Detailed background paper for the CANADA NON-PROFIT CORPORATIONS BILL

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

Detailed background paper for the CANADA NON-PROFIT CORPORATIONS BILL

DETAILED BACKGROUND PAPER

CANADA NON-PROFIT CORPORATIONS BILL

Table of Contents

Canada Non-Profit Corporations Act

TABLE OF CONTENTS — CONCORDANCE WITH *CBCA*

PART VI — SECURITIES CERTIFICATES, REGISTERS AND TRANSFERS

PART VII — TRUST INDENTURES

PART VIII — RECEIVERS AND MANAGERS

77	Functions of receiver	89
78	Functions of receiver-manager	90
79	Directors' powers cease	91
80	Duty to act	92
81	Duty under instrument	93
82	Directions given by court	95
83	Duties of receiver and receiver-manager	96

PART IX — DIRECTORS AND OFFICERS

84	Power to manage	97(1)
85	Number of directors	97(2)
86	By-laws	98
87	Organization meeting	99
88	Qualifications of directors	100
89	Notice of directors	101
90	Cumulative voting	102
91	Ceasing to hold office	103
92	Removal of directors	104
93	Attendance at meeting	105
94	Filling vacancy	106
95	Number of directors	107
96	Notice of change of directors	108
97	Meeting of directors	109
98	Delegation	110
99	Validity of acts of directors and officers	111
100	Resolution in lieu of meeting	112
101	Directors' liability	113
102	Liability of directors for wage	114
103	Disclosure of interested director contract	115
104	Officers	116
105	Duty of care of directors and officers	117
106	Dissent	118
107	Indemnification	119
108	Remuneration	120

PART X — MEMBERS ASSOCIATIONAL INTERESTS

109	Classes of membership	[Part X — Insider Trading]
110	Admission to membership	
111	Transfer of a membership interest	
112	Entry in register	
113	Termination of member's rights	
114	Power to discipline a member	
115	Right to a fair hearing	
116	Application to court	

Proposed CNCA	*Topic*	*CBCA*
	PART XI — MEMBERS	
117	Place of meetings	126
118	Calling meetings	127
119	Fixing record date	128
120	Notice of meeting	129
121	Waiver of notice	130
122	Member proposal	131
123	List of members	132
124	Quorum	133
125	Right to vote	134
126	Voting	135
127	Resolution in lieu of meeting	136
128	Requisition of meeting	137
129	Meeting called by court	138
130	Court review of election	139
131	Pooling agreement	140
	PART XII — PROXIES	
132	Definitions	141
133	Appointing proxyholder	142
134	Form of proxy	143
135	Attendance at meeting	146
136	Mail ballot	
	PART XIII — FINANCIAL DISCLOSURE	
137	Annual financial statements	149
138	Exemption	150
139	Consolidated statements	151
140	Approval of financial statements	152
141	Copies to members	153
142	Copies to Director	154
143	Qualification of auditor	155
144	Appointment of auditor	156
145	Dispensing with auditor	157
146	Ceasing to hold office	158
147	Removal of auditor	159
148	Filling vacancy	160
149	Court appointed auditor	161
150	Right to attend meeting	162
151	Examination	163
152	Right to information	164
153	Audit Committee	165
154	Qualified privilege (defamation)	166
	PART XIV — FUNDAMENTAL CHANGES	
155	Amendment to articles	167
156	Proposal to amend	169
157	Class vote	170
158	Delivery of articles	171

Proposed CNCA	*Topic*	*CBCA*
159	Certificate of amendment	172
160	Effect of certificate	173
161	Restated articles	174
162	Amalgamation	175
163	Amalgamation agreement	176
164	Members approval	177
165	Vertical short-form amalgamation	178
166	Sending of articles	179
167	Effect of certificate	180
168	Continuance (import)	181
169	Continuance (export)	182
170	Borrowing powers	183
171	Right to dissent	184
172	Reorganization	185
173	Arrangements	185.1
	PART XV — PROSPECTUS QUALIFICATION	
174	Distribution document	186
	PART XVI — BOARDS OF TRADE AND CHAMBERS OF COMMERCE	
175	Definitions	[Part XVI — Take-over Bids]
176	Application of Part	
177	Name	
178	Powers of Director	
179	Proxies	
	PART XVII — LIQUIDATION AND DISSOLUTION	
180	"Court" defined	200
181	Application of Part	201
182	Revival	202
183	Dissolution if no members	203
184	Proposing liquidation and dissolution	204
185	Dissolution by director	205
186	Grounds for dissolution	206
187	Further grounds for liquidation and dissolution of membership corporation	207
188	Application for supervision	208
189	Application to court	209
190	Powers of court	210
191	Effect of order	211
192	Cessation of activities and powers	212
193	Appointment of liquidator	213(1)
194	Vacancy	213(2)
195	Duties of liquidator	214
196	Powers of liquidator	215
197	Costs of liquidation	216
198	Distribution of remaining property	217

Proposed CNCA	*Topic*	*CBCA*
199	Custody of records	218
200	Preservation of actions	219
201	Unknown claimants	220
202	Vesting in Crown	221
	PART XVIII — INVESTIGATION	
203	Investigation	222
204	Powers of court	223
205	Powers of inspector	224
206	Hearing in camera	225
207	Criminating statements	226
208	Absolute privilege (defamation)	227
209	Solicitor-client privilege	229
210	Inquiries	230
	PART XIX — REMEDIES, OFFENCES AND PENALTIES	
211	Definitions	231
212	Commencing derivative action	232
213	Powers of court	233
214	Application to court re oppression	234
215	Evidence of member approval not decisive	235
216	Application to court to rectify records	236
217	Application for directions	237
218	Notice of refusal by Director	238
219	Appeal from decision of Director	239
220	Restraining or compliance order	240
221	Summary application to court	241
222	Appeal	242
223	Offences with respect to reports	243
224	Offence	244
225	Order to comply	245
	PART XX — GENERAL	
226	Notice to directors and members	246
227	Notice to and service upon a corporation	247
228	Waiver of notice	248
229	Certificate of Director	249
230	Certificate of corporation	250
231	Copies	251
232	Proof required by Director	252
233	Regulations	254
234	Filing of articles	255
235	Annual return	256
236	Alteration	257
237	Corrections	258
238	Inspection	259
239	Records of Director	260
240	Continuance of a federal corporation	261
241	Incorporation under *Canada Corporations Act*	262
242	Effective date	266

DETAILED BACKGROUND PAPER CANADA
NON-PROFIT CORPORATIONS BILL

INTRODUCTION

There are at present an estimated 15,000 non-profit corporations carrying on their activities in Canada, about 3,000 of which have been incorporated at the federal level either by special act, under Part II of the *Canada Corporations Act ("CCA"),* or under the *Boards of Trade Act.* Like the federal business corporations, although relatively few in number, the federal nonprofit corporations include many if not most of the large charitable and membership organizations and virtually all of the boards of trade and chambers of commerce that carry on their activities on a Canada-wide basis, giving them a pervasive influence throughout Canadian society as Canadian—as distinct from merely local—institutions.

Most of the federal nonprofit corporations have been created under and are regulated by the provisions of Part II of the *CCA* and the *Boards of Trade Act*, which were clearly outdated before 1975, and which have been rendered positively archaic when compared with the *Canada Business Corporations Act ("CBCA")* that came into force on 15 December 1975. Having been forewarned by the authors of the *CBCA Proposals* that they would recommend a discrete statute to apply only to business corporations, in 1970 the Department retained Professor Peter Cumming of the Osgoode Hall Law School and requested that he review the more recently enacted nonprofit corporation laws of several jurisdictions, analyse the policies of those laws with a view to determining their utility in Canada, and prepare a report accordingly for the Department. Professor Cumming submitted his report to the Department in 1973. The Department published his report in 1974 under the title *Proposals for a New Not-for-Profit Corporations Law for Canada ("CNCA Proposals").* These *Proposals* were widely distributed at that time to nonprofit organizations, professional groups, and individual lawyers and accountants who work actively in the field. The Department received several major briefs and a large number of comments on the *Proposals*, which have been substantially amended in response to the criticisms received.

