the amendment rules are and can act accordingly. A by-law provision offers less protection to members than the same provision in the articles. As long as the rules are clear and members can initiate amendments to the articles, members are free to entrench any rights important to their continued participation in the corporation.

The same analysis applies to s. 198(1)(h) (removing by-law provisions respecting transfers of memberships), s. 198(1)(1) (changing the manner of giving notice to members set out in the by-laws) and s. 198(1)(m) (change in proxy voting rules). If members want to entrench these provisions, two-thirds can, at any time, pass a special resolution to amend the articles.

For separate reasons, s. 198(1)(j) stands or falls with whether the articles include a purpose provision and what function the provision has. See the discussion on s. 7(1)(f) above.

If these changes are made, then the reference to by-laws in s. 198(1) can be deleted because the remaining paragraphs are limited to amendments to articles. Also, the reference to "members" in "special resolution of the members" is superfluous and should be deleted.

While soliciting corporations and other corporations subject to s. 236 cannot distribute any residual assets to members on liquidation, other corporations are not so restricted. Indeed, the default rule for these s. 237 corporations is distribution of residual assets to members on a *per capita* basis. Accordingly, if there is a fundamental change to which a member dissents, there should be the same type of dissent and appraisal right available as there is for a shareholder in a CBCA corporation.[33] The true value of including an appraisal remedy applicable to members where there is a right to residual assets may lie in its disciplining effect more than in the volume of successful member appraisal contests it enables.

RECOMMENDATION:

The CBA Sections recommend that:

(a) ss. 198(1)(e), (h), (j), (l) and (m) be deleted from Bill C-4;

(b) the reference to by-laws in s. 198(1) be deleted;

(c) the reference to "of the members" in "special resolution of the members" in s. 198(1) be deleted; and

(d) an appraisal remedy be added to Part 13 of Bill C-4 modeled on s. 190 of the CBCA in respect of section 237 corporations.

200(1) Class Vote

All the paragraphs of s. 200(1), requiring a separate class or group vote, are opt-out except for s. 200(1)(f), which deals with exchanging or creating a right of exchange from one class into another class of memberships in the corporation. We recommend that this exchange provision be opt-out as well. First, it would rarely be used – certainly not often enough to justify a stand-alone rule. There is value in removing unnecessary complexity. Second, the same effect as an exchange can probably be achieved through other means. For example, if there are Class A members and Class B members, s. 200(1)(a) to (e) could be used to amend the rights attached to both classes of memberships so they were substantively the same in all respects, thereby defeating most of the purpose of s. 202(1)(f). Alternatively, the articles could be amended to cancel, for example, the Class B members who would then be made Class A members.

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[33] CBCA, s. 190.

RECOMMENDATION:

The CBA Sections recommend that s. 200(1)(f) be made opt-out so that all of the paragraphs of s. 200(1) become opt-out.

207(3) Separate Class Right to Vote on Amalgamation

The rights of members to vote as a separate class should parallel the class voting rights in s. 200(1). Thus, non-voting members should not have the right to vote on an amalgamation that overrides any restricted voting rights set out in the articles. They should have a separate class vote if, but only if, they would have the right to vote as a class or group under s. 200. In this respect, members cannot properly be analogized to shareholders of a CBCA corporation.

RECOMMENDATION:

The CBA Sections recommend that s. 207(3) be deleted from Bill C-4.

208(1) Vertical Short-form Amalgamation

The reference to "repayment of capital" in s. 208(1)(c)(i) is unnecessary and confusing in light of s. 158, which states that, upon termination of membership, any rights to corporate property cease. Repayment of capital is a CBCA concept that does not apply in the context of the amalgamation of an NFP corporation.

RECOMMENDATION:

The CBA Sections recommend that the words "without any repayment of capital in respect of those memberships" be deleted from s. 208(1)(c)(i) of Bill C-4.

208(2) Horizontal Short-form Amalgamation

The comment on s. 208(1)(c)(i) also applies to s. 208(2)(b)(i).

RECOMMENDATION:

The CBA Sections recommend that "without any repayment of capital in respect of those memberships" be deleted from s. 208(2)(b)(i) of Bill C-4.

210 Effect of Amalgamation

Adding to s. 210 a provision to the effect that, if a soliciting corporation amalgamates with one or more non-soliciting corporations, the amalgamated corporation is a soliciting corporation, would avoid any misunderstanding that the time frame for calculating receipts of issued donations and government funds is calculated anew.

RECOMMENDATION:

> **The CBA Sections recommend that s. 210(g) be added to Bill C-4 to state, that, in calculating donations, gifts, grants and similar financial assistance for the purposes of the definition of "soliciting corporation" in s. 2(1) and for the purposes of s. 236(1)(c), the donations, gifts, grants and similar financial assistance of the amalgamated corporation equal the sum of the donations, gifts, grants and similar financial assistance of each amalgamating corporation except any grants or similar financial assistance received by one amalgamating corporation from any other amalgamating corporation.**

214(4) Right to Vote on Export Continuance

The rights of members to vote as a separate class should parallel the class voting rights in s. 200(1). Thus, non-voting members should not have the right to vote on an export continuance that overrides any restriction on voting rights set out in the articles. They should have a separate class vote if, but only if, they would have the right to vote as a class or group under s. 200.

RECOMMENDATION:

> **The CBA Sections recommend that s. 214(4) be deleted from Bill C-4 and that a provision analogous to s. 207(4) be substituted for it.**

215(4) and (5) Right to Vote on Sale of Substantially All Property

The comments on s. 200(1), s. 207(3) and s. 214(4) apply equally to the sale of all or substantially all the assets of the corporation. In all cases, the voting rights, if any, should be the same for amendments, amalgamations, export continuances or sales of substantially all of the corporation's property. Each is a fundamental change. If members have economic rights under s. 237, then they should also have an appraisal right modeled on s. 190 of the CBCA. See the discussion on the appraisal right at s. 198(1) above.

RECOMMENDATION:

The CBA Sections recommend that s. 215(4) be deleted from Bill C-4 and that s. 215(5) be conformed to s. 207(4).

Part 14 Liquidation and Dissolution

Part 14 should be organized in a more logical sequence rather than blindly following the meandering path of Part XVIII of the CBCA. We propose that Part 14 be reorganized as set out in Schedule C (showing subheadings, section description and current section references).

The scheme of the reordering is as follows:

(a) application of Part 14;

(b) placing the liquidation constraints upfront rather than burying them near the back of Part 14;

(c) voluntary and involuntary liquidation (except to consolidate the just and equitable winding up with the oppression remedy in Part 16);

(d) voluntary and involuntary dissolution; and

(e) revival.

RECOMMENDATION:

The CBA Sections recommend that Part 14 be reorganized on the basis set out in Schedule C.

218 Definition of "Court"

Subsection 2(1) defines "court" as, essentially, the superior trial court of unlimited monetary jurisdiction in any province or territory. However, in two places in the proposed Act, "court" is defined more narrowly as the court having jurisdiction in the place (sic) where the corporation has its registered office.[34] The first occasion is s. 218. To achieve consistency with a liquidation under s. 254(3)(1) (where the jurisdiction of the court is not so limited), s.

