Charities & Red Tape Review (CNCA)

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

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PREFACE

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

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

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Charities & Red Tape Review (CNCA)

I. INTRODUCTION

We write on behalf of the Canadian Bar Association's Charities and Not-for-Profit Law Section (CBA Section**)** regarding the "Consultation paper: Modernizing business law frameworks (Red tape review)" (Consultation Paper**).** Specifically, we comment on proposed issues under the *Canada Not-for-profit Corporations Act* (CNCA) under considerations for amendment.

The CBA is a national association of over 40,000 members, including lawyers, notaries, academics and law students across Canada, with a mandate to seek improvements in the law and the administration of justice The CBA Section and its members across Canada are the most experienced and knowledgeable group in the use and interpretation of the CNCA on a day-to-day basis. We act for clients in every part of Canada and every aspect of the not-for-profit sector. We have been actively and continuously reviewing the CNCA and making recommendations for its reform since prior to its initial passage in 2010, including in our 2023 Brief[1]. We believe that we can add significant value to the content of the draft legislation if we are allowed to review it prior to its tabling in Parliament.

We appreciate the opportunity to comment on the Consultation and raise other issues to consider. Below, we have set out our comments on Part A2 of the Consultation Paper.

A. Virtual & Hybrid Meetings

The CBA Section supports this proposed amendment. This subject was not dealt with in our 2023 Brief.

The rationale provided in the discussion paper in support of the proposed amendment is that virtual and hybrid meetings "should be available by default". We agree with this. However, corporations should not be required to facilitate virtual participation in meetings that would otherwise be in person. Subsection 159(4) of the CNCA offers protection for this as it states that the members may participate by electronic means "if the corporation makes available such a communication facility". We recommend introducing similar language for director meetings

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[1] 2023 CBA Submission (Ottawa): online.

under subsection 136(7). This language could also be strengthened by stating that the corporation is not obligated to take any action or provide any facility to permit or facilitate the use of any communications medium at a meeting, unless the directors have determined that the meeting will be virtual or hybrid.

We also agree that a corporation should be able to restrict virtual or hybrid meetings in its articles or by-laws if desired. We suggest, though, that any restriction must be express. Subsection 83(1) of the *British Columbia Societies Act*[2], which is like subsection 159(4) of the CNCA, allows a person who is participating in an electronic meeting or a partial electronic meeting to participate in the meeting by telephone or other communications medium "[u]nless the by-laws of a society provide otherwise". In *Farrish v. Delta Hospice Society*,[3], the Supreme Court of British Columbia found by-laws that contained provisions that contemplated in-person attendance at meetings as "providing otherwise", despite there being no prohibition on electronic meetings or virtual attendance. The by-laws contained standard provisions, such as meetings being held at a place, members being present at the meeting, and voting being done by show of hands. Any restriction on participation by electronic means or holding virtual and hybrid meetings should be express in the articles or by-laws.

B. Name Change

The CBA Section supports this proposed amendment. This subject was not dealt with in our 2023 Brief either.

C. Director Appointment Rule

The CBA Section supports this proposed amendment. We wish to confirm our understanding that the term "active directors" is meant to distinguish directors elected by the members from directors appointed by another process, including *ex officio* directors. We also understand that there will no longer be a restriction on the appointment of directors by the directors based on the number of directors elected at an annual meeting, but rather the number of positions will be based on the total number of such directors in office at any given time.

We do not believe there is a need for confirmation of these directors at a subsequent meeting of members. The term of office of these directors should expire at the next <u>**annual**</u> meeting of members. The term should not expire at a special meeting held for a different purpose.

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2 *Societies Act,* SBC 2015, c 18.

3 2021 BCSC 1374: online.

D. *Ex Officio* Director

The CBA Section supports an amendment of this nature. The absence of such a provision has been a fundamental concern of the sector since the CNCA came into effect. It has resulted in several "workarounds", in some cases of a quite complex nature, in order to continue a widespread and long-standing practice. In other cases, it has led to the choice of one of the provincial acts over the CNCA. In many cases, these directors are there to ensure that the interests of a related organization are made known and protected at the board level. We recognize the fiduciary duty of loyalty, but the issues raised by that duty can be readily dealt with by existing legal principles and the CNCA's current provisions. They are no different than the issues applicable to any other director who may have been elected with the support of a related party.

