

Background Paper for

**Bill C-4: *An Act respecting not-for-profit corporations
and certain other corporations***

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Introduction

This paper discusses Bill C-4, *An Act respecting not-for-profit corporations and certain other corporations* by providing a brief history of the *Canada Corporations Act* (hereafter referred to as the CCA) and the objectives of Bill C-4. It will then discuss some of the provisions in Bill C-4 giving information on both the CCA and what is in Bill C-4.

Brief History of the Federal Not-for-profit Statute

The concept of a not-for-profit corporation was first added to the federal general corporate statute¹ in 1917. Prior to the *Companies Act Amending Act, 1917*, federal non-share capital corporations were created by Special Acts of Parliament.² The *Companies Act Amending Act, 1917* added section 7A to the *Companies Act* to allow the Secretary of State of Canada to issue letters patent for the creation of corporations without pecuniary gain and “objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like.”³

Subsection 7A(6) included a list of the sections in Part I of the *Companies Act* that did not apply to such a corporation. This included provisions related to shares, such as issuance of shares, liability of shareholders and issuance of a prospectus.

The provisions in section 7A have not substantially changed since their enactment in 1917. Section 7A was renumbered section 8 as part of the Revised Statutes of Canada 1927. In 1934, the *Companies Act* was amended to divide section 8 into sections 139 to 143 and a new “Part II – Corporations without share capital” of the *Companies Act* was created. The name of the *Companies Act* was changed to the CCA by chapter 52 of the Statutes of Canada 1964-65.

Over the years non-substantive changes have been made to the provisions including changing the reference to the Secretary of State to the Registrar General of Canada and then simply to the Minister.⁴ Also, the list of cross-references in subsection 7A(6) became a positive list of the provisions that apply to these corporations in the 1934 amendments⁵, instead of a negative list of provisions that do not apply.

Since the early 1970s, the federal government has been working to replace Part II of the CCA with a stand-alone federal not-for-profit corporate statute. Seven bills were introduced in Parliament and died on the Order Paper until the 8th attempt, Bill C-4, finally made its way through the Parliamentary Process and received Royal Assent on June 23, 2009.

Objectives of a new Canada Not-for-profit Corporations Act

The objectives of Bill C-4 were stated by The Honourable Diane Ablonczy, Minister of State (Small Business and Tourism) on the introduction of the Bill, when she said “This new Act

¹ Although it is now known as the *Canada Corporations Act*, in 1917 it was the *Companies Act*.

² Special Acts of Parliament are often private members’ bills that create a specific corporation with or without share capital.

³ Subsection 7A(1), *Companies Act Amending Act, 1917*, S.C. 1917, c. 25.

⁴ Currently it is the Minister of Industry.

⁵ S.C. 1934, c.33, s.143.

would promote accountability, transparency and good corporate governance for the not for profit sector and is the first significant modernization of Canada's not-for-profit legislation since 1917.”⁶ The Act is to be a modern framework that meets the needs of large and small corporations while providing accountability and transparency. As a result, it should foster greater public trust and confidence in the not-for-profit sector. It should also improve the flexibility and efficiency of the legislation by reducing the regulatory burden on both the corporations and the federal corporate registrar.

Part 1 – Interpretation and Application

Bill C-4 starts with a list of definitions that are applicable throughout the bill. One of the problems with the CCA is that it contains few definitions and most of these were written for share corporations, which makes them difficult to apply to non-share corporations. For example, what is a public or a private corporation in non-share situations? The definitions in Bill C-4 were all written for corporations without shares, although most are based on equivalent definitions in the *Canada Business Corporations Act* (CBCA) that have been modified to meet the needs of not-for-profit corporations.

One of the more important provisions is the definition of “soliciting corporation”⁷. Although this definition is somewhat complex, it has significant implications for:

- corporations’ financial reporting requirements;
- the number of directors that are required;
- the dispersal of assets upon liquidation; and
- whether it may have a unanimous member agreement.

In essence, the definition is aimed at corporations that receive public money, directly or indirectly, from public donations or grants from a government.

The determination of whether a corporation is soliciting or not is based on the date of the end of the financial year. The corporation becomes or ceases to be a soliciting corporation as of the date of the annual meeting. By examining its sources of revenue in the financial statements at the financial year end, a corporation will be able to determine if it is indeed a soliciting corporation.

If the corporation has income over \$10 000 in a financial year from a public source, it will become a soliciting corporation, but the commencement date for soliciting corporation status only takes effect at its next annual meeting of members. If it does not receive public money in any of the next 3 years, it would cease to be a soliciting corporation as of the third annual meeting of members following the annual meeting at which it became a soliciting corporation. If the corporation receives public money in a future financial year, the time period for being a soliciting corporation re-commences.