In the *CNCA Proposals* Professor Cumming emphasized three objectives. First, the nonprofit corporation law should parallel the business corporation law except in respect of issues that are unique to nonprofit corporations. Second, the distinctive character of a nonprofit corporation should be based not on a structural aspect—the fact that it cannot issues shares—but on function, distinguishing where necessary between *charitable* corporations that carry on their activities primarily for the benefit of the public and *membership* corporations that carry on their activities primarily for the benefit of their members. The litmus test to distinguish between a business corporation and a nonprofit corporation relates to the income they earn and the profits they generate. A business corporation's function is to carry on business with a view to making a profit and distributing any profit in excess of the corporation's needs to its shareholders. In contrast, a nonprofit corporation's function, although the corporation may carry on an ancillary business that generates profits, is to further its charitable or membership purposes and, accordingly, to expend its revenues only for those purposes. Except in narrowly specified cases, a nonprofit corporation *cannot* pass through any contributions it receives or profits it generates to its members. The third and final strategic objective is to make the proposed law applicable to all federal nonprofit corporations, in order to ensure greater uniformity and to minimize the amount of statutory text required to deal with similar but different institutions under discrete statutes. These three fundamental policy recommendations were accepted by the Government and are reflected throughout the Bill.

As a result, the Bill, although it applies specifically to nonprofit corporations, seeks to achieve the same general goals as does the *CBCA*; that is, to set out a legal system that is clear, comprehensive, and practical; to minimize the scope of the administrative discretion exercised by Department officials; to relegate to the regulations the detailed rules, particularly the financial disclosure rules; and to simplify all statutory formalities with a view to increasing operational efficiency in the respective offices of the corporations, their professional advisors, and the Director who is responsible for the administration of the proposed act.

Because the concepts, structure and detailed provisions of the Bill parallel closely the *CBCA*, the following policy summary relates equally, in many cases, to both

laws. It attempts, however, to highlight the policies and technical provisions that are intrinsic to nonprofit corporations and therefore require unique legal treatment.

PART I — INTERPRETATION AND APPLICATION

Present Law

The structure of the *Canada Corporations Act ("CCA")*, which applies at present to nearly all the federal nonprofit corporations other than boards of trade and chambers of commerce, gives rise to two problems. First, and by far the most serious, the provisions of Part II, the Part that applies only to nonprofit corporations (that is, corporations without share capital), are encapsulated in five sections. These sections incorporate by reference other provisions of the *Act* that apply also to business corporations. The difficulty with this approach is either that there is no cross reference to a provision that would otherwise apply to a specific problem or, if there is a cross reference, that the provision referred to does not fit the case because it was tailored to apply principally to business corporations. This was the main reason for recommending a discrete statute that applies only to nonprofit corporations. Second, the definition sections of the *CCA* have been added in different places, at different times and for different purposes and, as a result, they tend to be both difficult to recall and inconsistent. The *Boards of Trade Act*, enacted in 1874, is simply an anachronism.

Proposed Law

The proposed law is designed to apply to all federally incorporated nonprofit corporations, whether incorporated by special act or under Part II of the *CCA* or the *Boards of Trade Act*. But the proposed act does not apply automatically to existing federal corporations. Each such corporation must apply to be continued under the proposed act, unless it is excepted from continuance by order-in-council.

Paralleling closely the *Canada Business Corporations Act ("CBCA")*, to give greater certainty to the meaning of substantive provisions and to permit compression of statutory text the Bill contains a large number of defined terms, some of which are set out in Part I and apply generally, and some of which are set out in specific Parts and therefore apply only to those Parts. Great care has been used, employing a computer generated KWIC index furnished by the Department of Justice, to ensure as far as is possible that the defined terms are concise, unambiguous, and internally consistent. The defined terms are especially important in the proposed law, for the substantive sections are all predicated on the meaning of and the distinctions drawn by the definitions of *activities, charitable corporation, member, membership corporation*, and *membership interest*.

PART II — INCORPORATION

Present Law

The letters patent system of the present *Acts (CCA* and the *Boards of Trade Act)* is based, at least in theory, on the concept of incorporation as an exercise of government prerogative. Moreover, the name granting function, probably the most problematical aspect of incorporation, is administered on a purely discretionary basis.

Proposed Law

This Part introduces three of the recurrent themes of the *CBCA* and the *CNCA Proposals* that are reflected throughout the Bill: (1) that incorporation should be as far as possible a matter of right rather than a privilege; (2) that administration of the law should be in accordance with express rules or standards and not based on discretion; and (3) that empty formalities (e.g., three or more incorporators who are usually mere nominees) should be eliminated.

Part II of the Bill therefore modifies radically the present incorporating system. Incorporation is as of right, subject to the condition that the express or implied purpose of the corporation is not prohibited by any act of Parliament, particularly the *Canadian Bill of Rights*, and subject to constraints on the use of the names "board of trade" or "chamber of commerce".

All other corporate names are granted pursuant to broad statutory standards that are to be further clarified by regulations paralleling the *CBCA Regulations*, which have been designed better to reconcile corporate name policy with trademark and trade name policies. The statutory formalities are simple, straightforward, clear, and consistent here and throughout the Bill. The administration system of the Bill parallels the *CBCA* system, which in practice has proved to be enormously successful.

Part II of the Bill also introduces provisions relating to pre-incorporation contracts, technical provisions that are designed to clear up what are now murky and demonstrably unsatisfactory common law rules. They will apply only rarely to a nonprofit corporation but have been included clearly to legitimate the use of pre-incorporation contracts in this context, particularly with respect to membership corporations, and to maintain uniformity with the *CBCA*.

PART III — CAPACITY AND POWERS

Present Law

There are at present two basic corporation law systems in Canada. The first is a letters patent system such as the present *Canada Corporations Act* under which incorporation is viewed as a privilege accorded pursuant to government prerogative. The second is a registration system such as the U.K. *Companies Act 1948* under which incorporation is characterized as a right. Although it is generally assumed that a letters patent corporation has all the capacity of a natural person and therefore that the ultra vires concept does not apply to such a corporation, because the law is unclear, the legislative draftsmen, out of an abundance of caution, structured the present *Canada Corporations Act* like a registration statute, requiring stated objects and setting out a long list of statutory powers that enable a corporation to achieve its objects. In addition to the uncertainty about corporate capacity and powers, there is considerable uncertainty under the present *Act* about the rights of a third party who in good faith enters into a contract with a corporation represented by a director or officer who has no actual authority to execute contracts on behalf of the corporation.

Proposed Law

Because objects and powers clauses have become meaningless to protect members or creditors they tend to be only a trap for the unwary, invoked in most cases only to permit a corporation to escape an onerous contract. The Bill therefore attempts to resolve the root problem instead of attacking symptoms such as excessively broad objects and powers clauses and third party prejudice. To preclude any inference, therefore, that the ultra vires doctrine might apply because the Bill is cast as a registration statute, the Bill states unequivocally that a corporation has the capacity and also the rights, powers and privileges of a natural person. As a result, a corporation may pursue any lawful object unless its activities are restricted by its articles of incorporation.

In order further to protect innocent third parties the Bill makes clear that even where a corporation has restrictions on its activities set out in its articles, an act contrary to its articles is not invalid. Thus such a restriction is effective only to govern the conduct of the members, directors and officers of the corporation.