We point out that this provision applies to two types of directors: (1) those who are automatically in office as a result of holding a position or having certain specific characteristics, for which only one person qualifies. An example would be the chair of a hospital board automatically holding a position on the board of directors of the hospital's charitable support foundation without the necessity of being elected; and (2). although not technically *an ex officio* director, a director appointed by a third party with the authority to designate a representative of its choosing to serve on the board. The amendment should provide for both types to be on the board.

We support the proposal that such a director must consent to being appointed and must satisfy the qualifications in section 126. We do not support the proposal that such a director can be removed by the members in general. This defeats the purpose for having *ex officio* directors in the first place. Those appointed by another party should be removable, but only by the party that appointed them. In addition, a director appointed by virtue of holding a particular office should not be removable, except where that person fails to consent, ceases to hold such office or fails to remain qualified.

If the power of removal is made general, many organizations will continue with their existing workarounds, while others will continue to incorporate under provincial legislation, which does not have such restrictions. We point out that in many cases the *ex officio* position is established at the onset of the relationship between the two parties as a means of ensuring that the affected organization remains compliant with its purposes and continues to hear the voice of the related party. Removing this protection would be a serious breach of the relationship

between the parties. A further consideration is that, in many cases, the director removed by the vote of the general membership can be reappointed as of right by the other party. Inter-party disputes of this nature should not be dealt with by the removal of the director. This is not an effective dispute resolution method.

We suggest the appropriate wording be simple and follow the pattern in subsection 42 of the *BC Societies Act*:

(2) To become a director of a society, other than a first director, an individual must be elected or appointed to that office in accordance with the bylaws.

(3) The bylaws of a society may provide that an individual who holds a particular office or who has a specified attribute is, by virtue of holding that office or having that attribute, appointed as a director of the society.

E. Delegate Voting

The CBA Section supports this proposed amendment. In our 2023 Brief, we recommended that CNCA subsection 171(2) be amended to read as follows:

> Delegate voting
>
> 171(2) The by-laws of a corporation may authorize delegate voting. If the by-laws so provide, they shall set out rules respecting how that voting is to occur.
> *[NOTE: provisions for non-voting members have been deleted]*
>
> Application for authorization
>
> 171(3) … [renumber current section 171(2)].

F. Non-Voting Members

The CBA Section supports this proposal. If the CNCA is amended to eliminate the voting rights of non-voting members, all the rights should be eliminated in all cases where such right is currently conferred in the CNCA, not just the rights referenced in the discussion paper. Further, all voting-member-like rights for non-voting members should be removed, such as the right of non-voting members to require the accountant to attend a members’ meeting at the expense of the corporation and answer questions related to their duties in subsection 187(2) of the CNCA.

G. Treatment of Proxies

The CBA Section supports this proposal. In our 2023 Brief, we also recommended that the proxy provisions in Regulation SOR/2011-223, subsection 74(2) be amended like subsections 64(1.1) and (1.2) of the ONCA to provide that the use of proxies must be authorized by the by-laws and that the by-laws may provide that a proxyholder must be a member. We continue to recommend this be implemented.

H. Membership Reimbursement

The CBA Section supports this proposed amendment. However, we note that it deals with only one aspect of our 2023 Brief, included in the Appendix to this submission. Further, with respect to member fee reimbursement pursuant to the canceled membership, it is important that the amendment language not inadvertently impact the income tax status of the corporation. As explained in our 2023 Brief, any payments of “income” to or otherwise available for the personal benefit of a member may result in the loss of tax-exempt status for a non-profit (paragraph 149(1)(l) of the *Income Tax Act (ITA)* or charitable registration. The language should not reference “income” and should clearly indicate that it is being paid as a reimbursement. Further, we recommend that Canada Revenue Agency (CRA) be consulted to ensure that the language of any proposed amendments to section 34 do not have unintended tax consequences.

General comments:
It is important to carefully consider the implementation language relating to these amendments. We recommend that the legislation clearly provide that existing Articles and By-laws provisions related to these issues remain in force/effective unless and until amended.

We note that the following matters contained in our 2023 Brief are not listed among the proposed amendments to the CNCA:

A. Accounting Issues
B. Class or Group of Members
C. Directors Elected by Majority Resolution at Annual Meetings
D. Distributions of Property to Members
E. Unintended Consequences of Section 235 of the Act on Members’ Rights
F. Indigenous Organizations
G. Electronic Voting Issues
H. Directors of Soliciting Corporation
I. Duty to Verify

We attach those portions of the 2023 Brief as an appendix to this submission. These amendments would improve the CNCA and position it as the statute of choice for not-for-profit incorporations across Canada, even where modern provincial statutes exist.