⁶ News released titled “Government of Canada Tables New Regime for Not-For-Profit Corporations”, dated December 3, 2008.

⁷ See subsection 2(5.1) of Bill C-4.

The application provision indicates that the Act will apply to any body corporate incorporated or continued under it.⁸ It will also apply to certain corporations without share capital created by Special Acts of Parliament⁹.

Part 1 also sets out the purpose of the Act as allowing for the creation or continuance of corporations without share capital for the purposes of carrying on legal activities.¹⁰ This purpose section does not repeat the CCA's requirements concerning no pecuniary gain to members and the list of permitted objects (i.e. national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like objects¹¹). There is no reference to the phrase "without pecuniary gain to members" or to a list of objects anywhere in the bill.

Part 2 – Incorporation

The bill allows for a system of incorporation "as of right" to replace the existing system of letters patent. An "as of right" system means there is minimal discretion on the part of the Director, appointed under the new Act, to determine what organizations can be incorporated. The Director must issue a certificate of incorporation if the required documents (i.e. articles of incorporation and notice of registered office and initial directors) are filed, are in conformity with the Act, and the required fee is paid. This contrasts with the discretion the Minister had under the CCA's letters patent system. The new system also allows for one incorporator, unlike the CCA requirement of at least three incorporators.¹²

The information required in the articles is similar to the information required on an application for letters patent and will include:

- the name of the corporation;
- the province for the registered office;
- the purpose of the corporation; and
- the name or names of the incorporators.

New information required in the articles will be:

- the classes or groups of members;
- the number of directors; and
- a statement concerning the distribution of assets on dissolution of the corporation.

Part 2 also sets out the rules for the name of a corporation. The rules in the bill together with the more detailed rules in the regulations are similar to the name-granting rules under the CCA and the CBCA.

⁸ Section 3 of Bill C-4.

⁹ See Part 19 of Bill C-4.

¹⁰ Section 4 of Bill C-4.

¹¹ Subsection 154(1) of the CCA.

¹² Ibid.

Part 3 – Capacity and Powers

The bill expressly states that a corporation has the capacity and rights of a natural person. Also, the concept of a corporation's activities being considered *ultra vires* will be eliminated. This replaces the CCA provisions that are not clear as to whether a corporation has the capacity of a natural person and whether the doctrine of *ultra vires* applies due to the lists of corporate powers (e.g., sections 15 and 16 of the CCA) and the limited list of objects (e.g., subsection 154(1) of the CCA) in the CCA.

Part 4 – Registered Office and Records

The requirement for a corporation to maintain a head or registered office has not changed although the articles will specify the province for the registered office instead of the place (i.e. municipality and province) as required in the letters patent under the CCA. One new obligation on corporations will require them to inform the Director of a change in the registered office address within 15 days of the change. The CCA only allows information on the address of the head office to be collected once a year on the annual summary. This frequently leads to complaints that the information in Corporations Canada's records and on its website is out of date for an extended period.

The requirements for the corporate records that have to be maintained are similar to those under the CCA, namely:

- (a) the articles and the by-laws, and amendments to them, and a copy of any unanimous member agreement;
- (b) the minutes of meetings of members and any committees of members;
- (c) the resolutions of members and any committees of members;
- (d) if any debt obligation is issued by the corporation, a debt obligations register;
- (e) a register of directors;
- (f) a register of officers;
- (g) a register of members;
- (h) accounting records;
- (i) the minutes of meetings of the directors and any committees of directors; and
- (j) the resolutions adopted by the directors or any committees of directors.¹³

The biggest change involves who has access to the information in the corporate records. The board of directors will have access to all the records, including the accounting records. Members of the corporation and creditors will have access to the articles, by-laws, minutes of members' meetings, debt obligation register and the registers of directors and officers. Only members will have access to the list of members and only if they submit a statutory declaration stating the purpose for which the information is being requested and that the information will only be used for permitted purposes. Those purposes are:

- (a) an effort to influence the voting of members;
- (b) requisitioning a meeting of members; or
- (c) any other matter relating to the affairs of the corporation.¹⁴

¹³ Subsections 21(1) and (3) of Bill C-4.

Under the CCA any person who submits a statutory declaration, not just members, can obtain access to the list of members.¹⁵ Both the bill and the CCA provide explicit penalties for misuse of the information about members.¹⁶

The bill makes use of a corporate seal optional although use of such a seal is mandatory under the CCA.

