

# A PRACTITIONER'S GUIDE TO THE NEW CANADA NOT-FOR-PROFIT CORPORATIONS ACT

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*On June 23, 2009, Bill C-4, the Canada Not-for-profit Corporations Act received Royal Assent. The new Act is important governance legislation in its own right but will doubtless exert an influence far beyond those corporations that will incorporate or continue under it. Just as the CBCA exerted a powerful influence on the shape of provincial and territorial laws governing business corporations in the years immediately following its implementation in 1975, this new federal Act is bound to exert an equally strong (if not more profound) influence on provincial and territorial not-for-profit corporate law reform in the years ahead.*

*This article reviews the types of not-for-profit corporations to which the new Act will apply, summarizes the rules differentiating soliciting and non-soliciting corporations, describes some of the new governance provisions, analyzes possible problem areas and suggests workaround solutions to these problems, draws implications from the implicit governance regime imported into the new Act and outlines the process for continuing to the new Act.*

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*Le 23 juin 2009, le Projet de loi C-4, la Loi régissant les organisations à but non lucratif et certaines personnes morales, a reçu la sanction royale. La nouvelle Loi est un acte législatif à part entière en matière de gouvernance, mais son influence s'exercera assurément au-delà des*

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\* McMillan LLP, Toronto. I was a member of the Canadian Bar Association (CBA) joint working group (CBA Working Group) that made a detailed submission on Bill C-4 and the draft regulations released for public consultation on February 6, 2009 and, with Mr. David Stevens, testified on behalf of the CBA at hearings on Bill C-4 before the Standing Committee on Industry, Science & Technology (see note 74 below). My thinking on Bill C-4 was enriched by my participation in the CBA Working Group, the other members of which were: Bruce King, Pitblado LLP, co-chair; David Stevens, Gowling Henderson Lafleur LLP, co-chair; Terrance Carter, Carters Professional Corporation; Cliff Goldfarb, Gardiner Roberts LLP; Susan Manwaring, Miller Thomson LLP; Margaret Mason, Bull, Housser & Tupper LLP; and Brian Westlake, Blake Cassels & Graydon LLP. Nevertheless, all views expressed in this article are personal and are not to be attributed to my firm, the CBA or any of the other members of the CBA Working Group.

*sociétés qui se seront constituées ou qui seront prorogées en vertu de celle-ci. De la même façon que la LCSA a exercé une grande influence sur la formulation des lois provinciales et territoriales régissant les sociétés par actions au cours des années qui ont suivi sa promulgation en 1975, cette nouvelle loi fédérale exercera une influence toute aussi forte (sinon plus profonde) sur les futures réformes de la législation provinciale et territoriale régissant les sociétés à but non lucratif.*

*L'article examine les types d'organisations à but non lucratif visées par la Loi et dresse la liste des critères qui différencient les organisations ayant recours à la sollicitation de celles n'ayant pas recours à la sollicitation. On y trouvera également une description des dispositions relatives à la gouvernance ainsi qu'une analyse des aspects qui pourraient présenter des difficultés et des solutions pour les contourner. Finalement, l'auteur se penche sur les conséquences du régime de gouvernance implicite qui s'en dégage et expose les grandes lignes de la prorogation en vertu de la nouvelle Loi.*

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### 1. Introduction

Canadian not-for-profit (NFP) organizations have long suffered from lack of an adequate federal incorporation choice. Part II of the *Canada Corporations Act*<sup>1</sup> (*CCA*), which was last substantially revised in 1917, has long been recognized as outdated, cumbersome and filled with gaps.<sup>2</sup> The problem besetting the NFP sector has been compounded by the lack of modernized NFP corporate legislative choices at the provincial and territorial levels except in Saskatchewan,<sup>3</sup> where modern legislation went into effect in 1997.

Apart from its World War I vintage, Part II of the *CCA* is sparse (consisting of 6 sections) and awkward to use (incorporating by reference, *mutatis mutandis*, various provisions from Part I of the *CCA* that applied to for-profit corporations before their migration to the *Canada Business Corporations Act*<sup>4</sup> beginning in 1975). Incorporation under Part II of the

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<sup>1</sup> R.S.C. 1970, c. C-32.

<sup>2</sup> On the early history of federal NFP corporate statutes and the subsequent reform initiatives, see Coleen Kirby, "Background Paper for Former Bill C-62: An Act Respecting Not-for-profit Corporations and Certain Other Corporations" (Paper presented to the Ontario Bar Association, Trusts and Estates Law Section, 3 February 2009) [unpublished].

<sup>3</sup> *The Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2 [Saskatchewan Act].

<sup>4</sup> Now R.S.C. 1985, c. C-44 [CBCA].

*CCA* is by letters patent, which is an exercise in Crown prerogative and slow by modern standards. By-laws require board, membership and Ministerial approval before becoming effective. Corporate borrowing can only be authorized by a special by-law passed by a least two-thirds of the members at a special meeting. The *CCA* does not contemplate modern methods of holding board or membership meetings such as by conference call or teleconferencing. Nor does it recognize the validity of board and membership resolutions passed by written consent. Continuances to or from the *CCA* are not allowed. Beyond forcing the corporation to liquidate, membership rights and remedies under the *CCA* are rudimentary. Board powers, duties and defences (such as the good faith reliance and due diligence defences) are left to the unreformed common law. There is no relaxation of the audit requirement irrespective of the NFP corporation's size or the willingness of its members to forego an audit.

The sector's plea for a modern NFP corporate statute has finally been answered. On June 23, 2009, Bill C-4, the *Canada Not-for-profit Corporations Act*, received Royal Assent.<sup>5</sup> The unofficial best estimate as to when the Act will come into force is spring 2011. The coming into force of the Act should be welcome news indeed not only for the nearly 19,000 active federal NFP corporations that will soon be able to continue under the Act<sup>6</sup> but also for the many more provincial and territorial NFP corporations that will have the option of moving to the Act under its voluntary continuance provisions.<sup>7</sup>

One example of the Act's benefits to federal NFP corporations is that they will now have the ability to pass written resolutions in lieu of holding meetings. This will be of particular benefit to smaller NFP

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<sup>5</sup> Now S.C. 2009, c. 23. To more immediately differentiate the Act from other corporate legislation, this article sometimes refers to the new Act as the *CNCA*. Note that this article is based, in part, on the version of the draft regulations released for public consultation on June 17, 2010; see *Canada Not-for-profit Corporations* (Draft), online: Industry Canada <[http://www.ic.gc.ca/eic/site/cd-dgc.nsf/vwapj/Consultationdraft-BIL-170610.pdf/\\$FILE/Consultationdraft-BIL-170610.pdf](http://www.ic.gc.ca/eic/site/cd-dgc.nsf/vwapj/Consultationdraft-BIL-170610.pdf/$FILE/Consultationdraft-BIL-170610.pdf)> [draft Regulations or *CNCR*].

<sup>6</sup> Note that the 19,000 figure excludes approximately 5,000 *CCA* Part II corporations that appear to have stopped filing annual reports and are, therefore, deemed to be inactive. Statistics for Part II *CCA* corporations were provided by Industry Canada: Email correspondence with Coleen Kirby, Industry Canada (11 January 2010 – 25 January 2010).

<sup>7</sup> Based on 2003 data, there were estimated to be approximately 161,000 NFP corporations in Canada; see Michael H. Hall, *et. al.*, *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* (Ottawa: Minister of Industry, 2004), online: Statistics Canada <<http://www.statcan.gc.ca/pub/61-533-x/2004001/4200353-eng.pdf>> at 13.

corporations as it will eliminate the need to go through the formal process of calling a meeting where there are only a handful of directors or members. Another example is the relaxation of the audit requirement for small NFP corporations. These and other examples of the benefits of the Act are discussed in further detail at Parts 5 and 6 of this article.

The Act and regulations entail a steep learning curve. It will, therefore, be useful in the coming months for existing federal NFP corporations, prospective incorporators of NFP corporations and existing provincial/territorial NFP corporations that are contemplating a continuance under the Act to become familiar with the new federal NFP corporate law regime.

This article reviews the types of NFP corporations contemplated under the Act (Part 2), summarizes the rules differentiating soliciting and non-soliciting corporations (Parts 3 and 4), highlights some of the new governance provisions (Part 5), analyzes possible practical problems with the Act and suggests possible solutions to any such problems (Part 6), highlights implications of the corporate governance regime that is woven into the fabric of the Act (Part 7) and outlines the process for continuing under the Act (Part 8) before concluding (Part 9). The focus of this article is on working with the Act as it is. A critical evaluation of the Act and the policy choices informing the Act is beyond the scope of this article, though I have written elsewhere on these matters.<sup>8</sup>

## *2. Types of Federal NFP Corporations*

A key to understanding, and eventually working with the Act, is to recognize that it differentiates among certain NFP corporations and accords modest differential treatment depending on the defining characteristics of the corporation. In particular, the Act recognizes three types of federal NFP corporations: (a) non-soliciting corporations; (b) soliciting corporations; and (c) religious corporations. A religious corporation comprises a subset of (a) or (b).

### *A) Non-Soliciting Corporations*

Non-soliciting corporations are the residual category.<sup>9</sup> Thus, any corporation that is not a soliciting corporation fits into the non-soliciting category.

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<sup>8</sup> See Wayne D. Gray, "The Late, But Welcome, Arrival of a New Federal Not-for-profit Corporations Law" (2010) 49 Can. Bus. L.J. 40. As indicated in its title, this article gives the Act high marks overall.

<sup>9</sup> Note that the Act uses, but does not define, the term "non-soliciting corporation."

## B) *Soliciting Corporations*

The Act recognizes a fundamental distinction between soliciting and non-soliciting corporations. The statutory distinction roughly correlates to the real-world distinction between public benefit corporations (which are akin to soliciting corporations) and mutual benefit corporations (which are akin to non-soliciting corporations) except that the Act relies on a measure of public funding as a proxy for the difference in the corporation's intended beneficiaries or purpose. The basic premise is that corporations that receive public funds (in a broad sense) should, in the public interest, be subject to tighter regulation than those corporations that do not rely on public funding. There are, therefore, two separate elements of the distinction. First, there are minimum governance standards or rules imposed on soliciting corporations that are not imposed on non-soliciting corporations.<sup>10</sup> Second, there is a concomitant need to differentiate the two types of corporations. In this regard, the Act relies on the brightest of bright-line tests: funds received in a specified timeframe.

The Act does not attempt to distinguish between soliciting and non-soliciting corporations on the basis of their underlying objects, the nature of their underlying activities or their charitable (or non-charitable) status under the *Income Tax Act* (Canada) (*ITA*).<sup>11</sup> Instead, under the *CNCA*, the definition of "soliciting corporation" is based on whether aggregate receipts from a short-list of public sources during a financial period are in excess of \$10,000.<sup>12</sup> If a corporation's revenues from public sources exceed \$10,000 in, say, 2011 (FY1), the corporation would be a soliciting corporation commencing at its next ensuing annual meeting (held in 2012 or FY2) and ending (unless extended by its revenues in a subsequent financial period) at the annual meeting held three years later (that is, in 2015 or FY5). In effect, this low financial threshold comprises a *de minimis* exemption. It is designed to filter out the inadvertent capture of corporations that do not receive significant public funds. The annual period to calculate revenues strikes a balance between continuity for an organization over time and flexibility where its funding sources have permanently changed.

The funding sources that determine whether a corporation is "soliciting" are:

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<sup>10</sup> See the discussion in Parts 3 and 4 of this article.

<sup>11</sup> R.S.C. 1985, c. 1 (5th Supp.).

<sup>12</sup> Act, *supra* note 5, s. 2(1) definition of "soliciting corporation" and s. 2(5.1) read in conjunction with *CNCR*, *supra* note 5, s. 16.

- (a) public donors (more specifically, donors who are not members, directors, officers or employees of the corporation at the time of the funding request or persons who are related by blood, marriage or cohabitation arrangement to such persons);
- (b) governments or governmental agencies (whether federal, provincial or municipal); and
- (c) conduit entities (other soliciting corporations or other entities that have received funds in excess of \$10,000 in its previous financial period from these same sources).<sup>13</sup>

Funding source (c) (conduit entities) is primarily intended to capture indirect funding from public sources, in other words, funds received through a conduit that is itself publicly funded (such as the United Way).

To clarify, a donation from a person who is not an existing member at the time of the funding request, but who, in accordance with the articles or by-laws governing admission of members, becomes a member as a result of making a donation, is to be included in calculating the receipt of public funds. However, a donation from, or membership contributions or dues payable by, an already existing member does not count in determining the receipt of public funds. Similarly, unsolicited donations, such as a gift left to the NFP corporation under a will, do not count in determining the amount of public funding.

The test for determining whether a corporation is a “soliciting corporation” is effectively applied on the last day of its fiscal year-end.<sup>14</sup>

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<sup>13</sup> *CNCA*, *supra* note 5, s. 2(5.1). Gray, *supra* note 8 at 45 concludes that the approach to differentiating between soliciting and non-soliciting corporations is one of the Act’s fundamental strengths. The other fundamental strengths are selecting the *CBCA* model, adapting the *CBCA* model to NFP corporations, defining NFP corporations exclusively by their liquidation constraints and differentiating soliciting and non-soliciting corporations by functional rules and a bright-line financial test.

