PROPOSALS FOR A NEW NOT-FOR-PROFIT CORPORATIONS LAW FOR CANADA

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LAW
for CANADA

Volume I

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NEW NOT-FOR-PROFIT CORPORATIONS LAW FOR CANADA

Volume I

Commentary

by

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PREFACE

The format of this report follows very closely that of the published *Proposals for a New Business Corporations Law for Canada,* (Vols. I and II) which has been a basis for Bill C-213, "An Act respecting Canadian business corporations", introduced for first reading in Parliament July 18, 1973, by the Honourable Herbert Gray, Minister of Consumer and Corporate Affairs. This approach has been adopted for several reasons. First, the readers of this report will be mainly lawyers who are familiar with the *Proposals for a New Business Corporations Law for Canada* and Bill C-213. Moreover, experience with the *Proposals for a New Business Corporations Law for Canada* has proven well the merits of its format. The task of examination of this report is facilitated considerably with an understanding of, and easy reference to, pertinent provisions of Bill C-213. The legislation proposed by Bill C-213 is referred to in this report as the "proposed Canada Business Corporations Act" or, more simply, the "proposed CBCA".

Second, this report recognizes as a fundamental premise when considering proposals for reform of the not-for-profit corporations law the necessity of having a single, unified and consistent corporation law so far as possible for all corporations incorporated federally. Therefore, this report proposes unique statutory language and provisions only to the extent that the functional distinctiveness of the not-for-profit corporation necessitates such unique statutory language and provisions. Those provisions of Bill C-213 which are suitable for not-for-profit corporations are included as provisions of the proposed Canada Not-For-Profit Corporations Act (Volume II of this report—referred to as the "proposed CNPCA").

In many instances, provisions of Bill C-213 are suitable *verbatim* for the proposed CNPCA, in other instances the substance of the provision is desirable but only with necessary changes in language. On the other hand, many provisions of Bill C-213 are irrelevant and unsuitable to the not-for-profit corporation. Furthermore, many of the unique provisions necessary for the not-for-profit corporation are not, of course, found in Bill C-213. In pursuit of a unified and consistent federal corporation law, the proposed CNPCA and the Commentary (Volume I of this report) follow the approach and framework of Bill C-213. The commentary and the provisions of the proposed CNPCA parallel as closely as possible the division into parts, the sequence of provisions, and headings of Bill C-213.

Finally, the reasons and arguments in favour of a given provision have been adapted from the *Proposals for a New Business Corporations Law for Canada* (Volume I) whenever the provision in the proposed CNPCA is based upon a provision in Bill C-213 which is supported by the reasons and arguments set forth in Volume I of the *Proposals for a New Business Corporations Law for Canada.* In such instances, the credit for the research, ideas, substance, and in a great many instances the actual wording of the proposal is due entirely to the authors of *Proposals for a New Business Corporations Law for Canada,* Robert W.V. Dickerson, John L. Howard, and Leon Getz. However, any misconception as to the suitability of adaptation of such proposals to the proposed CNPCA, or any errors in substance or style in the adaptation to this report, rest solely, of course, with myself.

The reader of this report will appreciate that both the substance and form of the provisions of Bill C-213 may well change significantly if and when Parliament eventually passes new legislation for business corporations. Therefore, the reader must realize that such departures from Bill C-213 in the eventual legislation for business corporations will result in many corresponding changes in any proposed legislation in respect to not-for-profit corporations,

in keeping with the stated premise of a single, unified federal corporation law so far as possible. This report does not discuss the merits of Bill C-213 for business corporations as such, but limits itself in this regard to the task of discussing the relevance of the proposed provisions to not-for-profit corporations. However, the reader should appreciate that the provisions of the proposed CNPCA will reflect necessarily any changes from Bill C-213 in the final development of federal legislation for business corporations so long as such provisions are functionally appropriate for not-for-profit corporations.

Appendix "A" to this report provides a synthesis of all of the provisions of the Canada Corporations Act which presently apply to not-for-profit corporations and provides comment in respect to such provisions for the purpose of evaluating the appropriateness of the present legislation because of the legislative approach employed and the language utilized. Appendix "B" to this report contains the *Canadian Standards of Accounting and Financial Reporting for Voluntary Organizations,* 1967, which is of particular relevance to the discussion in respect to Part 13.00 of the proposed CNPCA.

There is relatively little literature in respect to not-for-profit corporations, particularly in Canada, as compared with the extensive literature on business corporation law. Because of this paucity of literature in respect to not-for-profit corporations, I am particularly grateful to Mr. Robert S. Lesher, Chief Counsel to the New York Joint Legislative Committee for making available to me the comprehensive study underlying the major revisions made in the not-for-profit corporations law of New York state in 1969. Mr. Lesher also gave me considerably of his time, notwithstanding an extremely busy schedule, in providing personally the benefit of his views on this area of the law. An appreciation of the underlying premises in respect to not-for-profit corporations, and the origin of many of the ideas expressed in this report, came from reading Mr. Lesher's insightful article "The Non-Profit Corporation—a Neglected Stepchild Comes of Age", 22 *Business Lawyer* 951 (1967). This report is heavily indebted to this article. Acknowledgment in respect to Mr. Lesher's insights, ideas, arguments and language is given only generally in this preface, rather than specifically throughout this report, simply because Mr. Lesher's landmark article pervades so much of the report. The New York legislation is referred to often throughout the Commentary as it is the most recent and innovative legislation in the subject area. The legislation in Ontario for not-for-profit corporations is also referred to extensively. Although the Ontario legislation is also much in need of reform, presently under consideration, it represents the most expansive legislation in the subject area in Canada to date.

Victor Peters and Frank Zaid both provided helpful and appreciated assistance in research in the early stages of the preparation of this report. Individuals who contributed helpful advice and ideas from time to time included my colleagues Maurice Cullity, Warren Grover, and Jacob Ziegel. Robert W.V. Dickerson reviewed the entire draft of the proposed CNPCA which resulted in a good number of needed changes and considerable improvement in the final report. The number of persons involved with not-for-profit corporations who contributed advice, views and data is too extensive to list all of the individuals. Fern Levis of the Ontario Public Trustee's Office, and Donald Rickerd of the Donner Canadian Foundation, read the full draft of this report and provided appreciated advice. G.A. Brakely & Co. Ltd. and the Better Business Bureau of Metropolitan Toronto Inc. provided helpful information.

I am particularly grateful to John L. Howard, now Assistant Deputy Minister and formerly Director of Corporate Research, and Roger Tassé, formerly Assistant Deputy Minis-

ter, of the Department of Consumer and Corporate Affairs for their support and encouragement throughout the preparation of this report. Their advice, assistance, and patience is very much appreciated.

The considerable patience, skill and humour provided by my secretaries, Joyce Larcombe and Myrna Blackmore, throughout this undertaking is much appreciated. Barbara Persaud, Brenda Cecil, Ruby Richardson and Helen Musikka, also provided needed typing assistance at critical times.

This report, therefore, is a product of the ideas and efforts of many, especially the contributors to the *Proposals for a New Business Corporations Law for Canada* and in particular the authors of that report, Robert W.V. Dickerson, John L. Howard and Leon Getz. However, I must accept solely the complete responsibility for the contents of this report. I do so with the hope that this report will contribute substantially to an understanding of not-for-profit corporations law, and will lead ultimately to new, and improved, federal legislation in Canada.

Peter A. Cumming
September, 1973

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ABBREVIATIONS

Proposed CBCA	Short title for the "Canada Business Corporations Act", provided for by Bill C-213, given first reading in Parliament July 18, 1973.
Ghana Report	Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana, 1961.
Jenkins Report	Report of the Company Law Committee, Cmd. 1749, United Kingdom, 1962.
Lawrence Report	Interim Report of the Select Committee on Company Law, Ontario, 1969.
Model Act	United States' Model Non-Profit Corporation Act, Committee on Corporate Laws of the American Bar Association, Joint Committee on Continuing Legal Education, Philadelphia, 1964.
NY N-PCL	New York Not-For-Profit Corporation Law, Laws 1969, ch. 1066, as am.
Ontario Act	The Corporations Act, 1970 R.S.O., c.89.
Present Act	Canada Corporations Act 1970 R.S.C., c.C-32 as am. by c.10 (1st Supp.).
Proposed CNPCA	Proposed "Canada Not-For-Profit Corporations Act" (Volume II to this report).

INTRODUCTION

1. The introduction to this report serves several purposes. First, it provides an explanation of the objectives of the report, the approach taken to the subject matter discussed, and the underlying considerations upon which the recommended reforms in the law are based.

2. Most members of the legal profession are unfamiliar with the particular area of corporation law discussed in this report. Many laymen will be interested in the suggested proposals for reform. Therefore, the introduction seeks also to isolate and identify the all-important basic concepts and principles underlying this relatively esoteric area of corporation law and to provide a comprehensive overview before proceeding to the detailed analysis. This results in a comparatively lengthy introduction, however, provides the necessary framework for a consideration of the detailed proposals of this report and also reduces considerably the need for repetitious discussion in respect to such detailed proposals.

3. The report deals with corporations formed without share capital under Part II of the Canada Corporations Act 1970 R.S.C., c. C-32 as am. by c. 10 (1st Supp.) (hereinafter called the "present Act"). The report also considers corporations formed without share capital by Special Acts of Parliament and those incorporated under The Boards of Trade Act, 1970 R.S.C., c. B-8.

4. This report will refer to the corporation so incorporated as the "not-for-profit corporation", for reasons to be discussed shortly. This report will refer to companies with share capital incorporated under Part I of the present Act as "business corporations" in keeping with the term suggested in the *Proposals for a New Business Corporations Law for Canada* (volumes I and II) and Bill C-213 introduced for first reading in Parliament by the Hon. Herbert Gray, Minister of Consumer and Corporate Affairs, July 18, 1973. The legislation proposed by Bill C-213 is hereinafter referred to for the purposes of this report as the proposed "Canada Business Corporations Act" or more briefly, as the "proposed CBCA".

5. Subsection 154(1) of the present Act is the cornerstone provision for the federally incorporated not-for-profit corporation, requiring incorporation without share capital under Part II to be "without pecuniary gain to [the corporation's] members". This requirement may be otherwise expressed as stipulating that the corporation must be formed for a *non-pecuniary purpose*. This provision was first introduced to the federal corporation law by section 7A of the Companies Act Amending Act, 1917, with only minor amendments to date. Prior to section 7A of that Act a corporation without share capital could only be incorporated by Special Act. The first Act in which some of the provisions for not-for-profit corporations were isolated into a separate part was the 1952 Companies Act.

6. Appendix "A" to this report provides a compendium and synthesis of the provisions of the present Act applicable to not-for-profit corporations. Appendix "A" provides as well a criticism of the approach and framework of the present statutory provisions applicable to not-for-profit corporations. It is purposeful to read Appendix "A" before proceeding to read the text of the report.

7. Appendix "A" also provides some suggestions as to amendments which would afford only very limited improvement to the present Act. Such improvements would be necessarily limited because of the insurmountable restraints imposed in developing and providing a

comprehensive statutory basis for not-for-profit corporations within the framework of the present Act.

8. The criticisms advanced in Appendix "A" in respect to the present Act result in the conclusion that the present legislative approach inevitably provides an unsuitable framework for not-for-profit corporations. This report therefore proposes a new, independent, statutory enactment for not-for-profit corporations. This proposed statute can be referred to as the proposed Canada Not-for-Profit Corporations Act (hereinafter referred to as the "proposed CNPCA"), a draft of which is volume II to this report.

9. In making such proposals the report is written with the view of keeping those questions in mind which the legislator must always consider:

—What is the existing situation?
—What is wrong with the existing situation?
—Who cares?
—Why should legislation be considered in the form of the proposals made in this report?

The Unique Characteristics of the Not-For-Profit Corporation

10. The federal corporations which are the subject of discussion in this report may be classified as those incorporated for a *non-pecuniary purpose* or, in the language of subsection 154(1) of the present Act, the corporation is formed for a "purpose . . . without pecuniary gain to its members". This type of corporation is most commonly referred to by the legal profession and laymen alike as a "non-profit corporation". However, the new term "not-for-profit" is employed in this report as it is considered to be more accurate as well as more appropriate. The federal corporation formed for a non-pecuniary purpose is allowed to carry on lawfully a business incidental to such non-pecuniary purpose and hence a profit may result to the corporation. The corporation therefore is formed for a purpose which is "not-for-profit" to the members, but the corporation itself may earn a profit incidental to, and to further, its non-pecuniary purpose(s).

11. Therefor, implicit to the not-for-profit corporation is the single but fundamental limitation that it cannot be formed for the purpose of carrying on a business for a profit *with a view to distribution or use of that profit for the pecuniary gain of its members.* It must be formed for a non-pecuniary purpose.

12. It is evident that the not-for-profit corporation is opposite in purpose to the business corporation. The corporation formed for the purpose of carrying on a business has as its object the making of a profit for the pecuniary benefit of the shareholders. The business corporation has a pecuniary purpose and is accordingly formed with share capital as the corporate structure suitable to such purpose. The medium most suitable to the corporation formed for a non-pecuniary purpose is incorporation without share capital and this is the manner of incorporation provided under Part II of the Canada Corporations Act.

13. It is useful to realize that the nature of the incorporated co-operative association lies between the not-for-profit and business kinds of corporation. A co-operative corporation usually has as its main object the carrying on of a business for the purpose of a saving through lower prices paid for goods or services. There is therefore an *indirect* pecuniary gain to the membership through the co-operative venture which is formed to accomplish this very purpose. There may even be a direct pecuniary gain through the distribution of a surplus.

This report therefore excludes a consideration of the co-operative corporation which cannot be said to be formed truly for a non-pecuniary purpose. The co-operative corporation, also unique in our spectrum of kinds of corporations, is properly dealt with by way of separate legislation at the federal level, being the Canada Cooperative Associations Act, 1971 S.C., c. 6.

14. Not-for-profit corporations have received considerably less attention than the business corporation. This is readily evidenced by a significantly less developed statutory framework, very few judicial interpretations through the case law, little attention from the academic world and general disinterestedness on the part of the legal profession as a whole. This phenomena is understandable as not-for-profit corporations are few in number, there is a lack of pecuniary self-interest on the part of the membership, and much of the legal and accounting work for such corporations is done on a volunteer basis in the interest of service to the public. There is today, however, an increasing proliferation of not-for-profit corporations, probably due to several reasons, including the general growth in population, economy and wealth, and the tremendous expansion in governmental activity, particularly in the area of social and welfare services. Certain undertakings having a non-pecuniary purpose have today become so expansive, that incorporation is often advantageous or necessary. The total not-for-profit corporations incorporated simply at the federal level for the period 1900 to the end of 1970 numbered 1502. Of this number, 522 were incorporated in 1966-1970. Of these, 253 were incorporated in 1969-1970. (Federal Non-Profit Company Statistics 1900-1970: Data prepared for the purposes of this report by the Corporate Research Branch of the Department of Consumer and Corporate Affairs). These figures do not include federally incorporated board of trade and chamber of commerce corporations. See the commentary to Part 16.00.

15. Canada is also experiencing the relatively recent phenomena of the foundation. One estimate is that in 1971 there were some 1,400 foundations in Canada (see The Financial Post, May 8, 1971, p. 11). This figure includes some 264 foundations incorporated at the federal level. Almost one-half (126) of this number were incorporated in 1966-1970. Therefore, about twenty-five per cent of total federal not-for-profit incorporations (522) in 1966-1970 were foundations. (Federal Non-Profit Company Statistics 1900-1970, *supra*.)

Advantages to the Not-For-Profit Corporation Being Incorporated Without Share Capital

16. It is trite to state that incorporation often results in definite advantages over unincorporated groups conducting activities. What needs to be emphasized, however, is that certain corporate undertakings are best carried out by incorporating as a not-for-profit corporation without share capital. Part II of the Canada Corporations Act provides the existing appropriate medium for incorporation of those organizations which have in common the unique function of being formed for a non-pecuniary purpose.

17. If the incorporators wish to incorporate for a non-pecuniary purpose, it is appropriate to do so by the way of a statutory medium of incorporation which provides expressly for this distinctive and comparatively unusual corporate character so that the corporation's non-pecuniary purpose is enhanced and reinforced by a mandatory statutory basis (s. 154(1) of the present Act) precluding pecuniary gain to the membership.

18. The non-pecuniary purpose of the corporation will be further reinforced by necessary detailed statutory provisions (assuming a comprehensive statute) which further the unique

non-pecuniary purpose of the corporation. For example, one would expect regulatory provisions for the not-for-profit corporation pertaining to financial disclosure and the distribution of surplus assets on dissolution. The distinctive features of the not-for-profit corporation will be aided by appropriate statutory provisions pertinent to such matters.

19. Furthermore, a comprehensive statutory framework will take into account the unique characteristics of the corporation formed for a non-pecuniary purpose by facilitating the structuring of the internal corporate organization. For example, membership in a not-for-profit corporation without share capital is usually made non-transferable, and accordingly is sometimes by statute presumptively non-transferable (for example, s. 129(1) of the Ontario Act), so that membership lapses and ceases to exist upon the death of the member or, depending upon the by-laws, upon the non-payment of annual membership dues, or other events. It is common for only a small percentage of the shareholders to take part in a business corporation's activities. Even though most of the shareholders of the business corporation are either disinterested or not locatable they must be treated as active shareholders and be sent required notices. This is expensive and inconvenient. Flexibility is needed for the not-for-profit corporation so that, when appropriate, notices can be dispensed with or given through local newspapers (see, for example, s. 134(2) of the Ontario Act). Problems of control of a corporation can arise. There is no way to expel a shareholder of the business corporation whereas, if the by-laws expressly so provide, there can be expulsion of members of the not-for-profit corporation. The membership structure can have the common advantages of a share structure, such as classes of members and proxies, however, can dispense with many of the disadvantages. Membership in the not-for-profit corporation without share capital can be more easily limited to simply the active membership (see generally Cudney, "Corporations Without Share Capital" (1951) 29 Can. Bar Rev. 846).

20. Furthermore, those who wish to incorporate for a non-pecuniary purpose will often desire to facilitate the obtaining of resources, and maximize the use of corporate resources, for the corporate non-pecuniary purpose through a tax exempt status for the corporation in respect to both its income and property, and will desire donations to the corporation by donors to be deductible from their taxable income, or exempt from succession duty. Such tax exempt or deductibility status can only be achieved if the criteria of the relevant taxation legislation is met. The relevant legislation in every Canadian jurisdiction requires of a corporation as a minimum for achieving such tax exempt and deductibility status that it be formed for a non-pecuniary purpose. A further advantage of incorporation without share capital and providing a statutory basis for the non-pecuniary purpose of the corporation is that exemption from regulatory legislation, such as securities legislation is more easily achieved. Once the designated medium of incorporation (Part II of the present Act) is chosen, statutory provisions restricting the corporation to a non-pecuniary purpose come into play. There is case law illustrative of the failure to achieve the necessary non-pecuniary status to meet the exemption requirements of taxation and securities legislation (see, for example, *St. Catharines Flying Training School Ltd.* v. *M.N.R.*, [1953] C.T.C. 362, 369 and *In the Matter of Hawkesbury Golf & Curling Club,* [1968] O.S.C.B. 161 (July, 1968)) through simply having restrictive provisions in the charter and by-laws, being the only basis available by which to seek non-pecuniary status once the medium of incorporation with share capital has been chosen. If a non-pecuniary purpose is truly desired for the corporation it is therefore advantageous to incorporate without share capital under Part II of the present Act.

Necessary Prerequisites for a Statutory Framework for the Not-For-Profit Corporation because of the Unique Characteristic of being formed for a Non-Pecuniary Purpose

21. The functional distinctiveness of not-for-profit corporations calls for legislative provisions appropriate to such corporations. When focus is placed upon the fundamental difference between a corporation formed for a non-pecuniary purpose as compared with one formed for a pecuniary purpose it seems necessary and logical that the facilitating statutory framework for the not-for-profit corporation should provide appropriate provisions which restrict and regulate the withdrawal of monies connected with the corporation's activities. The enabling statute should do whatever is reasonably necessary to further the basic non-pecuniary purpose. For example, as has been mentioned, there should be appropriate statutory provisions pertinent to financial disclosure, directors' responsibilities and remuneration and distribution of surplus assets upon dissolution. The enabling statute should also facilitate the unique requirements in respect to structuring of the internal corporate organization of the not-for-profit corporation.

22. The distinctive nature of the corporation formed for a non-pecuniary purpose also requires statutory language appropriate to such purpose, that is, non-commercial terminology. The statutory language generally employed for the business corporation is inappropriate for the functionally different not-for-profit corporation. This problem is compounded by the approach of the present Act which is to incorporate by reference provisions of Part I as being applicable to the Part II not-for-profit corporation. Appendix "A" elaborates upon the many problems resulting from this legislative approach.

23. Furthermore, relationships within the business corporation, involving capital, management, directors, officers and employees, do not vary usually with the different operations of various business corporations. Where they do vary, special statutes or statutory provisions have been enacted, such as for banking, insurance, railway and public utility corporations. Special statutory provisions are also provided for the closely held business corporation. Subject to these qualifications, business corporations generally present the same problems for corporate law whatever the nature of the actual business operation. This is not nearly as true for not-for-profit corporations, the operations of which may vary considerably, depending upon their objects. The functional differences of not-for-profit corporations create different problems for corporate law and call for different statutory treatment depending upon the particular *type* of not-for-profit corporation.

The Two Basic Types of Not-For-Profit Corporations

24. This report considers that kind of corporation incorporated at the federal level solely for a non-pecuniary purpose. Not-for-profit corporations can and must, in turn, be divided into two basic types, depending upon the nature of their operations.

25. The first type is the corporation formed for a *public* non-pecuniary purpose which is more commonly referred to as the *charitable* not-for-profit corporation. Examples would be the Salvation Army, the Red Cross Society, the Canadian Unicef Committee—Comité Unicef Canada, and Hockey Canada. The charitable corporation can be considered to be one which meets the common law test as to what constitutes a charity set forth by Lord MacNaughten in *Pemsel* v. *Special Commissioners* [1891] A.C. 531, 583:

> 'Charity' in its legal sense comprises four principal divisions: the relief of poverty,

> the advancement of education, . . . the advancement of religion and . . . other purposes beneficial to the community not falling under any of the preceding heads.

Lord MacNaughten's definition (which is based upon the Statute of Charitable Uses of 1601, 43 Eliz. c.4) is not, of course, nearly exhaustive as to the many specific activities which constitute recognized charitable activities. The courts continue to employ this definition, and the specific divisions by analogy, albeit with limited success. It is impossible for a statute to exhaustively set forth all of the possible charitable activities because they depend upon changing values. This question is best left for final determination, in the event of a difference of opinion, by the courts. The most a statute can do is set forth a list of specific, acceptable charitable activities, and include a definition of a general nature such as the last category in Lord MacNaughten's definition. A distinction is not made in the present Act between the charitable and the other basic type of not-for-profit corporation.

26. The other type of not-for-profit corporation is the corporation formed for a *private* non-pecuniary purpose, such as social, fraternal, professional and the like. Activities for the benefit of the *membership* are the predominant aspect of the corporation, although the corporation may sometimes extend incidentally some services of a charitable nature for the benefit of the public at large. This type of corporation can be referred to as the "membership corporation". Examples would include the Scottish Rite and the Canadian Masonry Contractors' Association.

27. With the charitable not-for-profit corporation, the participants include many persons beyond simply the membership. The members themselves are really not present in a truly voluntary sense but rather because of the common belief that services provided by the corporation are essential to the well being of society, that is, membership usually results through a compelling sense of public duty. The monies involved in the operations of a charitable corporation are usually substantial. There are donations received from many persons, commonly through solicitation. The activities and services of such corporations are also often subsidized by the taxpayer because of both tax exempt status and also because of direct or indirect financial assistance by one or more levels of government. It must be further realized that simply because charitable corporations provide services to the public, the taxpayer and public at large have a corresponding interest in the nature and quality of the services so provided. Therefore, the taxpayer and others are very often present as the true participants in the charitable corporation and its activities, frequently without a voice or even knowledge. The charitable corporation is thus clearly formed for a *public* non-pecuniary purpose and operates in the public sector of society, with the result that public concern about its activities is much greater than with the corporation formed for a *private* non-pecuniary purpose.

28. The foundation is a charitable corporation for it is formed for a public non-pecuniary purpose although it usually will have been created privately. The term "foundation" is not referred to expressly in current legislation in Canada, but is commonly spoken of without precise definition. The basic distinction between a foundation and any other charitable corporation appears to be twofold. First, with a foundation the funding usually arises through an initial or on-going privately given non-solicited funding of monies to the corporation rather than through an on-going continuous public solicitation of others for funds. Secondly, the foundation is usually non-operational in the sense of providing charitable services similar to that of an operating charitable corporation. The foundation's usual role is that of funding operating charities rather than that itself providing such services. This suggested distinction between the operating charitable corporation and the non-operating one, the foundation, sometimes becomes blurred with a foundation which either may solicit or receive on-going

injections of monies, or may itself provide some charitable services through its staff. It is necessary, no matter what the activities of any particular foundation, to appreciate that the enabling legislation, Part II of the present Act, affording incorporation without share capital allows incorporation through such medium because the foundation is being formed solely for a non-pecuniary purpose. Moreover, the stated purpose of incorporation is almost invariably a *charitable* non-pecuniary purpose.

29. The membership not-for-profit corporation is so-called because the activities for the membership are the predominant aspect. This type of corporation therefore embraces all corporations without share capital formed for a non-pecuniary purpose other than charitable corporations. Membership in such a corporation is truly voluntary and for personal benefit although the benefit must necessarily be a non-pecuniary benefit. The impact of such corporations upon society at large is comparatively slight. Although some of these corporations may occasionally extend services to the public of a charitable nature and may also depend incidentally upon limited financial support from the public, the essence of such a corporation is that it is formed for a private non-pecuniary purpose and its operations are therefore within the private sector of society.

30. There is therefore a sliding scale of legitimate public interest in the not-for-profit corporation which depends upon whether the corporation is being formed for a *charitable* or a *private* non-pecuniary purpose.

31. At present only taxation legislation channels not-for-profit corporations on the basis of the charitable and private non-pecuniary purpose distinction. It is apparent, of course, that the *charitable* non-pecuniary purpose merits the most consideration by the legislator in making the policy decisions as to tax exemption or relief. The provisions of the Canada Corporations Act do not distinguish between the two basic types of not-for-profit corporations. The present Act is deficient in this regard for there are significant advantages in the statute enabling incorporation itself channeling the two basic types of not-for-profit corporations under different statutory provisions. This is not to suggest that the corporation law adopt the criteria which may be employed in tax legislation in determining exempt or deductibility status. Questions of tax policy are properly, of course, appropriate concerns only of taxation legislation and should not be dealt with as part of the statute enabling incorporation. However, certain regulatory provisions are most appropriate and suitable as a matter of corporation law. Given this premise it is necessary to take into account the functional distinctiveness of charitable and membership corporations.

Consequences of being a Charitable or Membership Not-For-Profit Corporation

32. The activities of the not-for-profit corporation may vary considerably, depending upon its objects. The statutory provisions for the corporation must on the one hand enable and on the other hand restrict depending upon the type of corporation under consideration. This is determined in large part by the activities carried out and the extent of public involvement which depends upon whether the corporation is being formed for a *charitable* or a *private* non-pecuniary purpose. With the corporation formed for a private non-pecuniary purpose membership is voluntary, incorporation is for the benefit of the membership, the money involved is relatively small and the impact upon the community is slight so that the members can be left for the most part to resolve their own problems. When we move to the charitable non-pecuniary purpose corporation the voluntary aspect grows considerably less, the partici-

pants being present often through necessity and a sense of public duty. The monies involved can be appreciable with donations from many persons including different levels of government, there is often solicitation of funds, and there is often subsidy through tax exemption. Further, the corporation is providing services to the public in respect to which the public therefore *always* has a corresponding interest *simply because the services are in the public sector of society.*

33. The reasons calling for different considerations in the legal framework for not-for-profit corporations as compared with other kinds of corporations, business or co-operative corporations, and between the two basic types of not-for-profit corporations, result from the unique character of such corporations because of their being formed for a non-pecuniary purpose. It is this fundamental characteristic which must underly all of the major considerations and features of the corporation law for not-for-profit corporations.

34. Therefore, an evaluation of the legal framework for not-for-profit corporations involves different considerations from those relevant to the business corporation, for three reasons. First, there is a fundamental difference in purpose between a corporation formed for a non-pecuniary purpose as compared with one formed for a pecuniary purpose which calls for essentially different statutory provisions. Secondly, the uses to which not-for-profit corporations as a group are being put are considerably more varied than the uses for business corporations. Thirdly, the functional distinctiveness of the non-pecuniary purpose corporation calls for statutory language suitable to its unique, non-commercial character.

35. This report also recognizes that it is very desirable to have a single, unified, and consistent corporation law so far as possible for all corporations incorporated federally. Therefore, this report proposes unique statutory language and provisions only to the extent that the functional distinctiveness of the not-for-profit corporation necessitates such unique statutory language and provisions. Otherwise, it is proposed that the provisions of the proposed CBCA which are suitable for not-for-profit corporations as well as business corporations be enacted as provisions of the proposed CNPCA.

36. This report provides an extended analysis of the basic premises and policies to be considered in developing a statutory framework for the not-for-profit corporation because of the present uncertainty and lack of articulation in this regard (as compared with the business corporation) and because certain basic considerations necessarily and logically follow once such premises and policies are clearly understood. First, when focus is placed upon the inherent non-pecuniary purpose characteristic of the corporation under discussion it seems necessary to consider, as a logical and necessary consequence, appropriate statutory provisions which regulate the withdrawal of monies connected with the corporation's activities. The statute must do whatever is reasonably necessary to further its underlying policy enabling the existence of this unique corporate entity and must do whatever is essential to ensure and further the non-pecuniary purpose of such entity. Secondly, when it is realized that there are two fundamentally distinctive types of not-for-profit corporations it seems necessary to consider having very flexible enabling and restrictive provisions depending upon the type of corporation (charitable or membership) under consideration. The needs of the corporation must determine the nature of the suggested statutory provisions.

Miscellaneous Objectives of this Report

37. As with the proposed CBCA, much of the simplicity which the proposed CNPCA would bring to corporate administration and to the corporate solicitor would be through standard

forms prescribed by regulation. There would be a prescribed form for all the standard steps from incorporation through to dissolution. These forms would specify the information required, supporting documents, etc.

38. As with the proposed CBCA, the emphasis with the proposed CNPCA would be in lessening the areas of administrative discretion. The consequences of given steps would be set forth in the statute with the Registrar's function to be mainly to simply ensure observance of the law. Adjudication should be left to the court. Scope must therefore be given for application to the court by interested or affected parties (and this will necessarily include a surrogate representing the public interest, necessary because of the public interest in those not-for-profit corporations formed for a charitable non-pecuniary purpose) and the court must be afforded wide discretion to give appropriate remedial orders.

PART 1.00

INTERPRETATION AND APPLICATION

39. The proposed CNPCA is intended to replace Parts II and III of the Canada Corporations Act and The Boards of Trade Act. If the proposed CNPCA is adopted by Parliament the present Act will have to remain in force until the corporations governed by Parts II or III of the Act have been continued under ss. 14.14 and 20.16 of the proposed CNPCA. Similarly, the Boards of Trade Act will have to remain in force until boards of trade and chambers of commerce incorporated under that Act have been continued under the proposed CNPCA. Section 20.16(3) also provides for prescribing by regulation that entities incorporated by Special Act and to which Part III of the present Act does not apply, shall apply for a certificate of continuance under s. 14.14 of the proposed CNPCA. The proposed CNPCA is premised upon the proposed Canada Business Corporations Act being adopted by Parliament for business corporations. The name "Canada Not-For-Profit Corporations Act" has been chosen as an appropriate short title because the proposed CNPCA will govern only not-for-profit corporations. The phrase "Not-For-Profit" is more descriptive of the corporations dealt with by the legislation and more communicative of the policy thereof than simply the phrase "Corporations Without Share Capital" employed as the heading for Part II of the present Act.

40. The terms defined within s. 1.02 apply, of course, to the whole of the proposed CNPCA. In addition, further definitions of more restricted application are contained in certain Parts and sections of the proposed CNPCA. All of the various terms defined will be discussed, to the extent considered necessary, in the context of the specific provisions in which they are used.

41. Section 1.03 is similar in approach to s. 3 of the proposed CBCA. The procedure to be followed in incorporation should be the same whatever the activities intended to be carried on by a given not-for-profit corporation. Similarly, the rights and duties of members, directors and others connected with a corporation should not vary with differences in the corporation's activities. However, the nature and degree of regulation of activities will be different. The charitable corporation requires very different regulation from the corporation formed for a non-pecuniary purpose in respect to which activities are simply for the benefit of the membership.

42. Unlike the proposed CBCA, which has provisions of general application but necessarily contemplates that statutes such as the Bank Act and the Trust Companies Act will continue to apply to and regulate pertinent business activity, the proposed CNPCA contemplates covering virtually all not-for-profit corporations without share capital. The advantages of dealing with virtually all not-for-profit corporations without share capital under a single statute outweighs the difficulties in doing so. The proposed CNPCA contains flexible provisions to enable or restrict depending upon the activities of the type of not-for-profit corporations under consideration. The provisions of the proposed CNPCA also cover entities presently formed under the Boards of Trade Act.

43. Therefore, it should be possible to incorporate all new federal not-for-profit corporations under the proposed CNPCA, which Act will itself regulate the activities of the various types of not-for-profit corporations through flexible enabling and restrictive provisions. Sections 14.14 and 20.16 will permit not-for-profit corporations in existence under special legislation

to be "transferred" into the proposed CNPCA so that ultimately there will be a common statute and body of case law governing the internal aspects, and regulating the activities (depending upon the type of not-for-profit corporation under consideration) of virtually all, if not all, not-for-profit corporations incorporated under the authority of the Parliament of Canada. The only exception will be any Special Act not-for-profit corporations which are considered to be sufficiently extraordinary so as to require unique *statutory* provisions, See the discussion in respect to s. 20.16.

PART 2.00

INCORPORATION

44. Section 2.01 is the same as s. 5 of the proposed CBCA, and makes two important changes from the present law. The present requirement (s. 154(1) of the present Act) of a minimum of three incorporators is a needless formality and the requirement is therefore reduced to one. The formal requirements of the present Act can be met by "dummy" incorporators. The minimum membership requirement does not afford real protection to creditors.

45. Subsection 2.01(2) removes also the restriction imposed by s. 154(1) of the present Act that the applicants for incorporation must be individuals. The artificiality of employing human intermediaries in the formation of a "subsidiary" not-for-profit corporation is thereby eliminated. Although it would be uncommon, a not-for-profit corporation may desire a "subsidiary". For example, a national not-for-profit organization sometimes has regional subsidiary organizational groupings and the corporate framework should be made easily available to facilitate this without needless artificialities. Furthermore, a business corporation sometimes desires to set up a not-for-profit "subsidiary" corporation, for example, to accomplish a non-pecuniary purpose for a given community in which it has a factory.

46. Section 2.02 describes the document required for incorporation as the "articles of incorporation" and sets forth the required contents thereof. A "prescribed form" must be followed, and the statutory requirements set forth in s.2.02 correspond broadly to those required to be included in an application for letters patent under s.155(1) of the present Act. Section 2.03 requires delivery of the articles of incorporation to the Registrar who issues a certificate of incorporation (s.2.04), and a corporation thereupon comes into existence (s.2.05).

47. Under s.154(1) of the present Act incorporation is by application for letters patent. The grant thereof is a discretionary exercise of the prerogative of the Crown ("The Minister may . . . grant") not subject to scrutiny (*Bonanza Creek Mining Co. Ltd.* v. *R.*, [1916] 1 A.C. 566; *Poizer* v. *Ward* [1947] 2 W.W.R. 193; *Re Cole's Sporting Goods Ltd.*, [1965] 2 O.R. 243). At first glance the only possible apparent merit of this device, namely, to better control the character and quality of incorporations and thereby to protect the public interest, seems particularly appropriate in respect to not-for-profit corporations, many of which are charitable in purpose and activities. In fact, most of the situations in which the withholding of the grant of letters patent has been considered have occurred in respect to applications under Part II of the present Act. The present practice is to refer certain applications with particular objects to a given Department for approval. About 150 applications are so referred in any year, the majority of the references being to the Department of National Health and Welfare. For example, if the objects pertain to a "charity" the application would be referred to the Department of National Health and Welfare. If the objects pertain to "Indians or Eskimos" the application is referred to the Department of Indian Affairs and Northern Development. However, there is no evidence that such discretionary powers as a technique of incorporation is more successful in the desired objective of protecting the public interest than the technique of incorporation as a matter of right.