Part 5 – Corporate Finance

The bill allows the directors to borrow money or issue debt obligations without having to get special permission from the members or adding special wording to the corporation's by-laws.

Part 5 also allows for the setting and collecting of annual dues or contributions (e.g., a specific number of volunteer hours with the organization). It explicitly states that property owned by the corporation is not held in trust and that directors are not trustees unless a transfer includes an explicit trust provision for either the corporation or the directors.

Further, Part 5 provides that no part of a corporation's property or profit can be distributed to members, directors or officers "except in furtherance of [the corporation's] activities or as otherwise permitted by the Act."¹⁷ For example, this will allow directors to be paid for their services as directors if the corporation so chooses and to be reimbursed for expenses incurred on the corporation's behalf. There have been some concerns that the CCA requirement for "no pecuniary gain to members" precludes directors being paid or reimbursed.

Part 5 also explicitly states that members are not liable for any liability of the corporation except as provided by the Act. An example of such an exception is found in subsection 239(5) of the bill, whereby a member who receives property of the corporation on dissolution is made liable to satisfy a court order to the extent of the amount received.

Part 6 – Debt Obligations, Certificates, Registers and Transfers

Part 6 allows for the issuance of debt obligations and is based on the CBCA and the *Canada Cooperatives Act*. While the CCA has some provisions concerning securities, the provisions were considered inadequate in 1970 and a new regime for securities was incorporated into the CBCA at that time. The parts of that regime that applied to corporations under Part II of the CCA (e.g., sections 68 to 73 of the CCA) are still inadequate almost 40 years later. It is expected that the use of Part 6 will be fairly uncommon, although there may be situations where a not-for-profit corporation requires a substantial amount of money to fulfil its purpose (e.g., undertaking a large capital project such as erecting a building). For those few situations, provisions for the issue, register and transfer of debt obligations will be required.

¹⁴ Subsection 23(7) of Bill C-4.

¹⁵ Subsection 111.1(1) of the CCA.

¹⁶ Subsection 262(3) of Bill C-4 and subsections 111.1(3) to (5) of the CCA.

¹⁷ Section 34 of Bill C-4.

Part 7 – Trust Indentures

Like Part 6, Part 7 issues will arise very rarely. However, there may be situations where a corporation decides to issue a debenture or debt obligation under a trust indenture.

Part 8 – Receivers and Receiver-managers

Part 8 clarifies the position of a receiver or receiver-manager whether appointed by a court or under an instrument. The provisions are based on the equivalent provisions currently in the CBCA. The only provision in the CCA concerning a receiver or receiver-manager that is applicable to a not-for-profit corporation is for notice of the appointment to be given to the Minister.¹⁸

Part 9 – Directors and Officers

One of the deficiencies of the CCA is its lack of provisions addressing the liability of directors and the balance between the rights and responsibilities of directors and members. Also, the CCA requires the by-laws¹⁹ of the corporation to set out:

- the mode of holding meetings;
- the provision for quorum; and
- the methods of appointing and removing directors and officers, and their respective powers and remuneration.

Bill C-4 tries to address these perceived deficiencies by creating standard provisions concerning:

- the qualifications of directors;
- the election and removal of directors by members; and
- the holding of meetings.

In the CCA, there is some consistency in these types of provisions through the Minister's approval of by-laws and by-laws amendments. However, this is not the best way to ensure that corporations have access to a set of balanced and effective provisions for these situations. Part 9 also sets a default quorum of "a majority of the number of directors or minimum number of directors required by the articles"²⁰ for meetings of directors. This quorum can be changed by the articles or by-laws. The bill also allows decisions of the directors to be made by consensus.

The CCA does not spell out the duties of the directors and provides for only a very limited due diligence defence.²¹ To correct these deficiencies, Part 9 of the bill explicitly sets out the responsibilities and duties of directors and provides for a full due diligence defence. These provisions are based on the equivalent provisions of the CBCA.

¹⁸ Section 69 of the CCA.

¹⁹ Subsection 155(2) of the CCA.

²⁰ Subsection 136(2) of Bill C-4.

²¹ Section 219 of the CCA.

The directors are responsible for the management of the corporation²² and have the duty to:

- act honestly and in good faith with a view to the best interests of the corporation (paragraph 148(1)(a) of Bill C-4);
- exercise the care, diligence and skill of a reasonably prudent person; (paragraph 148(1)(b) of Bill C-4)
- disclose any conflict of interest (section 141 of Bill C-4); and
- comply with the Act, articles, by-laws and any unanimous members agreements (subsection 148(2) of Bill C-4).