II. APPENDIX

A. Accounting Issues

Topic: Soliciting Corporation

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

The accounting requirements are difficult for our clients to understand, expensive to implement, unnecessary to protect members or donors, variable from year to year depending on revenue and donation levels (the so called "yo-yo effect"), frequently result in exemption applications and often lead to non-compliance. Giving the option to select the required accounting standard, together with allowing external funders to require audited financial statements, would offer adequate protection to both members and third parties.

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

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

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

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

[4] *Societies Act,* SBC 2015, c 18.

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

The current financial reporting requirement revenue levels (set in the CNCR) and problems in accessing an exemption from the appointment of a public accountant under section 182(1) (which requires the annual consent of 100% of voting members for both soliciting and non-soliciting corporations), often imposes a significant hardship on smaller not-for-profits (NFPs). For those organizations, the cost of even a review engagement can be a significant portion of their annual budget. This is further complicated because no exemption order is available from the Director to substitute for the required membership consent. Other NFP statutes either leave the type of financial report up to the members or set higher revenue levels and lower membership approval requirements to access various exemptions. For example, the *Ontario Not-for-Profit Corporations Act*[5] *(ONCA)* sets the revenue level for a "public benefit corporation" (like a soliciting corporation) dispensing with a public accountant at $100,000 and requires approval of 80% of the members voting at a meeting.

RECOMMENDATIONS

1. **The CBA Section recommends that a mandatory audit be removed from the CNCA and members who wish to appoint a public accountant or require an audit or review engagement be given the statutory right to vote for these options, either at a meeting or through by-laws.**
2. **In the alternative, the distinction between soliciting and non-soliciting corporations could be removed for accounting purposes and the prescribed revenue limits for dispensing with a public accountant be the same for both. Those limits should be at least double their current levels.**

In the alternative

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

> **Definition of soliciting corporation**: In section 2(5.1), a corporation becomes a soliciting corporation if it receives the prescribed amount from "any person who is not" (a)(i), "a member, director, officer or employee", etc. Except for "member", the other sources can only be individuals. "Member" is not defined in the CNCA. The other two sub-clauses of (a) refer to spouses or other individuals. It is unclear whether "member" is to be read as meaning an individual, or in the broader sense, including a corporation. If just individuals, a gift of $10,000 from a member which is

[5] 2010, S.O. 2010, c.

a non-soliciting corporation would render the corporation "soliciting." This was likely not the intent and a definition of "member" to include a non-soliciting corporation for the purposes of this section would be appropriate. Under section 2(5.1)(c), a gift of $10,000 from a corporate member that is also a soliciting corporation would still make the recipient a soliciting corporation.

CNCA vs. other corporations: The second problem is with section 2(5.1)(c). The definition of "corporation" in section 2(1) is limited to CNCA corporations. That means whenever a corporate gift is received, the donee must first determine whether the donor is a CNCA corporation. Even though the status of a corporation on the Corporations Canada website is supposed to include whether it is a soliciting corporation, it would still be advisable to make additional enquiries from the donor as to whether it satisfies the other requirement, that it is also a soliciting corporation. This has been referred to as the "stealth soliciting corporation." In addition, there is no discernible or legal distinction between donors that are CNCA corporations and those that are not. As a result, this additional component of the definition adds unnecessary potential status changes for CNCA corporations.

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

RECOMMENDATION

3. **The CBA Section recommends that the distinction between soliciting and non-soliciting corporations be eliminated and a different method, preferably an "asset lock," be offered for ensuring corporate assets intended to be used for public benefit remain in that capacity. At the time of incorporation, the articles would be required to state whether on dissolution the assets can go to the members (so the corporation will be a "soliciting corporation") or to a qualified done (so the corporation will be a "non-soliciting corporation"). This would be fixed and capable of amendment during the lifetime of the corporation only with approval by the court,[6] based on stringent requirements to protect charitable or other public benefit sourced funds. Source and level of revenues would no longer be relevant.**

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

B. Class or Group of Members

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

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

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

The words "class or group" or "classes or groups" are used in other sections of the CNCA and in the CNCR. The words are used together except in section 71(1) of the CNCR which uses the word "group" without the word "class":

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

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

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

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

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

The *CBCA, OBCA, BC Societies Act* and the Manitoba *Corporations Act*[7] do not use the word "group" for classes of shares or members, as applicable.

RECOMMENDATION

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

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

C. Directors Elected by Majority Resolution at Annual Meetings

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

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

We see no policy reason to require NFPs to elect directors exclusively at an annual meeting.