In addition, the Bill abrogates the doctrine of constructive notice. In other words, a third party is not deemed to have notice of a corporate document filed in a public registry. And to complete this pattern the Bill sets out and expands on the Rule in *Turquand's Case*, underlining that a corporation cannot invoke as a defence to a legal action the argument that its constitution was contravened or that its representative was not properly authorized, except where the third party knew or ought to have known of the contravention or lack of authority.

PART IV — REGISTERED OFFICE AND RECORDS

Present Law

The present *Canada Corporations Act* requires a corporation to maintain an office in Canada and to maintain there a full set of records including the corporate charter and by-laws, minutes of shareholder meetings, financial statements, and similar documents. The *Act* also places considerable emphasis on the use of the corporate seal.

Proposed Law

Continuing and buttressing the policies of the *CCA*, the Bill, like the *CBCA*, requires a corporation to maintain a registered office in Canada and also to notify the Director within 15 days of any change of that registered office. The corporation must maintain for inspection by interested persons at its registered office or any other office in Canada designated by the directors the corporate articles, certificates, by-laws and a number of other specified documents. In case the corporation keeps records outside of Canada, it must also keep duplicate records in Canada that contain adequate information to enable the directors to ascertain the financial position of the corporation on a quarterly basis. The Bill also continues, with a number of improvements, the provisions of the present *Act* relating to shareholder lists.

Consonant with the desire to eliminate unnecessary formality, the corporate seal is acknowledged but in effect relegated to the status of a decorative ornament that may be used when required to satisfy land registrars and other officials who administer acts requiring corporate documents to be under seal.

Finally, Part IV contains a provision to legitimate the maintenance of records in paper, microfilm, or machine readable form, subject to the condition that the records may be reproduced in intelligible written form within a reasonable time.

PART V — CORPORATE FINANCE

Present Law

The *Canada Corporations Act* authorizes a nonprofit corporation to borrow money by issuing debt obliga-

tions, but by definition such a corporation, which must be "without share capital", cannot issue any shares. The borrowing powers of a corporation incorporated under the *Boards of Trade Act* are only implicit.

Proposed Law

Part V expressly authorizes a corporation to issue securities. The definition of "security" refers only to one kind of financing instrument, a "debt obligation", which in turn means a bond, debenture, note or other evidence of indebtedness. Thus by indirection the Bill continues to bar a nonprofit corporation from issuing a share, which would imply some right of a shareholder to a return of any excess revenues of the corporation. Paralleling the *CBCA*, under ss. 23 and 170 of the Bill the directors, exercising their broad management power under s. 84, may borrow on behalf of a corporation unless their powers to borrow are expressly restricted by the corporation's articles or by-laws. And consistent with the *CBCA*, Part V sets out specific provisions relating to revolving loans and prohibited loans.

The remaining provisions of Part V, however, apply uniquely to nonprofit corporations, declaring that a corporation is an owner of property transferred to it unconditionally and not as an implied trustee for the donor or any other person, and placing statutory restrictions on a corporation's investment powers that apply unless the corporation's articles otherwise provide. By limiting investment powers to "legal for insurer" investments, the Bill attempts to establish an investment power norm that is conservative but reasonably flexible.

The most significant provision of Part V is s. 28, the cornerstone provision that establishes the character of a nonprofit corporation as a corporation that cannot pass through to its members any of its revenues, even revenues it may earn by carrying on some ancillary business enterprise, except in narrowly specified cases such as indemnification of directors or officers, remuneration of directors and officers and, most important, the return of remaining property to existing members under s. 198 on liquidation and dissolution of a *membership* corporation.

Subsection 28(2) sets out what appears to be a major exception to the general principle that a corporation cannot pass through any of its revenues to its members. The exception is, in fact, very narrow, for it requires that the member must only use any money or property it receives from a corporation "to carry out activities on behalf of the corporation". The specific purpose of the provision is to legitimate decentralization of control over the moneys of a nonprofit corporation that has a federated structure, for example, a sports federation that receives grants from the federal government but carries on its activities through a number of member corporations or associations.

PART VI — SECURITY CERTIFICATES, REGISTERS AND TRANSFERS

Present Law

The provisions relating to securities, security transfers and securities registers are spread throughout the present *Canada Corporations Act*. Although lengthy, the present provisions are both inadequate and archaic. Even more important, they do not deal with the respective, rights, liabilities and immunities of the parties to a securities transfer or transmission, problems that can not be resolved by reference to the common law, which has not yet concluded what a security is, let alone the rights and liabilities incident to a transfer. Compounding the complexity of the problem is the choice of law problem. In the absence of statutory rules, a problem relating to the securities of a federal corporation may be resolved in accordance with the laws of any jurisdiction in Canada, depending upon the law the court decides is applicable to the transaction in question.

Proposed Law

As pointed out in the comment on Part V, a "security" is defined in the Bill to include only several kinds of "debt obligations', and thus, by indirection, to exclude the concept of a share. As a result Part VI relates only to debt obligations issued by a federal nonprofit corporation.

Part VI is largely new federal law and represents an ambitious attempt to achieve two goals: first, to consolidate in one Part all of the rules relating to securities registers, dealings with security holders, and securities transfers; second, to introduce the concept of Article 8 of the *Uniform Commercial Code* developed by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, which in effect makes properly endorsed security certificates negotiable instruments between registration dates. Introduction of Article 8 was recommended by the 1967 Ontario Select Committee on Company Law, and these U.C.C. provisions were accordingly incorporated in the Ontario *Business Corporations Act*, 1970. Part VI parallels almost word for word the corresponding Part of the *CBCA*, making the federal law applicable to securities transfers largely uniform with Ontario, Manitoba, Saskatchewan and the U.S. states.

More specifically, what these security transfer provisions achieve is a synthesis of two concepts, negotiability and registration. The first, negotiability between registration dates, makes it clear that a security certificate is not just evidence of legal rights and privileges but is, like a promissory note, the very embodiment of those rights

and privileges, which are therefore transferred when the security certificate is transferred. The second, registration, makes clear to a bona fide purchaser that the registered owner is the owner of the security, giving assurance to him when registered, that his ownership of the security cannot be impugned.

The general effect of the system, for two reasons, is to favor the bona fide purchaser instead of the original owner as does the common law. First, there is no doubt that the original owner is in a far better position to protect himself—for example—from parting with the certificate because of mistake or misrepresentation—than is the purchaser for value with no notice of a defect of title. But even more important the system is designed to permit fast, reliable securities transactions with a minimum of title investigtion, conditions essential to maintaining liquid securities markets.

PART VII — TRUST INDENTURES

Present Law

There are no provisions in the *Canada Corporations Act* relating to trust indentures. There has, however, been a United States federal law regulating trust indentures since 1939. The 1967 Ontario Select Committee on Company Law recommended that rules similar to those of the United States statute be enacted in Ontario and, accordingly, variations of U.S. federal provisions were set out in Ontario *Business Corporations Act*, 1970.

Proposed Law

Adopting provisions similar to those included in the Ontario *Business Corporations Act*, 1970 (as amended in 1972) and the *CBCA*, which are based in principle on the U.S. *Trust Indenture Act of 1939*, the proposed law sets out specific rules that relate to trust indentures under which corporations issue securities and to the qualifications of trustees appointed under those indentures.

Although influenced by the U.S. *Trust Indenture Act*, this Part, like the Ontario law and the *CBCA*, is quite different in its approach. Whereas the United States law requires that both trustees and trust indentures be qualified by the Securities and Exchange Commission, these provisions only require compliance with the expressed statutory standards. These standards relate to trustee qualifications, conflict of interest, rights of debenture holders to obtain information, the rights of a trustee to demand information from the corporation, and the duties of a trustee. Being statutory standards, they apply irrespective of any contradictory or exculpatory clauses in a trust indenture.

It is probable that nonprofit corporations will distribute securities to the public only infrequently. Nevertheless, when any nonprofit corporation seeks to do so, because it will usually issue debt obligations under a trust indenture, these provisions, which parallel exactly the corresponding Part of the *CBCA*, will give greater certainty to the transaction and should therefore expedite the financing process.