The due diligence defence is set out in section 149 of the bill and states that a director is not liable “if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances”. A similar defence is available to officers of the corporation under section 150 of the bill since subsection 148(1) gives officers the same duties as the directors. The bill also explicitly allows for the advancement of defence costs and makes directors’ and officers’ liability insurance permissible expenses.

One other area where there is a change respecting directors concerns notification to the Director appointed under the Act of changes in directors and to their addresses for service. Under the CCA, the list of directors and their addresses is collected once a year on the annual summary.²³ As with the head office address, there are frequent complaints that the list of directors is out of date. For example, if the annual summary provides information as of March 31 each year and the annual meeting elects new directors on April 30 of each year, the list of directors would be out of date for at least 11 months of each year. The bill requires corporations to inform the Director of:

- a change in directors within 15 days of that change; or
- a change in a director’s address within 15 days of the director notifying the corporation of the change of address.

This will ensure that the public database maintained by the Director is accurate and up to date.

Part 10 – By-laws and Members

The CCA requires a corporation’s by-laws and all by-law amendments to be approved by the Minister. Also, the provisions of the CCA are not clear on whether members are permitted to propose by-law changes. Bill C-4 provides a standard procedure for proposing and approving by-law changes that does not include the Director reviewing or approving those by-laws or amendments. However, as requested by some members of the legal community, the corporation will have the obligation to send copies of the by-laws and any amendments or repeals to the Director.

The procedures in Bill C-4 for approving by-laws vary depending on whether the by-law or amendment is or is not considered a fundamental change that is governed by subsection 197(1)

²² Section 124 of Bill C-4.

²³ Section 133 of the CCA.

of the bill. For an ordinary by-law or by-law amendment, the directors may pass a resolution to approve, amend or repeal the by-law and the change will take effect immediately. The directors must then submit the change in the by-laws to the members for their approval at the next members' meeting. Member approval will be by ordinary resolution (i.e. a resolution passed by a majority of the votes cast on that resolution). If the directors do not submit the by-law change to the members at the next members' meeting, the change ceases to be effective. The members may approve the change as is, amend the change or reject it.²⁴

A by-law or amendment that is considered to be a fundamental change must follow the same procedure as changes to the articles (e.g., sections 197 to 199 of Bill C-4). Fundamental changes include changes to:

- the conditions for membership;
- the rights and conditions on any class or group of members;
- the method of giving notice of a members' meeting; and
- the manner of voting at a members' meeting.

These provisions address the concern that the directors could use an amendment to the by-laws to exclude a group of dissident members from a members' meeting or remove their rights as members.

These fundamental changes to the by-laws are not effective when the directors approve the change; they are only effective when approved by the members. Member approval will be by special resolution (i.e. a resolution passed by a majority of not less than two thirds of the votes cast on that resolution) and may require a class vote.²⁵

For both ordinary and fundamental changes to the by-laws, members may also propose changes by following the normal procedure for a member proposal in section 163 of the bill.²⁶ Also, once the members have approved the change, with or without further changes, or the repeal, the corporation will have 12 months to send a copy to the Director.²⁷

Part 10 also covers the conditions and other aspects of membership, which are part of the by-laws under subsection 155(2) of the CCA. For example, there are provisions for granting and terminating membership, including the power to discipline members. There are also provisions for holding meetings of members, including setting record dates for who may attend a meeting and allowing members to make proposals to be considered at a meeting. These provisions are based on the equivalent CBCA provisions. As with meetings of directors, the bill has a default quorum for members' meetings²⁸ that can be changed by the articles or by-laws and the members may vote by consensus.

One of the unique provisions in this Part is the introduction of rules for providing members with notice of a members' meeting. Subsection 162(1) requires the by-laws to set out the method or

²⁴ Section 152 of Bill C-4.

²⁵ Section 199 of Bill C-4.

²⁶ Subsections 152(6) and 198(1) of Bill C-4.

²⁷ Section 153 of Bill C-4.

²⁸ According to subsection 164(2) the default quorum is "... a majority of members entitled to vote at the meeting".

methods to be used to provide members with notices of meetings. The options for the method, along with certain requirements for each option, are to be set out in the regulations. The options are:

- mail, courier or personal delivery;
- telephonic, electronic or other communication facility;
- affixing the notice to a notice board on which information respecting the corporation's activities is regularly posted and that is located where the members usually attend; and
- in the case of a corporation that has more than 250 members, by publication in a newsletter of the corporation or in a public newspaper.

