
Reform of the
Canada Corporations Act

Draft Framework for a New
Not-for-Profit Corporations Act

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Corporate and Insolvency Law Policy Directorate
Policy Sector
Industry Canada

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Introduction

The *Canada Corporations Act* provides the framework for the incorporation and governance of federal not-for-profit corporations. The kinds of corporations governed under Part II of the Act include religious, charitable, political, mutual-benefit, and general not-for-profit organizations.

The context for reform

In recent years some concerns have been raised that the Act is outdated and that its provisions no longer meet the requirements of the modern not-for-profit sector. There have been public calls for its reform and in 1999 the federal government's Voluntary Sector Task Force called for improvements to the regulatory structure that governs the sector. Industry Canada's proposal to modernize the Act was part of the Task Force's plan.

The project was given additional impetus by the government's intention — announced in the Speech from the Throne on January 30, 2001 — to make sure that Canadian laws and regulations remain among the most modern and progressive in the world. As the federal Innovation Strategy for Canada noted in February 2002, the government has an important stewardship

responsibility to protect and promote the public interest. Vital tools for fulfilling this role include legislation and regulations that build an environment of trust and confidence, where the public interest is protected — a climate that is predictable, efficient and accountable to the public.

Consultations and proposals

In July 2000, Industry Canada issued a consultation paper, *Reform of the Canada Corporations Act: The Federal Nonprofit Framework Law*. Subsequently the department held a series of roundtable discussions in cities across the country to consider the ideas presented in the document, and the various legislative options open to us. Following the suggestions made at the roundtables, we are now in a position to make concrete proposals for reforming the not-for-profit law.

Framework Proposals

This framework paper sets out Industry Canada's draft proposals for a new *Not-for-Profit Corporations Act*. Based on roundtable meetings in 2000 and 2001, it conveys the major issues that would be contained in an Act, but it is not exhaustive. We will soon hold further consultations, and we ask for public feedback, particularly from the not-for-profit sector.

Principles for reform

Four principles guided our work. The overriding principle is to make the Act *flexible and permissive* rather than unduly regulatory. To ensure that the individual needs of each corporation can easily be met, many of the proposals can be adapted to particular circumstances. For example, a number of the proposals were written to allow organizations to opt into or out of their application. Organizations may also apply for exemptions from certain disclosure requirements, mandatory filings have been reduced or eliminated, and the proposed provisions would allow organizations the freedom to make use of electronic meetings.

Transparency and accountability are major themes that shaped the development of the proposals. The public requires that these organizations, particularly charitable organizations, be well run and accountable. There must be public trust that they are performing the functions that they are intended to carry out in a scrupulous, well-run manner. One objective of the framework is to balance the privacy of organizations and their members with the goal of ensuring public trust. The question of audits is an area where this balance comes into play. The framework meets this challenge by proposing that organizations with gross annual revenues over \$250,000 be required to have audits, while allowing smaller organizations to make their own decisions about audits. Other provisions allow an organization to apply for exemption from the need to disclose its financial statements where disclosure could cause harm to the organization or its members. Improved transparency and accountability can also be seen in the measures designed to strengthen the participation of members in meetings — by allowing member proposals, for example — and in the new compliance order provisions.

A further goal is the promotion of *efficiency*, both for organizations incorporated under the Act and for the federal government, which is required to administer it. Most significantly, the proposals would allow incorporation as a right. This will reduce the level of pre-incorporation scrutiny that not-for-profit corporations currently face, and eliminate the current system of Ministerial discretion in whether or not corporate status is granted. As a result, organizations would have the ability to incorporate more quickly, reducing costs both to the corporation itself and to government.

Finally, the goal of *fairness* was a major factor in preparing the proposals. For instance, directors of not-for-profit organizations have increasingly faced fears of liability. The proposals contain several provisions that would help to protect directors and officers from unfair and unwarranted liability. They set out a clearly defined duty of care, and the standard by which it should be measured. The proposals also provide directors with a due-diligence

defence to help them to avoid unwarranted liability, and a right to dissent from decisions that they feel are not in the best interest of the corporation. In addition, the proposals would allow directors and officers to be indemnified by the organization for legal costs arising out of their actions as directors or officers.

An opportunity for public input

This draft framework is accompanied by a separate supplementary paper, *Reform of the Canada Corporations Act: Discussion Issues for a New Not-for-Profit Corporations Act*, which highlights certain proposals in greater detail. The proposals in this framework paper and the questions raised in the issues paper are part of our attempt to obtain the views of Canadians, particularly those involved in not-for-profit activities. It is our hope that we can arrive at consensus on all these issues. We would like to have your feedback on these proposals. We will be holding further consultations on both papers; more information about the consultations and a registration form are available on our Web site at <http://strategis.ic.gc.ca/cilpd>. If you would like to send written comments, the Web site has the appropriate instructions.

The proposals contained in the draft framework and the questions raised in the issues paper are not in any sense government or even departmental policy. Rather, they are ideas that have come about largely through preliminary discussions with stakeholders across the country. This paper and the consultations that will follow, are intended to solicit further views on how the *Canada Corporations Act*, Part II can be improved.

Corporate and Insolvency Law Policy Directorate
Marketplace Framework Policy Branch

Part I - Application and Interpretation

The proposed Act would apply to every corporation incorporated under it.

It would also apply to every corporation described in the *Canada Corporations Act's* Part II (corporations without share capital), if these corporations file articles of continuance within three years of the new Act coming into force. After this period, continuance under the new Act of the remaining corporations would be automatic.

A section on interpretation would include definitions of various terms used in the Act.

Part II - Incorporation and Name

Incorporation — general

Similar to the *Canada Business Corporations Act* and the *Saskatchewan Non-profit Corporations Act*, incorporation of not-for-profit organizations would be “as of right”. This method of incorporation would streamline administrative practices and eliminate the cost of ministerial review associated with the present incorporation procedure by letters patent. (“Letters patent” refers to a document sealed with the seal of Canada by which a corporation is created and under which a company may do something or enjoy privileges not otherwise possible.)

Incorporation procedure — incorporators

The application for incorporation would require a minimum of one incorporator, either a person or a “body corporate” — any incorporated organization. Reducing the required number of incorporators would make the incorporation process easier and more flexible, particularly for smaller organizations. By allowing a corporate entity to act as an incorporator, moreover, a representative of the corporation (for example) would not have to act as an incorporator. This would eliminate the need to identify a particular individual who will act as director on behalf of that corporation.

Individual incorporators would have to be at least 18 years old, and have the legal power to contract. Undischarged bankrupts would be disqualified from acting as incorporators.

Articles of incorporation

To incorporate under the proposed Act, the incorporator(s) would have to file articles of incorporation with the Director.

The articles of a corporation typically comprise information on the corporation, its members and objects. Currently, under the *Canada Corporations Act*, letters patent issued by the Minister would contain this information in addition to specific provisions on the corporation’s powers and objects. Both the corporation and its members are bound by the articles.

The articles of the corporation would have to provide, among other things:

- Ⓒ the name of the corporation;
- Ⓒ the province where the registered office is to be situated;

- Ⓒ a statement on the transfer of membership interests (if it is permitted by the corporation) and the conditions relating to that transfer;
- Ⓒ the minimum number of directors of the corporation; and
- Ⓒ a statement of the objects that the corporation may carry on.

The articles may also include any provision permitted by the new Act to be set out in the by-laws of a corporation.

The by-laws of the corporation, any amendments made to them, and a list of current directors would have to be filed with the articles of incorporation.

Statement on the distribution of assets upon dissolution

The articles of incorporation would have to state how the remaining property of the corporation would be distributed after its liquidation and dissolution.

Before the surrender of its charter, a corporation would have to distribute its remaining assets “rateably” (that is, proportionally) among its members, or otherwise have divested itself of its assets. The corporation would choose between two options:

- Ⓒ allow distribution to the members of the organization; or
- Ⓒ allow distribution to another not-for-profit corporation.

In the case of an organization registered as a charitable organization under the *Income Tax Act*, a distribution to its members after dissolution may constitute pecuniary gain (a monetary gain enjoyed by the members). Such a corporation would have to include in its articles a provision that on dissolution, its property would have to be distributed to another charitable organization in accordance with the *Income Tax Act*. A particular organization may be specified, if desired.

Certificate of incorporation

The Director would have to issue a certificate of incorporation on receiving the articles of incorporation written in the prescribed form. The corporation would come into existence on the date shown on the certificate.

Name

The *Canada Business Corporations Act* and the *Canada Corporations Act* have similar provisions and regulations dealing with corporate names.

