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Reform of the  
*Canada Corporations Act*

Discussion Issues for a New  
*Not-for-Profit Corporations Act*

A Supplement to the  
*Draft Framework for a New  
Not-for-Profit Corporations Act*

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Corporate and Insolvency Law Policy Directorate  
Policy Sector  
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# Introduction

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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In recent years some concerns have been raised that the Act is outdated and that its provisions no longer meet the requirements of the modern not-for-profit sector.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.

### **Issues for Discussion**

This paper accompanies a separate draft framework setting out Industry Canada's proposals for a new *Not-for-Profit Corporations Act*. Highlighting certain topics in greater detail, it presents readers with a variety of options on a series of issues. We will soon hold further consultations and we hope that participants will be able to arrive at a consensus on a legislative approach to these issues.

## ***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.

This paper accompanies a separate framework paper, *Reform of the Canada Corporations Act: Draft Framework for a New Not-for-Profit Corporations Act*. The previous round-table discussions led to the issues presented in this paper, based on an assessment of their importance to the sector and their relative level of complexity. In each case we provide background information, examine the framework proposal, and present an alternative.

### ***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 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 (and are thus breaches of their fiduciary duties). 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***

The issues raised in this paper and the proposals in the framework 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 issues contained in this paper and the proposals contained in the draft framework 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





# 1. Classification Scheme

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## The issue

Whether the proposed Act should contain a system for the classification of not-for-profit corporations

## Background

The *Canada Corporations Act* does not have a classification system for the various types of not-for-profit corporations. The July 2000 discussion paper, *Reform of the Canada Corporations Act: The Federal Nonprofit Framework Law* proposed that a new *Not-for-Profit Corporations Act* might include a classification system. During a series of round-table discussions with sector representatives, however, the merits of a classification system were debated, with most participants arguing against the establishment of a classification scheme.

During these discussions, some other participants took the position that a classification system within the Act would meet the individual needs of each of the various types of not-for-profit corporations more adequately. Others argued that a classification system would create difficulties by requiring that an organization designate itself as belonging to a particular category. They pointed out that this can lead to confusion and wrongly classified organizations, because of imprecise definitions and a lack of scrutiny to ensure proper classification. Furthermore, it was noted that a classification system might lead to confusion with the Canada Customs and Revenue Agency's rules regarding the designation of corporations as charitable organizations for tax purposes.

The overwhelming response to the question of whether or not to incorporate a classification system was that the Act should be permissive, flexible and as easy to use as possible, regardless of whether a system of classification were to be incorporated.

## Framework proposal

### No classification system

Designing an Act with a classification system would conflict with the notion that the Act should be enabling and permissive. Reflecting this, the framework proposal does not include a system of classifications for the various types of not-for-profit organizations. Rather, the framework is permissive and flexible, allowing organizations to choose how to apply many of its provisions. The emphasis is on providing a set of rules to guide organizations in the conduct of their business, rather than on mandating a system of rules that must be followed.

The basic concept of a classification system would be that organizations would be treated differently, some with more government-imposed regulation and some with less. Under the proposal, corporations are, for the most part, treated in the same manner and allowed to adopt varying levels of regulation based on the needs and wishes of the particular organization and its members.

## Option

### Include a classification system

An alternative to the approach taken in the proposed framework would be to include a classification system, possibly based on one of the models outlined in the July 2000 discussion paper. Those included:

- C the model used in the *California Corporations Code* and in the American Bar Association Revised Model Act, which contains three categories: mutual benefit, public benefit, and religious organizations;
- C the five-part classification scheme recommended by the Ontario Law Reform Commission in its *Report on the Law of Charities*: religious, charities, political, mutual benefit, and general non-profit;
- C the Saskatchewan *Non-profit Corporations Act*'s two-part classification scheme: charitable and membership organizations; and

- the classification proposed in Alberta's *Volunteer Incorporations Act* of 1987, based on the types of financial distributions — including the distribution of profits and increases in property value — that organizations could make.

A classification system would make sure that organizations follow a standard set of rules designed specifically for that type of organization. All corporations within a class would be governed in the same manner and be subject to the same rules and requirements. Members of each type of corporation would also have the same rights and protections as all other members of corporations within the same class. The proposed Act would contain a general part, with provisions applicable to all organizations, and parts that specifically apply to only one type of corporation. It is arguable that this could make the Act more user-friendly for the sector participants, since members of an organization in one sector would not need to concern themselves with rules specifically tailored for organizations in another sector.

A classification system could allow greater transparency and accountability within the sector by allowing the proposed Act to include provisions for audits and access to records that are tougher for certain organizations, while exempting others from these provisions.



## 2. Access to Financial Statements

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### The issue

Whether to allow members, directors, officers and the Director of Corporations to have access to corporate financial statements

### Background

The *Canada Corporations Act* does not require disclosure of corporate financial records. It requires not-for-profit corporations to keep detailed accounts and to have their accounts audited, but it leaves disclosure largely to the discretion of the organization.

### Framework proposal

Require that not-for-profit corporations make corporate financial statements available to members, directors, officers, and the Director

A central goal of the proposed Act is to increase transparency and accountability within the sector. One of the most effective methods of attaining these goals is to require that corporations disclose their financial dealings to their members and to the people who run the organization. Reflecting this, the proposal contains provisions compelling organizations to make their financial records available to members, directors, officers and the Director.

Under this proposal, directors and officers of the corporation would have the right to view the financial statements so that they can properly manage or supervise the management of the corporation. Members would be given access to the statements so that they might be able to monitor the financial situation of the corporation between annual meetings, and make sure that the funds of the corporation are used to pursue the objectives of the corporation.

To prevent requests for copies of the financial statements from becoming a financial burden on the corporation, members would be required to pay for copies requested at any time before the notice of the annual general meeting is sent out by the corporation. The fee charged by the corporation would have to be fair and reflect only the actual cost to the corporation of copying the documents.

