

THE NEW CANADA NOT-FOR-PROFIT CORPORATIONS ACT FINALLY COMES INTO FORCE!

BY JEAN TRUDEL

April 2012 — Since the early 1970s, no less than seven bills were introduced in Parliament and died on the Order Paper. The new *Canada Not-for-profit Corporations Act* (S.C. 2009, c. 23) (the “**New Act**”) was assented to June 23, 2009 and came into force on October 17, 2011. In addition, the *Canada Not-for-profit Corporations Regulations* (SOR/2011-223) (the “**Regulations**”) were adopted on October 6, 2011 and also came into force on October 17, 2011.

The New Act and the Regulations introduce a new legislative framework for the federal incorporation of not-for-profit corporations and provides for the continuance of share corporations created by Special Acts of Parliament that are currently subject to Part IV of the *Canada Corporations Act*; these share corporations will be continued under the *Canada Business Corporations Act* (the “**CBCA**”).

Part II of the *Canada Corporations Act* dates from 1917. Corporations Canada has worked on modernizing the Canadian legislation on not-for-profit corporations for at least 20 years. Considering the technical nature of the New Act, it is important to analyze it.

We will refer to not-for-profit corporations incorporated or continued under the New Act as “corporations”.

The New Act is primarily based on the CBCA. The New Act therefore presents a modern and leading-edge framework for not-for-profit corporations.

INCORPORATION

The incorporation of corporations will now be made by filing articles of incorporation. The prior approval of letters patent and by-laws is henceforth abolished. The articles of incorporation must set out:

- (a) the name of the corporation
- (b) the province where the registered office is to be situated
- (c) the classes, or regional or other groups of members and any voting rights attaching to each of those classes or groups
- (d) the number of directors or the minimum and maximum number of directors
- (e) any restrictions on the activities that the corporation may carry on
- (f) a statement of the purpose of the corporation
- (g) a statement concerning the distribution of property remaining on liquidation after the discharge of any liabilities of the corporation.

The articles of incorporation may also set out any provision that may be set out in the by-laws of the corporation. The articles must be signed by one or more of the incorporators, who may be individuals or bodies corporate. The articles are thereafter sent to the Director appointed by the Minister who issues a certificate of incorporation. A notice of initial registered office address and first board of directors of the corporation must be sent to the Director at the same time as the articles of incorporation. The corporation comes into existence on the date shown in the certificate of incorporation.

The corporation has the capacity of a natural person. It therefore has the power to purchase and sell its property,

to make investments, to contract loans and issue debt obligations such as bonds, debentures or notes.

DIRECTORS

Such as is the case for directors of CBCA corporations, the directors of a corporation manage or supervise the management of the activities and affairs of the corporation.

The board of directors of a corporation is comprised of one or more directors, unless it is a “soliciting corporation”, in which case the board of directors is comprised of not less than three directors, at least two of whom are not officers or employees of the corporation or its affiliates. Contrary to the CBCA, there is no requirement for a certain number of directors to be resident Canadians. A director of a corporation is not required to be a member; no person may act for an absent director at a meeting of directors.

After the issue of the certificate of incorporation, the board of directors of a corporation must hold a meeting in order to, namely:

- (a) make by-laws
- (b) adopt forms of debt obligation certificates and corporate records
- (c) authorize the issuance of debt obligations
- (d) appoint officers
- (e) appoint an interim public accountant to hold office until the first meeting of members
- (f) issue memberships
- (g) make banking arrangements, including the opening of a bank account.

Note that under the New Act, the by-laws need not be pre-approved by the Director. Nevertheless, once the by-laws are confirmed by the members, they must be sent to the Director within 12 months following the date of confirmation by the members.

The directors are elected by the members having the right to vote. The directors of a corporation continue to hold office until their successors are elected, except if a director dies, resigns or is removed by ordinary resolution at a special meeting. Similarly to the CBCA, resolutions of members may be ordinary or special. They are ordinary if passed by a majority of the votes cast on that resolution and they are special if passed by a majority of not less than two thirds of the votes cast on that resolution.

In exercising their powers and discharging their duties, every director and officer of a corporation must act honestly and in good faith, with a view to the best interests of the corporation, and must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This obligation is similar to the one applicable to directors of a corporation governed by the CBCA. The New Act allows the directors to raise a defence based on reasonable diligence and good faith.

Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts, not exceeding six months wages payable to each employee for services performed for the corporation while they are directors.

Such as is the case under the CBCA, the directors and officers may be indemnified by the corporation which may, in turn, purchase and maintain liability insurance for their benefit. Similarly to directors of corporations governed by the CBCA, the directors and officers of a corporation must disclose their interest in a material contract or material transaction, whether made or proposed, with the corporation.

Finally, the directors may participate in a meeting by means of a telephonic, electronic or other communication facility if all of the directors consent thereto and the communication facility permits all participants to communicate adequately with each other during the meeting. They may also sign resolutions in writing which are as valid as if they had been passed at a meeting.

MEMBERS

The articles set out the classes, or regional or other groups, of members that the corporation is authorized to establish and, if there are two or more classes or groups of members, any voting rights attaching to each of those classes or groups.

The by-laws set out the conditions for membership in each class or group, the manner of withdrawing from a class or group or transferring membership to another class or group and any conditions of transfer and the conditions on which membership in a class or group ends. Unless the articles or by-laws provide otherwise, a membership may only be transferred to the corporation. A membership is terminated when the member dies or

resigns, is expelled, when his membership is otherwise terminated, when the member's term of membership expires or when the corporation is liquidated and dissolved. The articles or by-laws may provide that the directors have the power to discipline a member or to terminate his or her membership.

Meetings of members are held within Canada. They may also be held at a place outside Canada if the articles so provide or if all of the members entitled to vote at the meeting so agree. The members may participate in a meeting by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting. Resolutions in writing signed by all of the members entitled to vote thereon are as valid as if they had been passed at a meeting of members. A member entitled to vote may ask the corporation to include a proposal at an annual meeting provided that certain conditions are met. The proposal may deal with nominations for the election of directors provided that it is signed by 5% of members entitled to vote at the meeting.

Unless otherwise provided for in the by-laws of the corporation, the quorum for a meeting of members is reached if the members holding a majority of votes are present. Unless otherwise provided for in the by-laws, voting at a meeting of members is by show of hands. A ballot may always be demanded by a member either before or after any vote by show of hands. Any vote may also be held by means of a telephonic, electronic or other communication facility, if the corporation makes available such a communication facility.

UNANIMOUS MEMBER AGREEMENT

The New Act innovates in that it authorizes entering into a unanimous member agreement with respect to a corporation that is not a soliciting corporation that restricts, in whole or in part, the powers of the directors to manage, or supervise the management of, the activities and affairs of the corporation. This type of agreement is similar to a unanimous shareholders' agreement under the CBCA. If there is only one member, a written declaration to the same effect is also valid.

CLASSES OF CORPORATIONS

The New Act makes a distinction between "soliciting corporations" and "non-soliciting corporations". Soliciting

corporations are those that have, during a prescribed period calculated according to the Regulations and corresponding approximately to the three previous years, received income in excess of \$10,000 in the form of donations or gifts or, in Quebec, gifts or legacies or of grants received from a governmental or paragonmental agency. The donations or gifts or, in Quebec, gifts or legacies must be received from any person who is not a member, director, officer or employee of the corporation or a spouse, child, parent, grandparent, brother, sister, aunt, uncle, nephew or niece of such a member, director, officer or employee of the corporation. The donations or gifts or, in Quebec, gifts or legacies may also be received from another corporation or entity that has, in the prescribed period, received income in excess of \$10,000 in the form of donations or gifts or, in Quebec, gifts or legacies from the same source as that of a soliciting corporation.

FINANCIAL DISCLOSURE

The directors of a corporation must place before the members, at every annual meeting, comparative financial statements comprised of a statement of financial position or a balance sheet, a statement of comprehensive income on a statement of retained earnings, a statement of changes in equity or an income statement and a statement of cash flows or a statement of changes in financial position, prepared in accordance with the generally accepted accounting principles set out in the *Canadian Institute of Chartered Accountants Handbook – Accounting* or the *Canadian Institute of Chartered Accountants Public Sector Accounting Handbook*, the report of the public accountant and any further information respecting the financial position of the corporation and the results of its operations required by its articles, by-laws or any unanimous member agreement. If the corporation is a soliciting corporation, it must send a copy of these documents to the Director not less than 21 days before the annual meeting.