The proposed Act would largely adopt the current rules, including the requirement that a corporation not have a deceptive name, and — to avoid confusion with the names of other corporations — that a corporation have a distinctive name.

The new Act would largely maintain the current set of rules about the use and publication of corporate names. The provisions would be included as protections for the use — and as safeguards against the misuse — of a corporate name.

The requirements for the name of a corporation would be as follows:

- C the corporation may, in its articles of incorporation, choose a name in either of Canada's official languages or a combination of both; where a corporation operates outside Canada, a foreign-language name can also be designated;
- C the name of the corporation must be set out in all contracts and in all documents filed with the Director;
- C a corporation cannot be incorporated, carry on its operations or identify itself with a name that is prohibited or deceptive;
- C the Director can direct a corporation to change its name if it is prohibited or deceptive; if the corporation does not comply within 60 days, the Director can revoke the corporation's name and assign it a new name;
- C the Director, on request, may grant a reservation of a corporate name for up to 90 days for an intended corporation or for a corporation wishing to change its name; and
- C the Governor in Council may make regulations concerning the names of corporations.

Part III - Capacity of a Corporation

Capacity of a corporation

A corporation would have the capacity and (subject to the Act and the corporation's articles) the rights, powers and privileges of a natural person. A corporation would be able to carry on its activities throughout Canada. It would have the capacity to carry out its activities and affairs and to exercise its powers in any jurisdiction outside Canada to the extent that the laws of that jurisdiction permit. It would not be necessary for a by-law to be passed to confer any particular power on the corporation or its directors.

The articles would contain the objects of the corporation set out in broad terms, and the corporation would be allowed to do all things related to or in support of those objects.

Acts of a corporation contrary to its articles

No act of a corporation, including any transfer of property to or by a corporation, would be invalid simply because the act or transfer is contrary to its articles or the Act. This will protect innocent third parties who will not be expected to have knowledge of the corporation's articles or the Act.

Knowledge of the contents of the articles and by-laws

No person would be affected by or considered to have knowledge of a document concerning a corporation simply because the document has been filed with the Director or is available for inspection at an office of the corporation.

Contravention of articles not a legal defence

A corporation would not be allowed to assert as a legal defence against a third party that its constitution was contravened or that its representative was not properly authorized. For example, a corporation could not, as a means to void a contract, assert that the person who entered into the contract on behalf of the corporation was not properly authorized, except where the third party knew or ought to have known of the lack of authority.

Part IV - Registered Office and Records

Registered office

A corporation would have to specify the province — except as prescribed in the Regulations, if any — of its registered office in its articles. Directors of a corporation would be allowed to change the address of the registered office. If a change in address is made, the corporation would have to provide notice to the Director, in the prescribed form and within 15 days of any change.

Corporate records

A corporation would be required to prepare and maintain at its registered office (or at any other place in Canada designated by the directors) corporate records containing:

- Ⓒ the articles and amended articles of incorporation;
- Ⓒ the by-laws and by-law amendments;
- Ⓒ minutes of members' meetings;
- Ⓒ members' resolutions;
- Ⓒ copies of notices and copies of unanimous agreements;
- Ⓒ a list of current and past directors and their tenures;
- Ⓒ a list of members entitled to receive notice of meetings;
- Ⓒ a list of members entitled to vote; and
- Ⓒ other pertinent corporate records.

A corporation would have to prepare and maintain a membership list outlining the members' names, last known addresses and the date on which each individual became a member of the corporation.

The corporation would have to maintain adequate accounting records and records containing minutes of meetings and resolutions of the board of directors and its committees.

Every year the corporation would have to file with the Director an annual summary listing current and past directors, and amendments made to the articles or by-laws.

Custody of records

A person who is responsible for keeping the records of the corporation would remain liable to produce these records for six years after the corporation is dissolved, or for any shorter period ordered by a court. If the person is unable to produce the documents without a reasonable cause, he or she would be guilty of an offence and liable on summary conviction to a fine.

Access to records

The proposed Act would provide that members, their agents, legal representatives and the Director would have the right of access to a corporation's:

- Ⓒ articles, as amended;
- Ⓒ by-laws, as amended;
- Ⓒ membership list;
- Ⓒ list of members entitled to receive notice of meetings;
- Ⓒ list of members entitled to vote;
- Ⓒ financial statements;
- Ⓒ lists of current and past directors;
- Ⓒ list of officers;
- Ⓒ minutes of members' meetings; and
- Ⓒ any unanimous member agreements.

It would also stipulate the purposes for which the membership list, the list of members entitled to receive notice of meetings and the list of members entitled to vote could be used. These documents could only be used to influence the voting members of the corporation or any other matter relating to the affairs of the corporation.

Members of a corporation, their agents and legal representatives, and the Director would be able to examine these records during the corporation's usual business hours, and may make copies of the records. Directors would be entitled, on request, to free copies of all corporate records. A member of a corporation would be entitled, on request and without charge, to one copy of the articles and by-laws and of any unanimous member agreements. For all other documents, members would be required to pay a reasonable fee to the corporation approximating the actual cost of copying the documents.

A request made by a member or his or her agent or legal representative for a copy of the membership list, the list of members entitled to receive notice of meetings or the list of members entitled to vote would have to be accompanied by the payment of a reasonable fee to cover the cost of copying the documents, and an affidavit stating:

- Ⓒ the name and address of the requester or the corporation requesting the list; and
- Ⓒ that the list will only be used privately to influence the voting members of the corporation or for another matter relating to the affairs of the corporation.

The corporation would be required to furnish the list to the requester within 10 days from the receipt of the affidavit. Penalties, including fines and imprisonment, could be imposed for contravention of this section of the Act.

A corporation would have the option of applying to the Director for an order exempting it from the requirement to provide public access to its membership list. To issue such an order, the Director would have to be of the opinion that the disclosure of information could be detrimental to the corporation or its members.

Form of records

The proposed Act would state the acceptable forms of records and recognize, subject to some conditions, modern data-storage techniques. Similar provisions are found in the *Canada Business Corporations Act* and the *Saskatchewan Non-profit Corporations Act*.

All required registers and other records would have to be prepared and maintained in any of the following:

- Ⓒ bound or loose-leaf form;
- Ⓒ photographic form;
- Ⓒ any system of mechanical, electronic or another method of data storage; or
- Ⓒ any other information storage device capable of reproducing required information in intelligible written form within a reasonable amount of time.

A corporation and its agents would have to take reasonable precautions to prevent the loss, destruction or falsification of entries, and to facilitate the detection and correction of inaccuracies in all required registers and other

records. A person who contravenes this section without reasonable cause would be subject to a fine or imprisonment or both.

Corporate seal

If a corporation allows the use of a corporate seal, no instrument or agreement executed on behalf of a corporation by a director, an officer or an agent of the corporation would be invalid merely because the seal was not affixed.

Part V - Corporate Finance

Borrowing and finance

A corporation incorporated under the proposed Act and the directors of that corporation would have the power to borrow on the corporation's behalf, subject only to those restrictions found in the articles, the by-laws or any unanimous member agreement and their fiduciary duties.

At any time the directors would be able to issue debt obligations of the corporation to any person and for any consideration, provided that the debt obligation is fully paid in money or in property or past service that the directors reasonably determine to have the equivalent value. In this section, "property" would not include a promissory note or promise to pay.

The corporation would not be permitted to issue shares, because it would be, by definition, a non-share capital corporation.

Ownership of property

A corporation would own any property of any kind transferred to it, or otherwise vested in it, and would not be deemed to hold any property in trust unless that property was transferred to the corporation expressly in trust for a specific purpose or purposes.

Director not a trustee

No director would be deemed to be a trustee with respect to the corporation, or with respect to any property held or administered by the corporation. This would apply even in the case of property that is the subject of donor restrictions.

Investments by corporation

Subject to the limitations contained in any gift and in the articles or by-laws, a corporation would be allowed to invest its funds as its directors see fit given their fiduciary duties.

Property to be used to further the purposes of the corporation

The corporation would be obligated to use all profits or increases in the value of its property to further the activities of the corporation, and would not be allowed to distribute any of its profits, proceeds or property, directly or indirectly, to a member, director or officer of the corporation except as expressly permitted in other parts of the proposed Act.

The corporation would be allowed to distribute any of its money or property to a body corporate or association where that body corporate or association is a member of the corporation and authorized to carry out activities on behalf of the corporation, provided that the money or property is used for the purposes of carrying out those activities.

Donated memberships

Members would be able to donate their memberships to the corporation. The directors would be allowed to extinguish or reduce any debts or liabilities that the member owes in respect of that membership. Once a membership has been donated to the corporation, the membership would be cancelled.