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[34] Section 207 of the CBCA also still refers to "place" rather than "province". Generally, in 2001, S.C. 2001, c. 14 (formerly known as "Bill S-11") changed all references to the "place" where the registered office is located to the "province" (which includes territory) where such office is located. Amendments to s. 207 and 229(1) of the CBCA appear to have been unintentionally omitted.

218 should be deleted. The same comment applies to an investigation under s. 243(1), which is also inconsistent with the jurisdiction of a provincial or territorial court making an investigation order under s. 254(3)(m). The same comments apply to the counterpart provisions of the CBCA, ss. 207 and 229(1) respectively.

RECOMMENDATION:

The CBA Sections recommend that s. 218 be deleted from Bill C-4 and s. 207 of the CBCA be repealed.

219(1) Application of Part

Read with s. 31 of the proposed Regulations, s. 219(1) states that Part 14 (dealing with liquidation and dissolution) will not apply to a corporation until three years after the trustee in bankruptcy or receiver-manager has been discharged or the receiver has provided its final report and statement of accounts. We see no reason for a three-year hiatus where Part 14 is inoperative and unavailable to the Director, the corporation, its members or its creditors.

RECOMMENDATION:

The CBA Sections recommend that:

(a) the words "until the end of the prescribed period after" in s. 219(1) be deleted from Bill C-4 and "while" be substituted; and

(b) s. 31 of the proposed Regulations be deleted.

225(1) and (3) Court-Ordered Liquidation on Member Application

Applicants for a winding-up under s. 225(1) differ from applicants for winding-up under s. 254(3)(1). However, the potential applicants under s. 254 subsume all those who can apply under s. 225, and the grounds under the two provisions also overlap significantly. Also, in an application for liquidation under s. 225, the court can instead grant an oppression remedy under s. 254. Conversely, in an application for an oppression remedy, the court can order liquidation. Thus, an effort should be made to integrate and consolidate the various member remedies within Part 16 instead of maintaining separate sets of provisions. See the further discussion below on s. 254 substantially duplicating the remedy in s. 225.

RECOMMENDATION:

The CBA Sections recommend that s. 225 be deleted from Bill C-4 in favour of consolidating it with s. 254.

225(2) Faith-Based Defence on Liquidation

Subsection 225(2), which prohibits a court from granting orders with respect to tenets of faith of religious corporations, is discussed below in the context of ss. 252(3) and 254(3). Given the historical reluctance of courts to dissolve corporations (unless there is no other viable option)[35], the faith-based defence is unlikely to be meaningful in an application for a court-ordered liquidation.

RECOMMENDATION:

The CBA Sections recommend that, if s. 225 is not consolidated into s. 254 (the oppression remedy), s. 225(2) be deleted from Bill C-4.

236(1) Liquidation Distribution Limited to Qualified Donees

Sections 236 and 237 contain the liquidation constraints. Section 236 applies mainly (but not exclusively) to soliciting corporations (as extended, Section 236 Corporations), while s. 237 applies to all other corporations (Section 237 Corporations).

With respect to s. 236, it is important to reiterate the point that a corporation should not become an accidental soliciting corporation. The board of the corporation should know, based on its activities, whether the more onerous separate rules in the Act apply to it. In particular, receipt of funds from a non-governmental donor entity (that may, unbeknownst to the recipient corporation, be a soliciting corporation or equivalent entity) may cause the recipient corporation to become a soliciting corporation. In this regard, see the comments on the definition of "soliciting corporation" at s. 2(1) above.

RECOMMENDATION:

The CBA Sections recommend that changes be made to s. 236(1)(c) analogous to those made in the second recommendation.

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35 See, for example, *Wittlin v. Bergman* (1995), 23 B.L.R. (2d) 182, 25 O.R. (3d) 761 (C.A.).

236(2) Articles to Provide for Distribution of Property

The purpose of s. 236(2) is unclear, and it should be deleted. As a result of the combination of ss. 236(1) and (3), a soliciting corporation must distribute its remaining property to qualified donees, even in the absence of a provision to that effect in its articles. Thus, the provisions of the articles are overriden to the extent that they conflict with the distribution scheme contemplated in s. 236(1). Indeed, they could be misleading if the corporation switches from being either a soliciting corporation to a non-soliciting corporation or the reverse. There will almost inevitably be a time lag in conforming the articles to a change in corporate status, as a meeting of members would need to be called to consider and pass, in effect, a restriction that applies even if not explicitly set out in the articles. The restriction on a Section 236 Corporation derives from s. 236(1). It does not derive from the articles.

Distribution constraints should apply on the basis of status as a soliciting corporation and not necessarily require an amendment to the corporation's articles. Corporations could, of course, at anytime, voluntarily change their articles (which will still be required by Canada Revenue Agency with respect to charitable corporations or if the corporations wishes to target liquidation distributions to a subset of all qualified donees).

RECOMMENDATION:

The CBA Sections recommend that s. 236(2) be deleted from Bill C-4.

Part 15 Investigation

243(1) Investigation

In accordance with the comments at Part II.5, the proposed Act should not give rights to holders of debt obligations. Rather, holders of debt obligation should negotiate their rights.

Also, the court having jurisdiction in an investigation should not be limited to the province or territory where the corporation has its registered office, as that would conflict with the definition of "court" in s. 2(1) and the ability of any provincial or territorial court of unlimited monetary jurisdiction to order an investigation pursuant to s. 254(3)(m). See the discussion on s. 218 above.

RECOMMENDATION:

The CBA Sections recommend that:

(a) s. 243(1) be amended in accordance with Schedule A to delete any reference to "holders of debt obligations"; and

(b) the words "having jurisdiction in the place where a corporation has its registered office" be deleted from Bill C-26 and a companion amendment be made to s. 229(1) of the CBCA.

Part 16 Remedies, Offences and Punishment

251 Definition of "Complainant"

Holders of debt obligations should not be *per se* complainants but may instead be eligible to apply to the court as proper persons under paragraph (e) of the definition.

RECOMMENDATION:

The CBA Sections recommend that the term "debt obligation holder" be deleted from the definition of "complainant" in s. 251 of Bill C-4.

252(3) Faith Based Defence in Derivative Action

The CBA Sections had difficulty determining whether the faith-based defence, as written, is advisable. We recognize this is a sensitive issue. Some members were concerned that the defence will cause courts to become entangled in doctrinal disputes. Some would address this concern by allowing corporations to self-declare as religious at the date of incorporation, subject to some reasonableness requirement. Other members object to this solution because there may be no practical way to limit the ability to self-declare to religious corporations, meaning that the oppression remedy would become an opt-out remedy, and because, in any event, the derivative action is procedural. A middle way favoured by some members would be to adopt some definition of "religion" or "religious" which tied into a substantial body of existing jurisprudence, such as that under the *Charter* or in charity law. Others, however, are uncomfortable applying a definition taken from another context to this new context.

254(1) Oppression Action

Opponents of an oppression action for NFP corporations contend that the oppression remedy should be confined to corporations in which members are entitled to residual assets on a winding-up (Section 237 Corporations). With these corporations there is at least some potential economic interest accruing in favour of members and, therefore, an analogy to for-profit CBCA corporations. Proponents of an oppression remedy for all NFP corporations (with a carve-out for religious tenets of faith) suggest a court-ordered winding-up provision:

(a) add as additional grounds for a winding-up any acts, omissions or conduct that are oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any member, director or officer (i.e. the expanded grounds in ss. 225(1)(a) and 254(1)(a)); and

(b) expand the court's ability to grant orders other than a liquidation order (similar to the court's power under s. 254(3)).