PUBLIC ACCOUNTANT

The members must, by ordinary resolution, at each annual meeting, appoint a public accountant to hold office until the close of the next annual meeting. The members may, if all of the members entitled to vote agree, resolve not to appoint a public accountant.

The public accountant's mandate will be a review engagement or an audit engagement depending on

whether or not the corporation is a “designated corporation”. The New Act defines a designated corporation as being (a) a soliciting corporation that has gross annual revenues for its last financial year that are equal to or less than \$50,000 and (b) a non-soliciting corporation that has gross annual revenues for its last financial year that are equal to or less than \$1,000,000. The public accountant must conduct a review engagement of a designated corporation unless the members pass an ordinary resolution requiring an audit engagement.

The public accountant of a corporation that is not a designated corporation must conduct an audit engagement. However, the public accountant of a soliciting corporation that is not a designated corporation may conduct a review engagement if its gross annual revenues for its last financial year are equal to or less than \$250,000.

FUNDAMENTAL CHANGES

Articles of Amendment

The articles of a corporation may be amended by special resolution of the members. The members of a class or group may be entitled to vote separately by class or group if their rights are affected by the amendment. The articles of amendment are thereafter sent to the Director who issues a certificate of amendment. An amendment to the articles becomes effective on the date shown in the certificate of amendment.

Restated Articles

The articles of a corporation may be restated at the request of the directors of the corporation or the Director. Restated articles of incorporation are sent to the Director who issues a restated certificate of incorporation. Restated articles of incorporation are effective on the date shown in the restated certificate of incorporation and supersede the original articles of incorporation and all amendments thereto.

Articles of Amalgamation

Two or more corporations may also amalgamate and continue as one corporation. They must enter into an amalgamation agreement which must be approved by special resolutions of each amalgamating corporation; the resolutions must be adopted by all of the members, whether or not they have the right to vote. Moreover, if

the rights of certain members are affected by the amalgamation, those members have the right to vote by class or group and their approval must be given by special resolution. Furthermore, the New Act authorizes, without the entering into of an amalgamation agreement, vertical short-form amalgamations between a holding corporation and one or more of its subsidiary corporations which are not-for-profit corporations; the memberships in each amalgamating subsidiary corporation are cancelled and the articles of amalgamation must be the same as those of the amalgamating holding corporation. The New Act also authorizes, without the entering into of an amalgamation agreement, horizontal short-form amalgamations between two or more wholly-owned subsidiary corporations of the same holding body corporate; the memberships in all but one of the amalgamating subsidiary corporations are cancelled and the articles of amalgamation are the same as the articles of the amalgamating subsidiary corporation whose memberships are not cancelled. In the case of both vertical short-form amalgamations and horizontal short-form amalgamations, the amalgamation must be authorized by the directors of the holding corporation and the subsidiary corporations or by the directors of the holding body corporate and the wholly owned subsidiary corporations, as the case may be. In the case of an amalgamation, articles of amalgamation are sent to the Director who issues a certificate of amalgamation. The amalgamation becomes effective on the date shown in the certificate of amalgamation. The articles of amalgamation and the certificate of amalgamation are deemed to be the articles of incorporation and the certificate of incorporation of the amalgamated corporation.

Continuance – Import

A body corporate incorporated or continued otherwise than by or under an Act of Parliament may apply to the Director for a certificate of continuance if so authorized by the laws of its jurisdiction.

Continuance – Other Jurisdictions

A corporation which is authorized by its members and which establishes to the satisfaction of the Director that neither its creditors nor its members will be adversely affected may apply to the appropriate official or public body of another jurisdiction requesting that the corporation be continued as if it had been incorporated under the laws of that other jurisdiction.

Sale, Lease or Exchange of Property

Such as is the case under the CBCA, a sale, a lease or an exchange of all or substantially all of the property of a corporation other than in the ordinary course of its activities requires the authorization of the members by special resolution. Each membership in the corporation carries the right to vote whether or not it otherwise carries the right to vote. The members of a class or group of members are entitled to vote separately as a class or group in respect of the sale, lease or exchange only if the class or group is affected by the sale, lease or exchange in a manner different from the members of another class or group. The sale, lease or exchange must be authorized by the members of each class or group entitled to vote on it by special resolution.