Member immunity

Members would not be liable for any of the corporation's acts or liabilities, except to the extent that they receive money or property from the corporation upon its dissolution. Members would be liable for claims against the money or property for a period of two years after the dissolution of the corporation.

In the case of a corporation with a unanimous member agreement, the members would assume all liabilities in accordance with the terms of the agreement.

Part VI - Trust Indentures

Trust indenture

A definition of “trust indenture” similar to the one in the *Canada Business Corporations Act* would be included.

No person could be appointed as a trustee if there is a conflict of interest between his or her role as trustee and his or her role in any other capacity.

List of debt holders

A person who holds a debt obligation issued under a trust indenture would have the right to require that the trustee provide a list setting out the names and addresses of the registered holders of the outstanding debt obligations, the principal amount of outstanding debt obligations owned by each holder, and the aggregate principal amount of debt obligations outstanding.

A person seeking a copy of this list would have to deliver to the trustee a statutory declaration that states:

- Ⓒ the person’s name and address; and
- Ⓒ that the list would not be used except in connection with an effort to influence the voting of the holders of debt obligations, an offer to acquire debt obligations, or any other matter relating to the debt obligations.

Evidence of compliance

A trustee would be allowed to demand that the issuer or guarantor of debt obligations issued under a trust indenture provide the trustee with evidence of compliance with the trust indenture concerning any act to be done by the trustee, or any action to be taken by the issuer or guarantor. Evidence of compliance would consist of a statutory declaration or certificate by a director or officer of the issuer or guarantor.

The trustee would be required to give the holders of debt obligations issued under a trust indenture notice of every event of default arising under the trust indenture, unless the trustee reasonably believes that it is in the best interests of the holders of the debt obligations to withhold notice.

Part VII - Receivers and Receiver-managers

Functions of a receiver

A court would have the authority to appoint a receiver. Subject to the rights of secured creditors, an appointed receiver would be allowed to receive income and pay the liabilities connected with the property that is in receivership. The receiver would be able to realize on security on behalf of those who made an application to have a receiver appointed. However, the receiver would not be allowed to carry on the activities of the not-for-profit corporation, except to the extent permitted by the court.

Functions of a receiver-manager

A receiver appointed as a receiver-manager would carry on the activities of the corporation to protect the security interests of those who appointed the receiver-manager.

Directors' powers cease

When a receiver-manager is appointed by a court or under a security instrument, the directors would not be allowed to exercise the powers ceded to the receiver until the receiver-manager is discharged.

Duty to act

A receiver or receiver-manager appointed by a court would be obligated to follow the directions set down by the court.

Duty under an instrument

A receiver or receiver-manager appointed under a security instrument would have to act honestly and in good faith, and deal in a reasonable way with any property in his or her possession or control. The receiver or receiver-manager appointed under an instrument would be obligated to follow the directions set out in the instrument and any directions set down by the court.

Part VIII - Directors and Officers

Number of directors

A not-for-profit corporation would be able to operate with a minimum of one director. If the corporation issues debt obligations for public distribution, however, it would be required to have at least three directors on its board.

The by-laws of the corporation would be required to define the period during which a director can hold office.

Power to manage

The proposed Act would stipulate the extent of the directors' control by empowering the directors to manage, or supervise the management of, the activities and the internal affairs of the corporation. Directors would remain subject to any unanimous member agreements that limit their powers.

Qualifications of directors

The Act would prohibit the following persons from being appointed as a director: persons with the status of bankrupt, individuals under 18 years old, and those who have been found incapable of managing their financial affairs by a court.

Organizational meeting

Once the certificate of incorporation is issued, the directors would be allowed to hold a meeting or sign written resolutions for the purposes of:

- Ⓒ making by-laws;
- Ⓒ adopting forms of debt certificates and corporate records;
- Ⓒ authorizing the issue of debt obligations;
- Ⓒ appointing officers;
- Ⓒ admitting members;
- Ⓒ appointing an auditor to hold office until the first annual meeting of members; and

- Ⓒ making banking arrangements and transacting any other business.

The incorporator or a director would be allowed to call an organizational meeting of directors by giving at least five days' notice to each director, stating the time and place of the meeting. Directors would be allowed to waive notice of this meeting.

Removal of directors

Members of an organization would have an express right to remove a director from office before the end of his or her term by means of an ordinary resolution voted at a special meeting. However, where any class of members has an exclusive right to elect one or more directors, a director so elected could only be removed by an ordinary resolution at a meeting of the members in that class.

If all the directors have resigned or have been removed, any person who manages or supervises the management of a corporation would be deemed to be a director. This would not apply to:

- Ⓒ an officer who manages the business or affairs of the corporation under the direction or control of a member or other person;
- Ⓒ a lawyer, notary, accountant or other professional who participates in the management of the corporation solely for the purpose of providing professional services; or
- Ⓒ a trustee in bankruptcy, receiver, receiver-manager or secured creditor who participates in the management of the corporation or exercises control over its property solely for the purpose of the realization of security or (in the case of a trustee in bankruptcy) the administration of a bankrupt's estate.

Ceasing to hold office

A director of a corporation ceases to hold its office at the end of his or her term, or when he or she:

- Ⓒ dies or resigns;
- Ⓒ is removed according to the Act; or
- Ⓒ becomes disqualified.

A director's resignation would become effective when a written resignation letter is sent by the director, or at the time specified in the letter, whichever is later.

Filling a vacancy

A quorum of directors would be able to fill a vacancy on their board, except if the vacancy results from an increase in the minimum or maximum number of directors as specified in the by-laws. If there is a quorum of directors, the directors would be allowed to fill a vacancy created by a failure by the members to elect the number or minimum number of directors specified in the by-laws. Members would be allowed to approve the appointment of the new director at the following meeting of members. If there is no quorum or if there has been a failure to elect the number or minimum number of directors as specified in the by-laws, the directors or any member may call a special meeting to fill the vacancy on the board of directors.

If the members belong to a class of members that gives them the exclusive right to elect directors, and a vacancy occurs among these directors, the remaining directors of that class would be able to fill the vacancy. This would not apply to vacancies resulting from an increase in the minimum or maximum directors for that class, as specified in the by-laws, or from a failure to elect the number or minimum number of directors for that class, as specified in the by-laws. If there are no remaining directors for that class of members, any member of that class may call for a meeting to fill the vacancy.

The director appointed or elected to fill a vacancy would hold this position for the unexpired term of his or her predecessor.

Changes to the number of directors

Members would be able to amend the corporation's articles to change the number of directors or the required minimum or maximum number of directors. A decrease in the number of directors could not be used as a means to shorten the term of an existing director. Unless otherwise prescribed in the by-laws, any change to the number of directors would have to be approved by a special resolution of the members voting at a meeting.

If an amendment to the articles has been passed to increase the number of directors, members would be allowed to elect the additional director(s) during the same meeting.

Attendance at meetings of members

Directors would be entitled to receive notice of all meetings and to attend all meetings of members.

Unless otherwise specified in the by-laws, directors who are resigning, or are facing possible removal, would have the right to have the corporation circulate a written statement to the members and to the Director expressing his or her reasons for resigning or for opposing any proposed action or resolution regarding his or her removal as a director. The corporation, or anyone acting on its behalf, would not face liability for having circulated the director's written statement.

Meetings of directors

Under the proposed Act, a corporation would be able to pass by-laws governing the meetings of its board of directors. This section would outline a basic set of rules governing the meetings of directors, including:

- Ⓒ the place and timing of the meeting;
- Ⓒ the notice requirements;
- Ⓒ the waiver of notice procedure;
- Ⓒ the number of directors required for a quorum; and
- Ⓒ the method of communication used during meetings.

Subject to the articles, by-laws and unanimous member agreements, the use of interactive electronic communications would be allowed in any meeting to be held by directors or officers. However, all directors and officers participating in the meeting would have to consent to the use of electronic communications. The means of communication, related security issues and the rules governing the conduct of the meeting would be left to the corporation's by-laws.

Delegation

Directors would be able to delegate many of their powers (including the power to invest) to a committee or to a managing director. However, certain powers could not be delegated: the powers, for example, to adopt, change or repeal by-laws; to submit a proposal to the members for approval; to appoint an auditor; to approve financial statements; or to fill a vacancy on the board of directors. Directors would remain liable for the acts and omissions of those to whom the powers have been delegated.

Validity of acts of directors and officers

An act of a director or officer would not be void because of an irregularity in his or her election or appointment, or a defect in his or her qualifications.

Resolution in lieu of meeting

A written resolution signed by all the directors entitled to vote would be as valid as if it had been passed at a regular meeting. Directors would be able to sign in counterpart; that is, not every director would be required to sign the same physical copy of the document.