PART VIII — RECEIVERS AND RECEIVER-MANAGERS

Present Law

There are no provisions in the present *Canada Corporations Act* relating to receivers. As in the case of securities transfers and trust indentures, in the absence of provisions in the federal corporation act, the law applicable to the appointment, functions, powers, and duties of a receiver is the law of one of the jurisdictions where the corporation carries on business, depending upon the choice of law made by the court hearing the case.

Proposed Law

Although drawing upon the corresponding provisions of the U.K. *Companies Act 1948*, this Part is much less detailed because many of the provisions of the U.K. *Act* are set out, in Canada, in the *Bankruptcy Act*. This Part, which parallels exactly Part VIII of the *CBCA*, sets out statutory standards or delegates to a court discretion concerning the qualifications, functions, rights, powers and duties of a receiver, including his standing with respect to the directors. It also assures that only one legal system applies to a receiver of a federal corporation, irrespective of the number of jurisdictions in which it carries on business. This Part also aims to achieve one other seemingly small but significant goal: to require receivers to submit financial statements in the form that the directors would have been required to submit to members, reflecting correctly that a receiver in effect assumes management of the business and affairs of a corporation.

PART IX — DIRECTORS AND OFFICERS

Present Law

The present law confers sweeping powers on the directors to manage the business and affairs of a letters patent corporation. The common law has reinforced this concept to the point where a member may not even propose a by-law change unless either the by-laws permit it or the directors agree to process it.

The *Canada Corporations Act* presently contains no provisions relating to the fiduciary duties and the duties of care, diligence and skill of officers and directors other than provisions relating to indemnification for costs incurred by directors. Indeed, close analysis of the present law discloses that the current standards are even less stringent than the standards of the *U.K. Companies Act 1929*, which was the model for the present *Act*, and which has been amended several times since to clarify directors and officers duties and, what can be the obverse side of the same coin, the right of a corporation to indemnify a director or officer in respect of a loss incurred in connection with a transaction in breach of those duties.

Proposed Law

Continuing the policy of the *Canada Corporations Act*, the proposed law vests unequivocally in the directors the power to manage the "activities" and "affairs" of a corporation, which terms include its charitable or membership functions, any business it carries on, and relations among the corporation, its affiliates, its managers and its members. The residual powers of members to control indirectly the management of the corporation are, however, substantially increased. For example, members have the power to initiate by-laws, to submit general proposals to meetings of members, to remove directors, to vote on fundamental changes, and even, in the case of a membership corporation, to require the corporation to purchase their membership interests where some of them disagree with a proposed fundamental change.

Some structural changes are effected too. Cumulative voting is expressly legitimated but is not rendered mandatory. And to eliminate the ritualistic meetings that are now associated with the incorporation process, the first directors of a corporation are given broad authority to organize the corporation's affairs. Also, the one man corporation is legitimated, since one person may constitute a meeting of directors, a provision that may be useful to some foundations.

The most difficult conceptual problem introduced by this Part is s. 105, which imposes on a director or officer the duty to ". . .(a) act honestly and in good faith with a view to the best interests of the corporation and (b) exercise the care, diligence and skill of a reasonably prudent person". The concept of fiduciary duty set out in (a) is largely declaratory of the common law but also attempts to clarify existing law by underlining that a director or officer must act in the best interests of the corporation and not his own interests. He cannot exculpate himself by employment contracts, broad indemnity clauses, or member ratification. The duty of care, diligence and skill set out in (b), although it appears more novel than the fiduciary duty concept, is probably also in effect only declaratory of the common law, which has long imposed a duty of care on directors and officers, but which has hedged liability with many qualifications, realizing that the function of directors and officers is to decide among alternative risks and not, like most trustees, only to preserve property.

Like the Ontario *Business Corporations Act 1970* and the *CBCA*, both of which are based on the New York *Business Corporation Law*, the proposed law expressly sets out a standard of fiduciary duty and a standard of care of officers and directors. The substance parallels closely the Ontario model, except that, as under the *CBCA*, the corporation and its directors and officers have greater rights to obtain insurance in respect of claims against them alleging a lack of care, diligence or skill. But a corporation cannot insure directors and officers against claims based on a breach of fiduciary duty. Direct indemnification of directors and officers of the corporation in relation to legal claims is permitted if the indemnity is approved by the corporation or by a court, and then only if the impugned act was undertaken honestly, in good faith and in the best interests of the corporation. The only exception is where a director or officer succeeds in the litigation, in which case he is entitled, if he has succeeded on the merits and is not otherwise culpable, to indemnity as of right.

This Part, consonant with the like provisions of the *CBCA*, places some restrictions on foreign control of certain nonprofit corporations. Specifically, a majority of the directors of *any* corporation subject to the proposed act must be resident Canadians; and there must be present at any meeting of directors of any *charitable* corporation a majority of Canadian resident directors. No such constraint is placed on a meeting of members of a *membership* corporation. The policy is based on the assumption that virtually all charitable corporations will be financed by public contributions—which means subsidized by the tax system—and therefore should be subject to control by Canadians.

PART X — MEMBERS ASSOCIATIONAL INTERESTS

Present Law

One of the greatest weaknesses of the federal law that presently applies to nonprofit corporations is the failure to deal expressly with a member's rights to a fair procedure in connection with any action by a corporation to discipline him or to terminate his membership. Where a member has some tangible property rights in

the property of a membership corporation, he is probably adequately protected by the common law. In any other case, however, his rights are at best very uncertain.

Proposed Law

Part X of the Bill, in addition to dealing with technical issues such as the issue of membership cards and the rights of honorary members, attempts to deal clearly with this problem of membership rights. It requires that any corporation's disciplinary powers and the procedures relating to their exercise must be set out in the corporation's constitution, that a corporation must comply with these procedures, and that, in any event, the proceedings must comply with the rules of natural justice, that is, ensure fair notice of any charge, fair notice of any hearing, a fair trial and, probably, the imposition of a sanction that is not disproportionate to the offence.

Just as the Director's exercise of his administrative discretion is reviewable by a court, so is the exercise of powers of a nonprofit corporation to discipline or expel a member. This review is in the form of an oppression action under s. 214, which may be instituted by a summary application to a court under s. 221, obviating recourse to the technically complex and costly prerogative writ procedures.

PART XI — MEMBERS

Present Law

The provisions of this Part concern principally structural rules designed to ensure that any interested member may participate in the management of the internal "affairs"—as distinct from the external "activities"—of a nonprofit corporation. The present laws contain similar rules relating to members' meetings and related topics but tend to be far more rigid than the Bill, particularly with respect to formalities such as telephone meetings and written resolutions in lieu of meetings.

Proposed Law

The proposed Part IX parallels closely Part IX of the *CBCA*, which was designed to give as much flexibility to management of the internal affairs of a corporation as is consistent with fairly protecting the rights of members to participate either directly or indirectly by way of a member's proposal in the management of those affairs. On the one hand, the Bill is quite strict with respect to the time of giving notice of a members' meeting, notice of the purpose of the meeting, preparation of voters' lists, and conduct at the meeting. On the other hand, the Bill is very flexible with respect to quorum requirements and voting by representatives, technical issues that have long been problematical. In place of wooden formal constraints the Bill emphasizes remedies, such as the court review of an election of directors, to restrain any abusive exercise of power.

In addition, Part XI sets out a number of provisions that are unique to nonprofit corporations. For example, a *membership* corporation is entitled to provide in its articles that members meetings need be held only every second or third year instead of annually, and *any* corporation having more than 500 members may give notice of a meeting by publication instead of by sending specific notices.

