**Legislative Summary** **LS-498E**

# BILL C-21: CANADA NOT-FOR-PROFIT CORPORATIONS ACT

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# LEGISLATIVE HISTORY OF BILL C-21

| HOUSE OF COMMONS | | SENATE | |
|---|---|---|---|
| **Bill Stage** | **Date** | **Bill Stage** | **Date** |
| First Reading: | 15 November 2004 | First Reading: | |
| Referred to Committee: | 23 November 2004 | Second Reading: | |
| Committee Report: | | Committee Report: | |
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Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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# TABLE OF CONTENTS

**Page**

**Page**

**Page**

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# BILL C-21: CANADA NOT-FOR-PROFIT CORPORATIONS ACT*

## BACKGROUND

On 15 November 2004, the Minister of Industry introduced Bill C-21, An Act respecting not-for-profit corporations and other corporations without share capital, to the House of Commons. The bill was referred to the Standing Committee on Industry, Natural Resources, Science and Technology on 23 November 2004, and will be known as the Canada Not-for-profit Corporations Act (NPCA). Bill C-21 will be referred to as "the bill," "the Act" or the NPCA for the remainder of this paper.

The bill replaces Part II of the *Canada Corporations Act* (CCA),(1) the statute currently in force governing federally incorporated non-profit corporations (NPCs or corporations). Some of the provisions contained in the NPCA are also designed to apply to entities currently subject to Part III of the CCA, which governs corporations without share capital incorporated by a special Act of Parliament.

A government backgrounder on the bill stated that its primary purposes are to modernize and improve corporate governance and accountability in NPCs, eliminate unnecessary regulation, and offer flexibility to meet the needs of the non-profit sector. The backgrounder noted that the CCA, which currently regulates federally incorporated NPCs, has been largely unchanged since 1917 and lacks modern corporate governance rules. The new corporate governance provisions found in the NPCA, as well as many other provisions contained in the bill, are modelled on the corporate governance provisions contained in the *Canada Business*

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) R.S.C. 1970, c. C-32.

*Corporations Act* (CBCA),[2] the statute that regulates federally incorporated for-profit corporations (business corporations).

## A. Chronology

The NPCA was developed in accordance with the government's commitment to the Voluntary Sector Task Force, which was initiated in 1999 to modernize corporate governance in the non-profit sector.

In July 2000, Industry Canada issued a consultation paper entitled *Reform of the Canada Corporations Act: The Federal Nonprofit Framework Law*.

Subsequently, the government held a series of roundtable discussions in cities across Canada to discuss and consider options for reform.

In March 2002, after analyzing the input received during consultations, Industry Canada released two additional papers. *Reform of the Canada Corporations Act: Draft Framework for a New Not-for-Profit Corporations Act* provided a more substantial outline of the proposed new Act; and a supplementary paper, *Reform of the Canada Corporation Act: Discussion Issues for a New Not-for-Profit Corporations Act*, contained some specific options regarding certain sections of the proposed legislation. A second round of cross-country consultations followed the release of these papers. In the spring of 2002, following the second round of consultations, Industry Canada released a paper entitled *Reform of the Canada Corporations Act: the Federal Not-for-Profit Framework Law*, which summarized the results of the consultations.

In the Prime Minister's Reply to the 5 October 2004 Speech from the Throne,[3] the government emphasized the importance of strengthening Canada's social foundations and reaffirmed its commitment to a strong partnership with community-based organizations and volunteers.

On 15 November 2004, the Honourable David Emerson, Minister of Industry, introduced the NPCA in the House of Commons.

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(2) R.S.C. 1985, c. C-44.

(3) Speech from the Throne to Open the First Session of the Thirty-Eighth Parliament of Canada, Ottawa, 5 October 2004, available on-line at: http://www.pm.gc.ca/eng/sft-ddt.asp?id=2 (date accessed: 3 December 2004).

B. Highlights

The bill is comprehensive legislation designed to cover all aspects of corporations without share capital incorporated at the federal level. The bill:

- streamlines the incorporation process for NPCs, by allowing for incorporation by way of right. Currently, under Part II of the CCA, incorporation is achieved by letters patent, and the Minister must approve the issuance of letters patent to the NPC. Under the NPCA there is no need for the Minister to approve incorporation. Approval of incorporation is automatic, as long as the statutory provisions respecting incorporation are followed;
- allows NPCs to have only one director if they are non-soliciting corporations (corporations that do not solicit donations from the public);
- imposes different financial reporting requirements on NPCs, based on their status as soliciting or non-soliciting corporations and on the amounts of revenue they earn;
- makes directors of NPCs subject to the same duty and standard of care as directors of business corporations incorporated under the CBCA. In other words, NPC directors have an explicit duty to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill of a reasonably prudent person. Failure to abide by this duty and standard could result in liability for negligence;
- gives members the right to use the derivative action remedy (bringing an action against the directors and/or officers of the NPC in the name of the NPC) and the oppression remedy (bringing an action to enforce the rights of minority members of the corporation), if they feel that a wrong has been done to the NPC or to themselves as members; and
- creates a strong role for the Director, an administrative official appointed under the NPCA who essentially functions as a registrar for corporations, giving the Director broad investigative powers in the event of complaints. For the remainder of this paper, the Director will be referred to as Industry Canada.

## DESCRIPTION AND ANALYSIS

This summary describes Bill C-21's key provisions and how these key provisions differ from those found in the CCA.

### A. Part 1 – Interpretation and Application (Clauses 2-5)

Part 1 of the NPCA defines certain key terms used throughout the bill, delineates the types of corporations to which the bill applies, outlines the purpose of the NPCA, and explains how the Minister responsible for the bill will be appointed.

1. Interpretation (Clause 2)

The definitions contained in clause 2(1) generally mirror definitions found in s. 2(1) of the *Canada Business Corporation Act*, with some minor differences.

The CBCA contains no specific definition of "activities," whereas in the NPCA, "activities" is defined as "any conduct of a corporation to further its mission and any business carried on by a body corporate, but does not include the affairs of a corporation." Accordingly, in the NPCA "activities" and "affairs" are distinct from one another. "Affairs" is defined as "the relationships among a corporation, its affiliates and the directors, officers, shareholders or members of those bodies corporate." Presumably, a specific definition of "activities" was added to the NPCA in order to emphasize the fact that NPCs are empowered to do only things that serve to further their missions.

Unlike business corporations, which are not required to indicate in their articles of incorporation their corporate purpose, NPCs are required to outline their mission statements in their articles of incorporation. A corporation's failure to comply with its articles, including carrying out activities within a prescribed period of time,[(4)] provides grounds for Industry Canada to dissolve the corporation (see clauses 220(1)(a)(i) and (ii)).

Other differences between the definitions found in the NPCA and those in the CBCA reflect the fact that members of NPCs are not entitled to share in corporate profits. NPCs, unlike business corporations, are not designed to make money for their members. As a result, NPCs do not have shares in the conventional sense (portions of a corporation, owned in common with others, the ownership of which may entitle the shareholder to a "dividend" or a share in corporate profits). Accordingly, "series" is defined in the NPCA as a "division of a class of debt obligations" rather than as "a division of a class of shares," the definition found in the CBCA.

Some definitions in clause 2(1) of the NPCA are unique to the bill. The most important of these is the definition of "soliciting corporation." This term is used to describe an NPC that has, in the past year, or within any preceding period prescribed,[(5)] engaged in:

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(4) According to Regulation 32 of the proposed NPCA regulations, the prescribed period of time is three years.

(5) According to Regulation 16 of the proposed NPCA regulations, the prescribed period of time is three years.

- requesting donations;
- receiving grants or financial assistance from a government (whether federal, provincial or municipal) or government agency; or
- accepted money or other property from an NPC that has requested donations, or received a grant from a government or government agency.

Soliciting corporations are subject under the NPCA to more onerous corporate governance and financial accountability requirements than non-soliciting corporations. For example, soliciting corporations are required to have no fewer than three directors and are required to send copies of corporate financial statements to Industry Canada for review. The differences between soliciting and non-soliciting corporations will be discussed in further detail later in this summary.(6)

The interpretation section of the NPCA also defines what constitutes an "affiliate," a "holding body" or a "subsidiary" of a body corporate (clauses 2(2) to 2(4)). The definitions of these terms mirror the ones found in ss. 2(2) to (5) of the CBCA. A for-profit business corporation can be an affiliate, holding body or subsidiary of an NPC.(7)

2. Application (Clause 3)

The NPCA also explains the types of corporations to which the bill applies. Essentially, it applies to every body corporate that is incorporated or continued under the Act.

Initially, the Act will apply only to those NPCs that have been incorporated under the NPCA and NPCs incorporated under Part II of the CCA that have obtained certificates of continuance under the new Act from Industry Canada. However, it is mandatory for NPCs incorporated under Part II of the CCA to apply for a certificate of continuance under the NPCA within three years of the Act's coming into force, or they face dissolution (clause 295). Further incorporation of NPCs under Part II of the CCA is disallowed upon the coming into force of the transitional provisions (clause 296). Accordingly, the NPCA will eventually apply to all federal NPCs that have not been incorporated under a special Act of Parliament.

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(6) A corporation can apply to Industry Canada to change its status from a soliciting corporation to a non-soliciting corporation. Industry Canada is empowered to approve this change if it is satisfied that a change in status would not prejudice the public interest. See clause 2(6) of the NPCA.

(7) Under clause 2(1), "body corporate" is defined to include any entity with the status of a corporation or a company (i.e., an organization with legal personality wherever or however incorporated), while "corporation" is defined to mean only those bodies corporate that are incorporated under the NPCA.

The NPCA will also apply to a certain extent to corporations without share capital incorporated under a special Act of Parliament (Part III CCA corporations). The application of the NPCA to these special Act corporations will be further discussed in this summary's analysis of Part 19 of Bill C-21.

The CBCA, the CCA and the *Winding-up and Restructuring Act* (WRA)[8] will not apply to corporations created or continued under the NPCA.

The NPCA limits the type of businesses that corporations incorporated or continued under it can carry out. For example, NPCs cannot be banks or insurance, trust or loan companies. In addition, incorporation or continuation under the NPCA does not allow corporations to act as degree-granting institutions or to regulate trades or professions.

3. Purpose (Clause 4)

The NPCA's purpose is to allow for the incorporation or continuance of "corporations without share capital … for the purposes of carrying on legal activities" and also "to impose certain obligations on bodies corporate without share capital incorporated by a special Act of Parliament."

4. Responsible Minister/Ministry (Clause 5)

Clause 5 of the NPCA gives the Governor in Council authority to designate a member of cabinet to be the Minister responsible for this Act. Presumably, this Minister will be the Minister of Industry, as he introduced this bill at first reading, and Industry Canada currently administers corporations incorporated under the CCA.

B. Part 2 – Incorporation (Clauses 6-15)

Part 2 of the NPCA explains how one goes about incorporating an NPCA corporation and specifies:

- what the articles of incorporation must contain;
- how to file them;
- when a corporation comes into existence under the NPCA;
- how to obtain and change a corporate name; and
- the effect of pre-incorporation contracts on a corporation.

(8) R.S.C. 1995, c. W-11.

Most of the clauses respecting incorporation under the NPCA mirror the sections governing business corporations under the CBCA, except that they omit mention of shares and shareholders. As such, these provisions represent a significant change from the CCA provisions that currently govern NPCs.

1. Who Can Incorporate? (Clause 6)

As previously stated, NPCs incorporated under Part II of the CCA are not allowed to incorporate as of right, but must file an application for letters patent with the Minister of Industry, who has discretion to decide whether or not to grant them.

Under the NPCA, Industry Canada would have no authority to refuse to grant a certificate of incorporation to an NPC, provided that the person incorporating the NPC has the legal capacity to incorporate, and the articles of incorporation and supporting documents are filed with Industry Canada. In addition, the NPCA allows an application to incorporate to be filed by one "incorporator," as opposed to the three required under the CCA. In contrast to the situation under the CCA, there is no requirement under the NPCA that the incorporator become a member of the corporation.

2. Articles and Other Notices to Be Filed (Clauses 7-10)

In order to incorporate an NPC under the NPCA, incorporators must send the articles of incorporation to Industry Canada. Clause 7(1) of the NPCA states that the articles must contain:

- the corporate name;
- the province where the registered office is to be located;
- information on classes or groups of members and their voting rights;
- the number of directors or the minimum and maximum number of directors allowed;
- the mission statement of the corporation and any activity restrictions with respect to corporate activities; and
- a statement explaining how corporate assets are to be distributed on dissolution.