<sup>14</sup> Under the draft Regulations, the “prescribed period” is one financial year (FY). The “prescribed duration” is three years, but a corporation does not begin to be a “soliciting corporation” until the annual meeting immediately following the year-end in which it exceeds the \$10,000 annual revenue threshold. The reason for the delay in change of status is to afford the corporation time to make any necessary changes at its ensuing annual meeting such as, for example, changes in the size and composition of the board, appointment of a public accountant, level of review to be conducted with respect to the annual financial statements and amendment to the liquidation distribution provisions of the articles. Thus, if corporation, C, receives \$10,001 in FY1 and receives less than \$10,000 in each subsequent financial year, it would become a soliciting corporation at its annual meeting in FY2 and remain a soliciting corporation until its annual meeting in FY5.

The test is not applied at any other point during a fiscal period. Thus, for example, assume that the fiscal period of corporation C, ends on December 31 each year and that it only receives \$6,000 in public funds on December 15, 2011 and a further \$6,000 in public funds on January 15, 2012. C will not become a soliciting corporation by virtue of these receipts because in no financial year did its receipts from public funds exceed \$10,000. On the other hand, if C receives \$6,000 on January 15, 2011 and a further \$6,000 on December 15, 2011, it would become a soliciting corporation from its 2012 annual meeting through to its 2015 annual meeting. A non-soliciting corporation becomes a soliciting corporation at the first annual meeting held after the financial period in which its revenues from public sources exceed \$10,000.

As a further safety-valve, the Act empowers the Director appointed under section 281 to determine that a specific applicant corporation is not, or was not, "... a soliciting corporation if the Director is satisfied that the determination would not be prejudicial to the public interest."<sup>15</sup>

### *C) Religious Corporations*

The Act provides that religious corporations enjoy an exemption from court-ordered liquidations, derivative actions and oppression proceedings (but not a compliance or restraining order issued under section 259) if:

- (a) the impugned act, omission, conduct or exercise of powers is based on a tenet of faith held by the members of the corporation; and
- (b) it was reasonable to base the act, omission, conduct or powers on the tenet of faith, having regard to the corporation's activities.<sup>16</sup>

The Act does not, however, attempt to define what constitutes a "religious corporation" or a "tenet of faith." Instead, these concepts have been intentionally left to the courts. Thus, religious corporations will not

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<sup>15</sup> *CNCA*, *supra* note 5, s. 2(6).

<sup>16</sup> *Ibid.*, ss. 224(2) (liquidation), 250(3) (derivative action) and 253(3) (oppression remedy). While a complete discussion of the need for a carve-out for religious corporations is beyond the scope of this article, it is doubtful that courts would choose to adjudicate on tenets of faith in the absence of specific provisions. Courts pay deference to the business judgment of boards and management of for-profit corporations without legislative mandate. Much the same institutional incapacity operates in the case of tenets of faith as it does in the case of the business judgment rule; see *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461, 244 D.L.R. (4th) 564. That said, courts will doubtless find the specific carve-outs handy.

be entirely immune from the disciplinary effects of the liquidation, derivative action and oppression remedies. For example, courts will be able to deal with cases involving misappropriation of church property but will not have jurisdiction to hear disputes involving religious tenets of faith that are more properly argued outside of any courtroom.

In most (but not necessarily all) cases, a religious corporation can be expected to receive a type of funding that will make it a soliciting corporation.

### 3. Regulation of Soliciting and Non-Soliciting Corporations

As stated, the Act regulates soliciting corporations more tightly than non-soliciting corporations. The regulatory differences between these two types of corporations are set out in Table 1 below.

<b>Table 1 – Regulatory Differences Between Soliciting and Non-Soliciting Corporations</b>		
<b>Subject</b>	<b>Soliciting Corporation</b>	<b>Non-Soliciting Corporation</b>
Liquidation of residual assets <sup>17</sup>	Any residual assets (after satisfying all liabilities and returning property to a donor who gave the property on condition that it would be returned on dissolution) are to be distributed exclusively to one or more “qualified donees,” defined as such under the <i>ITA</i> . <sup>18</sup> Qualified donees under the <i>ITA</i> comprise registered charities, registered national arts service organizations, housing corporations in Canada set up exclusively	Unrestricted, <i>i.e.</i> , at liberty to provide in its articles for the distribution of residual property upon liquidation to qualified donees or anyone else. In the absence of specific provision in the articles, the default rule is that, on liquidation, the residual assets are to be distributed equally to members on a per

*Table 1 continued ...*

<sup>17</sup> As stated at footnote 12 above, Gray, *supra* note 8 at 44-45, lists the Act’s approach to defining the NFP corporation on the basis of its liquidation constraint as one of its fundamental strengths.

<sup>18</sup> *CNCA*, *supra* note 5, ss. 235 and 234. Note that s. 235 technically extends beyond non-soliciting corporations to include other “registered charities” within the meaning of s. 248(1) of the *ITA*, *supra* note 11, and corporations that have received more than \$10,000 from public sources in any financial period ended within 5 years of the liquidation date. See, also, the *CNCR*, *supra* note 5, s. 37. For purposes of the liquidation distribution, the corporations to which s. 235 applies might be described as “extended soliciting corporations.”

<b>Table 1 – Regulatory Differences Between Soliciting and Non-Soliciting Corporations</b>		
<i>... continued from previous page</i>		
<b>Subject</b>	<b>Soliciting Corporation</b>	<b>Non-Soliciting Corporation</b>
	to provide low-cost housing for the aged, the Crown (federal, provincial or territorial), Canadian municipalities, the United Nations and its agencies, foreign universities the student body of which ordinarily includes Canadian students and foreign charitable organizations to which the Government of Canada has made a gift in the donor's taxation year or in the 12 months before that period. <sup>19</sup>	capita basis. <sup>20</sup>
Board composition <sup>21</sup>	Minimum of 3 directors and a minimum of 2 non-management directors ( <i>i.e.</i> , directors who are not officers or employees of the corporation or an affiliate). <sup>22</sup>	Only needs 1 director. <sup>23</sup> No statutory prohibition against having a board consisting entirely of management ( <i>i.e.</i> , all officers and employees of the corporation).
Appointing a public accountant and waiving the audit requirement <sup>24</sup>	See Table 2 of this article.	See Table 2 of this article.
Filing annual financial statements <sup>25</sup>	Must file annual financial statements with Corporations Canada where they will be	No public filing requirement – although the Director may
<i>Table 1 continued ...</i>		

<sup>19</sup> *ITA*, *supra* note 11, ss. 110.1(1)(a) and (b), 118.1(1), 149.1(1) and 248(1), definition of “qualified donee.”

<sup>20</sup> *CNCA*, *supra* note 5, s. 236.

<sup>21</sup> In Gray, *supra* note 8 at 55-57, I express the concern that the rules applicable to non-soliciting corporations (including boards consisting of only one director or that exclude outside directors) may encourage unwarranted exploitation of the tax exempt status available to certain NFP organizations.

<sup>22</sup> *CNCA*, *supra* note 5, s. 125. Here, the term “non-management” is meant to be short-hand for a director who is neither an officer nor an employee of the corporation or any affiliate.

<sup>23</sup> *Ibid.*

<sup>24</sup> Gray, *supra* note 8 at 63 questions whether the distinctions between soliciting and non-soliciting corporations with respect to appointing a public accountant and the level of review of financial statements could have been eliminated in the interests of regulatory simplification.

<sup>25</sup> The requirement that soliciting corporations file their financial statements with Corporations Canada (where they will be available for inspection and copying by any member of the public) is justifiable on the basis of providing transparency and, thereby, encouraging public confidence in NFP corporations – that, by definition, receive funding from public sources. Generally, public disclosure of the financial statements of non-soliciting corporations would be an inappropriate intrusion into the affairs of what are

**Table 1 – Regulatory Differences Between Soliciting and Non-Soliciting Corporations**

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Subject	Soliciting Corporation	Non-Soliciting Corporation
	available for inspection/copying by any member of the public (similar to the requirement that a distributing corporation under the CBCA <sup>26</sup> file its annual financial statements with Corporations Canada). <sup>27</sup>	require a private filing. <sup>28</sup> Are required to circulate financial statements or a summary thereof to members in advance of the annual meeting or, alternatively, provide in its by-laws for a mechanism whereby the corporation simply notifies members in advance of the annual meeting that a copy of the financial statements or a summary thereof will be provided to those members who request them. <sup>29</sup>
Unanimous member agreement (UMA) or unanimous member declaration (UMD) <sup>30</sup>	Not available. <sup>31</sup>	Members have the option to enter into a UMA or UMD under which some or all board authorities, powers and liabilities are transferred to members. <sup>32</sup>

#### 4. Public Accountants and Audits

The default rules applicable to every corporation under the Act are that it must appoint a public accountant and have an audit of its annual financial statement. However, in recognition that, for smaller NFP corporations, the costs of appointing a public accountant and having an audit may outweigh the incremental benefits, various exemptions are available in the Act and the regulations based primarily on the type of corporation,

essentially “mutual benefit” organizations. Nevertheless, for policing reasons, the Director retains the authority under the Act to order a non-soliciting corporation to file its financial statements with the Director, but, at the same time, the Act exempts such financial statements from public disclosure through Corporations Canada.

<sup>26</sup> *Supra* note 4, s. 160(1).

<sup>27</sup> *CNCA, supra* note 5, s. 176(1).

<sup>28</sup> See the discussion at note 25 on the power of the Director to order the filing of financial statements by a non-soliciting corporation. The term “private filing” is used here to differentiate the blanket mandatory filing of financial statements by soliciting corporations (that are available to the public) and the non-soliciting corporation-specific filing required by the Director (resulting in filings that are not available to the public).

<sup>29</sup> *CNCA, supra* note 5, ss. 175(1) and (2).

<sup>30</sup> Since members of soliciting corporations have no economic rights as such (either before or upon liquidation), a unanimous member agreement (UMA) or unanimous member declaration (UMD) is inappropriate for a soliciting corporation.

<sup>31</sup> *CNCA, supra* note 5, s. 170(1).

<sup>32</sup> *Ibid.*

the aggregate revenue in the last completed financial period of the corporation and annual membership approval. As well, the Director appointed under the Act is vested with the discretion to, in effect, increase the revenue thresholds applicable to particular soliciting corporations (but not to non-soliciting corporations).<sup>33</sup> These exemption rules are summarized in Table 2 below.

<b>Table 2 – Exemptions from Public Accountant and Audit Requirements</b>			
<b>Type of Corporation</b>	<b>Annual Revenues (AR) for Previous Financial Year (FY)</b>	<b>Public Accountant (PA)</b>	<b>Audit/Review Engagement/Compilation<sup>34</sup></b>
Soliciting	AR ≤ \$50,000	PA not required if members entitled to vote at an annual meeting unanimously consent. Waiver must be made annually. <sup>35</sup>	Compilation applies if no PA. If PA appointed, review engagement applies unless members pass an ordinary resolution ( <i>i.e.</i> , not less than a simple majority voting approval) requiring an audit. <sup>36</sup>
	\$50,000 < AR ≤ \$250,000	Appointment of PA required unless (i) the Director is satisfied that deeming AR to be ≤ \$50,000 would not be prejudicial to public interest; and (ii) the other conditions immediately above are met. <sup>37</sup>	Audit may be waived in favour of review engagement by special resolution of members ( <i>i.e.</i> , not less than 2/3rds voting approval). <sup>38</sup>
			<i>Table 2 continued ...</i>

<sup>33</sup> *Ibid.*, s. 190. The Director appointed under the Act has the power to deem a soliciting corporation not to have exceeded the \$50,000 threshold (governing the appointment of a public accountant) and \$250,000 threshold (governing the requirement for an audit rather than a review engagement report) where to do so “would not be prejudicial to the public interest.” Note that the Director’s power under s. 190 is in addition to the Director’s power under s. 2(6) to, in effect, make a determination that a particular corporation is deemed not to be a soliciting corporation.

<sup>34</sup> In a compilation, no public accountant expresses any opinion on the financial statement. Where a public accountant does prepare the compilation report, the financial statement is accompanied by a “notice-to-reader” warning of the accounting firm’s limited engagement.

<sup>35</sup> *Ibid.*, ss. 179(a) and 182, and *CNCR*, s. 80(1).

<sup>36</sup> *CNCA*, *supra* note 5, s. 188. Note that, in these circumstances, only the approval of those members entitled to vote at an annual meeting is needed to require an audit. Members not entitled to vote at an annual meeting have no say on whether to require an audit.

<sup>37</sup> *Ibid.*, ss. 181(1) and 190(a).

<sup>38</sup> *Ibid.*, ss. 189(2) and 190(b), and *CNCR*, s. 84. Again, in these circumstances, only the approval of those members entitled to vote at an annual meeting is necessary to require

**Table 2 – Exemptions from Public Accountant and Audit Requirements**

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Type of Corporation	Annual Revenues (AR) for Previous Financial Year (FY)	Public Accountant (PA)	Audit/Review Engagement/Compilation <sup>34</sup>
Soliciting	\$250,000 < AR	Same as immediately above.	Audit required unless (i) the Director is satisfied that deeming AR to be ≤ \$250,000 would not be prejudicial to the public interest and (ii) the other conditions immediately above are met (in which case review engagement applies). <sup>39</sup> If (i) the Director is satisfied that deeming AR to be ≤ \$50,000 would not be prejudicial to the public interest and (ii) the other conditions above for waiving appointment of PA are met, compilation report applies. <sup>40</sup>
Non-Soliciting	AR ≤ \$1,000,000	PA not required if members entitled to vote at an annual meeting unanimously consent. Waiver must be made annually. <sup>41</sup>	Compilation report applies if no PA. If PA appointed, review engagement applies unless members pass ordinary resolution requiring an audit. <sup>42</sup>
	\$1,000,000 < AR	PA required. <sup>43</sup>	Audit required. <sup>44</sup>

### 5. Modernized Corporate Law Framework

The new Act provides a comprehensive, modern framework for the governance of federal NFP corporations. It is closely modelled on the *CBCA* template – by far the dominant Canadian corporate model. As I have argued elsewhere, selection of the *CBCA* model as its starting point

an audit. Members not entitled to vote at an annual meeting have no say on waiver of an audit requirement (unless, for example, the articles specifically require a separate class approval)

<sup>39</sup> *CNCA*, *supra* note 5, s. 190.