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

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[7] Section 24(3).

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

RECOMMENDATION

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

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

RECOMMENDATIONS

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

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

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

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

D. Distributions of Property to Members

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

Section 34 says:

> Distribution of property, accretions or profits
>
> 34 (1) Subject to subsection (2), no part of a corporation's profits or of its property or accretions to the value of the property may be distributed, directly or indirectly, to a member, a director or an officer of the corporation except in furtherance of its activities or as otherwise permitted by this Act.
>
> Distribution to member
>
> (2) If a member of a corporation is an entity that is authorized to carry on activities on behalf of the corporation, the corporation may distribute any of its money or other property to the member to carry on those activities.

This section seems to prohibit distribution of income or property to a member unless in furtherance of its activities or otherwise permitted by the CNCA. Arguably, the latter permits distributions on dissolution since that is a distribution contemplated by the CNCA. A further problem arises for distributions of income or capital during the life of the corporation. In one situation, members contributed land to the corporation in return for their membership, and cashflow issues arose. It was in the best interests of the corporation to distribute part of the land back to the members, rather than sell it and return proceeds. Because the "activity" of the corporation was stewardship and maintenance of the land, it could hardly be said that the distribution was "in furtherance of its activities.[8]"

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

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

The section seems to prohibit transactions related to the return of an interest in a corporation, for example, an equity interest in a golf club. Corporations Canada's view was that this would be permitted so long as the by-laws spelled out the process and terms of any distributions. This suggests that if the by-laws contemplate a distribution, the distribution would be considered by Corporations Canada to be "in furtherance of its activities." In our view, the language does not support this conclusion and creates confusion about the rules applicable to such distributions. While the decision in *Lash*[9] seems to support the view that distributions in the context of the application of Part 14 of the Act would be permitted, it does not clearly support distribution made in the normal course. As the Act seems to permit a non-share profit-making corporation, as well as member benefit organizations, such as sports and social clubs, trade associations, this section requires clarification.

RECOMMENDATION

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

Additional Comments from 2021 Submission

Distribution of Property to Members (Indigenous organizations)

In our July 2021 meeting, the CBA Section discussed concerns with the current iteration of the distribution of property to members under the CNCA. We were asked to consider situations where Indigenous organizations may make distributions to their members. We address these questions in turn.

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9 *Lash, ibid.*

A. Lack of clarity around section 34 of the Act

Uncertainty in the Act: Section 34(1) of the Act is unclear. The Act expressly prohibits distribution of property or accretions to members "except in furtherance of its activities or as otherwise permitted by this Act". The wording "except in furtherance of its activities" is too vague to give meaningful guidance and clarification would be helpful. Express permission for corporations to return equity interests to its members – which often applies to social clubs such as golf clubs – would be of great assistance.

Confusion with non-profit status under the ITA: Permitting distribution to members in some circumstances could also result in a NFP corporation making a distribution that could compromise its status as a charity or a non-profit organization under the ITA. The ITA stipulates that the income of a charity or non-profit organization must not be available for a member's personal benefit. Allowing distributions to members under the Act "in furtherance of its activities or as otherwise permitted by this Act" creates confusion, since organizations may not realize that a NFP corporation must adhere to both statutes, even where the CNCA is more permissive than the ITA.

Types of CNCA corporations: The CBA Section appreciates that, along with public benefit and member benefit corporations, the Act may also apply to corporations structured to make distributions to their members. In our experience as advisors to the not-for-profit sector, these corporations are extremely rare, and we believe that this rarity supports the need for further clarification of the distribution rules under the Act.

E. Unintended Consequences of Section 235 of the Act on Members' Rights

This second issue is related to the issue of uncertainty in the Act and deals with the unintended consequences of requiring soliciting corporations (and others referred to in section 235(1)(c) of the Act) to include in their articles that any property remaining on liquidation after the discharge of any liabilities of the corporation, be distributed to one or more qualified donees.

We have several concerns. First, this requirement can lead to the unintended non-compliance of a corporation that accidentally becomes a soliciting corporation (or a corporation described in section 235(1)(c) of the Act) by virtue of additional donations. For example, COVID-related federal support for not-for-profit corporations led to many non-soliciting corporations becoming soliciting corporations (or subject to section 235(1)(c)), when they never intended

to achieve that status, and therefore did not include that provision in their articles. For corporations who intend to return to a non-soliciting status and not otherwise be subject to section 235(1)(c), it would mean changing their articles to comply with section 235, and then changing them back once they are no longer a soliciting corporation. This is an undue administrative burden.