48. From a practical standpoint, incorporation frustrated at the federal level is often simply diverted to a provincial jurisdiction. The present technique tends to cause delay and inconvenience, is costly, and imposes an impossible burden on the administrators of the legislation.

The present technique may also hinder the furtherance of desired non-pecuniary purpose activities in society. Such activities can only be evaluated in a meaningful fashion through observation of the *conduct and results of activities.* It is at this level that controls (largely absent at present) should be placed upon the not-for-profit corporation. The creation of not-for-profit corporations should not be restricted further than those very few restrictions placed by the law generally upon unincorporated not-for-profit associations, or those restrictions which are necessary in respect to any incorporation, for example, that the intended corporation cannot have a "misdescriptive, deceptive, or confusingly similar name (s. 2.08).

49. The main argument for additional restrictions at the level of incorporation of the not-for-profit corporation is that through incorporation there may be an appearance of government sanction to the not-for-profit enterprise, which may solicit funds from the public. Paradoxically, it may well be that it is the present technique of incorporation *through the exercise of a discretionary prerogative power* that has the effect of giving a semblance of justification to the erroneous notion (if such exists at all) that because an incorporated entity is soliciting, the government, through the Corporations Branch has given perusal and approval of the enterprise. In practice most donors, and virtually all donors giving any appreciable amounts, respond to solicitation on the basis of whether the gift is tax deductible. Thus the appearance of government sanction to the enterprise, with attendant credibility, comes through the actions of the adminstrators of the taxation legislation. The question of "tax deductibility status" is not, of course, determined simply on the basis of whether the solicitor of funds is incorporated.

50. Effective controls must be imposed upon the not-for-profit corporation's activities, including solicitations. If this is accomplished, the probabilities are that the person desiring to fraudulently solicit will be discouraged from incorporating and thereby entering a much more comprehensive legal and administrative framework, with corresponding effective remedies, sanctions and penalties than exist, at least at present, in respect to unincorporated associations, and thereby providing more easily obtainable evidence of the persons engaged in the scheme.

51. Therefore, as with the proposed CBCA for business corporations ss. 2.03 and 2.04 of the proposed CNPCA change the existing law by permitting incorporation generally as a matter of right subject, of course, to compliance with the provisions of the proposed CNPCA. The traditional idea that limited liability is a privilege remains true but, generally speaking, only in relation to post-incorporation conduct rather than to incorporation procedures.

52. It is emphasized that incorporation generally as a matter of right, a significant departure from the present law for the not-for-profit corporation, is desirable as policy on the merits, and not simply to achieve uniformity with the approach of the proposed CBCA.

53. The change in incorporation technique necessitates, of course, a corresponding change in the powers of the incorporating officer—called, in the proposed CBCA and proposed CNPCA, the Registrar—who would have no discretion to refuse to file articles of incorporation if they comply with the proposed CNPCA. Refusal by the Registrar to file articles of incorporation is appealable under s. 19.09. The Registrar appointed under the proposed CBCA and the proposed CNPCA most probably would be the same person, wearing two hats, administrating, only to the extent necessary, two separate staffs.

54. As explained in the commentary to Part 3.00, as with the proposed CBCA, the concept of corporate objects has been done away with, so there is no provision in the proposed

CNPCA corresponding to s.115(1)(b) of the present Act. However, under s.2.02(1)(g) of the proposed CNPCA, incorporators may impose restrictions on the non-pecuniary purpose(s) which the corporation may carry on, or such restrictions may be added later by amendment of the articles.

55. Under s. 2.02(1)(h) incorporators must identify the type of corporation (i.e. charitable or private non-pecuniary purpose) as provided in s. 1.02(6) which determines the applicability of certain regulatory provisions (for example, the extent of disclosure—see s. 20.14). The incorporators of a charitable corporation would usually wish to restrict the purposes of the corporation in the articles of incorporation to charitable non-pecuniary purposes to meet the criteria of taxation legislation. See the Income Tax Act, 1970-71 S.C., c. 63, ss. 110(1)(a), 149(1)(f)(g) and (h). The incorporators may wish to restrict the purpose of the charitable corporation to a *specific* non-pecuniary purpose to meet the criteria of taxation legislation. See, for example, the Income Tax Act, s. 149(1)(i) and (j). Finally, even if the corporation is being formed for a *private* non-pecuniary purpose, the incorporators may well wish to restrict the non-pecuniary purpose to meet the requirements of taxation legislation. See the Income Tax Act, s. 149(1)(l) and (5). It may also be necessary to place restrictions in the articles of incorporation upon the powers the corporation may exercise, to meet the criteria of tax legislation. See, for example, the Income Tax Act, s. 149(1)(g) and (l). The proposed CNPCA allows for such restrictions in the articles of incorporation through s. 2.02(1)(g), and s. 3.02(2) explicitly limits the corporation to carrying on only those non-pecuniary purposes and exercising only those powers permitted by the articles of incorporation.

56. Section 2.02(2)(a) reproduces the substance of s.155(3) of the present Act. Incorporators may wish to entrench certain provisions which would usually appear in the by-laws by including them in the articles, thus subjecting them to the special protective procedures against casual change that are provided for in Part 14.00.

57. The present Act (s. 155(2)) requires that the application be accompanied by the by-laws, which must include provisions dealing with certain matters (for example, "conditions of membership") including a provision (s.155(2)(c)) that repeal or amendment of by-laws shall not be enforced or acted upon until approval by the Minister. This results in delay, inconvenience, administrative cost, and needless restrictions upon flexibility in internal organization. The approach of the proposed CNPCA is to do away with the cumbersome administrative framework. Where controls are necessary there should be a statutory provision setting up standards and requiring compliance (for example, the audit of accounts and appointment of auditors).

58. Perhaps there are justifiable reasons for distinguishing by way of the name between an incorporated business and an unincorporated one. However, there are no apparent reasons for distinguishing by name as between the not-for-profit corporation and the unincorporated not-for-profit association. Most existing not-for-profit corporations do not have the word "incorporated" as part of their corporate names (s. 25(1) of the present Act not being applicable to the not-for-profit corporation). Section 2.06(1) of the proposed CNPCA allows the corporation, if it wishes, to have as the last word of its name "Incorporated" or "Incorporée", or the abbreviation "Inc.".

59. Section 2.06(2) authorizes the use of either a French or an English corporate name (as does s. 25(2) of the present Act), or a combined form of corporate name.

60. Section 2.06(3) deals with publication of the corporation's name, reproducing the substance of s. 25(3)(c) of the present Act (not applicable to not-for-profit corporations).

61. Section 2.07(1) is entirely new. Although the present Act does not authorize the reservation of names for proposed not-for-profit corporations, the practice of the Corporations Branch is to agree unofficially to reserve a suitable name. Section 2.07(1) merely legitimates this practice, and in so doing brings the federal legislation into line with corporate legislation in other jurisdictions. This change will assist incorporators outside Ottawa and is a desirable step towards facilitating the incorporation process.

62. One of the most awkward problems in the incorporation process is the choice of a suitable corporate name. The Corporations Branch, before accepting a proposed name, has to ensure that the name will not conflict with the name of an already existing corporation. This task is more difficult for the Director of the Corporations Branch in Ottawa than it is for his provincial counterparts because the Branch must have regard to all corporations in Canada. Substantial delays can occur while proposed names are being cleared. During this period the corporation is not in existence, it cannot execute enforceable contracts and the incorporators may be frustrated in carrying out the corporate purpose. Delays in effecting the incorporation at this time reduce the utility of the Canada Corporations Act. Although the problems in this regard are not nearly so critical for the not-for-profit corporation as with the business corporation, they may arise. For example, it may be necessary that a lease be executed very quickly. In some cases the problems of delay in incorporation can be sidestepped by the use of pre-incorporation contracts. Section 2.10 of the proposed CNPCA authorizes such contracts.

63. In addition, s.2.07(2) provides that a corporation may become incorporated with a designating number instead of a name. Through this device incorporators will be able to get a very speedy incorporation and the corporation, using the designating number as its name, will be able to execute contracts and do anything else required to get on with its activities. The corporation could then, if it wished, submit a proposed name in the usual form to the Registrar for checking and approval in the ordinary way. Once the suggested new name has been accepted, the corporation, following the usual change of name procedure, could abandon its designating number and operate thereafter under the new name. Alternatively, the corporation could if it wished, retain the designating number as its name.

64. Section 2.08(1) reproduces the substance of s.28(1) of the present Act, with two important changes. Under the present law a corporation may not be incorporated with a name that so nearly resembles an existing name "as to be calculated to deceive," which makes the question one of the intention of the incorporators rather than one of fact. The present Act was not always in this form—the current wording was introduced in 1934—though recent decisions have indicated that the courts interpret the phrase "calculated to deceive" as having substantially the same meaning as "likely to deceive": *Re F. P. Chappel Co. Ltd.*, [1960] O.R. 531; *Re C.C. Chemicals Ltd.* (1967), 63 D.L.R. (2d) 203. Section 2.08(1)(a) brings the language of the statute into line with its probable judicial interpretation.

65. Section 2.08(1)(a) prohibits a name that is "as prescribed, prohibited, non-descriptive, misdescriptive, deceptive . . ." This is a very important provision because, while incorporation is a matter of right, incorporation must not be *used* to mislead. In particular, the name of a board of trade or chamber of commerce corporation needs protection. See the commentary to Part 16.00.

66. Section 2.08(1)(b) is new, and is a consequence of the right to reserve a name granted by s. 2.07(1).

67. The remaining subsections of s. 2.08, and s. 2.09, are essentially re-enactments of ss. 28 and 29 of the present Act. Section 30 of the present Act has not been carried into either the proposed CBCA or the proposed CNPCA because the provision is considered to be functionless.

68. Section 2.10 is new, and is designed to change what is an unsatisfactory state of the common law. Although the problems in this regard for incorporators of not-for-profit corporations are not nearly as prevalent as with promoters of business corporations, there is sometimes a necessity for pre-incorporation contracts in the process of organizing the not-for-profit corporation. Therefore, there is advantage in having a provision such as s. 2.10 applicable to not-for-profit corporations. Under existing common law rules, a corporation cannot ratify a contract purportedly entered into on its behalf before its incorporation *Kelner* v. *Baxter,* (1866) L.R. 2 C.P. 174; *Repetti Ltd.* v. *Oliver-Lee Ltd.* (1922), 52 O.L.R. 315. Nor can it adopt such a contract; to become bound it must renegotiate a fresh contract after incorporation: *Natal Land Co.* v. *Pauline Colliery Syndicate,* [1904] A.C. 120.

69. At common law, a person dealing with the organizer of a not-for-profit corporation can be placed in the same position as the person dealing with "a promoter" of the business corporation who can find that not only does he not have a contract with the corporation, but he has none with the promoter, either because the latter expressly disclaimed liability, as in *Dairy Supplies Ltd.* v. *Fuchs* (1959), 28 W.W.R. 1, or because the court concluded that it was not the intention of the parties that the promoter should become liable, as in *Black* v. *Smallwood* (1966), 39 Austr. Argus Reports 405. The theory in such cases seems to be that the person dealing with the promoter intended to look to the corporation as his debtor and he cannot later turn round and select a more suitable alternative. In practice, this means that a great deal may turn upon the form of a contract, and minor differences in wording may be decisive of the rights and liabilities of the parties. And, with oral contracts, there are difficulties of proof and problems of conflicting testimony. Although the third party may sometimes have other remedies against the promoter—see *Wickberg* v. *Shatsky* (1969), 4 D.L.R. (3d) 540—these are not always adequate substitutes for contractual remedies.

70. The general effect of s.2.10 is to declare that the organizer is liable on a pre-incorporation contract unless he takes adequate steps to procure adoption by the corporation, or he makes an express disclaimer of liability, or a court makes an order relieving him of liability. The justification for this approach is that the organizer is usually in control of the pre-incorporation and immediate post-incorporation process and is able to protect himself.

71. If the organizer wishes to escape his obligations under the contract (and forfeit its benefits), he may, under subsection (2), procure the adoption of the contract by the corporation, if the contract is in writing. The reason for the provision that only written contracts are susceptible of adoption is simply that this seems the only way of ensuring full disclosure of the terms of the contract, which is an essential protection for the corporation. The corporation will have to make a deliberate decision to adopt the contract—surely the least that the members are entitled to expect—and the onus will be placed squarely on the organizer to ensure that this is done.

72. If the corporation does adopt the contract pursuant to subsection (2)(a) then, by subsection (2)(b), the organizer ceases to be bound by or entitled to the benefits of the contract. It is obvious, however, that an organizer can evade liability by procuring the adoption of the contract by a shell corporation with insufficient assets to meet its obligations under the contract. Section 2.10(3) accordingly permits a third party to apply to court for an order that, in effect, renders the purported adoption either wholly or partially ineffectual, and authorizes the court to impose liability upon the organizer notwithstanding the adoption of the contract by the corporation. Section 2.10(3) also permits imposition of liability upon a corporation that has not adopted the pre-incorporation contract, the effect of which may well be to give the third party a choice of debtors where ordinarily there would at best be only one. Nevertheless, it is desirable to confer a wide discretion upon the court to make adjustments. The courts will clearly not impose liability upon the corporation where the organizer has no effective control over it and the other party's sole basis for seeking an order is that he is stuck with an unsubstantial organizer. On the other hand, a fraudulent organizer should not be allowed to evade his obligations by hiding behind a corporation that he in fact dominates.

73. But s.2.10(3) does not authorize the imposition of liability upon an organizer who has expressly and in writing disclaimed liability, whether or not the corporation has adopted the contract. The inclusion of an express written disclaimer should make the third party fully aware of the kind of arrangement he is getting himself into, and there seems no case for allowing the court to override the provisions of the disclaimer. On the other hand, a valid disclaimer will not prevent the court from imposing liability upon the corporation in an appropriate case, even if it has not adopted the contract.

PART 3.00

CAPACITY AND POWERS

74. Part II of the Canada Corporation Act uses the term "corporation without share capital", the difference from the Part I company "with share capital" being obvious. However, the Part II corporation without share capital is commonly referred to as a "non-profit corporation" or "charitable corporation" possibly because these are the usual corporations without share capital and therefore most visible. These labels imply that the operations of such a corporation are not to result in a profit, that is, there must be expenses equal to or in excess of receipts so that no profit results. This erroneous understanding persists today. Although most not-for-profit corporations have the non-profit characteristic in their actual operations it is important to decide whether it is really the qualifying characteristic for incorporation. What is to be the range of permissible purposes for such a corporation? What is the desired legislative policy in allowing incorporation of not-for-profit corporations without share capital?

75. This question is posed because current trends in Canada suggest that the not-for-profit corporation is a vehicle of increasing practical importance and impact upon society. Furthermore, it is essential that the needs of the entity should determine the substance and form of the legislative and administrative framework and not the reverse. Although this question necessarily leads to consideration of the uses, both present and future, for the corporation, this report can only explore and hopefully stimulate in this regard rather than set forth a definitive review of such uses.

76. It is useful to defer consideration as to the uses and needs of such corporations for the moment and first consider the possible legislative approaches as to permissible purposes for not-for-profit corporations as well as the approach of the present Act in this regard. The existing legislation in Canada and in the United States suggests that there are two approaches which may be adopted for permitting purposes for not-for-profit corporations, being the functional and economic approaches respectively.

77. With the functional approach, the activities in which the organization is engaged is the test. The functional approach sets forth those activities for which incorporation is permitted. Although a review of the legislation in Canada and the United States would reveal many stated permissible purposes it seems there are, generalizing, nine classifying categories: benevolent and charitable, social, recreational, trade and professional, educational, cultural, civic, religious, and scientific (see generally "Permissible Purposes for Non-Profit Corporations", (1951), 51 Colum. Law Rev. 889 and "Non-Profit Corporations—Definition", (1963), 17 Vand. Law Rev. 336).

78. The economic approach considers the economic relationship between the organization and its members as the test. The economic relationship between the corporation and its members becomes the crucial factor in determining the scope of the right to incorporation. This approach, by itself, would allow incorporation for any lawful purpose except those involving pecuniary gain to the members of the corporation. Any lawful purpose, so long as it is a non-pecuniary purpose, is a permissible purpose.

79. There are problems with each approach. With respect to the functional approach, the problems commonly confronted by such legislation are three-fold in nature, namely,

ambiguities in the language employed in defining permissible purposes, omissions in the list of permissible purposes, and the problem of changing permissible purposes to accord with changing social values as to what are desirable purposes for such entities.

Permissible Corporate Purposes Under Part II of the Present Act

80. S.154(1) of the Present Act is the enabling statutory provision for incorporation as a not-for-profit corporation. Incorporation is specifically qualified by the provision "for the purpose of carrying on, without pecuniary gain to its members objects . . ." This requirement, constituting an economic approach is, of course, in recognition of the non-pecuniary purpose of the incorporation. It is coupled with what may be a functional approach through an enumeration of permissible purposes, the provision reading "objects, . . . of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or *the like* objects" [emphasis added].

81. Several comments can be made. First, the legislative intent appears to be liberal in employing the economic approach. The only substantive limitation is upon the carrying out of the purposes that same be ". . . without pecuniary gain *to its members*" [emphasis added]. This language taken by itself suggests that incorporation is permitted for any lawful purpose. Note that this would also include a *business purpose.* Incorporation is permitted as long as the basic purpose does not contemplate distribution of any earned profit to the members, that is, incorporation is sought for a non-pecuniary purpose.

82. This view is supported by the observation that section 16 (except paragraph (1)(r)) is made applicable to the corporation by s.157(1)(b). Section 16(1)(a) permits the corporation "to carry on any *other* business" [emphasis added], which literally suggests that the corporation can carry on a "business" as its prime purpose, although the language of section 16(1)(a) speaks of "other" before "business" because it has been drafted for the business corporation which would, of course, be carrying on a business as its purpose. The fact that s.16(1)(a) is made applicable to the not-for-profit corporation suggests the legislative intent is to allow the not-for-profit corporation to carry on a business whereby a profit can be earned to further the fundamental non-pecuniary purpose. Compare the approach of the present Act with s.4 of the Alberta Societies Act. R.S.A. 1970, c.397 which allows incorporation ". . . but not for the purpose of carrying on a trade or business."

83. What is the purpose in specifically listing permitted objects in the present Act? They are very broad, particularly with the inclusion of the first object "national" and the concluding phrase "or the like objects". The legislative intent appears to be to simply list the objects as examples, enabling incorporation to take place subject to the necessary restriction that incorporation be for a non-pecuniary purpose.

84. Thus, it is arguable that the legislative intent of s.154(1) is simply to employ the economic approach as the criterion for incorporation. There is, however, an interpretation problem in the language used to impose this requirement, namely, as to what is meant by "pecuniary gain".

85. The problem implicit to the economic approach is that of achieving a precise definition "for without pecuniary gain" to members so that there is no room left for ambiguity. At least three possible interpretations can be given to the phrase in s.154(1) of the present Act "without pecuniary gain to its members". It may preclude any pecuniary benefit to members *in any form whatsoever,* which interpretation, for example, would preclude a trade associa-

tion from being incorporated. Secondly, the words may be intended to preclude direct and indirect pecuniary gain, for example, by the corporation reducing prices for goods or services to its members (as with a co-operative association). Thirdly, the words may simply be intended to preclude the corporation from paying dividends or making a direct return on the investment of members. It is obvious that the first test is more stringent than the second, and the second more stringent than the third. In other words, the third test provides the narrowest view as to what constitutes a "pecuniary gain". The third test, i.e. the precluding of *direct* pecuniary gains means that no part of the assets, income or profit *of the corporation* can be distributable to or can enure to the benefit of the members, directors or officers of the corporation except to the extent permitted otherwise by the statute. The administration of the present Act suggests that the intention is to allow incorporation as a not-for-profit corporation so long as the third test is met, and so long as incorporation is not sought to achieve the indirect pecuniary gain of a co-operative association, incorporation of which is afforded through the Canada Cooperative Associations Act, 1971 S.C., c.6. The incorporated co-operative association is not truly a not-for-profit corporation (see the discussion in the Introduction to this report).

The Proposed Scope for Incorporation of the Not-For-Profit Corporation

86. If incorporation is sought for the purpose of carrying on a business so as to make a profit which is to be distributed to the shareholders the entity must be a business corporation with share capital. It is implicit to the Part II corporation without share capital that it cannot be formed for the purpose of carrying on a business for a profit with a view to distribution of that profit to its members. The corporation, by virtue of its inherent nature has a prime purpose which is non-pecuniary in nature, hence it is to be formed without share capital as the appropriate structure to facilitate such purpose. A Part II corporation is inherently of a nature that it is formed for a non-pecuniary purpose. What must be decided is whether, given this inherent limitation, any lawful purpose (which would include any lawful business purpose, so long as the prime or ultimate purpose is non-pecuniary) should be permitted for such a corporation. There is general agreement that it is desirable for Parliament to authorize corporations to be formed for non-pecuniary purposes. The difficulty for Parliament is to decide upon the proper scope of the privilege of incorporation. Realizing that the necessary limitation for the Part II corporation must be that it cannot be formed for a pecuniary purpose, to what extent should there be any further limitation upon the privilege of incorporation?

87. This basic question necessitates a consideration of the relative merits of the functional and economic approaches. The answer must depend upon whether incorporation is to be regarded as a privilege to be accorded on the basis of the legislators' or administrator's notion of worthiness of the activity undertaken or whether it is to be regarded as a form of organization to be withheld only on the basis of policies which do not vary with the type of activity in which an unincorporated group engages or seeks to engage. Should incorporation be allowed to take place generally for any lawful, other than pecuniary, purpose?

88. We have seen that the one limitation inherent to the Part II corporation is that it must be formed for a non-pecuniary purpose. If it were otherwise, the entity sought by the incorporators must necessarily be the company with share capital, so as to be able to distribute the profits as dividends or otherwise to shareholders to fulfil its pecuniary purpose. However, given this single inherent limitation, it does not necessarily follow that there must be any further limitation upon the scope of permissible purposes, or that the permissible purposes must be enumerated. The corporation should be able to carry on a business and earn a profit within its purposes as long as earning a profit is incidental to its fundamental non-pecuniary purpose.

89. If a statute adopts simply the economic approach a not-for-profit corporation can have as a purpose any lawful business or can exercise the power to carry on a lawful business activity, subject to the inherent non-pecuniary purpose limitation. If simply the economic approach is adopted, the descriptive phrase "non-profit" corporation is misleading, the more correct description being "not-for-profit" corporation. The corporation can earn a profit incidental to its fundamental purpose but cannot be formed simply to earn a profit. It cannot have as its fundamental purpose a pecuniary purpose because incorporation is only sought in such an instance when the objective is to distribute the profit earned to the members.

90. It must then be considered as to what interests can adversely be affected by allowing incorporation of a not-for-profit corporation for any lawful purpose. The two interested parties are creditors and the government through its interest in tax revenues. In respect to creditors, because the amount of capitalization required for the business corporation is insignificant creditors are in no way prejudiced because of incorporation without share capital. In respect to the second interested party, the government, there is no automatic exemption in respect to taxation simply because of incorporation without share capital. The further possible concern that the not-for-profit corporation may provide unfair competition to the business corporation should only arise in deciding as to the merits of granting or maintaining a tax exempt status. No attempt is made in this report to suggest or definitively treat the tax status of not-for-profit corporations. Such status is of obvious importance, however, tax status should flow from the corporation's character and the manner in which it functions. The character of the corporation should not be determined by the tax legislation or tax policy considerations. Taxation of the not-for-profit corporation must be considered simply as a matter of tax policy which must take into account the merits of a privileged position for such corporations (or particular types thereof) because of their non-pecuniary purpose, and the concern about unfair competition resulting from any such privileged status conferred. See generally, Volume 4 of the *Report of the Royal Commission on Taxation* (1966), pp. 128-141.

91. At the present time not-for-profit corporations are formed to do what is essentially a business activity, and others can and do incidentally carry on business activities although such activities are necessarily not for the purpose of making a profit for the pecuniary benefit of the members. A dramatic example in the public sphere would be the Canadian Film Development Corporation 1970 R.S.C. c.C-8. Canada is experiencing an increasing use of not-for-profit corporations formed for a business or near-business purpose, that is, a purpose which is commonly thought to be only a purpose for the business corporation formed to make a profit for the pecuniary benefit of its shareholders. A business activity therefore can either constitute or complement an important non-pecuniary purpose.

92. In considering the economic and functional approaches of existing legislation it is apparent therefore that it is really the economic approach which is fundamental to the not-fot-profit corporation because of its inherent purpose and nature and although such corporations are commonly spoken of and conceptualized in terms of the functional approach such approach is unnecessary and undesireable to legislation enabling incorporation. The single, but essential, criterion to meet the requirements of enabling provisions of the proposed CNPCA should be that incorporation is being sought for a non-pecuniary purpose. It may well be that the carrying on of a business should be a factor considered by tax legislation, however, such consideration should not preclude incorporation taking place.

93. The statutory provisions should simply set forth the requirements for incorporation. Incorporation must be for a non-pecuniary purpose, that is, a purpose other than for the

production of financial profit, gain or benefits for members, directors, officers or any other persons that might be associated with the corporation. No part of the assets, income or profit of the corporation can be distributable to or can enure to the benefit of the members, directors or officers of the corporation except to the extent permitted otherwise by statute. Section 2.02(1)(f) of the proposed CNPCA requires this to be set out in the articles of incorporation. Such approach makes it clear that the legislative intent is to allow incorporation for any lawful purpose, provided that the basic purpose of the corporation is not to make money, a non-pecuniary purpose being one to obtain a public or charitable benefit, or a non-financial benefit to a particular group of persons known as members. These proposals are consistent with the provisions of the present Act, apparent existing legislative intent and policy, and the existing practice and activities of not-for-profit corporations. This proposal does suggest new statutory provisions, and much more explicit provisions, so as to better effectuate legislative policy, thereby rendering the enabling legislation more functional for both its intended purposes and the needs of not-for-profit organizations.

94. Therefore, as with the proposed CBCA, the proposed CNPCA abandons the traditional concept of corporate objects and powers, Not-for-profit corporations are and should be incorporated simply as a matter of course with unlimited objects, subject to the overriding requirement and limitation that incorporation is being sought for a non-pecuniary purpose. Section 3.01 of the proposed CNPCA affords the not-for-profit corporation the legal capacity of a natural person similar to the capacity proposed by the proposed CBCA for the business corporation. The corporation itself should decide whether it wants to restrict itself in the carrying on of activities or the powers it may exercise.

95. This express recognition by the proposed CNPCA of the extent to which the not-for-profit corporate entity may be used will better indicate the flexibility of this medium of organization. The government itself should recognize that the general Not-For Profit Corporations Act, the proposed CNPCA, will provide a suitable enabling statutory framework for many government sponsored not-for-profit corporations, such as, perhaps, the Canadian Film Development Corporation, 1970 R.S.C., c. C-8, the Canada Council Corporation, R.S.C. 1970, R.S.C. c. C-2, or the Company of Young Canadians, 1970 R.S.C., c. C-26 all of which were incorporated by Special Act.

96. The use of the general corporation statute to enable the government to incorporate such entities increases to a considerable extent the speed by which incorporation can take place, the ability of the government to use the corporate form with flexibility through greater ease of amendment of internal corporate structure, and reduces the present necessity of incorporation by Special Act, with consequential cost in time, money and energy. In addition, there is a greater tendency toward a single, most suitable, unified corporation law for not-for-profit corporations. Parliament would, of course, continue to have authority in respect to the crucial matter of appropriations for such corporations, and could hold the government accountable for its actions in the creation and administration of any such corporations.

97. The government could incorporate such corporations whenever it seeks to fulfil one or more public purposes outside of the usual government establishment. The government might furnish the financial resources, provide some or all of the management, but only indirectly control the operations. A corporation would be set up outside of the government in order to draw upon private management techniques, to make possible greater citizen participation in the management, and to act as a point of contact with the private sector of the community, which often can be accomplished with greater flexibility through a corporate

entity than with a government department. The essential characteristic of such a corporation is that the government assumes a position similar to that of the owner of the business corporation in that the government exercises significant control. The corporation can be considered a charitable or public non-pecuniary purpose corporation which may have the purpose of carrying out a business activity. However, the principal reason for its formation is to accomplish something other than making money. Such corporations have to date been created in Canada through Special Acts rather than through Part II of the present Act. It is because such corporations may not be within the common law definition of "charitable"—see the discussion in connection with *Pemsel* v. *Special Commissioners* [1891] A.C. 531 in the Introduction to this commentary—that the definition for the purposes of the proposed CNPCA (s. 1.02(6)(a)) extends the meaning to include a corporation the non-pecuniary purpose of which is ". . . otherwise primarily for the benefit of the public . . .". Clearly, such a corporation should be subject to the same regulatory provisions of corporation law as that for the charitable corporation within the meaning of the common law.

98. There is merit in the proposed CNPCA distinguishing between not-for-profit corporations on functional grounds. Not-for-profit corporations should be differentiated according to criteria relevant in the circumstances. Some of the regulatory provisions of the proposed CNPCA are necessary but appropriate only for the corporation formed for a charitable non-pecuniary purpose (for example, provisions requiring financial disclosure to the public). The proposed CNPCA therefore must necessarily include provisions which provide a classifying and channeling function as to the type of corporation (membership or charitable) being formed for a non-pecuniary purpose.

99. Therefore, there must be a clearly recognized distinction between the creation of not-for-profit corporate bodies, including the internal rights of members, and the regulation of corporate activities. In principle, the operative procedures for incorporation should be the same whatever the intended corporate activities. Similarly, the rights and duties of directors, officers and members should not vary because of those activities. However, the nature and extent of regulation of corporate activities will be different depending upon those activities.

100. Section 1.02 (6)(a) and (b) of the proposed CNPCA provide for two types of not-for-profit corporations. The first is the "charitable corporation" being the corporation formed for a charitable (whether an operating charity or a charitable foundation) non-pecuniary purpose. The second is the "membership corporation" being intended to cover the usual membership type of corporation whose activities by or for members are the predominant aspect. These definitions accord with the lengthy discussion in the Introduction and this Part. The concept of this approach, as well as the language to some extent, is taken from the NY N-PCL (s.201). The proposed CNPCA provides for two basic types of not-for-profit corporations. However, the New York Act provides for an additional basic type, being one formed "for any lawful business purpose". This was thought necessary in New York because of the limitations of the legislation pre-existing the NY N-PCL. However, as has been discussed, under the proposed CNPCA as under the present Act, either a membership or a charitable corporation can carry on a business activity, provided it is formed for a non-pecuniary purpose. The approach of the proposed CNPCA requires categorization into only two basic types of not-for-profit corporations, "charitable" and "membership" corporations.

101. As the economic approach is the approach expressly adopted by the proposed legislation it is, of course, necessary that a precise statutory definition be provided as to what is meant by "non-pecuniary purpose" or "without pecuniary gain". This would be required

in any event even if the functional approach were to be employed as the non-pecuniary purpose restriction is always inherent to the type of corporation under consideration. The definition of non-pecuniary purpose provided by s.1.02(1) makes it clear that what is intended is to preclude direct pecuniary gain and indirect pecuniary gain such as that derived through a cooperative association, incorporation of which is properly provided for by separate statute. The proposed CNPCA makes it clear that there is no intention to exclude from the benefits of incorporation those associations such as trade associations (many of which have been incorporated under Part II of the present Act) the activities of which may result in pecuniary benefit to the members.

102. Section 2.02(1)(f) provides that a corporation can be formed under the proposed CNPCA for a non-pecuniary purpose, defined by s.1.02(1) as being "exclusively for a purpose or purposes other than the making of a profit for the pecuniary gain or benefit of members" and "no part of the assets, income or profit of which is distributable to, or enures to the benefit of" its members, etc., except to the extent permitted under the statute. The quoted provision (the latter part is similar in wording to s.102(5) of the NY N-PCL) has two advantages over the present wording of the s.154(1) "without pecuniary gain" limitation. First, it is more descriptive and definitive than the present Act in respect to the restriction upon pecuniary benefit to the members. The benefits received through an incorporated trade association would be clearly permissible under this provision of the proposed CNPCA. Secondly, the quoted provision expressly contemplates exceptions to the restriction but only to the extent expressly authorized by the legislation. The present Act is ambiguous as to whether exceptions are permitted and, if permitted, to what extent.

103. As the economic approach is the inherent limitation which must necessarily govern incorporation there is need to employ statutory language setting forth precisely the limitation upon benefits to members, and this limitation must allow for any desired exceptions (for remuneration to directors and members and distribution of surplus assets upon dissolution or surrender) and specify the permitted extent of any such exceptions. Two examples of the confusing provisions of the present Act as to the extent of exceptions to the "without pecuniary gain" limitation of s.154(1) are illustrative of the need for express and clear statutory provisions in this regard.

104. For example, problems arise in construing the "without pecuniary gain" phrase in s.154(1) of the present Act in respect to remuneration of directors and members. Note that s.155(2)(d) requires the by-laws to include any provisions in respect to the matter of remuneration of "directors, trustees, committees and officers". The unqualified "without pecuniary gain" statutory limitation imposed by s.154(1) suggests literally that any person in receipt of a salary from a corporation should not be a member. Further, the present Act is not explicit as to whether directors are required to be members. Section 154(1) provides that the applicants "become members of the corporation thereby created" and s.155(1)(e) requires the applicants to be the first directors of the corporation. There is no specific provision clearly requiring that other than the first directors be members. This can, of course, be accomplished through the by-laws as permitted by s.155(2)(d). Contrast this confusion with s.316(1) of the Ontario Act which requires a director to be a member, and s.127(2) of the Ontario Act which qualifies the limitation upon the corporation that it be "without the purpose of gain for its members" imposed by s.127(1) by providing expressly in s.127(2) that both directors and members can receive reasonable remuneration and expenses for their services to the corporation.

105. A second example arises in the event of dissolution of the corporation. Can the surplus assets be distributed among the members and if so, to what extent, or must the assets be donated to similar undertakings? On the one hand there is the "without pecuniary gain" language of s.154(1) of the present Act which limitation is included in the charter, but confusion is created by the inappropriate provisions from Part I, namely, ss.16(1)(s), 32(1)(a), and 33, made applicable to the Part II corporation (see Appendix "A"). The result is that the answer to the question as to what happens to surplus assets upon dissolution is uncertain. In the absence of a restriction in the charter (a restriction being required to be included in the charter by administrative practice in respect to charitable corporations), upon dissolution of a not-for-profit corporation the members might claim to be entitled to their respective share of the assets. Clearly, this should not be permitted to the charitable corporation. Straightforward statutory provisions are needed in this regard. The power to distribute among members upon dissolution should be limited by statute to the membership corporation (see s.17.19 of the proposed CNPCA). However, this is not satisfactorily provided for by the present Act.

106. Furthermore, although it is arguable because of the purposes permitted to the charitable not-for-profit corporation by its charter and the incidental powers conferred by s.16(1)(s) of the present Act that a charitable corporation can dispose of its assets upon dissolution to similar undertakings (or through the aid of the common law *cy près* doctrine), express statutory provisions should be provided in this regard. Assuming that upon dissolution there is a restriction upon distribution to the members, the present Act is very unclear as to what is to happen otherwise to the undistributed surplus assets. There should be clear statutory machinery determining where the undistributed surplus assets of the charitable corporation should go upon dissolution (see s.17.19 of the proposed CNPCA).

107. Part 3.00 is substantially similar to Part III of the proposed CBCA, except for the necessary changes in terminology to render the statutory language appropriate to the not-for-profit corporation. The arguments and reasons set forth in this report for such provisions are taken almost *verbatim* from Volume I of *Proposals for a New Business Corporations Law for Canada.* Although the problems discussed have arisen in practice simply in respect to the business corporation, the same issues are present for the corporation incorporated under Part II of the present Act. The suggested manner of resolution of such problems is therefore similarly appropriate for the not-for-profit corporation.

108. Part 3.00 of the proposed CNPCA deals with three problems that have plagued Anglo-Canadian corporation law for over a century: (1) the *ultra vires* doctrine, (2) the constructive notice doctrine, and (3) the so-called rule in *Royal British Bank* v. *Turquand* (1856), 119 E.R. 886.

109. Furthermore, the approach of Part 3.00 resolves the confusion as to whether a not-for-profit corporation can carry on a business activity, already discussed at length in the commentary to this Part.

110. In terms of the *ultra vires* doctrine a corporation has the legal capacity to do only such acts as are expressly or by reasonable implication authorised by its objects clause. Acts outside that range are totally void for want of legal capacity in the corporation, and cannot be set right even with the unanimous assent of all members or shareholders: *Ashbury Ry. Carriage & Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653.