Finally, adapting the unanimous shareholder analogue of the *CBCA*, this Part empowers the member by unanimous agreement to take direct control of the activities and affairs of a corporation instead of managing indirectly through directors. This provision was designed specifically to minimize the formalities connected with administration of a membership corporation or a foundation having few members.

PART XII — PROXIES

Present Law

The proxy rules that were added to the *Canada Corporations Act* by amendment in 1970 and continued with little change in the *CBCA* were based on Ontario law. Although frequently characterized as the cornerstone of shareholder democracy in a business corporation law, the proxy rules have never been significant in the context of a nonprofit corporations statute, where each member usually has only one vote, whereas under a business corporations statute a shareholder usually is entitled to exercise one vote in respect of each share he holds unless the articles otherwise provide. Thus under a business corporation law the proxy institution can be the key to control of a corporation. Indeed, with respect to a business corporation, under the *Canada Corporations Act* any person *may* solicit proxies in accordance with the rules, and the management of a public corporation *must* solicit proxies from shareholders to ensure that they are able, at their option, to participate in the management of the corporation's internal affairs. But these proxy rules do not apply in any case to a nonprofit corporation subject to Part II of that *Act*.

Proposed Law

From time to time the Department is asked to exercise, as agent of the Minister, administrative discretion under the *CCA* to permit a nonprofit corporation to set out proxy provisions in its bylaws, so that members who

are not able to attend a meeting may vote through a proxyholder. The Department has approved such bylaw provisions.

Consistent with the policy of constraining the exercise of broad administrative discretion by departmental officials, Part XII expressly entitles a member of a nonprofit corporation to vote by proxy unless the articles of the corporation bar voting in that manner. The one major exception to this general norm is a board of trade or chamber of commerce referred to in Part XVI, a member of which is not entitled to vote by proxy unless the articles expressly provide for such voting. On the assumption that members of a nonprofit corporation, in contrast to passive investors in a business corporation, are highly motivated to participate in the corporation's affairs, the Bill does not make mandatory any proxy solicitation by management. In essence, the Bill only legitimates the use of the proxy institution and imposes express duties on a proxyholder.

Even more important to most federal nonprofit corporations is the mail ballot concept, which is also clearly legitimated under this Part. If provided for in a corporation's articles or bylaws, it may be used to decide any issue in respect of which members are entitled to vote, including the election or removal of directors or approval of a proposed fundamental change.

PART XIII — FINANCIAL DISCLOSURE

Present Law

Since 1970 the *Canada Corporations Act* has imposed quite stringent financial disclosure requirements on public distributing business corporations and on substantial closely-held business corporations (over $5 million assets or $10 million gross sales). These provisions were further strengthened by the *CBCA*, which relegates the details of financial disclosure to the *Regulations* that are in turn, by reference, largely based on the provisions of the *CICA Handbook*.

Considering that nonprofit corporations—and particularly charitable corporations—are heavily subsidized by the tax system, which makes charitable contributions deductible from a taxypayer's income and exempts nonprofit corporations from paying income taxes, it is surprising to note that the *CCA* does not require any particular form of financial disclosure by nonprofit corporations. That *Act* requires a nonprofit corporation to keep detailed accounts and to have its accounts audited but leaves disclosure largely to the discretion of a corporation's management.

Proposed Law

For two reasons the Bill requires mandatory financial disclosure by a membership corporation to its *members* and by a charitable corporation to the *public*. The first is to maintain greater uniformity of policy with the *CBCA*. This is not, however, simply an attempt to achieve conceptual symmetry. It is inexcusable that the management of a nonprofit corporation, particularly of a charitable corporation that distributes public funds, should not make at least as full disclosure as does the management of a business corporation.

Second, and far more important, financial disclosure is the least obtrusive form of what is clearly desirable regulation of the activities of nonprofit corporations. It is also consistent with the recent amendments to the *Income Tax Act*, which were implemented to require prompt distribution by charitable organizations of moneys they receive and also to require public disclosure of their financial statements. At least one province, because of the increasing use of nonprofit corporations to carry out fraudulent schemes, is considering licensing requirements that would go beyond mere financial disclosure and require qualification as an acceptable charitable organization in accordance with specific statutory standards. The Bill, in view of the very few known frauds involving federal nonprofit corporations, eschews a licensing approach and, like the *Income Tax Act*, relies on full disclosure as the best means to ensure the accountability of management. The Bill proposes an open system that attempts tacitly to achieve a balance between virtually unrestricted freedom of association on the one hand and reasonable protection of the members of nonprofit corporations and public contributors on the other.

PART XIV — FUNDAMENTAL CHANGES

Present Law

The *Canada Corporations Act* was largely assembled brick by brick with little concern for overall symmetry or even internal consistency, therefore it has become extraordinarily difficult to interpret and to comply with the law. This is especially true of the fundamental change institutions (amendment, amalgamation, arrangements), each of which stipulates slightly different formalities, and most of which do not even apply to nonprofit corporations subject to Part II.

Because of the amount of discretion exercised and the complicated inter-relations among these rules, working with the *Act* has become an arcane art that requires an insider's knowledge of the statute provisions, departmental policies, and rules of practice. Even more serious, the

present *Act* omits altogether a number of minority shareholder protection rules that have been embodied in the U.K. *Companies Act 1948* or U.S. state corporation laws for at least a generation.

Proposed Law

Part XIV, which parallels closely the corresponding Part of the *CBCA*, introduces three new concepts to the law applicable to federal nonprofit corporations.

First, it makes available to a nonprofit corporation all of the fundamental change techniques that may be used in respect of a business corporation. Second, it makes uniform all the formalities relating to fundamental changes of a nonprofit corporation's constitution or activities—amendment of articles, amalgamation, continuance, and sale or lease of assets out of the ordinary course of its activities—changes that may be made as of right, largely free of any administrative discretion of public officials to intervene.

And finally, this Part confers on a member of a *membership* corporation who dissents from a proposed fundamental change the right to tender his membership certificate to the corporation and demand fair compensation. As under the *CBCA*, this policy permits management and the majority members to effect changes in the activities and affairs of a corporation with maximum flexibility and, at the same time, gives a member an option to withdraw from a membership corporation that is proposed to be fundamentally changed in character from the organization he originally joined. In short, this provision makes it difficult for a minority of members to veto a majority decision or for the majority simply to impose its will on the minority.

Further protection of members from majority oppression is accorded by the remedies set out in Part XIX, which an aggrieved member may invoke when he perceives he cannot obtain fair compensation for his loss through exercise of his right to dissent.

PART XV — PROSPECTUS QUALIFICATION

Present Law

The *Canada Corporations Act* (ss. 74-84) appears to regulate the distribution of securities to the public by federal corporations. In reality, these provisions are only a hangover of the rules established by the U.K. *Companies Act 1929*, which have been amended and supplemented from time to time in England, and which, in Canada, have been completely abrogated in practice by the provincial securities acts. The only meaningful provision in the present *Act* is s. 78, which empowers the Department to accept a prospectus qualified in another jurisdiction, for the Department is in fact only a depository of prospectuses. No qualification is done at the federal level.

But even these provisions do not apply to a federal nonprofit corporation that proposes to distribute its securities ("debt obligations") to the public. Such a corporation is in a legal limbo. Presumably, however, nothing bars it from issuing securities under s. 65 if it complies with the applicable provincial securities act.

Proposed Law

The Bill clearly confers on a nonprofit corporation the capacity to distribute securities to the public but, like the *CBCA*, does not contain any provision concerning the qualification of a prospectus. The Bill assumes this function will be carried out under the pertinent provincial securities acts.

Accordingly, the only provision in Part XV of the Bill is a "qualification by coordination" rule that acknowledges the current reality in respect of prospectus filing at the federal level, that is, filing without any federal administrative qualification. Its sole purpose is to ensure full disclosure through the Director's file of any public securities distribution by a federal nonprofit corporation in any jurisdiction, Canadian or foreign.