Other Acts of Parliament may require the articles to contain additional items, and if so, the articles must also contain these items (clause 7(2)). The NPCA allows by-law information to be set out in the articles (clause 7(3)).

At the same time that the incorporator sends the articles of incorporation to Industry Canada, he/she must also send Industry Canada a notice of registered office and a notice (list) of directors (clauses 8, 20(2) and 129(1)).

Once Industry Canada is in receipt of all the necessary documents, it must issue a certificate of incorporation (clause 9). An NPC comes into existence on the date shown on the incorporation certificate (clause 10).

3. Corporate Name (Clauses 11-14)

The provisions governing corporate names in the NPCA are similar to the provisions found in the CCA and CBCA.

Clause 11 states that an NPC may choose a name in either of Canada's official languages or a name that combines both English and French forms of the name. If the NPC operates outside of Canada, a foreign name may be chosen. The name must be set forth in all the NPC's contracts, invoices and negotiable instruments, but an NPC may also carry on activities and identify itself by a name other than its corporate name.

Clause 12 states that an NPC may ask Industry Canada to assign a number, followed by the word "Canada" and a prescribed term,[9] as the corporate name. Industry Canada may also, upon request, reserve a name for an intended corporation, or a corporation about to change its name.

As is the case under the CCA and CBCA, prohibited, reserved or deceptive names cannot be chosen. If, through inadvertence, the NPC is issued a prohibited, reserved or deceptive name, Industry Canada can direct the NPC to change its name (clause 13). If the NPC does not comply with its directions, Industry Canada can revoke the corporate name and assign a different name to the corporation.

Once a new name has been assigned to the NPC, Industry Canada must issue a certificate of name change. It addition, it must publish a notice of name change to make the public aware that the corporation has changed its name (clause 14).

(9) According to Regulation 60(2) of the proposed NPCA regulations, the prescribed term may be any one of the following terms: Association, Center, Centre, Fondation, Foundation, Institut, Institute or Society.

4. Pre-Incorporation Contracts (Clause 15)

Part 2 of the NPCA contains fairly standard provisions respecting pre-incorporation contracts. Clause 15 specifies that unless a contract expressly provides otherwise, a person who enters into a contract in the name of or on behalf a corporation before it comes into existence is expressly bound by the contract. Once the corporation comes into existence, it may adopt the contract, at which point the corporation is bound and the person who entered into the contract on the corporation's behalf is released. If there is a dispute regarding whether or not the contract binds the corporation, a party to the contract can apply to the courts to determine or apportion liability.

C. Part 3 – Capacity and Powers (Clauses 16-19)

Part 3 establishes the capacity and powers of NPCA corporations. Clause 16 specifies that (like business corporations incorporated under the CBCA)[10] NPCs incorporated or continued under the NPCA have the capacity and powers of a natural person. These powers include the capacity to carry out activities throughout Canada, and to exercise its powers outside Canada, to the extent that the laws of foreign jurisdictions permit. It is not necessary for the corporation to pass a by-law to confer a particular power on a corporation or its directors (clause 17(1)).

These provisions represent a substantial change from the CCA, where the powers of an NPC are outlined in an exhaustive list. Under the CCA, corporations are required to pass by-laws, obtain Ministerial approval of the by-laws, file supplementary letters patent with the Minister, and obtain Ministerial approval of the supplementary letters patent (at which point they are published in the *Canada Gazette*) if they wish to add to or reduce corporate powers.[11]

The NPCA does impose some restrictions on corporate powers. Clause 17(2) of the NPCA specifies that corporations are subject to any restrictions on corporate activities contained in their articles.[12] This includes any restrictions in the articles respecting the corporate mission.

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(10) See s. 15(1), CBCA.

(11) See ss. 16(1)-(4), 20(1)-(5) and 157(1)(b), CCA.

(12) This provision is very similar to s. 16(2), CBCA.

Other provisions found in Part 3 are designed to protect third parties who are not generally expected to have knowledge of an NPC's articles or corporate governance structure. Persons are not assumed to have knowledge of the articles or the restrictions contained in them merely because the articles are available for public viewing (clause 18), and contracting parties are entitled to reasonably rely on representations made by the corporation and its directors unless parties knew or ought to have known that the representation was false or contrary to corporate powers (clause 19).

### D. Part 4 – Registered Office and Records (Clauses 20-27)

Part 4 of the NPCA concerns the location of registered offices of NPCs, and the corporate records that NPCs are required to prepare and maintain. Part 4 also contains provisions governing access to corporate records. The provisions respecting registered offices and records found in the NPCA largely mirror the CBCA provisions.[13]

#### 1. Registered Office (Clause 20)

Clause 20 of the NPCA states that an NPC's articles of incorporation must specify the province in which its registered office is located. An NPC is required to maintain a registered office in that province at all times. It must also send a notice of registered office to Industry Canada, providing its specific office address. If the directors of the NPC want to change the location of the registered office, either to a location in another province or to a different address within the province, they must send a new notice to Industry Canada.

#### 2. Corporate Records (Clause 21)

Clause 21(1) of the NPCA specifies that corporations are required to maintain the following records:

- articles;
- by-laws;
- minutes of members' meetings and members' committee meetings;
- members' resolutions and members' committee resolutions;
- a debt obligations register, if any debt obligations have been issued;

(13) See ss. 19 to 23, CBCA.

- a directors' register;
- a officers' register; and
- a members' register.

With respect to the directors', officers' and members' registers, the content of these registers will be prescribed by regulation (clause 21(2)).(14)

Clause 21 also requires NPCs to prepare and retain(15) adequate accounting records, minutes of directors' meetings, and directors' resolutions. These records must be kept at the registered office of the corporation, or at any other place in Canada the directors think fit.

Clause 21(9) allows for the above records to be kept outside of Canada as long as they are accessible electronically.

3. Access to Corporate Records (Clauses 21-25)

The NPCA contains different provisions respecting access to corporate records, depending upon who is attempting to access them. Clause 21(7) states that the corporate records must be open to the directors for inspection "at all reasonable times" and that the corporation is required to provide a director, upon request, with any extract from the records free of charge. In the event that the accounting records are kept outside Canada, the corporation must ensure that records sufficient to enable the directors to determine the financial position of the corporation are made available on a quarterly basis at a Canadian location, whether at the registered office of the corporation or otherwise (clause 21(8)).

Clause 22 of the bill states that the records maintained by corporations are accessible to members and their personal representatives, although additional conditions are

(14) According to Regulation 3 of the proposed NPCA regulations, the register of members must contain the names of members, current residential or business address of each member, e-mail addresses of members (if members have consented to receive information electronically), dates on which the members became and ceased to be members and the class or group of membership of each member, if any. With respect to the directors' and officers' registers, the same information will be required, except that there are no classes or groups of directors or officers. Accordingly, no information on classes or groups of directors or officers must be provided.

(15) According to Regulation 5 of the proposed NPCA regulations, the prescribed period of time for retention of accounting records, minutes of directors' meetings and directors' committee meetings, and directors' resolutions or directors' committee resolutions is six years, subject to any other Act of Parliament or a legislature that provides for a longer retention period (also see clause 21(4), NPCA).

attached to access for some records. Creditors are able to access most of the records listed above on the same conditions as members and their personal representatives.

Members, personal representatives and creditors may be required to pay a fee if they want to access corporate records (clause 22(4), 23(1) and 23(2)). However, members do not have to pay a fee to obtain one copy of the articles, by-laws and unanimous members' agreements (clause 22(3)).

With respect to the debt obligation register, in order for members, personal representatives of members or creditors to access this register, they must sign a statutory declaration, stating that the information obtained from this register will be used only in connection with an effort to:

- influence the voting of debt obligation holders;
- offer to acquire corporate debt obligations; or
- any other matter relating to the debt obligations and affairs of the corporation.(16)

Using the list or information obtained from this register in any way other than those stated above is prohibited (clause 22(7)), and constitutes an offence under the Act.

Members and personal representatives and debt obligation holders are able to access the members' register. Creditors, however, are not (clauses 23(1) and 23(2)).

Members and their personal representatives are entitled to obtain a list of members only before each special meeting of members, or, if there are no special meetings of members, once a year (clause 23(3)), although they can go into the corporate office during normal business hours and view the register at any time (clause 23(1)).

As noted above, debt obligation holders are able to access the members' register. However, they can do so only by asking the corporation or agent/mandatary to furnish them with list of members. They are not permitted to go to the corporate office and inspect the members' register (clause 23(2)). In addition, debt obligation holders may make an application to obtain a list only after receiving a notice of a members' meeting at which they, as holders, are entitled to vote (clause 23(4)). Corporations may charge debt obligation holders fees for access (clause 23(2)).

(16) See clauses 22(2) and 22(4) to (6), NPCA.

To access the members' register, members or their personal representatives must sign a statutory declaration stating that they shall not use the list of members or members' information except in connection with:

- an effort to influence members' voting;
- requisitioning a meeting of members; or
- any other matter relating to the affairs of the members.(17)

To access the members' register, debt obligation holders must file statutory declarations with the corporation stating that the information will be used only to influence member voting on an issue that the debt obligation holders are entitled to vote on (clause 23(5)).

Members, their personal representatives, and debt obligation holders are prohibited from using the members' list or information obtained from the members' register in a manner that is inconsistent with their statutory declarations (clauses 23(7) and 23(8)). Doing so constitutes an offence under the Act.

Industry Canada may examine all records of a corporation, except directors' minutes, directors' resolutions or accounting records, at the registered office of the corporation, and may make any copies of the records free of charge (clause 24). Industry Canada may also ask the corporation to send it a copy of a list of corporation's debt obligation holders and/or members.

Upon application of a corporation or any of its members, Industry Canada may refuse to allow someone to access corporate records that he/she would otherwise be entitled to access on the grounds that furnishing the information would be detrimental to any member or the corporation (clauses 25(1) and (2)).

4. Form of Records (Clauses 26-27)

The NPCA provides flexibility in the form of records. Clause 26(1) states that the registers and records of the corporation "may be in any form, provided that the records are capable of being reproduced in intelligible written form within a reasonable time." NPCs are required to take reasonable precautions to prevent the loss, destruction or falsification of entries, and to facilitate the detection and correction of errors or inaccuracies in the records (clause 26(2)).

(17) See clauses 23(1), (2), (5) and (6), NPCA.

## E. Part 5 – Corporate Finance (Clauses 28-37)

Part 5 of the NPCA outlines the powers of the corporation and its directors to borrow, invest, act as guarantors, create security interests in corporate property, and acquire and issue debt obligations on behalf of the corporation. It also contains provisions governing corporate property ownership, the surrender of memberships to corporations by members, and membership immunity for corporate debts. The provisions governing corporate finance contained in the NPCA are somewhat different from those found in the CBCA. The differences are primarily due to the fact that NPCs, unlike business corporations, do not raise capital by issuing shares.

### 1. Borrowing and Finance (Clauses 28-31)

Clauses 28(1) and 31 of the NPCA give directors of NPCs the power to:

- borrow on the credit of the corporation;
- issue, reissue, sell, pledge or hypothecate corporate debt obligations;
- give guarantees to secure performance of obligations;
- create security interests in corporate property for the purpose of securing corporate obligations; and
- require members to pay fees or dues.

The directors' powers are subject to any restrictions contained in the articles, by-laws, or unanimous member agreements of the corporation (clauses 28(1) and 31). Directors can delegate any of the powers listed above, except the power to require members to pay fees or dues, to a single director, committee of directors or an officer of the corporation, as long as this is not inconsistent with the corporation's articles, by-laws and unanimous member agreements (clause 28(2)).

In addition to the above powers, directors can also issue "debt obligations" for the corporation. Debt obligations are the NPC equivalent of shares. Debt obligations provide evidence that the holder of a debt obligation has given something of value (money, property or past service) to the NPC and that the NPC owes something in return to that holder. The holder of the debt obligation may also be entitled to certain rights in his/her dealings with the corporation, such as voting rights. However, as stated previously, the fact that someone is a debt obligation holder of a corporation does not entitle him/her to a share of any profits the corporation makes in the form of a dividend.