111. The original purpose of the *ultra vires* doctrine was to place limits upon the scope of the activities open to a corporation, in the interests of its members or shareholders and creditors and of the public generally. Its effectiveness in achieving that purpose has been largely frustrated, however, as ingenious corporate draftsmen included every conceivable type of activity or business in the objects clause and, by using general phrases, authorised the corporation to carry on the widest possible range of activity—see, for example, *H & H Logging Co. Ltd.* v. *Random Series Corporation Ltd.* (1967), 63 D.L.R. (2d) 6; *Bell Houses Ltd.* v. *City Wall Properties Ltd.*, [1966] 2 All E.R. 674. The result has been that the protection afforded to those whom the doctrine was designed to protect have been minimal: See generally Getz, *Ultra Vires and Some Related Problems* (1969), 3 U.B.C. Law Rev. 30. On occasion the *ultra vires* doctrine works severe hardship, not only upon creditors—*In Re Jon Beauforte,* [1953] Ch. 131—but also in certain circumstances upon members or shareholders as well, because unauthorised transactions are void for want of legal capacity.

112. In any event, there has always been some doubt as to whether, and if so to what extent, the *ultra vires* doctrine applies to corporations incorporated by grant of letters patent under the Canada Corporations Act. The doubt is based upon a suggested analogy between letters patent corporations and corporations created by Royal Charter at common law. See *Bonanza Creek Gold Mining Co.* v. *R.*, [1916] 1 A.C. 566; and generally, Mockler, *The Doctrine of Ultra Vires in Letters Patent Companies,* in Ziegel (ed.), *Studies in Canadian Company Law,* 1967, p. 231.

113. With the abandonment in the proposed CNPCA of the letters patent technique of incorporation, and the substitution for it of incorporation by registration, most of the old learning becomes redundant, and therefore it is not reviewed here.

114. Three principal problems are considered in relation to *ultra vires.* First, it is sought to make it clear that a corporation incorporated under the proposed CNPCA does not suffer from any limitations upon its legal capacity. This is accomplished by s.3.01(1) which declares that a corporation has and is deemed always to have had the legal capacity of a natural person of full legal capacity. This is admittedly a clumsy formulation but, read together with s.3.02(3) which declares that acts in violation of express restrictions in the articles of incorporation shall not be invalid, effectively disposes of *ultra vires.*

115. The second problem which is considered is the simplification of the articles of incorporation and, especially, the elimination of the "objects" clause. This has been done in the proposed CBCA for business corporations, and has the virtue of eliminating practices whose sole effect is to mislead. This point is true, although of lesser importance, in respect to not-for-profit corporations. In respect to the not-for-profit corporation there is no overriding advantage to an "objects" clause and, therefore, as with the proposed CBCA for the business corporation, the proposed CNPCA does away with the "objects" clause. This is accomplished by s.3.01(1). Despite the apparently unlimited scope of the rule, it should be noticed that it does not significantly differ *in effect* from the multi-paragraph "objects" clauses so widely found in modern corporate constitutions. Its great merit is that it is simple and not likely to mislead anyone.

116. Account must also be taken here of s.3.02 which makes it plain that every corporation has all the powers of a natural person unless there is some express restriction of power in the articles. This, in effect, achieves much more simply what is sought to be achieved by s.16(1) of the present Act.

117. The combined effect of ss.3.01 and 3.02 is to make the articles of incorporation much simpler.

118. A third problem to consider in relation to *ultra vires* is that of conferring adequate protection upon members against unauthorised transactions, while at the same time safeguarding the interests of creditors. This objective is sought to be accomplished through the remedy of an application to the court, provided by s.19.04. The members may be reluctant to act on their own initiative as their interest in the corporation is simply non-pecuniary but the Registrar is also entitled to apply to the court. The public has an interest in respect to the activities of the charitable corporation (see the commentary to the Introduction and to Part 13.00) which requires protection irrespective of the views or inaction of the members. Similarly, a disposition of property of the corporation other than in the ordinary course of its activities requires consultation with the membership in accordance with s.14.16(2).

119. Section 3.03, which is new, is designed to clarify a doubt that exists whether the so-called doctrine of constructive notice applies to the contents of all documents required to be filed in a public registry. Whether this doctrine applies to public documents under the present Act is not clear, although s.10 appears to have this effect. See also *Re W. N. McEachren & Sons Ltd.*, [1933] 2 D.L.R. 558. The application of the doctrine to commercial transactions in the absence of express legislation has always been viewed with some reserve, and there seems wide agreement that the mere fact of filing in a public registry should not, *per se,* fix the public with notice of the contents of the register. Section 3.03 adopts this view, leaving it open to the court, in an appropriate case, to apply the doctrine of constructive notice if there is a good reason for so doing. It may be that prudent people do inspect public documents in their own interests. That, however, is a far cry from imposing upon them as a matter of course a legal duty to do so—and that is the effect of the doctrine of constructive notice.

120. Section 3.04 is new, and is based upon s.142 of the Draft Ghana Companies Code. The purpose of the section is to attempt a statutory statement of the effect of the so-called rule in *Royal British Bank* v. *Turquand* (1856), 119 E.R. 886. In terms of that decision, a person dealing with a corporation is entitled to assume that its internal procedures have been properly complied with. If a person dealing with a corporation was bound to satisfy himself that all formalities required by the corporate constitution had been properly satisfied, the efficient conduct of business would be difficult, if not impossible. The policy of the decision in *Turquand's* case is to relieve the outsider of any obligation to enquire whether there has been due compliance with internal procedures, and that policy is embodied in this section.

121. Of course, if a third person knows that there has been some internal irregularity or, in all the circumstances ought to know, he will not be entitled to claim the protection, and this is dealt with by the proviso to s.3.04. It should also be noted that the section is drafted to make it clear that *anyone* is entitled to its protection, a matter which was unclear at common law—see Prentice, *The Indoor Management Rule,* in Ziegel (ed.), *Studies in Canadian Company Law,* 1967, pp. 322-3.

122. The first part of s.3.04(d) merely restates the well established common law rule that the protection afforded by the decision in *Turquand's* case is not lost if the person with whom the outsider dealt was never properly appointed—*Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869. The second part of the paragraph merely states a well known rule

of agency law, namely, that a person dealing with an agent is entitled to assume that that agent has the authority usual to persons in his position.

123. Section 3.04(e) modifies the common law rules. In *Ruben* v. *Great Fingall Consolidated,* [1906] A.C. 439 Lord Loreburn stated that the decision in *Turquand's* case "applies only to irregularities that might otherwise affect a genuine transaction. It cannot apply to a forgery." The justification for this view was that the outsider had better means of protecting himself against the loss. This view has been strongly questioned by a number of commentators—see, for example, Prentice, *supra* at pp. 339-340—and is accordingly modified in s.3.04(e), by which if the dishonest officer has been given authority to issue genuine documents and warrant their genuineness, the outsider is protected if the officer abuses his authority by uttering a forgery.

PART 4.00

REGISTERED OFFICE AND RECORDS

124. Section 4.01 reproduces, in part, the provisions of s.24 of the present Act. Section 2.02(1)(b) of the proposed CNPCA requires the articles of incorporation to specify the place within Canada where the registered office of the corporation will be situated. Subsections 4.01(1) and (2) require the corporation to specify the address of the corporation within that place and to notify the Registrar in the prescribed form of this address and of any changes of address.

125. The place where the registered office is situated may be changed by an amendment to the articles of incorporation in accordance with the procedure for amendment specified in Part 14.00. The address itself, however, may be changed by a decision of the directors under subsection (3) and compliance with the formalities prescribed in subsection (4).

126. Section 4.02 is largely a consolidation of ss.109, 112 and 117 of the present Act (only s.109(1)(a) to (d) of the present Act is applicable to Part II corporations), except that the nimiety of s.117(1) has been expunged. This provision corresponds substantially to s.20 of the proposed CBCA.

127. Section 4.02(1)(d) of the proposed CNPCA is similar in purpose to s.20(1)(d) of the proposed CBCA (requiring a securities register to be maintained at the corporation's registered office), however, the definition of "security" in s.1.02(1) limits that term for the not-for-profit corporation to mean simply "a certificate evidencing a debt obligation of a corporation".

128. Section 4.02(1)(e) requires the not-for-profit corporation to maintain a register of members. The register must contain the names, addresses and occupations of all members, active and otherwise, and the dates on which each became and ceased to be a member. This provision is similar to s.109 (1)(b) and (c) of the present Act, applicable to Part II corporations.

129. Subsections 4.03(1) and (2) parallel s.111(1) of the present Act and s.21(1) of the proposed CBCA, with one change. The right of inspection by persons other than members, creditors and the Registrar is limited to simply the charitable corporation. The right of inspection by anyone in respect to the charitable corporation is necessary to further the policy of affording maximum disclosure in respect to such corporations.

130. Section 4.03(1) does not afford the right to inspection in respect to the membership corporation beyond simply members and creditors. The public's interest in such matters is limited to the charitable corporation.

131. Section 4.03(2) is new. Members should be entitled to receive an up-to-date copy of the constitution of the not-for-profit corporation, similar to the right of the shareholder of the business corporation in which he has invested (s.21(2) of the proposed CBCA).

132. Section 4.03(3) is based upon s.111.1 which was added to the present Act in 1970. It represents not only an important complement to the rights conferred by subsections (1)

and (2) but also serves other important purposes. The comment in Appendix "A" in respect to s.111.1 of the present Act makes the argument that provisions having the substantive content of ss.109(2) and 111(1) of the present Act must also be made applicable to the not-for-profit corporation to render s.111.1 (s.21(3) of the proposed CBCA) meaningful. The reasons for making these provisions applicable to the not-for-profit corporation are in part different from the reasons why the provisions are necessary for the business corporation. The provisions may be sometimes used by a member as a piece of machinery ancillary to the proxy provisions in Part 12.00, and to the right conferred upon members to requisition meetings under s.11.12 and to propose amendments to the articles and by-laws under 9.02(6), 11.06 and 14.02, by making it possible to communicate with members for the purpose of influencing votes (although this would not, of course, be to increase ownership through acquiring shares, as often would be the case with the business corporation).

133. With the charitable corporation there is a further reason for access to the list of members. The membership of the charitable corporation should be open to scrutiny by the public generally. The wording of s.21(9) of the proposed CBCA is sufficiently broad to allow scrutiny of the membership list without the scrutinizer having to then actively influence votes so long as the list is not otherwise used for improper purposes. This protection is needed for the not-for-profit corporation as well. Therefore, s.4.03(8) of the proposed CNPCA is similar to s.21(9)(a) of the proposed CBCA. Under s.4.03(3)(b) any person wishing to communicate with the members of a charitable corporation for the purpose of influencing the voting of members may obtain a copy of a list of members upon payment of a reasonable fee and the sending of the affidavit required by subsection (6). The availability of their facility will enhance the position of both members and the public in respect to the charitable corporation. Note that the right to a list of members under this subsection is not confined simply to members of the charitable corporation, but is available to any person provided the list is not used for a purpose other than that permitted by s.4.03(8). The right extended by s.4.03(3)(b) to "any person" to a list setting out the names and addresses of members only applies to charitable corporations. Section 4.03(3)(a) limits the right in respect to membership corporations to simply the members as no person beyond the membership has a justifiable interest in either having a list of members or influencing voting.

134. Section 4.04 has no counterpart in the present Act. It is based upon comparable provisions in the legislation of the United Kingdom and Ontario which were introduced to reverse the effect of the decision in *Hearts of Oak Assurance Co.* v. *Flower & Son,* [1936] Ch. 76 that looseleaf ledgers were not "books" within the meaning of the Act, and inadmissible in evidence as such. There is no justification for retaining this rule, especially in view of modern record-keeping techniques, and s.4.04(1) is drafted to recognize, subject to the qualification mentioned and to the protections required in subsection (2), modern techniques of data storage and retrieval.

135. The proposed CNPCA in s.4.05 (as with the proposed CBCA in s.23) makes clear that the use of a seal is entirely voluntary, and documents signed in the ordinary way by authorized corporate officers are completely valid.

PART 5.00

CORPORATE FINANCE

136. Part 5.00 of the proposed CNPCA deals with (1) the not-for-profit corporation's raising of current and non-current funds, and (2) the administration of corporate property and the disposition of corporate property other than by way of fundamental changes or upon liquidation and dissolution. There is very little in the present Act in the way of statutory provisions providing a framework pertaining to such essential matters, with resulting uncertainty and confusion.

137. In respect to the first topic, the raising of current and non-current funds, the present Act provides through s.154(1) that the corporation be without share capital, however, has few provisions dealing otherwise with these matters for the Part II corporation. Section 155(2)(a) provides that "conditions of membership" be dealt with in the by-laws. Sections 65 to 73 dealing with "borrowing powers", etc. are incorporated by reference via s.157(1)(c) for the Part II corporation. In contrast, the N.Y. N-PCL and, to a lesser extent, the Ontario Act provide extensive provisions in respect to such matters for the not-for-profit corporation. There are, of course, provisions dealing with this topic for the business corporation through both Part I of the present Act (ss. 13, and 34 to 73 inclusive) and Part V of the proposed CBCA. The proposed CNPCA draws upon all of these sources with a view to providing an uncomplicated, yet comprehensive, statutory framework for the not-for-profit corporation in respect to the raising of current and non-current funds.

138. Section 5.01 is similar to s.24(3) and (4) of the proposed CBCA and ss.121 and 126 of the Ontario Act. However, unlike the Ontario Act, the proposed CNPCA (as with the proposed CBCA) requires that any provision for more than one class of members, and the rights, privileges, restrictions and conditions attaching to membership in the different classes, must be set out in the articles, and cannot be provided for simply in the by-laws. If there is only one class of members, membership must carry a right to vote. If there is more than one class, the members of each class have the right to vote unless the articles otherwise provide, but there must always be one class carrying the right to vote in an election of directors and auditor. Note section 11.09(1) which provides further that each member is to have one vote, unless the articles otherwise provide. Section 5.01(3) makes it expressly clear that there is no limit on the number of members of a corporation, unless the articles of the corporation otherwise provide. Section 5.01(3) and section 11.09(1) are similar to ss.126 and 124 of the Ontario Act respectively except that s.5.01(3) and s.11.09(1) provide that the matters discussed are to be dealt with in the articles of incorporation, and therefore cannot be provided for simply in the by-laws. Although the matters discussed can be dealt with in the by-laws under the present Act, the by-laws and any subsequent changes in respect thereto require the Department's approval (s. 155(2)(c)).

139. Section 5.02(1) and (2) are similar to s.125 of the Ontario Act, and are provided to make it clear by way of an express statutory provision, where the power lies, and the process, for the creation of memberships. Section 5.02(3), allowing for the issuance of membership certificates or cards, expressly authorizes what is done extensively in practice, whether done pursuant to an express by-law provision (as authorized by s.155(2) of the present Act) or not. If the articles provide for more than one class of members, the cards or certificates issued

must state the rights, etc. of each class or (subsection (5)) that the class is subject to rights, etc. which can be ascertained from the corporation upon demand.

140. Section 5.03 renders non-transferable, unless the articles or the by-laws otherwise provide, a membership interest in a corporation. This is similar in effect to s.5.02(d) of the N.Y. N-PCL and section 129(1) of the Ontario Act. It will be unusual for the members of a membership corporation to desire membership interests to be transferable. A membership interest in a membership corporation may be transferable. Upon dissolution of a membership corporation a member may receive the value of his membership interest (s.17.19). There cannot, of course, be any proprietary interest in the charitable corporation through membership. A membership interest is purely of a personal nature and therefore will almost always be non-transferable. However, sometimes the members of a privately created foundation will want the membership interests of the corporation to be transferable, particularly upon death, so that the creator of the foundation can determine who will control the foundation upon his death.

141. Note that section 9.02(2)(a) to (f) provides explicitly to the directors the authority to pass by-laws, not contrary to the Act or to the articles of the corporation, regulating the admission of members, fees and dues of members, the issue of membership cards and certificates, the suspension and termination of memberships and the transfer of memberships, if transferable. This provision is substantially similar to s.130(1)(a), (b), (c), (d) and (e) of the Ontario Act.

142. Section 5.04 is adapted from s.25(1), (3) and (4) of the proposed CBCA. However, the reasons for the inclusion of such adapted provisions in the proposed CNPCA are different from the reasons for their inclusion in the proposed CBCA. The present Act affords borrowing powers, etc. to the not-for-profit corporation through its directors to enable the raising of non-current funds by rendering ss.65 to 73 inclusive applicable to the Part II corporation via s.157(1)(c). Section 5.04, coupled with s.14.16, provides the substance of ss.65 and 66 of the present Act. These provisions are included in the proposed CNPCA to provide the power to raise non-current funds within a statutory framework which states expressly the nature of the consideration to be received when securities are issued, thereby enhancing and protecting the non-pecuniary purpose of the corporation. Note that the definition of "security" by s.1.02(1) of the proposed CNPCA limits the meaning of the term for the not-for-profit corporation to "a certificate evidencing a debt obligation" of the corporation.

143. Section 5.05(1) is taken from s.35(7) and (8) of the proposed CBCA which re-enacts in a shorter and more intelligible form s.67 of the present Act (applicable to Part II corporations via s.157(1)(c)). At common law, apparently, a corporation could not re-issue a debenture which it had previously redeemed: *In re George Routledge & Sons Ltd.*, [1904] 2 Ch. 474. This is not in accord with modern practice, and though the practice would be very uncommon as compared with the business corporation, s.5.05(2) permits the practice whereby not-for-profit corporations can acquire their own debentures and later pledge them as security for a fresh borrowing. In this way the new lender can be given, quickly and cheaply, the same security as the original lender.

144. Section 5.06 provides that a not-for-profit corporation is precluded from lending to, or guaranteeing a loan for a member, director or officer, or an associate of any such person. "Associate" is defined in s. 1.02(1). Section 5.06 is adapted from s. 40 of the proposed CBCA, but, unlike s.40 of the proposed CBCA, does not provide for any exceptions to the

general prohibition on loans. Section 40 of the proposed CBCA substantially adopts the rule of s.17 of the present Act (not applicable to Part II corporations). To allow for loans would compromise the underlying non-pecuniary purpose of the not-for-profit corporation. It is clear that there must be an express prohibition in respect to the charitable corporation making a loan to or guaranteeing a loan of those associated with the corporation. The charitable corporation, formed for a charitable or public non-pecuniary purpose, must not compromise that purpose. However, it may be the occasional practice of some Part II corporations (membership corporations under the proposed CNPCA) with objects of a fraternal nature to make, or cause to be made, incidental loans to needy members. The present Act is really silent on this matter. The "without pecuniary gain" prohibition of s.154(1) would seem to render unlawful such practice. Section 17 of the present Act is not made applicable to the not-for-profit corporation. However, the exceptions to the general prohibition on loans, provided by s.17(2), are inappropriate for the Part II corporation in any event, and this may be the reason why s.17 is not rendered applicable to Part II corporations.

145. It may be arguable that there is no harm in allowing the membership corporation to make loans, subject to appropriate and fairly rigid controls. However, there are potential dangers. The statute should reinforce the non-pecuniary purpose of the corporation unless there is justification for an exception. To the extent that a membership corporation with objects of a fraternal nature might want to make such loans a separate trust fund can be constituted by the members independent of the corporation, with the monies for the fund coming from the members rather than the corporation. Thus, there are no apparent problems imposed by the blanket prohibition of s.5.06. It is both unnecessary and unwise to make an exception to the prohibition in s.5.06 and to the underlying, fundamental premise of the membership corporation being formed, and operated, for a non-pecuniary purpose.

146. An important question is whether the common law characterizes a charitable corporation as a trust. Obviously any property received by a charitable corporation under a formal trust instrument will be held in trust. However, the case law in some jurisdictions suggests that even the unrestricted property of the corporation is subject to a trust. See, for example, *Re Manchester Royal Infirmary* v. *Attorney-General* (1890), 43 Ch.D 420, 428 and *Royal College of Surgeons of England* v. *National Prov. Bank Ltd.*, [1952] A.C. 631, 634, 662-663 and, generally, Mockler, *Charitable Corporations: A Bastard Legal Form:* 1966 Can. Bar Assoc. Papers 229, 231-233. What is the position in Canada? The question is important because it determines whether the provisions of the provincial Trustee Acts may be operative and whether the equitable *cy près* doctrine is applicable.

147. The problem is difficult to answer for several reasons. First, there is very little case law in Canada on the matter. However, the existing case law suggests that in Canada a charitable corporation is not *per se* a trust. See *Roman Catholic Archiepiscopal Corp. of Winnipeg* v. *Ryan* (1958), 12 D.L.R. (2d) 23, 24 (B.C.C.A.) and *Re Schechter* (1964), 43 D.L.R. (2d) 417, 426, 427 (B.C.C.A.), affirmed (1966), 53 D.L.R. (2d) 577, 580 (S.C.C.). Secondly, the matter is not definitively settled in other jurisdictions. Thirdly, the notion of charity suggests implicitly notions of fiduciary duties in the layman's use of such terms, apart from whether legal and equitable principle are truly operative. Monies given to the charitable corporation, whether given directly or indirectly, in layman's language can be said to be given "in trust" to be used for a charitable purpose. There is always an expectation on the part of the public that the corporation will be held responsible for the use of such monies in accordance with the intended purpose similar to that responsibility commonly understood to be demanded of someone who is in law a trustee. Thus, s.1(2) of the Charities Accounting

Act, 1970 R.S.O., ch. 63 deems a charitable corporation to be a trustee within the meaning of that Act.

148. An *absolute* gift to a charitable corporation, a separate legal entity, which simply has as its object a charitable purpose should result in the corporation holding and administering that property with a clear legal title entirely free of trust law. The English and American cases dealing with the problem can arguably be rationalized on the basis that because of the charitable non-pecuniary purpose of the charitable corporation appropriate rules which are applicable to trustees will be employed by *analogy* to such a corporation in respect to their otherwise unrestricted property. See Scott *The Law of Trusts* (3rd ed.), Vol. IV, pp.2770-2780; but see Tudor *On Charities,* 6th ed. at p.318. Thus, the courts of equity have historically exercised jurisdiction whenever the corporation's administration of the corporate property departs from its non-pecuniary purpose so as to defeat the wishes of the "participants", members and otherwise, of such a corporation. See, for example, the cases referred to by Scott, *supra.* As early as 1601, by the Statute of Charitable Uses, the chancellor was authorized to investigate the abuses, breaches of trust and mismangement of property given for charitable uses.

149. Section 5.07 is provided to make it clear by statutory provision that an *absolute gift* to a charitable corporation results in the corporation holding and administering the property received entirely free of trust law and the operation of provincial Trustee Acts. This simply clarifies the common law and gives certainty that the preferred view of the common law position is operative.

150. The question then is, should the investments of charitable corporations, in respect to property received free of trust law and the application of any provincial Trustee Act, be restricted in any way. Canadian corporations statutes do not place restrictions upon the type of investments of charitable corporations (although s.2 of the Ontario Charitable Gifts Act 1970 R.S.O. c.61 limits the extent of investments to not more than a 10 per cent interest in a business). Other jurisdictions expressly permit unrestricted investments—see, for example, s.512 of the N.Y. N-PCL. Section 5.08(1) of the proposed CNPCA does not impose any mandatory restriction, but does limit investments of the charitable corporation to trustee investments similar to those within the scope of s.64(1)(a)(iii) of the Trust Companies Act, 1970 R.S.C., c.T-16, unless the articles otherwise provide. This allows flexibility in respect to investment practice, however, requires a conscious departure from the statutory restriction otherwise applicable. Investments must, of course, always be made subject to the inherent limitation imposed by the corporation's being formed for a non-pecuniary purpose. An investment could not be made which would be of pecuniary benefit to those associated with the corporation because of the general prohibition contained in s.5.09. Furthermore, the directors must exercise their investment judgment within the framework of the duties imposed by ss.9.17 and 9.19. Section 5.08(1) permits investments in respect to securities in which trustees are authorized to invest trust monies by the laws of the province in which the registered office is located.

151. Section 5.08(2) provides that the membership corporation may invest its funds as its directors deem advisable, unless limitations are imposed in a gift, devise or bequest. Restrictions can be imposed by the articles or by-laws of the corporation. Investments would always have to be made otherwise than in contravention of the non-pecuniary purpose of

the corporation (see s.5.09) and the directors would have to exercise their judgment pursuant to the duties imposed by ss.9.17 and 9.19 of the Act.

152. Section 5.09 of the proposed CNPCA is complementary to the definition of "non-pecuniary purpose" provided by s.1.02(1). Section 5.09 expressly provides that "any profits or other accretions" shall be used in furthering the corporate non-pecuniary purpose. This cornerstone provision to Part 5.00 expresses the essential limitations upon the administration of the corporate property of the not-for-profit corporation. The provision is similar in purpose to s.154(1) of the present Act, s.127 of the Ontario Act, ss.204 and 508 of the NY N-PCL, and ss.2(c) and 4 of the Model Act. As there are, of course, many ways apart from a direct distribution of "dividends", in which members, like shareholders, might receive a pecuniary gain from the corporation, if it were not for express statutory prohibition, s.5.09 imposes a blanket prohibition upon "the assets, income or profit" of the corporation being a pecuniary benefit to members or directors, with only the specific, stated, exceptions to this blanket prohibition being permitted.

153. Subsection 5.10(1) is substantially similar to s.127(2) of the Ontario Act. "Reasonable" remuneration to directors and members is a desirable, justifiable, and necessary exception to the general limitations upon pecuniary gain to directors and members imposed by s.5.09 of the Act. Subsection 5.10(2) gives express authorization to directors or members having a pecuniary interest, whether directly or indirectly, in a contract or proposed contract with the corporation. In the case of a director, s.9.17 of the proposed CNPCA will be operative. The exception provided by s.5.10(2) is implicitly extended by the present Act to Part II corporations as s.98 is made applicable by s.157(1)(c).

154. There are problems in interpreting the "without pecuniary gain" phrase in s.154(1) of the present Act in respect to remuneration of directors and members. Note that s.155(2)(d) requires the by-laws to include any provisions in respect to the matter of "remuneration of directors, trustees, committees, and officers". The unqualified "without pecuniary gain" statutory limitation imposed by s.154(1) suggests literally that any person in receipt of a salary from a corporation should not be a member. Further, the present Act is not explicit as to whether or not directors are required to be members, but this seems to be an implicit requirement. Section 154(1) provides that the applicants "become members of the corporation thereby created" and s.155(1)(e) requires the applicants to be the first directors of the corporation. There is no specific provision clearly setting forth whether other than the first directors be members. This can, of course, be accomplished through the by-laws as permitted by s.155(2)(d). Contrast this confusion with s.316(1) of the Ontario Act which requires a director to be a member, and s.127(2) of the Ontario Act which qualifies the limitation upon the corporation that it be "without the purpose of gain for its members" imposed by s.127(1) by providing expressly in s.127(2) that both directors and members can receive reasonable remuneration and expenses for their services to the corporation. Note that s.9.04(2) of the proposed CNPCA states that a director, unless the articles otherwise provide, is not required to be a member of the corporation.

155. There must be limitations upon the remuneration of directors and members. This is provided by the limitation in s. 5.10(1) that the remuneration be "reasonable". Beyond this, public disclosure is required of the charitable corporation through ss.13.01, 13.19 and 20.14, and appropriate remedies to prevent or rectify abuse are provided by Part 19.00.

156. Section 5.11 is similar to s.41 (1) of the proposed CBCA and s.48(1) of the present Act (not applicable to Part II corporations), and is substantially the same as s.123 of the Ontario Act and s.517(a) of the NY N-PCL. The provision simply makes it clear that the members, as members, are not liable for any act or default of the not-for-profit corporation. Thus, as with the shareholders of the business corporation, the principle of limited liability, basic to corporate law, is extended expressly to the members of the not-for-profit corporation. Limited liability is, of course, implicitly extended to the not-for-profit corporation under the present Act.

PART 6.00

SECURITY CERTIFICATES, REGISTERS AND TRANSFERS

157. The purpose of Part 6.00 is to deal with the fairly uncommon situation where a not-for-profit corporation borrows funds to enable it to carry on its non-pecuniary purpose and issues securities, such as bonds or debentures, as permitted by ss.5.04 and 14.16 (ss.65 and 66 of the present Act). The question of "securities" in respect to a not-for-profit corporation arises only in relationship to creditors, and not in relationship to members as such. Section 1.02(1) defines "security" to mean a "certificate evidencing a debt obligation". Part 6.00 of the proposed CNPCA incorporates by reference, with the necessary changes to points of detail, the provisions of Part VI of the proposed CBCA. It may be that experience will suggest that some not-for-profit corporations issuing securities should be exempted from some or all of the provisions incorporated into Part 6.00 and s.6.01(2) preserves this flexibility through allowing the regulations under the proposed CNPCA to prescribe for the exemption thereof.

PART 7.00

TRUST INDENTURES

158. Section 7.01 is self-explanatory. This provision is necessary to deal with those situations, albeit uncommon with the not-for-profit corporation, when there is an issue of debentures under a trust indenture.

PART 8.00

RECEIVERS AND RECEIVER-MANAGERS

159. Section 8.01 is self-explanatory. Part 8.00 clarifies the position of the receiver appointed by a court order or under a trust indenture to take over the assets of or to administer a corporation. Secondly, it makes uniform across Canada the law applicable to receivers of corporations incorporated under the proposed CNPCA and the proposed CBCA.

PART 9.00

DIRECTORS AND OFFICERS

160. The present Act is deficient in providing appropriate statutory provisions in respect to directors and officers for not-for-profit corporations. This may be because the provisions of Part I applicable to the business corporation are so unsatisfactory in language and content for not-for-profit corporations that they are not made applicable through s.157. However, Part II has not been sufficiently developed to provide comprehensively for this subject area. Sections 86-92 and 94-97 of the present Act are not made applicable to not-for-profit corporations. There is simply incidental coverage on subsidiary matters (ss.93, 98 and 99). The present approach results in a virtual absence of essential provisions and general standards for the not-for-profit corporation. This approach also imposes upon the Corporations Branch the task, difficult to adequately fulfil, of exercising a significant degree of continuing administrative control as to what is contained in the by-laws. There is also an unnecessary expenditure of time and energy through this supervisory administrative role. (In contrast, the Ontario Act has extensive provisions in this area through ss.130, 131, 313 to 320, 321(1), 322, 324 and 328). The absence of statutory standards results in a lesser knowledge and appreciation of duties, responsibilities, and powers on the part of directors and members than would be so if there were comprehensive statutory provisions. There is a resulting uncertainty by the corporation, its directors, officers and members as to capacity and locus for exercise of power within the corporate structure, and imposition of responsibility for corporate decision making and actions. There is a need for express statutory provisions in respect to these matters.

161. Section 9.01(1) is adapted from s.96(1) of the proposed CBCA which is a considerably simplified version of ss.86(1) and 94 of the present Act (not applicable to Part II corporations). The proposed CNPCA includes the innovation of the proposed CBCA, in allowing for a departure from the present statutory norm that complete power of management is vested in the directors, through a "unanimous member agreement": s.11.15. Although the members would probably only very rarely agree to such a different structure of management, such structure may be of occasional advantage. In particular, the members of a foundation may desire an "unanimous member agreement". Therefore, s.9.01(1) extends this flexible arrangement to the members of the not-for-profit corporation. The statutory pattern can only be departed from if there is unanimity, and a departure will have to satisfy the requirements of s.11.15 so that in practice the arrangement will only be apt to those membership corporations in which there is a relatively small membership.

162. It will be noted that s.9.01(1) represents a change from the existing legislation, in that only one director is required, whereas the present Act (s.155(1)(e)) requires a minimum of three directors. This change is a necessary consequence of the adoption in s.2.01 of the one-man corporation. However, almost all charitable corporations will be required to have at least three directors so as to comply with s.9.01(2) and s.13.17(1). See the commentary in respect to the latter provision.

163. Section 3.04(d) is designed to abolish the doctrine of constructive notice of limitations upon the authority of directors. There is some doubt whether that doctrine applies to limitations on the authority of directors of federally incorporated corporations. See Thompson, *Company Law Doctrines and Authority to Contract,* (1956) 11 U. of Toronto L.J. 248; and Prentice, *The Indoor Management Rule,* in Ziegel (ed.,) *Studies in Canadian Company*

Law, 1967, pp. 310 to 313. Anyway, it is widely believed that the doctrine is commercially unrealistic, and accordingly it is abrogated by s.18(d) of the proposed CBCA. Similarly, s.3.04 of the proposed CNPCA makes it plain that only actual knowledge of limitations on the apparent authority of directors will avail against persons dealing with them.

164. Section 9.02, except for subsection (2), is adapted from s.97 of the proposed CBCA. Section 9.02 is new, representing a significant departure from existing law. Under ss. 94 and 95 of the present Act (not applicable to Part II corporations), it appears that the directors alone may adopt or alter by-laws *Kelly* v. *Electrical Construction Co* (1908), 16 O.L.R. 232; *Stephenson* v. *Vokes* (1896), 27 O.R. 691—subject only to confirmation by the shareholders. While it may be sensible to vest exclusive management powers in the directors, as the present Act does through s.86(1) for business corporations, there is nothing to be said for vesting in them the power to control the internal government of the corporation to the exclusion of shareholders. The same argument holds true for not-for-profit corporations.

165. Section 9.02 accordingly confers power upon members not merely to sanction by-law changes proposed by the directors—subsection (3)—but also to initiate changes in the corporate structure: subsection (6). Where the directors do propose a change in the by-laws, they must submit the changes to the next meeting of members, who may confirm, reject or amend any by-law proposed by the directors. If a member wishes to propose a change in the by-laws, he may if he wishes take advantage of the provisions of s.11.06, which enable him to call upon the directors to circulate his proposal to the general membership. In the result, this scheme recognizes the realities of corporate management by placing residual control of internal government where it belongs—with the members—but giving the directors power to administer the corporation from day to day (ss. 9.01(1), 9.02(1), (2) and (4)).

166. Where the directors initiate a change in by-laws, the change will be effective until it is dealt with by the members. If it is rejected, or amended, rights acquired under it are protected under subsection (4). If it is confirmed or amended, it continues to be effective as confirmed or amended from the date of confirmation or amendment: subsection (5). Subsection (5) also contains the safeguard that prevents directors, if the members reject a by-law, from immediately enacting another by-law substantially the same and thus circumventing the decision of the members.

167. Section 9.02(2) of the proposed CNPCA, which sets forth items that may be dealt with in the by-laws, is similar to s.130 of the Ontario Act. Although the provision is simply illustrative, and not exclusive, of the general power of directors to adopt, amend or repeal by-laws under s.9.02(1), it is purposeful to particularize in this manner for the not-for-profit corporation. This approach provides a listing of the important matters that must usually be dealt with in the by-laws of not-for-profit corporations. The uniqueness as an entity of the not-for-profit corporation, coupled with the consequence that there is general unfamiliarity with the nature and internal government of the entity, provide the purposefulness in this provision being included in the proposed CNPCA. There is an express, clear communication through the statute of essential matters (for example "the suspension and termination of memberships") which can, and should, be dealt with in the by-laws. Note that s.9.02(2)(a) provides for the admission of "unincorporated associations" as members. Note also that any by-laws in respect to "the suspension and termination of memberships" are subject to the limitations imposed by s.10.01.

168. Subsection (7) of section 9.02 is unique. This provision allows for the regulations to prescribe by-laws to regulate any of the affairs of corporations for which by-laws have not been adopted under ss.9.02 or 11.06. It is not uncommon for those responsible for the affairs of a not-for-profit corporation to be remiss in not having the necessary by-laws adopted. The proposed CNPCA goes a considerable step further than simply making available a model set of by-laws which *can* be adopted. To the extent it seems appropriate, the regulations can prescribe that such a model set of by-laws shall apply, in the absence of by-laws having been adopted for the corporation by those responsible for its affairs. The by-laws provided by regulation would therefore fill any gaps arising and would make it considerably easier to manage a corporation, without in any way restricting the freedom of management of a corporation's affairs by those responsible for it, by their adopting by-laws to override those otherwise applicable by virtue of the regulations. An anology to s.9.02(7) is s. 8 of The Companies Act (1948), 11 & 12 Geo. 6, c.38 which makes the articles of association set out in Table A of that Act the articles of any company which does not specifically exclude or alter them.

169. Section 9.03 is based upon s.98 of the proposed CBCA which in turn is based upon an amalgam of the provisions of s.52 of the Model Business Corporations Act and s.404 of the New York Business Corporation Law of 1963. It introduces into Canadian law the entirely novel concept of an organization meeting of directors. The purpose of the provision in the proposed CBCA is to obviate most of the elaborate and meaningless ritual, especially the fictitious series of organization meetings of first directors and shareholders that characterizes organization procedure of a business corporation under the present Act. This particular problem under the present Act is not as acute for the not-for-profit corporation because of the requirement imposed by s.155(2) that the by-laws accompany the application for incorporation. However, the reform introduced by s.9.03 has merit for the not-for-profit corporation as an improvement upon the present situation, and with the mode of incorporation for the not-for-profit corporation under the proposed CNPCA being the same as for the business corporation, s.9.03 becomes purposeful for the same reasons advanced in respect to s.98 of the proposed CBCA for the business corporation.