<sup>40</sup> *Ibid.*, ss. 189(2) and 190(b), and *CNCR*, s. 84.

<sup>41</sup> *CNCA*, *ibid.*, ss. 179(b) and 182; and *CNCR*, s. 80(2).

<sup>42</sup> *CNCA*, *ibid.*, s. 188. Again, in these circumstances, only the approval of those members entitled to vote at an annual meeting is necessary to require an audit. Members not entitled to vote at an annual meeting have no say on whether to require an audit.

<sup>43</sup> *Ibid.*, s. 181(1).

<sup>44</sup> *Ibid.*, s. 189(1).

is one of the core strengths of the *CNCA*.<sup>45</sup> One useful by-product of using the *CBCA* template is that the *CNCA* is thereby made much more accessible to non-specialists (lawyers and lay users) than would have been the case if a highly idiosyncratic NFP corporate statute had been enacted instead. As well, use of the *CBCA* template allows federal NFP corporations, their advisors and the courts to tap into the rich reservoir of case law that has accumulated under the *CBCA*, and cognate federal, provincial and territorial corporate legislation, during the past thirty-five years.

### *A) Incorporation*

The Act abandons the letters patent system that makes incorporation an exercise in Crown prerogative and, therefore, not subject to judicial challenge. Instead, incorporation under the Act is as of right (subject to the same name clearance requirements found in the *CBCA*),<sup>46</sup> except that, under the Act, there are no mandatory legal elements such as “Inc.,” “Corp.,” “Association” or “Society.”

Articles of incorporation for a *CNCA* corporation will closely parallel the articles required for incorporation of a *CBCA* corporation. This will include the name of the corporation (except, in the case of a *CBCA* corporation, one of the mandatory legal elements), the province where the registered office is located, the number of directors or the minimum and maximum number of directors and any restrictions on the activities that the corporation may carry on.<sup>47</sup> In addition, the articles must 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 these classes or groups.<sup>48</sup> Further, the articles

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<sup>45</sup> See Gray, *supra* note 8 at 43. In effect, the *CNCA* completes a matched set of corporate statutes at the federal level that includes the *CBCA*, *supra* note 4, the *Canada Cooperatives Act*, S.C. 1998, c. 1, the *Bank Act*, S.C. 1991, c. 46 and other statutes governing federal financial institutions. The real issue becomes the nature and extent of the deviations from the *CBCA* model to adapt it to the world of non-share capital corporations. On the whole, Gray, *ibid.* at 43-44, concludes that most (but not all) of the adaptations of the *CBCA* model in the *CNCA* are well-conceived. Some adaptations reduce to a judgment call on whether the *CNCA* has gone far enough or whether it exhibits a degree of path dependency in that it still too closely tracts the *CBCA*.

<sup>46</sup> *CNCA supra* note 5, s. 13(1); and *CNCR*, Part 3 (Corporate Names), ss. 42-59. For *CBCA* corporations, the counterparts are *CBCA*, *supra* note 4, s. 12(1); and the *Canada Business Corporations Act Regulations, 2001*, SOR/2001-512 (*CBCR*), Part II (Corporate Names), ss. 17-34.

<sup>47</sup> *CNCA, ibid.*, ss. 7(1)(a), (b), (d) and (e).

<sup>48</sup> *Ibid.*, ss. 7(1)(c).

must contain statements concerning (a) the distribution of residual assets on liquidation and (b) the purpose of the corporation.<sup>49</sup>

Finally, the articles may, but are not required to, entrench any provisions that could be set out in the by-laws.<sup>50</sup> Where the articles do so, “[a]ny requirement under [the] Act to set out a provision in the by-laws is deemed met by setting out the provisions in the articles.”<sup>51</sup>

### *B) Abolition of Ultra Vires Doctrine, and Restricting the Activities of Registered Charities*

Like the *CBCA*, the new Act abolishes the *ultra vires* doctrine.<sup>52</sup> Thus, the statement of purpose in the corporation’s articles will not operate to invalidate activities carried on by the corporation that a member or third party could argue fall outside the authorized purposes of the corporation. Rather, *CNCA* corporations will enjoy all of the rights, powers and privileges of a natural person, thereby enabling such corporations to engage in any commercial or non-commercial activities, subject only to voluntary restrictions contained in the articles.<sup>53</sup> Whether the abolition of *ultra vires* is complete is discussed in further detail at a later point in this article.

A corporation that is intended to be a registered charity under the *ITA* will need to adopt voluntary restrictions on its activities to meet the requirements of Canada Revenue Agency (CRA) to qualify for, and maintain, status as a registered charity. For example, a charity whose objects state that the corporation is to provide shelter for the poor could cast its articles to state, “The corporation shall not carry on any activities other than the provision of shelter for the poor.” Saskatchewan charitable corporations have pioneered these techniques since 1997.<sup>54</sup>

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<sup>49</sup> *Ibid.*, ss. 7(1)(f) and (g). However, the Act assigns no legal purpose to the purpose requirement.

<sup>50</sup> *Ibid.*, s. 7(3).

<sup>51</sup> *Ibid.*, s. 7(3.1). Stated otherwise, where the Act states that a statutory rule is subject to the by-laws (opt-out) or that the by-laws may provide for a rule (opt-in), the reference in the Act to the “by-laws” includes the articles if that by-law provision is entrenched in the articles.

<sup>52</sup> *Ibid.*, s. 16(1); see also the further discussion on s. 16(3) of the Act at Part 6(A), *infra*.

<sup>53</sup> *Ibid.*, ss. 16(1) and 17(2).

<sup>54</sup> Saskatchewan Act, *supra* note 3, s. 16(2).

### C) *Directors and Officers*

The *CNCA* replaces the common law duties of care and loyalty applicable to directors and officers with statutory duties of care and loyalty identical to those under the *CBCA*, and incorporates both the statutory due diligence and good faith reliance defences enshrined in the *CBCA*.<sup>55</sup> The *CNCA* expands the rights of indemnification, facilitates the advance of defence costs and permits an NFP corporation to purchase directors' and officers' liability insurance coverage.<sup>56</sup> The *CNCA* adopts substantially the same statutory conflict of interest regime found in the *CBCA*.<sup>57</sup>

To facilitate modern board practices, the *CNCA* expressly allows directors to meet by conference call and to transact business by way of written resolution.<sup>58</sup>

### D) *Members and Membership Rights and Remedies*

The Act permits membership interests to be transferable if the articles or by-laws so provide.<sup>59</sup> If the articles and by-laws are silent, the default rules are that membership interests are transferrable only to the corporation itself<sup>60</sup> and a member's interest in the corporation ceases to exist on termination of his or her membership.<sup>61</sup>

Except with respect to disputes on tenets of faith of religious corporations, members will enjoy enhanced rights, including the rights to bring an oppression action and to seek leave of the court to bring a derivative action on behalf of the corporation.<sup>62</sup> Subject to the same exception for religious tenets of faith, members retain their existing rights under the *CCA* to bring an application for the just and equitable winding-up of their corporation as well as expanded grounds for seeking winding up of the corporation.<sup>63</sup> Courts will have greater flexibility to avoid draconian liquidation orders and instead make lesser, more

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<sup>55</sup> *CNCA*, *supra* note 5, ss. 148(1), 149 and 150.

<sup>56</sup> *Ibid.*, s. 151.

<sup>57</sup> *Ibid.*, 141.

<sup>58</sup> *Ibid.*, ss. 136(7) and 140(1) respectively.

<sup>59</sup> *Ibid.*, s. 154(8).

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, s. 157.

<sup>62</sup> *Ibid.*, ss. 253 and 251 respectively. Under s. 251, leave can also be granted to defend an action brought against the corporation.

<sup>63</sup> *Ibid.*, s. 224.

context-sensitive orders that are still sufficient to rectify the grounds of complaint.<sup>64</sup> Finally, members (including members of religious corporations) will have the right to seek a summary compliance or restraining order.<sup>65</sup>

Time will tell how often and in what circumstances members will invoke these new remedies. At least in the case of soliciting corporations, members (unless they happen to be “qualified donees” entitled to residual assets upon liquidation) will not have the same economic incentives to invoke corporate law remedies that shareholders in *CBCA* corporations have long exercised. Therefore, even in the proportion of *CNCA* corporations to *CBCA* corporations, the volume of membership litigation should be far less than the volume of shareholder litigation in our courts.

Perhaps more important than these judicial remedies, the Act gives members the power to set the number of directors and remove directors before the expiration of their terms of office by ordinary resolution.<sup>66</sup> This makes directors accountable to members and subject to removal by members at any time.

Again, as with directors, the Act expressly allows members to meet by conference call and to transact business by way of written resolution.<sup>67</sup>

### *E) By-laws*

The Act replaces the cumbersome procedure for adopting or amending by-laws, which under the *CCA*, requires approval by the directors, members and, finally, Corporations Canada. Under the new Act, directors will have the residual power to pass by-laws and amending by-laws.<sup>68</sup> With some exceptions discussed below, the board may pass by-laws or amending by-laws that take effect immediately and that will remain in effect unless the members fail to confirm such by-laws or amending by-laws at the next ensuing meeting of members.<sup>69</sup> In

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<sup>64</sup> *Ibid.*, s. 224(3), which cross-references to the wide relief available under the s. 253 oppression remedy.

<sup>65</sup> *Ibid.*, ss. 259 (compliance/restraining order) and 260 (summary application).

<sup>66</sup> *Ibid.*, ss. 130 and 131. Subsection 7(5) of the Act prevents the articles from entrenching directors, *i.e.*, the articles cannot require that more than a simple majority of those members entitled to vote thereon is needed to remove a director.

<sup>67</sup> *Ibid.*, ss. 159(4) and 166(1) respectively.

<sup>68</sup> *Ibid.* s. 152(1).

<sup>69</sup> *Ibid.*, ss. 152(2) and (3).

addition, while by-laws or amending by-laws must be filed with Corporations Canada within 12 months from confirmation by the members, they will no longer require the approval of Industry Canada or any other governmental approval.<sup>70</sup> By-laws do not lose any of their effectiveness just because they are not filed.

#### *F) Borrowing*

Under the Act, directors have the default power to borrow and grant security on behalf of the corporation subject to any contrary restrictions imposed by the articles, by-laws or, in the case of a non-soliciting corporation, a UMA.<sup>71</sup> In this important respect as well, the borrowing authority rules long applicable to *CBCA* corporations will be extended to *CNCA* corporations, which should help reduce their transactions costs incrementally.

#### *G) Fundamental Changes*

To a significant extent, the *CNCA* tracks the *CBCA* provisions governing amendments to articles (including changes to membership rights), amalgamation, continuance (import to the *CNCA* or export from the *CNCA* to the laws of a province, territory or foreign jurisdiction), sale (lease or exchange) of all or substantially all the corporation's property and court-ordered arrangements and reorganizations.<sup>72</sup> As stated in Part 1 of this article, the provisions for continuance<sup>73</sup> into or out of the federal jurisdiction are new and have not previously been available under the *CCA*.

In general, fundamental changes will require the approval of two-thirds of each class of member voting at a special meeting or the unanimous written consent of such members. However, in contrast to the *CBCA*, the *CNCA* does not provide a statutory dissent and appraisal right – presumably on the assumption that, even in the case of non-soliciting corporations where members have a residual economic interest, the costs entailed in exercising the appraisal right likely outweigh any anticipated benefits for members. Other important differences between fundamental changes obtaining under the *CNCA* and the *CBCA* are discussed in the next part of this article.

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<sup>70</sup> *Ibid.*, ss. 152(3) and 153; and *CBCR*, *supra* note 46, s. 60.

<sup>71</sup> *CNCA*, *supra* note 5, s. 28(1).

<sup>72</sup> *Ibid.*, Part 13 (Fundamental Changes), ss. 197-216.

<sup>73</sup> *Ibid.*, ss. 211 and 212 (import continuance) and 213 (export continuance).

## 6. Problems and Solutions

In the long gestation period leading to passage of the Act, several questions emerged on possible problems, theoretical or practical, once the Act goes into effect.<sup>74</sup> The purpose of this Part 6 is to articulate the possible problems and, where necessary, offer some pragmatic solutions.

### *A) Whether the Ultra Vires Doctrine is Preserved in Part*

Subsection 16(3) of the new Act provides that:

A corporation has the capacity to carry on its activities, conduct its affairs and exercise its powers in a jurisdiction outside Canada to the extent that the laws of that jurisdiction permit.

Some have seen this provision as problematic for those federal NFP corporations operating in foreign countries and have even suggested that an amendment to the new Act is needed to enable these NFP corporations to continue carrying on their activities in foreign countries.<sup>75</sup> On close examination, however, the concern that section 16 will be less than fully effective to abolish the *ultra vires* doctrine is unfounded.