Additionally, having to change the corporation's articles to comply with section 235 of the Act could be a violation of a corporation's own articles or by-laws. For example, if a social club or other member benefit club that included provisions for a distribution to its members inadvertently became a soliciting corporation or otherwise caught by section 235(1)(c), it would be required to choose between non-compliance with section 235 or amending its articles to remove the members' rights to their equity stake in the assets of the corporation.

F. Indigenous Organizations

We were asked to consider whether amendments to the CNCA should allow Indigenous organizations that make distributions to their members. CBA Section members with expertise in structuring community economic development activities of Indigenous communities and bands say that Indigenous communities only use CNCA corporations to accept government funding and then flow that funding to the community in various ways. These corporations do not make distributions to their corporate members.

The structuring of community economic development activities of Indigenous groups is complex and typically involves different types of entities that are part of a large family of organizations. Our understanding is that these structures do not include CNCA corporations. Rather, they include share-capital corporations, unincorporated associations and trusts.

Some "independent" Indigenous organizations (i.e., not part of a community economic development structure to receive government funding) are incorporated under the Act. However, we are not aware of any reason why these corporations might require special rules, regulations or wording in the Act to account for them making distributions to their members.

The CBA Section believes that Indigenous organizations incorporated under the Act will benefit in the same manner as all other organizations from amendments that make the Act more practical, flexible, and easy to comply with. We do not believe that Indigenous organizations incorporated under the Act are making distributions to their corporate members.

RECOMMENDATIONS

9. **The CBA Section recommends that the phrase "or as otherwise permitted by this Act" at the end of section 34(1) be amended to clarify that it will apply to distributions made on dissolution, for example, pursuant to the operation of section 220(3)(b) of the Act.**

10. **Also, the Act should be amended to expressly permit social clubs and other organizations to distribute surplus funds or property to their members outside the application of Part 14 in the case of resignation or termination of membership, and consideration be given to an exception specific to social clubs, defined similar to the "member-funded" societies under the British Columbia *Societies Act*, to enable distributions of property in accordance with the by-laws.**

G. Electronic Voting Issues

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

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

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

The technology enabling a stand-alone vote is well established and reliable, and some corporations already conduct "referendum" style votes under permissive provisions of the by-laws. This gives further flexibility for a corporation to make a decision requiring membership approval without requiring a full meeting.

RECOMMENDATION

11. **The CBA Section recommends adding language to section 165 that clearly authorizes a corporation to conduct, at the board's discretion, a vote of**

members at any time, and not necessarily in connection with a meeting of members. For example, a new section might read:

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

Topic: CNCR sections 71(1) and 71(2) require that the technology selected to conduct a partially or entirely virtual meeting of members must be capable of presenting the votes to "the corporation" in a manner that maintains complete anonymity.

The requirement of general anonymity may be unnecessary. For example, there is no anonymity for a vote conducted by show of hands or by proxy. In addition, a requirement of anonymity from the corporation itself is problematic in practical terms.

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

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

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

RECOMMENDATION

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

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

Additional Comments from 2021 Submission

The Act permits members to exercise their right to vote – on any matter, whether governed by the Act or not – in two ways: (i) at a meeting (in person or, unless prohibited by the corporation's by-laws, by a communication facility) or (ii) prior to a meeting by means of any absentee voting method permitted by the Act and the corporation's by-laws (i.e. proxy, mailed-in ballot, or telephonic, electronic, or other communication facility).

The fundamental purpose of member meetings is to offer an opportunity for members (not otherwise engaged in the governance or operations of the corporation) to interact with each other, directors, employees and other stakeholders, to receive information, and to exercise their limited right to vote.

Unfortunately, attendance at member meetings is often quite low. This lack of member participation may be attributed to several factors, including the difficulty of scheduling a meeting convenient for many individuals located across multiple time-zones and a lack of interest to attend a meeting only to vote on a short list of legislatively mandated governance-related matters.

To encourage members to attend meetings, many organizations schedule the annual meetings in conjunction with a social event or conference. Given the Act's constraints on the timing of annual meetings, this is often problematic for organizations that prefer the flexibility to hold their annual event at a different time or location but have limited options to maximize attendance at their meetings. Other organizations invite their members to discuss operational and governance matters, in addition to those mandated by the Act, but by doing so risk blurring the line between seeking member approval versus member input. Some organizations, as an incentive, pay travel costs and lodging to attend a meeting. Others opt to meet by telephonic or electronic means, but these are often costly, complicated, administratively challenging, and inefficient when many attendees are involved.