170. The proposed CNPCA, like the proposed CBCA, empowers only the first directors to hold the organization meeting. If therefore, the actual proposed members are named as the first directors, then the organization meeting can reduce the clerical work surrounding organization to an absolute minimum. If, on the other hand, office incorporators are used, then after the organization meeting a further members' meeting will have to be held to elect new directors. In addition, a new notice of directors will have to be filed in compliance with s.9.12. Because of the novelty of the procedure in Canadian law, s.9.03(1) lists the major items of business in the organization process in order to eliminate any doubt as to the breadth of the powers of the first directors.

171. Section 9.04 is based on s.99(1) of the proposed CBCA and is largely self-explanatory. The provision makes two important changes in the present law. The present Act does not specifically bar bodies corporate from acting as directors and, while there is no evidence of any widespread practice in Canada of having corporate directors, s.9.04(1)(c) has been added to preclude this possibility. The case for such a provision is succinctly put by Professor Gower in his comment to s.182 of the Draft Ghana Companies Code: "The objection to corporate directors is that, having 'no soul to be saved or body to be kicked', they should not be entrusted with any tasks involving personal duties of good faith and discretion." In any event, since corporate directors will always have to act through authorized human representatives, it seems more realistic to acknowledge this fact than to deny it.

172. Secondly, the present Act is unclear as to whether other than first directors of a not-for-profit corporation need be members. (See the commentary to Part 3.00). The Ontario Act (s.316) requires directors to be members but the NY N-PCL (s.701) does not require this. The requirement that a director be a member is a needless formality and, as with the business corporation and the question as to whether a director should be a shareholder, should be a matter for the incorporators to determine.

173. Given that the activities of the charitable corporation are in the public sector of Canadian society, s.9.04(3) imposes the requirement that a majority of the directors of the charitable corporation which solicits money or property from the public for the purpose of carrying on its charitable activities, must be "resident Canadians" as defined by s.1.02(1) (and being the same intended test of qualification for directors of a business corporation (see ss. 2(1) and 99(3) of the proposed CBCA)). See also, s.19 of the Trust Companies Act, 1970 R.S.C., c. T-16, as am. for an analogous provision.

174. Some international charitable organizations may, of course, have directors at the international level who are not citizens or residents of Canada. Such an international organization may wish to have as directors of the corporate organization in Canada, non-citizens and non-residents. A charitable corporation which provides assistance to people in other countries may well want directors from recipient countries. Section 9.04(3) extends this latitude to the charitable corporation. However, given that the activities of the charitable corporation are in the public sector of Canadian society, s.9.04(3) imposes the requirement that a majority of the directors of the charitable corporation which solicits money or property from the public, must be ordinarily resident in Canada.

175. Individuals who are residents or citizens of one country, such as the United States, may wish to incorporate a foundation in Canada to carry on charitable activities within Canada. There is no reason, if no solicitation is made of the public in Canada, why the foundation should be required to have any minimum number of resident Canadians as directors.

176. Moreover, there is no apparent reason why a director of a membership corporation should be a citizen or resident of Canada, and some membership corporations have international activities or affiliations.

177. Therefore, the residency requirement of s.9.04(3) is limited to simply charitable corporations, and to only those charitable corporations which have public solicitations.

178. Section 9.05 is based upon s.100 of the proposed CBCA and changes the law in several ways. Under s.155(1)(e) of the present Act, the application for incorporation must set out the names of the proposed first directors, who are then named in the letters patent as the first directors and who remain the directors until replaced according to the provisions of the by-laws which must accompany the application and deal with the "appointment and removal of directors" (s.155(2)(d)). Section 9.05(1), like the proposed CBCA, read together with s.2.02(1)(e), simplifies this procedure. Under the latter provision the articles of incorporation need only state the number (or minimum and maximum number) of directors.

179. Under s.9.05(1) a notice of directors in prescribed form is sent to the Registrar. The persons so named hold office until the first meeting of members which, under s.11.02, must be held within 18 months of the date of incorporation and may be called earlier. Generally,

directors may only be elected at an annual meeting, although first directors can be replaced and other vacancies in the board may be filled at any time.

180. Section 90(1) of the present Act (not made applicable to the Part II corporation by s.157(1)) imposes a maximum 2 year term on directors of business corporations except "class directors" who may hold office for 5 years. Subsections 9.05 (2), (3) and (4) of the proposed CNPCA, similar to s.100 of the proposed CBCA, permit 3 year terms and staggered terms so that continuity in the board can be assured. These provisions do not apply, however, where a corporation adopts cumulative voting (s.9.06).

181. Section 9.05(6) is based upon s.100(6) of the proposed CBCA which is designed to meet the situation in which one or more nominees for office named in an information circular pursuant to the proxy requirements in Part XII of the proposed CBCA, cannot be elected because of subsequent disqualification, incapacity or death. In such cases the directors elected at the meeting, if a quorum, may act, but may not, under s.9.10(1) fill the vacancy thus arising. This subsection is based upon the amendment made in 1970 to s.86(4) of the present Act (not applicable to Part II corporations). The simplified proxy provisions of Part 12.00of the proposed CNPCA do not provide for an information circular. However, s.9.05(6) is still useful to allow the directors to have the power to act, provided they constitute a quorum, in the event there is a failure to elect a slate of directors proposed to the members in advance of the meeting, due to either disqualification, incapacity or death of any of the candidates for directorships.

182. Section 9.06 is based upon s.101 of the proposed CBCA which has no counterpart in the present Act, although it has been Departmental practice to permit cumulative voting for directors where the applicants for incorporation so request. Section 9.06 expressly provides for the articles permitting cumulative voting. This provision is similar in effect to NY N-PCL s.617.

183. The purpose of a cumulative voting system is to enable minority interests to obtain representation on the board of directors by permitting them to multiply the number of votes they have by the number of directors to be elected, and then to concentrate the total number of votes upon a single candidate or group of candidates, and thereby secure the election of their nominees. Since in the absence of a right to cumulate the votes of a simple majority will always be sufficient to elect, the efficient exercise of the right to cumulate may considerably enhance the protection available to minority interests. Although it would be relatively unusual, a minority group of members in a not-for-profit corporation might have differing views from the majority of members, such as to make a cumulative voting system important and useful. Even though the interest of a member is non-pecuniary, if there is a sufficient number of members with a particular viewpoint to constitute a minority group who could elect a director, given a cumulative voting system, the facility should be available for a corporation so desiring to provide in the articles. Mathematical examples showing the effect of a cumulative voting system are given below in the commentary to s.9.11.

184. Subsection (1) of s.11.09 provides that unless the articles stipulate otherwise, each member has one vote. Although it would be very unusual for a not-for-profit corporation to provide that there is more than one vote per member, such a provision would compound the advantages of a statutory provision permitting cumulative voting.

185. The right to cumulate may be effectively defeated by a variety of devices such as rotating directorships and reduction in the number of directors. The former is precluded by paragraph (f) which requires the annual retirement of the entire body of directors, and the latter by paragraph (h) which limits the right to reduce the number of directors of corporations in which cumulation is permitted. Paragraphs 9.06 (c) and (d) introduce a procedure for the election of directors that is novel in Canadian legislation. Under this provision (based upon the proposed CBCA which in turn is based upon comparable legislation in the United Kingdom—Companies Act, 1948, s.183—and South Africa—Act 46 of 1926, s.96) the election of every director must be the subject of a separate resolution, unless the members first pass a resolution allowing more than one director to be elected by a single resolution. The purpose of this requirement is to prevent members from being confronted with the necessity to vote upon an entire slate of nominees for office, of only some of whom they may approve. This is a necessary part of the cumulative voting provisions. Paragraph (e) is designed to deal with a problem that may arise under this sytem if there is a greater number of candidates than there are offices to be filled. The procedure prescribed here is simply that the candidates receiving the lowest number of votes are eliminated, and the remaining candidates are declared elected.

186. Section 9.07, adapted from s.102 of the propsed CBCA, is self-explanatory. Section 9.10 deals with the filling of vacancies.

187. Section 9.08 is adapted from s.103 of the proposed CBCA which is new. It is based in part on s.184 of the United Kingdom Act, and marks an important change in the law applying to federally incorporated corporations. At common law shareholders or members have no inherent right to remove directors before the expiration of their term of office; the power to remove must be expressly conferred, either by statute or by a provision in the by-laws: *Imperial Hydropathic Hotel Co.* v. *Hampson* (1882), 23 Ch. D 1; *London Finance Corporation Ltd.* v. *Banking Service Corpn. Ltd.,* [1925] 1 D.L.R. 319. Accordingly, unless specific provision authorizing removal is made, shareholders or members are powerless to remove a director with whom they have become dissatisfied. This was perhaps an appropriate rule for business corporations in days when there was no clear distinction in fact or legal theory between managers and owners, or, in respect to not-for-profit corporations, it was unusual to have a broad base of members as is now common to both membership and charitable corporations. Considering the diverse nature of the operations of present not-for-profit corporations, and especially charitable corporations, the right of removal seems elementary and necessary, and should not depend upon fortuitous provision for removal in the corporate constitution. Section 9.08(1) accordingly provides for the right to remove by ordinary resolution. This right is, however, subject to two conditions.

188. It would clearly render ineffectual the right to cumulative voting conferred by s.9.06 if, where this right exists, a simple majority of members were able, by ordinary resolution, to remove a "minority" director elected through successful cumulation. Section 9.06(g) accordingly protects the right of cumulation against destruction by providing that the resolution to remove in such corporations will only be effective if fewer votes are cast against it than would be required to elect a single director at an election in which the full complement of directors were being elected, and the same total number of votes were cast.

189. Subsection 9.08(2) is designed to protect any class right to elect directors. It is self-explanatory. In practice, it will be possible to remove a director only at a special meeting, that is, a meeting other than the annual meeting—see s. 11.02. All business transacted at

a special meeting is special business, the notice of which must state "the nature of that business"—s. 11.04(6), (7)—and must, by s. 9.09, be sent to any director in respect of whom a resolution to remove is proposed. Moreover, the director is entitled to attend and be heard at any such meeting (and at any meeting called to appoint or elect his replacement) and he may also require the corporation to send a statement of his to the members: s. 9.09(1), (2), (3). This procedure is important not only in the interests of the director himself, so that he may have an adequate opportunity to state his case, but also in the interests of the members generally, since the removal power can be used for both legitimate and illegitimate purposes. Section 9.09(4) protects the corporation where a director's statement is defamatory.

190. Section 9.10 is based upon s.104 of the proposed CBCA which is a substantial elaboration of the provisions of s.92(c) of the present Act (not applicable to Part II corporations). Unless, pursuant to subsection (4), the articles of incorporation provide that vacancies among the directors may only be filled by the members' vote, the normal procedure for filling such vacancies will be that prescribed by subsections (1) and (3).

191. In the ordinary course of events a quorum of directors may fill a vacancy. If there is no quorum able to act then, by subsection (2), a special meeting of members must be called for the purpose. This procedure will not apply, however, in three cases. The first is where the vacancy arises from an increase in the number or minimum number of directors. Since it is hardly possible to speak of a "vacancy" unless an office has been filled and vacated, this exception is possibly unnecessary. It has been included for the sake of completeness. In any event, since the power to increase the number of directors is specifically reserved to the members under s.9.11, it seems logical to reserve to them the right to fill the positions created by such an increase. The second is where the vacancy arises from a failure to elect a full slate of replacements for retiring directors. At common law, a vacancy arising in this way would not be regarded as one capable of being filled as a casual vacancy—*Munster* v. *Cammel Co.* (1882), 21 Ch. D 183—and this position is preserved under the proposed CNPCA and proposed CBCA. If the directors were empowered to fill vacancies arising in this way there would be an obvious loophole in the system of elections to office. The exception in s.9.10(1) is designed to block this avenue for manipulation, and protect the members' right to elect directors. The third exception is where the vacancy arises among the directors elected pursuant to any special right to elect directors conferred upon the members of a given class of members: s.9.10(3).

192. Section 9.10(4) is self-explanatory. There is no reason why members should not agree that they alone should have the power to fill vacancies among the directors and subsection (4) permits this to be done. Subsection (5) reproduces the effect of s.92(c) of the present Act (not applicable to Part II corporations).

193. Section 9.11 is based upon s.106 of the proposed CBCA which reproduces the effect of s.89(1) of the present Act (not applicable to Part II corporations) with some modifications. Since, under 2.02(1)(e), the articles are required to state the number or, where there is not cumulative voting, the minimum and maximum number, of directors, any change in that number will require an amendment of the articles in accordance with s.14.01. It should be remembered that directorships created as a result of an increase in the number of directors can only be filled by the members; they are not "vacancies" under s.9.10.

194. Section 9.11 is subject to s.9.06(h). The proviso is necessary to protect the right to cumulative voting. It is obvious that the smaller the number of directors in a corporation, the greater the proportional votes of members required to elect one director. The formula for determining the number of votes required to elect a single director is:

$$\frac{\text{Total number of votes that can be cast}}{\text{Number of directors to be elected} + 1} + 1 = X$$

Thus, in a corporation in which there are 9 directorships to be filled and 300 membership interests, the number of votes required to elect a single director is:

$$\frac{9 \times 300}{9+1} + 1 = 271$$

which is approximately 10% of the votes. If, however, the number of directors is reduced to 5, the number of votes required to elect a single director would be:

$$\frac{5 \times 300}{5+1} + 1 = 251$$

which is almost 17%; and if the number of directors is reduced to 3, the number of votes required will be 226 out of 900, that is, about 25%. Mathematically, cumulative voting will not work unless there are at least 3 directors. Reducing the number of directors thus makes it much more difficult for a minority interest to employ the right to cumulate, and dilutes its value to them. They are entitled to protection against this, and the qualification to s.9.11 gives that protection.

195. Section 9.12, based upon s.107 of the proposed CBCA, does not require a great deal of explanation. It merely follows through the idea of s.9.05(1), and ensures that there will always be public notice of who are the current directors of a corporation. By s.20.01 an address shown in a notice of directors is an address for service.

196. Section 9.13 is identical to s.108 of the proposed CBCA which is new, but is largely self-explanatory. Subsection (2) reflects what is probably the common law rule: *La Compagnie de Mayville* v. *Whitely,* [1896] 1 Ch. 788. Subsection (5) reverses the general common law rule that a director cannot waive his right to receive notice of a directors' meeting: *Young* v. *Ladies Imperial Club,* [1920] 2 KB 523. Subsection (8) allows for a directors' meeting, if all directors consent, by telephone provided all participating in the meeting can hear each other.

197. Section 9.14 is adapted from s.109 of the proposed CBCA, which is new. In the absence of express or implied authority, directors have no power to delegate the exercise of their powers: *Monarch Life Assurance Co.* v. *Brophy* (1907), 14 O.L.R. 1. The present Act does authorize in s.96 (not applicable to Part II corporations) delegation to an executive committee of directors if a corporation has more than six directors. This seems an entirely arbitrary and senseless condition, and is accordingly abandoned in the proposed CBCA. The present Act permits delegation in respect to not-for-profit corporations through s.155(2)(d) which requires the by-laws to include provisions upon "appointment and removal of directors . . . committees . . . and their respective powers". It is usual for community minded citizens to serve on the board of directors as volunteers with little time to become familiar with the practical operation of the not-for-profit corporation, with the result that they are completely dependent upon the professional administrator, or, at best, discharge the most important aspects of their function through organized committees of the board, including the executive committee. The committee structure therefore is very important as to make it possible for the directors to function as directors in fact as well as in name. The status of the committee

is best provided for by statute as well as by the by-laws. Section 9.14 of the proposed CNPCA provides explicitly a general authority to delegate.

198. Nevertheless, there are certain aspects of management that are sufficiently important to warrant the attention of all directors and s.9.14(3) accordingly declares these to be non-delegable.

199. Section 9.14(4) is included to make it clear that directors cannot escape liability for negligence—see s.9.19(1), for example—by relying upon the delegation of power to a managing director. This aspect of the leading case of *Re City Equitable Fire Insurance Co.*, [1925] Ch. 407 is therefore abrogated.

200. Section 9.15 (identical to s.110 of the proposed CBCA) which gives statutory sanction to a provision frequently inserted in corporate by-laws is new. Although formal meetings are possibly more necessary with the not-for-profit corporation than with the business corporation, because of the lack of a pecuniary interest, and corresponding lack of self-interest, on the part of the directors, this provision allows for flexibility (in particular, for the membership corporation) when formality is unnecessary. This flexibility can result in a saving of time and money. A formal meeting will be required, however, where an auditor is to be appointed to fill a vacancy in the office of auditor, because the incumbent auditor is given a right by s.13.14 to attend the meeting and make representations. Section 11.11 contains a similar provision to allow meetings of members to be dispensed with.

201. Subsections 9.16(1) and (2) are similar in purpose to part of s.111(1) and (2) of the proposed CBCA. Section 9.16 (1) and (2) impose a statutory liability upon directors when they take actions contrary to specified provisions of this Act.

202. The remaining subsections of s.9.16 set out the right of a director to recover from the other directors or from the members who received money.

203. The common law, although it was very indulgent toward the majority shareholders of a business corporation, was absolutely strict in its treatment of a director of any corporation having an interest in a contract with the corporation of which he was a director. The common law rule was that a contract between an interested director and a corporation of which he was a director was void and the director had a duty to account to the corporation for any profits he received, irrespective of how fair the contract was to the corporation: *Aberdeen Railway* v. *Blaikie* (1854), 149 Rev. Rep. 32. But at the same time the common law recognized that there was no legal limitation upon what the parties could agree to in the articles of association. Therefore, draftsmen tended to employ articles in the business corporation which waived the obligation of the director to disclose his interest, permitted the director to vote in respect of a contract in which he had an interest, and absolved the director altogether from any duty to account for profits he made on the contract. Such articles had become so widespread before 1929 that the Companies Act was amended that year to include what is now s.199 of the United Kingdom Companies Act, 1948. Section 199, when compared with other contemporary corporation Acts, really covers only one aspect of the problem: it focuses almost entirely upon disclosure of the interest in the contract, leaving to the common law the sanction to be imposed in the event of non-compliance by an interested director. Section 98 of the present Act (applicable by s.157(1)(c) to Part II corporations) is obviously based on s.199 of the United Kingdom Act, but s.98 has been expanded to limit the rights of an interested director to vote and to declare when a director is not

accountable for profits he has made on the contract with either the business or not-for-profit corporation.

204. Section 9.17 is based upon s. 112 of the proposed CBCA which also takes s.199 of the United Kingdom Act as a point of departure. In fact, the proposed CBCA provision is a composite of the standards set out in the New York Business Corporation Law (s.713) and the Delaware General Corporation Law (s.144), both of which are adaptations of s.820 of the California General Corporation Law, and the standards developed by the common law: *Gray* v. *New Augarita Porcupine Mines Ltd.,* [1952] 3 D.L.R. 1.

205. Section 9.17 has two objectives: first to stipulate the conditions that must be fulfilled by a director having an interest in a corporation (permitted under s.5.10(2), subject to s.9.17); and second, to declare that if the director does fulfil these conditions, the contract is not void and he has no liability to account for any profit he may make under the contract. Particularly noteworthy is the overriding criterion that the contract be "reasonable and fair to the corporation", which is necessary to preclude mutual "back-scratching" by directors who might otherwise tacitly agree to approve one another's contracts with the corporation. Of course directors who indulge in such conduct will be liable under the general provisions of ss.5.09 and 9.19 in any event. And should there be an abuse by a majority of members the remedies provided in Part 19.00 are available. The "reasonable and fair" standard set out in subsection (4)(c) serves only to underline the director's specific duties in the circumstances.

206. Section 9.17(1) gives the particulars of the disclosure required. The subsection is broad in scope, requiring disclosure of both the nature and the extent of the director's interest in a contract, adopting the principle set out in *Gray* v. *New Augarita Porcupine Mines Ltd., supra.* The subsection is also broad in application, requiring disclosure both from a director who is himself a party to a contract or who has a material interest in a person who is or proposes to be a party to a contract with the corporation. The broad definition of "person" in s. 1.02(1) extends the application of this section even further.

207. Subsections 9.17(2) and (3) are self-explanatory. A similar provision is contained in s. 98 of the present Act.

208. Section 9.17(5) states clearly that a director may not be counted for the purpose of determining a quorum and he may not vote to sanction a proposed contract in which he has an interest, except in the specific cases enumerated in that subsection.

209. Section 9.17(6), following s.98(3) of the present Act, permits an interested director to give a general notice to the corporation, rendering unnecessary a new notice each time a contract is entered into with a person in which the director has a material interest. This is a particularly useful provision because of the broad application of subsection (1) which includes both directors and officers.

210. Section 9.17(7), however, is new. In the absence of such statutory sanction, if a director fails to make the disclosure required under subsection (1), and thus fails to fulfil the conditions of subsection (4), apart from possible relief under s.219 of Part VI of the present Act, he has no immunity from the harsh common law rules which render the contract void, and which impose upon the director the duty to account for any profit he has made irrespective of the "fairness" of the contract to the corporation. To ensure that a contract

beneficial to the corporation will not be declared void because of the interest of a director, subsection (7) makes clear that such a contract is valid until the corporation or some interested person opts to set the contract aside. In short, the effect of subsections (4) and (7), although they allow contracts that might be void at common law to be valid, is to furnish a very strong incentive to a director to disclose his interest in a contract with the corporation of which he is a director before the contract is entered into.

211. Section 9.18(a), based upon s.113(a) of the proposed CBCA, deals more explicitly with some of the matters to be dealt with in the by-laws as provided in s.155(2)(d) of the present Act, and is the counterpart of s.94(d) of the present Act (not applicable to Part II corporations). The only significant change is that, in accordance with the policy adopted throughout the proposed CNPCA and proposed CBCA, the power of the directors to appoint officers is made subject to variation under the articles, the by-laws or a unaminous member agreement. See the commentary to s.9.01.

212. Section 9.18(b) (based upon s.113(b) of the proposed CBCA) is new, and is designed to make it clear that the common law doctrine of "incompatibility of offices"—*Iron Ship Coating Co.* v. *Blunt* (1868), L.R. 3 C.P. 484—does not apply to federally incorporated corporations. Paragraph (c), identical to s.113(c) of the proposed CBCA, is also new. Many statutes provide that the offices of president and secretary may not be held by the same person. This provision appears originally to have been designed to ensure that where, for example, the by-laws required some act to be done on behalf of the corporation by the president and secretary, it should not, as a precaution, be done by the same person acting in both capacities. There is no reason why, if members choose to simplify their operations, they should not be free to minimize formalities, and paragraph (c) permit this.

213. Section 9.19 is similar to s.114 of the proposed CBCA which is new and represents a general statutory formulation of the principles underlying the fiduciary relationship between corporations and their directors. The Jenkins Committee, while opposing an attempt at codification of directors' duties, took the view that some such general statement was desirable as possibly "useful to directors and others concerned with company management": Jenkins Report, para. 87. The Lawrence Committee, in its Report (paras. 7.1.7, 7.2.1, 7.2.3), took a similar view. Although the Jenkins Committee's recommendation has not been acted upon, the Lawrence Committee's proposal has been adopted for business corporations in s. 144 of the Ontario Business Corporations Act, 1970 R.S.O., c. 53.

214. In so far as the general duty of loyalty and good faith is concerned, section 9.19 is simply an attempt to distill the effect of a mass of case law illustrating the fiduciary principles governing the position of directors. Those principles have long since been accepted by courts in Canada: see, for example, *Sun Trust Co.* v. *Begin,* [1937] S.C.R. 305; *Peso Silver Mines Ltd.* v. *Cropper* (1966), 58 D.L.R. (2d) 1. Section 9.19 does not purport to answer in advance the manifold problems involved in assessing the facts of particular cases. Its purpose is simply, and perhaps gratuitously, to give statutory support to principles that are as difficult to apply as they are well understood.

215. No attempt has been made in s.9.19(1)(a) to give precision to the notion of "the best interests of the corporation". The view taken by Professor Gower in his Draft Ghana Companies Code is that "on the whole . . . it is probably better to leave the law to develop in the hands of the judges": Ghana Report, p. 146. The abandonment of the *ultra vires* and collateral purpose doctrines in that Code and the emphasis upon good faith in s.9.19(1)(a) seem

to leave the way free for directors to take into account whatever factors they consider relevant in determining corporate policies, and for the courts to escape from the constraints of what has somewhat charitably been described as the "anachronistic" view that has developed in the English courts: see Gower, *Modern Company Law* 3rd. ed., 1969, p. 522.

216. Members of a not-for-profit corporation, lacking the pecuniary interest and resulting motivation of immediate self-interest of shareholders of a business corporation, are generally content to leave the management of the affairs of the corporation exclusively to the board of directors. This suggests an argument for a standard of care higher than for the directors of a business corporation so as to provide an additional safeguard to offset the indifference of the members. It can be argued further that the duty of care of a director in a charitable corporation should be higher than in a business corporation because it is *analogous* to a trustee's duty on the basis that the assets of the corporation come in many cases from public solicitations, contributions, or through tax exemption, and therefore are closer to a trust *res* than ordinary business corporation capital.

217. On the other hand, directors of charitable corporations usually serve because of a sense of public service, and as representatives on behalf of the community at large. They usually do so without remuneration, indeed, often at considerable personal sacrifice. They are seldom able to spend sufficient time to become familiar with the details of the corporation's operations. They are often prominent citizens in the community, bringing substantial skills to the board of directors (for example, successful management expertise, fund raising skills, public relations know-how, and professional skills such as accountancy or legal) and they attend meetings simply in an advisory and supervisory capacity. Many do so with little appreciation of the corporation's particular problems, other than those problems which relate to their particular skills from time to time. As the director of the charitable corporation serves from a sense of public duty rather than self-interest, he cannot be expected to devote as much attention and time to the corporate affairs as he would if he had a proprietary interest. The argument can be made that the duty of care of such director should be less exacting than the director of the business corporation so as not to discourage public spirited citizens from assuming such a role. However, the standard exacted by the statute can be a flexible one. If the director is simply one whose role is supervising, the standard of care employed should be the degree of care of a reasonably prudent person *in comparable circumstances* (see s. 144 of the Ontario Business Corporations Act, s.114(1)(b) of the proposed CBCA and s.7.17 of the NY N-PCL to the same effect).

218. The formulation in s.9.19(1) (b) (identical to s.114(1) (b) of the proposed CBCA) of the general duty of care, diligence and skill owed by directors represents an attempt to upgrade the standard presently required of them. The principal change here is that whereas at present the law seems to be that a director is only required to demonstrate the degree of care, skill and diligence that could reasonably be expected from him, having regard to his knowledge and experience—*Re City Equitable Fire Insurance Co.*, [1925] Ch. 407, 425—under s.9.19(1)(b) he is required to conform to the standard of a reasonably prudent person in comparable circumstances. Thus the new statutory provision somewhat raises the common law standard which employs a fairly subjective test. However, the common law "reasonable man" test is a juristic construct, that is, the court is the "reasonable man" and the "reasonably prudent person" test of s.9.19 (1) (b) will be applied by the same courts. Therefore, considerable scope for discretion remains in applying the test. Recent experience in respect to business corporations has demonstrated how low the prevailing legal standard of care for directors is, and this provision seeks to raise it significantly. The argument is sometimes

made that raising the standard of conduct for directors may deter people from accepting directorships. The truth of that argument has not been demonstrated and the argument is specious. The duty of care imposed by s.9.19(1)(b) is exactly the same as that which the common law imposes on every professional person, for example, and there is no evidence that this has dried up the supply of lawyers, accountants, architects, surgeons or anyone else. The members of the not-for-profit corporation should be able to have the confidence that the activities of the corporation are being managed by competent persons held properly accountable. There is also considerable merit in having a consistent, single, well-understood federal corporation law in the area of directors duties. Therefore, the same standard should govern the director of the not-for-profit corporation as that which governs the director of the business corporation.

219. Section 9.20 deals with the matter of "dissent" by directors and is identical in substance to s.115 of the proposed CBCA. Section 9.20(3) of the proposed CNPCA is based upon s.115(3) of the proposed CBCA, which is new. Gower, in *Modern Company Law,* 3rd ed., 1969, at p. 551 remarks that "Though it is said that (directors) ought to attend these meetings (of the board) whenever they can, the cases suggest that this is little more than a pious hope. As in other walks of life, if anything is going wrong there are great advantages in 'not being there'." See also *Re Dominion Trust Co.* (1917), 32 D.L.R. 63. Subsection (3) is designed to make it clear that absence from meetings at which important decisions affecting the corporate financial structure are made will not *per se* relieve the absent director of his statutory liability under this section.

220. Section 9.21 (identical in substance to s.116 of the proposed CBCA), dealing with the indemnification of directors and officers of a corporation, raises one of the most complex and most controversial problems of contemporary corporation law. Reflecting this conflict of policies, there exists such a bewildering number of models in current statutes that no simple composite section is possible. Section 93, applicable to Part II corporations by s.157, is the relevant provision in the present Act dealing with the matter.

221. The most comprehensive statutory provisions for the not-for-profit corporation are those set forth in ss.721 to 726 of the NY N-PCL which are similar to those in ss.721 and 726 of the New York Business Corporation Law. In addition to being far more detailed than English and Canadian law, they create an exclusive regime that applies to every New York corporation irrespective of any other provisions contained in the corporation's articles or by-laws. Although much influenced by the New York laws, s.9.21 of the proposed CNPCA, identical in substance to s.116 of the proposed CBCA, does not adopt its policy of setting up an exclusive statutory regime. Rather, this section represents a selection of the better provisions of the various contemporary laws, which are imposed by law upon every not-for-profit corporation to which the proposed CNPCA applies. A corporation may, however, impose a stricter regime by its articles, by-laws or through an agreement of members. In fact, the specific policies reflected in s.9.21 are very comprehensive : first, the provisions apply to former and present directors and officers and also nominee directors who represent a corporate member; second, the provisions cover actions of all kinds—civil, criminal and administrative; third, the provisions distinguish between different procedures, individual actions against persons sued in their capacity as directors or officers, and derivative actions in the name of the corporation against their directors or officers; and fourth, except in respect of derivative actions, the provisions provide for indemnity not only for costs but also for amounts paid to settle an action or to satisfy a judgment.

222. Subsection (1) confers very broad powers on a corporation to indemify a director or officer who is sued in his capacity as a director or officer by a person other than the corporation of which he is a director or officer. The only standards he must fulfill are, in a civil action, that he acted honestly and in good faith with a view to the best interests of the corporation and, in a criminal action or administrative proceeding, that he had reasonable grounds for believing that his conduct was lawful.

223. Subsection (2), which refers to a derivative action in the name of the corporation against its directors or officers, sets up tests in addition to the general standards of subsection (1). Note that the indemnity here does not include amounts paid to settle an action or to satisfy a judgment. The implied premise of this subsection is that if a derivative action in the name of the corporation has been brought against a director or officer, he has probably not been acting in the interests of the corporation and therefore his conduct must be more closely scrutinized. Subsection (2) also requires court approval as a pre-condition to payment.

224. As another safeguard against abuse, subsections (6) and (7) allow the Registrar and, if the court thinks it appropriate, any other interested person, to appear and be heard upon an application for approval of an indemnity payment. Subsection (3) says that a director or officer may claim indemnity from a corporation as a matter of right where he has been wholly successful in his defence of an action brought against him in that status.

225. Certainly the most controversial provision in this section is subsection (4), permitting a corporation to purchase directors' and officers' liability insurance covering cases in respect of which the corporation itself could not have indemnified the directors or officers, because the misconduct constituted a breach of the standards set out in subsections (1) and (2). Similar provisions have been recommended by the draftsmen of the Model Business Corporation Act (s.4A) and have been adopted in the Delaware General Corporation Law (s.145). A version of this provision has also been adopted in the Ontario Business Corporations Act (s.147), qualified to preclude coverage where the director or officer is in breach of the general duty of care specified in s.144. This qualification appears to negate entirely the purpose of obtaining the insurance, for there is virtually no other conduct in respect of which a director or officer could be sued and could obtain indemnity under an insurance policy.

226. Some writers have severely censured these provisions, arguing that they not only conflict with but derogate seriously from the statutory standards. See, for example, Hornstein, *Corporation Law & Practice,* Supp., s.733. These criticisms have validity if no account is taken of the insurance policies that are available. But they largely beg the question by assuming that insurers are in business only to shield directors and officers from liability for their own misconduct. In fact, the insurers are in the business to make a profit, and of course they must qualify the coverage they offer in order to achieve that goal. To limit abuse by directors and officers, the insurers, under both standard form policies now on the market, stipulate for a very large deductible (usually $20,000 for each loss) and for a form of co-insurance (the insured pays 5% of the loss). The most important limitation, however, is the exclusion of coverage where the director or officer obtains any personal profit from the alleged misconduct, an exclusion which bars coverage in the case of self-dealing by a director or officer. Until experience shows that this broad power to obtain indemnity insurance from commercial carriers has been abused by directors and officers, there appears to be no reason to limit the insurance coverage that may be obtained. As stated, the insurers themselves will

be compelled to stipulate exclusions that will limit their exposure in cases of misconduct that cannot be characterized as in the interests of the corporation.

227. The authors of the report upon which the proposed CBCA is based suggest that one other safeguard would be useful. To bar any possible collusion between insurers and the directors and officers of a corporation to waive or qualify exclusions by special endorsement (which of course would require payment of a greater premium), it is intended the regulations under the proposed CBCA will require disclosure of all D & O insurance premiums paid, and this approach can be taken under the proposed CNPCA as well. Disclosure can be effected by way of a note to the financial statements. In case of apparent abuse a member has adequate remedies under the proposed CNPCA to state effectively his objections.

PART 10.00

MEMBERS ASSOCIATIONAL INTERESTS

228. This Part deals with the associational interests of a member in respect to the not-for-profit corporation. The interests of a member in his position and status in a not-for-profit corporation can be referred to as his *associational* rights. See H. L. Oleck, *Non-Profit Corporations, Organizations and Associations* (2 ed.) at pp. 371-382. This matter is sufficiently distinctive that it can be isolated from Part 11.00 (Members). Also, to maintain symmetry with the division into parts of the proposed CBCA it is necessary to have an entirely unique Part 10.00 in the proposed CNPCA as Part X of the proposed CBCA deals with "Insider Trading". Although statutory provisions in respect to such associational rights as voting, office holding, and similar matters are common, nothing is usually said about such important questions as discipline or expulsion of members. A member has property rights in a dissolution of the membership corporation (s.17.19), unless the articles or by-laws state otherwise.

229. Associational rights beyond propery interests are difficult to define. The member has some emotional, social, moral or other intangible interest in the corporation, or he would not have joined. Once he is a member, such interest should be entitled to the minimal protection of fair and reasonable treatment, in particular, from arbitrary expulsion. Although the case law is not entirely clear, it appears that if the by-laws or articles so provide, a member can be expelled for any cause. The position of a member who has a property interest, for example, by his means of livelihood being in jeopardy through expulsion appears to be much stronger at common law than that of a member asserting loss of other, less tangible, associational rights. There is an understandable refusal on the part of the court to interfere in respect to questions of opinion, ethics and relationships within a voluntary not-for-profit association. At the least, if a property right is in jeopardy it seems that the member can insist upon the observance by the corporation of the principles of natural justice. See *Posluns* v. *Toronto Stock Exchange and Gardiner,* [1964] 2 O.R. 547, 610, 613-614 (Ont. H. Ct.) for a thorough review of the authorities.

230. The modern rule in at least some American jurisdictions seems to be that a member has the right to insist upon the observance of the principles of natural justice even when non-property associational rights are involved. See Oleck, *supra* at p. 377. This is the preferred view of the common law in Canada, as well. See *Posluns* v. *Toronto Stock Exchange and Gardiner, supra.* This approach is adopted in s.10.01 of the proposed CNPCA. Beyond the standard of natural justice matters are left properly to the corporation itself. If a corporation has not adhered to the requirements of s.10.01, subsection (6) thereof allows an aggrieved member to apply to the court under s.19.04. This remedy is simpler and probably more expansive than that available through the prerogative writs at common law (even with, in Ontario, The Judicial Review Procedure Act, 1971, S.O. c. 48, which would apply). Section 10.01 is somewhat analogous to s.51 of the Canada Cooperative Associations Act. However, unlike s.51 of that Act, s.10.01 does not require that the corporation pay compensation to the member upon expulsion. This approach accords with the distinction between an incorporated cooperative association and a not-for-profit corporation. See the commentary in the Introduction. A court could order compensation, if it saw fit, under s.19.04 in an expulsion where the not-for-profit corporation has not adhered to the requirements of s.10.01.