Section 16 of the *CNCA* is identical to section 15 of the *CBCA*. Sections 15 and 16 of the Ontario *Business Corporations Act*<sup>76</sup> and section 15 of the Saskatchewan Act<sup>77</sup> are substantively to the same effect. While the provision is new for federal NFP corporations, the same

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<sup>74</sup> The possible problems identified in Part 6 of this article derive from various sources. Some are reflected in The Canadian Bar Association, National Business Law and National Charities and Not-for-profit Law Sections, “*Submission on Bill C-4 – Canada Not-for-profit Corporations Act*” (February 2009), online: Canadian Bar Association: <<http://www.cba.org/CBA/submissions/pdf/09-08-eng.pdf>> (CBA Submission). Others have been raised in various continuing legal education programs on the *CNCA* in which I have spoken, including CBA programs held on November 10 and December 15, 2009 and an Insight program held on November 23-24, 2009. Other practitioners have raised some of the following problems with me in telephone and email discussions since Bill C-62, the predecessor of Bill C-4, received first reading on June 13, 2008.

<sup>75</sup> A practitioner first raised this issue in telephone and email communications with me. As well, at least one major charitable group has expressed the same concern. See also: Clifford S. Goldfarb, “C4-Transitioning to the New *Canada Not-for-profit Corporations Act*” (Insight Non-Profit and Charity Seminar, November 23-24, 2009) at 11, raising but appearing to accept the arguments advanced here.

<sup>76</sup> R.S.O. 1990, c. B.16 (*OBCA*).

<sup>77</sup> *Supra* note 3.

provision has existed for many years in the *CBCA* and all of the federal, provincial and territorial statutes modelled on the *CBCA* without any apparent problem.

The Dickerson Committee<sup>78</sup> clearly favoured abolishing the *ultra vires* doctrine through what ultimately became section 15 of the *CBCA*. Professor Peter Cumming intended the same in his 1973 monograph, *Proposals for a New Not-for-profit Corporations Law for Canada*.<sup>79</sup>

Section 15 of the *CBCA*, and its *OBCA* counterpart, were considered by the Supreme Court of Canada in *Communities Economic Development Fund v. Canadian Pickles Corp.*,<sup>80</sup> where Iacobucci J., writing for a unanimous court, held that the *ultra vires* doctrine was abolished by section 15 for corporations that incorporate under the *CBCA* (and by sections 15 and 16 for corporations that incorporate under the *OBCA*). He further stated that the general abolition of the *ultra vires* doctrine is in accordance with sound policy and common sense. The original purposes of the doctrine were to protect creditors by ensuring that funds of the corporation to which creditors must look for payment are not dissipated in unauthorized activities and to protect investors by allowing them to know the objects for which their money is to be used. These purposes were largely frustrated. Subsequent statutory and case law developments made the doctrine a protection for no one and a trap for the unwary. There was no suggestion in *Canadian Pickles* that section 15(3) of the *CBCA* qualifies the abolition of the *ultra vires* doctrine in any way, keeping the doctrine alive outside of Canada or automatically transforming all corporate acts that may breach a foreign law into an *ultra vires* act under domestic law.

The simple purpose of section 16(3) is to codify cases such as *Bonanza Creek Gold Mining Co. v. R.*<sup>81</sup> and to ensure that the useful result in *Bonanza Creek* is not lost as a result of replacing a letters patent incorporation regime with a registration regime. In *Bonanza Creek*, the Judicial Committee of the Privy Council stated that, in the absence of

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<sup>78</sup> Robert W.V. Dickerson, Leon Getz and John L. Howard, *Proposals for a New Business Corporations Law for Canada: Commentary and Draft Act*, vol. 1 (Ottawa: Information Canada, 1971) at 26.

<sup>79</sup> Department of Consumer and Corporate Affairs, 1973, Vol. 1 at 26.

<sup>80</sup> [1991] 3 S.C.R. 388 [*Canadian Pickles*].

<sup>81</sup> [1916] A.C. 566 (P.C.) [*Bonanza Creek*], which considered the *Companies Act*, R.S.O. 1897, an early Ontario letters patent statute. Subsection 16(3), and its *CBCA* ancestor, reflect a concern that the useful ruling in *Bonanza Creek* may be distinguished (and, therefore, lost) where a corporation is formed under a registration statute such as the *CNCA* or the *CBCA*.

express legislative restrictions, a provincially-incorporated corporation may accept powers and rights conferred on it by authorities outside of its incorporation jurisdiction. Similarly, in *Smith v. Draper Dobie & Co.*,<sup>82</sup> the Supreme Court of Alberta (as it then was) held that what is now section 16(3) of the *OBCA* gives an Ontario corporation the right to exercise powers outside Ontario as permitted by the applicable laws of the host jurisdiction, in that case, Alberta. Laws of a host foreign jurisdiction can always limit the powers exercisable in that jurisdiction by a federal, provincial or territorial corporation. Extrapolating from *Bonanza Creek*, a *CBCA* or *CNCA* corporation should be able to accept powers and rights conferred on it by authorities outside of Canada in the absence of express restrictions to the contrary in the host jurisdiction.

Even on a plain reading, section 16(3) is enabling, not disabling. It contains a positive statement that “the corporation *has* the capacity to carry on its activities” in a jurisdiction outside of Canada. It does not in any way negate the positive capacity conferred by section 16(1), which the Supreme Court in *Canadian Pickles* held to be sufficient to abrogate the *ultra vires* doctrine. Despite section 16(1) of the Act, it is possible for a host foreign law to prohibit or restrict a *CNCA* corporation from operating within the host jurisdiction. Canadian corporate capacity cannot trump the application of foreign law.<sup>83</sup>

By the same token, the *ultra vires* doctrine is purely a function of the domestic law that governs a corporation. Foreign law can make a corporate act illegal but not *ultra vires*.

In any event, section 17(3) of the Act also has potential application. It confirms that the legislative intent of the Act is enabling – specifically that a mere contravention of the Act does not result in a declaration of invalidity. The *CBCA* formula for abolition of the *ultra vires* doctrine has withstood judicial scrutiny at the highest level. It would have been

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<sup>82</sup> (1978), 93 D.L.R. (3d) 69, 8 Alta. L.R. (2d) 84 (S.C.).

<sup>83</sup> A counter-argument can be made to the effect that to read s. 16(3) as enabling, rather than disabling, makes it redundant in light of s. 16(1). This counter-argument, however, conflates ss. 16(1) and (3) and ignores the legislative history that informs s. 16(3). *Bonanza Creek* was a case involving an Ontario letters patent corporation – to which the *ultra vires* doctrine *had no* application. Thus, the capacity of a provincial corporation to operate outside of its home province was not decided on the basis of the *ultra vires* doctrine but as a separate issue involving the capacity to assume extra-jurisdictional powers. While it is possible that a court could interpret s. 16(1) such that it renders s. 16(3) redundant, this assumption runs an unnecessary risk that would require a future appellate decision (or legislative amendment) to resolve. Meanwhile, Parliament has wisely chosen to put the issue of extra-territorial powers beyond doubt.

counterproductive for the *CNCA* to have undermined this certainty by deviating from the tested legislative formula for abolishing the *ultra vires* doctrine.

Those who are not persuaded by the foregoing analysis have few choices available other than learning to live with section 16(3) – given that an amendment to this provision before the Act is proclaimed into effect is extremely unlikely.

There are two such choices. One solution is to operate in foreign countries through a wholly-owned subsidiary – which may not be possible for a particular organization. The second solution is to continue the *CNCA* corporation to a more favourable Canadian jurisdiction, perhaps Ontario which, at the moment, has no counterpart of section 16(3) of the Act. A letters patent corporation, such as a non-share corporation subject to Part III of the Ontario *Corporations Act*,<sup>84</sup> has all of the powers of a natural person and enjoys the extra-territorial capacity enshrined in *Bonanza Creek*.

#### *B) Vacillation Between Soliciting and Non-Soliciting Status*

In the vast majority of cases, a corporation will either be earmarked as a soliciting corporation or as a non-soliciting corporation from its inception. Stated otherwise, the corporation will either be initially conceived of as a public benefit corporation or a mutual benefit corporation. The former will likely contemplate receipt of public funds and, if it qualifies for charitable status at common law, seek to become a registered charity under the *ITA*. A mutual benefit corporation would generally not expect to be receiving public funds. A mutual benefit corporation usually looks to its members for funding. By definition, funds received from members are excluded from the calculation of revenues that determine whether a corporation is a non-soliciting corporation. If a corporation nevertheless receives a *de minimis* level of public funds (less than \$10,000 in a financial period), it will not thereby be rendered a soliciting corporation.

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<sup>84</sup> R.S.O. 1990, c. C.38 (*OCA*). Note, however, the discussion at Part 9 below on the close similarity between the *CNCA* and the pending new legislation governing Ontario NFP corporations. Indeed, Bill 65, *An Act to revise the law in respect of not-for-profit corporations*, 2nd Sess., 39th Leg., Ontario, 2010, which received first reading in the Ontario Legislature on May 12, 2010, and second reading on June 2, 2010, includes s. 15(2) which is identical to *CNCA*, *supra* note 5, s. 16(3) (apart from changing “Canada” to “Ontario”).

However, there may be a small number of corporations under the Act that, over time, vacillate between soliciting and non-soliciting status.<sup>85</sup> Indeed, the annual revenue calculation is specifically designed to capture changes in status.

One option for corporations that expect to exist on the borderline between soliciting and non-soliciting status is to voluntarily adopt rules, or most of the rules, applicable to soliciting corporations, thereby eliminating the relevancy of the distinction for them. Thus, a corporation may voluntarily choose to:

- (a) provide in its articles that, on liquidation, the net assets are to be paid exclusively to qualified donees;
- (b) appoint not less than three directors (at least two of whom are non-management personnel);
- (c) appoint a public accountant (unless its revenues are less than \$50,000 in a financial year and all members consent);
- (d) require an audit each year (unless its revenues are less than \$250,000 in a financial year and its members waive the audit by special resolution);
- (e) file its financial statements with Corporations Canada;<sup>86</sup> and
- (f) not take up the opportunity to adopt a UMA.

In practice, a corporation that is content to voluntarily adopt the governance standards that are mandatory for soliciting corporations need no longer worry about whether its technical status may vacillate over time.

### *C) Lack of Knowledge Qualifier in Soliciting Corporation Status*

In most cases, a soliciting corporation will be able to monitor its receipts of funds to know whether they came from public sources. This will be particularly true of funds that consist of donations from individuals who are not members, directors, officers, employees or related persons or that

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<sup>85</sup> This potential issue was raised in the CBA Submission, *supra* note 74 at 5.

<sup>86</sup> While s. 177 of the *CNCA*, *supra* note 5, only requires a soliciting corporation to file its financial statements with Industry Canada, there is nothing in the Act that precludes a non-soliciting corporation from filing its financial statements on a voluntary basis.

consist of government grants. For many, these sources will suffice to exceed \$10,000 in a financial period.

However, there is a possibility that a corporation could receive a donation or gift from a donor that itself is a soliciting corporation (or another donor entity that received funds from public sources at or above that same level) without knowing the soliciting status of that donor corporation or entity and that that gift lifts the recipient corporation above the annual \$10,000 threshold.<sup>87</sup> The definition of “soliciting corporation”<sup>88</sup> in the Act does not have an explicit knowledge qualifier – that is, a requirement that a director or senior officer of the recipient corporation know the status of a particular donor entity before determining whether its donation must be included in (or excluded from) the annual revenue calculation.

One can expect that courts and the *CNCA* Director will not interpret “soliciting corporation” status in a way that allows a recipient *CNCA* corporation to turn a blind eye to the obvious or to fail to ask reasonable questions of its donors. A donation from a well-known soliciting corporation such as United Way cannot be ignored in the annual revenue calculation. At the other extreme, the Act does not impose a requirement on the recipient corporation so onerous that it forces such a corporation to choose between:

- (a) verifying the source of funds of each donor entity in the financial period with perfect certainty, failing which, such donation must be presumptively included in calculating revenues from public sources; and
- (b) declining the donation.

Somewhere between these extremes, corporations on the cusp of receiving \$10,000 from public sources will have to make a decision as to the status of the donor entity. In the real world, one would expect that entities that are generous enough to make a donation will wish to cooperate in providing recipient corporations with information on the donor’s status and, indeed, that such donor entities will have made enquiries of the recipient’s status before making the donation. Again, status as a soliciting corporation signifies that certain minimum governance norms apply.

However, in case a recipient corporation inadvertently or unwittingly becomes a soliciting corporation as a result of a donation from an entity

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<sup>87</sup> This issue was identified in the CBA Submission, *supra* note 74 at 5-6.

<sup>88</sup> *CNCA*, *supra* note 5, s. 2(5.1).

that later proves to have tripped the \$10,000 wire, what is highly unlikely to happen is that a court would rule that resolutions of the board are invalidated because, for example, they were passed at a time when the corporation thought that it did not need a minimum of three directors, at least two of whom are non-management personnel. Nor is a fine likely in these circumstances. A public accountant can always be appointed. Lack of an audit can always be rectified. Financial statements can be late-filed with the *CNCA* Director. If there is a UMA, it would be annulled as a constitutional document. However, arguably, some of the agreement could survive as an ordinary contract – the outcome likely depending on the application of well-developed principles of severability.<sup>89</sup>

One solution to the uncertainty surrounding the status of a recipient corporation as a result of receiving funds from a donor entity whose status is unknown to the recipient is the same as the solution to the problem of vacillating corporations discussed above. As long as the recipient corporation is willing to voluntarily adopt the minimum governance standards applicable to a soliciting corporation, the problem of not being certain as to the status of all donor entities disappears.