These expansions would enable the court to make a array of orders less Draconian than liquidation. It would be possible to narrow access to the oppression remedy to members, excluding holders of debt obligations and other potential non-member complainants. For example, s. 254(3)(g), requiring a corporation to pay a member all or part of the amount that the member paid for membership, should not apply in the case of soliciting corporations, and, Section 237 Corporations should be able to pay members the fair value of their membership interests in the case of oppression, not just reimburse the amount paid. Finally, as discussed in connection with s. 225(1) above, the court-ordered liquidation and oppression remedies might usefully be combined in s. 254.

RECOMMENDATION:

The CBA Sections recommend that:

(a) as an additional ground, courts be permitted to grant an order in an oppression action if the court is satisfied that it is just and equitable that the corporation be liquidated and dissolved;

(b) only the Director and a past or present member (not any other categories of complainants) be entitled to apply for relief from oppression;

(c) s. 254(3)(g) only apply to Section 237 Corporations and be amended to enable a court to order payment of fair value (not just restitution) in respect of a membership interest; and

(d) for the reasons stated in Schedule A, the reference to debt obligations be deleted from s. 254(3)(d) and s. 254(3)(f) be deleted in its entirety.

254(2) Tenets of Faith in Oppression Actions

Religious tenets of faith should be excluded from adjudication under the oppression remedy. This would allow the courts to distinguish between religious tenets of faith (which are not subject to adjudication) and other issues such as breaches of duties of loyalty or care and misappropriation of corporate property (which would be subject to adjudication). For misconduct in the affairs of an NFP corporation, it will be difficult to exclude the courts altogether.

255(2) Court Approval to Discontinue Action

Subsection 255(2) technically requires court approval to discontinue or settle any action brought under Part 16. While this is appropriate for a derivative action where the applicant is representing the interests of another person (the corporation) and requires leave from the court, it is inappropriate and unnecessary in other contexts where the applicant is pursuing a personal remedy (such as the oppression remedy). Court approval just adds to the expense of settlement or discontinuance. Under the CBCA, the equivalent provision (s. 242(2)) is routinely ignored in all contexts other than settling or discontinuing a derivative action.

RECOMMENDATION:

The CBA Sections recommend that s. 255(2) only apply to applications or actions made or brought, or intervened in, under s. 252, not all of Part 16.

255(3) No Security for Costs

Subsection 255(3) prohibits a court from ordering security for costs in any action brought under Part 16. Again, this is logical in the context of a derivative action (where the applicant is granted leave to bring an action on behalf of the corporation) or possibly an application for a compliance or restraining order under s. 260 (which involves no monetary award). However, there is no reason to disadvantage a NFP corporation in other actions under Part 16 such as an oppression action. Rather, courts should have discretion, exercised in accordance with the applicable rules of that court, to order a plaintiff to post security for costs in appropriate cases.

RECOMMENDATION:

The CBA Sections recommend that the words "this Part" be deleted from s. 255(3) and the words "sections 252 or 260" be substituted for them.

255(4) Interim Costs

Subsection 255(4) enables the court to require the corporation to pay interim costs to a complainant in any action under Part 16 (including, notably, an oppression action). Again, this rule would greatly disadvantage an NFP corporation in relation to complainants in actions other than a derivative action (brought for and on behalf of the corporation).

Also, the analogy to CBCA corporations is weak here. Where s. 242(4) of the CBCA is invoked (invariably in the context of a non-distributing corporation), the minority shareholder typically has a considerable amount of personal wealth locked up in a corporation, the shares of which are non-transferable without majority approval and are, therefore, illiquid. The minority shareholder may at a significant practical disadvantage in comparison with the majority who can litigate an impecunious minority into submission unless the minority can draw upon the value of their shares, which will be credited against the ultimate buyout price, if the minority is successful in its oppression claim. In effect, the corporation has security for costs in the form of the intrinsic value of the minority's shares.[36]

In an NFP corporation, however, the member's interest may have little or no economic value. The member's rights in a soliciting corporation will, by definition, have no economic value. In any event, access to the oppression remedy is unlikely to turn on unlocking the intrinsic value of the member's rights in the corporation. Also, in an NFP corporation, there is no built-in security for costs, as the membership interest will characteristically have little or no economic value.

RECOMMENDATION:

The CBA Sections recommend that s. 255(4) only apply to applications or actions made or brought, or intervened in, under s. 252, not all of Part 16.

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[36] For cases under the OBCA where interim costs have been awarded, see *Wilson v. Conley* (1990), 1 B.L.R. (2d) 220 (Gen. Div.) and *Alles v. Maurice* (1992), 5. B.L.R. (2d) 146 (Gen. Div.).

256(1) Court-Ordered Rectification of Records

For the sake of consistency, "complainant" should replace the list of possible applicants under s. 256(1): directors, officers, members and other "aggrieved persons". The corporation would remain listed as a potential applicant. Whether holders of debt obligations remain on the list of per se applicants under s. 256(1) would turn on whether the proposed Act generally removes debt obligations from its purview.

RECOMMENDATION:

The CBA Sections recommend that the words "a debt obligation holder, director, officer or member of the corporation or any aggrieved person" be deleted from s. 256(1) and that "and complainant" be substituted.

260 Compliance or Restraining Order

The proposed Act sets out a number of minimal or baseline corporate governance requirements. Generally, compliance with these minimum standards is not difficult or onerous. In general, compliance or non-compliance is easily ascertainable.

The Director is well positioned to enforce these minimum standards. Requiring a member or other complainant to enforce the standards through court orders would be more cumbersome, expensive and time-consuming than having the Director issue a compliance order. Due to s. 96 of the *Constitution Act*, 1867,[37] a restraining order should be left for a court.

RECOMMENDATION:

The CBA Sections recommend that:

(a) the Director be authorized to issue compliance orders under s. 260 (in addition to the court's power to do so); but

(b) only a court be authorized to issue a restraining order under s. 260.

Part 17 Documents in Electronic or Other Form

No comments.

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[37] 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

Part 18 General

273(1) Notice to Directors and Members

Is there need for further clarification to s. 273(1) to ensure that direct communications to members are not limited to being sent by prepaid mail or personal delivery but can include, for example, electronic communications in accordance with Part 17? Or is it clear that "may be sent" in s. 273(1) means these methods are non-exclusive? For example, electronic communications are permitted but require consent, which may be revoked at any time. It is important, as well, not to force corporations to amend their by-laws in order to permit electronic communications. Not only does reliance on by-laws to opt-in to methods of communications force corporations to make changes to their by-laws but, more ominously, it exposes corporations to the risk of using electronic communications without first having made the necessary changes to their by-laws, which would cast into doubt the validity of corporate proceedings and acts purportedly authorized in such circumstances.

278 Execution of Documents

In the 2001 amendments to the CBCA, s. 262.1(2) was added – a useful mechanism for the board of a corporation to authorize an agent (typically its law firm) to file notices and documents required under the CBCA such as a notice of registered office, notice of directors and annual return. A similar provision should be included in the proposed Act as s. 278(3).