To balance the need for accountability and transparency with the need to protect privacy, there are no requirements that financial information be made public. As well, the proposal contains a provision that would allow organizations to apply to the Director to be exempted from the disclosure requirements. Exemptions could be granted by the Director where the Director reasonably believes that the disclosure of the financial statements could be detrimental to the corporation or to its members.

These provisions strike an appropriate public-policy balance between promoting transparency and accountability within organizations in the sector, while protecting the need for privacy and the financial position of the organization. A corporation would be free to determine whether its own situation warrants public disclosure of financial information, without being compelled by law to do so.

Some have argued that organizations in the not-for-profit sector, especially those receiving donations from the public, should be required to be accountable to the public. Stakeholders who favour public disclosure argue that these organizations use public funds and should therefore be required to make their finances public, and not simply make this disclosure to their members, who might have different interests than the general public.

### Option

Allow corporations to decide whether or not to disclose their financial statements to members

This option would allow each organization to decide whether or not members should have regular access to the financial records of the corporation. Organizations that place an emphasis on transparency and accountability would be free to provide open access, perhaps access beyond that anticipated in the framework. Other organizations that place a greater emphasis on the need for privacy would be free to limit access to the records.

This follows the basic goals of the framework — permissiveness and flexibility. Each organization would be allowed to make the decision for itself about whether or not to allow members to have access to the corporate financial records. The decision would be based on the individual needs of the organization and the interests of that organization's members.

### 3. Membership Lists

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#### The issue

Whether to make membership lists, notice lists and voter lists available to members

#### Background

The *Canada Corporations Act* currently allows “any person” to obtain a copy of the list of members of a not-for-profit corporation (s. 111.1(1)). The Act sets out a list of purposes for which the list may be used and provides for a fine and/or imprisonment if the list is used for other purposes.

#### Framework proposal

Require that membership lists, notice lists and voter lists be made available only to members, officers and directors of the corporation

The proposed framework requires that organizations keep lists of members, members entitled to vote, and members entitled to receive notice of meetings. It also contains provisions that would allow members to copy the various member registries. The proposed Act would specifically state that the lists could only be used for matters related to the organization.

Specifically, these provisions allow members to contact other members of the organization for the purposes of influencing votes or attempting to direct the actions of the organization.

To help prevent misuse of the lists, the proposed framework also includes fines or possible jail terms if the lists are used improperly. Members seeking access to the membership lists would be required to file a sworn statement setting out the reasons for which they are seeking access to the list.

As with the provisions relating to access to financial records, the proposal contains provisions that would allow organizations to apply to the Director for an exemption from the requirement to make these lists available. To obtain an exemption, the organization must show that it or its members could suffer harm as a result of the disclosure of information.

Member communication and participation are major parts of modern corporate governance. Access to membership lists would encourage

increased member participation by enhancing the ability of members to communicate with one another. The lists would provide a mechanism through which members could build consensus and support for such things as member proposals, or governance-related initiatives such as the election of directors, changes to the articles or by-laws, or the selection of an auditor. This proposal would encourage democracy and transparency within the sector, while balancing the need for privacy.

The requirement to have membership lists kept up to date would also facilitate the governance provisions contained in the framework proposals related to notice requirements and voting. The framework requires that corporations provide members with notice and periodically contact members. Without up-to-date lists, it is possible that members deserving of notice will be missed and that the rights of members could inadvertently be ignored.

Without the requirement for corporations to maintain and provide access to the lists, members' rights could be overlooked and members' participation in the operations and affairs of the organization may suffer.

### Option

Allow corporations to decide whether to make membership lists available to members

Organizations would be given the freedom to decide whether to allow members to have access to membership lists, based on their own particular needs.

During cross-country round-table meetings, many participants argued that allowing access to the membership lists could lead to misuse of the information. It was feared that the information could be used by minority interests to interfere with the affairs of the organization. It was also argued that the privacy of members could be invaded if their personal information is made widely available. These stakeholders argued that the protections provided would be insufficient to prevent the possible misuse of the information, and that the requirement for members to file a sworn statement setting out the reasons for which they are seeking access to the list would be of little consequence to individuals intent on misusing the information.

It was also argued that the exemption provisions are arbitrary and rely on the discretion of the Director. It was suggested that organizations deserving of exemptions could be mistakenly denied the protection of the exemption.



While the exemption provisions found in the framework proposal would grant the Director a certain degree of discretion, one of the rationales for replacing the *Canada Corporations Act* is to end — or at least reduce — the reliance on governmental discretion. Allowing corporations to determine who has access to membership lists would provide each organization with a right to make a decision based upon its own needs and interests.

Others have argued that requiring organizations to maintain various lists of members would impose a financial cost on the organizations, such as that associated with keeping and maintaining these lists. It might therefore be reasonable to give organizations the discretion to decide whether or not to undertake the costs associated with keeping lists.



## 4. Standard of Care

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### The issue

What the standard of care for directors and officers should be

### Background

The *Canada Corporations Act* does not outline the fiduciary duties applicable to directors and officers of not-for-profit corporations, nor does it contain any provisions for the standard of care applicable to them. The duty of care imposed upon directors and officers is a matter of common law. However, the common law in this area is not standardized across the country — directors in some provinces face higher standards of care than directors in other provinces.

The subjective test used in some provinces can hold directors and officers with professional designations to higher standards. This test compares the actions of the director or officer with the conduct that might be expected of a person who has comparable knowledge, skill or qualifications. Individuals are judged on their own personal characteristics, thus creating disparities between individuals of different backgrounds or qualifications. This can result in inequities.

In comparison, most modern corporate laws, like the *Canada Business Corporations Act* and the *Saskatchewan Non-profit Corporations Act*, have an objective standard which judges a director's actions in the context of what a reasonably prudent person would do in comparable circumstances. For example, the standard of care in subsection 122(1) of the *Canada Business Corporations Act* states that a director or an officer, in exercising his or her powers and discharging his or her duties, must act honestly and in good faith with a view to the best interests of the corporation and display the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The lack of clear provisions setting out the extent of the directors' and officers' duties to the corporation is commonly seen as an impediment to recruiting and retaining qualified individuals to serve on the boards of not-for-profit corporations.