Directors may issue “debt obligations” only in exchange for money, property or past services (clause 29(1)). If the consideration used to obtain the debt obligation is property or past services, the value of the property or services must be equivalent to the money the corporation would have received if the debt obligation was issued for money (clauses 29(2) and (3)). Mere repayment of a debt obligation does not, in and of itself, mean that the debt obligation has been redeemed or bought back and therefore is capable of being reissued again to a new holder (clause 30(1)). However, when the debt obligation is actually purchased or redeemed by the corporation, it may be cancelled, or, subject to a trust indenture or any other agreement between the corporation and another person, be reissued, pledged or hypothecated again to secure existing or future corporate obligations (clause 30(2)).

2. Property Ownership (Clauses 32-33)

Clause 32 of the NPCA provides that a corporation owns any property transferred to and vested in it. It does not hold the property in trust unless the property was transferred to the corporation expressly for that purpose. Clause 33 of the NPCA provides that directors are not trustees for any corporate property, including property that is actually held in trust by the corporation.

3. Investment (Clause 34)

Clause 34 states that in general, directors are empowered to invest corporate funds as they see fit. The directors’ power in this regard is subject to any restrictions on investment contained in the corporate articles, by-laws, and limitations accompanying any gift or donation to the corporation.

4. Distribution of Profits, Property and Accretions to Property Value (Clause 35)

NPCs incorporated or continued under the NPCA are generally prohibited from distributing corporate profits, property or accretions to property value to members, directors, or officers of NPCs, “except in furtherance of its activities or as otherwise permitted by this Act” (clause 35(1)). However, if a member of a corporation is an entity (body corporate, partnership, trust, joint venture or unincorporated association or organization) authorized to carry on activities on the NPC’s behalf, the corporation may distribute money or property to the entity to allow it to carry on authorized activities on the corporation’s behalf (clause 35(2)).

5. Surrender of Membership and Liability of Members (Clauses 36-37)

Members of corporations may surrender their memberships as gifts to the corporation, and corporations may extinguish or reduce liability with respect to an unpaid member amount in exchange for such gifts (clause 36).

Members, in their capacity as members, are not liable for any debts of the corporation except as otherwise provided in the Act (clause 37(1)). Memberships can, however, be subject to corporate liens for debts that remain owing from the acquisition of membership (clause 37(2)). If so, the corporation may enforce this lien in accordance with the corporation's by-laws (clause 37(3)).

## F. Part 6 – Debt Obligations, Certificates, Registers and Transfers (Clauses 38-104)

Part 6 of the NPCA is complex. It addresses the technical aspects of issuing debt obligations, including the rights and responsibilities of holders, brokers, purchasers, transferors and transferees of debt obligations, corporate responsibilities related to debt obligations, methods of ensuring the validity of debt obligations (including guarantees and endorsements), matters dealing with adverse claims, issuance of debt obligation certificates, debt obligation registers, deliveries of debt obligations, the role of agents and mandataries respecting debt obligations, and the presumptions that will apply if lawsuits are launched over debt obligations.

Part 6 of the NPCA largely mirrors Part VII, ss. 48 to 81, of the CBCA, the part of the CBCA dealing with securities and security certificates, registers and transfers.

1. Definitions and Interpretation (Clause 38)

Clause 38(1) contains several defined terms which are applicable to Part 6 of the NPCA. Most of these terms are, at least to a certain extent, self-explanatory. Some require further explanation.

"Adverse claim" is defined in clause 38(1) to include "a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the debt obligation."

The distinctions between "holders" and "bearers" of debt obligations are important. According to clause 38(1), one is considered a "bearer" of a debt obligation if the

obligation must be "payable to the bearer or endorsed in blank." By contrast, one is considered a "holder" of a debt obligation if the debt obligation is "issued or endorsed to the person, to bearer, or in blank." The definition of "bearer" is more restrictive than the definition of holder. A debt obligation certificate in bearer form entitles whoever is in possession of the certificate to payment of the debt obligation. A debt obligation certificate which is not in bearer form but issued in the name of someone entitles the particular person mentioned on the certificate to payment of the debt obligation.

Clause 38(2) of the NPCA explains that unless restrictions are noted on the evidence of debt obligation (normally, a debt obligation certificate would be the evidence), the debt obligation is a negotiable instrument. It is valid in the hands of a "good faith purchaser," which is defined in clause 38(1) as a "purchaser for value in good faith and without notice of any adverse claim who takes delivery of a debt obligation."[(18)]

Clauses 38(3) to (5) describe the various forms of debt obligations. A debt obligation certificate or document is in registered form if it specifies who is entitled to the debt obligation, if it is capable of being recorded in a debt obligations register, or if bears a statement that it is in "registered form" (clause 38(3)). A debt obligation is in "order form" if it is payable to the order of a person, and the person is specified with reasonable certainty in it, or if it is payable to a person to whom it is assigned (clause 38(4)). A debt obligation is in bearer form if it is payable to the bearer, not because it has been endorsed (clause 38(5)).

2. Debt Obligation Certificates (Clause 39-44)

Clause 39 states that an "issuer" must provide holders of debt obligations with either debt obligation certificates or non-transferable written acknowledgements of their right to obtain debt obligation certificates. "Issuer" is not a defined term in the NPCA.[(19)] Issuers are entitled to charge a "reasonable fee" for issuing debt obligation certificates (clause 40). If the debt obligation is jointly held, the issuer is not required to issue a certificate to more than one of the holders, and delivery of a certificate to one holder is considered delivery to all (clause 41).

Debt obligation certificates must be signed by a director, officer, transfer agent, branch transfer agent, person acting on behalf of a transfer agent or branch transfer agent, or a trustee, appointed under the terms of a trust indenture, of the issuer (clause 42(1)). If a director

(18) It is unclear whether or not "value" in this context means "fair market value" or the value recorded on the debt obligation certificate in accordance with clause 43(1)(d) of the NPCA.

(19) Presumably, it means an NPC, but this is not specified.

or officer signed the certificate and is no longer a director or officer of the corporation, this does not affect the validity of the certificate (clause 42(2)).

Debt obligation certificates are required to show, on their face, the name of the issuer or NPC, and the words "Incorporated under the *Canada Not-for-profit Corporations Act*," "Subject to the *Canada Not-for-profit Corporations Act*," or the French equivalent of these two expressions (clause 43(1)). If the debt obligation certificate is not in bearer form, the certificate must contain the name of the person to whom it was issued (clause 43(1)). The certificate must also show its value (clause 43(1)).

The rights, privileges, restrictions and conditions attached to any class or series of debt obligations must be stated on the certificate, or alternatively, the certificate must state that the class or series of debt obligations has certain rights, privileges, restrictions or conditions associated with it. In the second case, the certificate must further state that the issuer will provide the holder with a copy of the text of the rights, privileges, restrictions and conditions attached to his/her debt obligation on demand (clause 44(1)). Upon receipt of such a demand, the issuer is required to provide the holder with a copy of this text (clause 44(2)).

If the debt obligation was issued by a corporation before the corporation was continued under the NPCA, and if there were restrictions on transfer or charge of the debt obligation before continuation, these restrictions will not be effective against a transferee who has no actual knowledge of such restrictions, unless the restrictions are noted conspicuously on the debt obligation certificate (clause 43(2)). If previously issued debt obligations are held by more than one person and remain outstanding, the corporation shall not impose restrictions on transfer or ownership of any class or series of debt obligations (clause 43(3)).

### 3. Debt Obligations Registers (Clauses 45-54)

If a corporation issues debt obligations, it is obligated to maintain a register in which it records all of the debt obligations it has issued in registered (as opposed to order or bearer) form. The register must show the prescribed information for each class or series of registered debt obligations (clause 45(1)).[20] If the corporation does not want to maintain the

(20) According to Regulation 4 of the proposed NPCA regulations, the "prescribed information" that an NPC's debt obligation register must contain is: the name and residential or business address of each debt obligation holder, e-mail address of the holder (if he or she has consented to receive information electronically), the dates that the holders became and ceased to be holders, and the principal amount of each holder's outstanding debt obligations.

register itself, it can appoint an agent or mandatary to maintain the register on its behalf (clause 46).

An issuer (corporation) or a trustee under the terms of a trust indenture is entitled to treat the person whose name appears in the debt obligation register as an owner of that obligation for all purposes (clause 48). Despite clause 48, however, if the corporation restricts transfer of debt obligations, the corporation may treat the holder's heir, fiduciary of the holder's estate, a liquidator of the holder, or a trustee of the holder in bankruptcy as the registered holder of the debt obligation (clause 49).

Heirs or fiduciaries of deceased persons' estates are entitled to become registered holders of the debt obligations originally belonging to deceased persons, or to designate others as registered holders in place of the deceased. Clause 54(1) of the NPCA states that, in order to become the registered holder, or to designate someone else as the registered holder, the heir or fiduciary must deposit the following information with the issuer or its transfer agent:

- the debt obligation certificate or, alternatively, proof that the deceased person was the debt obligation holder;
- proof of death; and
- proof of the right under law to deal with the debt obligation.

Normally, the debt obligation certificate must also be endorsed by the heir or fiduciary (clause 54(2)). Deposit of all of these documents with the issuer/transfer agent permits the issuer or agent to record the transfer in the debt obligation register, and for the issuer/agent to treat the transferee as the registered holder (clause 54(3)).

It is not always necessary to deposit all of the documents listed above with the issuer after the death of the debt obligation holder. Clause 51 of the NPCA states that if the registered debt obligation is jointly held and the joint holder is entitled to survivorship rights under the common law, the corporation is empowered to treat the surviving joint owner as the new sole owner, as long as satisfactory proof of death of the other joint holder has been provided to the issuer.

Where there has not been a death, liquidation or bankruptcy, a person claiming to be the registered debt obligation holder whose name is not recorded in the debt obligation register cannot be treated by the issuer as the new holder, unless the person provides proof to the issuer that he/she has acquired the debt obligation by operation of law or has the legal authority to exercise the rights and privileges attached to the debt obligation (clause 50).

In addition to obligating NPCs to establish debt obligation registers, and explaining how various parties go about becoming registered holders, Part 6 of the NPCA contains provisions governing the effect of registration on those who have rights and duties associated with registration.

4. Overissue (Clause 55)

If an issuer wrongfully registers a transfer of a debt obligation to someone not entitled to it, the issuer is generally obligated to deliver a replacement debt obligation to a person in whose name the transfer should have been registered (clause 101(2)). However, one of the situations in which an owner is not obligated to do so is when doing so would result in "overissue."

Clause 38(1) of the NPCA defines overissue as "the issue of debt obligations in excess of any maximum number of debt obligations that the issuer is authorized by a trust indenture to issue." Trust indentures will be covered more thoroughly in the discussion of Part 7 of Bill C-21, below.

Clause 55(1) of the NPCA specifically states that any of the provisions contained in Part 6 "that validate a debt obligation or compel its issue or reissue" do not apply if they would result in overissue.

In the event of an overissue, the person who now holds the overissued debt obligation may compel the issuer to purchase and deliver a similar debt obligation to him/her, against the surrender of the overissued debt obligation that the person currently holds (clause 55(2)). If no similar debt obligation is reasonably available, the person may recover a sum of money from the issuer. The amount the person is entitled to receive is equal to the price the last purchaser paid for the invalid debt obligation (clause 55(3)).

Overissued debt obligations remain valid only if the issuer increases its authorized debt obligations to a number large enough to accommodate existing, valid debt obligations and those it has overissued (clause 55(4)).

5. Proceedings (Clause 56)

In the event of a lawsuit involving a debt obligation, clause 56 provides that the following presumptions will apply:

- signatures on the debt obligation and/or endorsements will be considered admitted unless expressly denied;
- signatures on the debt obligation are presumed to be genuine and authorized. In the event of a dispute over whether or not a signature is genuine and authorized, and hence effective, the burden of proof will be on the person claiming under the signature;
- in the event that the signature is admitted or established as genuine and authorized, production of the debt obligation certificate will generally entitle the holder to recover on the debt obligation. However, if the other party is able to establish a defence or defect that calls into question the validity of the debt obligation, the holder may be barred from recovery; and
- upon establishment of a defence or defect by the other party, the burden shifts to the plaintiff to show that the defence or defect is ineffective against the plaintiff or another person against whom the claim is made.

6. Delivery (Clause 57)

Clause 57 states that in order for a transfer of a debt obligation to a purchaser to be effective, evidence of the debt obligation, in the form of a debt obligation certificate or other document, must be delivered to the purchaser. The debt obligation which is delivered may be in bearer form, registered form (endorsed to the transferee), endorsed to the person or in blank.