RECOMMENDATION:

> **The CBA Sections recommend that the following s. 278(3) be added to Bill C-4:**
>
> **"(3) The notices referred to in subsections 20(2), 20(4), 129(1) and 135(1), and the annual return referred to in section 279, may be signed by any individual who has the relevant knowledge of the corporation and who is authorized to do so by the directors, or, in the case of the notice referred to in subsection 129(1), the incorporators."**

284(3) Retention of Records

Subsection 284(3) read together with s. 45 of the proposed Regulations, state that the Director is only required to keep copies of articles, statements of intent to dissolve and statements of revocation of intent to dissolve indefinitely. All other notices and documents

filed with the Director can be destroyed after 6 years from receipt. As a minimum, by-laws (if required to be filed under the Act), all notices of directors and the last filed notice of registered office should be added to the list of documents to be kept in perpetuity. Stale financial statements are safe to purge.

RECOMMENDATION:

The CBA Sections recommend that the words "other than a certificate or statement received under section 277," be deleted from s. 284(3) of Bill C-4 and that the words "obtained under section 177 or section 178" be substituted for them.

293 Power to Make Enquiries

Section 293, which is identical to s. 237 of the CBCA, contains the same flaw: while the Director has the power to make enquiries of any person, that person is under no obligation to respond to the enquiries. Ever since its inclusion in the CBCA in 1975, it appears that s. 237 has never been used, nor has it received any judicial consideration. The proposed Act should trim this excess provision.

RECOMMENDATION:

The CBA Sections recommend that s. 293 be deleted from Bill C-4.

294 Regulations

The proposed Regulations have, in part, been drafted with the laudable objective of enabling the proposed Act to be kept current. Thus, in particular, financial figures and timeframes have largely been left to the proposed Regulations.

In most cases, we agree with the delegation of financial amounts and timing details to the proposed Regulations. In some cases, we disagree that, combined, the proposed Act and proposed Regulations strike the appropriate balance between the needs of prospective amendment (which favours the Regulations) and clarity (which favours not bifurcating a provision into part in the Act and part in the Regulations). Certain provisions are unlikely to be varied significantly with the passage of time. In some cases, comparable provisions of the CBCA have not been altered for many years or, if amendments were deemed desirable for the proposed Act, statutory amendments to the CBCA would likely have to be made to keep

the CBCA and the proposed Act substantively harmonized. If a bill is needed to amend the CBCA, it is easy enough to expand it to amend the proposed Act. However, if the processes for effecting substantive amendment of the CBCA and the proposed Act were to differ, the risk of the two legislative regimes diverging over time increases.

RECOMMENDATION:

The CBA Sections recommend that the provisions set out in Schedule B below be reintegrated as part of Bill C-4 rather than remain bifurcated between Bill C-4 and the proposed Regulations.

Part 19 Special Act Bodies Corporate Without Share Capital

No comments.

Part 20 Transitional Provisions, Consequential Amendments, Coordinating Amendments, Repeals, Coming into Force

298(4) Time Limits for Continuance

Some members of the CBA Sections wonder whether it is clear that, read together, ss. 298(4), 212 and 220 enable a body corporate formed under Part II of the CCA that has been dissolved under s. 298(4) to be revived under s. 220 of the proposed Act.

In any event, we strongly recommend that, in conjunction with the coming into force of the proposed Act, Corporations Canada publish kit for converting a body corporate under Part II of the CCA into a Canada Not-for-profit corporation, including model forms of articles of continuance and by-laws.

III. CONCLUSION

We close by reiterating something we said at the outset. We commend Industry Canada officials for their perseverance with this important, overdue area of law reform and in advancing a well-conceived, modern NFP corporate law to replace the current antiquated, dysfunctional regime. We hope Canadians will soon reap the benefits of their work.

IV. SCHEDULES

Schedule A – Debt Obligations

Table 1 – Proposed Act

Section of Bill C-4	Description	Additional Comment
2(1)	Definition of "issuer"	Subsection 2(1) defines "issuer" as a corporation that is required by the proposed Act to maintain a debt obligations register. Since we recommend that the Act not require corporations to maintain a debt obligations register, this definition can also be deleted.
2(1)	Definition of "series"	No need for a series of a class of members. Hence, this definition may be deleted.
21(1)(d)	Debt obligations register	Delete. Few private holders of debt obligations will care if the corporation maintains a register. Holders of debt obligations make private arrangements to keep track of debt ownership changes. Most publicly traded debt obligations will take place on a book basis, i.e., in the indirect holding system. Consequential amendments needed to ss. 21(1) and (2).
22(2)	Examination of debt obligations register	Delete entirely.
22(4), (5), (6) and (7)	List of holders of debt obligations	Delete entirely.
23(2)	Register of members	Delete reference to holders of debt obligations.
23(4)	Same	Delete entirely.
24(2)	Requirement to provide list of debt obligation holders	Delete entirely.
29(1) through (4)	Issue of debt obligations	Section 28 is sufficient. Section 29 seems to be intended as an analogue of s. 25 of CBCA. However, s. 25 of CBCA only applies to shares – which do not exist for corporations formed or continued under the proposed Act. Hence, s. 29 (which, for instance, would limit a corporation incorporated under the proposed Act to issuing debt obligations only for cash or non-cash consideration consisting of property or past services) has no counterpart under CBCA and, to achieve consistency, should be deleted.
Part 6 (sections 38 through 104)	Debt obligations, Certificates, Registers and Transfers	See discussion at Part II.6 above. Some specific comments follow but, in light of our recommendation to delete most of Part 6, are not exhaustive.
39	Debt obligation certificate	A CBCA corporation is required to issue shares in registered form but may issue debt obligations in order

Section of Bill C-4	Description	Additional Comment
		form or bearer form as well as in registered form. Requiring corporations incorporated under proposed Act to issue debt obligations only in registered form appears to be an unintended mistake. It makes the inclusion of ss. 38(3) and (4) nonsensical. If it is more efficient to issue bearer bonds or other unregistered debt obligations, this option should be left open to the NFP corporation.
43(1)	Content of certificate	CBCA states these requirements for share certificates. But it does not impose any requirements for certificates of debt obligations – which arguably should be allowed to be uncertificated if that is more efficient. Again, to maintain consistency with CBCA, CBCA requirements with respect to share certificates should not be transposed into the requirements for debt obligation certificates under the proposed Act.
43(2)	Restrictions, charges, *etc.*	A unanimous member agreement does not apply to debt obligations. While CBCA provides restrictions on the transfer of shares, it imposes no restrictions on the transfer of debt obligations. Again, transposing CBCA share requirements to the different world of the debt obligations issued by federal NFP corporations creates substantive inconsistency.
43(3)	Restrictions	Despite elaborate regime to restrict the transfer of debt obligations, this provision says the issuer shall not restrict ownership or transfer of its debt obligations if there are multiple holders of that class or series of its debt obligations. Thus, restrictions apply only if there is a sole holder of the class or series of debt obligations. Also, provision would put into doubt the enforceability of a private restriction on transfer anytime the class or series of debt obligations has one or more holders.
44(1) and (2)	Contents of certificate	See comments on s. 43(1) above.
45(1)	Register of debt obligations	A CBCA corporation has the option to issue debt obligations in registered form. It appears that a corporation incorporated under the proposed Act would be limited to issuing debt obligations in registered form. See comments on s. 21(1)(d) above.
Part 7	Trust Indentures	See detailed comments at Part II.7 above.
128(1)(c) and (d)	Organization meeting	Delete. It does more harm than good to refer to the issuance of debt obligations in the post-incorporation organizational meeting. In practice, the equivalent CBCA provision (*i.e.,* s. 117(1)(c)) is exclusively limited to issuing shares to initial subscribers. Certainly, CBCA does not specifically refer to the issuance of debt obligations. The issuance of debt as part of the initial