While it is mandatory to select a method for giving notice of members' meetings in the by-laws, the bill provides a default of sending²⁹ the notice to every member entitled to vote if the by-laws do not select any method, or select a method that is not within the options set out in the regulations. Section 162 provides flexibility by authorizing the Director to allow a corporation to use some other method of notice, provided that the Director "reasonably believes that the members will not be prejudiced."³⁰ This will permit the Director to address unusual situations, such as the chosen method is very difficult or impossible, or a novel method has been proposed.

Another unique feature of Part 10 concerns absentee voting. Section 171 is similar to section 162 in that the by-laws may prescribe a manner of absentee voting chosen from a range of options in the regulations, and that the Director is authorized to allow a corporation to use some other manner "if the Director reasonably believes that the members and the corporation will not be prejudiced."³¹ The bill does not provide for a default manner of absentee voting since the corporation is not required to allow absentee voting. This differs from the mandatory requirement to provide all members entitled to vote at a meeting with notice of that meeting. The following options for the manner of absentee voting, along with certain requirements for each option, are to be set out in the regulations:

- voting by proxy;
- voting by mailed-in ballot; and
- voting by means of a telephonic, electronic or other communication facility.

Part 11 – Financial Disclosure

Parts 11 and 12 of Bill C-4 are based on Part XIV of the CBCA. The provisions have been divided to separate the provisions for the preparation and disclosure of financial statements from the provisions concerning the public accountant's review of the financial statements.

Part 11 provides for the production of annual financial statements prepared according to the Canadian generally accepted accounting principles as set out in the *Handbook of the Canadian Institute of Chartered Accountants*. Copies of these financial statements must be provided to members each year in advance of the annual meeting of members and, if the corporation is a

²⁹ See subsection 272(1) of Bill C-4 for an explanation of "send".

³⁰ Subsection 162(5) of Bill C-4.

³¹ Subsection 171(2) of Bill C-4.

soliciting corporation, must also be sent to the Director. While Part II of the CCA requires the auditor to conduct a review of the annual financial statements³² for non-share corporations, it is silent on the preparation of annual financial statements and their distribution to members.³³

Section 173 of Bill C-4 gives the Director broad discretion to exempt the corporation from any provision of Part 11 “if the Director reasonably believes that the detriment that may be caused to the corporation by the requirement outweighs its benefit to the members or, in the case of a soliciting corporation, the public.”

Part 12 – Public Accountant

Part 12, which deals with the public accountant and replaces sections 130 to 132 of the CCA, covers both the qualification and appointment of the public accountant as well as the public accountant’s responsibilities to review the financial statements. It also includes a provision for an optional audit committee, if a corporation so chooses.

Although the provisions for the qualification and appointment of the public accountant in Bill C-4 are based on the equivalent provisions of the CBCA, there is a difference in the qualifications required for the public accountant. In subsection 180(1) of the bill, the public accountant must be both a member in good standing of the provincial accounting association (i.e. a member of the provincial Chartered Accountants of Canada, Certified General Accountants Association of Canada or the Certified Management Accountants of Canada) and meet any qualifications set by a province for financial reviews or audits in that province.

Therefore, if a province requires that a public accountant must have a license in order to conduct a review engagement or audit in the province, the public accountant will need to have that license to be qualified. However, if the public accountant only does review engagements, and a province only requires a license to conduct audits but not review engagements, the public accountant will have to be a member of the provincial accounting association to be qualified, but will not be required to be licensed by the province. The scheme in subsection 180(1) ensures that the public accountant meets any provincial requirements for conducting reviews of financial statements.

The financial review provisions of Part 12 require a corporation to determine into which of five categories it fits. The criteria for the categories are based on the corporation’s gross annual revenues, and on whether or not it is a soliciting corporation. Each category can have up to three options for its financial review, although there is a default or mandatory option for each. The three possible options are: no review; a review engagement; or an audit. In doing a financial review, the public accountant is required to use the Canadian generally accepted auditing standards set out in the *Handbook of the Canadian Institute of Chartered Accountants*.

The following table sets out the five categories and the options applicable to each:

³² Section 132 of the CCA.

³³ Sections 118 to 128 of the CCA are not incorporated into Part II of the CCA.

Type of Corporation	Gross Annual Revenues	May Dispense with Public Accountant	Review Engagement	Audit
soliciting	less than \$50K	yes	default review	optional
soliciting	between \$50 K and \$250K	no	optional	default review
soliciting	more than \$250K	no	no	mandatory
non-soliciting	less than \$1M	yes	default review	optional
non-soliciting	more than \$1M	no	no	mandatory

Part 13 – Fundamental Change

The CCA provides little authority for fundamental structural changes to not-for-profit corporations (e.g., amalgamations, continuances or reorganizations) other than provisions for the amendment of a corporation’s letters patent. Most of Part 13 of the bill is based on the equivalent provisions of the CBCA. Part 13 includes provisions for amending a corporation’s articles and, in certain cases, its by-laws.³⁴ Part 13 also provides a corporation with the option of amalgamating with another corporation, continuing into or out of the statute and reorganizing through a court order or an arrangement. While it is anticipated that these provisions will not be used extensively, they will ensure that a corporation that wants to amalgamate, for example, with another corporation has the authority to do so.