7. General Provisions Respecting Debt Obligations (Clauses 58-104)

Part 6 of the NPCA also contains numerous general provisions concerning debt obligations, including:

- terms included in a debt obligation;
- rights acquired by a purchaser of a debt obligation;
- defences that issuers, transferors and purchasers are entitled to assert in the event that there is a defect in the debt obligation, the debt obligation certificate, or delivery of the debt obligation to the purchaser;
- what constitutes an adverse claim;
- effects of adverse claims on purchasers, issuers and brokers;
- guarantees that can be given in relation to debt obligations;
- effect of guarantees on the rights of purchasers, issuers and transferors;
- endorsement of debt obligations;
- effects of endorsement on the rights of purchasers, issuers and transferors;
- deliveries of debt obligations and obligations to deliver them; and
- the rights and obligations of agents and mandataries who act for issuers.

Clauses 58-104 are intricate. They explain in detail how someone who obtains a debt obligation from an issuer or transferor, or from someone acting for an issuer or transferor (i.e., a broker or agent), can ensure that his/her interest in or title to the debt obligation is good, secured and indisputable.

Clauses 58-104 also outline the responsibilities and liabilities of all who deal with debt obligations in the event that there is a dispute over title, or someone claims that a mistake has been made in the purchase, transfer, issue, redemption or surrender of a debt obligation. In addition, clauses 58-104 provide a number of defences that can be raised by parties to avoid or limit liability in the event of losses associated with a defect in, or wrongful issuance or transfer of, a debt obligation.

A person wishing to ensure that he/she is taking good title to a debt obligation from an issuer or transferor should:

- read the debt obligation certificate or other document providing evidence of the debt obligation to ensure that he/she understands the terms of the debt obligation, including those incorporated by reference (clause 58);
- in the event that the person is taking the debt obligation directly from the issuer, ensure the debt obligation is signed by someone entrusted by the issuer with the duty to sign the debt obligation (clause 67);
- in the event that the person is taking the debt obligation from a transferor, make certain that it is endorsed/signed by an appropriate person. The appropriate person will generally be the current debt obligation holder, but may also be someone authorized to act for him/her (clauses 78-87 and 92);
- ensure that the debt obligation, as well as any endorsements of the debt obligation, are delivered to him or her (clauses 75, 84 and 88-90);
- ensure, to the extent that he/she can, that the debt obligation does not contain a defect. For example, a person will not obtain good title to a debt obligation if he/she takes it notwithstanding prior knowledge of an adverse claim, or if the debt obligation is stale (clauses 62, 68(3), and 70-73).

Similarly, issuers who receive debt obligations from purchasers for registration following transfer should take the following steps in order to limit their liability:

- ensure that the debt obligation certificate contains all the necessary endorsements or signatures (clauses 86(2), 95 and 101);
- obtain guarantees of endorsements (clause 96); and
- investigate adverse claims, when they have the duty to do so (clauses 97-99).

With respect to the duties of agents, mandataries and others acting for principals involved in transferring debt obligations, these actors are not generally liable for losses suffered in the event of a problem with transfer, as long as they act in good faith (clause 94). When acting for issuers in respect of the issue, registration, transfer and cancellation of an issuer's debt obligation, agents and mandataries have a duty to the issuer to exercise good faith and reasonable diligence, and have the same obligations to the holder or owner of the debt obligation that the issuer does (clause 103).

## G. Part 7 – Trust Indentures (Clauses 105-116)

Part 7 of the NPCA concerns the subject of trust indentures. Trust indenture means "any deed, indenture or other instrument … under which the corporation issues debt obligations and in which a person is appointed as trustee for the holders of the debt obligations issued under the deed, indenture or other instrument" (clause 105(1)). Debt obligations issued under trust indentures are controlled and managed by a trustee for the benefit of holders.

The provisions contained in Part 7 of the NPCA largely mirror the provisions governing trust indentures found in Part VIII, ss. 82 to 93, of the CBCA.

### 1. Application (Clause 105)

Clause 105 states that Part 7 of the NPCA applies to trust indentures if the debt obligations issued or to be issued under it are part of a public distribution.

Industry Canada may exempt a trust indenture from the application of Part 7 if the trust indenture, debt obligations issued under it, and the security interest effected by it (the corporate property secured by way of debt obligation) are subject to provincial or foreign laws substantially equivalent to the laws contained in Part 7.

### 2. Qualifications of Trustee (Clause 106-107)

At least one trustee appointed under a trust indenture must be a body corporate incorporated under the laws of Canada or a province and authorized to act as a trust company (clause 107). In other words, at least one trustee must be a corporation with the capacity under the law to receive deposits from the public and lend or invest those deposits. If there is only one trustee, that trustee must be a corporation authorized to act as a trust company.

In addition to the above qualifications, clause 106 states that trustees of trust indentures must not accept appointments as trustees if there is a material conflict between their trustee role and their role in any other capacity. Upon becoming aware of the material conflict, a trustee is given a certain period of time to either eliminate the conflict or resign.(21)

Trust indentures, debt obligations issued under them, and security interests effected by the trust indenture remain valid despite the trustee's material conflict of interest.

3. List of Debt Obligation Holders (Clause 108)

According to clause 108, debt obligation holders under trust indentures wanting to obtain a list of other debt obligation holders containing certain prescribed information(22) may ask the trustee for such a list. Upon receipt of this request, the trustee will furnish this demand to the issuer. The issuer is required to send the requested information to the trustee for distribution to the holder. In order to obtain this list, the debt obligation holder must forward a statutory declaration to the trustee, stating that the list will be used only for one of the following purposes:

- to influence the voting of debt obligation holders;
- to offer to acquire debt obligations; or
- any other matter relating to the debt obligations or to the affairs of the issuer or guarantor of the debt obligations.

Debt obligation holders are prohibited from using the list for any other purposes apart from those listed above. The trustee must furnish this list within a prescribed period, updated to a prescribed day.(23)

(21) According to Regulation 23 of the proposed NPCA regulations, the prescribed period of time within which the trustee must either eliminate the material conflict or resign is 90 days after becoming aware that a material conflict exists.

(22) According to Regulation 6 of the proposed NPCA regulations, the prescribed information consists of: the names (in alphabetical order) and addresses of registered holders of outstanding debt obligations, the principal amounts of each holder's outstanding debt obligations, and the aggregate principal amount of all outstanding debt obligations.

(23) According to Regulation 8 of the proposed NPCA regulations, the prescribed period is within 10 days after the receipt of the debt obligation holder's statutory declaration, and the prescribed day is a date not more than 10 days before the receipt of the statutory declaration.

4. Trustee Rights and Obligations (Clauses 109-115)

Trustees are entitled to demand evidence of compliance with the trust indenture with respect to any act to be done by the trustee at the request of the issuer or guarantor, as well as with respect to various actions to be taken by the issuer or guarantor (clauses 109(1) and (2) and clauses 112(1) and 112(2)(a)). Upon receipt of such a demand, issuers and guarantors are required to furnish evidence of compliance by way of statutory declaration or certificate (clauses 110 and 112(2)(a)). The statutory declaration or certificate must be furnished by a director or officer of the issuer or guarantor, and, depending on the content, may need to include a legal opinion or accountant's report to show that certain conditions have been complied with (clauses 110 and 111).

Issuers and guarantors are also obligated to provide certificates of compliance to trustees at certain prescribed times[(24)] to demonstrate that all conditions which would give rise to an event of default under the trust if unmet have been complied with; or, if these conditions have not been met or complied with, a certificate containing particulars of the failure to comply (clause 112(2)).

Trustees are required to give debt obligation holders under a trust indenture notice of every event of default arising under the trust indenture, unless the trustee reasonably believes that it is in the best interests of the debt obligation holders to withhold such notice (clause 113). Notice of default must be provided within the prescribed period (clause 113).[(25)]

Trustees must act honestly and in good faith with a view to the best interests of those who hold debt obligations issued under the trust indenture, and must exercise the care, skill and diligence of a reasonably prudent trustee (clause 114). No term of a trust indenture or agreement will serve to relieve a trustee of these duties (clause 116). Having said this, however, trustees will not be liable if they rely in good faith on statements made in statutory declarations, certificates, legal opinions or accountant's reports made in accordance with the terms of the trust indenture and the NPCA (clause 115).

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(24) According to clause 112(2) of the NPCA and the proposed NPCA regulations, the prescribed time is at least once a year, beginning on the date of the trust indenture.

(25) According to Regulation 25 of the proposed NPCA regulations, the prescribed period is 30 days after the trustee becomes aware of an event of default.

H. Part 8 – Receivers and Receiver-managers (Clauses 117-124)

Part 8 of the NPCA describes the authority and role of receivers and receiver-managers in relation to NPCs. Receivers and receiver-managers are persons appointed, by the court or another instrument, to take possession of property belonging to an NPC.

Receivers may not carry on the activities of an NPC except as permitted by a court. By contrast, receiver-managers may carry on the activities of the corporation in order to protect the security interests of those on whose behalf the receiver is appointed. During the time that a receiver-manager is authorized to act on behalf of those who hold security interests in the corporation, the directors of the corporation may not exercise their directors' powers (clause 117-119).

Receivers and receiver-managers have a duty to act in accordance with the court order or instrument under which they were appointed, and must also act in good faith (clauses 121 and 122(a)). In addition, they must deal with the property of the corporation in a commercially reasonable manner (clause 122(b)). Courts are empowered to make orders upon application of a receiver or receiver-manager to assist these persons in dealing with the corporation's property in accordance with their mandate (clause 123).

Receivers and receiver-managers are responsible for notifying Industry Canada of their appointment and discharge, taking custody and control of corporate property, opening and maintaining a bank account for corporate money coming under their control, keeping detailed accounts of transactions carried out under their administration, preparing financial statements, and rendering a final account of their administration upon completion of their duties (clause 124).

I. Part 9 – Directors and Officers (Clauses 125-152)

The provisions in Part 9 of the NPCA concern the management of an NPC. The election and removal of directors, board meetings, and the duties, responsibilities, and liabilities of management are regulated by this part of the bill. The provisions generally mirror those found in the CBCA, with members given rights roughly equivalent to those of shareholders.

1. Duty to Manage and Qualifications of Directors (Clauses 125-127)

The NPCA stipulates that directors must manage, or supervise the management of, the corporation, subject to corporate articles or unanimous member agreements that limit their powers (clause 125). NPCs may operate with a minimum of one director, but soliciting corporations are required to have at least three directors on the board. The NPCA prohibits bankrupts, individuals under 18 years old, and those found incapable of managing their own financial affairs from becoming directors. Unless the by-laws provide otherwise, directors are not required to be members of an NPC (clause 127).

2. Organizational Meetings (Clauses 128 and 129)

When the articles of incorporation are sent to Industry Canada, the applicants include a list of initial directors (clause 129). After receiving the certificate of incorporation, the initial directors hold a first meeting in which they can create by-laws, appoint officers and auditors, admit members, authorize debt, make banking arrangements, and transact any other business.

At the first annual members' meeting, members have the opportunity to elect directors. The bill has various provisions allowing for the appointment of directors should the meeting fail to elect sufficient numbers. Under clause 136, directors are entitled to receive notice of and attend all member meetings.

3. Resignation and Removal of Directors (Clauses 130-133)

Directors cease to hold office at the end of their term, when they die or resign, or if they are removed or become disqualified (clause 130).

Members of an NPC have a right to remove a director from office before the end of his or her term through an ordinary resolution voted at a special meeting. If any class of members has an exclusive right to elect directors, that director can be removed only by a resolution of that class.

The members at the special meeting can elect a replacement for the director they have removed. If they fail to do so, a quorum of directors can fill a vacancy on their board.[26] If

(26) Except if the vacancy is the result of a change in the by-laws that increases the minimum or maximum number of directors or the members fail to elect the minimum number of directors.

there is no quorum, or the members fail to elect the minimum number of directors, the directors must call a special meeting of members to elect additional directors. If, after this meeting, the NPC has neither directors nor members, any interested party may ask a court to appoint them.

If all of the NPC's directors have resigned or been removed, a person who manages or supervises the management of a corporation is deemed to be a director, unless that person is an officer under the direction and control of another person, a professional providing professional services, or a trustee in bankruptcy.