Section of Bill C-4	Description	Additional Comment
		post-incorporation organization meeting is sufficiently rare that it may confuse lay users.
146(1)	Directors liability	Delete. Directors of a CBCA corporation are only liable where they issue shares (not debt obligations) for inadequate non-cash consideration. This provision should fall along with s. 29.
242(1) and (2)(b)	Investigation	Holders of debt obligations should not have a statutory right to apply for an investigation under Part 15. They should negotiate for equivalent rights, if they want them.
251	Part (b) of the definition of "complainant"	Holders of debt obligations *per se* should not have statutory rights to seek oppression remedies, derivative actions or compliance/restraining orders under Part 16. They should negotiate for their rights in their credit and security agreements.
253(c)	Powers of court in a derivative action	Holders of debt obligations should not have right to seek orders for the direct disbursement to them of litigation proceeds otherwise payable to the corporation. If they want to enjoy security on corporate receivables, they can negotiate such rights in their security agreements.
254(3)(d) and (f)	Powers of a court in an oppression action	Oppression remedy should be limited to members, not holders of debt obligations *per se*. Thus, for example, purchase of debt obligations by the corporation should be governed by terms of the credit agreement as it is tantamount to a redemption or repayment. Likewise, purchase of debt obligations by others in control of the corporation should be governed by terms of any guarantees.
254(5)	Solvency limitation	Under CBCA, the solvency test only applies to share redemptions or repurchases, never to repayment of debt. Achieving substantive consistency with CBCA, therefore, means that the solvency test should not be introduced to the repayment of debt obligations issued by a corporation incorporated under the proposed Act.
263(3)	Offence for use of information	Delete each reference to "debt obligation holder". Rights of access to register of debt obligations holders can be regulated by contract.
277(4)	Proof of debt obligation	Delete as unnecessary.

Table 2 – Proposed Regulations

Section of Proposed Regulation	Description	Section of Proposed Regulation	Description
3	Register of debt obligation holders	17 though 22	Debt Obligations Certificates and Transfers
5	List of debt obligation holders	23, 24 and 25	Trust Indentures
8(1) and (2)	Same		

Schedule B – Reintegration of Act and Regulations

Section of Proposed Act	Section of Proposed Regulation	Rationale
12(1)	59(1)	Subsection 11(1) of CBCA provides that the Director may reserve a corporate name for 90 days.
12(2)	59(2)	Subsection 11(2) of CBCA sets out required legal elements of a CBCA corporate name. The proposed Act prescribes all such legal elements by regulation. It is unlikely that some of these prescribed names would ever cease to be prescribed. Accordingly, it would be worthwhile to hard-wire at least some of the permitted legal elements in s. 12(2) of the proposed Act while, at the same time, stating that further names may be prescribed in the proposed Regulations.
13(5) and 297(a)	60	Subsections 12(5) sets out 60 days notice before the Director may revoke a corporate name.
17	45(5)	Subsection 50(7)(a) of CBCA sets out retention of certificates for 6 years after cancellation.
21(4)	4	Subsection 20(2.1) of CBCA hard-wires 6 years in keeping financial records.
22(2) and 23(1)	7	Subsection 21(3) of CBCA hard-wires 10 days for furnishing a list of shareholders.
22(4), 23(2), 24(2) and 108(1)	5, 8(1) and (2)	See also overarching comment on Part 7 of the proposed Act. Subsection 85(1) of CBCA requires a trustee to furnish a list of the holders of debt obligations within 15 days of receipt of statutory declaration or request.
62(2)(a)	18(1)	See also overarching comments on Part 6 of the proposed Act.

Section of Proposed Act	Section of Proposed Regulation	Rationale
		Paragraph 56(b) of CBCA hard-wires 2 years in similar circumstances. Provincial securities transfer legislation (such as s. 61(1)(b)(ii) of Ontario STA) also hard-wires 2 years. BC, AB, SK, MB, NL and NB have identical provisions. It is anticipated that remaining provinces and territories of Canada will adopt same provision.
62(2)(b)	18(2)	Paragraph 56(a) of CBCA hard-wires 1 year. Subsection 61(1)(a)(iii) of Ontario STA also hard-wires 1 year. BC, AB, SK, MB, NL and NB have identical provisions and remaining provinces and territories are expected to follow suit.
73(2)(a)	19(1)	See also overarching comments on Part 6 of the proposed Act. Paragraph 62(a) of CBCA hard-wires 1 year. Clause 20(a) of Ontario STA also hard-wires 1 year. BC, AB, SK, MB, NL and NB have identical provisions and remaining provinces and territories are expected to follow suit.
73(2)(b)	19(2)	Paragraph 62(b) of CBCA hard-wires 6 months. Clause 20(b) of Ontario STA also hard-wires 6 months. BC, AB, SK, MB, NL and NB have identical provisions and remaining provinces and territories are expected to follow suit.
98(2)	21	See also overarching comments on Part 6 of the proposed Act. Subsection 78(2)) of CBCA has long stipulated that a restraining order or an indemnity bond must be delivered within 30 days in similar circumstances. Subsection 89(3) of Ontario STA provides that notice is effective for not more than 30 days, although issuer is allowed to specify less time so long as shorter time period is not "manifestly unreasonable". BC, AB, SK, MB, NL and NB have identical provisions and remaining provinces and territories are expected to follow suit.
100	22	See also overarching comments on Part 6 of the proposed Act. Subsection 78(4) of CBCA has long stated that a notice of adverse claim is effective for 12 months from the date received unless renewed. Ontario STA has dispensed with concept of an expiry date for notice of an adverse claim. BC, AB, SK, MB, NL and NB have done the same and remaining provinces

Section of Proposed Act	Section of Proposed Regulation	Rationale
		and territories are expected to follow suit.
106(2)	23	See also overarching comments on Part 7 of the proposed Act. Subsection 83(2) of CBCA has long required 90 days for resolving a material conflict of interest.
112(2)	24	Subsection 89(2) of CBCA requires a certificate of compliance at least every 12 months.
113	25	Subsection 90 of CBCA has long required 30 days to give notice in similar circumstances.
124(f)	26	Paragraph 101(f) of CBCA provides for 6 months in similar circumstances.
128(3)	27	Subsection 104(3) of CBCA states that incorporators or directors may call the organizational meeting by giving not less than 5 days notice.
129(3)	28(1)	Subsection 106(3) of CBCA provides for a maximum term of 3 years for a director. This raises the issue of whether the harmonization of the maximum term of a director under the CBCA and the proposed Act outweighs the incremental value of extending the maximum term from 3 to 4 years in the case of a corporation incorporated under the proposed Act.
129(9)(b)(i)	28(2)	Clause 106(9)(b)(i) of CBCA provides for notice in writing not later than 10 days after date of a director's election or appointment.
135(1)	29(1)	Subsection 113(1) of CBCA provides for 15 days to file a notice of change of directors.
135(2)	29(2)	Subsection 113(1.1) of CBCA prescribes that a director will give corporation not less than 15 days notice of change of address.
148(3)	30	Subsection 123(3) of CBCA provides for 7 days notice of dissent of an absent director.
161(1)(a)	62(1)	Paragraph 133(a) of CBCA requires directors to call first annual meeting not less than 18 months after incorporation.
161(1)(b)	62(2)	Paragraph 133(b) of CBCA requires directors to call subsequent annual meetings not later than 15 months after previous annual meeting and not less than 6 months after end of the corporation's preceding financial year.
163(7)	64(4)	Subsection 135(3) of CBCA provides for 30 (rather than 31) days in similar circumstances. To minimize confusion, we suggest these two periods be harmonized (perhaps at 31 days).