## Framework proposal

Adopt a standard of care similar to the one contained in the *Canada Business Corporations Act*

The framework proposes an objective standard of liability that would clarify that every director or officer of a corporation would owe a duty of care to the corporation and would have to:

- Ⓒ act honestly and in good faith with a view to the best interests of the corporation;
- Ⓒ exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances; and
- Ⓒ comply with the Act, articles, by-laws and any unanimous member agreements.

The adoption of this standard would address concerns expressed by the not-for-profit sector on the potential effect of a subjective standard on the recruitment of highly qualified board members. In its 1997 *Report on the Law of Charities*, the Ontario Law Reform Commission expressed a preference for an objective standard.

The proposed objective standard, based on that found in the *Canada Business Corporations Act*, has the advantage of having been well defined and clarified by Canadian courts. It would also harmonize the new Act with other federal corporate laws such as the *Canada Business Corporations Act* and the *Canada Cooperatives Act*.

Adoption of the objective test would create a uniform standard of care for directors and officers of federally incorporated not-for-profit corporations across Canada. There would be a reduction in the uncertainty over the liabilities faced by directors and officers across Canada, and an increased awareness of the standards that directors and officers are expected to meet.

## Option

Adopt a standard of duty and care that comprises a subjective element

It has been argued that, by their very nature, most not-for-profit organizations are run by individuals who do not have a material interest in the organization. In business corporations, shareholders have a direct

financial interest in the corporation. They are therefore more inclined to examine the actions of the directors and to make sure that the directors and officers operate in the best interests of the corporation. In the not-for-profit sector, however, members do not always take a direct interest in the functioning of the corporation in the same manner as shareholders, leaving the directors and officers with potentially less scrutiny. Because of this, it has been argued that directors and officers should be held to a higher level of accountability than those of business corporations. A subjective test might have the effect of placing directors and officers under a higher burden to ensure that the corporation is properly run and effectively administered.



## 5. Due Diligence Defence

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### The issue

Whether the new Act should contain an additional safeguard for directors of not-for-profit corporations in the form of a due diligence defence

### Background

A director or officer is said to have acted with due diligence if he or she exercised the degree of care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances. The standard is said to be “objective” because a director must exercise the reasonable care and skill which an ordinary person might be expected to exercise in the circumstances. In situations where a due-diligence defence is applicable, the onus of proof of substantiating due diligence is on the director. The due-diligence defence for directors and officers is a provision commonly found in modern corporate laws like the *Saskatchewan Non-profit Corporations Act* and the *Canada Business Corporations Act*. The *Canada Corporations Act* does not provide this kind of defence.

With a due diligence defence, a director may act reasonably prudently by relying on financial statements represented to him or her by an officer or auditor of the corporation, or by relying on the director’s own assessment of the financial health of the corporation. However, the due diligence defence also recognizes that the nature and extent of the expected precautions will vary under each circumstance. These precautions can include such things as putting in place appropriate controls and systems, monitoring the affairs of the corporation, requiring a proper review of periodic reports to ensure that policies are being implemented, and taking appropriate action when a problem is brought to the directors’ attention.

Putting a due diligence defence in a new not-for-profit Act would clarify that the defence, which is already found in common law, is specifically applicable to directors and officers of not-for-profit corporations. This defence would restrict liability to circumstances where the director did not perform as he or she could reasonably have been expected to perform: that is, the director or officer did not display the care, skill, and diligence in carrying out the duties of the position that a reasonably prudent person would have exercised in comparable circumstances.

### Framework proposal

Include a due diligence defence for directors and officers of not-for-profit corporations.

A due diligence provision would complement a redefined duty of care by setting the context in which the standard of care is applied. Courts will apply the standard of care to directors and officers and measure their actions against the actions of a reasonably prudent person. If the director or officer has acted as a reasonably prudent person could have been expected to have acted, the director or officer would be able to rely on the defence of due diligence to avoid liability even if his or her actions caused the harm at issue.

This defence would modernize the law and provide the sector with protections on par with other modern corporate laws in North America. The defence would provide strong protection for directors in light of recent concerns regarding the liabilities faced by the sector. The defence would allow individuals who act appropriately to avoid liability, while not protecting those who have acted improperly.

The defence should aid in the recruitment and retention of directors and ensure that the voluntary sector can continue to grow and perform its vital function.

### Option

Status quo — no statutory defences for directors and officers

An option to providing a due diligence defence is to maintain the status quo, which provides no defence for directors. However, there appears to be little support for this option. *Building on Strength* (1999), the final report of the Panel on Accountability and Governance in the Voluntary Sector, concluded that the present uncertainty in the *Canada Corporations Act* is making it difficult for not-for-profit organizations to recruit qualified directors. The establishment of a due diligence defence, taken in combination with a defined duty of care, clarifies the parameters of a director's responsibilities, and reduces the uncertainty he or she faces when circumstances occur that may give rise to liability.



## 6. Limiting Liabilities of Directors and Officers

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### The issue

Whether the liabilities faced by directors and officers of not-for-profit corporations should be limited

### Background

Liability is a major concern for the not-for-profit sector in Canada, especially for those individuals who act as directors and officers of the corporations. Directors and officers in the sector, like those in the for-profit sector, face numerous liabilities ranging from statutory responsibility for environmental problems to liabilities for unpaid wages, civil liabilities arising out of breaches of fiduciary duties, and liability for their own negligent actions.

There have been calls to limit statutorily the monetary liabilities faced by these individuals. Those who argue for the limitation suggest that the risk of personal liability has made it difficult for organizations to attract and keep directors. Proponents suggest limiting the liabilities in a fashion similar to that found in many American jurisdictions where certain liabilities are capped for paid directors or eliminated for volunteer directors.

Other proponents of limiting the liabilities of directors point to Nova Scotia, which introduced the *Volunteer Protection Act, An Act to Limit the Liability of Volunteers Serving Non-profit Organizations* as Bill 98 on 19 November 2001. The bill proposes to eliminate certain liabilities for all volunteers serving not-for-profit organizations.