Under clause 132(1), a director who resigns or is in danger of being removed is permitted to submit a written statement giving reasons for his or her resignation or for opposing his or her removal, and to have notice of this statement circulated to the members.

4. Changes to the Number of Directors (Clauses 134-135)

Members can amend the corporation's articles to change the number of directors or the required maximum or minimum number of directors. A decrease in the number of directors cannot be used to shorten the term of an incumbent director (clause 134(1)). Members at a meeting that increases the number of directors through amendment to the articles can elect additional directors at the same meeting. Members may also delegate the power to fix the number of directors to the board.

Clause 135 states that an NPC must give notice to Industry Canada of changes to its board.

5. Meetings of Directors (Clauses 137-138)

NPCs are able to pass by-laws governing the meetings of its board of directors. The NPCA provides default rules on directors' meetings, including provisions governing notice, quorum, teleconferencing, and meetings for NPCs that have only one director.(27)

6. Delegation (Clause 139)

Directors can generally delegate their power to a management committee or to the managing director; however, certain fundamental powers cannot be delegated. Under

(27) The NPCA contains a curious provision on consensus. Clause 138(1) states that the by-laws may provide that the directors or members must make a decision by consensus "including a decision required to be made by a vote" except for a decision taken "by a vote, if consensus cannot be reached."

clause 139(2), a managing director cannot submit a question to members requiring the approval of members, fill a vacancy of the board or appoint additional directors, appoint accountants, issue debt obligations, approve financial statements, amend by-laws, or establish membership dues. Directors would remain liable for the acts and omissions of those to whom power has been delegated, except in the case of a unanimous shareholder agreement that delegates power (clauses 149(4) and 170(5)).

7. Disclosure of a Director's Interest in a Contract (Clause 142)

Under clause 142, directors and officers are required to disclose to the NPC the nature and extent of any interest in any material contract with the corporation. This disclosure is required either immediately, or at the first meeting after which the conflict of interest becomes apparent. Once a conflict of interest is declared, the director may not vote on the transaction unless it relates to the director's compensation, indemnification or insurance, or is with an affiliate.

There is a continuous disclosure section that allows a director or officer to declare an ongoing interest in relation to contracts or transactions that an NPC may make with a particular party the director is associated with.

The contract or transaction related to the disclosure cannot be invalidated if adequate disclosure was made, if it was reasonable and fair to the corporation, and the directors approved the contract (clause 142(8)). Contracts may also be approved if reasonable and fair, disclosure of the interest was made to members, and the members approve the contract by special resolution.

If a director or officer fails to comply with the conflict of interest rules, the corporation or any of its members may apply to have the contract or transaction set aside, and for an order that the director or officer account for any profits earned as a result of the contract or transaction.

8. Officers (Clause 143)

Directors are able to designate the offices of the corporation and appoint any person as an officer of the corporation. The directors may also determine the duties and powers of the officers, subject to the articles and by-laws of the corporation and to any unanimous member agreement. The directors may not delegate powers referred to in section 139(2).

9. Remuneration of Directors, Officers and Members (Clause 144)

Subject to the articles, the by-laws or a unanimous member agreement, the directors would set reasonable remuneration for themselves and officers and employees of the corporation.

10. Duty of Care of Directors and Officers (Clause 149)

Clause 149(1) of the NPCA imposes a duty of care on directors and officers identical to that found in for-profit corporate statutes. Under the legislation, directors and officers performing their duties must:

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

At common law, this standard leaves aside a director's or officer's personal background and experience in the assessment of his or her duties.

Clause 149 states that directors cannot absolve themselves of their liability through a provision in the articles, by-laws, or a members' resolution, except in accordance with the provisions regarding unanimous member agreements. If a unanimous member agreement restricts the directors' powers to manage the affairs of a corporation, and delegates such powers to other parties, the duty of care and due diligence defences are transferred to these other parties along with the delegated powers (clause 170(5)).

11. Other Directors Liabilities – Employee Wages (Clause 147)

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

- the corporation is sued within six months of the debt becoming due;
- the corporation has started the process of liquidating or dissolving or has been dissolved, and the claim has been proven within six months of the commencement of liquidation or dissolution or the date of dissolution; or

- the corporation has made an assignment or gone into receivership under the *Bankruptcy and Insolvency Act*,[28] and a claim for debt has been proven within six months after the date of the assignment or receiving order.

A director is liable for employee wages only while he or she is a director, or within two years after ceasing to be a director. This section also allows directors who have personally paid debts to subrogate the claims of employees after bankruptcy. Directors who pay employee wage claims are entitled to contribution from other directors.

12. Liability for Other Obligations (Clause 146)

Directors who consent to a resolution authorizing a debt obligation for property or services instead of money are liable to the corporation if the value of the property or services received is less than the monetary value of the debt obligation. A director is not liable if he or she did not know that the debt obligation was issued for less than its monetary value.

Directors are liable to the corporation for the repayment of:

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

These liabilities can only be enforced for up to two years after the director ceased being a director. Directors are entitled to contribution from other directors, and can seek a court order compelling a member to give back improper payments.

13. Due Diligence Defences (Clause 150-151)

Clause 150(1) states that directors can avoid personal liability in the event of a claim that they have breached their duty of care, if they establish that they exercised the care, skill, and diligence of a reasonably prudent person in comparable circumstances. Officers have a similar defence under clause 151. Due diligence can include relying in good faith on the reports of professionals and, in the case of directors, reliance on financial statements.[29]

(28) R.S.C. 1985, c. B-3.

(29) Officers can rely on financial statements if prepared by a professional, but probably could not reasonably rely on statements prepared by a fellow officer.

14. Right to Dissent (Clause 148)

Under clause 148, a director has a right to dissent. The dissent allows a director to avoid liability for improper actions or resolutions taken during a board meeting. A director who did not attend the meeting at which a decision was taken may also avoid potential liability by disclosing dissent within seven days of becoming aware of the resolution.

15. Indemnification (Clause 152)

Bill C-21's indemnification clause allows NPCs to compensate directors for losses suffered by third parties. The Act's indemnity provisions:

- apply to former as well as acting directors and officers of the NPC, and individuals acting in a similar capacity in another entity at the NPC's request;
- apply to civil, criminal and administrative actions and investigative and other proceedings; and
- include indemnity for costs, charges and expenses.

Indemnification of directors and officers is at the discretion of the NPC. However, the NPC may not indemnify if the director did not act honestly, in good faith and in the best interests of the corporation, or, in the case of a criminal or administrative action or proceeding that is enforced by monetary penalty, if the director did not have reasonable grounds to believe that his or her conduct was lawful.

Corporations are allowed to purchase liability insurance to cover directors and officers (clause 152(6)).

J. Part 10 – By-laws and Members (Clauses 153-171)

1. Making and Amending By-laws (Clause 153)

Unless the articles or by-laws provide otherwise, the directors are allowed to make, amend, or repeal any corporate by-laws, except matters that fundamentally change the corporation.[30] Changes to by-laws must be submitted to the members at the next members' meeting, where the members may, by ordinary resolution, confirm, reject or amend the by-law.

(30) Fundamental changes require a special resolution under section 195(1) and will be discussed in this summary's analysis of Part 13 of Bill C-21.

A member of the NPC has the right to make a proposal to make, amend or repeal a by-law at an annual meeting.

2. Conditions, Issuance and Termination of Memberships (Clauses 154-158)

The directors may issue memberships in accordance with the NPC's articles or by-laws (clause 155). Under clause 154, the by-laws must set out the conditions of membership. If the corporation has more than one class of membership, its by-laws must set out the conditions of membership in each class, as well as conditions for the transfer and termination of memberships for that class. The by-laws must also designate at least one class of members entitled to vote at meetings of members. Unless otherwise specified by the by-laws, every member has the right to vote. Members have the right to designate a proxy to vote for them.

Unless the articles or by-laws provide otherwise, a membership is transferable only to the corporation (clause 154(8)). Memberships terminate when:

- the member dies or resigns;
- the member is expelled in accordance with the by-laws;
- the member's term of membership expires; or
- the NPC is liquidated or dissolves.

The NPCA provides that all rights of membership, including rights to property, terminate when the membership is terminated. Under clause 158, an NPC's articles or by-laws may provide that directors or members have the power to discipline a member or to terminate the membership interest of a member.

3. Meetings of Members (Clauses 159-162)

The NPCA stipulates that an NPC's by-laws must designate a place in Canada where the meetings of members are to be held. The by-laws or the members may authorize a meeting of members to be held outside of Canada. Members' meetings may be conducted by telephone or other electronic medium (clause 159).

The directors are required to call an annual meeting of members not later than 18 months after the NPC comes into existence. Thereafter, the directors must hold annual meetings within 15 months after the first annual meeting. The directors can call a special

meeting of members at any time. The directors may fix a record date determining members that are eligible to participate in meetings.

Notice of the time and place of the meeting must be sent to each member entitled to vote at the meeting, to each director, and to the auditor of the corporation, if any. Individual members are allowed to waive their right to receive notice of meetings. Under clause 162, Industry Canada can approve alternative notice if it deems that members would not thereby be prejudiced.

4. Membership Proposals (Clause 163)

Members entitled to vote at a meeting are allowed to submit notice to the corporation of a matter that they propose to raise at the meeting. The corporation must include the proposal and a supporting statement in its notice of the meeting; however, the sponsor of the proposal must pay all costs of distribution, unless the by-laws provide otherwise.(31) If the proposal is a nomination of directors, the nomination must be supported by the prescribed percentage of members(32) entitled to vote at the meeting. The proposal would be limited to 500 words in length.(33)

A corporation could refuse to include a proposal in a notice of a meeting if:

- the proposal is not submitted within the prescribed period of time;(34)
- the proposal is intended to enforce a personal claim or grievance;
- the proposal promotes a cause which does not relate in a significant way to the activities of the corporation;
- the member fails to present the proposal at a meeting;
- substantially the same proposal was submitted to members in a notice of a meeting held within the prescribed period(35) of time and the proposal did not meet the minimum prescribed level of support; or
- the rights conferred are being abused to secure publicity.

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(31) It is unclear whether sponsors are obligated to pay only the cost of printing or all costs – i.e., the costs of sending the proposal and statement.

(32) According to Regulation 65 of the proposed NPCA regulations, 5% of the membership.

(33) See proposed NPCA Regulation 64.

(34) Between 150 and 90 days before the anniversary of the previous meeting. See proposed NPCA Regulation 66.

(35) The prescribed period is two years. See proposed NPCA Regulation 67.

If the NPC refuses to distribute a member's proposal, it must send notice in writing to the person submitting the proposal setting out the reasons for the refusal.

5. Voting, Quorum and Requisitioning a Meeting (Clauses 164-169 and 171)

The by-laws may set a quorum for a meeting of members. If the by-laws are silent, a quorum is a majority of members entitled to vote (clause 164).

Unless the articles or by-laws provide otherwise, voting can be conducted by a show of hands, but any member may demand a ballot either before or after the show of hands. The vote can be conducted electronically, if the NPC makes such communication facilities available.

A resolution in writing signed by all the members entitled to vote on the resolution is as valid as if it were passed at a meeting or members. A copy of every written resolution must be kept with the minutes of the meetings of members (clause 166).

Members representing not less than the prescribed amount (5% of voting members)[(36)] would be allowed to requisition the directors to call a meeting of members for the purposes stated in the requisition. The requisition must state the business to be transacted at the meeting, and must be sent to each director and to the registered office of the corporation. The corporation must send notice of the meeting to all members entitled to attend the meeting. However, directors do not have to call a meeting in certain specified circumstances.[(37)]

If the directors fail to call a meeting, any member may call a meeting, and the NPC must reasonably reimburse him/her for expenses incurred in calling the meeting.

On the application of a director, of a member entitled to vote, or Industry Canada, a court can order that a meeting be called, held and conducted in a manner that the court directs (clause 168).

An NPC, a member, or a director may apply to a court to determine any controversy respecting the election or appointment of a director or auditor of the corporation. The court is allowed to make any order it sees fit, including an order restraining a director or auditor from acting pending determination of the dispute, an order declaring the result of the

(36) The regulations specify 5%. See proposed NPCA Regulation 72.

(37) See clauses 167(3), 161(1)(a), 162 and 163(6)(b) to (f) of the NPCA.

disputed election or appointment, or an order determining the voting rights of members (clause 169).

If the by-laws allow, members of corporations may vote by absentee ballot or, upon application to Industry Canada, by any other method Industry Canada sees fit (clause 171).