PART 11.00

MEMBERS

231. Section 11.01, adapted from s.123 of the proposed CBCA, is new. Section 90(1) of the present Act (not applicable to Part II corporations) requires meetings to elect directors to be held within Canada, but makes no provision in respect of the location of meetings of shareholders. It has been thought wise to include a general provision dealing with this matter in the proposed CBCA. The proposed CNPCA follows the same approach.

232. Section 11.02 is based upon s.124 of the proposed CBCA. Section 11.02(a) reproduces the substance of s.102(1) of the present Act, applicable to Part II corporations by s.157(1)(c). Section 11.02(b), read together with s.11.04(6) and (7) reproduces the substance of s.101(6) of the present Act, not applicable to Part II corporations. Section 155(2)(b) of the present Act provides that the by-laws shall include provisions upon the "mode of holding meetings" and the not-for-profit corporation's by-laws would often include a provision as to special meetings of members.

233. Section 11.03(1) is adapted from s.125(1) of the proposed CBCA which reproduces the substance of s.105(1) of the present Act, not applicable to Part II corporations. Under s.11.03(1), the directors are authorized to fix a date, not more than 50 days before the meeting, upon which the determination of those entitled to receive notice of the meeting may be made. By s.11.04(2), anyone entered upon the register of members at that date is entitled to receive notice of a meeting. By s.11.07, anyone becoming a member after the record date fixed under s.11.03(1) is also entitled to attend and vote, though not entitled to receive notice of the meeting. If a record date is fixed, under subsection (3) notice thereof must be advertised. The fixing of a record date in respect to a not-for-profit corporation will be rare, and usually s.11.03(2), which is straightforward, will be operative.

234. Section 11.04(3) is adapted from s.605 of the NY N-PCL and is similar in purpose to s.134(2) of the Ontario Act. Section 11.04(3) serves the purpose of easing considerably the administrative work and expense of mailing notices, particularly where the corporation is a charitable corporation which may have a widely scattered, mostly disinterested, membership amounting to several thousand people. If the corporation has more than five hundred members notice can be made by newspaper publication as set forth in the provision.

235. The corporation with a membership of five hundred or less will not incur a significant burden through having to mail notices, and as notice by mail results in a more probable communication with the members, it is useful to require notice to be by mailing in such event.

236. Subsections (4) and (5) are based upon s.126(3) and (4) of the proposed CBCA and are new. At common law, an adjourned meeting is treated as a continuation of the meeting adjourned—*Jackson* v. *Hamlyn,* [1953] Ch. 577—and fresh notice need not be given, unless any new business is to be transacted: *Christopher* v. *Noxon* (1883), 4 O.R. 672. Some corporations include a requirement that fresh notice must be given if the adjournment is over a longer period than prescribed, and this principle is adopted in the proposed CBCA and proposed CNPCA.

237. Subsections (6) and (7) are based upon s.126(5) and (6) of the proposed CBCA and are new, but are merely statutory statements of provisions that are common in corporate by-laws, and do not call for extended explanation. Subsection (8) requires a notice of publication to include a reference to any proposal under s.11.06(3) and affords the right of examination to members of a membership corporation and to any person in respect to a charitable corporation. This provision is similar in effect to ss.13.03(3) and 13. 05(2) and (3) in respect to financial statements.

238. Section 11.05 is similar to s.127 of the proposed CBCA and has no counterpart in the present Act. The practice of waiving notice of meetings of shareholders is, in small closely-held business corporations, a common one, and it seems desirable to legitimize this by an explicit statutory provision. Such a provision has merit for not-for-profit corporations as well, although it will be much less frequently employed. This provision is similar to s.6.06 of the NY N-PCL. There are comparable provisions for waiver of notice of directors' meetings in ss.9.03(3) and 9.13(5) of the proposed CNPCA.

239. Section 11.06 is adapted from s.128 of the proposed CBCA which substantially reproduces the provisions of section 108.8, an addition to the present Act made in 1970, but not made applicable to Part II corporations.

240. The purpose of the proposed CBCA provision is to provide a shareholder with machinery enabling him, at the expense of the corporation, to communicate with his fellow shareholders on matters of common concern. At common law, the mangement of a corporation is under no obligation to make any reference in any of the documents sent out by it to any non-management view of the matters to be discussed—*Campbell* v. *Australian Mutual Provident Society* (1908), 24 T.L.R. 623—nor to include in a notice of meeting any proposals other than its own: Gower, *Modern Company Law,* 3rd. ed., 1969, p. 479. This places shareholders wishing to have a matter discussed at a meeting at a severe disadvantage because the meeting cannot effectively do anything not fairly comprehended by the notice of meeting.

241. Section 11.06 performs the same function for members of not-for-profit corporations. However, as there is not a solicitation of proxies by the management of not-for-profit corporations, s.11.06 requires the "proposal" to be included when a notice of meeting is being sent out as required by s.11.04. It is possible that this provision will seldom be employed. However, there may well be occasions when it is utilized to advantage, especially with the charitable corporation where there can be widely divergent views as to the general approach in achieving fulfilment of the non-pecuniary purpose. Members may have different views on the basic programs to be undertaken, or a proposed change in the basic programs to better accomplish the non-pecuniary purpose. This machinery is purposeful in rendering the not-for-profit corporation more responsive to the views of members than it might otherwise be.

242. The only alternative now open to dissident shareholders of the business corporation in such a situation is to requisition a meeting pursuant to s.103 of the present Act. Although s.103 of the present Act is not applicable to not-for-profit corporations, s.11.12 of the proposed CNPCA is the substantial equivalent thereof. However, the requisition of a meeting under s.11.12 could be costly.

243. Section 11.06 accordingly seeks to provide a suitable alternative. It is based upon the proposition that members, as with shareholders, are entitled to have an opportunity to effectively discuss corporate affairs in general meeting, and that this is a right and not a privilege to be accorded at the pleasure of management. The machinery of the section permits a member in a corporation to have his proposal included with the notice of meeting required by s.11.04. Similarly, where notice of meeting is by publication—s.11.04(3)—the notice by publication can include the proposal or (if authorized by the articles or by-laws) a reference to the proposal and a statement that the proposal is available for examination: s.11.04(8).

244. The member is only entitled to have his proposal included if he gives adequate notice of it, and if it is an appropriate matter for action by the members in general meeting: s.11.06(5)(a) to (c). Subsection (5)(b) is designed to make it clear that the machinery of this section cannot be used to authorize the taking of decisions by the general meeting which the members are not otherwise competent to make. Whether a proposal is a subject for action by members must be determined by the Act, the articles, by-laws and any members' agreement.

245. Paragraphs (c) and (f) are designed to make it clear that the members' meeting is not an appropriate forum for discussing personal grievances or life in general. Paragraphs (d) and (e) are intended to protect management and the members generally from being harassed by repetitious discussion of stale matters.

246. Subsection (6), like s.9.09(4), protects a corporation from the consequences of circulating a defamatory statement. Subsection (7) requires a corporation to notify any member whose proposal it refuses to circulate, or to refer to in its notice of meeting by publication (s.11.04(8)), and subsections (8) and (9) allow either party to seek the court's assistance. Subsection (10) provides that the Registrar is to receive any notice of an application to the court and is entitled to appear and be heard.

247. Section 11.07, similar in purpose to s.129 of the proposed CBCA, provides for a list of members entitled to receive notice, or who would have been so entitled if s.11.04(3) was not operative, to be prepared after the record date. Such a list will be used to determine who can vote. This provision will not impose an administrative burden, and it is necessary to set forth clearly by statutory provision who can vote. Although it is comparatively unusual for there to be contentious voting in the not-for-profit corporation, such situations do arise, in which event it is essential to be certain as to who may properly vote.

248. Section 11.08 is based in part upon s.130 of the proposed CBCA, which has no counterpart in the present Act, and in part upon s.608 of the NY N-PCL. This provision is designed to clarify the common law in a number of respects. At common law, there is authority for the view that as a general rule a meeting requires at least two persons: *Re Primary Distributors Ltd.*, [1954] 2 D.L.R. 438; *Re Cowichan Leader Ltd.*, (1963), 42 D.L.R. (2d) 111. In view of the legitimation by the proposed CNPCA of the "one-man corporation", it is necessary to provide that one person may constitute a meeting, and this is done by subsection (4).

249. There is no reason why the by-laws should not provide for fewer than majority quorum requirements, and this is a common practice in the by-laws of corporations with many members. However, subsection (3) precludes the practice of providing that if a quorum

is not present at the opening of a meeting, the meeting shall stand adjourned to a fixed time, when the members then present shall constitute a quorum and may proceed to business.

250. At common law there is some doubt whether a quorum must be present throughout a meeting, or only at the opening. The better view, as reflected in the decision in *Re Hartley Baird,* [1955] Ch. 143, is that a quorum is necessary only at the opening of a meeting, and this view is embodied in s.11.08(2).

251. Section 11.09(1) reproduces part of s.104 of the present Act (not applicable to Part II corporations). It is very unusual in a not-for-profit corporation for a member to have more than one vote, or to not have any vote at all. In the absence of the articles otherwise providing, each member is entitled by s.11.09 to one vote. Note also s.5.01 which deals with classes of membership.

252. Subsections (2) and (3) reproduce the substance of s.107 of the present Act (not applicable to Part II corporations), and provide that an authorized individual can represent a body corporate or association which is a member of the corporation, and exercise all the powers it could exercise if it were an individual member. By s.5.02 "persons" can be members, and "persons" has an extended meaning by s.1.02(1). Section 5.01 provides for classes of memberships and allows for different rights, privileges, restrictions and conditions attaching to each class.

253. Section 11.10 is adapted from s.132 of the proposed CBCA, which is new. Subsection (1) reflects the common law rule that voting takes place by show of hands, unless a ballot is demanded: *In Re Horbury Bridge, Coal, Iron* & *Wagon Co.* (1879), 11 Ch. D 109. It also clarifies the uncertainty existing at common law as to whether a proxyholder is entitled to demand a ballot: *Queen* v. *Government Stock Investment Co.* (1878), 3 Q.B.D. 443; *Re Haven Gold Mining Co.* (1882), 20 Ch. D 151. Under s.1110 (1) it is clear that a proxyholder may demand a ballot.

254. Subsection (2) clarifies the doubt which exists at common law as to whether a vote by show of hands is an essential precondition to a call for a vote by ballot: *Carruth* v. *Imperial Chemical Industries Ltd.,* [1937] A.C. 707; *Holmes* v. *Heyes,* [1959] Ch. 199. Under s.11.10(2) a ballot may be demanded at any time.

255. Section 11.11 is based upon s.133 of the proposed CBCA which is a new provision, especially useful in the "one-man corporation". It seems pointless to require ritual meetings in such corporations and this section simply recognizes the realities of the situation. Moreover, it has long since been recognized that informal consent of all shareholders, or members, to an act *intra vires* the corporation is as effective as a formal resolution at a duly convened meeting: *Walton* v. *Bank of Nova Scotia,* [1965] S.C.R. 681. Comparable provision is made for written consents of directors in s.9.15. The principle of the section applies, of course, to corporations with more than one member, which will be the common situation.

256. Section 11.12 is adapted from s.134 of the proposed CBCA, which is based, with some changes, upon s.103 of the present Act (not applicable to Part II corporations). As with several of the statutory provisions of the proposed CNPCA, it is probable that s.11.12 will only be seldom utilized. However, it is necessary to provide the members with this facility, so that it can be utilized, if needed. At the time of the writing of this report, a group of members were seeking to requisition a meeting under s.325 of the Ontario Act in respect

to an Ontario incorporated not-for-profit corporation. The proportion of members required for a valid requisition under s.11.12 is 5%. It is probable that a small group of members requisitioning will actually represent a sizeable percentage of the *active* members of the corporation. Therefore, a 5% requirement for a valid requisition represents a reasonable proportion in the interests of facilitating the requisitioning of meetings for legitimate corporate purposes. The requirement for a valid requisition of shareholders by s.134 of the proposed CBCA is 10% of the shares.

257. Subsection (6) adopts s.103(5) of the present Act together with the provision that the members may resolve that the corporation not reimburse the requisitionists. This addition seems desirable as a protection against harassment through requisitioned meetings.

258. Section 11.13 is based upon s.135 of the proposed CBCA which reproduces s.106 of the present Act (applicable to Part II corporations) but subsection (2) has been added to remove any doubt that the court has power to impose a different quorum rule, the usual reason why resort would be made to this section.

259. Section 11.14 is based upon s.136 of the proposed CBCA and provides the straightforward right to a corporation's member or director to make a summary application to the court to determine any controversy with respect to an election of a director or auditor of the corporation. The powers of the court in this section are broad and unequivocal. The provision is an analogue of the generic remedy set out in s.28 of The Federal Court Act, which provides for a summary review of judicial or quasi-judicial decisions made by federal tribunals. The purpose of s.11.14 is to furnish a remedy which, like the prerogative writ of *quo warranto* (traditionally, the remedy invoked to review a contested election of a director), may be invoked by a summary application to the court, but which will be free of the conceptual and procedural difficulties that have long encumbered those writs. This statute provided remedy also renders unnecessary any possible distinction among personal actions, representative actions by a member on behalf of all members, and derivative actions in the name of the corporation.

260. Section 11.15 is adapted from s.137 of the proposed CBCA. Although pooling or unanimity agreements would be rarely sought among the members of a not-for-profit corporation, the flexibility to enter such agreements should be provided, to be used if desired. For example, the members of a family controlled foundation might want a unanimity agreement.

261. It is implicit in the definition of director in s.1.02(1) that where a person, though never elected a director, acts as one, he incurs the liability of a director. Section 11.15(4) merely makes this explicit where a members' agreement has been entered into, and is designed to prevent members who have entered into such an agreement from relying upon it as a defence to an action based upon derelection of duty as director. It also prevents members who have unanimously entered into a total management contract with a stranger from relying on the agreement to escape any liability they may otherwise incur for failure to perform their duties of supervision.

262. It will be very unusual to have a unanimous agreement of members and it will also be very unusual that a membership interest can be transferred (s.5.03). By s.11.15(3) a transferee of the interest of a member subject to a unanimous member agreement is deemed to be a party to the agreement.

Part 12.00

PROXIES

263. Part 12.00 of the proposed CNPCA is an adaptation of ss.138 and 139 of Part XII of the proposed CBCA (in turn based upon ss. 108.1 and 108.2 of the present Act—not applicable to Part II corporations). Part 12.00 gives a statutory basis to the appointment of a proxyholder by a member, sometimes provided for at present in the by-laws of not-for-profit corporations. Section 12.01 is simply an interpretation section and is self-explanatory. Section 12.02 of the proposed CNPCA corresponds closely to s.85 of the Ontario Act and is similar to s.609 of the NY N-PCL, being the statutory provisions in respect to proxies for not-for-profit corporations under Ontario and New York law respectively.

264. Section 12.02(1) confers upon every member entitled to vote at a meeting of members the right to appoint a proxyholder to cast his vote at the meeting, and that proxyholder need not be a member. However, subsection (8) provides that the articles of a corporation can provide that a proxyholder must be a member. This is necessary because a corporation, in particular, a membership corporation with a non-pecuniary purpose of a fraternal nature, may well discuss matters at meetings which are properly discussed only amongst members. It may even be considered that a member should not vote unless present. Thus, a corporation may also specify in its articles that a member may not appoint a proxyholder.

265. Subsections (2), (5), (6), and (7) are self-explanatory.

266. Subsection (3) ensures that proxies can be used only for the purpose of voting on the questions upon which the member has been given the opportunity to consider. If a proxy could be used at a subsequent meeting, perhaps to vote on entirely different matters, the true function of the proxy would be lost. A new proxy could, of course, be given.

267. Subsection (4) specifies the minimum requirements as to the content of every proxy form. A member who wishes to give a proxy really has to do little more than name the proxyholder and make clear the particular meeting at which the proxyholder is to act.

268. Section 12.03 is a unique provision. Section 15 of the Model Act legitimates the use of mail ballots but only in respect to the election of directors or officers by members or a class of members. Trade unions sometimes provide for mail ballots. The use of a mail ballot by a not-for-profit corporation should often facilitate participation by members in respect of matters upon which members can vote. The meetings of not-for-profit corporations, particularly charitable corporations, are often poorly attended because of the lack of any pecuniary or active non-pecuniary interest in respect to the corporation. Section 12.03 permits the use of a mail ballot where the by-laws so provide.

PART 13.00

FINANCIAL DISCLOSURE

Introduction

269. Very little is provided under the present Act in requirements as to the form and content of financial statements or financial disclosure in respect to not-for-profit corporations. The provisions applicable are ss.117, 130-132. Section 117 makes mandatory the keeping of "proper accounting records" and ss.130 and 131 pertain to the appointment of the auditor. Section 132 sets forth the requirements of "an audit" and "auditor's report" which is to be based on "the financial statement". However, s.132 does not specify the nature of the "financial statement" required for the not-for-profit corporation.

270. The present Act has extensive provisions for business corporations in respect to financial reporting and disclosure. These provisions are inappropriate for the not-for-profit corporation because of its non-commercial nature. For example, s.118 of the present Act requires the directors of the business corporation to place before the annual meeting a "comparative financial statement" made up of an "income" statement, a statement of "surplus", etc. The terms used necessarily have simply a commercial connotation. This language is unsuitable for the not-for-profit corporation because of its functional distinctiveness from the business corporation. Perhaps it is because of this unsuitability of language that s.118 is not made applicable to Part II corporations. However, there is not a parallel, suitably worded, provision in Part II of the present Act.

271. Moreover, because the uses to which not-for-profit corporations are being put are more varied than as between business corporations there is need for statutory treatment which is flexible depending upon the activities of the particular type of not-for-profit corporation.

Financial Statements and Reporting Required of a Not-for-Profit Corporation

272. Part 13.00 of the proposed CNPCA is based upon Part XIII of the proposed CBCA. The duty to keep accounts (presently s.117), as with the proposed CBCA, has been placed in s.4.02(2) of Part 4.00.

273. The proposed CBCA does not specify the kind of financial statements required of a business corporation. The rules for business corporations (found in ss.118 to 126 of the present Act) which set forth the particular items of information required, are omitted from the proposed CBCA which proposes that such requirements be prescribed in regulations. This novel approach is even more appropriate for not-for-profit corporations.

274. The form and content of the financial statements for the not-for-profit corporation is best dealt with through being prescribed in regulations. This would be done only after previous exposure to the accounting profession and interested groups. This would be accomplished by the regulations not being effective until 60 days after their publication; s.20.09(2). Moreover, the Statutory Instruments Act S.C. 1970-71, c. 182 provides controls upon delegated legislation. The proposed CNPCA also provides a right to apply to the Registrar for an exemption from any of the rules laid down in the regulations in respect to the form and content of financial statements: s. 13.02.

275. The need for improvement in the quantity and quality of financial disclosure required of not-for-profit corporations can be best accomplished through this approach. First, accounting practices are always evolving and the legal framework needs to be easily flexible and sufficiently adjustable to meet this demand. Secondly, there are two, very different, basic types of not-for-profit corporations, and within each basic type widely varying operations, which call for a responsive and flexible form of legislation.

276. From the standpoint of present practice, the general principles set forth in the *Canadian Standards of Accounting and Financial Reporting for Voluntary Organizations,* 1967 (set forth in full as Appendix "B" to this report) are often followed by the auditors of not-for-profit corporations. The compilation of *Canadian Standards of Accounting and Financial Reporting for Voluntary Organizations* was thought necessary in part because of the need for appropriate standards for the not-for-profit corporation, the present absence of meaningful statutory standards, and the different, non-commercial, terminology and criteria, as compared with business corporations, considered to be appropriate for not-for-profit corporations.

277. General standards would be set forth in the regulations in the nature of those suggested in *Canadian Standards of Accounting* (see Appendix "B" to this report) such as in respect to the accrual basis of accounting, fund accounting, comparative figures, an analysis of expenses on a functional basis, a summary of financial activity, statements of changes, etc. This approach will not only bring extensive reform in respect to quantity and quality but will also bring *uniformity* in respect to the form and structure of financial statements. This is essential to realization of the goal of meaningful disclosure to the public in respect to the activities of charitable corporations.

278. There must be adequate reporting provisions to afford both the government and the public disclosure of the charitable corporation's financial affairs and its administration and operations. Reporting provisions would require initial and annual returns, or more often if so requested by the appropriate government officials. The form of such returns can be determined by regulations modified as necessary from time to time but would include such matters as: the financial statements with all necessary supplementary explanatory information, the auditor's certification of the financial statements, names and addresses of the directors and officers, and remuneration paid thereto, information as to tax exempt status, details about the nature of monies raised through solicitations (but not the names of contributors), names and addresses of professional fund-raisers, particulars of contracts with professional fund-raisers, details of the nature of operations so as to reveal whether there is self-dealing, etc. and particulars of the property of the corporation, including details as to transactions during the period reported. Prompt notification should be required of the corporation as to significant changes in information required to be furnished in the annual return (for example, a new professional fund-raiser's contract, or new fund-raising campaign, or loss of tax exempt status).

279. Although little is required by the present Act, in practice most not-for-profit corporations do, of course, follow accounting procedures necessary and appropriate to their operations. The imposition of generally accepted accounting standards through the proposed CNPCA and prescribed regulations will not result in either hardship or expense for the vast majority of not-for-profit corporations. The Community Funds and Councils of Canada, Inc. recommends and requests of its member United Way organizations compliance with the standards set forth in Appendix "B". The appropriate accounting standards benefit the corporation itself, of course, through assisting in planning and control. The proposed frame-

work will provide, through saving and exception provisions, sufficient flexibility to prevent hardship and cost. Therefore, the requirements of financial disclosure for the not-for-profit corporation will result, without significant cost, in greater safeguards to the corporation, members, and the public, from the potential harm and much greater cost which may occur through unrecognized abuse of the non-pecuniary purpose of the corporation.

The Need for Financial Disclosure

280. The policy underlying the Income Tax Act is that the privilege of an exemption of otherwise taxable income is desirable to facilitate the non-pecuniary purposes of charitable corporations. As the loss of tax revenues must be made up from taxpaying sources, the taxpaying public is subsidizing the services provided by charitable corporations. A charitable gift is also underwritten by the public to the extent that the cost of the gift to the donor is reduced by the allowance of an income tax deduction (or succession duty exemption). Therefore, the public has the corresponding right to evaluate the performance of "tax exempt" corporations in providing such services, similar to the evaluation afforded in respect to the use of other public monies. A policing function to prevent tax evasion is performed vicariously by the Department of National Revenue. However, this policing function is limited simply to establishing that the monies involved in the operations of the not-for-profit corporation are being channelled into services which the corporation is to provide. This policing function would be facilitated incidentally through the requirement of public disclosure in respect to the given corporation's activities, financial statements, etc.

281. The question arises as to the extent to which the supervision of charitable corporations is or should be undertaken by the Department of National Revenue. Clearly, the primary function of that Department is to produce revenues through enforcement of the Income Tax Act. However, most of the usual problems of the charitable corporation are not of importance to the Department of National Revenue, for example, problems such as investment policy, inefficient or inactive management, the quality of services provided, and the efficient utilization of monies and property. The sanctions imposed by the Income Tax Act do not tend to promote the public interest in respect to these concerns.

282. Many jurisdictions divide the function of supervision and enforcement between the taxation authorities and another government agency. For example, in England responsibility for the supervision of charities is vested with the Charity Commissioners, whose traditional powers were extended by the Charities Act 1960, 8 & 9 Eliz. 2, c. 58, s.1(3), (4), and they have broad powers. See generally, *Report of the Committee on the Law and Practice Relating to Charitable Trusts,* Cmd. 8710 (1952), and *The Modern Law Of Charities* (2ed), G.W. Keeton and L.A. Sheridan at pp. 207-230. It is necessary, of course, that the appropriate balance between the two agencies be considered and that there be the fullest co-operation so that the overall objectives of the government and the public in supervision and enforcement are best achieved.

283. The provisions of the proposed CNPCA in respect to disclosure are not suggested for reasons of tax policy. Such concerns are properly left solely to tax legislation. The provisions of the proposed CNPCA are necessary simply because the goals of tax legislation are not coincidental, even though they are somewhat complementary. The provisions of the proposed CNPCA will tend to facilitate the policy of the tax legislation but this is an incidental result and benefit. The provisions requiring financial disclosure have important goals in themselves, which are not achieved through the tax legislation.

284. What should be the concern of the not-for-profit corporation, its members, the public, and the government in respect to financial disclosure? Implicit to the idea of "charitable" is the notion of "trust", apart from the question as to what extent actual legal or equitable principles of law come into play. Monies are given to the charitable corporation in the layman's sense of being "in trust", to be used for the given charitable purpose. There is an expectation on the part of the public that the corporation will be held responsible for the use of such monies in accordance with the intended charitable purpose. Furthermore, the members and directors of the charitable corporation are not motivated by a pecuniary self-interest. There are not the built-in incentives on the part of the members and directors to maintain interest and control as in the business corporation.

285. The two basic types of not-for-profit corporations depend upon the extent of public involvement. In respect to the membership corporation, formed for a private non-pecuniary purpose, the membership is voluntary, the impact on the community is slight, and the monies involved relatively insignificant so that the members can be left for the most part to work out their own problems. Therefore, flexibility is needed through saving and exception provisions to minimize the regulatory control in respect to membership corporations.

286. Public involvement is significantly greater in respect to the charitable corporation. Donations are made by many persons, for the most part from beyond the membership, and services are made by the corporation to the public. Several hundred millions of dollars are involved annually. For example, the amount of money deducted for tax purposes for 1970 for donations to charities by simply individuals amounted to over one-quarter billion dollars. See Taxation Statistics, Information Canada, 1972. Society has an interest in seeing that the services are satisfactorily provided. The real investors are often the taxpayers, present without choice or knowledge. Some charitable corporations are financed by monies flowing through the Canada Assistance Plan or otherwise by the federal government. The projected expenditures to the provinces for 1972-73 under the Canada Assistance Plan amount to almost one-half billion dollars. See "How Your Tax Dollar is Spent", Treasury Board, Information Canada, 1972, at p. 22. The voluntary aspect of the charitable corporation is minimal. The public concern is paramount.

287. When the foundation is considered in relation to its stated charitable non-pecuniary purpose, adequate disclosure is both a logical and necessary consequence. Lack of direct contact with the public does not mean that the foundation should be any less exempt from public scrutiny than the operating charitable corporation providing services directly to the public.

288. Disclosure and policing mechanisms encourage the proper channelling by foundations of their resources and provide a better basis for the public to identify problems that might exist. It is difficult at present to establish the extent of the phenomenon of the foundation in Canada, or the possible problems in respect thereto, because there is no central source to afford meaningful data.

289. There are some 1400 foundations in Canada (of which some 264 have been incorporated at the federal level) and these can be classified into five broad categories: general charitable purpose, particular charitable purpose, business corporation sponsored, family controlled, and foundations which confine their interest to a given geographical area or community. The fact that a foundation depends upon private initiative for its creation, funding and on-going activities does not mean that financial disclosure should not be made

to the public. The foundation is incorporated for a charitable non-pecuniary purpose. The element of personal control possible in the foundation and personal interest in respect to the foundation's property may sometimes be conducive to under-recognition of the stated charitable non-pecuniary purpose of the corporation. Furthermore, tax privileges are almost always sought by the foundation and its donor, with the result that the public, through the taxpayer, is a participant in the foundation.

290. There is a common need by fund raisers and operating charitable corporations and organizations to know what is happening and what is available in the way of funds from foundations. With effective disclosure, foundations are also more likely to know what other foundations are doing so as to better co-ordinate and not duplicate their respective programs, and so as to better develop a common and mutually-advantageous professional and administrative expertise. The effectiveness of foundation planning, administration and giving of funds is impeded by the lack of communication amongst foundations themselves.

291. The considerations advanced for disclosure to the public extend to the operating charitable corporation or foundation which does not solicit donations through public subscription (either by membership fee or donations from non-members, or both), or seek tax exempt or deductibility for donor status, simply because the stated purpose of the corporation is to provide services, directly or indirectly, in areas of recognized public need. The public should be able to ascertain whether and what services are being provided and the quality thereof. This information will tend to enhance the nature and quality of the services of such corporations through corporate awareness that the information is available to the public and will provide a basis for private or public initiative when the quality of services is considered to be inadequate.

292. The charitable corporation is a suitable mechanism to utilize individual initiative in meeting certain social needs with a minimum of government participation. The public has the right to assess the performance of charitable corporations. Disclosure also increases the likelihood of retention of the present system of extensive private activity in the charitable activities field. Activities are less likely to be unwittingly consumed by unnecessary government programs.

293. A more-informed response can be made to a solicitation if information is available setting forth clearly the cost of administrative overhead, etc. For example, the Better Business Bureau, in responding to enquiries about solicitations by charitable organizations often employs the standard of determining the percentage of monies expended in administration as compared with operations. However, even this simple and rough yardstick is difficult to use because of the lack of required disclosure, and the lack of uniformity in the form of disclosure voluntarily chosen.

294. A simplified, and least costly, approach to public disclosure would be to marry the reporting requirements under the proposed CNPCA with those required under the Income Tax Act, utilizing a return with a "confidential" portion (which would include, for example, any reference to the names of contributors) and a "public" portion. A copy of the entire return would go to the taxation authorities, with a copy of the "public" portion being utilized for the purpose of the proposed CNPCA. Disclosure of the "public portion" could be extended, of course, as in the United States, to all charitable organizations (thereby including provincially incorporated corporations and unincorporated associations) filing returns under the Income Tax Act through the tax legislation itself requiring public disclosure thereof.

295. Section 13.01 of the proposed CNPCA follows the approach of s. 146 of the proposed CBCA in providing that the form and content of the financial statements be "as prescribed" by the regulations. Section 13.01 requires the directors to place before the members comparative financial statements at the annual meeting. Section 13.01 is similar to s. 118 of the present Act, not applicable to Part II corporations. Subsection (2) allows for the omission of the financial statements for the immediately preceding financial year, providing this is noted.

296. Section 13.02 is identical to s. 147 of the proposed CBCA, which is similar in purpose to s. 129.3 of the present Act, not applicable to Part II corporations. Flexibility is particularly necessary with not-for-profit corporations because of their widely varying activities. Section 13.02 allows the Registrar to exempt a corporation from preparing a required financial statement or to omit any particular item.

297. Subsection 13.03(1) is self-explanatory. Subsections (2) and (3) afford the right of examination to the subsidiary statements referred to under subsection (1). Subsection (4) allows a corporation to apply to a court for an order barring the right of a person to examine on the basis that examination would be detrimental to the corporation or the subsidiary body corporate. Subsection (5) requires notice of such application to be given to the Registrar and provides that the Registrar may appear and be heard.

298. Section 13.04 is self-explanatory. It is similar to s. 149 of the proposed CBCA, which is similar to s. 127 of the present Act (not applicable to Part II corporations).

299. Subsection 13.05(1) is based upon s. 150(1) of the proposed CBCA, and requires a copy of the financial statements to be sent to each member twenty-one days before the annual meeting.

300. Subsection (2) provides, in addition, that every charitable corporation must publish newspaper notices stating that the financial statements are available for examination. This facilitates disclosure to the interested public.

301. Subsection (3) provides that a charitable corporation with more than 500 members, or a membership corporation which chooses to publish the notice required by subsection (2), may resolve to not send a copy of the financial statements to each member as required by subsection (1). Thus, the charitable corporation with more than 500 members may publish the required notice of a meeting—s. 11.04(3)—and if it is an annual meeting incorporate in that notice reference to the financial statements to meet the requirement of s. 13.05(1). This will avoid some of the heavy cost of direct communication for the charitable corporation with a large membership. However, the charitable corporation with 500 members or less must send notices of meetings, and the financial statements if an annual meeting, to the members as the cost will be relatively insignificant and there will be a greater likelihood of communication with the members than is likely simply through publication.

302. Charitable corporations are also required by s. 13.06 to send a copy of the financial statements to the Registrar. This will facilitate disclosure to the public directly, as there is a right of inspection through the office of the registrar provided by s. 20.14. It will also further the interest of the public indirectly through assisting the government in acting as surrogate on behalf of the public in taking any appropriate remedies as provided by Part 19.00.

303. Sections 13.07 to 13.14 are adapted from ss. 152 to 159 of the proposed CBCA.

304. Section 13.07 provides for the "independence" of the auditor. At present, it is not uncommon to have as an auditor of a not-for-profit corporation someone who is a director or a partner or associate of a director. There is no reason why this is necessary. The fact that the auditor may be providing his services gratuitously perhaps accounts for his being a director. Obviously, there is not present in the not-for-profit corporation the potential conflict of interest of an auditor who is a shareholder or director of a business corporation for which he does the audit. Nevertheless, the function of management should be divorced absolutely from that of auditor. One of the prime purposes of the audit is to comment upon the accounting books, the internal controls in respect to financial and accounting matters, and the financial statements. The not-for-profit corporation deserves an independent auditor so that there is neither an actual conflict of interest nor the appearance of a conflict of interest. Note that s.13.10(4) allows the court to exempt an auditor from disqualification. Subsection (3) provides that a person is not disqualified from being an auditor simply because he is a member of the corporation.

305. Section 13.09 provides that a membership corporation, not required to make their financial statements public, may forego the benefits of an audit if all the members wish. Thus, as with the proposed CBCA, (s. 154), the proposed CNPCA draws a distinction between a good audit or none at all, but not between a good audit and one which is open to question because of lack of independence.

306. Sections 13.08 and 13.10 to 13.14 govern the appointment, removal and replacement of auditors. The purpose of these provisions is to strengthen the auditor vis-à-vis the management of the corporation. By making the removal of the auditor comparatively difficult (at least if the incumbent auditor has valid grounds for disputing his removal) greater control by the members is enhanced. The rules in s.13.14 parallel those in s.9.09 dealing with directors.

307. Section 13.15 is based upon s.160 of the proposed CBCA and deals with the auditor's duty to examine and report.

308. Subsection (2) allows an auditor of a holding corporation to reasonably rely on the work of another auditor, if the extent of that reliance is declared in the report of the auditor of the holding corporation. The holding corporation's auditor must be able to show that it was reasonable for him to so rely, however, and subsection (3) says that reasonableness is a question of fact.

309. Section 13.16 is identical in substance to s.161 of the proposed CBCA. This provision ensures that the auditor of a corporation has the power to demand, both in terms of quantity and quality, the information he needs to perform his duties.

310. Section 13.17 is adapted from s.162 of the proposed CBCA, which embodies the ideas advanced by the Lawrence Committee and implemented in ss.182 and 171(4) and (5) of the Ontario Business Corporations Act. The provision is significant for almost all charitable corporations. Section 13.17(1) requires an audit committee of not fewer than 3 directors, a majority of whom are not officers or employees of the corporation, to be constituted whenever the corporation is one which solicits money or property from the public for the purpose of carrying on its non-pecuniary purpose or purposes. This provision is designed to

facilitate protection of the public interest in respect to charitable corporations which solicit funds from the public, whether by way of giving membership interests or not.

311. Section 13.18, identical to s.163 of the proposed CBCA, gives qualified privilege to statements made by an auditor, whether the statement is one made in his report to the members or a statement made under section 13.14. In this latter respect the section parallels s.9.09(4). The idea, of course, is to encourage full and frank statements by auditors. Such statements (provided always that there is no malice) probably have qualified privilege now at common law. It is desirable to make the point clear, particularly to auditors who may not be aware of the common law position.

312. Section 13.19 provides for reports, annually or more often, as may be prescribed, in respect to the activities of the charitable corporation. This provision meets the concern for the broad disclosure of such information as that referred to in paragraph 278 to this commentary. This information, or the lack of it, will facilitate an appreciation by the members, public, and Registrar as to what is happening in respect to the corporation, and whether remedial action is required. Section 20.14 affords disclosure of the information to the interested public. The provision is similar in purpose to annual returns required by s.133 of the present Act, although the information required will be both more appropriate and more extensive to the purpose of meaningful disclosure of the financial and related activities of the charitable corporation.

PART 14.00

FUNDAMENTAL CHANGES

313. Part 14.00 deals with fundamental changes, whether by way of amendment to the articles (ss.14.01 to 14.07) or by virtue of corporate amalgamation (ss.14.08 to 14.18). There is an almost complete absence of provisions in the present Act applicable to Part II corporations in respect to this subject area. Both the Ontario Act (ss.134(1) and 114) and the NY N-PCL (ss.801 to 805 and 901 to 909) have provisions dealing with this subject area. However, they do not provide appropriate models for a federal not-for-profit corporation law. Accordingly, the provisions of the proposed CBCA in this area have been adapted to meet the needs of the federal not-for-profit corporation.

314. With the business corporation, the primary concern in respect to fundamental changes is to protect the rights acquired by a minority shareholder through ownership of a share. Thus, the proposed CBCA provides workable standards to govern the conduct of the majority shareholders. In particular, Part XIV of the proposed CBCA confers upon a shareholder who dissents from a fundamental change the privilege of opting out of the business corporation and demanding fair compensation for his shares.