Another potential solution lies in section 2(6) of the Act – which, again, enables the Director to, in effect, deem a corporation not to be or have been a soliciting corporation where “the Director is satisfied that the determination would not be prejudicial to the public interest.” While it remains to be seen how this public interest discretion might be used, it is difficult to imagine a more compelling application than to a case where a corporation has, unbeknownst to it, become a soliciting corporation and, as a result, non-compliant with the governance standards applicable to a soliciting corporation. Notably, the Director’s determination can be made with retrospective effect – in case it is thought necessary to retroactively validate transactions authorized on the false assumption that the corporation could function with a board of less than three directors or less than two non-management directors or under a UMA.

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<sup>89</sup> For the most recent rulings of the Supreme Court of Canada on severance, see *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249 (applying notional severance to reduce a criminal interest rate to 60% *per annum*); and *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157 (*per* Rothstein J.) (refusing to apply notional severance to preserve the enforceability of an ambiguous restrictive covenant).

#### D) *Accidental or Unintentional Members*

Can a corporation governed by the Act inadvertently create members simply by describing a person or group of persons as a “member” or as “members” informally, that is, outside of its articles?<sup>90</sup>

While the Act does not define either “member” or “membership,” it is clear that, from a legal perspective, classes or groups of memberships can only be created through the articles, not by extra-constitutional means. Paragraph 7(1)(c) of the Act requires that the articles 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 attached to each of those classes or groups. The articles must also contain a statement concerning the distribution of net assets remaining on liquidation. The default rule for a non-soliciting corporation is that the net assets are distributable on a *per capita* basis to members.<sup>91</sup> Likewise, section 154(1) of the Act states that the by-laws shall set out the conditions required for being a member of the corporation. All members, voting and non-voting, are required to execute a UMA.<sup>92</sup>

To be sure, it would not be good practice for a corporation to call a person a “member” in circumstances in which the person does not qualify under the articles and by-laws for that status. However, there is nothing in the Act to suggest that informal or incorrect use of “member” and “membership” labels alone can legally create a membership interest not provided for under the articles and by-laws.

It may be that, in an egregious case, a person who has been misled as to his or her membership status may become a “complainant” within the meaning of section 250, entitled as such to bring an oppression action under section 253. However, the definition of “complainant” is clearly much wider than the concept of “member.”<sup>93</sup> Under the oppression remedy, a member is a *per se* complainant. However, to have status as a complainant, a court must, in its discretion, find the non-member to be a “proper person to make

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<sup>90</sup> Goldfarb, *supra* note 75 at 8.

<sup>91</sup> *CNCA*, *supra* note 5, s. 236(2). Again, technically, s. 235 (not s. 236(2)) applies to certain non-soliciting corporations. See footnote 18 for a brief discussion of “extended soliciting corporations.”

<sup>92</sup> Again, a UMA can only be created in respect of a non-soliciting corporation.

<sup>93</sup> Members (and former members) are only one of 5 categories of *per se* “complainants” for purposes of s. 250 and are, therefore, a subset of “complainant.” The other 4 categories of *per se* complainants are former and present holders of debt obligations, shareholders of affiliates, directors and officers as well as the “Director” appointed under s. 281 of the Act.

an application under” Part 16 of the Act. Even if a court determines that the applicant is a “proper person” to seek a remedy under Part 16, the person will have no voting, liquidation distribution or other rights *qua* member. Thus, for example, a failure to give notice to that person of a meeting of members will not invalidate the transaction of business at that meeting.

### *E) Minority Veto Power*

At least one NFP umbrella organization has expressed the concern that the Act fetters the hands of corporate management by giving minority groups in the corporation veto power on fundamental changes.<sup>94</sup> For example, it is argued that, even where, under the articles, a class of members are not intended to vote, the Act provides voting rights (or even class voting rights) that can block fundamental changes that the voting members would like to make.

Two important preliminary points should be emphasized here.

First, the concern about the veto power of members applies to those corporations that choose to have more than one class of membership. The purpose of having classes or groups of members is to give those members certain statutory protections. It is a mistake to see this as somehow restrictive or potentially problematic for the corporation. Classes exist to give corporations a ready-made device with which to provide for a complex membership structure. Whether a corporation chooses to use membership classes is entirely opt-in. However, if a corporation chooses to have different classes or groups of members, then the effect of the Act is to provide certain built-in protections for the members of that class. This structure is the essence of creating a separate class. All that the Act refuses to permit is the creation of completely illusory classes – classes whose class rights can be varied or destroyed without the consent of at least two-thirds of the members of the class who vote on the change.

If class rights provided under the *CNCA* are unpalatable, the corporation can choose not to use them. If they are used, they mean something. Class rights have long been useful under the *CBCA* and cognate federal, provincial and territorial legislation. They are likely to be of significant benefit as a tool for shaping corporations under the *CNCA* as well.

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<sup>94</sup> Imagine Canada, “Submission of The National Non-profit Sector Task Force on the Modernization of the Federal Not-for-Profit Corporations Law [to the Standing Committee on Industry, Science & Technology]” (February 2009), online: Imagine Canada <[http://www.imaginecanada.ca/files/www/en/publicaffairs/submission\\_to\\_house\\_of\\_commons\\_committee\\_03102009.pdf](http://www.imaginecanada.ca/files/www/en/publicaffairs/submission_to_house_of_commons_committee_03102009.pdf)>. (Imagine Canada Submission). See also, Goldfarb, *supra* note 75 at 6-7.

Second, as the ensuing analysis shows, the concern about minority voting rights impeding fundamental changes is overstated. Suppose, for argument's sake, that a corporation wishes to provide for a class of members but to minimize its veto power. How far can the corporation go? Put differently, to what extent is the voting regime built into the Act likely to impede fundamental changes that the majority wishes to implement? The answer is “negligible”.

The ensuing discussion, presupposes that the object is to create a class of membership but to minimize its veto power. This article returns below<sup>95</sup> to the theme of enfranchising members, but in the context of the corporation's chosen governance structure. The following analysis of membership voting rights should not be construed as implying that marginalizing a membership class is something necessarily to be pursued in practice. Rather, the discussion serves to explore the outer limits of the flexibility that is available under the Act for the purposes of assessing whether, as some contend, the Act goes too far in enfranchising non-voting members.

<b>Table 3 – Separate Class Votes on Articles of Amendment</b>			
<b>CNCA, s. 199(1)</b>	<b>Opt-out Y/N</b>	<b>Summary</b>	<b>CBCA counterpart</b>
(a)	Y	<i>Exchange, reclassify or cancel of all or part of class memberships</i>	s. 176(1)(b)
(b)	N	Add, change or remove rights or conditions attaching to class memberships (including reduction or removal of liquidation preference) or add, remove or change prejudicially voting or transfer rights of the class	s. 176(1)(c)
(c)	N	Increase rights of any other class having equal or superior voting rights to those of the protected class <sup>96</sup>	s. 176(1)(d)
(d)	N	Increase rights of a class of members having rights inferior to those of the protected class to make the inferior class equal or superior to the protected class	s. 176(1)(f)
(e)	Y	<i>Create a new class having rights equal or superior to those of the protected class</i>	s. 176(1)(e)
(f)	N	Exchange or create a right of exchange of all or part of the memberships of another class into memberships of the protected class	s. 176(1)(g)

<sup>95</sup> *Infra*, Part 7(A)(2).

<sup>96</sup> In this article, the term “protected class” refers to the class or group of members that may have an SCV right as a result of an amendment to the articles adverse to their rights.

In general terms, the Act provides tremendous flexibility in defining membership classes or groups and attaching voting rights to the various classes or groups. There are limited sets of circumstances, however, in which even non-voting members have statutory voting rights that cannot be removed or overridden by the articles.

### *1) Possible Issues*

#### *i) Amendments to Articles*

The starting point in the analysis is section 199(1) of the Act. It provides that members of a class or group are entitled to vote separately as a class or group (exercise an SCV) on a proposal to make certain amendments to the articles. There are six such amendments listed in section 199(1). These are summarized in Table 3 below.

As indicated in Table 3, sections 199(1)(a) and (e) (highlighted in *italics*) are entirely opt-out. The remaining provisions (sections 199(1)(b), (c), (d) and (f)) set out core protections that cannot be removed in the articles. They in effect define what a membership class or group means under the Act – providing the level of protection that would be expected of a corporation that has multiple classes. Replicating class protections in the articles would present a significant drafting challenge without the aid of section 199(1) – which automatically provides protections merely by choosing to create class rights.

As stated above, a corporation that wishes to maximize its future flexibility will best avoid creating more than one class. If it nevertheless prefers to have a multiple class structure, the corporation can opt out of certain of the less-core protections, (namely, sections 199(1)(a) and (e)), but not the other protections. The mandatory voting protection for classes is, therefore, limited. However, it is a mistake to consider the class structure as restrictive when members collectively choose it.

The ability, under section 199(1)(a), to opt out of an SCV where an amendment effects a “cancellation of all or part of the memberships of the class or group” means that, if desired, classes other than the protected class, Class NV, can cancel Class NV in its entirety without the consent of Class NV members. The ability, under section 199(1)(e), to opt out of an SCV where an amendment creates “... a new class or group of members having rights equal or superior to those of the [protected] class ...” means that, if desired, classes other than the protected class, Class NV, can reserve a trump card over the voting and other rights of the Class NV members (including, where applicable, a liquidation

preference). Clearly, Class NV members are vulnerable if the articles opt out of these protections. However, such Class NV members can obtain a copy of the articles and, if the rights are unacceptable, negotiate changes as a condition of becoming members of the corporation.

Section 199 of the Act provides that members of the protected class are entitled to an SCV on a proposal to amend the articles to effect any of the amendments set out in section 199(1) except those (in sections 199(1)(a) or (e)) that are explicitly excluded in the articles.<sup>97</sup> This confers an SCV on the protected class. For greater certainty, the Act provides that the protected class or group has an SCV even if it does not “otherwise carry the right to vote.”<sup>98</sup>

Hence, in substance, it will not be difficult to work around the limited protections that section 199(1) affords non-voting members. A corporation wishing to maximize flexibility can include in its articles a provision opting out of the class protections set out in sections 199(1)(a) and (e), simply elect not to use the class regime or provide for unilateral cancellation of the class.

## *ii) Amalgamations*

The Act protects membership classes or groups on an amalgamation or sale of all or substantially all of the assets of the corporation on much the same basis as set out in section 199(1). Otherwise, the class rights could be defeated by these other types of fundamental changes.

There are two separate levels of protection. The first level, enfranchisement, confers voting rights on what are otherwise non-voting members. The second level confers an SCV on the class of membership.

With respect to long-form amalgamations, section 206(3) enshrines the first level of protection, enfranchisement, stipulating that:

Each membership in an amalgamating corporation carries the right to vote in respect of an amalgamation agreement whether or not it otherwise carries the right to vote.

However, the Act does not stipulate that the non-voting class thereby has veto power, *i.e.*, an SCV. It is possible to ensure that the non-voting members, Class NV members, do not exercise veto power by expressly stipulating that they vote together with the voting class, (Class V), on an

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<sup>97</sup> *CNCA*, *supra* note 5, ss. 199(1) and (3).

<sup>98</sup> *Ibid.*, s. 199(2).

amalgamation, a sale of substantially all of the corporation's assets or an export continuance and that they do not have an SCV, except to the extent required by the Act. Class V members could be given sufficient votes to carry approval of an amalgamation, sale or export continuance. For example, Class V could be given multiple voting rights (say, 100 votes *per* member), whereas the Class NV members have only one vote each.

With respect to the second level of class member protection, an SCV, section 206(4) provides that:

The members of a class or group of members of an amalgamating corporation are entitled to vote separately as a class or group in respect of an amalgamation agreement if the amalgamation agreement contains a provision that, if contained in a proposed amendment to the articles, would entitle the members to vote as a class or group under section 199.

However, as discussed earlier, an amalgamating corporation may have opted out of certain of the class protections set out in section 199(1). To the extent that the relevant amalgamating corporation has done so, section 206(4) provides no SCV. An amalgamation affords no less, but no more, approval rights than would apply on a vote to approve articles of amendment.

In the case of a vertical short-form amalgamation (an amalgamation in which a parent corporation amalgamates with one or more subsidiary corporations under the Act) or a horizontal short-form amalgamation (an amalgamation where two or more wholly-owned subsidiaries of the same parent corporation amalgamate to form one wholly-owned subsidiary under the Act), no membership approval is required because there is no effective change in membership interests resulting from the amalgamation. In both cases, the amalgamation is approved by the board of each amalgamating corporation.<sup>99</sup>

### *c) Disposition of Substantially All Property*

Similarly, section 214 of the Act, which requires membership approval of a sale, lease or exchange of all or substantially all of the property of a corporation other than in the ordinary course of its activities, provides for

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<sup>99</sup> *Ibid.*, ss. 207(1) (providing for the vertical short-form amalgamation which, in contrast to the *BCA*, does not require the subsidiaries included in the amalgamation to be wholly-owned by the parent), and 207(2) (providing for the horizontal short-form amalgamation, where, as under the *BCA*, the amalgamating subsidiaries must be wholly-owned by the same parent).

a right to vote and an SCV that parallels the rules described above applicable to a long-form amalgamation. Again, the purpose of section 214(5) is to buttress the class rights provided by section 199(1) but to confer no further rights.