6. Unanimous Member Agreements (Clause 170)

A unanimous member agreement (UMA) is an agreement among all members (or among all members and a third party) that restricts the powers of the directors to manage the activities and affairs of the corporation. Members become bound by a pre-existing UMA when they become members, but may rescind their memberships if unaware that they were bound. Under an UMA, parties can be given all the rights, powers and duties of a director of the corporation, to the extent that the agreement restricts the powers of the directors to manage the activities and affairs of the corporation. If this is done, the directors are relieved of their duties and liabilities to the same extent.

The members may terminate a UMA by special resolution.

K. Part 11 – Financial Disclosure (Clauses 172-177)

Directors must approve and sign all financial statements. Subject to the corporation's by-laws, they must also send financial statements to members 21 days in advance of an annual meeting, to allow members to review the contents (clause 175). Notice of the meeting must include:

- the prescribed financial statements for the most recently completed financial period;
- the report of the auditor, if any; and
- any further documents respecting the financial position of the company.

At the annual meeting, directors must present these documents to the members for their approval (clause 172).

An NPC can apply to Industry Canada for an exemption from its obligation to disclose its financial statements, if it believes that the disclosure could be detrimental to its operations, and the possible detriment outweighs the benefits of disclosure to the members, or, in the case of a soliciting corporation, to the public. An NPC can publish a notice that the financial

statements are available at the NPC's registered office, where any member can obtain a free copy.

A corporation must keep a copy of the financial statements of each of its subsidiaries or other corporations whose accounts are consolidated with those of the NPC.

If the NPC is a soliciting corporation, it must also send copies of its financial statements to Industry Canada (clause 176).

## L. Part 12 – Public Accountant (Clauses 178-194)

### 1. Audit Requirements for Corporations (Clause 178 and 181)

NPCs with gross annual revenues of less than the amount prescribed by regulation ($50,000 or less for a soliciting corporation, $1,000,000 for a non-soliciting corporation) are not required to undergo an annual audit. NPCs that are exempt from audits nonetheless have the right to appoint a public accountant and require, in its articles or by-laws, an audit annually or otherwise.

### 2. Qualifications and Appointment of an Auditor (Clauses 179-181)

According to clause 179, to be eligible to be appointed as an auditor, the person or accountancy firm must a member in good standing of a provincially regulated professional body. The auditor must be independent of the NPC, its affiliates, or the directors of the corporation. The auditor is not independent if he/she is:

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

Auditors who are not independent must resign, or they may be disqualified by a court. A court can also make an order that allows an auditor deemed not to be independent to

continue to act as auditor for a corporation, if this would not unfairly prejudice members of the corporation.

Clause 180 states that at the first annual meeting and at each subsequent annual meeting, members of the corporation can appoint an auditor by an ordinary resolution. If an auditor is not appointed at an annual meeting, the qualified incumbent remains until a successor is appointed. Members may fix the auditor's remuneration through an ordinary resolution. If they do not, the directors are free to fix remuneration (clause 180(4)).

All oral and written reports prepared by an auditor have qualified privilege (clause 194).

3. Review Engagements for Mid-level Soliciting Corporations (Clause 188(2))

Soliciting corporations with revenues of between $50,000 and $250,000 may decide not to undergo an audit, but instead opt for a less onerous review engagement, if the NPC's members pass a special resolution to that effect.

Generally, the scope of a review engagement is less than that of a full audit. Review engagements provide analysis as to whether financial statements supplied by management are plausible. Review engagement reports will generally include:

- a statement regarding which financial statements have been reviewed;
- a statement that a review does not constitute an audit and that the accountant is not expressing an audit opinion on the financial statements; and
- a conclusion indicating whether anything has come to the accountant's attention that causes the accountant to believe the information being reported on is not in accordance with generally accepted accounting principles.

4. Ceasing to Hold Office and Filling a Vacancy (Clauses 182-186)

An auditor ceases to hold office if he or she dies, resigns or is removed by the members of the corporation (clause 182). Members of the corporation may vote by ordinary resolution at a special meeting to remove an auditor from office and fill the vacancy.

The by-laws of the corporation may indicate that a vacancy in the office of auditor must be filled by a vote of members. If no such by-law exists, the directors must fill the vacancy by appointing an auditor (clause 184). An auditor who fills a vacancy holds office for the unexpired term of his or her predecessor.

An auditor who resigns or is removed is entitled to send to the corporation a written statement providing the reasons for the resignation, or for opposing his or her removal. In the latter case, the NPC must also supply a statement giving reasons for the removal. Both of these statements must be circulated to members of the corporation. Any new auditor must request a written statement from the old auditor giving details of the circumstances and reasons for replacement (clause 186(7)).

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

5. Right to Information and to Attend Meetings (Clauses 186 and 191)

The auditor of the corporation is entitled to receive a notice of and attend every meeting of members. Auditors must attend if requested to by directors or members, and must answer questions.

The auditor may demand that the present or former directors, officers, employees and agents furnish information, records, documents, books and accounts of the corporation or any of its subsidiaries. Directors are also required to obtain and furnish information.

6. Audit Committees (Clauses 192 and 193)

An NPC can set up an audit committee, composed of at least three directors, a majority of whom are independent of the corporation. This committee reviews the NPC's financial statements before they are approved by the full board. The NPC's auditor has the right to attend audit committee meetings. Directors and officers are obliged to notify the audit committee and the NPC's auditor of any error or misstatement they become aware of, after which the directors must prepare and send a revised financial statement to the members and Industry Canada.

M. Part 13 – Fundamental Changes (Clauses 195-214)

1. Amendment of Articles and By-laws (Clauses 195-201)

A corporation is allowed to make fundamental changes to its articles or by-laws with a special resolution of two-thirds of the members voting at a meeting called for that purpose. Fundamental changes include:

- changing the corporation's name or the province in which the corporation's registered office is situated;
- adding, changing or removing any restriction on the activities that the corporation may carry on;
- creating a new class or group of members, changing the designation of any class or group of members, or changing or removing any rights and conditions of any such class or group;
- changing a condition required for being a member;
- dividing any class or group of members into two or more classes or groups and fixing the rights and conditions of each class of group;
- adding, changing or removing a provision respecting the transfer of a membership;
- increasing or decreasing the number of – or the minimum or maximum number of – directors fixed by the articles;
- changing the mission statement of the corporation;
- changing the statement concerning the distribution of the assets of the corporation on dissolution; or
- adding, changing or removing any other provision that is permitted by this Act to be set out in the articles.

Any member or director can make a proposal for a fundamental change to the NPC.

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

All fundamental changes must be sent to Industry Canada, which then issues a certificate of amendment to the NPC. Industry Canada can also require an NPC to restate its articles of incorporation.

2. Amalgamation (Clauses 202-207)

Corporations seeking to amalgamate must enter into an agreement setting out the terms, conditions and process of amalgamation. The agreement needs to address, among other things, articles of incorporation for the new entity, the proposed directors, how memberships are to be converted, the by-laws of the new NPC, and management and operational details of the new NPC.

Amalgamation agreements must be approved by two-thirds of the membership of each corporation in a special resolution. Each class of members of each amalgamating corporation is entitled to vote separately. A notice of the meeting to decide on the amalgamation

must include a copy or a summary of the amalgamation agreement, and must be sent to every member of the amalgamating corporations.

After the special resolution, a director or officer must send a statutory declaration to Industry Canada stating that the amalgamating companies have discharged their liabilities, have not depleted their assets, and have notified and provided for creditor (clause 206). Debts due to each amalgamating NPC continue after amalgamation (clause 207). The amalgamation takes effect on the date shown on the certificate sent by the Industry Canada; however, clause 204(6) allows directors of the amalgamating corporations, if authorized by the amalgamation agreement, to terminate the agreement at any time before Industry Canada issues the certificate.

3. Vertical and Horizontal Short-form Amalgamations (Clause 205)

Two or more corporations are allowed to amalgamate vertically, meaning that the corporation can amalgamate with one or more subsidiary corporations controlled by the members of the first entity, without having to follow the standard amalgamation process. Vertical short-form amalgamation must be approved by a resolution of the directors of each amalgamating corporation. The resolution must provide for the cancellation of the membership interests of each amalgamating subsidiary corporation without any repayment of capital. Articles of the amalgamated corporation are the same articles as those of the amalgamating holding corporation.

Two or more wholly owned subsidiary corporations of the same NPC may amalgamate and continue as one corporation, without having to follow the standard amalgamation process. The horizontal short-form amalgamation must be approved by a resolution of the directors of each amalgamating subsidiary corporation. The resolution must cancel the membership interests of all but one amalgamating subsidiary corporation, without any repayment of capital. The articles of the new amalgamated corporation are the same as the articles of the amalgamating corporation whose membership interests were not cancelled.

4. Continuance Under the NPCA – Becoming an NPCA Corporation (Clause 210)

The continuance provisions of Bill C-21 allow corporations or societies incorporated federally, provincially, territorially, or internationally to move into the federal jurisdiction and continue their operations under the NPCA. Any “body corporate” is entitled to apply for continuance, provided it satisfies the requirements for incorporation, and is authorized

to do so by the laws of the jurisdiction where it is incorporated. The NPCA contains rules on applying for continuance, issuing the certificate of continuance, and the effect of continuance. The NPCA also allows for-profit corporations to convert themselves into NPCs.

5. Continuance Under Another Act – Leaving the Federal Jurisdiction (Clause 211)

Clause 211 allows NPCs to leave the federal jurisdiction and continue under an Act of another jurisdiction. NPCs could, for example, continue as provincial corporations if the NPCA were not to their liking. An application for continuance under another Act requires a special resolution of the members. The NPC must establish, to the satisfaction of Industry Canada, that its continuance under another jurisdiction would not adversely affect members or creditors of the corporation.

To proceed with the continuance, the laws of the jurisdiction under which the continuance is sought must provide that:

- the property of the corporation remains the property of the new corporation;
- the new corporation continues to be liable for the obligations of the corporation; and
- legal proceedings or judgments against the NPC can be enforced or otherwise remain valid.

Notice of the meeting to authorize continuance must be sent to each member of the corporation, and each class of membership carries the right to vote, whether or not it carries this right in other situations. The directors, if sanctioned by members, could withdraw the application after authorization by members but before the issue of a certificate by Industry Canada.

6. Extraordinary Sale or Lease (Clause 212)

Clause 212 concerns the sale or lease of all, or substantially all, of an NPC's assets. Notice must be given to members along with a summary of the proposed sale or lease, and the members (and different classes of members) must authorize the sale with a special resolution of at least-two thirds of the membership.

7. Reorganization Arising out of Insolvency (Clause 213)

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

The court has the power to order changes to the corporation's articles or by-laws, authorize debt obligations, and replace directors. If such an order is made by the court, the corporation must send Industry Canada the revised articles and by-laws of reorganization. On receipt of the revised articles, Industry Canada issues a certificate of amendment. The reorganization becomes effective on the date shown in the certificate of amendment.

8. Arrangements (Clause 214)

Arrangements are proposals to make changes to an NPC's articles or by-laws that cannot practicably be achieved under the proposed Act. A court is given the power to approve an arrangement upon application by the corporation. If an application is made by a corporation to the court, Industry Canada must be notified and is entitled to appear before the court.

The court has the power to require meetings to be held, require notice to be given, or appoint counsel to represent the interests of the members at the expense of the corporation. If the court makes an order, the articles of arrangement must be sent to the Industry Canada. An arrangement becomes effective on the date shown in the certificate of arrangement issued by Industry Canada.

N. Part 14 – Liquidation and Dissolution (Clauses 215-239)

Part 14 allows for the dissolution and liquidation of an NPC. Part 14 does not apply when the NPC is insolvent and an application has been made under the *Bankruptcy and Insolvency Act*. The NPC can be dissolved by the directors if there are no members, or by a special resolution of members. If the corporation has assets, they are distributed according to the corporation's articles. If the NPC is a soliciting corporation or a registered charity, excess assets are distributed to "qualified donees" as determined under the *Income Tax Act*.[38]

Bill C-21 outlines procedures for appointing a liquidator and the duties of a liquidator. Industry Canada must ultimately issue a certificate of dissolution, if the required

(38) R.S.C. 1985, c. 1 (5th Supp.).

procedures have been taken. A court may also order the dissolution and liquidation of a corporation on application from a member.