315. As the not-for-profit corporation is formed for a non-pecuniary purpose there is not nearly as compelling a concern to restrict the conduct of majority members. Fundamental changes to the charitable corporation must be consistent with maintaining its basic nature of being formed and operated for a charitable non-pecuniary purpose. Providing the fundamental changes are consistent with this continuing restriction and providing the expectations of people who have donated monies to the corporation on a given premise are recognized, there is no real concern.

316. However, with the membership corporation, formed for a private non-pecuniary purpose, it might be unfair to a dissenting member to allow a fundamental change without providing the privilege of opting out of the corporation and demanding fair compensation for his membership interest. A member of a membership corporation should not run the danger of becoming a member with the expectation of receiving given benefits, albeit non-pecuniary, and the corporation through a fundamental change not fulfilling that reasonable expectation.

317. Part 14.00 thus provides the right to dissent to the member of the membership corporation from a proposed fundamental change. A member of a charitable corporation is not given this right. However, the member of a charitable corporation and the general public, who may be financing the activities of the corporation to a considerable extent, have an interest in any fundamental change. This is recognized in the proposed CNPCA by certain proposed changes of charitable corporations requiring prior approval of the court. Subject to these important qualifications, Part 14.00 of the proposed CNPCA follows the structure and approach of Part XIV of the proposed CBCA, and its provisions are an adaptation thereof.

318. Part 14.00 has several objectives. First, all of the usual amendments to the articles of incorporation are consolidated in one section, providing a convenient although not exclusive checklist for the practitioner. Second, class rights are given specific protection because a class of members (even though there is not a pecuniary interest to protect) have an interest in their position so far as influencing the management and the direction of the corporation's

activities. Third, Part 14.00 deals with all variations of fundamental change in one place, applying consistent rules to each. Fourth, uniform formalities are adopted, parallel with the formalities required to be complied with at the time of incorporation.

319. Section 14.01 consolidates in one place a uniform regime, governing all kinds of amendments to articles of incorporation. The list is not exclusive, however, since paragraph (j) permits amendment of any extraordinary provision that may be set out in the articles. Section 14.01 includes all of the provisions applicable to Part II corporations scattered throughout the present Act: general amendment (subsections 20(1) (3) (4) and (5)), change of registered office (s.24), and change of name (s.29).

320. It is implicit in s.14.01 that a corporation generally may amend its articles as of right, just as incorporators generally may incorporate as of right under s.2.01. However, amendment is restricted generally by s.14.01(2) which stipulates that a charitable corporation may amend its articles only in a way consistent with its continuing to be a charitable corporation.

321. Amendment of the articles of a charitable corporation is further restricted specifically by s.14.01(3) if the proposed amendment is in respect to the corporate non-pecuniary purpose or the exercising of any power by the corporation. In such event prior court approval is required. This restriction is not primarily for the benefit of the members, who will have the opportunity to put their views at the meeting to consider the special resolution necessary for such amendment. The provision is to protect reasonable expectations on the part of the public who may well have already funded the corporation through solicited donations. The function of this provision is simply to provide representation on behalf of the public through the Registrar and an impartial determination of the matter by the court. The view as to the corporation's charitable purpose held by two-thirds or more of the members passing the special resolution may not accord with the expectations of the financing public. The court can exercise a broad discretion in deciding whether to approve the proposed amendment and what, if any, conditions should be imposed in respect to such approval. In particular, the court might wish to impose a condition requiring existing monies or other property, solicited from a donor with an expectation that his donation would be used for the existing specific charitable purpose of the corporation, to be so used: s.14.01(5).

322. The Registrar has no discretion to bar a lawful amendment. Beyond s.14.01(2) and (3) the only legal qualification on the right to amend is the class vote under s.14.03. In addition, the right of members of a membership corporation to dissent under s.14.17 might impose a practical limitation.

323. Section 14.02(1) confers on a member the right to propose an amendment to the articles, a right that was previously reserved to the directors. This corresponds to the right of a member to propose an amendment to the by-laws under s.9.02(6). The mechanics of making the proposal are set out in s.11.06. Subsection (2) underlines the fact that a proposal to amend is special business that is required to be set out in the notice of meeting of members that is given pursuant to s.11.04. The notice to members of a membership corporation must also set out members' right to dissent, but failure to give notice of that right does not render the amendment invalid. If proper notice of a proposed amendment is not given, a member will have grounds to apply under s.19.10 to restrain the meeting until proper notice is given to all members.

324. It will be very unusual for a not-for-profit corporation to have classes of membership. However, when such is the corporate structure, concerns are present similar to those in respect to shareholders of the business corporation. The proposed CNPCA adapts the approach of the proposed CBCA in meeting this concern. The contractual rights acquired by a member through a membership interest are not vested rights but are, rather, rights that are alterable by a special resolution of the members. Although the membership interest is thus a unique legal institution (in this respect analogous to a share) where only one class of members exists there is no great injustice involved in such amendment, since every member is aware of this peculiar qualification of his rights. But, where a corporation has, in addition to one class of voting membership interests, other classes to which particular rights, privileges, restrictions and conditions are attached, an obvious injustice may arise if the voting members are permitted to abrogate, vary or derogate from these rights, privileges, restrictions and conditions.

325. Section 14.03, adapted from s.166 of the proposed CBCA, confers very broad protection upon class members but at the same time does not unduly restrict management from amending the corporate structure in order to achieve desireable goals of the corporation.

326. The substantive provisions of s.14.03 are straightforward. A member of a class whose rights are affected has a right to vote whether or not voting rights are attached to his membership interest in case of any proposed amendment that falls within subsection (1). A proposed amendment which does or might derogate from the rights of a class member is sanctioned only if the class approves of the amendment by special resolution (two-thirds majority). Where, on the other hand, the proposed amendment does not affect class rights, if the class has no voting rights attached to its membership interests the class does not vote on the issue.

327. Note that where members of a special class do vote, they vote separately. In short, a separate special resolution is required from each class of members voting. Thus, it is conceivable that one class could veto an amendment agreed to by other classes. But no member has veto power. The circumstances described in s.14.17(1) and (2) are those in which even a single member should not be compelled to go along with the majority. In those cases the member is not given power to block the amendment agreed to by the other members, but he is given an opportunity to withdraw from the corporation altogether. The machinery for this is more fully described in the commentary to s.14.17.

328. Sections 14.04 to 14.06 are self-explanatory, setting out the administrative procedures relating to an amendment of the articles, which procedures parallel the incorporation routine.

329. Section 14.07 permits the directors of a corporation (or the Registrar to require the directors) to consolidate the corporation's original articles and all amendments thereto in one document to be known as restated articles. In addition to encouraging better corporate housekeeping, by simplifying the format of the articles it will facilitate the member's right of access to corporate records under s.4.03.

330. Sections 14.08 to 14.13 deal with corporate amalgamations. Section 137 of the present Act, which provides for corporate amalgamations, is not applicable to Part II corporations. However, such corporations do occasionally consider amalgamation and it is

necessary to have an appropriate statutory framework. Sections 14.08 to 14.13 are adapted from ss.171 to 176 of the proposed CBCA, but influenced as well by provisions of the NY N-PCL (ss.901-909) and the Ontario Act (s.114).

331. Section 14.08(2) provides that if one of the amalgamating corporations is a charitable corporation, the continuing corporation upon amalgamation must be a charitable corporation. This provision is necessary given the unique character of the charitable corporation which is formed for a purpose which is charitable or otherwise primarily for the benefit of the public. The public therefore has an interest in the corporation which cannot be compromised through an amalgamation.

332. Section 14.09 sets out in broad terms the required contents of the amalgamation agreement that the members must consider. The section is self-explanatory except for subsection (1)(d) which is discussed in the commentary to s.14.17.

333. Section 14.10 sets out the mechanics of amalgamation. Note that all members of the corporation have the right to vote in respect of an amalgamation even if all classes of members do not ordinarily have a right to vote; but a class of members has a right to vote separately as a class only if the amalgamation agreement in some way derogates from the rights of the class: subsection (5). This is a slight variation of the policy relating to amendment of the articles of incorporation. Subsection (2), which is an analogue of s.14.02(2), requires that adequate notice of the proposed amalgamation be sent to the members along with a copy of the amalgamation agreement. If the corporation is a charitable corporation with more than 500 members, the notice of meeting may be published: subsection (4). Subsection (7) permits the directors of a constituent membership corporation to terminate an amalgamation agreement any time before the amalgamation is perfected. Such immunity from contractual liability is necessary in case there are many dissenting members of a constituent membership corporation, resulting in extraordinary demands being made upon the cash resources of the corporation and thus rendering the amalgamation impracticable.

334. Section 14.11 is self-explanatory. It permits the directors (without any sanction by the members) to amalgamate a subsidiary corporation with a holding corporation or to amalgamate one wholly-owned subsidiary corporation with another. This provision will be seldom utilized. However, a not-for-profit corporation may have a wholly-owned subsidiary business corporation and perhaps might have a subsidiary not-for-profit corporation. The cumulative effect of s.14.11 is to allow for amalgamation where desired, providing always that the remaining corporation is a not-for-profit corporation with membership interests. Note that the definition of "subsidiary body corporate" in s.1.02(5) is sufficiently broad to cover a subsidiary business corporation.

335. Sections 14.14 and 14.15 permit a corporation that was incorporated under the laws of one jurisdiction to continue its existence under the laws of another jurisdiction.

336. Of the two provisions, s.14.14 relating to imports is the easier provision to draft, since in this case the corporation becomes subject to the proposed CNPCA which offers broad protection to members, and the public if a charitable corporation, and most of the pre-conditions to the transfer will be spelled out in the law of the place out of which the corporation wishes to transfer.

337. Section 14.15 deals with the export of corporations by continuance under the laws of another jurisdiction (i.e. discontinuance under the proposed CNPCA). It is difficult to have fixed rules here. Therefore, broad discretion is given to the Registrar to block a proposed export, if there is the possibility of unfairness to the members, or in respect to the public interest if a charitable corporation. A charitable corporation can only be continued under the laws of another Canadian jurisdiction. This limitation is imposed because the charitable corporation is formed to fulfil what is considered a need by the Canadian public (although the charitable activities carried on may be outside Canada). Note also that a member has the right to vote in respect of continuance under the laws of another jurisdiction whether or not he is otherwise entitled to vote.

338. Section 14.16(1) largely reiterates s.65 of the present Act, but it completely reverses the emphasis of that section. Here the directors of the corporation are presumed to have broad borrowing powers unless they are restricted by the articles or by-laws of the corporation or by a unanimous agreement of members. Under s.65 of the present Act, these powers must be expressly authorized by by-law.

339. Section14.16(2), (3) and (5) to (9) are adapted from s. 179(2) to (8) of the proposed CBCA. The common law position appears to be that directors have complete powers to dispose of the entire undertaking of a corporation without consulting the shareholders or members: *Wilson* v. *Miers* (1861), 142 E.R. 486; *Daniel* v. *Gold Hill Mining Co.* (1899), 6 B.C.R. 495. Apparently no distinction is drawn between sales in the ordinary course of business and sales of assets that constitute a sale of the whole or a substantial part of the corporate enterprise. Subsection (2) confirms the common law position in respect of a sale, lease or exchange of property in the ordinary course of carrying on the non-pecuniary purpose or purposes of the corporation, but in respect of an extraordinary disposition of assets subsection (2) requires member approval. It must be remembered that the not-for-profit corporation may carry on a business incidental to its non-pecuniary purpose, and s. 14.16(2) facilitates this. Where there is doubt as to whether a sale, lease or exchange is of substantially all the corporation's undertaking prudent third parties to such transactions will demand approval under subsection (3). The procedural rules and the formalities are parallel to those relating to amalgamation and discontinuance. Therefore, it is unnecessary to describe those provisions in detail in this commentary.

340. Section 14.17 has been referred to several times in the preceding commentary. It has been adapted from s.180 of the proposed CBCA as a mechanism to afford protection to the member of a membership corporation who does not believe that he will realize his reasonable expectation of a non-pecuniary benefit through the not-for-profit corporation because of a contemplated fundamental change. Subsection (1) sets out the four basic cases where the right to dissent arises: first, an amendment of the articles that restricts an existing provision in the articles allowing the transfer of membership interests or to change its corporate non-pecuniary purpose (and often, as s.2.02 does not require the corporation to state its non-pecuniary purpose or impose any restrictions thereon, the membership corporation will have no stated non-pecuniary purpose, or at least no narrowly defined non-pecuniary purpose, and therefore will not need to change its non-specific non-pecuniary purpose to re-direct its activities or operations); second, amalgamation with another corporation, except a vertical short-form amalgamation; third, continuance under the laws of another jurisdiction (export); fourth, a sale, lease or exchange of all or substantially all the corporation's property. In addition, subsection (2) confers upon the membership interests of a class of members to which particular rights, privileges, restrictions or conditions are attached the right to dissent

from any amendment to the articles that derogates from the rights of members of that class of membership interests. Subsection (3) sets out the substantive right to dissent.

341. Subsections (4) to (24) of this section are largely self-explanatory, and are an adaptation of s.180(5) to (9) and (11) to (26) of the proposed CBCA. They set out in detail the procedure to be followed by a member to obtain payment of the fair value of his membership interest. Usually, the amount paid for a membership interest in a membership corporation, and toward annual dues, will go toward the operating costs of the corporation. Therefore, there would not be sufficient funds to pay the dissenting member. However, the membership corporation, particularly one which carries on a business, may have a substantial surplus. The corporation may be able, therefore, to pay to the dissenting member the fair value for his membership interest. Although these provisions will probably be only seldom called upon, they are necessary to render the substantive right to dissent meaningful.

342. To clear up the obscure meaning of "reorganization", s.14.18(1) states that the term includes a court order made under the Bankruptcy Act, s.19.04 and any other federal law. The object of the section is to enable the court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with all the formalities of the proposed CNPCA, particularly member approval of the proposed amendment. For example, the reorganization of an insolvent not-for profit corporation may require the relegation of secured debenture holders to the status of unsecured note holders. The corporation might then be in a position to borrow further upon the security of its assets. In addition, the court will even have power to reconstitute the board of directors, thus permitting representatives of the creditors of the corporation to take over the administration of the corporation until the corporation is once again solvent.

PART 15.00

PROSPECTUS QUALIFICATION

343. Not-for-profit corporations will sometimes issue securities. See the commentary to Part 6.00. Moreover, not-for-profit corporations will sometimes "trade" in membership interests such as to come within the ambit of securities legislation. See, for example, *In the Matter of Commencement Sales Limited,* [1969] O.S.C.B. 60 (April, 1969). Provisions similar to those applicable to federally incorporated business corporations should be provided for the federally incorporated not-for-profit corporation and the securities it seeks to issue, and also for the membership interests which certain corporations seek to issue.

344. The application of the Ontario Securities Act, R.S.O. 1970, c.426, is demonstrative of the necessity of these requirements. A membership interest in a not-for-profit corporation can constitute a "security" within the meaning of that Act: see *In the Matter of The Sky Larks Society, Incorporated,* [1967] O.S.C.B. 21 (June, 1967). Moreover, any "documents constituting evidence of any interest in a scholarship or educational plan or trust" are included in the definition of "security": s. 1(1)22. The Act exempts generally not-for-profit corporations from the registration and prospectus requirements: ss.19(2)6, 58(2)(a). However, in respect to scholarship or educational plans experience has shown it is necessary to provide the public with the protection afforded by the Securities Act even though a not-for-profit corporation is involved. See, for example, *In the Matter of Commencement Sales Limited, supra.*

345. Part 15.00 is similar to Part XV of the proposed CBCA. Section 15.01 provides, in effect, that whenever any corporation does certain things which bring it within the ambit of securities legislation, a copy of the relevant document is filed with the Registrar. For example, undoubtedly this would include a corporation dealing with an "educational plan or trust".

PART 16.00

BOARD OF TRADE AND CHAMBER OF COMMERCE CORPORATIONS

346. Part 16.00 applies to federally incorporated boards of trade and chambers of commerce. Some 925 boards of trade and chambers of commerce have been incorporated under the Boards of Trade Act, 1970 R.S.C., c. B-8, of which about 772 appear to be active (Data prepared for the purposes of this report by the Corporate Research Branch of the Department of Consumer and Corporate Affairs). A few have been created by Special Act. An incorporated board of trade or chamber of commerce is without share capital and is formed for the non-pecuniary purpose of promoting trade and commerce and thereby improving the economic, civic and social welfare of a given geographical area. The corporations vary greatly amongst themselves as to size and impact upon communities.

347. The Boards of Trade Act is an archaic piece of legislation. A great many of its provisions are outdated. There has been little change in this legislation since it was first enacted in 1874, S.C. 1874, c. 51. There is a great deal of needless formality in the process of incorporation. Moreover, the existing approach perpetuates the false notion that these bodies corporate have a quasi-government character and are something more than ordinary membership corporations, because they connote an extension of the nineteenth century English government department called the "Board of Trade". It is to the advantage of boards of trade and chambers of commerce to come within the flexible framework of the proposed CNPCA provisions applicable to membership corporations. Note that boards of trade and chambers of commerce are considered to be special not-for-profit corporations by s. 1410 of the NY N-PCL. It is to the advantage of the public generally to repeal archaic and unnecessarily special legislation such as the Boards of Trade Act. The only two essential, special provisions necessary for these entities are preserved by Part 16.00.

348. It is essential, given the history of these entities, their valued presence in virtually every populated area of the country, and the understanding held in respect to them by the general community, to regulate (1) the use of the words "Board of Trade" or "Chamber of Commerce" in the name of a corporation, and (2) the boundaries of a district for a given board of trade or chamber of commerce. This is done at present under the Boards of Trade Act through restrictions upon the use of the words "Board of Trade" and "Chamber of Commerce" and through the federal Cabinet determining the boundaries of districts. This is hardly a matter that should occupy the time of Cabinet. Moreover, in reality the Corporations Branch does not investigate and examine as to the possibility of overlapping boundaries and advise the Cabinet so that Cabinet can designate boundaries at the time of granting a charter. Instead, an application is received which specifies boundaries and is simply processed to ensure that the statutory formalities have been complied with.

349. Protection for incorporated boards of trade and chambers of commerce, and the public generally in respect to these two concerns, is accomplished through ss. 16.02 and 16.03.

350. First, the concern as to protection of the name is characterized and dealt with as a conventional name granting problem. Section 2.08(1) prohibits generally any name that is,

as prescribed, prohibited or deceptively misdescriptive. Under the regulations a person will not be able to use a confusing name unless the first user consents to use of the name.

351. Section 16.02 deems any proposed name containing "Board of Trade" or "Chamber of Commerce" to be confusingly similar to any corporation that has first used either name in respect of any district. Moreover, no local "board of trade" or "chamber of commerce" can be set up without consent of the national body, the Canadian Chamber of Commerce, that has long had first use of the name. The Canadian Chamber of Commerce can then grant a conditional consent, including a condition limiting use to a district.

352. Section 16.03 provides that the Registrar may designate or change the district for the corporation. Changes in boundaries of districts will be able to be accomplished more quickly, and will not involve the highest level of government. Representations can be received from the Canadian Chamber of Commerce and any affected local board of trade or chamber of commerce as to the designation of, or change in, the boundaries of a district.

353. Section 16.01 provides that a board of trade or chamber of commerce is a membership corporation to which the provisions of the proposed CNPCA are generally applicable.

354. Section 16.04 is opposite in approach to s. 12.02, in that s. 16.04 denies the right to appoint a proxyholder unless the articles so provide. This provision accords with what is reported to be the approach generally in the corporate structure of boards of trade and chambers of commerce.

PART 17.00

LIQUIDATION AND DISSOLUTION

355. The law of dissolution for not-for-profit corporations, as with business corporations, is in a chaotic state. Sections 31 to 33 of the present Act permit voluntary dissolution, and ss.5.6,133(11) and 150(1) authorize the dissolution or winding up of not-for-profit corporations which have acted outside the scope of their objects or powers or which have failed to comply with certain provisions of the Act. There is some uncertainty as to whether the Bankruptcy Act applies to an insolvent not-for-profit corporation (see the somewhat limited definition of "corporation" provided by s.2 of the Bankruptcy Act), although this appears to be an assumption which has been acted upon and also the intention of the draftsman of the Bankruptcy Act (as not-for-profit corporations are not expressly excluded from the definition of "corporation"—and not-for-profit organizations are included within the definition of "debtor" and "person"—s.2). See the decision of the Quebec Court of Appeal in *Chausse v. L'Association Du Bien-Etre De La Jeunesse Inc.*, [1960] B.R. 413 in which it was held by the majority that a not-for-profit corporation incorporated under the Quebec Companies Act was not a corporation governed by the provisions of the Bankruptcy Act. The Winding-up Act applies to federally incorporated not-for-profit corporations in situations both of solvency, and insolvency, although, under the 1966 amendments to the Bankruptcy Act, that Act (if it applies to not-for-profit corporations) can be used to oust the jurisdiction of the Winding-up Act where the corporation concerned is insolvent.

356. Part 17.00 is based upon Part XVII of the proposed CBCA, but necessarily goes beyond the provisions of the proposed CBCA because of the unique characteristics of not-for-profit corporations, which dictate novel provisions in respect to the distribution or disposal or remaining property in a dissolution. Part 17.00, therefore, is a clarification of the rules which should apply to corporate dissolution, except where the corporation is insolvent. Insolvency should be dealt with in the Bankruptcy Act. If the proposed CBCA and proposed CNPCA are adopted the archaic Winding-up Act will no longer apply to any federal corporations. Furthermore, the machinery in ss. 14.14 and 20.16 under which all not-for-profit corporations incorporated federally can be "transferred" into the proposed CNPCA will permit the repeal of the Winding-up Act.

357. Procedurally, Part 17.00 is straightforward, the terminology is consistent with that used throughout the proposed CNPCA, and the steps in a dissolution follow the pattern established in other Parts. Thus, "articles" are sent to the Registrar, he issues a certificate of dissolution, and so on.

358. Generally, under the proposed CNPCA, as with the proposed CBCA, applications may be made or actions brought in any Canadian superior court—defined in s.1.02(1). One exception is in Part 17.00 and another is in Part 18.00 (see ss.17.01 and 18.01) where the only courts with jurisdiction will be those in the place where the corporation has its registered office. The argument for this is that the convenience of the corporation is paramount when the question is liquidation and dissolution.

359. Section 17.02 describes the jurisdiction of this Part. Liquidation and dissolution provisions apply only when the corporation in question is solvent, and should yield to a comprehensive bankruptcy statute if the corporation is insolvent. This policy is therefore consistent with the recommendations in the recent Bankruptcy Report. If a corporation in

the process of liquidation under Part 17.00 is found to be insolvent, s.17.02 prevents a conflict of legislation by stating explicitly that the proceedings shall be stayed, at which point the machinery in the Bankruptcy Act would take over. Section 17.03, allowing for revival, is self-explanatory.

360. Under s.17.04(1), the incorporators or first directors of a corporation which has no members may dissolve the corporation by simply filing articles of dissolution. If the corporation has members but no property, the same simple procedure is available under subsection (2), except that the decision to dissolve must be made by the members by special resolution.

361. Section 17.05 deals with the next level of complexity, the voluntary dissolution of a corporation which has property. Under subsection (1) the directors or a member's proposal under s.11.06 may propose dissolution, but a special resolution of each class of members is required to authorize it: subsection (3). Obviously, the notice of meeting must refer to the proposed dissolution: subsection (2).

362. Under s.17.05 the first document filed is a statement of intent to dissolve—subsection (4)—after which the corporation must cease to carry on its non-pecuniary purpose: subsection (6). Subsection (7) describes the steps to be followed in carrying out the liquidation and dissolution. Normally, in a dissolution under s.17.05, the members will themselves appoint a liquidator, but an application may be made under subsection (B) at any time to have the liquidation supervised by a court. In any event, the disposal of the remaining property of the corporation will have to be in accordance with s.17.19.

363. Unless the decision to dissolve is revoked—subsections (10), (11) and (12)—the corporation, after clearing its debts and distributing its property—subsection (13), will file articles of dissolution: subsection (14). The Registrar then certifies the dissolution, at which time, as under s.17.04(5), the corporation ceases to exist: subsections (15), (16).

364. Under s.17.06(1) the Registrar may either cancel a corporation's certificate of incorporation or apply to a court for a dissolution order. This procedure is open to the Registrar when the corporation has not commenced or has ceased to carry on its non-pecuniary purpose. Corporations may be incorporated merely to tie up a desirable name. The Registrar should have power to prevent this abuse of the Act, and also to clear his files of dead corporations. Failure to file documents required under the Act is also a ground for action under this section: subsection (1)(c). This provision parallels ss.133(11) and 150(1) of the present Act, and is designed to encourage compliance.

365. Subsection (2)—like s.133(11) of the present Act—requires notice to be given although the notice period is shortened.

366. Where a corporation has property the Registrar will usually apply for a dissolution order, in which event s.17.11 will apply. If on the other hand, the Registrar has elected simply to cancel the certificate of incorporation, he will effect that cancellation by issuing a certificate of dissolution at the end of the notice period: s.17.06(3), (4).

367. Section 17.07 is another provision allowing the Registrar to apply for dissolution of a corporation. This section would normally be used against an operating corporation, and thus it is not a case where simple cancellation of the certificate of incorporation would be appropriate. The grounds set out in subsection (1) include those now found in s.150(1) of

the present Act, and the section thus encourages compliance with important provisions of the proposed CNPCA.

368. The order made by the court under subsection (3) depends upon whether the corporation has assets to liquidate and distribute. If not, it may be dissolved straightaway. If a liquidation is necessary, the court has the powers conferred on it by s.17.11. Section 17.07(4) specifies what the Registrar has to do following the court's order.

369. Section 17.08 sets out the court's power to order a liquidation and dissolution. Section 17.08 is adapted from s.203 of the proposed CBCA. Paragraph (b) of subsections (1) and (2) takes account of the strict limits which the courts have imposed in respect to business corporations on the "just and equitable" rule. Subsections (1) and (2) contain a set of more relaxed criteria which the courts may find useful in a situation where dissolution appears to be the equitable solution, but which might be excluded under an application of the "just and equitable" rule to the not-for-profit corporation.

370. The "just and equitable" concept as it might be applied to not-for-profit corporations could cover, at least, two kinds of situations in which a dissolution could be ordered on this ground. One is where there is a deadlock in voting power, leaving the court no option but to put the parties asunder. The other is where there is such a degree of over-reaching by directors or controlling members that it almost amounts to fraud. The "just and equitable" rule is not the only basis upon which dissolution may be sought—note the other criteria in s.17.08(1) and (2).

371. Section 17.08(2) is provided as a means of protection of the public interest in respect to the charitable corporation. It provides that any person, including the Registrar who will usually be the surrogate on behalf of a complaining public, may apply to the court for liquidation of the property and dissolution of the corporation. The corporation must have exceeded its legal authority, for example, by a solicitation of funds which are used for a purpose other than the corporate non-pecuniary purpose.

372. There is an overriding restraint upon dissolution, in that the court's order is discretionary and the court would have to view dissolution as being in the public interest: subsections (2) and (3).

373. Subsection (3) forges a link between s.17.08 and s.19.04 which will facilitate the resolution of intra-corporation disputes. An applicant for a dissolution order can apply in the alternative for an order under s.19.04, a section which, as will be described later, gives the courts broad discretionary powers to make remedial orders falling short of corporate dissolution. A court could make such an order even if it was not specifically applied for—see s.17.11—but it seems wise to highlight the alternative remedy. As will be seen, the interaction of ss.17.08 and 19.04 is reinforced by the fact that ss.17.08(1) and (2) and 19.04(1) and (2) are similarly phrased. Section 17.08(4) brings into an application for dissolution certain procedural rules which assist the applicant.

374. Since under the proposed CNPCA corporations will have the capacity of a natural person it is not appropriate to have a provision like s.5.6 of the present Act providing for the dissolution of a corporation which has acted outside its declared objects or powers. If the articles of either a charitable or membership corporation incorporated under the proposed CNPCA do contain limitations on the non-pecuniary purposes which the corporation may

carry on, or if the corporation has contracted to limit its activities, ss.19.01 and 19.04 give the Registrar, a member, creditor, or any other person if the corporation is a charitable corporation, a right to apply to a court and the court may give a restraining order or have an improper contract set aside, or make any order necessary to rectify the matters complained of. This appears to be an adequate remedy. In a flagrant case, it should be possible to show that the improper action was so oppressive or prejudicial that it would justify dissolution under s.17.08(1) or (2).

375. Both s.17.08(1)(b)(i) and s.17.08(2)(b)(i) give a means of enforcing something which may be stipulated for in a unanimous member agreement.

376. Sections 17.09 and 17.10 are procedural and require no comment. Section 17.11 lists the powers of the court which, deliberately, are very broad. Sections 17.12 to 17.15 are self-explanatory.

377. Sections 17 16, 17.17 and 17.18 set out in detail the duties and powers of a liquidator. Although the list is extensive, each item is self-explanatory. Again, the final step in a court-supervised liquidation is the issue of a certificate of dissolution by the Registrar—s.17.18(7).

378. Sections 17.20, 17.21 and 17.22 are concerned with matters arising after a dissolution has been completed. Records must be kept for a reasonable period—s.17.20—and, under s.17.21, actions may be continued and brought. Section 17.21(4) and (5) expand slightly on the provisions of s.33 of the present Act. Section 17.22 directs the disposition of unclaimed property.

379. This commentary (paragraph 105) discusses the problem of the present Act being unclear as to what happens to surplus assets upon dissolution. A federally incorporated not-for-profit corporation would be wound up under the Winding-up Act. However, that Act has no special provisions for not-for-profit corporations, and is generally inappropriate.

380. Administrative practice for the last several years under the present Act (and similarly under the Ontario Act) has been to require a provision to be included in the charter requiring disposal of the charitable corporation's assets on dissolution or surrender to be in a manner which will not result in a distribution to members. Surprisingly, none of the Corporations Acts or Societies Acts in Canada provide a clear framework in respect to this matter for charitable corporations. See, for example, *Guaranty Trust Co. of Canada* v. *M.N.R.*, [1967] S.C.R. 133, and *Re Windsor Medical Services, Inc.* [1971] 2 O.R. 141 which deal with ss.127(1) and 133 of the Ontario Act. See also s.6 of the British Columbia Societies Act, R.S.B.C. 1960, c.362 which reads "No society shall . . . declare any dividend or distribute its property among the members *during the existence of the society* . . ." [emphasis added].

381. In the absence of a statutory provision, if there is not a provision in the charter, the common law is unclear as to what happens to the surplus assets of a charitable corporation on dissolution. It seems that there may be three possibilities. First, the court may find an implied condition that the assets of the corporation were not received from a donor with a general intention in favour of a charitable purpose. Hence, they may be required to be returned to the donor. See Scott, *The Law of Trusts* (3 ed.) Vol. IV, pp. 3054, 3055.

382. The second possibility is that the Crown may be able to claim the property of a corporation upon the winding-up of its affairs on the principle of *bona vacantia—Re Enderton* [1954] 4 D.L.R. 710 (Man. Q.B.).

383. The third possibility is that the *cy près* doctrine will be applicable—*Re Kelley,* [1933] 4 D.L.R. 416, 420 (N.S.S.C.); *Wallis* v. *Solicitor-General for New Zealand,* [1903] A.C. 173 (P.C.). Charitable corporations commonly receive donations from donors who do not have any intention of making a gift to the members individually. When literal effect cannot be given to the donor's intention because of the dissolution of the donee, the intention of the donor should govern, *as nearly as possible.* The legal rule to this effect is called the *cy près doctrine,* and is based upon the analogy of the charitable corporation to a trust. See H.L. Oleck, *Non-Profit Corporations, Organizations and Associations* (2 ed.) at p. 522; *Annotation on Charitable Trusts,* [1931] 3 D.L.R. 1.

384. Section 17.19 deals with both membership and charitable corporations, and provides for a statutory *cy près* rule in respect to the charitable corporation. This is the modern approach adopted in several jurisdictions. Subsection (1) requires property remaining after payment of liabilities to be distributed in accordance with s.17.19. Property held upon condition requiring return because of dissolution is required to be returned: subsection (2). Subsection (3) provides that the articles are operative and s.2.02(1)(i) requires the articles of a charitable corporation to include a *cy près* provision. The specifics of such a provision can be changed through amendment by s.14.01(1)(i). Where the articles are somehow inapplicable, subsection (4) specifies that the remaining property of the charitable corporation must be transferred within a *cy près* context. Subsection (5) provides for the liquidator selecting the recipient of the property within the *cy près* context stipulated by subsection (4). The liquidator's plan of distribution is subject to the court's approval: subsection (5) and s.17.11(l). The liquidator must give the Registrar notice: subsection (7). The effect of s.17.19 is similar to the result accomplished through ss.1001 and 1005 of the NY N-PCL and ss.46 and 47 of the Model Act.

385. The present Act does not seem to impose any limitations upon the distribution of surplus assets accompanying the dissolution of a not-for-profit corporation formed for a private non-pecuniary purpose (i.e. a membership corporation). Historically, there is some suggestion at common law that the assets may be escheated to the State. See (1921-22), 35 Harv. Law Rev. 85. Although the position at common law is unclear, the weight of authority seems to be that there is not any restriction upon distribution to the members, in the absence of a statutory restriction. See *Re Windsor Medical Services, Inc., supra.* Occasionally these assets can be very substantial—such as in the case, *Re Windsor Medical Services, Inc.* None of the jurisdictions examined place any statutory restriction upon membership corporations in respect to this matter. Many jurisdictions have statutory provisions which expressly permit the distribution of surplus assets upon dissolution to the members of a membership corporation. See, for example, s.133(5) of the Ontario Act.

386. Section 17.19(6) provides for a distribution of any surplus to the members of a membership corporation in the absence of any provision in the articles. A corporation formed for a private non-pecuniary purpose could provide, of course, that any surplus is to go to another corporation or organization with similar objects, or otherwise than to the members, upon dissolution.

387. Section 17.23 is self-explanatory. It provides that any property not disposed of at the date of dissolution in the manner provided for by s.17.19 and this Part, shall vest in the Crown in right of Canada.

PART 18.00

INVESTIGATION

388. Part 18.00 deals with investigations of the affairs of corporations, either at the instance of a member, or of the Registrar. The principle involved is not new, for provisions authorizing investigations may be found in s.114 of the present Act. The investigation provisions of the present Act were greatly amplified in 1970, and some of the changes made there have been incorporated into Part XVIII of the proposed CBCA, from which Part 18.00 of the proposed CNPCA is adapted.

389. The system of inspection is designed to serve two purposes. First, it is a valuable weapon in the armoury available to members as a protection against mismanagement. Although Part 19.00 greatly extends and improves the means of redress open to individual members in the courts, it will almost certainly be true in many cases that even the most sophisticated litigative weapons will be valueless for lack of information as to the details of suspected mismanagement. That information is, by its very nature, likely to be known by the suspected wrongdoers and unlikely to be known or voluntarily disclosed to those seeking to complain of the suspected wrongdoing. Accordingly, s.18.01(2) provides that if an applicant can satisfy the court that there are circumstances suggesting wrongdoing, an investigation order may be made in aid of litigation.

390. Moreover, there is a particular public interest in the proper conduct of corporate affairs in respect to charitable corporations, and while the protection of the public interest may be a by-product of the protection of members' interests, it is not necessarily a by-product. Because the interest of the member is non-pecuniary, he does not have the immediate self-interest of the shareholder of the business corporation. The member may well be less motivated than the shareholder to take action. It is therefore essential that the Registrar be able to initiate an investigation of the not-for-profit corporation. Accordingly, s.18.01(1) provides for an application by the Registrar.

391. If the application is by a member, subsection (3) requires notice to be given to the Registrar.

392. In practice, applications for investigations are unlikely to be made by anyone but the Registrar although, probably, the Registrar will often act because a member has brought a suspected irregularity to his attention. Section 114.4(3) of the present Act provides that applicants for an investigation may be required to give security for costs. This is a highly undesirable provision because it is almost guaranteed to deter complainants, in particular, in respect to the members of a not-for-profit corporation because their interest in the corporation is non-pecuniary. Section 18.01(4) therefore states the opposite.

393. The most significant difference between the proposed CNPCA and the provisions in the present Act is that investigations are to be supervised by the courts whereas the present Act puts them under the supervision of the Restrictive Trade Practices Commission. There are two reasons for this change. First, Part 19.00 of the proposed CNPCA gives members realistic civil remedies for virtually any kind of corporate wrong. The law today—substantive and procedural—is so hopelessly inadequate that, for practical purposes members are often remediless. Under the present Act, therefore, the argument might be advanced for a body

like the Restrictive Trade Practices Commission to do what members are unable to do for themselves. Under the proposed CNPCA, based upon the proposed CBCA, however, civil justice should be much more accessible, and investigations, already rare, will be rarer still. There will be no need for a specialist tribunal.