*d) Export Continuance*

The rules in respect of voting on an export continuance from the Act to the laws of another jurisdiction differ in one important respect from those applicable on a long-form amalgamation or a sale of all or substantially all of the corporation's assets. Under section 213(4), each membership in the corporation carries the right to vote in respect of an export continuance irrespective of whether it otherwise carries the right to vote. However, only the first level of protection, enfranchisement as described above, applies. That is, the class becomes voting but does not enjoy an SCV regardless of whether, on the continuance, there would be an alteration of a right protected under section 199(1). Again, therefore, a corporation could dilute the voting rights of the enfranchised class in the same way described earlier.<sup>100</sup>

Class or group members are entitled to protection on an export continuance presumably because the laws of the jurisdiction to which the corporation is continued may have no, or dissimilar, protections for such membership classes or groups. Due to the possible lack of equal protection accorded class members post export continuance, an SCV is a right that could be specifically added to protect the class. In the absence of explicit protection in the articles, an export continuance affords another opportunity to cancel a class or group of members, if there are sufficient votes to approve the continuance.

As discussed below, for an NFP corporation formed under provincial or territorial law, continuance under the Act is voluntary or opt-in. Hence, the protections accorded members of such corporations under the Act are voluntarily accepted. However, corporations formed under Part II of the *CCA* are subject to compulsory dissolution unless continued under the Act within three years after section 298(5) of the Act comes into force.

Thus, once the Act comes into effect and a corporation continues under it, minority classes or groups of members will have voting entitlements on any subsequent export continuance of the corporation to the laws of another jurisdiction (typically, a Canadian province or

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<sup>100</sup> *Supra*, Part 6(E)(1)(ii).

territory). One solution is to make changes to the letters patent and by-laws of the incoming body corporate before or at the time that it is continued under the Act. For example, the incoming body corporate could either abolish various classes of membership or consolidate such classes into fewer classes. A second solution is to opt out of the class protections set out in section 199(1) to the maximum possible extent and embed provisions for the post-continuance cancellation of certain classes or groups of members. A third, partial solution is to dilute the statutory voting entitlements by ensuring that the remaining membership classes carry sufficient votes to swamp the enfranchised class.

*v) Dissolution and Liquidation*

Dissolution is effected by board resolution where the corporation has not issued any memberships.<sup>101</sup> However, if the corporation has issued any memberships (even if it has disposed of all of its property and has no liabilities), it can only be dissolved by special resolution of each class or group of members, voting as a separate class.<sup>102</sup> Similarly, a corporation with property or liabilities may be voluntarily liquidated and dissolved by special resolution of each class or group of members, voting as a separate class.<sup>103</sup> In both circumstances, class members are not only enfranchised (that is, they have statutory voting rights notwithstanding the articles) but also enjoy an SCV or veto. One solution to minority blockage of a voluntary dissolution or liquidation is discussed below.

*f) Waiver of Appointment of Public Accountant*

As stated earlier, even if the revenues of a corporation are such that the corporation can validly waive the appointment of a public accountant (less than \$1.0 million for a non-soliciting corporation and, generally, less than \$50,000 for a soliciting corporation), all members “entitled to vote at an annual meeting of members” must also waive the appointment of the public accountant for such waiver to be effective.<sup>104</sup> The waiver must be made annually to be effective.<sup>105</sup>

Thus, only a member who has the right to vote at an annual meeting can, in such circumstances, veto an attempt to waive the appointment of a public accountant. A class or group that is not entitled to vote at the

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<sup>101</sup> *CNCA*, *supra* note 5, s. 220(1).

<sup>102</sup> *Ibid.*, s. 220(2) and (3).

<sup>103</sup> *Ibid.*, ss. 221(1) and (3).

<sup>104</sup> *Ibid.*, s. 182(1).

<sup>105</sup> *Ibid.*, s. 182(2).

annual meeting has no veto power or influence (1) on whether the appointment of a public accountant is waived or (2) if not waived, who is appointed as public accountant for the corporation. In this respect, non-voting classes of memberships can be used to facilitate waiver of the appointment of a public accountant.<sup>106</sup>

## 2) *Possible Solutions*

As discussed, most of the potential problems set out here can be avoided by abolishing or consolidating multiple membership classes, diluting their voting rights or opting out of the separate class protections in section 199(1) to the maximum possible extent, including making them unilaterally cancellable.

If, however, insurmountable difficulties are encountered in amending articles, amalgamating, continuing out of the Act or selling all or substantially all of the assets of the corporation, the Act contains a further solution. Resort may be had to section 216 of the Act, which sets out the statutory arrangement process. Under this process, a court can effectively override the rights of a class or group of members that use their voting power to block an amendment, amalgamation, continuance or sale of assets that is in the best interests of the corporation and its various stakeholders taken as a whole. As the Supreme Court of Canada recently held in *BCE Inc. v. 1976 Debentureholders*,<sup>107</sup> an important factor in determining whether a plan of arrangement serves a valid business purpose is the necessity of the arrangement to the continued operations of the corporation. The more necessary the plan of arrangement, the more willing a court will be to approve the arrangement despite its prejudicial effects on some members.<sup>108</sup>

If a class seeks to exert its veto power to block (or demand a consent premium before it will approve) a voluntary dissolution or a voluntary liquidation and dissolution, a further solution is to apply for a court-ordered liquidation. The power of the court to order liquidation in cases

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<sup>106</sup> Note that, in this respect, the *CNCA* differs from the *CBCA*. Under the *CBCA*, a non-distributing corporation can only waive the appointment of an auditor if all shareholders (voting and non-voting) consent. Such consent must be annual. Distributing corporations cannot waive the appointment of an auditor or the requirement for an audited financial statement regardless of the level of shareholder approval. Waiver is impracticable where a private corporation has many shareholders who act at arm's length to each other.

<sup>107</sup> 2008 SCC 69, [2008] 3 S.C.R. 560, decided under s. 192 of the *CBCA*, *supra* note 4.

<sup>108</sup> *Ibid.* at 618.

of oppression, unfair prejudice, deadlock or other just and equitable grounds should enable those members seeking an otherwise meritorious liquidation to prevail over an obstructionist minority.

*F) Does Membership Have Any Privileges?*

While the Act allows the articles and by-laws to set rules on who may become a member, it dictates few limitations on the content of membership rights and privileges. That is, there are few inalienable membership rights. Unlike business corporations, corporations governed by the Act are non-share capital corporations and, as such, are unable to distribute profits to members before liquidation.<sup>109</sup> Even on liquidation, the articles may provide a scheme of liquidation distribution that entirely excludes members. In the case of an extended soliciting corporation, the distribution of net assets cannot be made to members unless, fortuitously, they happen to be “qualified donees” under the *ITA*.<sup>110</sup> In the case of all other corporations, the articles can provide for any scheme of distribution. The default rule is that, on liquidation, the residual assets must be distributed to all members at the time of liquidation equally on a *per capita* basis.<sup>111</sup> However, creating differential rights to residual assets on liquidation perfectly illustrates what the membership class scheme of the Act is meant to do.

The Act states that members of a corporation have the right to vote at any meeting of the members if there is only one class or group of members. The inherent voting rights extend to the election of directors,<sup>112</sup> waiver or appointment of a public accountant,<sup>113</sup> waiver of an audit,<sup>114</sup> amendment of the articles,<sup>115</sup> authorization of certain by-law amendments<sup>116</sup> or confirmation of by-law amendments made by directors,<sup>117</sup> long-form amalgamations,<sup>118</sup> export continuance,<sup>119</sup> sale of

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<sup>109</sup> *CNCA*, *supra* note 5, ss. 34(1) and (2).

<sup>110</sup> Even if the articles of an extended soliciting corporation do not provide for a liquidation distribution to one or more qualified donees, s. 235(3) directs the liquidator to apply to court for a distribution to one or more qualified donees. See *supra*, note 18 above for the meaning of the term “extended soliciting corporation” as used in this article.

<sup>111</sup> *Ibid.*, s. 236(2).

<sup>112</sup> *Ibid.*, s. 128(3).

<sup>113</sup> *Ibid.*, s. 181(1) and 182(1).

<sup>114</sup> *Ibid.*, s. 188 and 189.

<sup>115</sup> *Ibid.*, s. 197(1).

<sup>116</sup> *Ibid.*, s. 152(6) and 197(1).

<sup>117</sup> *Ibid.*, s. 152(2).

<sup>118</sup> *Ibid.*, s. 206(5).

<sup>119</sup> *Ibid.*, s. 213(5).

all or substantially all of the assets of the corporation,<sup>120</sup> dissolution<sup>121</sup> or liquidation and dissolution.<sup>122</sup>

Where, however, the corporation has two or more classes or groups of members, these voting rights (with the limited exceptions set out above) need only be attached to at least one membership class or group.<sup>123</sup> It is, therefore, possible to have a class or group of members that has no voting rights outside the minimum voting rights mandated under the Act and that also has no right to receive any property of the corporation either before or at the time of liquidation.

### *1) Irreducible Class Membership Rights*

Hence, the only irreducible rights of a class or group of members are to:

- (i) approve an amendment of the articles that would affect the protected class rights set forth in Table 3 above;
- (ii) approve an amalgamation, sale of assets or export continuance; and
- (iii) approve a voluntary dissolution or a voluntary liquidation and dissolution.

Membership as such will contain few inalienable rights or privileges. Given the minimal nature of these membership rights (as distinguished from statutory remedies that are available to members and other complainants outlined below), the Act effectively gives the corporation wide latitude to allocate voting and other membership rights among two or more classes or groups of membership. Hence, with respect to defining members and membership rights, the Act facilitates private ordering and is not prescriptive.<sup>124</sup>

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<sup>120</sup> *Ibid.*, s. 214(6).

<sup>121</sup> *Ibid.*, s. 220(3).

<sup>122</sup> *Ibid.*, s. 221(3).

<sup>123</sup> *Ibid.*, s. 154(3) and (4).

<sup>124</sup> *Imagine Canada, supra* note 94 at 3 takes the view that the Act is prescriptive.

## 2) Statutory Membership Remedies

In addition to these rights, a member can pursue various remedies accorded members and other “complainants” in the Act, the most important of which are as follows:<sup>125</sup>

- (i) oppression remedy;<sup>126</sup>
- (ii) application for a court-ordered liquidation;<sup>127</sup>
- (iii) derivative action;<sup>128</sup> and
- (iv) compliance and restraining order,<sup>129</sup>

subject, in the cases of (i), (ii) and (iii), to the limitations applicable to tenets of faith of religious corporations.

## G) Hybrid By-Laws and By-Law Amendments

Corporate articles and by-laws under the *CBCA* and the *CNCA* have several important differences. There are differences in terms of how they are amended, and in particular, which corporate organ (directors or shareholders) can make an effective amendment and what shareholder approval threshold is required. There are also differences concerning when the amendment comes into effect; and public filing and fee requirements.

With limited exceptions, an amendment to the articles of a *CBCA* corporation only requires approval by special resolution of the shareholders without any required board approval. It takes effect only upon the filing with the *CBCA* Director which necessitates payment of the prescribed filing fee.<sup>130</sup> An amendment to the by-laws of a *CBCA* corporation is made by the directors; is subject to later approval by ordinary resolution of the shareholders; takes effect immediately upon board approval but ceases to be effective if not approved at the next ensuing meeting of shareholders; and requires no public filing or payment of any fee to Corporations Canada.<sup>131</sup>

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<sup>125</sup> Note that numerous lesser member remedies are scattered elsewhere through the Act.

<sup>126</sup> *CNCA*, *supra* note 5, s. 253.

<sup>127</sup> *Ibid.*, s. 224(1).

<sup>128</sup> *Ibid.*, ss. 251 and 252.

<sup>129</sup> *Ibid.*, s. 259.

<sup>130</sup> *CBCA*, *supra* note 4, ss. 173, 178 and 179(1).

<sup>131</sup> *Ibid.*, s. 103. Under s. 102(5) and 137 of the *CBCA*, shareholders can also propose and make an amendment to the by-laws without board approval. Under ss. 152(6) and 163 of the *CNCA*, *supra* note 5, members can do the same. In both cases, the by-laws are made or amended by ordinary resolution.

In contrast, the *CNCA* adopts a bifurcated regime for by-law amendments, which, unless handled carefully, may cause non-experts confusion.<sup>132</sup> While the *CNCA* adopts the *CBCA* regime for amending articles, it contemplates two regimes governing by-law amendments depending on the subject matter of the underlying by-law. The residual category of by-law amendments will therefore follow the description above for by-law amendments under the *CBCA* (subject only to the addition of a post-member-approval filing requirement under the *CNCA*).<sup>133</sup> Section 152(1) of the *CNCA*, read in conjunction with section 197(1), creates, however, a hybrid category of by-law amendments that require approval by special resolution of the members without the need for any board approval. Such amendments take effect only upon passage of the special resolution; and require a public filing within one-year of such membership approval<sup>134</sup> but no filing fee.