1. Revival (Clause 217)

Corporations are revived when there is some advantage to having a dissolved entity restored to existence. For example, a corporation might be revived by a plaintiff in order to sue it. Any person is allowed to apply to Industry Canada to have a corporate entity revived under the NPCA, including corporations that were dissolved under Part II of the CCA.

The articles of revival are sent by the interested person to Industry Canada, and become effective on the date shown on the certificate of revival. Industry Canada has the power to impose any reasonable conditions on the revived corporation. The revived corporation has all the rights, privileges and liabilities it would have had if it had not been dissolved. Any legal action taken against the revived corporation between the time it is dissolved and its revival would be valid and effective.

2. Dissolution (Clause 218)

If a corporation has no members, a resolution of all the directors is required to dissolve it. If the corporation has members but no property or liabilities, it can be dissolved by a special resolution of each class or group of members.

A corporation that has property or liabilities can be dissolved by a special resolution of the members authorizing the directors to distribute any property or discharge any debts. After the remaining property is distributed and the liabilities are discharged, the articles of dissolution are sent to Industry Canada. The corporation ceases to exist on the date shown in the certificate of dissolution that Industry Canada issues on receipt of the articles of dissolution.

3. Proposing Liquidation and Dissolution (Clause 219)

A director or a member entitled to vote at an annual meeting may, in accordance with the rules regarding submitting a proposal, make a proposal for the voluntary liquidation and dissolution of a corporation. The notice of the meeting must include the terms of the proposal. A special resolution of members is required to proceed with the proposal to liquidate or dissolve the corporation. If there are classes of voting members, a special resolution by members of each class is required.

A statement of intent to dissolve the corporation must then be sent to the Industry Canada. Industry Canada will issue a certificate of intent to dissolve. Once the certificate is issued, the corporation is required to cease carrying on its activities, except to the extent necessary for the liquidation. It must also take the following steps:

- notify each known creditor of the corporation of its intent to dissolve;
- take reasonable steps, without delay, to provide notice in each province of Canada where the corporation carries on its activities;
- do all acts needed to liquidate its property and discharge all of its obligations; and
- if the corporation is a soliciting corporation or registered charity, distribute any remaining property according the rules contained in the *Income Tax Act*.

If the certificate of intent to dissolve has not been revoked and the corporation has followed the proper procedure, the corporation prepares articles of dissolution. The articles of dissolution must be sent to Industry Canada, and the corporation ceases to exist on the date shown in the certificate of dissolution issued by Industry Canada.

4. Dissolution by the Director (Clause 220)

Clause 220 allows Industry Canada to dissolve a corporation by issuing a certificate of dissolution where the corporation:

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

Before dissolving a corporation, Industry Canada is required to give notice of its intent to dissolve and publish such notice in a publication generally available to the public. Unless cause to the contrary has been shown, or a court order has been issued concerning the corporation that will be dissolved, Industry Canada can issue a certificate of dissolution, after which the corporation ceases to exist.

Industry Canada can also issue a certificate of dissolution if the required fee for issuance of a certificate of incorporation has not been paid.

5. Court Supervision (Clauses 219(8) and 223)

During the liquidation, Industry Canada or any interested person is allowed to apply for a court order that would put the liquidation under the supervision of the court. The court would be allowed to make any further order it considers appropriate in the situation.

A person making an application to the court would be required to notify Industry Canada, which would have the right to appear before the court and be heard.

Under clause 223, any application to request court supervision must state the reasons why court supervision of the liquidation and dissolution is necessary, and be accompanied by an affidavit from the applicant.

6. Dissolution by a Court (Clauses 221-222 and 224)

Industry Canada, or any other interested person, can apply to the court for an order to dissolve a corporation where the corporation has:

- failed to hold or call an annual meeting of members for the prescribed period (two consecutive years);
- exercised its powers contrary to its articles;
- denied members access to corporate records;
- failed to keep a registry of members;
- failed to keep up-to-date financial statements; or
- procured a certificate under the NPCA by misrepresentation.

The court can order dissolution or liquidation under its supervision, or make any other order it thinks fit. The court may also issue a dissolution order if the corporation had acted in an oppressive manner to its members, creditors, directors or officers, or if the court is satisfied that a unanimous members' agreement that requires dissolution applies. The oppression remedy is subject to the same faith-based defence found in Part 16 of the Act.

Under clause 224, any application to a court for liquidation and dissolution must state the reasons why the order is needed, and be accompanied by an affidavit from the applicant.

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

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

A copy of the court's show cause order must be published as directed in a newspaper that is published or distributed where the corporation has its registered office. The order must be served on Industry Canada and any other person named in the order.

7. Powers of a Court (Clauses 225-227)

In connection with the liquidation and dissolution of a corporation, a court may do the following:

- order the corporation to liquidate;
- appoint or replace the liquidator and fix his or her remuneration;
- appoint or replace inspectors or referees and specify their powers;
- determine, or dispense with, any notices required to be given to any interested person;
- determine the validity of any claims made against the corporation;
- restrain the director and officers from exercising any of their powers, collecting or receiving any debt or property of the corporation, or paying out or transferring any property of the corporation;
- determine and enforce the duty of any present or former director, officer or member to the corporation, or their liability for an obligation of the corporation;
- determine the use of documents and records of the corporation;
- give directions on the disposal of any property belonging to creditors or members; and
- after the final account of the liquidator, dissolve the corporation.

The process of liquidating a corporation under the preceding section begins with a court order for liquidation, after which the powers of the directors and members cease and are transferred to the liquidator (who can then delegate to members, directors and officers).

8. Appointment, Powers and Liabilities of the Liquidator (Clauses 228-230)

The court may appoint any person as liquidator of the corporation, including a director, an officer or a member of the corporation. Where the office of liquidator becomes vacant, the property of the corporation remains under the control of the court until the office of liquidator is filled.

Upon his or her appointment, the liquidator is required to give notice of the appointment to any claimant and creditor known to the liquidator, and publish such notice. If the corporation operates in more than one province, the liquidator must take reasonable measures to give notice in every province where the corporation operates. The notice will require any person:

- indebted to the corporation to render an account and pay the liquidator any amount owing;
- possessing property of the corporation to deliver it to the liquidator; or
- claiming against the corporation to present particulars of the claim to the liquidator no later than two months after first publication of the notice.

The liquidator is also required to:

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

For the execution of his or her duties, the liquidator is given a number of powers under clause 230 of the bill, including the right to retain professional advisers, take part in any legal or administrative proceedings, sell property, execute documents, borrow money, and settle claims on the corporation.

A due diligence defence, similar to that provided for directors and officers, is provided for liquidators. If the liquidator exercises the care, diligence and skill of a reasonably prudent person in comparable circumstances, he or she will not be liable. This defence includes reliance in good faith on the corporation’s financial statements. The liquidator is allowed to

apply to a court for an order to restore corporate property that has been concealed, withheld or misappropriated.

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

9. Distribution of Remaining Property by a Liquidator (Clauses 232-239)

When the liquidator has paid all claims, he or she is required to transfer any remaining property of the corporation. The distribution of the remaining assets of the corporation, upon dissolution, would be subject to its articles. Any undistributed property of the dissolved corporation belonging to a creditor or a member who cannot be found would be converted into money and transferred to the Receiver General, and any property of a corporation that has not been disposed of at the date of its dissolution would vest in the Crown.

O. Part 15 – Investigation (Clauses 240-247)

A member, creditor, or Industry Canada may make a court application for an investigation of the corporation. The court may direct an investigation and appoint an inspector if it appears the corporation is engaging in fraud or in conduct that is oppressive to members. The courts are empowered to give considerable powers to inspectors, including the right to examine documents, require attendance at hearings, and enter the premises of the NPC. There are some procedural safeguards for *ex parte* applications and solicitor-client privilege.

P. Part 16 – Remedies, Offences and Punishment (Clauses 248-261)

Part 16 authorizes civil legal actions taken by or against the corporation, and permits criminal prosecutions for violations of the Act. A complainant is defined as a former or present member or holder of a debt obligation, a former or present director or officer, Industry Canada, or any other interested person, at the discretion of the court.

The bill allows for derivative actions, in which complainants can get a court order requiring the corporation to take legal action against other parties. Procedures for the granting of a derivative action are established under the Act. Complainants can also apply for a court order that the corporation has acted in an oppressive manner, through unfairly prejudicial actions. If

the court finds oppression, it has broad discretion to remedy the situation, including restraining the conduct complained of, setting aside a transaction, and appointing new directors.

Both the derivative action and the oppression remedy have a defence for faith-based actions in which a religious corporation acted reasonably based on a tenet of faith.

A complainant can also apply to a court for a rectification of the records of the corporation. Industry Canada may apply to a court for direction, meaning that the court can condone future actions taken by Industry Canada.

The Act reinforces the concept of incorporation by way of right by requiring Industry Canada to give reasons for refusing to allow incorporation. The NPCA also allows complainants to appeal certain Industry Canada decisions, notably:

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

A court is empowered to issue a compliance or restraining order to force a corporation or any of its directors, officers, employees or auditors to comply with its own articles, by-laws or unanimous member agreements, as well as with the Act and regulations. In such circumstances, courts are allowed to make any orders they consider appropriate.

The criminal provisions of Bill C-21 make it an offence to contravene the Act. Offences are punishable on summary conviction by a fine of up to $5,000, or up to six months in prison, or both. Making misleading statements in required documents and improper use of information attract similar sanctions. All criminal offences are subject to a defence that prevents criminal liability where the accused exercised due diligence to prevent the commission of the offence. There is a limitation period of two years, and a clause that allows concurrent criminal prosecutions and civil actions against an offender.

Q. Part 17 – Documents in Electronic or Other Form (Clauses 262-269)

Part 17 allows for the use of electronic documents in communications between the corporation and its members. Corporations are not obliged to use electronic communications, and may do so only if members consent to such communications. Electronic documents must be capable of being retained, so that they are usable for subsequent reference. The bill allows for secure electronic signatures.

R. Part 18 – General (Clauses 270-291)

This Part contains disparate clauses associated with the administration of the Act. What constitutes adequate service of documents, acceptable notice, acceptance of notice, and waiver of notice is set out in this portion of the bill. All correspondence sent on behalf of the corporation must be signed by a director or officer, and can be used as evidence. Persons who have paid the prescribed fees are allowed to inspect most documents held by Industry Canada.

Part 18 also allows the Minister of Industry to appoint a Director (Industry Canada) and may appoint Deputy Directors.(39) Industry Canada is empowered to establish the form and content of notices and documents, the keeping of records, and the ability to cancel articles and make inquiries.

The Governor in Council is empowered to establish regulations pursuant to the Act.

S. Part 19 – Special Act Bodies Corporate Without Share Capital (Clauses 292-294)

Corporations without share capital that were incorporated by a special Act of Parliament were only sometimes subject to the CCA, depending on the specific statute that created the corporation. Part 19 makes special Act corporations subject to portions of the NPCA, specifically, all of Part 3 of the NPCA, and requirements for annual meetings, continuances, and dissolution and liquidation. There is also a provision that allows special Act corporations without share capital to change their names.

(39) As previously stated, this summary uses “Industry Canada” instead of “Director,” since “the Director” is easily confused with corporate directors.

T. Part 20 – Transitional, Consequential and Commencement Provisions (Clauses 295-330)

This Part states that a corporation incorporated under Part II of the CCA will have three years to apply for continuance under the NPCA or face dissolution. When the transition is complete, the bill repeals Part II of the CCA. Portions of the CCA dealing with special Act corporations are also repealed when the NPCA comes into force.

The NPCA must be reviewed within ten years of coming into force. The Minister must report to Parliament with recommendations, after which the report is automatically referred to Committee.

The NPCA makes a number of consequential amendments to change references made in other legislation from the CCA to the NPCA.

The Act comes into force on a day to be fixed by order of the Governor in Council.

## COMMENTARY

Bill C-21 was only recently introduced in the House of Commons, and has not yet generated significant media attention. However, as stated at the beginning of this summary, Industry Canada engaged in two rounds of stakeholder consultations to gather input on how the CCA should be reformed, and what an Act governing federally incorporated non-profit corporations should contain. In March 2002, after completing its first round of consultations, Industry Canada released a paper entitled *Reform of the Canada Corporations Act: Draft Framework for a New Not-for-Profit Corporations Act*. This paper contained a proposed legislative framework for reform of the *Canada Corporations Act*.