Under the American statutes, the liability of directors and officers for breach of fiduciary duties is limited. However, directors and officers continue to be liable for criminal, grossly negligent or reckless conduct. They are also generally liable for injury related to the operation of a motor vehicle and are not protected from lawsuits brought by the organization. This approach is adopted in Nova Scotia's Bill 98 for all volunteers serving not-for-profit entities in that province.

The American statutes also tend to include caps on the liabilities faced by paid directors and officers: usually \$100,000 or the individual's annual salary, whichever is greater.

To gain the protection of these statutes, a volunteer must have acted on behalf of the not-for-profit organization and within the scope of the volunteer's responsibilities.

### Framework proposal

Provide defences against personal liability for directors and officers while encouraging due diligence and proper corporate governance

Rather than limiting or extinguishing the liabilities of directors and officers of not-for-profit organizations, as contemplated by the American statutes and Nova Scotia's Bill 98, the framework offers them a number of protections and benefits. The protections and benefits should effectively limit their exposure to liability except where the directors and officers are in breach of clearly defined fiduciary duties. Breaches would include wilful, grossly negligent, reckless or criminal conduct. The proposal provides incentives for directors and officers to adopt and follow proper corporate governance procedures, while at the same time balancing the need to protect them from unwarranted liability.

The first level of protection provided by the proposed Act is incorporation, which creates a legal entity capable of being held responsible for its own actions and the actions of its employees, volunteers and controlling minds. A corporation will protect these individuals from personal liability so long as they are acting within the scope of their duties as defined in the Act.

Second, the proposed Act would clearly define the fiduciary duties and standard of care to which directors and officers will be held. It would require that every director and officer of a corporation, in exercising their powers and discharging their duties, act honestly and in good faith with a view to the best interests of the corporation. They must also exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. In addition, every director and officer of a corporation must comply with the Act, the Regulations, articles, by-laws and any unanimous member agreement.

Third, the proposed Act would include a due diligence defence that can be relied upon by directors and officers if they are named in an action. Under this defence, directors or officers would not be liable if they are able to demonstrate that they exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances. This would include reliance on financial statements of the corporation or the

report of an auditor or another expert. The defence encourages directors and officers to adopt proper governance procedures and will allow them to avoid liability if those procedures are followed.

The proposal also contains new indemnification provisions that would broaden the scope of situations in which a director or officer could be indemnified for costs and awards arising out of legal actions. This could help provide directors with protection from the costs of unfounded suits and also for costs arising from incidents where, in the corporation's opinion, the actions of the director warrant indemnification.

The proposal would encourage directors and officers to exercise proper care and diligence in running corporations, while providing the means for them to avoid personal liability. The framework would put the responsibility for harm where it belongs, on those responsible, rather than on those who have been made to suffer. Where a director or officer fails to meet the standard of due diligence, misplaces his or her fiduciary responsibilities, acts criminally with gross negligence, or wilfully causes harm to an individual, that director or officer would continue to be responsible for the harm, and the burden of bearing the costs of the harm would not be transferred to the innocent party.

The role of director or officer brings with it a level of responsibility that should not be taken lightly. Limiting or extinguishing liability will not encourage directors and officers to exercise properly the care expected from a person in such a position. Although the extinction or limitation of liability will not necessarily encourage directors and officers to avoid their fiduciary duties or not exercise proper due diligence, there could be a public perception that this will be the case. In addition, there is a risk, where liabilities have been limited or extinguished, that individuals who suffer harm as a result of the actions of a director or officer would end up bearing not only the effects of the harm, but also the costs associated with it. The risks would be transferred from the directors and officers, the organizations or their insurers to the injured party.

The not-for-profit sector has an increasingly important role in Canadian society, and it has a large impact on the daily lives of Canadians. Public policy demands that these organizations be properly run. There must be public trust that the organizations are performing the functions that they are intended to carry out in a scrupulous, well-run manner.

## Option

Limit or eliminate the liability for directors and officers

A limitation or the elimination of the liabilities of directors and officers of not-for-profit corporations could be introduced in the legislation. This could be done in a manner that would eliminate the liabilities faced by all directors, or it could be drafted only to limit the liabilities faced by volunteer directors and officers. In any case, this option would not limit the liabilities faced as a result of conduct that is criminal, grossly negligent, wilfully harmful, or beyond the scope of the individual's role in the organization.

There is a question as to whether liabilities under the common law, under other federal statutes (such as the *Environmental Protection Act*, the *Income Tax Act* and the *Canada Labour Code*) and under a host of provincial statutes could or should be limited or eliminated through a new not-for-profit Act. It is therefore possible that only those liabilities that typically would be found in corporate law — such as those pertaining to fiduciary duties, unpaid wages and a number of other liabilities — could be limited or eliminated in a not-for-profit incorporation statute.

## 7. Filing By-laws

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### The issue

The requirements, if any, that should apply to the filing of by-laws and amendments to the by-laws of not-for-profit corporations

### Background

Under Part II of the *Canada Corporations Act*, not-for-profit corporations are incorporated through a “letters patent” system. Under this system, incorporation is not a right. Rather, persons wishing to incorporate a not-for-profit entity must apply to the Minister of Industry for the granting of a charter to create a body corporate for the purpose of a national patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or like object (s. 154(1)).

This application must be accompanied by the proposed by-laws of the corporation, which would be reviewed and approved by the Minister to ensure that each by-law conforms to the requirements of the *Canada Corporations Act*. Any subsequent amendments to the by-laws also have to be submitted for ministerial scrutiny and approval. These amended by-laws do not become effective until ministerial approval has been obtained (s. 155(2)). In practice, the granting of the letters patent, including approval of the by-laws, is undertaken through the office of the Director of Corporations, the office within Industry Canada that enforces the Act and maintains corporate records on behalf of the government.