Section of Proposed Act	Section of Proposed Regulation	Rationale
163(8)	64(5)	Subsection 135(4) of CBCA provides for notice of an adjourned meeting if adjourned for 30 days or more.
164(5)	66	The 5% threshold for nominating directors is also set out in s. 137(4) of CBCA.
168(1)	73(1)	Subsection 143(1) of CBCA requires not less than 5% of the shareholders of the corporation to requisition a meeting of shareholders.
168(4)	73(2)	Subsection 143(4) of CBCA entitles shareholders to call a requisitioned meeting if the directors do not call it within 21 days after receiving the requisition.
171(4)	74	Subsection 146(4) of CBCA gives purchasers of shares without notice of a unanimous shareholder agreement 30 days to rescind the transaction.
175(3)	77	Subsection 157(3) of CBCA gives the corporation 15 days to seek an order barring examination.
176(1)	78	Subsection 159(1) of CBCA requires a corporation to send financial statements to its shareholders not less than 21 days before an annual meeting. As long as the corporation complies with the 21-day minimum notice requirement, there is no need for a 60-day maximum notice requirement. No maximum requirement exists under CBCA. Circulating financial statements to shareholders or members ahead of time in no way disadvantages them.
177(1)(a)	79(1)	Paragraph 160(1)(a) of CBCA requires a distributing corporation to file its financial statements with the Director not less than 21 days before each annual meeting.
177(1)(b)	79(2)	Paragraph 160(1)(b) of CBCA requires a distributing corporation to file its financial statements with the Director within 15 months after the last preceding annual meeting and, in any event, within 6 months at the end of the corporation's preceding financial year.
186(2)	82	Subsection 166(2) of CBCA requires directors then in office, if not constituting a quorum, to call a meeting 21 days after a vacancy occurs in the office of auditor.
188(2)	83(1)	Subsection 168(2) of CBCA requires 10 days notice to an auditor to attend the meeting of shareholders.
188(8)	83(2)	Subsection 168(8) of CBCA also requires 15 days in like circumstances.
209(3)(c)	86(2)	Paragraph 185(3)(c) of CBCA provides 30 days advance notice to creditors of an amalgamation.

Section of Proposed Act	Section of Proposed Regulation	Rationale
219(1) and (2)	31	First, there appears to be no logical reason to stay proceedings under Part 14 (Liquidation and Dissolution) until a prescribed period after discharge from bankruptcy or receivership. No equivalent 3-year stay period under s. 208 of CBCA. A liquidation or dissolution can occur on the day after discharge. Second, it strikes us as unlikely that flexibility is needed in the amount of time required before a federal NFP corporation can avail Part 14.
223(1)(a)(iii)	32(3)	Clause 212(1)(a)(iii) also sets out 1 year for a default in sending any fee, notice or document required to be sent the Director before administrative dissolution can be initiated.
223(3)	32(4)	Paragraph 212(2)(a) of CBCA also sets out 120 days notice to the corporation before dissolution.
224(1)(a)	33	Paragraph 213(1)(a) of CBCA sets out 2 years for dissolving a corporation in similar circumstances.
227(2)	34(1)	Subsection 216(2) of CBCA provides 4 weeks (rather than 30 days) for the show cause order. To minimize confusion, harmonization should trump minor difference between two federal corporate enactments.
227(4)(a)	34(2)	Subsection 216(4)(a) of CBCA also provides for a newspaper publication at least once a week.
232(b)(iii)	35(1)	Clause 221(b)(iii) of CBCA requires a liquidator to give not less than 2 months (rather than 60 days) notice in similar circumstances. Again, harmonization principle should trump.
232(h)	35(2). Note that proposed Regulations incorrectly refer to s. 223(h) rather than s. 232(h) of proposed Act.	Paragraph 221(h) of CBCA sets out 12 months in similar circumstances.
234(2)	36	Subsection 223(2) of CBCA requires the liquidator's final accounts within 1 year after appointment.
239	38	Subsection 225(1) of CBCA sets out 6 years for the custody of records.
252(2)(a)	39	Paragraph 239(2)(a) of CBCA requires not less than 14 days advance notice before bringing a derivative action.
258(1)	40	Subsection 245(1) of CBCA sets out 20 days for the Director to give written notice of refusal to file articles.

Section of Proposed Act	Section of Proposed Regulation	Rationale
		Again, perhaps, harmonization should rule.

Schedule C –
Reorganization of Part 14 – Liquidation and Dissolution

Application of Part 14, s. 219

Distribution Constraints

Transfer of Property on Condition of Return, s. 235
Distribution Constraint Limited to Qualified Donees, s. 236
Distribution Constraint Applicable to All Other Corporations, s. 237

Liquidation

Voluntary Liquidation and Dissolution, s. 222
Just and Equitable Winding-up – s. 225
(consolidate with Part 16 remedies, in particular, the oppression remedy in s. 254.)
Application for Supervision, s. 226
Application to Court, s. 227
Powers of Court, s. 228
Effect of Order, s. 229
Cessation of Activities and Powers, s. 230
Appointment of Liquidator, s. 231
Duties of Liquidator, s. 232
Powers of Liquidator, s. 233
Costs of Liquidation, s. 234
Right to Distribution in Money, s. 238

Dissolution

Dissolution Before Commencing Activities, s. 221
Dissolution by Director Without Court Order, s. 223
Court-Ordered Dissolution, s. 224
Trustee of Records, s. 239
Continuation of Actions Against Dissolved Corporations, s. 240
Unlocated Creditors and Members, s. 241
Bona Vacantia, s. 242

Revival

Revival, s. 220

Schedule D – Summary of Recommendations

1. The CBA Sections recommend that the definition of "public accountant" in s. 2(1) be amended to add references to subsection 185(2), section 186 and subsection 187(1).

2. The CBA Sections recommend that the definition of "soliciting corporation" be amended so that:

   (a) whether a corporation meets the definition of "soliciting corporation" is tested only at the end of each financial period of that corporation;

   (b) a change in status from soliciting corporation to non-soliciting corporation, or the reverse, only takes effect at the conclusion of the next ensuing annual meeting of members; and

   (c) the following knowledge qualifier apply to receipts of donations or gifts from corporations or other entities that have, in the prescribed period, received income in excess of the prescribed amount from public donors or government sources (as described at paragraphs (a) and (b) of the definition of "soliciting corporation" in s. 2(1)):

      > "For the purposes of paragraph (c) of the definition of "soliciting corporation" in s. 2(1) and s. 236(1((c)(iii), the corporation has notice that a donor entity has, in the prescribed period, received income in excess of the prescribed amount from donors referred to in paragraphs (a) and (b) of the definition of "soliciting corporation in s. 2(1) when information has come to the attention of an officer or senior employee of the corporation with responsibility for matters to which the information relates under circumstances in which a reasonable person would take cognizance of it."