Part 14 – Liquidation and Dissolution

Liquidation, dissolution and revival are other areas in which the CCA has inadequate provisions. The CCA does not have a liquidation procedure for not-for-profit corporations. It simply allows a corporation that has no assets and no debts, liabilities or other obligations to surrender its Charter³⁵ or, if a corporation has assets or debts, leaves the liquidation and dissolution procedure to the *Winding-up and Restructuring Act*. There is no revival provision in the CCA.

Part 12 (once again based on the equivalent provisions of the CBCA) provides for:

- the revival of a dissolved corporation (section 219 of Bill C-4);
- the voluntary dissolution of a corporation (sections 220 and 221 of Bill C-4);
- the administrative dissolution of a corporation by the Director, if the corporation is not in compliance with the Act (section 222 of Bill C-4); and
- court supervised liquidation and dissolution (sections 223 to 233 of Bill C-4).

³⁴ For fundamental changes to by-laws, please see the explanation in Part 10 above.

³⁵ Section 32 of the CCA.

Part 12 includes provisions for the disposition of the property of the corporation on dissolution that are different from those in the CBCA. For example, if any property is given to a corporation on the condition that it is returned on dissolution, that property is to be returned to the person who gave it.³⁶

A corporation that is a registered charity, a soliciting corporation or a corporation that meets the requirements of paragraph 235(1)(c) of the bill is required to distribute its property to another “qualified donee” as defined by subsection 248(1) of the *Income Tax Act*. The selection of the “qualified donee” is to be set out in the articles of the corporation. However, if the statement on the distribution of assets on dissolution in the articles does not meet the requirements of section 236 of Bill C-4, a court must be asked to approve the distribution of assets.

A corporation that does not meet the requirements of subsection 235(1) (e.g., it is not a registered charity or a soliciting corporation), will distribute its property based on the statement in the articles for distribution of assets on dissolution. If the articles do not provide for the distribution of assets on dissolution, then the remaining property is to be divided “into as many equal shares as there are memberships in the corporation and distributed at the rate of one share to the holder of each membership.”³⁷

Part 15 - Investigation

The CCA investigation provisions for not-for-profit corporations are simply a cross-reference to the relevant provisions of the CBCA.³⁸ Part 15 is based on those same provisions of the CBCA. Therefore, there will be no change in the investigation provisions that apply to a not-for-profit corporation under the bill, except that the provisions have now been written to specifically apply to not-for-profit corporations (e.g., the provisions refer to “members”, not “shareholders”).

Part 16 – Remedies, Offences and Punishment

In the CCA, remedies and punishments available to members, the Minister and the general public for dealing with defaults and offences are very limited, and do not include the usual modern corporate remedies. Many of the complaints received by Corporations Canada about not-for-profit corporations consist of disputes between members and/or directors about how the corporation should be run. Frequently, these complaints involve disputes about whether the provisions of the by-laws are being followed and who are the members or directors of a corporation. The new provisions in Part 16 attempt to provide directors, members, the Director and the general public with remedies that can be used to settle such disputes.

Part 16 of the bill introduces the oppression remedy and the derivative action to federal not-for-profit corporate law. The provisions are based on the equivalent provisions of the CBCA. For the purposes of this part, “complainant” can include present and former members, directors and officers, the Director and any person who is granted leave by a court to commence an action. These remedies will allow access to the courts if the parties to the dispute are unable to reach a settlement on their own.

³⁶ Section 234 of Bill C-4.

³⁷ Subsection 236(2) of Bill C-4.

³⁸ Section 157.1 of the CCA.

Part 16 introduces one unique exception for religious corporations – the faith-based defence. This defence precludes a court from issuing an order under the oppression remedy or the derivative action if the court decides that the corporation meets three criteria:

- a) the corporation is a religious corporation;
- b) the decision being challenged is based on a tenet of faith held by the members of the corporation; and
- c) it was reasonable to base the decision on a tenet of faith, having regard to the activities of the corporation.³⁹

The bill does not define “religious corporation” or “tenet of faith”, but leaves it to the courts to determine if a particular corporation is or is not a “religious corporation” and whether or not a decision is based on a “tenet of faith”. The object of this defence is to distinguish between commercial decisions and religious decisions, since corporate law should not be used to change religious tenets.