While the CNCA offers methods of absentee voting (proxy, mailed-in ballot, or electronic, telephonic, or other communication facility prior to a meeting) to increase the potential number of votes cast, many organizations are reluctant to permit absentee voting. For example, the use of

proxies is often not desirable because: (i) proxyholders need not be members and therefore may have even less interest in or knowledge of the organization than the members; (ii) the requirements for creating, sending, collecting and verifying proxies are confusing, daunting and time-consuming to organizations and their members, and thus a deterrent to their use; and (iii) many organizations fear that proxies will be abused and result in skewed votes.

The proxy requirements under the Act can also result in an extremely lengthy document with different requirements for the different votes (for example, elections of directors when elections are held for different named positions and there are multiple candidates for each position). The requirement to use a complicated proxy form does not encourage member engagement. Even if voting by proxy is offered to members, the proxy must be filled out by a member and the proxyholder must attend the meeting; neither can be forced to fulfill either task.

The other methods of absentee voting under the Act (mailed-in ballot or telephonic, electronic, or other communication facility) are often expensive, time-consuming and complicated. They are not attractive for many organizations. For example, as noted our 2019 submission, the requirement for a system that counts votes that can be verified without the organization being able to identify how specific members voted typically requires an organization to use third party providers, which is even more complicated if proxies are permitted.

As a result, it is commonplace for quorum of a members' meeting to be set very low to ensure the meeting can be held. In practice, the need for member engagement at formal meetings has been significantly reduced in the sector. However, to informally engage members, many organizations hold information sessions prior to a meeting, with a formal vote based on the discussions to occur at a later meeting (and most often attended by a lot fewer members). Other organizations gather members' votes by various means prior to a meeting and then have members confirm or ratify the results of the votes at a formal meeting. In other words, to comply with the Act but still engage members, the sector has adapted by creating informal, non-binding, unregulated fora that offer members an opportunity to be indirectly involved in the decision-making process outside of meetings.

Permitting an organization to hold stand-alone member votes outside the confines of a meeting would give legal, binding effect to the informal decisions already made by members. Regulating these votes would ensure informed voting and equitable access. Recognizing that a stand-alone vote option may not be necessary or appropriate for all organizations, we propose that stand-alone member votes be optional (i.e., can be prohibited by the by-laws). Even if permitted,

stand-alone votes should be called only by a corporation's board of directors since it has responsibility to ensure that meeting-related funds are spent appropriately. We further recommend that the regulations set out requirements relating to:

- notice period of a vote (long enough to permit members to properly requisition a special members' meeting in lieu of the stand-alone vote);
- ability of members to submit written statements, of a prescribed length, in support of or in opposition to the vote;
- information that must be submitted with the notice of the vote;
- minimum length of voting period (i.e., over a certain number of days to optimize engagement); and
- method for members to ask and receive answers and further information from the board of directors during the voting period.

RECOMMENDATION

13. The CBA Section recommends amending section 165 to clearly authorize a corporation to conduct, at the board's discretion, a vote of members at any time, and not necessarily in connection with a meeting of members. The new section might read:

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

H. Directors of Soliciting Corporation

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

With smaller boards where there may only be three directors this requirement is so impractical that it is frequently ignored. Most corporations need to have two signing officers, which would necessitate increasing the board. An alternative would be for one director to be appointed as both president and secretary, without other officers, which can be inconvenient. The rationale for including this seems to make it analogous to the CBCA "distributing corporation" provision (CBCA, section 102(2)). In our view, it is inappropriate to treat the composition of a charity or NFP board in the same way as the board of a public company.

RECOMMENDATION

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

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

I. Duty to Verify

Topic: Section 148(3) of the CNCA imposes on each director a duty to "verify the lawfulness of the articles and the purpose of the corporation."

This duty is unique to the CNCA. There is no similar provision in the *ONCA, CBCA, OBCA, BC Societies Act, Saskatchewan Non-Profit Corporations Act,* 1995 or Manitoba Corporations Act. No guidance is offered as to how a director can discharge this duty and what or who they can rely on to do so. When the CNCA was before Parliament, the CBA Section stated: "It is unclear what verifying the "lawfulness" of the articles and the "purpose" of the corporation entails. It is also unclear what standard applies and what the consequences of an incorrect verification would entail."[10]

RECOMMENDATION

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

[10] See, 42nd Parliament, proceedings of the Special Senate Committee on the Charitable Sector, December 3rd, 2018.