Disclosure of a director's interest in a contract

During a meeting of directors, directors would be required to disclose any direct or indirect conflict of interest they may have with respect to a contract, a transaction or a proposed contract with the corporation. Once a conflict of interest is declared, the director may not vote on the issue unless it relates to compensation, indemnification or insurance matters affecting the director. An interested director may, however, be counted as part of the quorum for the purposes of a directors' meeting during which the conflict is being discussed. Interested directors would not be required to be absent during voting if their presence is necessary to meet the quorum requirements. If the remaining directors use a written resolution rather than voting on the disclosed conflict, the absence of the interested director's signature on the resolution would not render it invalid.

The obligation to disclose a conflict of interest would be extended to officers of the corporation. The disclosure would have to be made in writing or entered in the minutes of the meeting of directors.

The contract or transaction related to the disclosure would not be invalid and the director or officer would not have to account to the corporation for any profits earned as a result of the contract or transaction if it was reasonable and fair to the corporation at the time it was approved, the directors approved the contract, and the disclosure requirements were fulfilled.

If a director or officer fails to disclose a conflict of interest, the corporation or any member would be allowed to apply to court:

- Ⓒ to have the contract or transaction in question set aside; or
- Ⓒ for an order requiring the director or officer to account for any profits earned as a result of the contract or transaction; or

C both.

Officers

Directors would be able to designate the offices of the corporation and appoint any person as an officer of the corporation. The directors may determine the duties and powers of the officers according to what the directors can lawfully delegate. This privilege would, however, remain subject to the articles and by-laws of the corporation, and to any unanimous member agreement.

The by-laws or articles of the corporation would be able to provide that an officer is a director by virtue of his or her office, or that an office-holder from a specific organization could serve as a director.

Remuneration of directors, officers and members

Remuneration would remain subject to the articles, the by-laws or a unanimous member agreement.

Subject to the articles and by-laws of the corporation, directors and officers would be allowed to receive reasonable remuneration for their services and indemnification for expenses incurred on behalf of the corporation or in their capacity as directors or officers. In addition, members, officers or directors could receive reasonable remuneration and expenses for their services in any other capacity.

Part IX - Directors' Liability

Duty of care of directors and officers

The Act would provide a clear standard for a duty of care that is well known and understood by Canadian courts. The standard would leave aside a director's or officer's personal background and experience in the assessment of his or her duties.

Under the proposed standard, every director and officer of a corporation would owe a duty of care to the corporation, and would have to:

- Ⓒ act honestly and in good faith, for the best interests of the corporation; and
- Ⓒ exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Directors and officers would be bound to comply with articles and by-laws of the corporation, the new Act and its Regulations, if any.

Directors would not be able to absolve themselves of their liability through a provision in the articles, by-laws or resolution or through employment contracts, indemnity clauses or member ratification, except in accordance with the provisions regarding unanimous member agreements.

Directors' liability

Directors who authorized the issue of a debt obligation for consideration other than money would be liable to the corporation if the value of the property is less than what would have been received had the debt obligation been issued for money. A director could avoid being held liable if he or she did not know, or could not reasonably have known, that the debt obligation was issued for less than its fair equivalent in money.

Directors would also be liable to the corporation for the repayment of:

- Ⓒ a payment to a member, director or officer contrary to the Act; or
- Ⓒ a payment of an indemnity contrary to the requirements provided by the Act.

Due diligence defence

The Act would include a due diligence defence, which would allow a director or officer to avoid personal liability arising out of his or her duties as a director or officer, if the person can establish that he or she displayed the care, skill, and diligence in carrying out the duties of the position that a reasonably prudent person would have exercised in comparable circumstances. Due diligence, which will vary according to the context, can include relying in good faith on financial statements or the reports of professionals, ensuring that appropriate controls are put in place so that policies are implemented, and taking appropriate action when required.

Liability of directors for wages

Directors would be liable for debts not exceeding six months' wages payable to an employee for services performed for the corporation during the period that they are directors. Directors would be liable under this section only if:

- Ⓒ the corporation is sued within six months of the debt becoming due;
- Ⓒ the corporation has started the process of liquidating or dissolving or has been dissolved, and the claim has been proven within six months of the commencement of liquidation or dissolution or the date of dissolution; or
- Ⓒ the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act*, and a claim for wages has been proven within six months after the date of the assignment or receiving order.

A director would only be liable for a debt while he or she is a director, or within two years after ceasing to be a director.

Right to dissent

The right to dissent would allow a director to avoid responsibility for actions or resolutions taken during a board meeting by having his or her dissent recorded. Unless the director discloses his or her dissent before the end of the meeting at which the decision is taken — by a written note or a request that the dissent be entered in the minutes, or immediately after the meeting is adjourned by a written statement sent to the registered office — the director is deemed to have accepted the action or resolution, and would lose the right to claim later that he or she dissented.

A director who did not attend the meeting at which a decision was taken could also avoid potential liability by disclosing his or her dissent within seven days of becoming aware of the resolution.

Any director who consented or voted for a resolution would be precluded from exercising the right to dissent.

Indemnification

Generally speaking, indemnification means making good the loss that someone suffered through another's act or default. The Act's indemnity provisions would generally:

- Ⓒ apply to former, present and acting directors and officers of the corporation;
- Ⓒ individuals acting in a similar capacity in another entity at the corporation's request;
- Ⓒ cover civil, criminal and administrative actions and investigative proceedings;
- Ⓒ apply to personal actions; and
- Ⓒ include indemnity for costs, settlement amounts, judgments, and defence costs.

Indemnification of directors and officers would, in most instances, be at the discretion of the corporation. Indemnification would only be mandatory in the case where a director or officer was not judged to have committed any fault or to have omitted to do anything that he or she was supposed to have done. For a director or officer to be indemnified, he or she would have to have acted honestly, in good faith and in the best interests of the corporation, and, in the case of a criminal or administrative action or proceeding that is enforced by monetary penalty, to have had reasonable grounds to believe that his or her conduct was lawful.

Corporations would specifically be allowed to purchase insurance to cover directors and officers.

Part X - By-laws

Making by-laws

The directors would be allowed to make by-laws to regulate the activities and affairs of the corporation. These by-laws would have to be filed with the articles of incorporation.

Amending by-laws

Unless the articles or by-laws provide otherwise, the directors would be allowed, by resolution, to make, amend or repeal any by-law that regulates the activities and affairs of the corporation. A member who is entitled to vote at a meeting of members would have the right to make proposals to make, amend or repeal a by-law.

The directors would have to submit a by-law, or an amendment or a repeal of a by-law, to the members at the next meeting of members, and the members would be allowed, by resolution, to confirm, reject or amend the by-law, amendment or repeal. A by-law, or an amendment or a repeal of a by-law, would be effective when it is approved by the members at a meeting or by resolution in writing, and filed with the Director.

Part XI - Membership

Classes of membership

The by-laws of a corporation would be allowed to provide for more than one class of membership. If the corporation is to have more than one class, its by-laws will have to set out the rights, privileges, restrictions, conditions, and period of membership of each class. The by-laws would have to provide for at least one class of membership that entitles the members to vote at all meetings of members.

Definition of a member

The Act would contain a provision defining a member as “anyone designated by the board of directors”. The by-laws would be allowed to provide otherwise.

Transfer of membership interest

Unless the articles or by-laws provide otherwise, a membership would not be transferable, and would terminate when:

- Ⓒ the member dies, resigns or is expelled;
- Ⓒ the term of membership expires, if at all; or
- Ⓒ the corporation is liquidated and dissolved.

If there is only one member who is also the corporation’s only director, the membership interest would transfer to his or her personal representative at the time of death.

Discipline of members

A corporation’s articles or by-laws may provide that the directors, members or any committee of directors or members have the power to discipline a member or to terminate the membership interest of a member. Where the articles or by-laws do so, the circumstances and manner in which this power may be used would have to be set out in the article or by-laws.

Part XII - Members

Meetings of members

The proposed Act would stipulate that a corporation's by-laws should designate a place in Canada, chosen by the directors, where the meetings of members of a corporation would be held. The members could, by special resolution, authorize a meeting of members to be held at a different place within or outside of Canada.

The directors would be required to call an annual meeting of members not later than 18 months after the corporation comes into existence. Thereafter, the directors would have to call an annual meeting of members not later than 15 months after holding the preceding annual meeting. The directors would be allowed to call a special meeting of members at any time.

Subject to the by-laws, not less than 21 days before a meeting of members, notice of the time and place of the meeting would have to be sent to each member entitled to vote at the meeting, to each director, and to the auditor of the corporation, if any. Individual members would be allowed to waive their right to receive notice of meetings.