Part 16 of the bill also includes provisions for:

- the Director to ask a court for directions;
- appeals of certain decisions of the Director (e.g., to give or refuse a name, to issue or refuse an application⁴⁰); and
- compliance or restraining orders against corporations and directors.

Bill C-4 puts all the offences in one section, namely section 262, as opposed to the CBCA where the offences are scattered throughout the Act. Section 262 includes general offences for contravention of the Act or regulations for both the corporation and its directors and officers. There is an offence for any person who makes, or assists in the making, of a false or misleading statement in any document required by the Act to be sent to the Director or to any other person. There is a specific offence for the misuse of information obtained from the register of members or of debt obligation holders. There is also a due diligence defence available for any person accused of an offence in section 262.

Part 17 – Documents in Electronic or Other Form

Because the existing CCA not-for-profit corporation provisions were written in 1917 and the CCA has not been substantially amended since the CBCA was created in 1975, it is understandable that it lacks any provisions for the electronic communication of material. There are two different situations for electronic communication provided for in the bill: communication to and from the Director; and communications between the corporation and its members or between members.

Communication to and from the Director is dealt with in Part 18 of the bill where the Director is given the authority to establish all requirements for forms, notices and other documents sent to or issued by the Director.⁴¹ The possibility of being able to communicate with the Director

³⁹ The faith-based defence is in three subsections 225(2), 252(3) and 254(2) of Bill C-4.

⁴⁰ Section 258 of Bill C-4.

⁴¹ Section 282 of Bill C-4.

electronically should assist both the corporation and the Director in reducing the regulatory burden of the bill.

Part 17 is aimed at communication between the corporation and its members or between members. It is based on Part XX.1 of the CBCA and Part 21.1 of the *Canada Cooperatives Act*, both of which were added to those statutes in 2001. Provisions for electronic meetings and electronic voting are in those sections of the bill that address the holding of meetings⁴² and voting at meetings.⁴³

Part 17 does not make the electronic communication of material mandatory. It simply provides an option that a corporation can, if it wishes, communicate electronically with its members. If the requirements of the Part are respected (e.g., consent is obtained), an electronic document will fulfil any requirement in the bill for a paper document. Part 17 has been written to avoid references to any specific forms of electronic technology. This will allow it to be adapted to any future changes in technology.

Part 18 - General

Part 18 contains provisions of a general administrative nature. The first section deals with notices, certificates and other documents, while the second concerns the Director and regulatory authority.

With respect to notices, certificates and other documents, Part 18 contains provisions about:

- sending documents to members or directors;
- sending or serving documents on the corporation;
- certificates issued by the corporation to certify some fact; and
- certificates issued by the Director (e.g., a certificate of incorporation or amendment).

The choice of which representative of the corporation is required to sign forms or notices sent to the Director are left to the Director's discretion.⁴⁴ This Part maintains the requirement on corporations to file an annual return with the Director.⁴⁵ It also provides explicit authority for public access to the corporate records maintained by the Director.⁴⁶

With respect to the Director, Part 18 creates the position of the Director and authorizes the Director to:

- set the content and signature of forms and notices sent to the Director;
- maintain records on each corporation;
- correct or cancel articles, certificates or other documents;
- issue certificates of existence and compliance; and
- make certain information available in a publication generally available to the public.

⁴² Sections 136 and 159 of Bill C-4.

⁴³ Section 165 of Bill C-4.

⁴⁴ Section 277 of Bill C-4.

⁴⁵ Section 278 of Bill C-4.

⁴⁶ Section 279 of Bill C-4.

The final provision of Part 18 is the authority for the Governor in Council to make regulations.

Part 19 – Special Act Bodies Corporate without Share Capital

Under the CCA, Part III of the Act applies to corporations:

- without share capital;
- incorporated by Special Act of the Parliament of Canada⁴⁷;
- carried on, without pecuniary gain to its members; and
- with objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like objects.

Bill C-4 replaces Part III of the CCA with a new Part 19 that will apply to corporations:

- without share capital;
- incorporated by Special Act of the Parliament of Canada and not continued under any other Act.

There is an exception for departmental and parent Crown corporations as defined in section 2 of the *Financial Administration Act*. The references to “without pecuniary gain” and the list of objects from the criteria for who is affected by Part 19 have been removed, as they have been for the rest of the Act.