Reorganization

In the context of an application regarding oppression, of the approval of a proposal under the *Bankruptcy and Insolvency Act* or of an application made under any other Act of Parliament that affects the rights among a corporation and its members and creditors, a court may require any amendment of the articles or by-laws of the corporation. Once the court order is made, articles of reorganization are sent to the Director who issues a certificate of amendment. The reorganization becomes effective on the date shown in the certificate of amendment.

Arrangement

When it is not practical for a corporation to effect a fundamental change in the nature of an arrangement under any other provision of the New Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation. Once the court order is made, articles of arrangement are sent to the Director who issues a certificate of arrangement. An arrangement becomes effective on the date shown in the certificate of arrangement.

Liquidation and Dissolution

A corporation that has not issued any memberships may be dissolved by resolution of all of the directors. A corporation that has no property and no liabilities may be dissolved by special resolution of the members voting by class or group, as applicable, whether or not the members are otherwise entitled to vote. A corporation

that has property or liabilities or both may be dissolved by special resolution of the members voting by class or group, as applicable, whether or not the members are otherwise entitled to vote, provided that any money or other property has been distributed and any liabilities have been discharged. Articles of dissolution are thereafter sent to the Director who then issues a certificate of dissolution. The corporation ceases to exist on the date shown in the certificate of dissolution.

The Director may also dissolve a corporation which has not commenced its activities within the three years of its incorporation, which has not carried on its activities for three consecutive years, which has defaulted for one year in sending to the Director any fee, notice or other document required by the New Act or which does not have any directors due to the fact that they have resigned or have been removed.

A director or a member who is entitled to vote at an annual meeting of members may make a proposal for the voluntary liquidation and dissolution of the corporation. A special resolution of the members, voting by class or group, as applicable, whether or not the members are otherwise entitled to vote, must be adopted. Subsequently, a statement of intent to dissolve must be sent to the Director who thereafter issues a certificate of intent to dissolve. As of such time, the corporation ceases its activities, except to the extent necessary for its liquidation. If the certificate of intent to dissolve has not been revoked and if the corporation has followed the dissolution procedure, i.e., it has issued its notices of intent to dissolve, distributed its property and discharged its liabilities, the corporation sends its articles of dissolution to the Director; the Director issues a certificate of dissolution and the corporation ceases to exist on the date shown in the certificate of dissolution.

Any interested person, as defined under the New Act, namely a member, a director, an officer, an employee and a creditor of a dissolved corporation, may apply to the Director for the revival of any corporation dissolved under the New Act.

The court may also order, on the application of a member, the liquidation and dissolution of a corporation if it is satisfied, among other reasons, that the corporation or any of its affiliates is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, any shareholder, creditor, director, officer or member.

Remedies

Among the various remedies offered by the New Act, we note the derivative action, and an oppression remedy comparable to what is offered under the CBCA.

A derivative action grants a complainant leave to bring an action in the name of and on behalf of the corporation or any of its subsidiaries, or to intervene in an action to which such a body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on its behalf.

The oppression remedy is an order made by a court, on the application of a complainant, if it is satisfied that a corporation or any of its affiliates is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, any shareholder, creditor, director, officer or member, or causes such a result. In the context of such an application, the court has all the necessary latitude to render any order that it judges appropriate.

In both cases of the derivative action and the oppression remedy, a complainant means a former or present member or debt obligation holder of a corporation or any of its affiliates, a former or present registered holder or beneficial owner of a share of an affiliate of a corporation, a former or present director or officer of a corporation or any of its affiliates, the Director or any other person who, in the discretion of a court, is a proper person to make such an application.

Continuance of a Corporation Governed by Part II of the *Canada Corporations Act*

A body corporate to which Part II of the *Canada Corporations Act* applies **must apply for a certificate of continuance in the three years following the coming into force of the New Act, i.e. before October 17, 2014.** Otherwise, the Director may dissolve such a body corporate. A body corporate to which Part IV of the *Canada Corporations Act* applies **must apply for its continuance under the *Canada Business Corporations Act* in the six months following the coming into force of the New Act, i.e. before April 17, 2012.** Otherwise, such body corporate is dissolved on the expiry of such six-month period.

CONCLUSION

We would like to underline the dedicated work of the members of Corporations Canada in proposing this modern and leading-edge legislative framework. Although some of the provisions of the New Act could be slightly refined, the arrival of this New Act will easily outweigh the few irritants that may be alleviated by future amendments.

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