In practice, it may be difficult for non-experts to correctly categorize those by-law amendments that are subject to the special hybrid amendment regime and those by-law amendments that are subject to the usual or default regime described above as applicable to *CBCA* corporations. An error will lead to an invalid by-law amendment and may well, in turn, 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, definitions and other interpretation provisions will generally apply throughout the by-laws. Thus, a change to a definition could inadvertently require a different amending process for the two types of by-law provisions contained within the same document or could take effect at different times. 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.

One way to minimize the difficulties that the bifurcated regime presents is to split the corporation's by-laws into two separate categories, embodied in two separate documents. Under this approach, every corporation would adopt both ordinary by-laws and special by-laws. The special by-laws could only be amended by special resolution of the members and would be limited to the following matters:

- (a) conditions required for being a member (membership eligibility);

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<sup>132</sup> CBA Submission, *supra* note 74 at 28-29 points out that the Act's bifurcated by-law amendment regime may become a source of potential confusion and invalidity.

<sup>133</sup> *CNCA*, *supra* note 5, s. 152.

<sup>134</sup> *Ibid.*, s. 153 and *CNCR*, *supra* note 9, s. 60.

- (b) provisions respecting the transfer of memberships (sale or gift of membership interests);
- (c) manner of giving notice to members entitled to vote at a meeting of members (membership meeting notices);
- (d) method of voting by members not in attendance at a meeting of members (absentee voting);<sup>135</sup> and
- (e) related definitions and interpretative provisions.

All other by-laws would be set out in the ordinary or general by-laws. Passing or amending the ordinary by-laws would track the *CBCA* approach for passing by-laws described above. Appropriate definitions and interpretative provisions would be replicated in both sets of by-laws. In that way, boards and memberships would know precisely how to amend a given by-law. The opportunity for error would be minimized.

A second technique to minimize the difficulties of the bifurcated regime is to include provisions in the articles requiring that only members voting, by special resolution, can pass or amend by-laws. Thereby, in effect, all by-laws and by-law amendments would voluntarily conform to the standard otherwise applicable to only special by-laws (as described above). This second technique sacrifices flexibility for certainty. It will work for some, but not all, corporations.

#### *H) Self-Perpetuating Boards*

Again, underscoring the flexibility of the Act, it is clearly possible for a corporation to have a completely self-perpetuating board, that is, a membership that consists entirely of board members. First, the Act imposes no limits on who may be a member. Second, section 126(1) imposes only limited qualifications on who can validly be a director; a director must be an individual at least eighteen years of age, who is not an undischarged bankrupt and who has not been found by a court to be incapable. Thus, a director can be a member. In effect, the same individual or small group of individuals may be both members and directors (provided that all individuals meet the limited directorship qualifications set out in section 126(1)).

This arrangement would have the practical effect of obliterating the distinction between members and directors, except to the extent that corporate formalities (such as the approval of articles and certain by-law

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<sup>135</sup> *CNCA*, *supra* note 5, ss. 197(1)(e), (h), (l) and (m).

amendments) must be observed. The same individuals can wear two different hats but will have to be mindful of which hat is worn at a particular meeting. A director's hat is inappropriate attire for a member's meeting, and a member's hat should not be worn at a board meeting.<sup>136</sup>

### *1) Ex Officio Directors*

Subsection 128(3) of the Act states:

Members shall, by ordinary resolution at each annual meeting in which an election of directors is required, elect directors to hold office for a term expiring within the prescribed period.<sup>137</sup>

With limited exceptions, therefore, only members elect directors. The only exceptions are where there is a vacancy in the office of a director (in which case, the remaining directors in office, if constituting a quorum, can fill the vacancy)<sup>138</sup> or where the articles expressly permit the directors in office to appoint additional directors between annual meetings, not to exceed one-third of the number of directors elected at the last annual meeting.<sup>139</sup> On the face of it, section 128(3) rules out *ex officio* directors.<sup>140</sup>

However, in practice, it will be easy to work around this new rule to achieve the functional equivalent of appointing *ex officio* directors. As described above, the Act is flexible as to how the articles define "members" and what voting rights are attached to each class or group of members. The articles could create a special membership class, comprised of one member in that class, and give that member the right to appoint or elect a director to the board of the corporation. If that member is an individual, she could elect herself to the board. The special member may have no other rights to vote or to participate in a distribution of the remaining assets on liquidation. Thus, for example, instead of providing in the by-laws that the Mayor of Mariposa from time to time is an *ex officio* director of the Leacock Literary Society, the articles could either name the Town of Mariposa as a single-member class with the right to appoint a

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<sup>136</sup> This is not to suggest, however, that a board meeting or meeting of members would be invalid merely as a result of wearing the wrong hat; see *Walton v. Bank of Nova Scotia*, [1965] S.C.R. 681. Also, in the case of a non-soliciting corporation, a UMA can be used to further obliterate the formal distinction between members and directors.

<sup>137</sup> Subsection 28(1) of the *CNCA*, *supra* note 5, prescribes a maximum four-year term for a director, which of course does not preclude re-election for any number of consecutive renewal terms.

<sup>138</sup> *CNCA*, *supra* note 5, s. 132(1).

<sup>139</sup> *Ibid.*, s. 128(8).

<sup>140</sup> CBA Submission, *supra* note 74 at 20-21.

director or could name the Mayor from time to time as the single-member class. While this solution is not the same as allowing for *ex officio* directors, in most cases, it will yield substantively the same result.

### *J) Liability of Directors and Officers*

Section 146 of the Act imposes liability for unpaid employee wages, vacation pay and reimbursable employee expenses on directors.<sup>141</sup> This is in addition to the other liabilities imposed under the Act on directors. In 2003, the Saskatchewan Act was amended to protect directors and officers of Saskatchewan NFP corporations from excessive or unwarranted liability.<sup>142</sup> In part, Saskatchewan introduced the liability shield to remove financial disincentives that discourage strong director candidates from joining the boards of NFP corporations.<sup>143</sup>

Section 112.1 of the Saskatchewan Act immunizes directors and officers of a Saskatchewan corporation from personal liability for misfeasance. It does not seek to protect directors and officers from malfeasance, that is, breach of the statutory duty of loyalty (including self-dealing). Nor can it shield directors from federal laws imposing personal liability for withholdings and remittances under the *ITA* and under federal legislation related to the goods and services tax,<sup>144</sup> the Canada Pension Plan<sup>145</sup> and employment insurance.<sup>146</sup>

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<sup>141</sup> In *Proulx v. Sahelian Goldfields Inc.* (2001), 55 O.R. (3d) 775, 204 D.L.R. (4th) 670 (C.A.), the Ontario Court of Appeal held that director liability to employees “for all debts” under the *CBCA* means that directors are, subject to the monetary cap set out in the *CBCA*, jointly and severally liable for unreimbursed out-of-pocket expenses such as travel, food and lodging expenses that an employee incurs in the course of providing services to the corporation. Section 146(1) of the *CNCA*, *supra* note 5, contains the identical formulation found in s. 119 of the *CBCA*. Similarly, in *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343, 47 D.L.R. (4th) 381 (C.A.), the Ontario Court of Appeal held that director liability to employees “for all debts” (which appears in the *CBCA*, s. 119(1) and *OBCA*, s. 131(1)) means that directors are liable for vacation pay despite the failure to explicitly list liability for vacation pay in the *CBCA*.

<sup>142</sup> Saskatchewan Act, *supra* note 3 as amended by S.S. 2003, c. 33, s. 2, adding s. 112.1 to the Saskatchewan Act.

<sup>143</sup> Gray, *supra* note 8 at 60-62, briefly discusses the controversial issue of providing a partial immunity to protect directors and officers of NFP corporations from misfeasance claims. The CBA Submission, *supra* note 74 at 24-26 recommended that the *CNCA* include a provision closely modeled on s. 112.1 of the Saskatchewan Act.

<sup>144</sup> Directors’ liability for goods and services tax (GST) is provided for under the *Excise Tax Act*, R.S.C. 1985, c. E-15.

<sup>145</sup> Directors’ liability for Canada Pension Plan (CPP) contributions is provided for under the *Canada Pension Plan Act*, R.S.C. 1985, c. C-8.

<sup>146</sup> Directors’ liability for employment insurance (EI) premiums is provided for under the *Employment Insurance Act*, S.C. 1996, c. 23.

For directors and officers who want greater liability protection than the *CNCA* affords (particularly directors and officers of NFP corporations engaged in high-risk activities), consideration might therefore be given to continuing the corporation from the federal jurisdiction to the Saskatchewan Act as soon as the *CNCA* comes into effect. After all, partial immunity is preferable to liability for which a director or officer may claim indemnification from the corporation. Continuance to Saskatchewan would take place in 2 steps. First, if the federal NFP corporation is currently governed by Part II of the *CCA*, it would initially continue under the *CNCA* and then, as step two, immediately continue from the *CNCA* to the Saskatchewan Act.<sup>147</sup>

Unless there is a continuance to Saskatchewan (where there is a partial immunity from liability), the main protective devices under the *CNCA* are:

- (a) obtaining directors' and officers' insurance (subject to all the coverage deductibles, caps, exclusions, defences and premium charges such insurance entails);
- (b) obtaining indemnity (subject to the NFP corporation's continuing solvency);
- (c) adopting a UMA (applicable only to non-soliciting corporations and only to the extent that membership liability is substituted for director liability);
- (d) exercising a proper and timely dissent; and
- (e) if all else fails, tendering a resignation before the liability begins to accrue.

### 7. *Corporate Governance*

The analysis set out above details the extent to which it is possible under the new Act to minimize the veto power of non-voting classes of members. However, that discussion should not be misconstrued as an endorsement of corporate devices designed to marginalize members or classes of members.

Rather, the flexibility that the Act affords should spawn a search for the optimal governance regime for each particular NFP corporation. The

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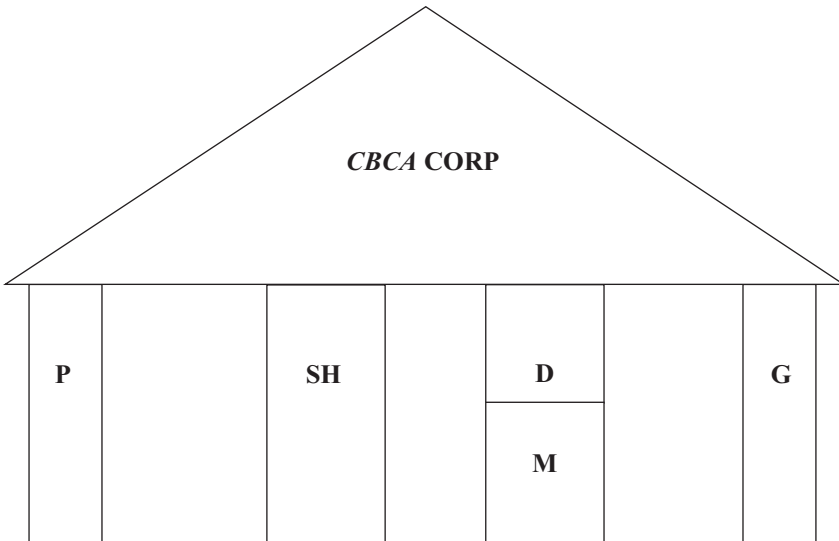
<sup>147</sup> There is no provision for a direct continuance of a *CCA* Part II corporation to a provincial or territorial statute.

purpose of the discussion that follows is to refocus on the corporate governance pillars that the Act provides and how they might be employed as part of the governance structure of a given corporation.

### *A) Implicit CBCA Governance Model*

Before turning to the *CNCA*, however, it is useful to first take a look at the implicit governance structure of the *CBCA* (depicted in Figure 1 below), which has been transplanted to the *CNCA*. It will be shown that the same *CBCA* governance structure may not adequately support a *CNCA* corporation and that, therefore, members, boards and managements of *CNCA* corporations will have to consider ways to reinforce the transplanted governance pillars.<sup>148</sup>

**Figure 1 – Implicit *CBCA* Governance Model**



#### *1) CBCA Governance Pillars*

**SH** = shareholders. SH own the corporation, receive dividends and liquidation distributions, elect and remove directors and approve fundamental changes, including voluntary liquidation of the corporation. SH may even remove all board powers by unanimous shareholder agreement (USA) and thereby govern directly.

<sup>148</sup> Gray, *supra* note 8 at 53-55, concludes that transplanting the *CBCA* governance regime to the *CNCA* raises a substantive concern and, at the very least, involves a leap of faith.

**D** = directors. Collectively, the board has the residual power to manage, or supervise the management, of the business and affairs of the corporation, including hiring and firing top management (CEO, president and CFO), issuing shares and declaring dividends. SH elect/remove D but (absent a USA) do not have the power to dictate decisions to D.

**M** = management (defined individually as an “officer” under s. 2(1) of the *CBCA*). M carries out day-to-day management of the corporation, runs the business, hires/fires subordinate employees and looks for and implements business opportunities. D hires/fires M. Thus, while M is part of the overall governance structure, much of the remaining governance structure is built with a view to controlling or guiding M.

**PA** = a public accountant. Under the *CBCA*, a PA is required to perform an audit in the case of all non-distributing corporations (except those whose voting and non-voting SH have unanimously waived the audit requirement for a given financial year) and all distributing corporations (irrespective of any SH waiver). Audited financial statements are an important piece in the governance edifice in that they provide key information on how the board and management have performed in the most recently completed financial year on a comparative basis with its immediately preceding financial year (upon which SH can assess whether it is in the best interests of the corporation to make changes in the board/management composition and take necessary action at the ensuing annual meeting).