It has been argued that the letters patent system is administratively burdensome, costly and time-consuming to both corporations and the government. Additionally, it is contrary to modern practice, where incorporation is a right. Under a system of incorporation as a right, so long as the required information has been filed with the Director of Corporations (accompanied by any required fees), incorporated status is automatically granted. Business corporations and cooperatives are already incorporated in this manner with no problems under the *Canada Business Corporations Act* and the *Canada Cooperatives Act*.

## Framework proposal

Require corporations to file their by-laws with the Director — no approval process

The proposed framework would make the incorporation of not-for-profit organizations a right. The filing of by-laws without a requirement for approval is consistent with this aspect of the proposed Act. Under this proposal, the approval process is removed, the process of incorporation is simplified, and corporations are provided increased flexibility. Additionally, the process is more efficient and less costly for both corporations and the government.

Under this regime, corporations would file their by-laws with the Director at the time of incorporation, at which time they would become effective. The Director would not have to approve the by-laws, but would review them to ensure that minimum requirements are met (for example, that the minimum number of directors is present) before the by-laws are filed. Corporations would also be required to file amendments to their by-laws. The changes would not become effective until they have been filed with the Director.

Removing the requirement for approval of by-laws provides corporations with the flexibility to develop by-laws to meet their own specific needs. A model set of by-laws will be developed that corporations would be free to adopt or modify. Corporations would, alternatively, be free to write their own by-laws. In any event, the requirement for filing with the Director would ensure that the members of a corporation would have access to a definitive and accurate copy of the corporation's by-laws.

The requirement to file would work with other parts of the proposed Act that require by-law changes to be approved by the corporation's members before they come into force. Any amendments to the by-laws would require the approval of members before the Director can accept them for filing. No amendment to a by-law would be in force, however, until it is filed with the Director.

The proposals envisage a regime that is somewhat more restrictive than that applicable to business corporations, which are not required to file by-laws with the Director. As well, amendments to a business corporation's by-laws are effective from the date that they are decided upon by the directors of the corporation (subject to shareholder approval).

These proposals strike an appropriate public-policy balance between the need for a more flexible system and concerns expressed by some stakeholders during preliminary consultations that the government should maintain some degree of control over the by-laws of not-for-profit corporations.

### First option

Do not require the filing or the approval of the by-laws by the Director

Those stakeholders who favoured the most flexibility suggested that allowing corporations to maintain custody of their by-laws without having to file them with the Director would be more consistent with the concept of incorporation as a right. Under this option, corporations would be allowed to make decisions at a meeting and have amendments to the by-laws become immediately effective without the need to send the documents to the Director for filing. This option could be less costly and more efficient for both the government and not-for-profit corporations. The government would not have to undertake the expense of maintaining a registry of by-laws, and corporations would not have to pay the fees associated with the preparation of by-law amendments or filing them with the Director.

### Second option

Keep the current regime requiring not-for-profit corporations to file their by-laws for approval

Arguments have been made that the current practice of ministerial approval of by-laws allows the government to retain a certain level of control over the internal governance of federally incorporated not-for-profit organizations. Some stakeholders argued that maintaining the current process would provide reassurance to not-for-profits that their by-laws conform with the Act. This would be particularly the case for smaller corporations that may not have the capacity to hire a qualified person to draft and review their by-laws.





## 8. Natural Justice and Fair Procedures

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### The issue

Whether the new Act should include a provision on natural justice or fair procedures, applicable to matters involving discipline of members

### Background

Natural justice and fair procedures are concepts commonly used in administrative and penal law. They refer to a person's right to be treated fairly when facing disciplinary action, and where appropriate to be heard by an impartial tribunal or committee.

Many modern corporate statutes, both business and not-for-profit, have provisions related to natural justice. These provisions require that any disciplinary action taken by a corporation against one of its members must proceed on the basis of natural justice and fair procedures.

For example, the *California Corporations Code* (ss. 5341 and 7341) provides that, except in the case of a religious corporation, any disciplinary action undertaken by a corporation must be done "in good faith and in a fair and reasonable manner". The Code also states that a procedure is fair and reasonable when it follows the rules set in the corporation's by-laws or articles and where it provides the member with sufficient notice and the opportunity to make representations orally or in writing.

### Framework proposal

Do not include provisions for natural justice in the new Act

During the round-table discussions, it was argued that there is no demonstrable need for provisions requiring that organizations operate in accordance with natural justice because the common law and remedies stipulated within the proposed Act are available to protect the interests of members. The framework proposals were designed to maximize flexibility and freedom of action for not-for-profit organizations. Under the proposals, corporations can adopt rules and procedures for their own governance, relatively free from the dictates of government. As a result, the Act would not prevent organizations from adopting provisions in their by-laws which

guarantee that disciplinary actions will be undertaken in accordance with natural justice.

Including natural-justice provisions in the new Act would add extra complications, and could lead to confusion about the applicability of the provisions and their availability to members of a particular corporation. If the provisions were enacted, the Act would also have to clarify when and how the provisions would apply. For example, there might be the need to adopt a classification system that could specify the types of organizations to which the provision would apply, such as is the case under the *California Corporations Code*. For reasons that are explained in section 1 (Classification Scheme) of this paper, a classification system is an undesirable attribute for the proposed Act.

Requiring organizations to implement fair proceedings and natural justice would likely result in additional costs to not-for-profit corporations. These procedures could also result in long and cumbersome processes for the discipline of members.

A final problem with a statutorily mandated requirement to have fair hearings and natural justice is that it could lead to challenges to the principles of an organization, specifically a religious organization. Allowing members to challenge the organization's decisions by requiring a fair hearing could result in the principles of an organization, and possibly the tenets of faith, being "put on trial" as a result of a decision made to discipline a member.

The framework is designed to legislate only where there is a demonstrable need. In the case of natural justice and fair hearings, there is little to indicate that organizations are not treating members fairly or denying members the right to natural justice. There are also instances — especially in the case of decisions based on differences in interpreting religious doctrines — where an individual's right to natural justice could cause more harm to the organization than the denial of that right could cause to the individual. Canadians have traditionally avoided testing the tenets of faith in courts or other tribunals, and the framework does not propose to change this tradition.