394. The second reason for giving the supervision of investigations to the courts instead of to a tribunal is that the civil rights of persons affected by or concerned in the investigations are better assured. The matters spelled out at great length in the 1970 amendments to s.114 of the present Act are unnecessary in the proposed CNPCA. It should be remembered that the function of the court is not to conduct the investigation, a task requiring a certain expertise and for which a court is possibly not well suited. If this was to be the task of the court there would be a strong case for establishing an expert tribunal. But the court's function is to oversee the conduct of the investigation, to lend the court's authority to the inspector, and to ensure that those affected by the investigation are justly treated. These are things which courts already do and do well. There is therefore no need to create a new tribunal.

395. Section 18.01 also permits an application for an investigation of the affairs of "affiliated bodies corporate", as defined in s.1.02(2) of the proposed CNPCA. It will be rare for a not-for-profit corporation to have "affiliated bodies corporate". However, this may happen either through the not-for-profit corporation having a subsidiary not-for-profit corporation or a subsidiary business corporation (with share capital).

396. Sections 18.02 to 18.08 are self-explanatory, dealing with procedural matters incidental to the conduct of an investigation.

PART 19.00

REMEDIES, OFFENCES AND PENALTIES

397. Although many of the substantive provision of the proposed CNPCA are complemented by specific remedies to enforce compliance with specific rules, these specific remedies must be buttressed by other remedies having much wider application. First, the proposed CNPCA is fairly permissive, for it omits altogether the traditional—but largely formalistic—safeguards such as limited and clearly specified objects and similarly omits the traditional limitations upon the exercising of powers by all corporations, thereby possibly allowing scope for misconduct, and therefore requiring fast, effective remedies, to prevent abuse of the rights of persons having an interest in a not-for-profit corporation. Second, it is impossible for the draftsman to anticipate all the possibilities of misuse. The remedies proposed in Part 19.00 reflect three fundamental policies.

398. First, the structuring of a corporation as an ideal "democratic" polity, while desirable, is not at all a complete answer to the problem of satisfactorily resolving corporate disputes. Throughout the proposed CNPCA structuring techniques such as cumulative voting are both legitimated and encouraged. However, such techniques (more useful as a planning tool for the closely held business corporation) have only a limited function in respect to the not-for-profit corporation. Effective remedies must be provided to prevent or rectify demonstrable wrongs.

399. Second, the ideal means of enforcing a corporation law is to confer reasonable power upon the allegedly aggrieved party to initiate legal action to resolve his problem, making the proposed CNPCA self-enforcing so far as possible, obviating the need for sweeping administrative discretion and harsh penal sanctions, and, at the same time, forcing resolution of the issue before the courts, which have the procedures, the machinery and the experience that enable them better than any other institution to deal with such problems. Included within this concept, of course, is the right, conferred upon each member of a membership corporation by s.14.17, which entitles a member to withdraw his membership at an objectively appraised value in the event of a fundamental change in the non-pecuniary purpose of the corporation.

400. Third, the remedies provided in the proposed CNPCA recognize that corporation law—and particularly the duties of officers and directors of corporations—is in a very fluid state, reflecting the uncertain role or identity of the corporation, whether business or not-for-profit, in contemporary society. For this reason only very broad quality standards of conduct are set forth (e.g. s.9.19 referring to duties of directors and officers and s.19.04 relating to "oppressive or unfairly prejudicial" conduct of management), permitting the courts to determine whether there has been failure to comply with those standards, that is, to continue to develop the common law of responsibility of corporate management unhampered by the legal fetters created at a time when courts were preoccupied with enforcing "democratic" structures—particularly voting power—as the one real object of the law. Investigation by a government agency is also provided for, but it is essentially a residual remedy, available to resolve problems that cannot be adequately dealt with by ordinary litigation.

401. The remedial techniques employed in the proposed CNPCA fall, analytically, into six categories that can be best explained by concrete illustrations.

(1) Disclosure: access to corporate records and lists of members under s.4.03, disclosure of financial statements and related information of corporations under s.13.01, 13.03, 13.05, 13.06, 13.19, and s.20.14.
(2) Structural techniques: member proposals under s.11.06.
(3) Civil action: court review of an election of directors under s.11.14, and provisions supportive of members' associational interests under s.10.01.
(4) Administrative proceedings: revocation of corporate name under s.2.08, cancellation of certificate of incorporation under s.17.04, or investigation under Part 18.00.
(5) Director's personal liability: improper payment to a director or member contrary to s.5.09, or making a loan, guarantee, or financial assistance contrary to s.5.06, which are referred to in s.9.16.
(6) Penalties: failure to maintain records under s.4.02, refusal to permit access to corporate records under s.4.03, or failure to forward financial statements under s.13.06.

The foregoing examples are not complete, being selected only for illustrative purposes.

402. The major promise of this Part is that a corporations Act should be largely self-enforcing by civil action initiated by the agrieved party, not by severe penal sanctions or sweeping investigatory powers. If this policy is not adopted, given the state of the common law, reliance must be made on ever broader powers of investigation as a means to remedy corporate ills. However, with the not-for-profit corporation the members do not have a pecuniary interest. As such, immediate pecuniary self-interest is not present as a motivating force on the part of members. With the membership corporation, formed for a private non-pecuniary purpose, the member can still be expected to seek redress if sufficiently aggrieved because it is his self-interest, albeit non-pecuniary, which is in jeopardy. However, with the charitable corporation, the public interest is paramount, and the public must be afforded adequate remedies when that interest is jeopardized and the members fail to seek the necessary redress. Bearing in mind this need, based on the nature of the not-for-profit corporation and the functional distinctiveness as between types, Part 19.00 will be reviewed section by section.

403. Although only two defined terms are used in Part 19.00, they are sufficiently important to be set out in a separate section, thus underlining their very broad scope. The term "action" is largely self-explanatory: it extends the application of these provisions to any legal action to which a corporation is a party, whether or not the right of action was created by the proposed CNPCA. The term "complainant" encompasses the persons who clearly might be interested—a member, a security holder, or the Registrar—and, in addition, to include any other person the court thinks is a proper person to participate in the litigation. Thus, a court can allow an individual who is not a member to be a complainant. This might well be appropriate in respect to contemplated action involving a charitable corporation. The members of the corporation may be disinterested in pursuing an action for the benefit of the corporation. The term "complainant" also includes a security holder, but it must be remembered that s.1.02(1) limits "security" to simply a certificate evidencing a debt obligation of a not-for-profit corporation.

404. Section 19.02(1) confers upon a complainant the right to apply to a court for consent to bring or intervene in a derivative action in the name and on behalf of the corporation or of one of its subsidiaries to enforce a right of the corporation. This provision is largely self-

explanatory, but two points merit special emphasis. First, it is most important to keep in mind that this provision relates only to the enforcement of rights of the corporation. It is not available as a remedy to enforce rights of an individual member or even a group of members, although a group of members may bring, in representative form, a derivative action in the name of the corporation if they can characterize the issue as the enforcement of a right of the corporation. Typical examples of cases where a derivative action may be invoked are actions against directors or officers for a breach of duty under s.9.19 alleging self-dealing or negligence, an action for an injunction to prelude a threatened injury to a corporation, or an action to restrain an act outside the scope of the authority of the corporation, its directors or officers. Second, by including the reference to a subsidiary of the corporation, this provision contemplates and permits the "double derivative" action, that is, it confers on a member of a holding corporation the right to initiate a derivative action in the name of a subsidiary of that holding corporation, notwithstanding that the member does not have a membership interest in or own a share of the subsidiary. A not-for-profit corporation may have a subsidiary body corporate, although this would be unusual.

405. Section 19.02(2) requires a member who seeks to bring a derivative action to obtain a court order before commencing legal proceedings. This provision circumvents most of the procedural barriers that surround the present right to bring a derivative action. Although it confers extraordinary wide discretion upon the court, subsection (2) does state the conditions that must be met before a derivative action may be commenced. By requiring good faith on the part of the complainant this provision precludes private vendettas. And by requiring the complainant to establish that the action is "prima facie in the interest of the corporation" it blocks actions to recover small amounts, particularly actions really instituted to harass or to embarrass directors or officers who have committed an act which, although unwise, is not material. In effect, this provision abrogates the notorious rule in *Foss* v. *Harbottle* and substitutes for that rule a new regime to govern the conduct of derivative actions.

406. Section 19.03 is designed to give very broad discretion to the court to supervise generally the conduct of a derivative action, providing maximum flexibility in respect of interim financing of the litigation and the control over the conduct of the action in a way that obviates a multiplicity of actions. Moreover, in certain cases, e.g., where a corporation has been liquidated or dissolved, a court can order payment directly to a security holder of the amount recovered.

407. Section 19.02 in broadly permissive terms—but always subject to court supervision—legitimates the member's derivative action that is brought in the name of the corporation to enforce a right of the corporation. The object of s.19.02 is to remedy a wrong done to the corporation, therefore it applies to all corporations irrespective of size or type. Section 19.04, on the other hand, may be invoked when a wrong has been done in respect to a membership interest. This might be a wrong involving money as the member of a membership corporation has the right to return of the amount paid in respect to his membership interest in given situations (s.14.17). However, s.19.04 also serves to protect the member's reasonable expectations in fulfilment of his particular non-pecuniary interest through the corporation's activities. In other words, the "minority" non-pecuniary interest may need protection in a given situation. The courts should have very broad discretion, applying general standards of fairness, to decide these cases on their merits. Section 10.01(6) provides that a member aggrieved by an expulsion or disciplinary power or procedure can apply to the court under 19.04. The court may even wind up the corporation if the other remedies are inappropriate. Section 19.04 can also be invoked where the public interest is prejudiced by the actions or omissions of a charitable corporation.

408. Corresponding to s.19.03, which relates to the powers of the court in respect to a derivative action, subsection (3) ensures that the court has broad powers to carry out its mandate under subsection (2). These powers have one common object: to enable the court to apply a remedy that will offer continuing relief or indemnity to the complainant and, at the same time, render unnecessary the liquidation and dissolution of the corporation. These broad powers also assure that the public interest will be protected in respect to charitable corporations. Note that s.19.04(3)(i) and (l) are analogous to the powers given to a court under s.4(e) and (j) of the Ontario Charities Accounting Act, 1970 R.S.O., c. 63. The court also has the power to appoint an auditor, where the corporation does not have one, under s.13.13.

409. Section 19.05 is adapted from s.232 of the proposed CBCA, which sets out several rules that apply both to derivative actions and "oppression" applications. Although the problems giving rise to the need for the rules are different, the rules as set forth in s.19.05 are necessary for the not-for-profit corporation. Although it would be very unusual, ratification by the members might be given in a situation where either "minority" interests or the public interest, albeit non-pecuniary, were unfairly compromised. Member ratification should be an evidentiary issue, with the court having discretion to consider all the pertinent facts and subsection (1) so provides.

410. Section 19.05(2) complements the court's power to supervise the commencement and conduct of a derivative action, providing for court supervision of any settlement or other disposition of the action before trial. Although there is not the "strike suit" concern in respect to the not-for-profit corporation, any disposition of the action before trial should be subject to court supervision. Interests other than the member or members initiating the action may be indirectly affected. Derivative actions and applications under Part 19.00 will be sufficiently rare to suggest both that the issue raised is of importance and that the time of the court will not be unduly taken up by this requirement.

411. Section 19.05(3) is self-explanatory. Its purpose is to ensure that a member may institute a derivative action before any court in Canada without being required to put up security for costs. Court scrutiny of such actions, applying the standards set out in s.19.02 constitutes a sufficient safeguard against frivolous actions. Subsection (4) empowers the court to compel the corporate plaintiff to provide interim financing to the complainant in a derivative action, offering some assurance that apparently well founded actions will be not abandoned for lack of funds to maintain the litigation. This requirement is particularly appropriate for the not-for-profit corporation where the complainant will often not have any pecuniary interest in the outcome of the action.

412. Section 19.06 is self-explanatory, the provisions of which allow for summary application to the court.

413. Like a receiver under Part 8.00 or a liquidator under s.17.11(j), the Registrar is given the right under s.19.07 to apply to a court for directions as to how he shall fulfil any duty imposed upon him by the proposed CNPCA. This right could prove most useful in cases where a decision of the Registrar might affect the rights of members or security holders, for example, where the Registrar has a strict duty to issue a certificate in respect of a fundamental change under Part 14.00.

414. In some Parts of the proposed CNPCA the Registrar is given very wide discretion to make a final decision with respect to a particular issue: e.g., with respect to granting a

corporate name (s.2.08), and permitting continuance of a corporation under another law (export under s.14.15). Generally, however, the underlying philosophy of the proposed CNPCA is to make clear that persons who seek to incorporate, make a fundamental change in, or liquidate and dissolve a corporation, do so as a matter of right. Where persons comply with the formal requirements of the law and make an unequivocal request that the Registrar file the articles or other documents presented, the Registrar has a clear duty to accept and to file those documents. If the Registrar refuses or neglects to file the documents he must notify the applicants accordingly under s.19.08(1). If the Registrar does not give such notice he is deemed by s.19.08(2) to have refused to file the documents. In either case the applicants then have standing to appeal the Registrar's decision under s.19.09. In addition, s.19.09 permits an appeal to a court where the Registrar revokes a corporate name under s.2.08 or cancels a certificate of incorporation under s.17.06. Since under s.2.08 the Registrar is given rather wide discretion the appeal in such cases will tend to be based on the ground that the Registrar's decision was arbitrary or capricious—or an abuse of discretion—rather than on the ground that he mistakenly applied any valid criteria. To complete the pattern s.19.12 permits an appeal to a court of appeal from any order of the court made under the proposed CNPCA.

415. Section 19.10 is largely self-explanatory. It empowers a court, a complainant or a creditor to compel a director, officer, employee, agent or auditor of a corporation to comply with the proposed CNPCA, the regulations, the articles, by-laws or a unanimous member agreement, or to restrain those persons from acting in breach of the provisions contained in those documents. The complainant can, of course, be the Registrar and he quite probably would be the complainant if a charitable corporation is the subject of the complaint.

416. Section 19.11 enables a summary application to a court in broadly permissive terms. The section ignores procedural details leaving it to the court to impose its own rules of court to the extent that they are applicable to the case. Section 19.12 provides for an appeal.

417. Section 19.13 states in general terms that it is an offence to make a misrepresentation in a document required to be filed under the proposed CNPCA. The language of this provision, identical to s.240 of the proposed CBCA, parallels closely the misrepresentation provisions relating to proxy circulars, prospectus statements, and take-over bid circulars of the proposed CBCA. However, the language of the provision is also appropriate to facilitate the interests of not-for-profit corporations, for example, in respect to reports to be filed by charitable corporations with the Registrar under Part 13.00. Any person may institute proceedings under this section: the Minister need not give prior consent to a prosecution. In a self-enforcing law such as the proposed CNPCA, there is no reason to give the Registrar or the Minister control over all prosecutions.

418. Section 19.14 serves the purpose of stating that the contravention of any provision of the Act, or regulations, for which no punishment is provided is an offence punishable on summary conviction. Section 19.15 provides that a court may order a person to comply with the provision of the Act, or regulation, in respect to which there has been an offence and conviction. It must be remembered that the proposed CNPCA, unlike the common law, provides an abundance of civil remedies that enable an aggrieved person to institute civil action as necessary. These sanctions are buttressed by administrative supervision and protection of the public interest in respect to charitable corporations.

PART 20.00

GENERAL

419. Part 20.00 is adapted from Part XX of the proposed CBCA and is arranged in four divisions:

Notices—ss.20.01 to 20.03
Evidence—ss.20.04 to 20.07
Administration—ss.20.08 to 20.15
Transition—ss.20.16 to 20.17

As the title to this Part implies, these provisions are of general application and thus are superimposed on all the other provisions of the proposed CNPCA except where the same problem is specifically dealt with in a particular section.

420. Section 20.01 deals with notices to directors and members and is self-explanatory.

421. Section 20.02 is similar to s.20.01, but applies only to the corporation itself. Note, however, that the section contemplates service of legal process upon a corporation as well as simple notice to a corporation. This was added to give clear legitimacy to those rules of court that permit service on a corporation by prepaid registered mail in lieu of personal service.

422. Section 20.03 enables the members of a corporation to waive or to agree to an abridged notice at any time. Thus a meeting in respect of which an invalid or late notice was sent out may nevertheless be a valid meeting if all members agree to waive the requirement of notice. Of course, if no actual meeting is required, then the proposed corporate action may be effected by way of a resolution in writing under s.9.15 (directors) or s.11.11 (members).

423. Sections 20.04 to 20.07 deal generally with evidence problems. Consistent with the philosophy of the proposed CNPCA, empty formalities are reduced to a minimum and procedural routines are designed as far as possible to reflect what is widely accepted as good practice. As with the proposed CBCA, the proposed CNPCA dispenses with the requirement of a seal.

424. Section 20.05(1) concerns the authentication of documents issued by a corporation, particularly in respect of certificates setting out extracts of minutes of directors' or members' meetings that relate to specified corporate acts. Like s.4.05, this section minimizes the significance of the corporate seal. If some further verification is desirable, the outsider can demand a statutory declaration of a corporate representative verifying the facts upon which the transaction is predicated. In any event, many of the formalities that now accompany corporate dealings are rendered redundant by the proposed CNPCA which, based upon the approach and provisions of the proposed CBCA, in general terms is designed to enable a third party to assume that an act of a corporation is within its capacity and that it has carried out all internal procedures required to sanction the act. Subsection (3) declares that a security certificate is evidence of the title of the certificate holder. This provision is the same as s.247(3) of the proposed CBCA. However, as the only security interest which can be taken by the creditor of a not-for-profit corporation is in respect to a debt obligation, a security certificate is of limited importance: s.1.02(1)

425. Section 20.06 is new, and is identical to s.248 of the proposed CBCA. It contemplates receipt by the Registrar of documents in photostatic, or photographic form, including microfilms. Note that unqualified discretion is conferred upon the Registrar to decide whether or not a document or substitute for a document is acceptable.

426. Section 20.07 sets out the right of the Registrar to demand verification of any facts by affidavit. Subsection (2) permits either a statutory declaration under the Canada Evidence Act or an affidavit. The reference to the proof of a fact required by the proposed CNPCA is to provisions such as ss.79 and 80 of the proposed CBCA (incorporated by reference into Part 7.00 of the proposed CNPCA by s.7.01) which relate to the verification of facts that confirm compliance with the terms of a trust indenture either at the time of its execution or at any other time.

427. Except for the terminology, s.20.08 is self-explanatory. The term "Registrar" was adopted in the proposed CBCA following the usage of the United Kingdom Companies Act, 1948, first because it is a well-known term in jurisdictions having so-called registration Acts and second, because to use the term "Director" as it is employed in the Canada Corporations Act would cause some confusion with the directors of a corporation. In fact, the term "Registrar" is somewhat misleading, since the Registrar does not maintain any registry in the sense that a transfer agent maintains a register of shareholders; but the term is useful to avoid ambiguity. Given the broad wording of s.20.08, the Minister may appoint the Director of the Corporations Branch as the Registrar, if necessary to reconcile the language of the proposed CNPCA and the proposed CBCA with the organization of the Department.

428. A fundamental tenet implicit in both the proposed CBCA and the proposed CNPCA is that much of the detail set out in contemporary laws should be contained in regulations. First, this approach enables the draftsmen to economize on the length of the statute, which would be very long indeed if it had to include, say, all the particulars to be set out in financial statements. Second, it facilitates change of what are essentially formal or disclosure matters to ensure that they correspond with changes in the practices of accountants, and the changing activities of the corporation (for example, an initial solicitation of funds), and so forth. Third, this approach allows for flexibility, particularly important because of the two distinctive types of not-for-profit corporations. Finally, it permits the use of clear, concise and consistent forms that make practice under the proposed CNPCA easily comprehended by lawyers across Canada, irrespective of different local procedures and formalities. For these reasons, s.20.09 confers very broad regulatory powers on the Governor in Council.

429. As has been noted in the discussions of Part 13.00, there is little danger in such a grant of regulatory powers for two reasons. First, a system of scrutiny is afforded by the Statutory Instruments Act. Second, s.20.09(2) provides in addition that regulations will not take effect until sixty days after publication in the Canada Gazette. This will give ample opportunity for public awareness and scrutiny before they take effect. This provision is analogous to those dealing with the formulation of the rules of the United States Supreme Court. See 28 U.S.C. §.2072, as amended. In addition, if it seems appropriate, proposed regulations can be circulated to interested parties, such as charitable corporations and the legal and accounting professions, for comment and advisory committees can be constituted to participate in the process of formulation of the regulations.

430. Many of the references in the proposed CNPCA to matters that may be prescribed by regulation are to forms such as articles of incorporation. However, the power is also given

to regulate in respect of information returns (s.13.19), the form and content of financial statements (s. 13.01), and discretionary continuance (s. 20.16(3)). The effect of these regulatory powers is discussed in greater detail in connection with those specific sections.

431. Instead of repeating the formal procedures in connection with each vital event in the corporation's existence-incorporation, amendment, amalgamation and so on—as with the proposed CBCA, the formalities of filing are consolidated in one section (s.20.10) and incorporated in the related sections by reference. This achieves a significant economy of language.

432. Section 20.11, requiring an annual return to be filed, is self-explanatory.

433. Section 20.12 is a simplified version of s.9(5) of the present Act. Its objective is to expedite incorporation and other fundamental changes in a corporation's structure. Note that, unlike the precedent followed, it applies to all documents filed with the Registrar and therefore includes a notice of directors, a notice of registered office, and all articles.

434. Section 20.12 applies to errors that are noticed before the issue of a certificate by the Registrar. Section 20.13 sets out the procedure to be followed if an error is contained in an issued certificate. It follows generally the policy of s.11 of the present Act.

435. Section 20.14 permits examination of documents filed by a charitable corporation, in the office of the Registrar. It is adapted from s.256 of the proposed CBCA which, in turn, is in part based upon section 129(1) of the present Act (not applicable to Part II corporations). This provision will facilitate the policy of full disclosure in respect to the charitable corporation. However, in respect to the membership corporation, formed for a private non-pecuniary purpose, only the members and creditors should have the opportunity to examine, and this is otherwise provided for in specific sections of the Act (ss.4.02 and 13.03).

436. Subsection 20.15(1) provides for the keeping of records by the Registrar, allowing documents to be maintained in microfilm form or even in files that may be integrated with electronic data processing facilities. The duty of the Registrar to produce records (subsection (2)) is limited to a period of six years (subsection (3)).

437. Section 20.16 deals with the problems of transition and adopts the approach of the proposed CBCA. Several alternatives were considered in respect to the proposed CBCA, and the same alternatives are present in respect to the proposed CNPCA: (a) allow the present Canada Corporations Act to continue but disallow new incorporations under that Act; (b) allow the present Act to continue, disallow new incorporations under it, but permit continuance under the proposed CNPCA; (c) allow the present Act to continue for a limited period of time during which existing corporations may effect continuance under the proposed CNPCA; or (d) repeal the present Act and make the proposed CNPCA applicable to all federal not-for-profit corporations as of the effective date of the proposed CNPCA. The last alternative is superficially attractive, but it is really the most difficult of all, both for corporations and for the Department. It would require many additional and complicated provisions in the proposed CNPCA because that Act would then apply both to corporations created under the old letters patent regime and to those incorporated under the simpler scheme of the proposed CNPCA. The result would be a statute more complicated than the present one, defeating one of the major objectives of the proposed CNPCA. Therefore, a variation of the third alternative has been adopted, that is, to require continuance under the proposed CNPCA.

438. Quite apart from the rather short (and entirely arbitrary) time limit of five years imposed in s.20.16(1), the mandatory continuance rule will impose a burden on every not-for-profit corporation presently in existence under Part II of the Canada Corporations Act, or to which Part III of the present Act applies, as well as those incorporated under the Boards of Trade Act. It is a question of choosing the lesser evil. Although the continuance procedure in s.14.14 is straightforward, for corporations incorporated under the wholly different machinery of the present Act continuance is, in fact, if not in law, a re-incorporation. Some corporations may have to do extensive internal re-structuring before they can apply for a certificate of continuance. Subsection (4) alleviates the problem somewhat. A rule which allowed the present Act (and corporations governed by it) to continue indefinitely would be easier at the outset, but much more troublesome and expensive in the long run. It would create two quite different regimes of not-for-profit corporation law at the federal level, apart from the different regime of business corporation law. This would result in even more public confusion than at present. The temporary cost and inconvenience through the s.21.16 approach is outweighed by the benefit of a single, comprehensive not-for-profit corporation law, and one which accords with the new federal business corporation law so far as possible. Moreover, as argued in Appendix A to this Report, the present Act is very unsuitable for existing not-for-profit corporations.

439. Other difficult problems are posed by s.20.16(3). It confers discretion upon the Governor in Council to require, by regulation, that a corporation governed by a Special Act of Parliament be continued under the proposed CNPCA. The ultimate objective is to have one regime of corporation law applicable to each not-for-profit corporation incorporated at the federal level irrespective of the nature of its activities. If the principle of this transition provision is accepted, some federal not-for-profit corporations presently in existence by virtue of Special Acts (for example, the Canadian Film Development Corporation or the Company of Young Canadians—see the commentary on Part 3.00) will probably have to be dealt with on an 'ad hoc' basis. It is, of course, impossible to predict how long this will take. For this reason, s.20.16(3) allows the transition to be implemented by Cabinet decision. However, those Special Act corporations to which Part III of the present Act applies (for example, the Red Cross Society) are required under s.20.16(1) to apply for continuance under the proposed CNPCA. However, if there is any Special Act corporation to which Part III of the present Act applies, which is considered to be so extraordinary as to require unique *statutory* provisions, it can be exempted from the requirement of mandatory continuance: subsection (2). In such event, amendments could be made to the Special Act, so that Part III of the present Act need not remain in force simply because of such Special Act corporation. See also the commentary on Part 1.00.

440. Whether a corporation is governed by the present Canada Corporations Act or by a Special Act it may be continued under the proposed CNPCA without fee, pursuant to s.20.16(4). The continuance would be effected under s.14.14, such corporations being imported into the proposed CNPCA just like any other foreign corporation. Failure to effect continuance as required by s.20.16 will bring into play the sanction set out in subsection (5), which declares that a non-complying corporation is automatically dissolved.

APPENDIX "A"

INTRODUCTION

This appendix provides a synthesis of all the provisions of the Canada Corporations Act R.S.C. 1970, c.C-32, as am., which apply to not-for-profit corporations (the term "not-for-profit corporation" is used throughout to refer to Part II "corporations without share capital" and the term "business corporation" is used to refer to Part I "companies with share capital"). The comment also refers to those provisions as amended by R.S.C. 1970, c.10 (1st Supp.), assented to Oct. 7, 1970. (The Canada Corporations Act is hereinafter referred to as the present Act).

The comment only mentions in passing some of the arguable inadequacies because of statutory omissions, and does not review the policy underlying the various provisions of federal not-for-profit corporation law. The comment is provided for the purpose of synthesizing the provisions of the present Act applicable to not-for-profit corporations and considering the appropriateness of the present Act because of the legislative approach employed and the language utilized.

There are many general criticisms which become apparent in this review of federal statutory not-for-profit corporation law.

First, there is an awkwardness in researching and referring to federal statutory not-for-profit corporation law through the basic approach of necessarily going to Part II of the present Act and then having to refer to the several sections of Part I which are made applicable to such corporations by s.157(1). Such an approach makes the statutory law applicable to not-for-profit corporations difficult to read and comprehend. It is difficult for someone referring to the statute to obtain an overview and to appreciate and grasp the interrelationship of the various sections as made applicable to not-for-profit corporations.

Secondly, the approach utilized in making specific provisions of Part I of the present Act applicable to not-for-profit corporations creates difficulties because of the inappropriateness of the language of Part I which was drafted, necessarily, for the single purpose of being suitable for the business corporation, that is, the "company with share capital". This results in problems of interpretation in respect to the statutory law for the fundamentally different not-for-profit "corporation without share capital."

This approach results, on the one hand, in instances of statutory language which is entirely irrelevant but literally applicable to the not-for-profit corporation and, on the other hand, instances where there is an absence of the necessary language within those provisions of Part I made applicable to such corporations to make such applicability meaningful and effective. Both shortcomings result in a failure to accomplish apparent legislative intent. S.157(1) does not even employ the phrase *mutatis mutandis* in seeking to make appropriate the language of Part I as applied to not-for-profit corporations (contrast s.157(1) with s.134(1) of The Corporations Act, R.S.O. 1970, c.89 hereinafter referred to as the Ontario Act). The result of the legislative approach employed is that the provisions of Part I made applicable to a not-for-profit corporation include words or phrases which are totally inappropriate because there cannot be any "partial deletion" or "partial amendment" of such provisions.

Thirdly, the present legislative approach has undoubtedly resulted in inherent limitations upon the development of appropriate statutory provisions for not-for-profit corporations. A basic approach of Part II of the present Act is provided through s. 155(2) which requires the application for incorporation to be accompanied by the by-laws, in duplicate, which shall include provisions upon several essential matters. However, there is little in the way of general statutory provisions and standards as a background pertaining to such essential matters. This approach may be necessitated because the important provisions of Part I are thought to be sufficiently unsatisfactory in language and content for not-for-profit corporations and therefore are not made applicable to such corporations. However, Part II

has not been sufficiently developed to include comprehensively the areas of coverage so omitted and therefore the Department of Consumer and Corporate Affairs must exercise a significant degree of continuing administrative control as to what is contained in the by-laws. The provisions in respect to directors are illustrative. Ss. 86-92 and 94-97 are not made applicable to not-for-profit corporations. Undoubtedly the language thereof would have to be modified to make such provisions appropriate for such corporations. Nevertheless, the present legislative approach results in a virtual absence of general statutory provisions in respect to directors for not-for-profit corporations (for example, the equivalent of s. 94 for business corporations). There is simply incidental coverage on subsidiary matters (i.e. ss. 93, 98 and 99). With this federal statutory approach, contrast the provisions in the Ontario Act which provide some general principles and standards pertaining to directors, for example, ss. 130, 131, 313 to 320, 321(1), 322, 324 and 328.

It may be that the main reason for the s.155(2) approach of the present Act is to meet the necessity of dealing with such gaps by requiring such matters to be dealt with in the by-laws and requiring the by-laws, in duplicate, to accompany the application for incorporation with on-going supervision and regulation through proposed repeal or amendments of the by-laws being subject to the approval of the Minister. However, it is questionable as to whether this is a satisfactory approach. It is arguable that the absence of statutory standards results in a lesser knowledge and appreciation of duties, responsibilities, powers, etc. on the part of directors than would be so if there were statutory provisions present as enabling provisions and standards. It further results in an unnecessary expenditure of time and energy through the supervisory administrative role of the Department. It might also result in a tendency toward gaps in respect to suitable provisions and standards in by-laws, and lack of uniformity and inconsistencies as between not-for-profit corporations. For example, s.154(1) provides that the applicants "become members of the corporation thereby created" and s.155(1)(e) provides that the applicants "are to be the first directors of the corporation". However, there is not a specific provision clearly requiring that other than the first directors be members. The only provision in this regard can be through the by-laws (see s.155(2)(d)). Is the absence of a statutory provision requiring directors to be members a gap or is flexibility intended as a matter of policy? (Compare the federal statutory position for not-for-profit corporations with s.88 of the present Act for business corporations and with s.316 of the Ontario Act for Ontario corporations without share capital). The s.155(2) approach tends to impede the development of general legal principles and standards and an understanding of those general principles and standards suitable for not-for-profit corporations.

Perhaps many of the problems of interpretation discussed in this comment are moot and not real and practical. However, they do suggest, at the least, potential problems, they do give rise to much unnecessary confusion, and they do indicate the unsuitability of the present statutory provisions as an administrative and legal framework for not-for-profit corporations. The present Act is not being functional for its intended purposes. Perhaps the reason for few real problems (if such be the case) is due in part to the present Act being so awkward, confusing, and functionally unsuitable that there is lack of interest and desire to use the existing federal corporation law as a medium for incorporation of a not-for-profit corporation. A better legislative approach is to have an independent statutory enactment applying only to not-for-profit corporations without share capital (either as a completely self-contained Part II with all of the provisions contained therein that are meant to be applicable to such corporations or, preferably, a completely separate statute for not-for-profit corporations).

The provisions of the present Act applicable to not-for-profit corporations will now be analyzed for the purpose of considering the abovementioned criticisms in respect to the present legislative approach.

Interpretation

3. (1) In this Part and in all letters patent and supplementary letters patent issued under

"accounts receivable" includes existing or future book debts, accounts, claims, moneys and choses in action or any class or part thereof and all contracts, securities, bills, notes, books, instruments and other documents securing, evidencing or in any way relating to the same or any of them, but shall not include uncalled share capital of the company or calls made but not paid;

"the company" or "a company" means any company to which this Part applies and "another company" or "any other company" means any company wherever or however incorporated;

"court" means in Ontario, the Supreme Court, in Quebec, the Superior Court; in Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, Alberta and Newfoundland, the Supreme Court in and for each of those Provinces, repectively; in Manitoba, the Court of Queen's Bench; in Saskatchewan, the Court of Queen's Bench; in the Yukon Territory, the Territorial Court; and in the Northwest Territories, the Territorial Court;

"debenture" includes bonds, debenture stock, and any other securities of a company that constitute or are entitled to the benefit of a charge on the assets of the company;

"Department" means the Department of Consumer and Corporate Affairs;

"director" includes any person occupying the position of director by whatever name he is called;

"document" includes notice, order, certificate, register, summons or other legal process;

"equity share" means any share of any class of shares of a company carrying voting rights under all circumstances and any share of any class of shares carrying voting rights by reason of the occurrence of any contingency that has occurred and is continuing;

"judge" means in the said respective Provinces and Territories a judge of the said courts respectively;

"Minister" means the Minister of Consumer and Corporate Affairs;

"mortgage" includes charge and hypothec;

"officer" means the chairman or vice-chairman of the board of directors, the president, vice-president, secretary, treasurer, comptroller, general manager, managing director or any other individual who performs functions for the company similar to those normally performed by an individual occupying any such office;

"private company" means a company as to which by letters patent or supplementary letters patent

(a) the right to transfer its shares is restricted,

(b)the number of its shareholders is limited to fifty,

not including persons who are in the employment of the company and persons, who, having been formerly in the employment of the company, were, while in that employment, and have continued after the termination of that employment to be shareholders of the company, two or more persons holding one or more shares jointly being counted as a single shareholder, and

(c) any invitation to the public to subscribe for any shares or debentures of the company is prohibited;

"public company" means a company that is not a private company;

"real estate" or "land" includes messuages, lands, tenements, and hereditaments of any tenure, and all immovable property of any kind;

"securities" means [any shares of a company] or any debentures or other obligations of a company, whether secured or unsecured;

"shareholder" means every subscriber for or holder of a share in the capital stock of the company and includes the personal representatives of a deceased shareholder and every person who agrees with the company to become a shareholder;

"undertaking" means the business of every kind which the company is authorized to carry on.

(2) A by-law mentioned in section 20, subsection 29(1), section 51 or 52 may be referred to as a "special resolution". R.S., c. 53, s. 3; 1964-65, c. 52, s. 3; 1966-67, c. 25, s. 38; 1967-68, c. 9, s. 6; 1967-68, c. 16, s. 10.

COMMENT

1. The s.3(1) definition of "the company" or "a company" is irrelevant to the not-for-profit corporation because of s.157(3).

2. The s.3(1) definition of "equity share" is irrelevant to not-for-profit corporations, being entities without share capital. The provision is apparently devised for the purpose of insider trading rules.

3. The s.3(1) definition of "private company" is unsuitable for the not-for-profit corporation. The "private company" distinction is probably mainly important for business corporations because of required compliance by the "public company" with ss.119 to 124 (s.118(4) allowing an exception for the "private company"). However, ss.119 to 124 are not made applicable to not-for-profit corporations by s.157(1). So far as not-for-profit corporations are concerned, the "private corporation" can only have the limited benefits afforded by s. 98(4)(b) and s.131(2). (Query as to whether legislative intention is to include ss. 128 and 129 as applicable to corporations—see the comment following s.150, *infra*).

The definition of "private company" in s.3(1) is unsuitable. First, paragraph (a) speaks of "transfer [of] shares". The present Act fails to provide a word or phrase to substitute for "shares" where, as here, that word is used in a provision of Part I which is made applicable to not-for-profit corporations. S.157(3) is the only interpretation section used to adapt the provisions of Part I to not-for-profit corporations and s.157(1) fails to even have a *mutatis mutandis* provision, although this would not really suitably solve the problems which are generally created by the legislative approach. (Compare the wording of s.157(1) of the present Act with s.134(1) of the Ontario Act). Furthermore, although in respect to the definition in s.3(1) of "private company" paragraph (a) is always complied with by not-for-profit corporations (as by statutory requirement such a corporation is incorporated under Part II "without share capital"), there is non-compliance in a literal sense because such a corporation, not having share capital, would not by its letters patent stipulate that "the right to transfer its shares is restricted."