A resolution in writing signed by all the members entitled to vote on the resolution would be as valid as if it were passed at a meeting of members. A copy of every written resolution would have to be kept with the minutes of the meetings of members.

Members representing not less than five percent of the voting rights at a meeting of members would be allowed to requisition the directors to call a meeting of members for the purposes stated in the requisition. The requisition would state the business to be transacted at the meeting, and would have to be sent to each director and to the registered office of the corporation. The corporation would have to send notice of the meeting to all members entitled to attend the meeting, except those members who have waived their right to receive notice.

Corporations with more than 250 members

Unless the articles or by-laws provide otherwise, if the corporation has more than 250 members, the proposed Act would allow notice of any meeting of members to be published in a publication that is designated in the by-laws. The members of a corporation could, by special resolution, authorize another or substitute method of providing notice. In the absence of such a resolution, notice would be given in the manner designated in the by-laws. Notice

would have to be provided not less than three weeks before the meeting, or not less than 15 days before the meeting in a publication of the corporation that is sent to all members.

Members' proposals

A member entitled to vote at a meeting, who has been a member of the corporation for a period to be specified in the Regulations, would be allowed to submit notice to the corporation of a matter that he or she proposes to raise at the meeting. A proposal could be submitted for any matter relating to the corporation, including nominations for the election of directors, if it is supported by the prescribed percentage of members entitled to vote at the meeting. The proposal would be limited to 500 words in length. The proposal would be sent to members by the corporation at the corporation's expense.

A corporation would be allowed to refuse to include a proposal in a notice of a meeting if:

- the proposal is intended to enforce a personal claim or grievance;
- the proposal promotes a cause which does not relate in a significant way to the activities of the corporation;
- substantially the same proposal was submitted to members in a notice of a meeting held within the prescribed period of time and the proposal did not meet the minimum prescribed level of support; or
- the right to submit a proposal is being abused for the purpose of obtaining publicity.

If the corporation refuses to distribute a member proposal for which it has received evidence of the required level of support within the prescribed period of time, the corporation would be required to send notice in writing to the person submitting the proposal setting out the reasons for the refusal. The person submitting the proposal would have the right to apply to a court for an order delaying the meeting or for any other order that the court would allow.

List of members entitled to notice of meeting

A corporation would be required to prepare and maintain a list of members entitled to receive notice of a meeting, arranged in alphabetical order.

Quorum of members

Unless the by-laws provide otherwise, a quorum of members would be considered to be present at a meeting of members if the members entitled to cast a majority of the total number of votes are present or represented by a proxy. If a quorum of members is not present at the opening of a meeting, the members could adjourn the meeting to another time and place, but they would not be allowed to transact any other business. A quorum of members would be maintained so long as there was a quorum at the opening of a meeting.

Voting by members

Unless the articles or by-laws provide otherwise, each member would be entitled to one vote at a meeting of members.

If a body corporate or association is a member of a corporation, a person authorized to represent it at a meeting of members of the corporation would be provided the right to exercise all of the power that the corporate body or association could exercise if it were an individual member.

Unless the by-laws provide otherwise, if two or more persons hold a membership interest jointly, they would only be allowed to vote as one.

Voting at a meeting of members would be by show of hands, unless the by-laws provide otherwise, or a ballot is demanded by a member or proxyholder entitled to vote. A member or proxyholder could demand a ballot either before or after any vote by show of hands.

Application for a court order

On the application of a director, of a member entitled to vote, or of the Director, a court would be allowed to order that a meeting be called, held and conducted in a manner that the court directs.

A corporation, a member, or a director could apply to a court to determine any controversy respecting an election or the appointment of a director or an auditor of the corporation. The court would be allowed to make any order it considers appropriate, including an order restraining a director or auditor from acting pending determination of the dispute, an order declaring the result of the disputed election or appointment, or an order determining the voting rights of members and persons claiming to have membership interests.

Unanimous member agreement

An agreement among all the members of a corporation that restricts, in whole or in part, the powers of the directors to manage the activities and affairs of the corporation would be valid.

A unanimous member agreement would be a written declaration that restricts the powers of the directors to manage the activities and affairs of the corporation. A member who is a party to a unanimous member agreement would have all the rights, powers and duties of a director of the corporation, to the extent that the agreement restricts the powers of the directors to manage the activities and affairs of the corporation. The directors would be relieved of their duties and liabilities to the same extent.

Part XIII - Electronic Communications

Electronic meetings

Unless the articles or by-laws provide otherwise, a notice of a meeting of members could be created and provided to members in electronic form. If the corporation decides to provide notice electronically, members would be allowed to request written notice of the meeting.

Unless the articles or by-laws provide otherwise, directors and members would be allowed to participate in a meeting by means of a telephonic, electronic or other method of communication, designated and made available by the corporation, that permits all participants to communicate adequately with each other.

A member or director who participates in a meeting using one of these methods of communication would be deemed to be present at the meeting.

The by-laws may provide that a corporation would be allowed to hold meetings entirely by means of a telephonic, electronic or other communication facility. The directors or members who call a meeting of members would determine if the meeting would be held entirely by means of the telephonic, electronic or other communication facility designated and made available by the corporation.

Electronic voting

Unless the by-laws provide otherwise, any vote may be held entirely by means of a telephonic, electronic or other method of communication made available by the corporation.

Unless the by-laws provide otherwise, any person entitled to vote and participating in a meeting of members through a telephonic, electronic or other method of communication that the corporation has made available would be allowed to vote using the means provided by the corporation.

Part XIV - Proxy Voting

Definition

This section would set out the definition of a proxy (a completed and executed form of proxy by which a member appoints a proxyholder to attend and act on his or her behalf) and the form that it may take (written or printed).

Appointment of a proxyholder and execution of the proxy

If the by-laws of the corporation allow the use of proxies, a member entitled to vote at a meeting of members would be able to appoint a proxyholder. If the corporation allows the use of proxies, the notice of meeting would have to include a notification that the member has the right to appoint a proxy.

The proxyholder would have the right to attend the meeting and act to the extent of the authority granted in the proxy. The proxyholder would have to be a member of the corporation unless the corporation's by-laws provide otherwise. The member who gives the proxy may revoke it at any time prior to the meeting.

Attendance at meetings and mail ballots

The person appointed as proxyholder would have to comply with the instructions contained in the proxy. In practice, this will compel the proxyholder to attend the meeting for which the proxy is given.

The proxyholder would also have the same right to speak or vote as the member who appointed the proxyholder. Proxyholders who fail to fulfill the instructions contained in the proxy would be subject to a fine or a term of imprisonment.

In its articles or by-laws, a corporation may allow members who are entitled to vote to cast votes by mail to decide the issues proposed. In addition to the express permission to use mail ballots, the by-laws or the articles of the corporation would need to state the procedures for administering the vote and reporting the results.

Part XV - Financial Disclosure

Annual disclosure at the meeting

To provide time for members to review the contents of the financial statements effectively, and subject to its by-laws, not less than 21 days in advance of an annual meeting a corporation would be required to notify its members that copies of following documents would be available upon request:

- Ⓒ the financial statements for the most recently completed financial period;
- Ⓒ the report of the auditor, if applicable; and
- Ⓒ any other documents required to be disclosed at the annual meeting.

At the annual meeting, directors would be compelled to present these documents to the members for their approval.

A corporation would be allowed to apply to the Director for authorisation to exclude certain items from its financial statements, or to be exempted from its obligation to disclose its financial statements. If the Director believes that the dissemination of information contained in the financial statements could be detrimental to the operations of the corporation or its members, the Director would be allowed to permit this omission, with any conditions that he or she believes are appropriate.

Consolidated statements

A corporation would be required to keep at its registered office copies of the financial statements of each of its subsidiaries or other corporations whose accounts are consolidated in the statement of the corporation. Members of the corporation, or their agents or legal representatives, would be entitled to receive copies of the financial statements upon payment of a reasonable fee, or to inspect these documents during usual business hours.

A corporation may apply to the Director for an order that would prevent access to its financial statements. The Director would have the power to make additional orders if he or she is satisfied that the examination would be damaging to the corporation.

Audits

Corporations with gross annual revenues equal to or greater than an amount to be prescribed in the regulations (currently suggested to be \$250,000) would be required to have an annual audit. They would be required to maintain separate financial records for their ancillary activities, including (but not limited to) subsidiaries and divisions.

Any corporation not required to have an audit under the provisions of the Act would have the right to appoint an auditor and require, in its articles or by-laws, an audit annually or otherwise.