### Option

Include in the new Act a provision allowing not-for-profit corporations to set disciplinary procedures in accordance with natural justice

Lack of a fair-procedure provision would result in a not-for-profit corporate law that does not include membership protections found in comparable statutes, such as the Saskatchewan *Non-profit Corporations Act* and the *California Corporations Code*.

Views gathered during the first round of discussions were mixed on whether provisions relating to natural justice and fair procedure should be included in the Act. Stakeholders who favour these provisions maintain that, if the provisions are not included in the proposed Act, there could be a presumption against natural justice being included in the by-laws of not-for-profit corporations. This, it has been argued, may create a situation where members could be disciplined without due process and the opportunity to defend themselves.



## 9. Dissent Right and Appraisal Remedy

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### The issue

Whether to include dissent rights and an appraisal remedy in the new Act

### Background

A member who holds a membership in a corporation and has the right to receive a share of the corporation's remaining property on its liquidation or winding-up would be allowed under the right to dissent to object to a significant change in the organization, or to a change in the class of membership, and to receive a monetary payment for the value of the membership upon its surrender.

A dissenter's right would allow a member to require that the organization purchase his or her membership interest when a substantial change to the organization is undertaken. If the organization and the member cannot agree on the value of the membership interest, the member or the corporation could apply to a court to have the value of the membership appraised under an appraisal remedy. The *Canada Corporations Act* does not provide this remedy to members, but it is available under the *Saskatchewan Non-profit Corporations Act*, the *Canada Business Corporations Act* and the *Canada Cooperatives Act*. The Ontario Law Reform Commission recommended that provision be made for both dissenters' rights and appraisal remedies in a new not-for-profit Act.

### Framework proposal

Do not include the dissent right or the appraisal remedy for members

This type of remedy is only applicable in the few instances where members have significant financial interests in their organizations. Corporations would be free to include this provision in their articles or by-laws should they determine that their situation warrants providing this protection to their members.

During consultations, concern was expressed that, if provided by statute, some individuals could use this right to deter corporations from undertaking changes otherwise desired by the majority of members. It was feared that the repayment provisions could harm the financial position of the corporation.

### Option

Include the dissent right or the appraisal remedy for members

It is arguable that including these provisions would help ensure that members are able to protect their financial interests when significant changes to the organization are undertaken. Members of certain organizations purchase expensive membership interests with understandings about the functions and objects of the organization. If these functions or objects change, it can be argued, members should have the right to withdraw their memberships and recover their financial contributions.

Most modern business corporate statutes include the dissent right and appraisal remedy. There is an argument to be made that including them in the new Act would provide members with protections and rights on par with those given to shareholders of for-profit corporations and members of not-for-profit corporations under Saskatchewan's *Non-profit Corporations Act*.

## 10. Audit Requirements

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### The issue

Whether the proposed Act should require audits for certain corporations

### Background

The *Canada Corporations Act* requires every corporation to have an annual audit and to present the auditor's report to the members at the corporation's annual meeting.

Audit requirements are common in other statutes governing the incorporation of not-for-profit organizations. The Saskatchewan *Non-profit Corporations Act*, for example, allows certain organizations to determine whether their financial information will be audited. At the annual meeting of members, membership corporations may resolve not to appoint an auditor. Charitable corporations with revenues under \$25,000 may resolve not to appoint an auditor to review the financial statements of the corporation. Those with revenues of less than \$100,000 in the previous fiscal year need not appoint an auditor, but they must appoint a qualified person to review the corporation's financial statements. Charitable corporations with revenues in excess of \$100,000 must have their financial statements audited. Organizations may also apply for exemptions from the disclosure provisions of the Act.

### Framework proposal

Require that not-for-profit corporations with gross annual revenues of more than \$250,000 undertake an audit and make the results known to their members

The framework proposals would require corporations with gross annual revenues of more than an amount to be prescribed in the Regulations to have annual audits and to make the results of the audits available to their members. For the purposes of these consultations, the suggested amount to be prescribed is \$250,000. This dollar amount was chosen so that typical large not-for-profit organizations would be required to have audits, while allowing smaller corporations to avoid the costs associated with a standard annual audit.

In addition to having their own books audited, corporations with gross annual revenues of over \$250,000 would be required to keep separate books for the accounts of their ancillary activities, including (but not limited to) subsidiaries and divisions. This requirement is designed to encourage accurate accounting and to ensure that not-for-profit corporations do not improperly fund or subsidize other activities.

The requirement for an audit would provide transparency and accountability, while acknowledging that not all corporations are large enough to require audits. Small not-for-profit corporations could elect to have an annual audit if they feel that one is necessary.

### First option

Require audits for all corporations

It has been suggested that all not-for-profit corporations should be required to have annual audits to increase the level of public trust and to ensure that funds are used in furtherance of the corporations' objects. This would provide the maximum degree of transparency and accountability. It would be in the public interest to make sure that funds are used for their intended purposes. However, an argument can be made that smaller organizations would be disproportionately affected by the expense of annual audits.

### Second option

Allow individual organizations to determine whether their situation requires an audit

This would provide maximum flexibility by allowing the members of each corporation to assess the needs of the organization and determine whether an audit is appropriate. Proponents of this position have suggested that audits are administrative expenses that negatively affect the organization's ability to carry out its objects. Funds used to perform the audit cannot be used to carry out the corporation's functions.



# 11. Oppression Remedy

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## The issue

Whether the use of the oppression remedy should be allowed in the new Act

## Background

The oppression remedy was originally included in for-profit corporate statutes to protect the rights of shareholders from oppressive or unfairly prejudicial actions by the corporation. The remedy allows a court the discretion to make any order it sees fit to provide relief to the complainant. The oppression remedy is not currently available under the *Canada Corporations Act*.