Following five additional weeks of consultations with stakeholders in the spring of 2002, Industry Canada released a paper entitled *Reform of the Canada Corporations Act: the Federal Not-for Profit Framework Law* (the Consultation Report), which summarized the contentious issues discussed in the consultation process.

In general, participants in the consultations supported reform, and agreed that the obsolete CCA should be replaced. The Consultation Report indicated strong support for the proposals concerning the standard of care and due diligence defence, indemnification and insurance, and limiting the liabilities of directors and officers. However, there was a divergence of views amongst participants on whether or not the NPCA should contain a classification system, the filing of by-laws, and audit requirements.

The following is a summary of some of the contentious issues identified in the Consultation Report, and an analysis of how Bill C-21 addressed these issues.

### A. Confusion Over Distinction Between Not-for-profit Corporations and Registered Charities

There was some complaint that NPCs that were also charities were under the jurisdiction of both the Canada Revenue Agency and the Ministry of Finance, and that this could cause undue complications in terms of charities understanding the requirements applicable to them.

The NPCA does not address or change any provisions of the *Income Tax Act* that deal with registered charities, and charities remain under two regulatory authorities.

### B. Classification System

Merits of including a classification system in the NPCA were also discussed during the consultation process. In other words, the merits of categorizing non-profit corporations in terms of what they do and their membership, and making different requirements applicable to non-profit corporations depending on what they do and how many members they have, were discussed. Those opposed to a classification system felt it would unduly complicate matters, since it would be difficult to classify some organizations because of the varied work that they do and because organizations might inappropriately put themselves into a specific system.

A number of participants were in favour of a classification system based on either levels of revenue or number of members, or a system that distinguished between public benefit, mutual benefit, religious, and, in some cases, political organizations.

The NPCA distinguishes between soliciting corporations and non-soliciting corporations, and bases audit requirements and the number of directors needed on this classification.

### C. Filing By-laws

There was general agreement during consultations that moving away from the letters patent system was a positive step. A number of participants expressed support for the simpler structure proposed, and some said that there should be no requirement to file by-laws at all.

The Consultation Report outlined the following concerns with the application of the by-law system:

- there was no benefit in filing if by-laws automatically become effective when passed.
- there could be problems if by-laws did not become effective at the moment when members passed them, particularly for organizations that do not meet frequently.
- one person predicted that with a filing requirement but no scrutiny, Industry Canada would end up with "the worst of both worlds": organizations that are not in compliance with the law and filed by-laws that are inaccurate.

D. Repository Function of Industry Canada

The Consultation Report stated that since some organizations have rapid turnover and limited corporate memory, participants generally supported the notion of Industry Canada acting as a central repository for corporate documents. There were several requests for Industry Canada to put by-laws on-line if it accepts the repository role.

Under the NPCA, Industry Canada will act as a repository for a number of different NPC documents. It is unclear whether the documents will be placed on-line.

E. Access to Financial Statements

A majority of participants were in favour of proposals that required NPCs to make corporate financial statements available to members, directors, officers, and Industry Canada. Not all participants agreed that members should be charged a fee for a copy of the financial statements, since this might be burdensome and costly. Some participants objected to Industry Canada's having access to financial statements. One participant suggested that the law be written in as narrow a context as possible, granting Industry Canada only the right to information for a specific purpose.

Some participants did not want a requirement that financial statements be presented to members "for their approval," as Part 11 of the NPCA currently requires.

Others disagreed with clause 173 of the NPCA, which allows Industry Canada to issue exemptions from financial disclosure requirements. This stemmed from a concern that allowing exemptions would place Industry Canada between the auditor of an organization and the organization itself. This seemed to contravene the principles of transparency and accountability underlying the initiative to create a new Act.

F. Membership Lists

A majority of participants agreed with the proposal to allow members to obtain copies of membership lists of their NPC, provided that access was restricted. Several participants asked that the issue of selling lists be addressed and noted that the new Act should be consistent with other federal statutes such as the *Personal Information Protection and Electronic Documents Act*(40) and the *Anti-Terrorism Act*.(41) In order to circumvent the release of membership lists that include names, addresses, and telephone numbers, it was suggested that an organization charge for mailings on behalf of members.

The Consultation Report stated that the definition of "member" was contentious, since some organizations define members as anyone who receives services while others include donors. At the time of the consultations, it had been proposed that "member" under the NPCA would be defined as "anyone designated by the board of directors." This definition alarmed some of the consultation participants.

The NPCA currently contains no definition of the word "member." Instead, Clause 154 of the NPCA states that the conditions for membership in an NPC shall be set out in the by-laws.

G. Audit Requirements

Most participants favoured a graduated approach to NPC audit requirements, or one based on classification, materiality, or size.

Many participants supported the Saskatchewan model, in which NPCs with annual revenues of over $100,000 must be audited, those with annual revenues between $25,000 and $100,000 must have at least an internal review, and those with annual revenues of less than $25,000 have no audit requirements. There was support for a graduated standard such as a review engagement.

Other suggestions included differentiating between organizations that receive public funding and those that do not, or basing it on classification. For example, if an organization is classified as political, it should be required to have an audit regardless of its size; a charitable organization with tax benefits should be subject to a threshold; and mutual benefit organizations could determine their own thresholds.

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(40) S.C. 2000, c. 5.

(41) S.C. 2001, c. 41.

Some of the above suggestions were incorporated into the NPCA, with the introduction of different audit requirements for corporations depending upon their annual revenue and on their status as soliciting or non-soliciting corporations.

## H. Auditors

Representatives of accountants' groups held differing views on how an "auditor" should be defined and the qualifications auditors should have. Some representatives suggested that individuals other than CGAs or CAs should be allowed to conduct audits if the new Act made audits mandatory for all NPCs. Some participants thought smaller organizations should be allowed to have a non-accountant conduct the financial review, provided that individual had no ties to the board.

## I. Standard of Care and Due Diligence Defence

The majority of participants favoured the imposition of a duty and standard of care on directors and officers of an NPC. The standard of care proposed (which eventually made its way into the NPCA) was seen by participants as an objective test that would create a uniform standard of care for directors and officers, and is clearly understood by Canadian courts. There was unanimous approval for the express inclusion of a due diligence defence for directors and officers in the NPCA.

## J. Indemnification and Insurance

The Consultation Report stated that a majority of participants favoured a broadening of the scope of situations in which organizations could indemnify directors and officers. Many participants wanted mandatory indemnification of directors and officers in specific circumstances, and others wanted a clause allowing corporations to purchase insurance.

Participants across the country were concerned that the cost of insurance would be prohibitive for small organizations or impossible to obtain.

Under the NPCA, indemnification is at the discretion of the corporation, and corporations can refuse to indemnify if the director or officer breached his or her standard of care. Liability insurance is optional.

## K. Derivative Action

The Consultation Report said that Industry Canada's proposal to include a derivative action remedy in the bill received mixed reviews across the country. Those opposed said the inclusion of a derivative action remedy could be used to burden organizations with frivolous lawsuits, or allow a third party to hijack the agenda of an organization. Those who favoured the inclusion of this remedy thought it necessary in order to ensure accountability and credibility. Others suggested keeping derivative action as a remedy, but limiting access to the remedy, so that small special interest groups could not abuse it.

Under clause 249 of the NPCA, a derivative action must have court approval, is subject to notice requirements, and must be sought in good faith and appear to be in the best interests of the corporation.

## L. Oppression Remedy

Participants in the consultation process also had a mixed reaction to Industry Canada's proposal to include an oppression remedy in the new bill. One participant argued that inclusion of this remedy in the NPCA would allow any disgruntled member to halt the workings of an organization. Some participants pointed out that common law remedies remain for truly problematic situations.

Those who argued in favour of putting this remedy in the NPCA included a participant who believed that there are many disputes within not-for-profit organizations, and therefore a real need for remedies. A participant in Quebec found this option redundant because such protection was already available under civil law.

Clause 251 of the NPCA allows courts to find oppression and gives courts broad discretion to craft a remedy.

## M. Corporations Sole

The Consultation Report states that the framework proposal to allow standard not-for-profit corporations to be set up with only one director and one member was not enthusiastically embraced by consultation participants. Many participants indicated they would prefer the new Act to require a minimum of three directors.

Under clause 126 of the NPCA, a corporation can be set up with only one director, unless it is a soliciting corporation, in which case it needs three.

## N. Transition Period and Continuance

Participants questioned the proposed transition period and process, and some suggested an opting-out provision for NPCs, stating that without one, there would be such active opposition to the new law that the Act would be scuttled.

There was general support for the proposal to allow for automatic continuance under the new Act after a three-year period. Participants believed that the mandatory dissolution of non-compliant organizations would result in complications, as had occurred in Ontario under the transition to Ontario's *Business Corporations Act*.(42)

The NPCA has a transition model that allows a corporation to join the Act over a three-year period. The NPCA also, however, empowers Industry Canada to dissolve the corporation if the corporation does not file a certificate of continuance under the new Act within three years.

## O. Disclosure of Conflict of Interest

Participants expressed concern about disclosure requirements. A number of participants wanted the new Act to require NPCs to disclose the remuneration of their officers and directors. There was also disagreement about the merits of remunerating directors and officers, but general support for leaving remuneration decisions up to the membership.

The NPCA does not include a clause requiring NPCs to disclose the remuneration of their directors and officers, although corporations are free to make such disclosure mandatory in their by-laws.

## P. Membership Proposals

The Consultation Report stated that some participants were concerned about the section in the *Draft Framework for a New Not-for-Profit Corporations Act* respecting membership proposals. Some complained that the plan to permit members to delay a meeting by court order if the corporation refused to include the membership proposal in a notice of meeting, could cause long, problematic delays for the corporation.

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(42) R.S.O. 1990, c. B.16.

Clause 163(9) of the NPCA allows for members to apply to the court for an order to restrain the corporation from holding the meeting at which the membership proposal is sought to be presented.

Q. Location and Notice of Meetings

Participants in the consultation process said that it was impractical to designate a specific place in Canada for meetings. It was noted that many organizations might want to move meetings around the country. A participant recommended that members be given the power to call a special meeting directly, in the event that directors refuse to call one after having been directed to do so by the members, as a protection for dealing with "rogue boards."

Many of these concerns were addressed in the NPCA. Clause 159(1) of the NPCA states that meetings are to take place in the place designated in the by-laws or, in the absence of such a designation in the by-laws, at a place determined by the directors. Meetings requisitioned by members can be called by the members, if the directors refuse to call them. Under clause 168, members may apply for a court order to call a meeting.

R. Proxy Voting

According to the Consultation Report, one participant in the consultations found proxy voting worrisome, as people who actually attend the annual general meetings learn more details of the issue in question. At that point, the proxy votes are already made and cannot be altered. The NPCA allows proxy voting under clause 171.

S. Stakeholder Interests

Several participants supported the notion of the relevant legislation's including clauses regarding stakeholders' interests. The difficulty in defining stakeholders, it was said, could be overcome in organizational mission statements.

Other participants, however, cautioned that the inclusion of stakeholder interests could create ambiguity regarding directors' liability. Since NPCs provide a broad spectrum of services, most organizations do not have stakeholders in the conventional sense, and directors would be paralyzed by potential liabilities.

The NPCA does not contain clauses respecting stakeholders' rights or stakeholders' interests. Clause 154 of the NPCA does make it mandatory for the by-laws to include conditions for membership; and if the corporation has different classes and groups of membership, conditions of membership must be stated for each class or group. This provision would appear to allow corporations to accommodate stakeholder interests by giving members' rights to different classes or groups of stakeholders if they so choose.

## T. Unanimous Member Agreements

The Consultation Report stated that many participants questioned the use of UMAs. One participant expressed the view that the new Act should not allow trust powers to be delegated by way of a UMA. Participants were concerned about the "slippery slope" of UMAs. One participant noted that powers of directors cannot be taken away without vesting them elsewhere. A suggestion was made that if members do assume the liabilities of directors, they should also have the same right to indemnification.

Participant suggestions respecting the transfer of liabilities to parties who are given some of the powers normally belonging to directors under a UMA have found their way into clause 170 of the NPCA.

## U. Opt-out for Religious Organizations

Participants stressed the importance of providing an opt-out for religious organizations. It is unclear from the Consultation Report the extent to which religious organizations wished to opt out of the Act's ambit. The NPCA does contain faith-based defences for both the derivative action and the oppression remedy.