There would be no audit requirements for corporations with gross annual revenues under the prescribed amount (\$250,000).

Qualifications of an auditor

To be eligible to be appointed as an auditor, the prospective auditor would have to meet certain conditions. Any person or firm of accountants appointed as an auditor would have to be independent of the corporation, its affiliates or the directors of the corporation. A person or firm of accountants would not be independent if that person or its business partner, or any member of the firm of accountants, or if the firm of accountants itself is:

- a business partner of any director, an officer or an employee of the corporation or any of its affiliates;
- Ⓒ an owner of, or a person in control of, a material interest in any debt obligation of the corporation or any of its affiliates; or
- Ⓒ a person who has been a receiver, a receiver-manager, a liquidator or a trustee in bankruptcy of the corporation or any of its affiliates within two years of the auditor's proposed appointment.

However, members of the organization would be able to approve the appointment of an auditor by a special resolution, even if the auditor is deemed not to be independent as described above.

The auditor would have to be a member, in good standing, of an institute or association of accountants incorporated by or under an Act of the legislature of a province.

Any interested person would be able to apply to a court for an order declaring an auditor to be disqualified under the meaning of these provisions.

The auditor would be required to follow *Canadian Generally Accepted Accounting Principles*.

Appointment of an auditor

At the first annual meeting and at each subsequent annual meeting, members of the corporation would be able to appoint an auditor by an ordinary resolution. If an auditor is not appointed at an annual meeting, the qualified incumbent would remain in office until a successor is appointed, subject to the provisions regarding the qualifications of an auditor and filling vacancies. Directors would be able to fix the level of pay for the appointed auditor.

Ceasing to hold office

An auditor would cease to hold office if he or she dies, resigns or is removed by the members of the corporation in accordance with the Act. The resignation of an auditor becomes effective at the time a written resignation letter is sent or at a time specified in the letter.

Removal of an auditor

Members of the corporation may vote by ordinary resolution to remove an auditor from office. This would not apply to a court-appointed auditor. Members may fill the vacancy created by the removal of the auditor at the same meeting.

Filling a vacancy

The by-laws of the corporation may indicate that a vacancy in the office of auditor would have to be filled by a vote of members. If no such by-law exists, the directors would be required to fill the vacancy by appointing an auditor. An auditor who fills a vacancy would hold office for the unexpired term of his or her predecessor.

Right to attend meetings

The auditor of the corporation would be entitled to receive a notice of, and to attend, every meeting of members. The auditor's expenses to attend these meetings would be paid by the corporation.

An auditor who resigns would be entitled to send to the corporation a written statement providing the reasons for the resignation. As well, the auditor would be entitled to submit a written statement to the corporation if:

- Ⓒ there is a meeting of members called for the purposes of removing the auditor from office;
- Ⓒ there is a meeting of directors or members to appoint a new auditor because of the removal or resignation of the incumbent auditor; or
- Ⓒ there is a meeting of members where a resolution resolving not to appoint an auditor for the corporation is to be voted.

Any written statement from the auditor would have to be sent, at the corporation's expense, to every member in advance the meeting.

Right to information

The auditor may demand that the present or former directors, officers, employees and agents furnish information, records, documents, books and accounts of the corporation that, in the opinion of the auditor, are necessary to examine and report on the financial affairs of the corporation.

Part XVI - Fundamental Changes

Amendment of articles and by-laws

A corporation would be allowed to amend any of its articles or by-laws. Any amendments to the corporation's articles or by-laws would require a special resolution of two-thirds of the members present and voting at a meeting called for that purpose.

If a corporation has more than one class of members, and subject to the articles or by-laws of the corporation, members of a class with voting rights would be entitled to vote on a separate special resolution on issues that affect their rights and privileges as a class of members.

Amalgamation

Corporations seeking to amalgamate would have to enter into an agreement setting out the terms and conditions of the process of amalgamation. The agreement would need to address, among other things, the provisions to be included in the articles of incorporation for the new entity, the names and addresses of the proposed directors, how the membership interest of each corporation is to be converted into the membership interest of the new corporation, and the by-laws of the new corporation.

The amalgamation agreement would have to be approved by a special resolution of each class of members of the amalgamating corporations. A notice of the meeting to decide on the amalgamation would have to include a copy or a summary of the amalgamation agreement, and be sent to every member of each of the amalgamating corporations.

The amalgamation would take effect on the date shown on the certificate sent by the Director upon the receipt of articles of amalgamation. However, it would be possible for directors of the amalgamating corporations, if authorized by the amalgamation agreement, to terminate the agreement at any time before the Director issues the certificate.

Amalgamating corporations would continue under the new corporate name, but unless specified in the amalgamation agreement, a new corporate entity would not be created.

Vertical short-form amalgamation

Two or more corporations would be allowed to amalgamate vertically. That is, a corporation would be allowed to amalgamate with one or more subsidiary corporations, controlled by the members of the first entity, without having to enter into the standard amalgamation process.

This vertical short-form amalgamation would have to be approved by a resolution of the directors of each amalgamating corporation. The resolution would have to provide for the cancellation of the membership interests of each amalgamating subsidiary corporation without any repayment of capital. The articles of the amalgamated corporation would have to be the same as the articles of the amalgamating holding corporation, except as may be prescribed in the Regulations.

Horizontal short-form amalgamation

Two or more corporations would be allowed to amalgamate horizontally. That is, two or more wholly owned subsidiary corporations of the same not-for-profit corporation would be allowed to amalgamate and to continue as one corporation, without having to enter into the standard amalgamation process.

This horizontal short-form amalgamation would have to be approved by a resolution of the directors of each amalgamating subsidiary corporation. The resolution would have to provide for the cancellation of the membership interests of all but one amalgamating subsidiary corporation, without any repayment of capital. In addition, the articles of the amalgamated corporation would have to be the same as the articles of the amalgamating corporation whose membership interests are not cancelled, except as may be prescribed in the Regulations.

Continuance under the Act

Any “body corporate” would be entitled to apply for continuance under the new Act, provided it satisfies the requirements for incorporation, it is authorized to do so by the laws of the jurisdiction where it is incorporated, and it complies with the requirements of the Act and its own articles and by-laws.

Continuance under the proposed Act would be open to all eligible bodies incorporated federally, provincially or territorially, and to those incorporated outside of Canada.

The new Act would contain rules on applying for continuance, issuing the certificate of continuance, and the effect of continuance. Specific provisions

would deal with the continuance of a for-profit body as a not-for-profit corporation. For example, a for-profit corporation would have to include in its application a copy of a special resolution containing the formula, terms and conditions outlining how the corporation would be converted from a for-profit corporation with shares to a corporation without shares. It would also have to demonstrate in its application how the shareholders of the for-profit corporation would, if applicable, become members of the not-for-profit corporation.

Continuance under another Act

An application for continuance under another Act would require authorization by special resolution of the members. Moreover, the corporation would have to establish, to the satisfaction of the Director, that its proposed continuance to another jurisdiction would not adversely affect members or creditors of the corporation.

To proceed with the continuance, the laws of the jurisdiction into which the continuance is sought would have to provide that:

- the assets of the corporation remain the property of the new corporation;
- the new corporation continues to be liable for the obligations of the corporation; and
- causes of action or any judicial orders, proceedings or judgments against the corporation may be enforced or remain valid.

Notice of the meeting to authorize the continuance would have to be sent to each member of the corporation. Each membership interest would carry the right to vote, whether or not it carries this right in other situations.

The directors, if authorized by members, would be able to withdraw the application without further authorization of the members.

Reorganization arising out of insolvency

This section would apply to a court order made under an application regarding a proposal under either the *Bankruptcy and Insolvency Act* or any other Act of Parliament that affects the rights among a corporation, its members and its creditors.

The court would have the power to order any change to the corporation's articles or by-laws that may lawfully be made under the Act. If such an order is made by the court, the corporation would have to send to the Director the

revised articles and by-laws of reorganization. On receipt of the revised articles, the Director would issue a certificate of amendment regarding the revised articles. The reorganization would become effective on the date shown in the certificate of amendment.

The court would have the power to appoint additional directors or to replace the current directors, and to authorize the issue of debt obligations of the corporation.

Arrangements

This section concerns arrangements proposed by corporations to make changes to their articles or by-laws that cannot practicably be achieved under the proposed Act. A court would be given the power to approve an arrangement upon an application by the corporation. Only a corporation that is solvent — that is, a corporation that is able to pay its liabilities or the realizable value of whose assets is greater than the aggregate of its liabilities — and is unable to effect changes to its articles or by-laws under any other provisions of the Act would be able to apply to the court. If an application is made by a corporation to the court, the Director must be notified and is entitled to appear before the court.