## Framework proposal

Do not include an oppression remedy

The oppression remedy was designed to apply in situations where shareholders of for-profit corporations face financial losses as the result of oppressive or unfairly prejudicial actions by the corporation. It helps make sure that individuals with minority interests are not oppressed by the majority of shareholders and that their financial interests are protected. The very nature of not-for-profit corporations precludes such a situation.

Individuals in the not-for-profit sector rarely have direct financial interests in the organizations of which they are members. By definition, organizations in the not-for-profit sector are not established with the intention that their members will realize profit or financial gain from their contributions to the organization. In the few situations where members have a direct financial interest in the organization — as in golf course memberships, for example — there are other methods available to protect member interests, such as common law remedies.

For the most part, the oppressive actions of not-for-profit corporations would not result in direct financial losses to individual members. Rather, they would likely affect a member's ability to exercise his or her rights as a member. There are more appropriate remedies available than resorting to the expensive, complex and time-consuming process of obtaining redress under

the oppression remedy. For example, members will be allowed to apply to a court for a compliance order to force the organization to act in accordance with the terms of its articles, by-laws, unanimous member agreements and the Act.

Including the oppression remedy would have disadvantages. It could lead to a situation where disgruntled members have the ability to tie organizations up in court as a way of challenging the corporation's decisions. For example, it could be used by members to challenge ecclesiastical religious decisions in court as being potentially oppressive. To avoid the potential of religious doctrines being challenged in court, the Act would have to be written to exclude religious organizations from the application of the remedy. This would increase the complexity of the new Act and necessitate a classification system with clear and unique definitions of the various types of organizations covered by the Act.

Where it is appropriate, organizations would be free to include provisions in their articles or by-laws that give members the ability to pursue an oppression remedy. Members of a corporation would be free to decide whether they have a sufficient financial interest to warrant guaranteeing this protection.

### Option

Provide for the oppression remedy in the new Act

The oppression remedy is included in almost all modern for-profit statutes. Additionally, it is allowed in the Saskatchewan *Non-profit Corporations Act*, and the Ontario Law Reform Commission recommended its adoption in a new Act. Adopting this remedy would give members of federally incorporated not-for-profit corporations an additional right that would provide them with similar protections compared to members and shareholders of other organizations.

## 12. Derivative Action

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### The issue

Whether the new Act should provide for derivative actions

### Background

The derivative action was originally integrated into for-profit corporate law to provide complainants with a tool to enforce the rights of the corporation. More specifically, the derivative action gives complainants the right to bring an action in the name and on behalf of the corporation to enforce one of its rights.

Section 157.1 of the *Canada Corporations Act* incorporates by reference the derivative action provisions found in the *Canada Business Corporations Act*. Under these provisions, a complainant may be a director, an officer or any security holder of the corporation as well as any person, in the discretion of the court, found to be a proper person to make an application. In the actual implementation of this remedy, common examples observed from the case law include situations where directors or officers are negligent or in breach of their fiduciary duty (for example, conflict of interest).

In the not-for-profit context, the provision allows members of a corporation to bring an action to court in the name of the corporation.

The Ontario Law Reform Commission recommended the adoption of this remedy in a new Act, although it warned that it would be best to restrict the use of this action to non-religious corporations. This precaution would avoid the possibility of a member using the remedy as a tool to challenge the nature or the legitimacy of the doctrine of a religious group. The *California Corporations Code*, in ss. 5710 and 7710, also reserves the use of the derivative remedy to mutual and public benefit corporations that do not carry out objects related to religious purposes.

## Framework proposal

There is no recommendation in the framework proposal concerning the derivative action

During the preliminary round-table discussions, it was argued that the remedy would allow members to have additional control over the actions of organizations and could be used to disrupt the functioning of those organizations. This could create problems by allowing special-interest groups and minority groups to challenge the legitimacy of decisions of the organization.

## Option

Provide for a derivative action in the new Act

The derivative action is a standard remedy available in corporate laws across North America. Their provisions generally give a court the authority to dismiss frivolous actions, for example, if the complainant is not acting in good faith or the action is not otherwise in the best interests of the corporation.

Adopting this provision in the new Act would be consistent with the *Canada Business Corporations Act*, the *Canada Corporations Act*, the *Saskatchewan Non-profit Corporations Act* and the recommendations of the Ontario Law Reform Commission. It would also be in keeping with the themes of increasing transparency and accountability by allowing members an additional remedy to ensure that the directors of a corporation properly manage its affairs.

## 13. Modified Proportionate Liability

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### The issue

Whether the new Act should include a regime of modified proportionate liability similar to that found in the *Canada Business Corporations Act*

### Background

Recently passed amendments to the *Canada Business Corporations Act* include a regime of modified proportionate liability that would apply to claims for financial loss arising from any error, omission, or misstatement in financial information required under that Act. Under the regime, the liability of each defendant for financial losses suffered by the plaintiff is directly proportionate to their degree of responsibility.

The modified proportionate liability regime applies to all persons involved in the preparation of financial information required under the *Canada Business Corporations Act*. This includes auditors, directors and officers. It is designed to align liability more closely to responsibility by offering a measure of protection to defendants who may be only marginally responsible for a plaintiff's loss, while preserving joint and several liability for designated categories of plaintiffs, including small investors, the Crown and certain Crown corporations, charitable organizations and unsecured creditors. Small investors are defined as those who have an investment of less than \$20,000 in a company.

The exemptions exist to protect fairness. Plaintiffs with small investments would normally not be expected to scrutinize the affairs of *Canada Business Corporations Act* corporations in the same manner as large investors, and therefore merit the stronger protection provided by a joint and several liability regime. As well, the status quo should apply to the Crown and Crown corporations so that taxpayers not be required to assume any loss as a result of changing the liability regime.

The regime has several other important components. In cases of insolvent or unavailable defendants, liability would be reallocated among available parties, including the plaintiff — each defendant is responsible only for the defendant's proportionate fault plus that same portion of the fault of the unavailable defendant. The plaintiff absorbs the balance of the loss suffered.