3. The CBA Sections recommend that s. 7(1)(f) be deleted.**1**

4. The CBA Sections recommend that subsection 7(3) of Bill C-4 be deleted and replaced with the following:

   > "(3) The articles may set out any provisions that may be set out in the by-laws, and any reference in this Act to a provision that may be set out in the by-laws is deemed to include any such provision whether set out in the articles or the by-laws."

5. The CBA Sections recommend that:

   (a) ss. 22(2) and (4) be deleted from Bill C-4 for the reasons discussed at Part II.5 under the heading "Debt Obligations under the proposed Act; and

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[1] Consequential changes must also be made to the definition of "activities" in s. 2(1) and to s. 198(1)(j).

(b) if ss. 22(2) and (4) are not deleted, the order of ss. 22(2) and (3) be reversed.

6. The CBA Sections recommend that the provisions in Schedule A of this submission be deleted from Bill C-4 or modified, as indicated.

7. The CBA Sections recommend that s. 35(2) be deleted from Bill C-4.

8. The CBA Sections recommend that s. 36 be deleted from Bill C-4.

9. The CBA Sections recommend that sections 38 to 104 inclusive be deleted from Bill C-4 so that the transfer of debt obligations of federal NFP corporations is dealt with exclusively under provincial and territorial securities transfer legislation, as is the case at present and as would remain the case under Bill C-4 with respect to transferable membership interests.

10. The CBA Sections recommend that Bill C-4 be amended to include a provision explicitly enabling a federal NFP corporation to select the law of any domestic or foreign jurisdiction (not limited to the jurisdiction where the registered office or head office is located) as the law governing the registration of transfer and the effect of registration of debt obligations and transferable membership interests. A companion change should also be made to the CBCA. Such a provision might read as follows:

11. The directors of a corporation may by resolution specify the law of any jurisdiction as the law governing any of the following matters:

    (a) the rights and duties of the corporation with respect to the registration of transfer of any securities;

    (b) the effectiveness of the registration of a transfer by the corporation;

    (c) whether the corporation owes any duties to an adverse claimant to a security; and

    (d) whether an adverse claim can be asserted against a person,

        (i) to whom the transfer of a certificated or uncertificated security is registered; or

        (ii) who obtains control of a certificated security.

12. The CBA Sections recommend that Part 7 (sections 105 to 116 inclusive) be deleted from Bill C-4 in favour of regulating the content of trust indentures and indenture trustees under applicable provincial legislation such as Part V of the OBCA or foreign legislation such as the U.S. *Trust Indenture Act* of 1939. A companion change should be also made to the CBCA.

13. The CBA Sections make no recommendation regarding the amendment of s. 126 of Bill C-4.

14. The CBA Sections recommend that s. 129(3) be amended to permit *ex officio* directors.[2]

15. The CBA Sections recommend that s. 129(8) be modified so that members may, by special resolution, authorize the directors to appoint one or more additional directors, not to exceed one-third the number of directors elected at the last annual meeting. A companion change should be also made to the CBCA. The CBCA should also be amended to adopt a counterpart version of s. 134(3) of Bill C-4.

16. The CBA Sections recommend that "their" replace "his or her" in s. 135(2) of Bill C-4.

17. The CBA Sections recommend that s. 135(3) be deleted from Bill C-4.

18. The CBA Sections recommend that the reference to "articles" in s. 137(1) and (2) be deleted from Bill C-4.

19. The CBA Sections recommend that s. 138 be deleted from Bill C-4 as more problematic than helpful.

20. The CBA Sections recommend that s. 139(2)(c) be deleted from Bill C-4.

21. The CBA Sections recommend that the reference to "articles" in s. 143 be deleted from Bill C-4.

22. The CBA Sections recommend that the reference to "articles" in s. 144(1) be deleted from Bill C-4.

23. The CBA Sections recommend that ss. 146(1) and (6) be deleted from Bill C-4.

24. The CBA Sections recommend that a liability shield for directors and officers modeled on s. 112.1 of the SK Act be added to Bill C-4. The provision could read as follows:

25. (1) In this section, "loss" means any pecuniary or non-pecuniary loss respecting, arising out of or stemming from any act or omission of:

    (a) the corporation; or

    (b) any director, officer, employee or agent of the corporation in the exercise or supposed exercise of any of their powers or in the carrying out of supposed carrying out of any of their duties.

    (2) Unless another Act expressly provides otherwise, no director or officer of a corporation is liable in any civil action for any loss suffered by any person.

    (3) The limitation on liability referred to in subsection (2) applies only if the director or officer was acting in good faith at the time of the act or omission giving rise to the loss.

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[2] At least one member of the CBA Sections agrees with this recommendation only if (a) rules relating to the appointment, removal and replacement of directors and to member approval of amendments to articles and by-laws (which prescribe *ex officio* directors) can be satisfactorily accommodated to an *ex officio* director regime and (b) the added complexity does not outweigh the alternative of having the other organization become a special member of the NFP corporation with the right to elect or appoint one or more directors. Indeed, the alternative could prove to be more coherent and simple than adopting an *ex officio* director regime.

(4) The limitation on liability referred to in subsection (2) does not apply if:

(a) the loss was caused by fraudulent or criminal misconduct by the director or officer; or

(b) the act or omission of the director or officer that caused the loss constituted an offence against this Act or any other Act.

(5) This section is to be interpreted as not affecting the liability of the corporation for loss suffered by any person.

(6) Without restricting the generality of the subsection (2), if damages are awarded against, or any amount is paid by, a corporation with respect to loss for which the director or officer is not liable pursuant to subsection (2), the corporation has no right of action to recover those damages or that amount against the director or officer.

(7) This section applies to any claim for damages for loss that is filed on or after the coming into force of this Act.

26. The CBA Sections recommend that s. 148 be deleted from Bill C-4 in favour of applicable federal/provincial/territorial employment law imposing liability on directors for unpaid wages and other debts of a corporation's employees.

27. The CBA Sections recommend that s. 149(3) be deleted from Bill C-4.

28. The CBA Sections recommend that the exception in s. 153(1) be deleted from Bill C-4 and companion changes be made to s. 198(1) so that s. 153 exclusively governs all by-law amendments.

29. The CBA Sections recommend that s. 154 be deleted from Bill C-4.

30. The CBA Sections recommend that the reference to "articles" in s. 157 be deleted from Bill C-4.

31. The CBA Sections recommend that the reference to "articles" in s. 158 be deleted from Bill C-4.

32. The CBA Sections recommend that the reference to "articles" in s. 159 be deleted from Bill C-4.

33. The CBA Sections recommend that either s. 161(2) be deleted from Bill C-4 or, if not, that the reference to "court" in s. 161(2) be deleted and that "Director" be substituted for it.