PART XVI — BOARDS OF TRADE AND CHAMBERS OF COMMERCE

Present Law

The *Boards of Trade Act* was enacted in 1874 as a vehicle to incorporate boards of trade and chambers of commerce having as their objectives ". . . promoting and improving trade and commerce and the economic, civic and social welfare of the district". Approximately 1000 corporations have been incorporated under that *Act* since 1874.

The *Act*, which had been influenced by the English concept of a board of trade and the European concept of a chamber of commerce, in addition to regulating the incorporation and administration of the internal affairs of such institutions, contains a number of vestigial provisions that confer quasi-governmental regulatory powers on a board of trade or chamber of commerce. These powers have long been abrogated by specific statutes. As a result, except for the rare case where a board of trade or chamber of commerce carries on some public administrative functions, these institutions have become, technically, special purpose membership corporations.

Proposed Law

In recognition of this development and of the great importance of the boards of trades and chambers of commerce in Canada, the Bill abrogates the *Boards of Trade Act* and sets out in a discrete Part a number of provisions that apply uniquely to these institutions.

Continuing the policy of the present *Act* the Bill treats the terms "board of trade" and "chamber of commerce" as synonyms and employs the concept of an exclusive "district" to prevent any overlap of jurisdiction of boards of trade established in contiguous territories. Unlike the *Act*, which gives discretion to the Minister to incorporate a board of trade and gives discretion to the Governor-in-Council to modify its district boundaries, the Bill grants these powers to the Director with a view to minimizing delays as well as costly administrative formalities. In the absence of a jurisdictional conflict, incorporation takes place as of right. If a jurisdictional conflict does arise, the Director must decide the territory in which each of the contesting corporations is entitled to exclusive use of the designation "board of trade" or "chamber of commerce", applying the factors set out in s. 178. Characteristically, the Bill makes any such decision subject to judicial review by way of summary application to a court.

The Bill gives a board of trade or chamber of commerce broad discretion, like any other nonprofit corporation, to make bylaws to regulate its internal affairs. But by design the Bill avoids attempting in any way to determine the relations among local boards of trade or chambers of commerce, leaving these structural relations to be determined, as in the past, by tradition and express agreement.

PART XVII — LIQUIDATION AND DISSOLUTION

Present Law

The provisions of the *Canada Corporations Act* relating to liquidation and dissolution are at best obscure with respect to business corporations and even worse with respect to nonprofit corporations. Generally the *Act* implies that a solvent corporation may be liquidated and dissolved under the *Winding-Up Act* and an insolvent corporation dealt with under the *Bankruptcy Act*.

Proposed Law

This Part declares this policy expressly. It synthesizes and sets out in one place all the liquidation and dissolution rules relating to solvent nonprofit corporations, whether pursuant to voluntary proceedings or involuntary proceedings initiated by the Director for failure to comply with the law. It abrogates the *Winding-Up Act* to the extent that *Act* applies to solvent nonprofit corporations and leaves to the *Bankruptcy Act* exclusive jurisdiction to deal with insolvent nonprofit corporations.

The technical provisions of this Part parallel closely Part XVII of the *CBCA*, stipulating clearly the right, powers and duties of a liquidator, and setting out clear, simple formal procedures. In addition, this Part empowers the Director in specified cases to revive a dissolved corporation, preserves certain rights of action, and deals with the custody of unclaimed moneys, filling up what are obvious gaps in the present law.

Finally, this Part contains a provision (s. 198) that is unique to and of strategic significance in a nonprofit corporation law. It deals with the distribution of remaining property of a nonprofit corporation on liquidation and dissolution, distinguishing clearly between a membership corporation and a charitable corporation. Generally, on liquidation and dissolution the liquidator of a *membership* corporation must distribute any remaining property of the corporation in accordance with its articles or, if the articles do not contain such provisions, rateably to each person having a membership interest when a liquidation order is made under s. 190, that is, to each person then named in the membership register maintained under ss. 19(1) whose membership interest has not been terminated under s. 111. The liquidator of a *charitable* corporation, however, must on liquidation and dissolution transfer any remaining property of the corporation in accordance with its articles or, if the articles do not contain such provisions, to other charitable corporations which carry on the same or similar activities and of which a court approves.

PART XVIII — INVESTIGATIONS

Present Law

The investigation provisions of the *Canada Corporations Act* (ss. 114-116) were substantially enlarged by amendments made in 1970 to expand the scope of their application and to set out a number of detailed procedural rules, including substitution of the Restrictive Trade Practices Commission for the courts as the tribunal to consider applications for investigations.

Proposed Law

The *CBCA Proposals* recommended that the proposed law limit reliance on the investigatory powers conferred by the recent amendments to the *Canada Corporations Act* and substitute, instead, definitive

shareholder rights that may be enforced by effective remedies. The *CBCA*, as enacted, adopted fully that recommendation, setting out extensive remedies under Part XIX. The Bill parallels very closely the *CBCA* in respect of both investigations and remedies.

The emphasis in this Part, therefore, is protection of the public interest as distinct from resolving individual grievances. Accordingly, the scope of the present investigation provisions is continued, but the procedure is fundamentally changed. Under the Bill, as under the *CBCA*, investigations must be authorized by a court instead of, as now, by the Restrictive Trade Practices Commission. In sum, the *Proposals* suggested and the Bill underlines that the law should be largely self-enforcing through ordinary judicial procedures, initiated by the members or the Director, instead of through government tribunals.

PART XIX — REMEDIES, OFFENCES AND PENALTIES

Present Law

The present statute does not deal with either of the two main questions raised in Part XIX, the derivative action and the oppression remedy. At present, Canadian law is clearly deficient in its analysis of minority members' rights, focusing largely on nineteenth century structural rules such as ratification of directors misconduct by majority vote instead of on the substantive issue, that is, the duties that majority members, directors and officers owe to the corporation and its members. Much of the common law is derived from the leading case of *Foss* v. *Harbottle*, a case that has been criticized by at least a generation of scholars and practitioners, principally because the law in effect renders majority members' misconduct immune from minority member action, either because the majority members are held to owe no duty, because the majority members have by ratification absolved themselves of a breach of duty, or simply because the minority members cannot overcome all the formal obstacles that have become encrusted on the common law.

Proposed Law

No one part of the Bill proposes more sweeping changes than does Part XIX. In effect, it strips away the self-imposed judicial constraints imposed by the *Foss* v. *Harbottle* Rule and compels the courts to adjudge on their merits complaints of minority members against majority members and management, applying a broad just and equitable standard. This it achieves in two ways.

First, like the *CBCA* it legitimates derivative actions in the name of the corporation (but initiated by members, the Director or other interested persons) to remedy a wrong to the corporation.

Second, again like the *CBCA*, the Bill adopts an amended version of s. 210 of the U.K. *Companies Act, 1948*, the so-called "oppression remedy", which permits an aggrieved person — particularly a disgruntled minority member — to apply to a court to right the alleged wrong. The court is given very wide discretion, applying an "oppressive or unfairly prejudicial" standard to deal with these cases. Since this remedy only complements the basic appraisal remedy conferred under Part XIV and the derivative action, it is unlikely that it will be invoked except in rather gross squeeze-out cases that do not fall within the scope of the appraisal remedy and that cannot be clearly characterized as wrongs to the corporation.

Throughout this Bill, a clear distinction has been drawn between management of the external *activities* and of the internal *affairs* of a corporation. On the one hand, the directors are given sweeping control to manage a corporation's activities and affairs, subject to the residual power of the members to remove them from office. On the other hand, the members are generally entitled to participate in and, in case of crisis, to control the internal affairs of the corporation, for example, any change of directors, constitutional change, or amalgamation. But in any event, under the Bill, directors and majority members are required to conduct the business and affairs of the corporation in the best interests of the corporation — not in their own interests. The remedies contained in Part XIX reinforce this policy.