Another feature of the reallocation regime is a 50 percent cap on reallocated liability. Under the cap, the modified adjustment for each insolvent defendant that is added to another defendant's liability is limited to 50 percent of the original proportionate liability. This cap is triggered only when there are multiple defendants, a large defendant is insolvent and other defendants are responsible for only a small portion of the fault. The intent of the cap is to make sure that a defendant that is, for example, only 5 percent responsible for the fault is not held liable for the negligence of another person who is 95 percent responsible for the fault.

Finally, in cases of fraud, the defendant would always be subject to the joint and several liability regime.

### Framework proposal

That a modified proportionate liability regime not be included because it is inapplicable to not-for-profit corporations

Incorporation of the *Canada Business Corporations Act's* modified proportionate liability regime into a not-for-profit Act is problematic for several reasons.

First, the regime as currently instituted applies only in cases where erroneous financial information has led to financial loss by an investor. While these cases may arise in the context of business corporations and cooperatives, there is little or no likelihood of similar cases arising in the context of not-for-profit corporations. Not-for-profit corporations are, by definition, not entities that attract investment in the public or private securities markets. One possible exception is a golf course that sells equity shares to members; assuming that such an entity is a not-for-profit corporation and the shares issued fall within the definition of "financial interest" found in the *Canada Business Corporations Act*, most of the members would, in all probability, be excluded from the modified proportionate liability regime because of the level of their investment.

Second, it may be argued that creditors and suppliers may rely on financial information supplied by the not-for-profit corporation before advancing credit or material. However, the *Canada Business Corporations Act* regime specifically exempts unsecured creditors from the modified proportionate liability regime. These creditors would therefore continue to claim under the present joint and several liability regime. Secured creditors such as banks would, if the loan or other credit were large enough, be captured by the

modified proportionate liability regime. Again, however, it is unclear whether a secured creditor has ever taken action against a director, officer or auditor of a not-for-profit corporation because of financial loss suffered solely as a result of erroneous financial information *required under the Act*, and if such action was successful.

As indicated above, the regime only applies to financial information *required* under the *Canada Business Corporations Act*. This financial information is statutorily required in order that stakeholders, specifically shareholders, be aware of the financial position of the corporation in which they have a financial interest. Not-for-profit corporations have considerably fewer statutory financial disclosure requirements. As well, it is not clear for whom such information is intended; certainly it is not intended to be used for investment purposes.

### Option

Include some form of modified proportionate liability regime in the Act

Arguments have been put forth that modified proportionate liability is important for not-for-profit corporations because members, lenders and others can have claims based on professional negligence if these organizations experience financial difficulties. Proponents of this view argue that a modified proportionate liability regime should apply to claims for professional negligence involving not-for-profit corporations in the same way that it applies to *Canada Business Corporations Act* business enterprises and *Canada Cooperatives Act* cooperatives because basically the same issues arise. According to this view, there is no distinction between the type of risk to which professional advisors of not-for-profit corporations are exposed under joint and several liability and the type of risk to which professional advisors of *Canada Business Corporations Act* corporations were exposed before the recent revisions to that Act.

However, a modified proportionate liability regime applicable to not-for-profit corporations cannot, for the reasons outlined above, be modelled on the regime contained in the *Canada Business Corporations Act*. It would, by definition, be much narrower in scope and would have to be specifically tailored to fit the unique circumstances of not-for-profit corporations.





## 14. Corporations Sole

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### The Issue

Whether the proposed Act should contain provisions for corporations sole

### Background

The corporation sole is an historical legal entity created to allow holders of religious or certain civic offices to pass title and lands from one office holder to another in perpetuity without having to pay taxes. Any claims made by third parties on these assets would also be avoided.

In essence, a corporation sole creates a corporation out of an office. Once the corporation is established, there is no distinction between the person who holds the office and the office itself. Effectively the person becomes the corporation and the corporation becomes the person. The office holder holds all property of the corporation in the name of the corporation, and may pass it on to the next office holder without the need for the property to change hands.

In Canada, the process of becoming a corporation sole requires a Special Act of Parliament, which is time consuming and burdensome for both the representative of the corporation and the government. There are approximately 24 corporations sole incorporated at the federal level, with none having been created in the past 10 years. Examples include a few religious offices, several statutory offices and the Queen's Canadian representatives: the Governor General and the Lieutenant Governors of the provinces.

The Senate Committee on Banking, Trade and Commerce is currently considering Bill S-30, *An Act to amend the Canada Corporations Act (Corporations Sole)*. The Bill proposes that the *Canada Corporations Act* be amended to allow for the incorporation of corporations sole for all of the purposes for which a standard not-for-profit corporation may be incorporated (that is, not for strictly religious or civic offices).

### Framework proposal

That the proposed Act not contain any provisions allowing for the creation of corporations sole

The framework proposal does not contain any provisions allowing the creation of a corporation sole. Instead, it would allow standard not-for-profit corporations to be set up with only one director and one member, which could be the same person. The governance requirements of the Act could be shaped to the needs of the particular corporation, thus allowing the same governance flexibility offered by the corporation sole. Moreover, standard incorporation under the not-for-profit Act would provide all of the succession benefits that a corporation sole would provide, while also providing for limited liability.

This would avoid some problems associated with creating a corporation sole. A corporation sole does not provide limited liability to the office holder, and can expose the assets of other related entities to lawsuits to which they might not otherwise be exposed. Each of these problems would be addressed through the use of a modern corporate form such as the one proposed in the framework.

It has been suggested that there may be some organizations that prefer the corporation sole to a standard corporate vehicle. For this reason, incorporators would continue to have the discretion to use this traditional form by means of a Special Act of Parliament. This would provide direct scrutiny of any imaginative corporate form that might be created to avoid paying taxes.

### Option

That the proposed Act contain provisions allowing for the creation of corporations sole

Providing a statutory method to establish corporations sole would remove the need to pursue a Special Act of Parliament for their incorporation. The statutory provisions would also ease the process of amending the corporation's articles and by-laws, a process that now requires an additional Special Act of Parliament.