As with Part III of the CCA, Part 19:

- requires affected corporations to hold an annual meeting;
- requires affected corporations to file an annual summary with the government, with consequences for not filing;
- allows affected corporations to continue into the rest of the Act as a not-for-profit corporation; and
- provides for the liquidation and dissolution of the corporation.

Part 19 adds that affected corporations have all the powers of a natural person that are addressed in Part 3 of the Act and that a corporation can change its name without resorting to a Private Member’s Bill (section 296).

When Bill C-4 comes into force, Part III of the CCA will be repealed and Part 19 will come into force. There will be no need for affected corporations to complete any transition. They will be subject to the new Part 19 automatically. There will be a new annual summary form specifically for Part 19 corporations, although it will not ask for any information not currently collected on the CCA annual summary form.

⁴⁷ A Special Act of Parliament is essentially a one purpose statute, often a private member’s bill (e.g., a statute passed by Parliament that originated with a particular MP, not the government).

Regulations

As the history of the federal not-for-profit statute and the attempts to replace Part II of the CCA demonstrates, changing the statute can be extremely difficult and can take a very long time. However, since regulations are generally much easier to change, this permits detailed provisions to be updated as required. Therefore, the philosophy in drafting the bill was to put the principles and provisions that are unlikely to change into the statute and put the details in the regulations. As a result, Bill C-4 has many references to things being “prescribed” or set out in the regulations (e.g., time periods, amounts, etc). This means that the regulations and the statute must be read together in order to fully understand many provisions. For example, the options for the method of giving notice of meetings and for the manner of absentee voting are provided in the regulations.

The regulations also establish the fees to be charged by the Director for providing certain services.

Transition Plan

Bill C-4 provides a transition mechanism to continue (transfer) corporations from Part II of the CCA to the Act. Under the CCA, corporations have letters patent and by-laws that have been approved by the Minister. Under the Act, corporations submit articles and a certificate is issued by the Director. The articles require certain information that is not in the letters patent, so in order to continue into the Act, each corporation will be required to write and submit articles to the Director. Further, the minimum requirements that must be set out in the by-laws are very different under the CCA and the Act, so each corporation will be required to conduct a by-law review and amend its by-laws accordingly. Unlike other corporate statutes, the Act provides a default provision for any mandatory by-law requirement (e.g., quorums and method of giving notice of members’ meetings) in case the issue is not properly addressed in the by-laws. The Director will not review or approve by-laws as part of the transition process.

Corporations will have three years from the coming into force of the Act to complete the transition to that Act.⁴⁸ If a corporation does not complete the transition within the three years, the Director may dissolve the corporation.⁴⁹ There will be no fee for this transition if it is completed within the prescribed three years.⁵⁰ If a corporation is dissolved under subsection 298(4), it will be eligible for revival under the Act, but there will be a fee for such revival.

Once the Act is in force, no corporation will be able to incorporate or continue under Part II of the CCA.⁵¹ At the same time, however, not-for-profit corporations will be unable to use the provisions of the Act until they complete the transition and are issued a “certificate of continuance” by the Director. Once all not-for-profit corporations have either continued to the Act or have been dissolved, Part II of the CCA will be repealed.

⁴⁸ Subsection 297(1) of Bill C-4.

⁴⁹ Subsection 297(4) or (5) of Bill C-4.

⁵⁰ Subsection 297(3) or (4) of Bill C-4.

⁵¹ Section 298 of Bill C-4.

To assist corporations with the continuance required for transition, the Director will release a policy to guide corporations in the continuance process; model articles of continuance; and model by-laws. The Director intends to release policies or step-by-step guides on most of the applications and procedures that involve not-for-profit corporations and the Director. This has been the practice of the Director under the other statutes that are administered by Corporations Canada (e.g., the CBCA and the *Canada Cooperatives Act*).

Conclusion

With the passage of Bill C-4, the long history of the attempts to replace Part II of the CCA with a new not-for-profit corporations statute reaches a satisfactory conclusion. However, there remains a need to bring Bill C-4 into force with its associated regulations, but a significant stage of the process has been cleared with the bill having received Royal Assent.

It should also be recognized that, as circumstances change, there will be a continuing need to review and, where required, reform the Act and its regulations. To that end, the Act contains a provision for a statutory review within ten years of its coming into force. Ten years should provide ample time for a thorough assessment of the new statute and its effects, both on the not-for-profit sector as a whole and on individual corporations. At that time, it may be appropriate to introduce amendments to ensure that the Act is keeping abreast of evolving marketplace standards.

Since a perfect corporate governance law will never be possible, the goal must be to create an evergreen statute that will continue to meet the needs of a changing marketplace for many years to come through a process of constant review and renewal. Bill C-4 takes us one step closer to that goal.