Finally, Part XIX sets out general provisions relating to restraining orders, offences and penalties, and appeals from decisions of the Director. Consistent with the investigatory powers (Part XVIII) and rule making powers (s. 233), the Bill, like the *CBCA*, introduces a system of review of administrative action that reflects great sensitivity to administrative law principles. In general, investigatory powers are restricted to broad public issues and must be granted by a court. All proposed regulations must be pre-published to ensure that persons affected have an opportunity to comment on them. And all important decisions of the Director are required to be made in accordance with express statutory standards and are subject to appeal to the courts, not just review by way of prerogative writ. In all cases, quick access to the courts is emphasized.

PART XX — GENERAL

Present Law

Two issues arising under Part XX are largely unconnected with the present *Canada Corporations Act*. The first concerns regulatory powers. The second concerns transition, that is, application of the proposed new law to existing federal corporations.

The *Proposals* recommended extended use of regulations in a great many areas such as name availability, financial statement contents, Department returns, and standard forms and procedures. The goal is to make more widely known to the public what are at present internal policies and procedures that are applied in the exercise of administrative discretion.

Proposed Law

In order to ensure that the rule making powers recommended by the *Proposals* are not exercised in an arbitrary manner, the Bill, paralleling the *CBCA* procedures, requires that all proposed regulations be published for public comment at least 60 days before being submitted to the Governor-in-Council for enactment, thus enabling interested persons to participate in the rule making process. Such explicit rule making is clearly a great improvement over the present system of discretionary administration.

Although the administrators of the proposed law will thus be compelled to administer more according to law and less under discretionary powers, that is not to say they are rendered powerless. Indeed, although his discretion to decide cases is narrowly restricted, the Director is empowered in a number of provisions to initiate or intervene in legal actions in order to resolve specified problems: for example, in respect of appointment of an auditor (s. 149); dissolving a corporation (ss. 185, 187); initiating an investigation (s. 203); or invoking the Part XIX remedies—the derivative action and the oppression remedy.

By far the most complicated provision set out in Part XX is the continuance provision (s. 240). Like the *CBCA*, because of the fundamental policy changes proposed to be effected by the Bill, the proposed law does not apply automatically to existing federal nonprofit corporations. Each such corporation must apply for continuance, a simple and inexpensive procedure that allows a corporation to adjust its activities and affairs to comply with the new law. The pattern of continuance set out in s. 240 can best be explained by a brief summary.

- A body corporate subject to Part II (letters patent nonprofit corporation) or Part III (special act corporation) of the *CCA* or subject to the *Boards of Trade Act* must be continued under the proposed law within 5 years from its effective date. If it fails to become continued, it is deemed dissolved on the expiry of the 5-year period.
- The Governor-in-Council may by order exempt a Part III (special act) corporation from the continuance requirements or, conversely, permit a federal special act corporation to which the *CCA* does not apply to become continued.
- A federal nonprofit corporation may, on continuing, effect any amendment to its charter that it could have made had it been incorporated under the proposed law.
- Finally, the directors of any federal nonprofit corporation may, without any member authorization, apply for continuance where no change of the corporation's charter is effected by the continuance other than a change required to conform with the proposed law.

SUMMARY

Canada Non-Profit Corporations Act — *Canada Business Corporations Act*

CNCA Sec. No.	CBCA Sec. No.	Topic	Comment
		PART I—INTERPRETATION AND APPLICATION	
1	1	Short title	
2(1)	2(1)	Definitions	(*Comment relates only to definitions that are unique to the CNCA Bill.*) "*activities*"—makes clear that a charitable or membership corporation may also carry on business. "*charitable corporation*"—generalizes the common law concept and distinguishes such a corporation from a membership corporation. "*member*"—distinguishes a person who has an interest in a charitable or membership corporation from a shareholder of a business corporation. "*membership corporation*"—distinguishes between a "charitable corporation" that carries on its activities primarily for the benefit of the *public* and a "membership corporation" that carries on its activities primarily for the benefit of its *members*. "*membership interest*"—focuses on the rights and duties of members to contrast this interest to the proprietary interest of a shareholder in a business corporation. "*periodical*"—defined here to refer to the periodical required to be published under the *CBCA*. "*security*"—limits the scope of the definition to a *debt obligation* to exclude any reference to a share.
2(2)-(8)	2(2)-(8)	Interpretation	Although they will not frequently apply, because the proposed *Act* empowers a nonprofit corporation to carry on business either directly or through a subsidiary, these affiliation rules are essential, particularly with respect to the provisions concerning the preparation of financial statements.

CNCA	CBCA	Topic	Comment
	2(9)	Deemed charitable corporation	A hybrid nonprofit institution is deemed to be a charitable corporation to ensure the stricter public disclosure rules apply.
3	3	Application of Act	Parallels *CBCA* in form but expressly excludes application of the *Act* to federal cooperative associations and pension funds to dispel any doubt. By definition the *Act* does not apply to a business corporation that is incorporated or continued under the *CBCA*.
	4	Purposes of Act	
		PART II—INCORPORATION	
4-13	5-14	Incorporation formalities and pre-incorporation contracts	Parallels *CBCA*, except that in ss. 4(1) the phrase "not prohibited by an Act of Parliament" is added to ensure no person may, as of right, incorporate a nonprofit corporation for the purpose, for example, of promoting racial discrimination.
		PART III—CAPACITY AND POWER	
14-17	15-18	Capacity and powers	Parallels *CBCA* and thus confers on a nonprofit corporation the capacity of a natural person, abrogates the common law constructive notice doctrine, and codifies the internal management rule.
		PART IV—REGISTERED OFFICER AND RECORDS	
18-22	19-23	Registered office and maintenance of corporate records	Parallels *CBCA*.
		PART V—CORPORATE FINANCE	
23	24	Issue of securities	Parallels *CBCA*, but note that the definition of "security" encompasses only "debt obligations", thus excluding any reference to shares which cannot be issued by a nonprofit corporation. A nonprofit corporation may issue only a membership certificate (see s. 110) or a debt obligation to evidence a loan to the corporation.
24	37(9)-(10)	Repayment, redemption and reissue of debt obligations	Parallels *CBCA* to distinguish clearly between an obligation under a loan contract and an obligation under a debt obligation taken as collateral security, designed to ensure that repayment of an open line of credit at one point of time does not extinguish the collateral security.

CNCA	CBCA	Topic	Comment
25	42	Prohibited loans and guarantees	Parallels *CBCA*.
26		Ownership of property by a charitable corporation	Express declaration that a charitable corporation has an absolute ownership interest in any property vested in it unless the property is transferred to it expressly in trust, thus barring any general inference of an implied trust.
27		Investment powers	Express restrictions on investment powers of nonprofit corporations, particularly to limit generally the investment discretion of directors of charitable corporations, unless the articles otherwise provide.
28		Use of corporate property	Cornerstone provision that prohibits a nonprofit corporation, except in specified circumstances, from distributing any of its property or income to its members. This is the litmus test distinction between a nonprofit corporation and a business corporation. Subsection (2) permits a corporation set up as a federated organization, e.g., an association of sports clubs, to distribute property or money to a member to enable the member to carry out nonprofit activities on behalf of the corporation.
29	35		Parallels *CBCA*.
30	43(1)		Parallels *CBCA*.
		PART VI—SECURITIES CERTIFICATES, REGISTERS AND TRANSFERS	
31-64	44-76		Parallels *CBCA*.
		PART VII—TRUST INDENTURES	
65-76	77-88		Parallels *CBCA*.
		PART VIII—RECEIVERS AND RECEIVER-MANAGERS	
77-83	89-96		Parallels *CBCA*.