The court would have the power to make a wide range of orders. For example, it could require meetings to be held, require notice to be given, or appoint counsel to represent the interests of the members at the expense of the corporation. If the court makes an order, the articles of arrangement will have to be sent to the Director. An arrangement would become effective on the date shown on the certificate issued by the Director.

Part XVII - Liquidation and Dissolution

Interpretation and application

For matters related to corporate liquidation and dissolution, the definition of “court” would be a court having jurisdiction in the province where the corporation has its registered office.

This part of the Act would only apply to solvent corporations, except for the provisions relating to dissolution by the Director and the revival provisions. That is, it would not apply to corporations that are insolvent or bankrupt as defined by the federal *Bankruptcy and Insolvency Act*; proceedings would be stayed if the corporation is found to be insolvent under the *Bankruptcy and Insolvency Act*.

Revival

Any person would be allowed to apply to the Director to have a corporate entity revived under the new statute. Corporate entities eligible for a revival would include any corporations dissolved under the new Act and any corporation dissolved under the *Canada Corporations Act*, Part II.

The articles of revival would have to be sent by the interested person to the Director. The revival of the corporation would become effective on the date shown on the certificate of revival issued by the Director. The Director would have the power to impose any reasonable conditions on the revived corporation. The Director would be able to refuse to revive a corporation if the corporation has not met the conditions that the Director considers reasonable, or if there are valid reasons for refusing to issue the certificate of revival.

The revived corporation would have all the rights, privileges and liabilities it would have had if it had not been dissolved. Any legal action taken against the revived corporation between the time it is dissolved and its revival would be valid and effective.

Dissolution if there are no members

If a corporation has no members, liabilities or property, a resolution of the directors would be required to dissolve the corporation.

Where a corporation has property or liabilities, the directors would be required to distribute any property or discharge any liability before they are

able to dissolve the corporation. After the remaining property is distributed or the liabilities are discharged, the articles of dissolution would have to be sent to the Director. The corporation would cease to exist on the date shown on the certificate of dissolution issued subsequently by the Director.

Dissolution if there are members

If a corporation has members but no liabilities or property, a special resolution of the members would be required to dissolve the corporation.

Where a corporation has property or liabilities, a special resolution of the members authorizing the directors to distribute any property or discharge any liability would be required to dissolve the corporation. After the remaining property is distributed or the liabilities are discharged, the articles of dissolution would have to be sent to the Director. The corporation would cease to exist on the date shown in the certificate of dissolution issued by the Director on receipt of the articles of dissolution.

Proposing liquidation and dissolution

A director may propose, or a member entitled to vote at an annual meeting may, in accordance with the rules regarding submitting a proposal (see Members' proposals), make a proposal for a voluntary liquidation and dissolution of a corporation. The notice of the meeting where the voluntary liquidation and dissolution is to be proposed would have to set out the terms of the proposal. A special resolution of members would be required to proceed with the proposal to liquidate or dissolve the corporation. If there are classes of voting members, a special resolution by members of each class would be required.

A statement of intent to dissolve the corporation would have to be sent to the Director. The Director would then be required to issue a certificate of intent to dissolve. Once this certificate is issued by the Director, the corporation would be required to cease carrying on its activities, except to the extent necessary for the liquidation, and take the following steps:

- Ⓒ notify each known creditor of the corporation of its intent to dissolve;
- Ⓒ without delay take reasonable steps to provide notice in each province of Canada where the corporation carries on its activities at the time the statement of intent to dissolve is sent to the Director;
- Ⓒ dispose of all properties that are not to be distributed and discharge all obligations or other acts needed to conclude its activities; and

- C distribute any remaining property according the rules contained in the provisions of the *Income Tax Act*, after the obligations of the corporations are paid or discharged and the notices of intent are given.

Supervision by a court

During the course of a liquidation, the Director or any interested person would be allowed to apply for a court order that would put the liquidation under the supervision of the court. If the application is successful, the court would be allowed to make any further order it considers appropriate in the situation.

A person making an application to the court would be required to notify the Director of the application. The Director would have the right to appear in court, or be represented by counsel, to be heard on this matter.

Certificate of revocation

Before the Director issues a certificate of dissolution, a revocation of the certificate of intent to dissolve could be obtained by sending to the Director a statement to that effect, approved by a special resolution of the members. If the corporation has no members, a statement indicating a revocation of the intent to dissolve would have to be approved by the directors and sent to the Director. The Director would be required to issue a certificate of revocation and the corporation would resume its operations on the date shown on the certificate.

Right to dissolve

If the certificate of intent to dissolve has not been revoked and the corporation has followed the procedure to dissolve — that is, providing the notices of intent and distributing and discharging its properties and liabilities — the corporation would be obliged to prepare its articles of dissolution.

The articles of dissolution would have to be sent to the Director. The corporation would cease to exist on the date shown on the certificate of dissolution issued by the Director.

Dissolution by the Director

The Director would be allowed to dissolve a corporation by issuing a certificate of dissolution or by applying to a court for an order to dissolve the corporation where:

- Ⓒ the corporation has not commenced to carry on its activities within three years after the date shown on the certificate of incorporation;
- Ⓒ the corporation has not carried on its activities for three consecutive years;
- Ⓒ the corporation is in default for a period of one year in sending to the Director any fee, notice or document required under the Act; or
- Ⓒ the corporation does not have any directors or is in the situation where all of the elected directors have resigned without being replaced.

Before dissolving a corporation, the Director would be required to give 120 days' notice to the corporation and its directors and, in a publication generally available to the public, publish a notice of the Director's intention to dissolve the corporation. If no cause to the contrary has been shown, or a court order to require the Director to change his or her decision has not been issued, the Director would be able to issue a certificate of dissolution and the corporation would cease to exist on the date shown on the certificate of dissolution.

The Director would also be able to dissolve a corporation by issuing a certificate of dissolution if the required fee for incorporation has not been paid. The Director would not have to provide any notice in this situation.

Dissolution by a court

The Director, or any interested person, would be able to apply to the court for an order to dissolve a corporation where the corporation has failed to hold or call an annual meeting of members for two consecutive years, denied members access to corporate records as required under the Act, or obtained any certificate under the Act by submitting misrepresented facts to the Director. This provision could not be used unless the person, other than the Director, applying to a court for an order to dissolve an active corporation has first sought a compliance order from the court.

Where a unanimous members agreement entitles a member to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred, the court may dissolve the corporation without requiring that the complainant first seek a compliance order.

A person making an application to the court to dissolve a corporation would be required to notify the Director. The Director would be entitled to be heard in person or be represented in court. On an application made under this section — or under the provision setting out the grounds for summary dissolution by the Director described immediately above — the court would be able to order the dissolution, or the liquidation and dissolution, of the corporation under the supervision of the court, and to make any other order it deems appropriate. The court would be required to determine which interested parties should receive notice of the application to dissolve the corporation.

If the court orders a corporation dissolved, the Director would be required to issue a certificate of dissolution. If the court order is to liquidate and dissolve under the supervision of the court, the Director would have to issue a certificate of intent to dissolve and publish a notice in a publication generally available to the public.

Application for supervision

Any application to a court to request that the liquidation and dissolution of a corporation be supervised by the court would have to state the reasons why court supervision is needed, and be accompanied by an affidavit from the applicant.

Application to a court

Any application to a court to request the liquidation and dissolution of a corporation would have to state the reasons why the order is needed, and be accompanied by an affidavit from the applicant.

Upon the application, the court may decide to require the corporation or any interested person to show cause why the corporation should not be liquidated and dissolved. The court may also order the directors and the officers of the corporation to submit material information, such as:

- Ⓒ the financial statements of the corporation;
- Ⓒ the name and address of each member of the corporation; and
- Ⓒ the name and address of each known creditor or claimant and any person with whom the corporation has a contract.

At the discretion of the court, a copy of the court's order requiring the corporation or any interested person to show cause why the corporation should not be liquidated and dissolved would have to be published in a

newspaper that is published or distributed where the corporation has its registered office at least once per week before the date set for the show-cause hearing. The order would have to be served on the Director and any person named in the order.

Powers of a court

When dealing with the liquidation and dissolution of a corporation, a court would be able to make, among others, the following orders:

- Ⓒ direct the corporation to liquidate;
- Ⓒ appoint or replace a liquidator and fix his or her remuneration;
- Ⓒ appoint or replace inspectors or referees, specifying their powers and setting their remuneration;
- Ⓒ determine, or dispense with, any notices required to be given to any interested person;
- Ⓒ determine the validity of any claims made against the corporation;
- Ⓒ restrain the director and officers from exercising any of their powers, collecting or receiving any debt or property of the corporation, or paying out or transferring any property of the corporation, except as the court permits;
- Ⓒ determine and enforce the duty or liability of any present or former director, officer or member to the corporation or for an obligation of the corporation;
- Ⓒ dispose of or destroy the documents and records of the corporation;
- Ⓒ dispose of any property belonging to creditors or members who cannot be found; and
- Ⓒ upon the final account of the liquidator, dissolve the corporation.