**G** = applicable government regulatory agencies. For all *CBCA* corporations, this starts with the *CBCA* Director (who, however, has limited regulatory functions under the *CBCA*). For distributing corporations, it will include provincial and territorial securities commissions. For some, it will include the Competition Bureau. For all business corporations, it includes the Canada Revenue Agency (CRA).

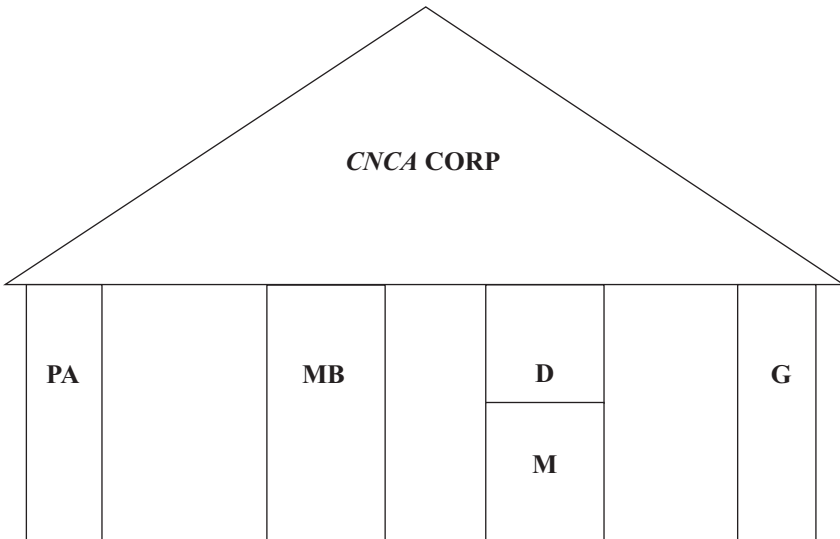
## 2) *Summary*

The *CBCA* is built on the concept of SH policing and enforcement, with strong SH rights and remedies and minimal G intervention. In a non-distributing *CBCA* corporation, shareholders carry most of the governance weight. As the residual risk-bearers, shareholders have the most to gain and the most to lose from the success or failure of the corporation. This is also true of many distributing corporations that have a controlling or dominant shareholder – a common element in domestic landscape. Shareholder rights (such as appraisal rights under sections 190 and 206 of the *CBCA*) and shareholder remedies (such as the

oppression remedy under section 241 of the *CBCA*) have economic importance to shareholders and are, therefore, frequently invoked. In a widely-held distributing corporation, rational apathy – the calculation that the personal time and/or expense of active intervention or personal enforcement of shareholder rights does not justify the proportionate potential gain to that shareholder – may erode the relative weight of shareholders in the governance structure and shift correspondingly more weight to the remaining pillars.

### *B) Implicit CNCA Governance Model*

**Diagram 2 – Implicit CNCA Governance Model**



#### *1) CNCA Governance Pillars*

**MB** = members. In Diagram 2 above, **D**, **M**, **G** and **PA** have the same meanings as in Figure 1 above.

Under the *CNCA*, MB have most of the nominal governance powers of SH of a *CBCA* corporation. However, compared with SH in most *CBCA* corporations, MB in most NFP corporations have far less (or, in the case of soliciting corporations, non-existent) economic interest in the net assets (or retained surplus) of the corporation. Unlike SH, MB cannot receive dividends or distributions before liquidation. As well, membership interests, unlike shares, are legally non-transferrable (unless the articles or by-laws stipulate otherwise). Thus, typically, MB of a

*CNCA* corporation will have much less incentive than SH to exercise their nominal governance powers or their statutory membership remedies (such as the oppression remedy, derivative action, application for a just and equitable winding-up and compliance and restraining orders). Generally, rational apathy makes MB a much less reliable governance pillar than SH (even SH in widely-held *CBCA* corporations). Thus, in a *CNCA* corporation, a significant burden of governance will be shifted onto the other pillars. As will be shown, by default this shift falls especially on D.

While the audit exemption regimes in the *CBCA* and the *CNCA* differ, if appointed as an auditor, the role of a PA in a *CNCA* corporation is substantially identical to the PA's role in a *CBCA* corporation. A PA is more likely to perform an audit of a *CNCA* soliciting or non-soliciting corporation than to audit a *CBCA* corporation (where, in non-distributing corporations, the audit is often waived). Non-distributing corporations comprise more than ninety-nine per cent of all *CBCA* corporations.<sup>149</sup> Unlike the *CBCA*, the *CNCA* specifies the circumstances in which a corporation may have a review engagement instead of an audit.

The role of *CNCA* Director in the corporate governance structure is also substantially the same under the *CNCA* as it is under the *CBCA*. Under the *CNCA*, the Director has the power to determine that a specific corporation is non-soliciting and that a soliciting corporation whose annual revenues exceed the limits set out in the regulations to the *CNCA* should nevertheless have the option to waive the appointment of a PA or to waive the audit. The *CNCA* Director also receives (but no longer approves) by-laws of *CNCA* corporations and receives annual financial statements of all soliciting corporations (and, where the Director so requests, any non-soliciting corporation).<sup>150</sup> Despite the foregoing, it is fair to characterize the Director's governance role for *CNCA* corporations as almost as limited as it is for *CBCA* corporations.

For a *CNCA* corporation (especially, but not limited to, a registered charity under the ITA), G includes the CRA. However, G would generally exclude securities commissions and the Competition Bureau. For a soliciting corporation, some of whose activities take place in Ontario, G might also include the Office of the Public Guardian and Trustee (Ontario PGT) under the *Charities Accounting Act*.<sup>151</sup> However, it appears that only about one-third of NFP corporations in Canada are

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<sup>149</sup> Wayne D. Gray and C. W. Halladay, *Guide to CBCA Reform: Analysis and Precedents* (Carswell: Toronto, 2002) at 73.

<sup>150</sup> *CNCA*, *supra* note 5, s. 177.

<sup>151</sup> R.S.O. 1990, c. C.10.

registered charities and the Ontario PGT is not relevant to all of these. Thus, the role of G in the governance structure of a given *CNCA* corporation may be marginally greater or lesser than it is for a “typical” *CBCA* corporation.

Since M is the primary pillar that is to be governed, that leaves only D to bear most of the additional governance load resulting from the significantly lessened role of MB (compared with SH in most *CBCA* corporations).

## 2) *Implications*

Those involved in the affairs of a federal NFP corporation will, therefore, have to carefully consider the optimal governance structure for their corporation. The governance role of G will remain comparatively static for a given corporation. Likewise, there is limited flexibility as to whether and to what extent a PA and an audit or review engagement can be expanded or contracted as part of the overall governance structure.

One important focus of attention will be the role of members in the governance process – not just what voting rights members (or various classes or groups of members) will have but also how they can be turned into active participants. Member involvement is crucial on many levels: financial contributions; a source of ready volunteers; board recruitment; embodiment of the very spirit of the organization. The governance structure must anticipate and be responsive to legitimate member concerns. Member participation must be woven into the fabric of the organization. The challenge is to make members a meaningful part of the overall governance structure in circumstances where the policing effects of rational self-interest are weak. NFP corporations that develop strong membership bonds will thrive and those that do not will likely suffer in comparison. The Act facilitates transparency and timely communication to members. For those organizations that embrace it, the *CNCA* encourages membership democracy on the same basis as it has long infused the *CBCA*.

A second important governance focus is on the size and composition of the board. Here, it will be important to strike the right balance between a board that is too diffuse to be effective and a board whose time is spread too thinly to properly discharge its watchdog and broader duties. To what extent will directors be independent of management? Will the board be composed entirely of independent, outside (that is, non-management) directors? Who will control the board nominating committee? Will there be an audit committee, and will it be composed of entirely independent,

outside, financially-literate directors? How will directors be protected against personal liability so as to alleviate the concerns of qualified candidates?<sup>152</sup> Will directors' and officers' insurance be available and, if so, subject to what deductibles, coverage caps, expiration dates and policy exclusions? Will directors be remunerated and, if so, on what basis?

To the extent that the M pillar remains weak, the D pillar will arguably have to be reinforced. In some cases, directors of a *CNCA* corporation will have to bear nearly the full burden that, in a *CBCA* corporation, SH and D would share.

These are just some of the governance issues that NFP corporations should be considering in the months before the new Act comes into force.

#### 8. *Transitioning to the New Act*

Once the new Act comes into force, it will no longer be possible to incorporate an NFP corporation under Part II of the *CCA*. Rather, all new federal NFP corporations will be formed under the new Act.

A body corporate to which Part II of the *CCA* applies will have a period of time within which to apply for a continuance under the new Act. If the *CCA* body corporate does not apply for a continuance within 3 years after section 297(5) of the Act comes into force, Corporations Canada may, upon first giving notice in writing to the body corporate and to each director, dissolve that body corporate. The body corporate will cease to exist on the date set out on its certificate of dissolution.

To continue under the Act, a *CCA* body corporate will need to file articles of continuance under section 211. The content of the articles of continuance parallels that of the articles of incorporation described above.<sup>153</sup> In addition, once the Act comes into force, an NFP body corporate formed under provincial, territorial or foreign law may apply to Corporations Canada for a certificate of continuance under section 211 if so authorized by the laws of its home jurisdiction and if the body corporate satisfies, or by its articles of continuance would satisfy, the requirements for incorporation under the Act. If the applicant for continuance is a body corporate with share capital, it must establish the terms and conditions on which it is converted to a body corporate without share capital.

Finally, over the years, our federal Parliament has enacted many "Special Act" corporations. In most respects, the *CNCA* will not apply to

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<sup>152</sup> See the further discussion in Gray, *supra* note 8 at 60-62.

<sup>153</sup> *Supra* at 14.

Special Act corporations. In other cases, however, the *CNCA* will apply in part by reference or adoption. For example, section 294 of the *CNCA* provides that, with some exceptions, certain provisions apply to any body corporate without share capital incorporated by Special Act of Parliament and not continued any other federal Act.<sup>154</sup> Federal Special Act corporations need to examine closely to what extent the *CNCA* applies to them.

### 9. Conclusion

Those familiar with the *CBCA* or the provincial and territorial statutes that have been modelled on the *CBCA* (such as the general business corporations statutes of Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nunavut, Ontario, Saskatchewan, the Yukon and, soon, Quebec<sup>155</sup>) should find the layout and much of the content of the *CNCA* familiar terrain. The *CNCA* can be fairly described as a comprehensive, modern corporate statute, the primary focus of which is enabling or private ordering. That is, it allows federal NFP corporations, their boards and members to organize their affairs in a manner that is optimal for their particular needs. The Act contains very little regulatory content apart from the minimum requirements imposed on soliciting corporations detailed in this article. As stated above, the principal challenge in continuing under the Act will be choosing the governance structure that is optimal for the continued corporation. In most cases, this will likely entail making members a meaningful part of the governance structure and strengthening boards in relation to management.

Time will tell how the provinces and territories will react to the new Act. As stated, the Saskatchewan Act was passed in 1995. No other jurisdiction in Canada has passed modern NFP corporate legislation.

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<sup>154</sup> These provisions are Part 3 (i.e. ss. 16-19, abolishing the *ultra vires* doctrine, providing for the right to carry on the body corporate's activities throughout Canada and to exercise extraterritorial capacity, abolishing the constructive notice doctrine and codifying the indoor management rule), and ss. 160(1) (calling annual meetings), 168 (court-ordered meetings), 212 (amendment of charter), 221 (voluntary liquidation and dissolution), 222 and 223 (involuntary dissolution) and 279 (filing annual return) and Part 19 (Special Act Bodies Corporate Without Share Capital).

<sup>155</sup> On December 4, 2009, the *Québec Business Corporations Act* (Bill 63, S.Q. 2009, c. 52 (*QBCA*)) received Royal Assent. The *QBCA* is largely modeled on the *CBCA* but includes some enhancements. See Wayne D. Gray, "M. Dickerson Arrive au Québec: A Comparative Law Perspective on the New *Business Corporations Act* (Quebec)" 50 *Can.Bus. L.J.* 175 (forthcoming).

However, this is about to change. Since the beginning of 2007, Ontario has been working on a comprehensive overhaul of the *OCA*<sup>156</sup> that currently governs approximately 46,000 Ontario NFP corporations. On October 19, 2010, Bill 65, the Ontario *Not-for-Profit Corporations Act, 2010*, passed third reading. Clearly, the new Ontario Act has drawn liberally from the *CNCA*. This is partly because the *OBCA* and the *CNCA* share common origins (both being largely derivatives of the *CBCA*). Just as the *CNCA* adheres to the *CBCA* model, Ontario's pending new NFP corporate legislation adheres to the *OBCA* model except to the extent that differences between NFP corporations and business corporations dictate otherwise. The new Ontario NFP corporate law is not expected to come into force until late 2012.

As for the remaining provinces and territories, can they be far behind in reforming their NFP corporate legislation?<sup>157</sup> If there is an inordinate delay at the provincial and territorial levels in enacting legislation that is reasonably competitive with the federal Act, one might anticipate at least some migration of existing and future NFP incorporations from older provincial/territorial governance regimes to the federal Act. Any significant exodus of provincial/territorial NFP corporations to the federal jurisdiction is bound to result in some pressure being exerted on the unreformed jurisdictions to at least match the federal Act.

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<sup>156</sup> *Supra* note 84.

<sup>157</sup> Notably, the provinces of Quebec and British Columbia have begun the process of overhauling their respective statutes governing NFP corporations.