CNCA	CBCA	Topic	Comment
		PART IX—DIRECTORS AND OFFICERS	
84-108	97-120	Duties and liabilities of directors and officers	Parallels *CBCA*. Under ss. 86(6) the *Regulations* are required to contain a model set of by-laws that may be abrogated pursuant to the procedures set out in ss. 86(1)-(5). And under ss. 89(3) the articles may provide for a director's term of office that exceeds three years.
		PART X—MEMBERS ASSOCIATIONAL INTERESTS	
109	[Part X—Insider Trading]	Classes of membership	A synthesis of analogous *CBCA*, ss. 24 and 27 that clearly legitimates the creation of classes of members.
110		Admission to membership	Declares expressly the power of directors to admit members except where exercise of those powers is restricted by a corporation's articles or bylaws; narrowly confines the voting rights of an honorary member; and authorizes the issue of membership cards or certificates (an analogue of *CBCA*, ss, 25(1) and 45(7).
111		Transfer of a membership interest	Reflecting standard practice, unless the articles or bylaws otherwise provide, narrowly restricts membership transfers and declares when membership automatically terminates.
112		Entry in register of termination of membership	Requires an entry in a register maintained under ss. 19(1) of the fact of termination of membership, which entry constitutes prima facie proof under ss. 230(2).
113		Termination of member's rights	Declares that, unless the articles or bylaws otherwise provide, a member's rights as a member and his interest in any property of the corporation cease to exist when his membership terminates.
114		Power to discipline a member	Requires that any disciplinary powers and the procedures relating to the exercise thereof must be set out in a corporation's articles or bylaws.
115		Right to a fair hearing	A corollary of s. 114, requires compliance with the procedures set out in the corporation's constitution and, impliedly, with rules of natural justice in respect of any proceedings relating to discipline of a member or termination of a membership.

CNCA	CBCA	Topic	Comment
116		Court review of disciplinary or termination proceedings	Permits judicial review of administrative action by way of an oppression remedy under s. 214, which may be instituted by a summary application under s. 221, thus obviating recourse to prerogative writ procedures.
		PART XI—MEMBERS	
117	126	Meetings of members	Parallels *CBCA*.
118	127	Calling of meetings by directors	Parallels *CBCA*, but adds a provision to permit a *membership* corporation to require a members' meeting only every second or third year.
119	128	Fixing record date	Parallels *CBCA*.
120	129	Notice of meeting	Parallels *CBCA*, but adds a provision to permit a corporation having more than 500 members to give notice by publication in newspapers or in a corporate newspaper or like document that is sent to all members.
121-131	130-140		Parallels *CBCA*.
		PART XII—PROXIES	
132	141	Interpretation	Parallels *CBCA*, but omits definitions of "registrant" and "solicit", which are irrelevant in this context.
133	142	Appointing proxyholder	Parallels *CBCA*, but adds a provision which, in contrast to the business corporation law, enables a corporation by its articles to stipulate that only a member may act as a proxyholder or even to bar voting by proxy.
134	143	Form of proxy as prescribed	Differs radically from the *CBCA* because no mandatory proxy solicitation by management is required in the proposed *Act*.
135	146	Rights and duties of a proxyholder	Parallels *CBCA*.
136		Mail ballot	In contrast to the business corporation law, which relies exclusively on the proxy system, the bylaws of a non-profit corporation may provide for a mail ballot to decide any issue in respect of which a member is entitled to vote.

CNCA	CBCA	Topic	Comment
		PART XIII—FINANCIAL DISCLOSURE	
137	149	Disclosure to members of annual financial statements	Parallels *CBCA*.
138	150	Exemption from disclosure	Parallels *CBCA*.
139	151	Consolidated statements and access to statement of subsidiaries	Parallels *CBCA*, except that only *a member* of a membership corporation is entitled to access, whereas *any person* is entitled to have access to the financial statements of a charitable corporation.
140	152	Approval of financial statements by directors	Parallels *CBCA*.
141	153	Copies of financial statements to members	Analogous to *CBCA*, but where under S. 118 a corporation holds a members' meeting every second or third year, it may publish the financial information; and in any other case a corporation may, instead of sending financial statements, publish a notice that its financial statements are available to be examined, if it is a membership corporation, by any *member*, or if it is a charitable corporation, by *any person.*
142	154	Duty of a charitable corporation to send financial statements to Director	Parallels *CBCA*, but imposes no requirement of such public disclosure on a membership corporation.
143-152	155-164	Auditors	Parallels *CBCA*.
153	165	Audit committee	Parallels *CBCA*, but applies only to a charitable corporation that solicits money or property from the public.
154	166	Auditor's privilege from defamation action	Parallels *CBCA*.
		PART XIV—FUNDAMENTAL CHANGES	
155	167	Amendment of articles	Parallels *CBCA*.
	168	Constraints on share transfers	Irrelevant in proposed *Act* because a nonprofit corporation has no right to issue shares.
156-170	169-183	Fundamental change institutions (amalgamation, continuance, etc.)	Parallels *CBCA*, except that ss. 169(1) adds a public interest test that is applicable to the proposed discontinuance (export) of a charitable corporation, and ss. (10) precludes any transfer of a charitable corporation to a jurisdiction outside Canada.

CNCA	CBCA	Topic	Comment
171	184	Members' right to dissent	Parallels *CBCA*, but applies only to a *membership* corporation.
172	185	Reorganization	Parallels *CBCA*.
173	185.1	Arrangement	Parallels proposed s. 185.1 of *CBCA*.
		PART XV—PROSPECTUS QUALIFICATION	
174	186	Duty to file any prospectus with Director	Parallels *CBCA*.
		PART XVI—BOARDS OF TRADE AND CHAMBERS OF COMMERCE	
175	[Part XVI —Take-over Bids]	Definition of "board of trade" or "chamber of commerce"	Makes the terms "board of trade" and "chamber of commerce" synonyms, and describes their nature in functional terms.
		Definition of "district"	Defines the limits of the territorial jurisdiction of any board of trade or chamber of commerce, which is determined specifically by the Director under s. 178, subject to judicial review of his exercise of administrative descretion under par. 219(e).
176		Application of Part	Limits application of this Part to boards of trade and chambers of commerce.
177		Name	Sets out right to exclusive use of name "board of trade" or "chamber of commerce" in respect of a district as authorized under s. 178, but declares that both a French and an English name may be used in relation to one district.
178		Determination of district	Empowers the Director to determine a district, subject to express standards and subject to judicial review under par. 219(e).
179		Proxies	Reverses the general rule of s. 133 to say that a member has no right to vote by proxy unless the articles of a corporation so provide.
		PART XVII—LIQUIDATION AND DISSOLUTION	
180-186	200-206	Procedures	Parallels *CBCA*.
187	207	Grounds for liquidation and distribution	Standards parallel *CBCA*, but a standard relating to "the interests of... the public generally" added in respect of a *charitable* corporation.

CNCA	CBCA	Topic	Comment
188-197	208-216	Powers of court, liquidator	Parallels *CBCA*.
198	217	Distribution of remaining property	Distinguishes clearly between a membership corporation and a charitable corporation, requiring distribution of remaining property of a *membership* corporation to the then members, and requiring distribution of remaining property of a *charitable* corporation pursuant to its constitution or, if its constitution does not deal with the issue, to one or more corporations carrying on similar activities in Canada (declaration of *cy-près* doctrine).
199-202	218-221	Unclaimed property	Parallels *CBCA*.
		PART XVIII—INVESTIGATION	
203-210	222-230	Investigation powers and procedures	Parallels *CBCA*, but omits as irrelevant *CBCA*, s. 228, which concerns an investigation to determine the beneficial ownership of securities.
		PART XIX—REMEDIES, OFFENCES AND PENALTIES	
211-225	231-245	Remedies	Parallels *CBCA*.
		PART XX—GENERAL	
226-242	246-264	General	Parallels *CBCA*.