34. The CBA Sections recommend that s. 180 be deleted from Bill C-4 so that the rules respecting the appointment of a public accountant and exemptions from audit and review engagements are the same for soliciting corporations and non-soliciting corporations. The default rules would remain the requirement to appoint a public accountant and have an annual audit. However, depending on the annual revenue threshold, an audit or review engagement and the appointment of a public accountant could be waived by special resolution. In exchange, a court, on the application of a member, a director or the Director, would be could require an audit where that appears to be in the public interest.

35. The CBA Sections recommend that s. 181(1)(c) in Bill C-4 be replaced with:

> "(c) subject to subsection (6), be independent of the corporation, each of its affiliates, each of the directors and officers of the corporation and each of the directors and officers of its affiliates."

36. The CBA Sections recommend that s. 183(1) of Bill C-4 be deleted and that the following be substituted for it:

> "(1) Members of a corporation whose revenues are less than the prescribed amount may resolve by special resolution not to appoint a public accountant."

37. The CBA Sections recommend that "articles" be deleted from s. 186(3) and that "by-laws" be substituted.

38. The CBA Sections recommend that s. 187(2) in Bill C-4 be deleted.

39. The CBA Sections recommend that ss. 189(1) and (2) of Bill C-4 be simplified so that corporations are required to conduct an audit or review engagement in accordance with the proposed Act, as applicable.

40. The CBA Sections recommend that ss. 190(1) and (2) of Bill C-4 be simplified so that corporations are required to conduct an audit or review engagement in accordance with the proposed Regulations, as applicable.

41. The CBA Sections recommend that s. 191 of Bill C-4 be simplified by replacing the concept of deeming revenues with reference to the requirements, that otherwise apply to:

    (a) appoint a public accountant; and

    (b) have either:

        (i) an audit if the annual revenues are less than the prescribed amount (initially, $100,000.01); and

        (ii) a review engagement if the annual revenues are less than the prescribed amount (initially, $1,000,000.01).

42. The CBA Sections recommend that a minimum number of directors on the audit committee, if any, be deleted from Bill C-4.

43. The CBA Sections recommend that language of s. 197 of Bill C-4 track that of s. 194(4) thereof and, similarly, that the language of s. 172 of the CBCA track that of s. 170(3) thereof.

44. The CBA Sections recommend that:

    (a) ss. 198(1)(e), (h), (j), (l) and (m) be deleted from Bill C-4;

    (b) the reference to by-laws in s. 198(1) be deleted;

    (c) the reference to "of the members" in "special resolution of the members" in s. 198(1) be deleted; and

(d) an appraisal remedy be added to Part 13 of Bill C-4 modeled on s. 190 of the CBCA in respect of section 237 corporations.

45. The CBA Sections recommend that s. 200(1)(f) be made opt-out so that all of the paragraphs of s. 200(1) become opt-out.

46. The CBA Sections recommend that s. 207(3) be deleted from Bill C-4.

47. The CBA Sections recommend that the words "without any repayment of capital in respect of those memberships" be deleted from s. 208(1)(c)(i) of Bill C-4.

48. The CBA Sections recommend that "without any repayment of capital in respect of those memberships" be deleted from s. 208(2)(b)(i) of Bill C-4.

49. The CBA Sections recommend that s. 210(g) be added to Bill C-4 to state, that, in calculating donations, gifts, grants and similar financial assistance for the purposes of the definition of "soliciting corporation" in s. 2(1) and for the purposes of s. 236(1)(c), the donations, gifts, grants and similar financial assistance of the amalgamated corporation equal the sum of the donations, gifts, grants and similar financial assistance of each amalgamating corporation except any grants or similar financial assistance received by one amalgamating corporation from any other amalgamating corporation.

50. The CBA Sections recommend that s. 214(4) be deleted from Bill C-4 and that a provision analogous to s. 207(4) be substituted for it.

51. The CBA Sections recommend that s. 215(4) be deleted from Bill C-4 and that s. 215(5) be conformed to s. 207(4).

52. The CBA Sections recommend that Part 14 be reorganized on the basis set out in Schedule C.

53. The CBA Sections recommend that s. 218 be deleted from Bill C-4 and s. 207 of the CBCA be repealed.

54. The CBA Sections recommend that:

(a) the words "until the end of the prescribed period after" in s. 219(1) be deleted from Bill C-4 and "while" be substituted; and

(b) s. 31 of the proposed Regulations be deleted.

55. The CBA Sections recommend that s. 225 be deleted from Bill C-4 in favour of consolidating it with s. 254.

56. The CBA Sections recommend that, if s. 225 is not consolidated into s. 254 (the oppression remedy), s. 225(2) be deleted from Bill C-4.

57. The CBA Sections recommend that changes be made to s. 236(1)(c) analogous to those made in the second recommendation.

58. The CBA Sections recommend that s. 236(2) be deleted from Bill C-4.

59. The CBA Sections recommend that:

    (a) s. 243(1) be amended in accordance with Schedule A to delete any reference to "holders of debt obligations"; and

    (b) the words "having jurisdiction in the place where a corporation has its registered office" be deleted from Bill C-26 and a companion amendment be made to s. 229(1) of the CBCA.

60. The CBA Sections recommend that the term "debt obligation holder" be deleted from the definition of "complainant" in s. 251 of Bill C-4.

61. The CBA Sections recommend that:

    (a) as an additional ground, courts be permitted to grant an order in an oppression action if the court is satisfied that it is just and equitable that the corporation be liquidated and dissolved;

    (b) only the Director and a past or present member (not any other categories of complainants) be entitled to apply for relief from oppression;

    (c) s. 254(3)(g) only apply to Section 237 Corporations and be amended to enable a court to order payment of fair value (not just restitution) in respect of a membership interest; and

    (d) for the reasons stated in Schedule A, the reference to debt obligations be deleted from s. 254(3)(d) and s. 254(3)(f) be deleted in its entirety.

62. The CBA Sections recommend that s. 255(2) only apply to applications or actions made or brought, or intervened in, under s. 252, not all of Part 16.

63. The CBA Sections recommend that the words "this Part" be deleted from s. 255(3) and the words "sections 252 or 260" be substituted for them.

64. The CBA Sections recommend that s. 255(4) only apply to applications or actions made or brought, or intervened in, under s. 252, not all of Part 16.

65. The CBA Sections recommend that the words "a debt obligation holder, director, officer or member of the corporation or any aggrieved person" be deleted from s. 256(1) and that "and complainant" be substituted.

66. The CBA Sections recommend that:

    (a) the Director be authorized to issue compliance orders under s. 260 (in addition to the court's power to do so); but

    (b) only a court be authorized to issue a restraining order under s. 260.

67. The CBA Sections recommend that the following s. 278(3) be added to Bill C-4:

68. "(3) The notices referred to in subsections 20(2), 20(4), 129(1) and 135(1), and the annual return referred to in section 279, may be signed by any individual who has the relevant knowledge of the corporation and who is authorized to do so by the directors, or, in the case of the notice referred to in subsection 129(1), the incorporators."

69. The CBA Sections recommend that the words "other than a certificate or statement received under section 277," be deleted from s. 284(3) of Bill C-4 and that the words "obtained under section 177 or section 178" be substituted for them.

70. The CBA Sections recommend that s. 293 be deleted from Bill C-4.

71. The CBA Sections recommend that the provisions set out in Schedule B below be reintegrated as part of Bill C-4 rather than remain bifurcated between Bill C-4 and the proposed Regulations.