Effect of an order

The process of liquidating a corporation under the preceding section would start when the court makes an order for liquidation.

Appointment of a liquidator

When ordering the liquidation of a corporation, a court may appoint any person as liquidator of the corporation. This person can be a director, an officer or a member of the corporation.

Cessation of a corporation's activities and powers

Where a court makes an order to liquidate a corporation, the corporation continues to exist, but would have to cease its activities except to the extent that (in the opinion of the liquidator in charge) the activities would be required for an orderly liquidation. The powers of the directors and the members would be terminated and vested in the liquidator, with the exception of any powers specified by the court. However, it would be possible for the liquidator to delegate any vested powers to directors or members of the corporation.

Vacancy in the office of liquidator

Where a court orders the liquidation of a corporation and the office of liquidator is or becomes vacant, the property of the corporation would remain under the control of the court until the office of liquidator is filled.

Duties of the liquidator

Upon his or her appointment, the liquidator would be required to give notice of the appointment to the directors and to any claimant and creditor known to the liquidator.

The liquidator would have to publish a notice for two consecutive weeks in a publication generally available to the public and distributed where the corporation has its registered office. If the corporation operates in various provinces, the liquidator would be obligated to take reasonable measures to give notice in every province where the corporation carries out its objects. The notice would require any person:

- C owing a debt to the corporation to render an account and pay to the liquidator any amount owing;
- C possessing property of the corporation to deliver it to the liquidator;
or
- C having a claim against the corporation to present particulars of the claim to the liquidator not later than two months after the first publication of the notice.

Among other duties, the liquidator would be required to:

- Ⓒ take custody and control of the property of the corporation;
- Ⓒ open and maintain a trust account;
- Ⓒ keep records of all sums paid or received by the corporation;
- Ⓒ maintain lists of the members, creditors and other persons having claims against the corporation; and
- Ⓒ provide financial statements of the corporation to the court and the Director.

Powers of the liquidator

For the execution of his or her duties, the liquidator may:

- Ⓒ retain professional advisers, such as lawyers, accountants, and engineers;
- Ⓒ bring, defend or take part in any legal or administrative proceeding on behalf of the corporation;
- Ⓒ carry on the activities of the corporation as required for an orderly liquidation;
- Ⓒ sell any property of the corporation by private sale or public auction;
- Ⓒ execute any document on behalf of the corporation;
- Ⓒ borrow money on the security of the corporation's property;
- Ⓒ settle any claims by or against the corporation; and
- Ⓒ do all things necessary for the liquidation of the corporation and the distribution of its property.

A due diligence defence would be provided for liquidators, similar to that for directors and officers. This would provide the liquidator with a defence against being found liable if he or she exercises the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances. This would include reliance in good faith on the corporation's financial statements, on information contained in a written report on the corporation's financial condition prepared by the corporation's auditor, and on any reports prepared by an expert.

If the liquidator has reason to believe that any person has in his or her control any property of the corporation, the liquidator would be allowed to apply to a court for an order requiring that person to appear before the court. If the

court finds that the person has concealed, withheld or misappropriated the corporation's property, it may order that person to restore the property or reimburse the liquidator.

Liability for environmental matters

A liquidator would not be personally liable for any environmental condition that arose or environmental damage that occurred before or after the liquidator's appointment, unless the environmental condition arose or damage occurred as a result of the liquidator's gross negligence or wilful misconduct.

Distribution of remaining property

When the liquidator has paid all claims, or has made adequate provision to pay all claims against a corporation, he or she would be required to transfer any remaining property of the corporation. The distribution of the remaining assets of the corporation, upon its dissolution, would be subject to its articles.

Continuation of actions

Any civil, criminal or administrative action or proceeding commenced by or against the corporation before its dissolution could be continued as if the corporation had not been dissolved. It would be possible to bring any such action or proceeding against the corporation within a period of two years after its dissolution. Any of the corporation's assets that would have been available to satisfy a judgement or order if the corporation had not been dissolved would remain available to satisfy any ruling or order against the corporation.

A member to whom property of the dissolved corporation has been distributed would remain liable to any claim up to the extent of the amount received. The claim would have to be made within two years of the corporation's dissolution.

Unknown claimants

Any undistributed property of the dissolved corporation belonging to a creditor or a member who cannot be found would be converted into money and transferred to the Receiver General. The transfer of money to the

Receiver General would be deemed to satisfy any debt or claim of such a creditor or member. If at any time the creditor or member establishes that he or she is entitled to the money transferred to the Receiver General, the Receiver General would be obliged to pay the equivalent amount to that person out of the Consolidated Revenue Fund.

Vesting in the Crown

Any property of a corporation that has not been disposed of at the date of its dissolution would vest in the Crown.

Return of property on revival

Subject to the rights of unknown creditors and any continuation of actions against the corporation, if the corporation is revived, the Crown would have to return to the corporation any transferred property it received and that was not disposed of between the time the corporation was dissolved and revived.

If the Crown has disposed of the property, the corporation would be entitled to receive the lesser of the value of any property on the date it was transferred to the Crown or the amount realized by the Crown from the disposition of the property. In addition, the corporation would be entitled to receive an amount equal to any money transferred to the Crown.

Part XVIII - Remedies

Definitions

An “action” would refer to any action taken according to the proposed Act.

A “complainant” would be defined as:

- Ⓒ a member;
- Ⓒ a present or former registered holder or beneficial owner of a debt obligation of a corporation or any of its affiliates;
- Ⓒ a director or officer or a former director or officer of a corporation or any of its affiliates;
- Ⓒ the Director; or
- Ⓒ any person, in the discretion of the court, seen as a proper person to make an application in relation to these remedies.

Rectification of records

A complainant would be allowed to apply to a court for a rectification of the records of the corporation. The court would have the power to:

- Ⓒ require the correction of the registers or records of the corporation;
- Ⓒ restrain the corporation from holding or calling a meeting of members before the rectification;
- Ⓒ determine the right of a party to the proceeding to have its name entered, omitted or deleted from the records or registers when the issue arises between two or more parties or between the corporation and any party; and
- Ⓒ compensate a party that suffered a loss.

Notice of refusal by the Director

The Act would reinforce the concept of incorporation as a right by requiring the Director to give sufficient written notice if an incorporation is refused, and to provide the reasons for the refusal.

The Director would be required to file any document that must be filed within 20 days of its receipt. If the Director were to refuse to file any document required to be filed within the time limit, the Director would be

deemed to have refused the application, opening the way for an appeal to a court to challenge this decision.

Appeal from a decision of the Director

If a person wants to appeal a decision of the Director, he or she would be able to apply to a court for an order to compel the Director to change the decision. The court would be allowed to make any order it considers appropriate. The following decisions by the Director would be grounds for an appeal:

- Ⓒ refusal to correct or cancel a document;
- Ⓒ refusal to file any document required by law to be filed;
- Ⓒ any decision related to the attribution, abbreviation, revocation or change of the corporation's name;
- Ⓒ refusal to issue a certificate of discontinuance;
- Ⓒ refusal to revive a corporation; and
- Ⓒ refusal to dissolve a corporation.

Offences with respect to reports

Making or assisting in the making of a report, notice or other document required by the Act or the regulations to be sent to the Director or any other person that contains an untrue statement or omits a material fact so as to be misleading would be an offence. The offence would be punishable on summary conviction to a fine or to a term of imprisonment not exceeding six months.

If the offence is committed by a corporation, any director or officer who knowingly authorized, permitted or acquiesced in the commission of the offence would be a party to the offence and liable for the fine or term of imprisonment set out above even if the corporation was not prosecuted or convicted of the offence.

No person would be guilty of an offence under this section if the person did not know of the untrue statement or omission, and could not have known of the untrue statement or omission through the exercise of due diligence.

Offence

Contravention of any provision of the Act or the regulations for which no punishment is provided would be an offence punishable on summary conviction.

Restraining or compliance order

A court would be empowered to issue a compliance or restraining order to force a corporation or any of its directors, officers, employees or auditor to comply with its own articles, by-laws or unanimous member agreement, and with the Act and its Regulations. A court would be allowed to make any order it considers appropriate. Only a complainant would be able to apply under this provision.