The other two conditions constituting a prerequisite to the "private company" definition are also inappropriate. Paragraph (b) requires that the number of members be "limited to fifty" and because of the fundamentally different nature of some not-for-profit corporations (which have a "public" character because of their objects and activities and not because of the number of members) it is arguable that the number of members distinction is not the relevant criterion for modifying the general statutory position with regard to not-for-profit corporations. The "public" character of many not-for-profit corporations at the federal level is not dependent upon the number of members. Paragraph (c) is unsuitable for not-for-profit corporations for two reasons. First, the statute fails to provide an appropriate word or phrase to substitute for "shares" (such as "membership interest" or a similar phrase). Secondly, with not-for-profit corporations an "invitation to the public" to become members (or to subscribe for debentures) is not uncommon and certainly would very seldom be "prohibited" by the letters patent. If improvement is sought simply within the framework of the present Act it might simplify matters, without negative effect, to delete the s. 3(1) definition of "private company" as one of the provisions made applicable to not-for-profit corporations through s.157(1). Consideration must then be given as to whether ss.98(4)(b) and 131(2) should not be applicable at all to such corporations or should always be applicable.

So far as s.98(4)(b) is concerned, it can be argued that to allow not-for-profit corporations to always fall within the exception thereof would not result in a significant lessening of protection to members and the public because of the general prohibition imposed by s.154(1) that the not-for-profit corporation is to be "for the purpose of carrying on without pecuniary gain to its members, objects . . ."

On the other hand, it can be argued that the directors of a not-for-profit corporation (as contrasted with those of a private company) generally should not need to call upon the exception of s.98(4)(b) and therefore it is better not to make this provision applicable to such corporations.

So far as s. 131(2) is concerned it is arguable that because of the "public" character that many not-for-profit corporations would have it is desirable not to allow such corporations to come within the exception thereof. This is the present position for corporations without share capital under the Ontario Act, through ss. 124(1) and 96(1). Therefore, ss. 98(4)(b) and 131(2) could be deleted as applicable to not-for-profit corporations which would remove the necessity of the definition in s.3(1) of the "private company" being included as a provision applicable to such corporations. However, one problem might remain if the above suggestions were adopted, namely, s.111.1(1), which allows an exception to compliance to the "private company". If s.3(1) definition of "private company" were not made applicable to not-for-profit corporations there could not be a "private corporation" as s.157(3) does not so provide. It is desirable that most federal not-for-profit corporations comply with s.111.1 because of their "public" character (with little harm caused in requiring all to comply—but see the comment following s.111.1, *infra*). However, to avoid confusion, if it is thought that an interpretation problem exists, s.111.1(1) could be amended to read:

> Any person, upon payment of the costs thereof and upon filing with the company or its transfer agent such declaration as may be prescribed by regulations, is entitled to obtain from a company, other than a private company *with share capital* or its transfer agent . . .

A similar point can be made in respect to s.128(3)(b) which, if s.128 is intended to apply to not-for-profit corporations (in this regard see the comment following s.150(1)(b)), could be amended to read:

> (b) a private company *with share capital* whose gross . . .

The above noted amendments to either, or both, ss.111.1(1) and 128(3)(b), could also be made if it were decided to leave the definition in s.3(1) of "private company" as a provision applicable to not-for-profit corporations, and it were intended to make either, or both, ss.111.1(1) and 128(3)(b) always applicable to such corporations. (However, in this regard see the comments following ss.111.1(1) and 150, *infra*).

The definition in s.3(1) of "public company" is, of course, only relevant to the not-for-profit corporation if there can be a "private corporation".

4. Query whether the definition is s.3(1) of "securities" is intended to apply to not-for-profit corporations as in substance this provision has been taken from s.74 ("securities") which was not, of course, made applicable to not-for-profit corporations. In any event, there are unnecessary words included in the definition, as indicated by the brackets inserted in the text of the definition.

5. The s.3(1) definition of "shareholder" is an unsuitable definition as to what a "member" means. Through s.157(3) "shareholder" means "member". However, the definition then reads:

> (n) "member"—member "means every subscriber for or *holder of a share in the capital stock of the corporation* and includes the personal representative of a deceased member and every person who agrees with the corporation to become a member." [emphasis added]

6. S.3(2) is in part irrelevant through reference to "section 51 or 52" as these sections are not made applicable to not-for-profit corporations.

Preliminaries

4. The provisions of this Part relating to matters preliminary to the issue of the letters patent or supplementary letters patent are directory only, and no letters patent or supplementary letters patent issued under this Part shall be held void or voidable on account of any irregularity or insufficiency in respect of any matter preliminary to the issue of the letters patent or supplementary letters patent 1964-65, c. 52, s. 4.

Formation of New Companies

5.6 (1) Where a company

(a) carries on a business that is not within the scope of the objects set forth in its letters patent or supplementary letters patent,

(b) exercises or professes to exercise any powers that are not truly ancillary or reasonably incidental to the objects set forth in its letters patent or supplementary letters patent,

(c) exercises or professes to exercise any powers expressly excluded by its letters patent or supplementary letters patent,

the company is liable to be wound up and dissolved under the *Winding-Up Act* upon the application of the Attorney General of Canada to a court of competent jurisdiction for an order that the company be wound up under the Act, which application may be made upon receipt by the Attorney General of Canada of a certificate of the Minister setting forth his opinion that any of the circumstances described in paragraphs (a) to (c) apply to that company.

(2) In any application to the court under subsection (1) the court shall determine whether the costs of the winding-up shall be borne by the company or personally by any or all of the directors of the company who participated or acquiesced in the carrying on of any business or the exercise or the professing of the exercise of any powers as described in subsection (1).

COMMENT

1. S.5 was amended by R.S.C. 1970, c.10 (1st supp.), s.3.

S.5.6 is nearly identical to s.5(4) and (5) of the statute as formerly enacted. S.5(5) was not applicable to not-for-profit corporations through s.157(1). (Note the comment in respect to s.150(1)(b), *infra*.)

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6. The Governor in Council may, from time to time, designate the seal of office to be used by the Minister as the seal under which letters patent may be granted under this Act, R.S., c. 53, s. 6.

9. (1) Before the letters patent are issued the applicants shall establish to the satisfaction of the Minister

(a) the sufficiency of the application and the truth and sufficiency of the facts therein set forth, and

(b) that the proposed name is not the same or similar to the name under which any other company, society, association or firm, in existence, is carrying on business in Canada or is incorporated under the laws of Canada or any province thereof or so nearly resembles the same as to be calculated to deceive and is not otherwise on public grounds objectionable, or that such existing company, society, association or firm is in the course of being dissolved or changing its name and has signified its consent to the use of the said name.

(2) The Minister or any officer to whom the application may be referred may take any requisite evidence in writing by oath or affirmation or by statutory declaration and the Minister shall keep of record any such evidence so taken.

(3) The letters patent shall recite such of the established averments in the application as to the Minister seems expedient.

(4) The Minister, after giving reasonable notice to the applicants, or to their authorized representative or agent, may give to the company a corporate name different from that proposed by the applicants in any case in which the proposed name is deemed by the Minister to be objectionable.

(5) The Minister after giving notice to the applicants or to their authorized representative or agent may, with the consent of such applicants or their authorized representative or agent, make such alterations in the application as may be deemed expedient by the Minister. R.S., c. 53, s. 8; 1964-65, c. 52, s. 7.

COMMENT

1. S.9(b) requires the applicants to establish "that the proposed name is not the same or similar to the name under which any other company . . ." however, the word "corporation", when "company" is preceded by a word other than "the", cannot be substituted for "company" through s.157(3), with the somewhat paradoxical result that, as it literally reads, s.9(b) will allow a not-for-profit corporation to have a name which is the same or similar to the name of any other "corporation" but not to that of a "company". (The interpretation problems caused by the use of "other company" are discussed at length in the comment following s.16, *infra)*. This criticism is also applicable to s.28. See the comment following that section.

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10. Notice of the granting of letters patent or supplementary letters patent shall be forthwith given by the Minister by one insertion in the *Canada Gazette*. 1964-65, c. 52, s. 8.

11. (1) When the letters patent or supplementary letters patent contain any misnomer, misdescription, clerical error or other defect, the Minister may direct the letters patent or supplementary letters patent to be corrected.

(2) Notice of the correction of the letters patent or supplementary letters patent shall be forthwith given by the Minister in the *Canada Gazette* if the correction made causes them to depart materially from the text of the original notice given pursuant to section 10. 1964-65, c. 52, s. 8.

12. A company comes into existence on the date of the letters patent incorporating it.

General Powers and Duties of Companies

15. All powers given to a company by letters patent or supplementary letters patent shall be exercised subject to the provisions and restrictions contained in this Part. R.S., c. 53, s. 13.

16. (1) A company may, as ancillary and incidental to the objects set out in its letters patent or supplementary letters patent, exercise any or all of the following powers, namely the power:

(a) to carry on any other business that may seem to the company capable of being conveniently carried on in connection with its business or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights;

(a.1) to purchase or otherwise acquire and undertake all or any of the assets, business, property, privileges, contracts, rights, obligations and liabilities of any other company or any society, firm or person carrying on any business that the company is authorized to carry on, or possessed of property suitable for the purposes of the company;

(b) to apply for, purchase or otherwise acquire any patents, patent rights, copyrights, trade marks, formulae, licences, concessions and the like, conferring any exclusive or non-exclusive or limited right to use, or any secret or other information as to any invention that may seem capable of being used for any of the purposes of the company, or the acquisition of which may seem calculated directly or indirectly to benefit the company, and to use, exercise, develop or grant licences in respect of, or otherwise turn to account, the property, rights or information so acquired;

(b.1) to amalgamate or enter into partnership or into any arrangement for sharing of profits, union of interests, cooperation, joint adventure, reciprocal concession or otherwise, with any other company or any society, firm or person, carrying on or engaged in or about to carry on or engage in any business or transaction that the company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit the company; and to lend money to, guarantee the contracts of, or otherwise assist any such company, society, firm or person, and to take or otherwise acquire shares and securities of any such company, and to sell, hold or otherwise deal with the same;
(c) to take, or otherwise acquire and hold, shares, debentures or other securities of any other company having objects altogether or in part similar to those of the company, or carrying on any business capable of being conducted so as, directly or indirectly, to benefit the company, and to sell or otherwise deal with the same;
(d) to enter into any arrangements with any government or authority, municipal, local or otherwise, that may seem conducive to the company's objects, or any of them, and to obtain from any such government or authority any rights, privileges and concessions that the company may think it desirable to obtain, and to carry out, exercise and comply with any such arrangements, rights, privileges and concessions;
(e) to establish and support or aid in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or of its predecessors in business, or the dependants or connections of such persons, and to grant pensions and allowances, and to make payments toward insurance, and to subscribe or guarantee money for charitable or benevolent objects, or for any exhibition or for any public, general or useful object;
(f) to promote any other company or companies for the purpose of acquiring or taking over all or any of the property and liabilities of the company, or for any other purpose that may seem directly or indirectly calculated to benefit the company;
(g) to purchase, take on lease or in exchange, hire, and otherwise acquire and hold, sell or otherwise deal with any real and personal property and any rights or privileges that the company may think necessary or convenient for the purposes of its business and in particular any land, buildings, easements, machinery, plant and stock-in-trade;
(h) to construct, improve, maintain, work, manage, carry out or control any roads, ways, branches or sidings, bridges, reservoirs, watercourses, wharfs, manufactories, warehouses, electric works, shops, stores and other works and conveniences that may seem calculated directly or indirectly to advance the company's interests, and to contribute to, subsidize or otherwise assist or take part in the construction, improvement, maintenance, working, management, carrying out or control thereof;
(i) to lend money to any other company, or any society, firm or person, having dealings with the company or with whom the company proposes to have dealings or to any other company any of whose shares are held by the company;
(j) to draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, bills of lading, warrants and other negotiable or transferable instruments;
(k) to sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company that has objects altogether or in part similar to those of the company;
(l) to apply for, secure, acquire by grant, legislative enactment, assignment, transfer, purchase or otherwise, and to exercise, carry out and enjoy any charter, licence, power, authority, franchise, concession, right or privilege, that any government or authority or any corporation or other public body may be empowered to grant, and to pay for, aid in and contribute toward carrying the same into effect, and to appropriate any of the company's shares, debentures, or other securities and assets to defray the necessary costs, charges and expenses thereof;
(m) to procure the company to be registered and recognized in any foreign country or place, and to designate persons therein according to the laws of such foreign country or place to represent the company and to accept service for and on behalf of the company of any process or suit;
(n) to remunerate any other company, or any society, firm or person for services rendered, or to be rendered, in placing or assisting to place or guaranteeing the placing of any of

the shares in the company's capital or any debentures or other securities of the company, or in or about the organization, formation or promotion of the company or the conduct of its business;

(o) to raise and assist in raising money for, and to aid by way of bonus, loan, promise, endorsement, guarantee or otherwise, any other company with which the company may have business relations or any of whose shares, debentures or other obligations are held by the company and to guarantee the performance or fulfilment of any contracts or obligations of any such company or of any person with whom the company may have business relations, and in particular to guarantee the payment of the principal of and interest on debentures or other securities, mortgages and liabilities of any such company;

(p) to adopt such means of making known the products of the company as may seem expedient, and in particular by advertising in the press, by circulars, by purchase and exhibition of works of art or interest, by publication of books and periodicals and by granting prizes, rewards and donations;

(q) to sell, improve, manage, develop, exchange, lease, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the company;

(s) to distribute among the shareholders of the company in kind, specie or otherwise, any property or assets of the company including any proceeds of the sale or disposal of any property of the company and in particular any shares, debentures, or other securities of or in any other company belonging to the company, or of which it may have power to dispose, if either such distribution is made for the purpose of enabling the company to surrender its charter under the provisions of this Act, or such distribution, apart from the provisions of this paragraph, would have been lawful if made in cash;

(t) to pay out of the funds of the company all or any of the expenses of or incidental to the formation and organization thereof, or which the company may consider to be preliminary;

(u) to establish agencies and branches;

(v) to invest and deal with the moneys of the company not immediately required in such manner as may from time to time be determined;

(w) to apply for, promote and obtain any statute, ordinance, order, regulation or other authorization or enactment that may seem calculated directly or indirectly to benefit the company; and to oppose any proceedings or application that may seem calculated directly or indirectly to prejudice the company's interests;

(x) to take or hold mortgages, hypothecs, liens and charges to secure payment of the purchase price, or for any unpaid balance of the purchase price of any part of the company's property of whatsoever kind sold by the company, or any money due to the company from purchasers and others and to sell or otherwise dispose of said mortgages, hypothecs, liens and charges;

(y) to carry out all or any of the objects of the company and do all or any of the things set out in this subsection as principal, agent, contractor, or otherwise, and either alone or in conjunction with others; and

(z) to do all such other things as are incidental or conducive to the attainment of the objects and the exercise of the powers of the company.

(2) The company shall from the date of its letters patent become and be vested with all property and rights, real and personal, theretofore held for it under any trust created with a view to its incorporation.

(3) Nothing in this section prevents the inclusion in the letters patent or supplementary letters patent of a company of other powers in addition to or in modification of the powers mentioned in subsection (1).

(4) Any of the powers set out in subsection (1) may be withheld or limited by the letters patent or supplementary letters patent of the company. R.S., c. 53, s. 14; 1964-65, c. 52, s. 12.

COMMENT

1. Note that the word "other" often precedes "company" and s. 157(3) renders the words "the company" or "a company" to mean a "corporation" in respect to which Part II applies. Two criticisms can be made.

First, the word "other" when used prior to "company" is somewhat misleading because "other" seeks to distinguish from "a company" in the opening words of s.16(1) and when "corporation" is substituted for "company" through s.157(3) it is misleading to then use "other" prior to "company". However, on the other hand, it is necessary to have "other" (or some word) prior to "company", so that the reference is to an entity other than the one whose incidental powers are under consideration.

Secondly, the word "other" as employed prior to the word "company" does not change "other company" to "other corporation", and therefore it is somewhat limiting. Once the phrase "other company" is used the word "corporation" cannot be substituted therefor. It would seem that the intention of providing the incidental power for s.16(1)(b.1) would extend to "a corporation" as well, so that the phrase would best read "other company or corporation". Similarly, it might be argued that this incidental power should likewise be afforded to a company "to . . . enter . . . any arrangement . . . with any other company or corporation".

2. A similar point could be made in respect to s.16(1)(c). Also, it is more meaningful for a not-for-profit corporation to have included as an incidental power the power "to become a member of any other corporation". The criticism in respect to the phrase "other company" can similarly be made in respect to s.16(1)(i), (k), and (n). With s.16(1)(k) the incidental power probably most desired is to permit the not-for-profit corporation to deal with any other "corporation" in the manner described.

3. The words "any of the shares in the company's capital" in s.16(1)(n) are misleading and irrelevant.

4. It is arguable that the incidental power conferred by s.16(1)(s) is inappropriate to a not-for-profit corporation. Since s.154(1) covers the situation ("without pecuniary gain") conferring of the incidental power, at least to the extent permitted under s.16(1)(s), is confusing and misleading. Control would also be exercised through s.155(2) by the Department such that s.16(4) is utilized in practice to withhold or limit by the letters patent or supplementary letters patent the power conferred under s.16(1)(s). Perhaps the power to distribute upon dissolution should be allowed in respect to a corporation which has not been formed for a charitable purpose. However, the language of s.16(1)(s) is not suitable to confer such a limited incidental power of distribution.

Change of Provisions of Letters Patent

20. (1) [Subject to any special rights attaching to shares of any class or classes as set forth in the letters patent or supplementary letters patent,] a company may from time to time, when authorized by by-law sanctioned by two-thirds of the votes cast at a special general meeting of shareholders called for the purpose, apply for supplementary letters patent, as provided in such by-law,

(a) extending the objects of the company to such further or other objects for which a company may be incorporated [under this Part,] or

(b) reducing, limiting, amending or varying the objects or the powers of the company or any of the provisions of the letters patent or supplementary letters patent issued to the company;

[but no such extension, reduction, limitation, amendment or variation may have the effect of altering or permitting the alteration of the authorized capital of the company in any manner other than pursuant to the issue of supplementary letters patent under sections 51 to 60 or section 134, as the circumstances of the case may require.]

(3) An application under subsection (1) [or (2)] may be made only within six months after the by-law therein mentioned has been sanctioned by the shareholders.

(4) Before such supplementary letters patent are issued, the company shall establish to the satisfaction of the Minister the due passage and sanction of the by-law authorizing the application, and for that purpose the Minister may take any requisite evidence in writing, by oath or affirmation, or by statutory declaration and shall keep a record of any such evidence so taken.

(5) Upon the due sanctioning of a by-law pursuant to subsection (1) [or (2),] as the case may be, being so established, the Minister may grant supplementary letters patent

(a) extending the objects of the company;

(b) reducing, limiting, amending or varying the objects or the powers of the company or any of the provisions of the letters patent or supplementary letters patent of the company; [or]

[(c) converting the company into a public or private company,]

as the case may be, and as provided in such by-law; and notice thereof shall be forthwith given by the Minister in the *Canada Gazette* and the supplementary letters patent take effect from their date. R.S., c. 53, s. 17; 1964-65, c. 52, s. 14.

COMMENT

1. The words in s.20(1) "Subject to any special rights attaching to shares of any class or classes as set forth in the letters patent or supplementary letters patent, "are irrelevant for a not-for-profit corporation because of there not being any substitute for the word "shares" (although there is need for similar protection to the rights of different membership classes). The words in s.20(1)(a) "under this Part" render that paragraph meaningless and ineffective for Part II corporations. The concluding words to s.20(1) "but no such extension, reduction, limitation, amendment or variation may have the effect of altering or permitting the alteration of the authorized capital of the company in any manner other than pursuant to the issue of supplementary letters patent under sections 51 to 60 or section 134, as the circumstances of the case may require" are meaningless because of the use of the words "authorized capital" therein. Also, ss.51 to 60 are not made applicable by s.157(1) to not-for-profit corporations and therefore the reference to them is unnecessary and misleading.

2. In s.20(3) the reference to "or (2)" is meaningless because s.20(2) is not made applicable through s.157(1) to not-for-profit corporations.

3. S.20(5) is rendered meaningless because of the above-mentioned problems in respect to the interpretation of s.20(1)(a). The criticism in respect to the inclusion of the words "or (2)" above-mentioned is also applicable here. S.20(5)(c) should be deleted as s.20(2) is not applicable to not-for-profit corporations.

Contracts, etc.

21. (1) Every contract, agreement, engagement or bargain made, and every bill of exchange drawn, accepted or endorsed, and every promissory note and cheque made, drawn or endorsed on behalf of the company, by any agent, officer or servant of the company within the apparent scope of his authority as such agent, officer or servant, is binding upon the company.

(2) In no case is it necessary to have the seal of the company affixed to any such contract, agreement, engagement, bargain, bill of exchange, promissory note or cheque, or to prove that the same was made, drawn, accepted or endorsed, as the case may be, in pursuance of any by-law or special vote or order.

(3) No person so acting as such agent, officer or servant of the company is thereby subjected individually to any liability whatever to any third person. R.S., c. 53, s. 18.

22. Every deed that any person, lawfully empowered in that behalf by the company as its attorney, signs on behalf of the company and seals with his seal is binding on the company and has the same effect as if it were under the seal of the company. R.S., c. 53, s. 19.

23. (1) A company if authorized by its by-laws may have for use in any province, not being the province in which the head office of the company is situated, or for use in any territory, district or place outside Canada, an official seal, which shall be a facsimile of the corporate seal, with the addition on its face of the name of the province, territory, district or place where it is to be used.

(2) A company having such an official seal may by writing under its corporate seal authorize any person appointed for the purpose to affix the same to any deed or other document to which the company is party in any capacity in such province, territory, district or place.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period, if any, mentioned in the instrument conferring the authority, or if no period is therein mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the official seal is affixed, certify the date and place of affixing the same, but failure to do so does not invalidate the deed or other document.

(5) A deed or other document to which an official seal is duly affixed binds the company as if it had been sealed with the corporate seal. R.S., c. 53, s. 20.

Head Office

24. (1) The company shall at all times have a head office in the place within Canada where the head office is to be situated in accordance with the letters patent or the provisions of this Part, which head office is the domicile of the company in Canada; and the company may establish such other offices and agencies elsewhere within or outside Canada, as it deems expedient.

(2) The company may, by by-law, change the place where the head office of the company is to be situated.

(3) No by-law for the purpose of changing the place where the head office is to be situated is valid or shall be acted upon until it is sanctioned by at least two-thirds of the votes cast at a special general meeting of the shareholders duly called for considering the by-law.

(4) A copy of the by-law certified under the seal of the company shall be forthwith filed with the Minister and shall be available for inspection at the office thereof during normal business hours.

(5) A notice of the by-law shall be forthwith published in the *Canada Gazette*. R.S., c.53, s. 21; 1964-65, c. 52, s. 15; 1967-68, c. 9, s. 3.

Name of Company

25. (2) If the company has a name consisting of a separated or combined French and English form, it may from time to time use, and it may be legally designated by, either the French or English form of its name or both forms.

(3) A company shall

(b) keep its name engraved in legible characters on its seal and, if the company has a name consisting of a French and English form, whether separated or combined, the company shall show on its seal both the French and English forms of its name or shall have two seals, each of which shall be equally valid, one showing the French and the other the English form of its name; and

27. Every director, manager or officer of a company, and every person on its behalf, who

(a) uses or authorizes the use of any seal purporting to be a seal of the company, whereon its name is not engraved in legible characters,

(b) issues or authorizes the issue of any notice, advertisement, or other official publication of such company,

(c) signs or authorizes to be signed on behalf of the company, any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or

(d) issues or authorizes to be issued any bill of parcels, invoice or receipt of the company, wherein its name is not mentioned in legible characters, is liable to a penalty of two hundred dollars, and is also personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company. R.S., c. 53, s. 24.

28. (1) A company shall not be incorporated

(a) with a name that is the same or similar to the name under which any other company, society, association or firm, in existence, is carrying on business in Canada or is incorporated under the laws of Canada or any province thereof, or that so nearly resembles that name as to be calculated to deceive, except where the existing company, society, association or firm is in the course of being dissolved or of changing its name and signifies its consent in such manner as the Minister requires, or

(b) with a name that is otherwise on public grounds objectionable.

(2) Where a company, through inadvertence or otherwise, is without the consent mentioned in subsection (1) incorporated with a name that is the same or similar to the name under which any other company, society, association or firm in existence has been previously carrying on business in Canada or has been previously incorporated under the laws of Canada or any province thereof, or with a name that so nearly resembles that name as to be calculated to deceive, or that is otherwise on public grounds objectionable, the Minister, after he has given notice to the company of intention so to do, may direct the issue of supplementary letters patent changing the name of the company to some other name, which shall be set forth in the supplementary letters patent.

(3) Notice of the issue of such supplementary letters patent shall be published in the *Canada Gazette*. R.S., c. 53, s. 25.

COMMENT

1. In s.28(1) the words "A company shall not be incorporated with a name that is the same or similar to the name under which any other company . . . is carrying on business" must be read as "a corporation shall not be incorporated with a name that is the same or similar to the name under which any other company . . . is carrying on business . . .". The problem of the use of the word "other" has already been discussed. Thus, there is no express provision to the effect that a not-for-profit corporation cannot have a name which is confusing with the name of another not-for-profit corporation. The phrase "any other company" would best read "any other company *or any other corporation*".

2. The same problem exists in the interpretation of s.28(2).

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29. (1) When a company desires to adopt another name it may, subject to confirmation by supplementary letters patent, change its corporate name by by-law sanctioned by at least two-thirds of the votes cast at a special general meeting of shareholders called for the purpose.

(2) The Minister, upon application of the company and upon being satisfied that the change desired is not objectionable, may direct the issue of supplementary letters patent, changing the name of the company to some other name which shall be set forth in the supplementary letters patent.

(3) Notice of the issue of such supplementary letters patent shall be published in the *Canada Gazette*. R.S., c. 53, s. 26.

30. No alteration of name under sections 28 and 29 affects the rights or obligations of the company; and all proceedings may be continued or commenced by or against the company under its new name that might have been continued or commenced by or against the company under its former name. R.S., c. 53, s. 27.

Forfeiture of Charter

31. (1) Where a company does not go into actual *bona fide* operation within three years after incorporation or for three consecutive years does not use its corporate powers its charter shall be and become forfeited.

(2) In any action or proceeding where such non-user is alleged, proof of user lies upon the company.

(3) The Minister may upon application of any person interested revive any charter so forfeited upon compliance with such conditions as he may prescribe. R.S., c. 53, s. 28.

Surrender of Charter

32. (1) The charter of a company may be surrendered if the company proves to the satisfaction of the Minister

(a) that the company has no assets and that, if it had any assets immediately prior to the application for leave to surrender its charter, such assets have been divided rateably among its shareholders or members, and either,

(i) that it has no debts, liabilities or other obligations, or

(ii) that the debts, liabilities or other obligations of the company have been duly provided for or protected or that the creditors of the company or other persons having interests in such debts, liabilities or other obligations consent; and

(b) that the company has given notice of the application for leave to surrender by publishing the same once in the *Canada Gazette* and once in a newspaper published at or as near as may be to the place where the company has its head office.

(2) Where an application to surrender a charter is made by a company that has not gone into *bona fide* operation or that has been inoperative for three or more consecutive years, if the circumstances mentioned in paragraph (1)(a) are proved to the satisfaction of the Minister, the Minister shall publish a notice of such application in the *Canada Gazette* and, unless an objection to the surrender is received by him within one year after such publication of the notice, he may accept the application for the surrender of the charter.

(3) Where the Minister has accepted the surrender of a charter upon due compliance with subsection (1) or subsection (2), as the case may be, the Minister may direct the cancellation of the charter of the company and fix a date upon and from which the company shall be dissolved, and the company is thereby and thereupon dissolved accordingly.

(4) No fee shall be charged in respect of a surrender under this section of the charter of a company described in subsection (2). 1964-65, c. 52, s. 17.

COMMENT

1. In s.32(1)(a) the words "if it had any assets immediately prior to the application for leave to surrender its charter, such assets have been divided rateably among its shareholders or members", cause confusion. On the one hand, s.154(1) sets forth the clear, and necessary, over-riding limitation upon the not-for-profit corporation that it be incorporated for the purpose of carrying on objects "without pecuniary gain to its members" and s.32(1)(a) seems to fly in the face of this policy and provision by at least not being sufficiently specific to make it clear that division of assets rateably amongst members is to be limited to the corporation not formed for a charitable purpose. On the other hand, the phrase "or members" is specifically included in s.32(1)(a) and this is the only section outside of Part II which refers to "members" specifically (i.e. other than through the interpretation provision of s.157(3) which provides that "member" shall be substituted for "shareholder").

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33. Notwithstanding the dissolution of a company under section 32, the shareholders of the company among whom its assets have been divided remain, to the amount received by

them respectively upon such division, jointly and severally liable to the creditors of the company; and an action may be brought in any court of competent jurisdiction to enforce such liability, but the action shall be commenced within and not after one year from the date of such dissolution of the company. R.S., c. 53, s. 30.

COMMENT

1. The language of section 33 is somewhat inappropriate for not-for-profit corporations ("the members of the corporation *among whom its assets have been divided* shall" [emphasis added]) without a prior provision setting forth clearly the limitations upon the rights of members to the not-for-profit corporation's assets upon dissolution. See the comment following ss.16(1)(s) and 32(1)(a).

Similarly, the language of section 33 is somewhat inappropriate for not-for-profit corporations without a prior provision (similar in effect to s.48) setting forth clearly the limitation of liability of members. S.48 is probably not made applicable to not-for-profit corporations by s.157(1) because the language of s.48(2) ("The liability . . . is limited (a) in the case of a share"), drafted for the business corporation, that is, the company with share capital, is not appropriate for not-for-profit corporations without share capital.

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43. A transfer of [the shares or other] interest of a deceased shareholder, made by his personal representative, is, notwithstanding that the personal representative is not himself a shareholder, of the same validity as if he had been a shareholder at the time of his execution of the instrument of transfer. R.S., c. 53, s. 40.

COMMENT

1. S.43 is rendered confusing, and perhaps meaningless, by the use of the word "shares". Perhaps the inclusion of the phrase "or other interest" covers the membership situation. Furthermore, although this section is only intended to give the personal representative of the deceased member capacity for transfer purposes, such a provision is somewhat misleading inasmuch as ordinarily membership in a not-for-profit corporation is not transferable (the only statutory provision is through the control exercised by s.155(2)(a)). The point is, in the absence of the by-laws saying otherwise, it would be better to have a specific statutory provision applicable, setting forth the presumption of non-transferability of membership interests, with s.43 more appropriate as an ancillary provision thereto. Compare this provision with the statutory approach of s.129(1) of the Ontario Act, which reads:

> Unless the letters patent or supplementary letters patent otherwise provide, the interest of a member in a corporation is not transferable and lapses and ceases to exist upon his death or when he ceases to be a member by resignation or otherwise in accordance with the by-laws of the corporation.

Borrowing Powers

65. (1) When authorized by by-law, duly passed by the directors and sanctioned by at least two-thirds of the votes cast at a special general meeting of the shareholders duly called for considering the by-law, the directors of a company may from time to time

(a) borrow money upon the credit of the company;
(b) limit or increase the amount to be borrowed;
(c) issue debentures or other securities of the company;
(d) pledge or sell such debentures or other securities for such sums and at such prices as may be deemed expedient; and

(e) secure any such debentures, or other securities, or any other present or future borrowing or liability of the company, by mortgage, hypothec, charge or pledge of all or any currently owned or subsequently acquired real and personal, movable and immovable, property of the company, and the undertaking and rights of the company.

(2) Any such by-law may provide for the delegation of such powers by the directors to such officers or directors of the company to such extent and in such manner as may be set out in the by-law.

(3) Nothing in this section limits or restricts the borrowing of money by the company on bills of exchange or promissory notes made, drawn, accepted or endorsed by or on behalf of the company. R.S., c. 53, s. 63; 1964-65, c. 52, s. 29.

66. A condition contained in any debentures or in any deed for securing any debentures is not invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding. R.S., c. 53, s. 64.

67. (1) Where either before or after the 1st day of October 1934, a company has redeemed any debentures previously issued, then

(a) unless any provision to the contrary, whether express or implied, is contained in the debentures or in any contract entered into by the company; or

(b) unless the company has, by resolution of its shareholders or by some other act, manifested its intention that the debentures shall be cancelled,

the company shall have power to reissue the debentures, either by reissuing the same debentures or by issuing other debentures in their place, but the reissue of a debenture or the issue of another debenture in its place, under the power by this section given to a company, shall not be treated as the issue of a new debenture for the purposes of any provision limiting the amount or number of debentures to be issued.

(2) On a reissue of redeemed debentures, the person entitled to the debentures has the same rights and priorities as if the debentures had never been redeemed.

(3) Where a company has power to reissue debentures that have been redeemed, particulars with respect to the debentures that can be so reissued shall be included in every balance sheet of the company.

(4) Where a company has deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit while the debentures remained so deposited.

(5) Nothing in this section prejudices any power to issue debentures in the place of any debentures, paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or by any deed securing payment of the same. R.S., c. 53, s. 65.

Information as to Mortgages and Charges

68. (1) In respect of every mortgage or charge created by a company after the 1st day of October 1934, being either

(a) a mortgage or charge for the purpose of securing any issue of debentures.

[(b) a mortgage or charge on uncalled share capital of the company,]

(c) a floating charge on the undertaking or property of the company,

[(d) a mortgage or charge on calls made but not paid,] or

(e) a mortgage or charge on goodwill, on any patent or licence under a patent, on any trade mark or on any copyright or licence under a copyright,

the company shall deliver to the Minister the prescribed particulars of the mortgage or charge, and a copy of the instrument, if any, by which the mortgage or charge is created or evidenced, certified by the secretary of the company, or, in the Province of Quebec, a notarial copy of such instrument within thirty days after the date of its creation.

(2) Subsection (1) does not apply to the giving by a company of any warehouse receipt or bill of lading or any security under the provisions of the *Bank Act* as collateral security for

the payment of any debt or liability of the company, nor to a floating charge created by a company on its accounts receivable or any of them after the 1st day of October 1934.

(3) In the case of a mortgage or charge created out of Canada comprising solely property situated outside Canada, it is sufficient if the prescribed particulars and the certified copy of the instrument by which the mortgage or charge is created or evidenced are delivered to the Minister within ninety days after the date on which the instrument or copy could in due course of post and if dispatched with due diligence have been received in Canada.

(4) Where after the 1st day of October 1934 a company acquires any property that is subject to a mortgage or charge of any such kind that, if it had been created by the company after the acquisition of the property, particulars thereof would have been required to be delivered to the Minister under subsection (1), the company shall deliver to the Minister the prescribed particulars of the mortgage or charge and a copy of the instrument, if any, by which the mortgage or charge is created or evidenced, certified by the secretary of the company, or, in the Province of Quebec, a notarial copy of such instrument, within ninety days after the date on which the acquisition is completed.

(5) The Minister shall keep with respect to each company a register in the prescribed form in which shall be entered with respect to every mortgage or charge a copy of which has been delivered to the Minister the date of the mortgage or charge, the amount secured by it, short particulars of the property mortgaged or charged and the names of the mortgagees or persons entitled to the charge or the particulars required to be delivered to the Minister under subsection (6) as the case may be.

(6) Where a series of debentures containing or giving by reference to any other instrument any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it is sufficient if there are delivered to the Minister within thirty days after the execution of the deed containing the charge or if there is no such deed after the execution of any debentures of the series, the following particulars:

(a) the total amount secured by the whole series;

(b) the date of the covering deed, if any, by which the security is created or defined or if there is no such deed the date of the issuance of the first debenture of the series;

(c) a general description of the property charged; and

(d) the names of the trustees, if any, for the debenture holders;

together with a copy of the covering deed, if any, certified by the secretary of the company under the corporate seal or in the Province of Quebec a notarial copy thereof, or if there is no such deed a copy of one of the debentures of the series certified by the secretary of the company under its corporate seal; and the Minister shall on payment of the prescribed fee enter those particulars in the register.

(7) Where any commission, allowance, or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be delivered for registration under this section shall include particulars as to the amount or rate per cent of the commission, discount, or allowance so paid or made.

(8) The deposit of any debentures as security for any debt of the company shall not, for the purposes of subsection (7), be treated as the issue of the debentures at a discount.

(9) Failure to comply with this section does not affect the validity of the mortgage or charge or of the debentures issued, but every director or officer knowingly and wilfully authorizing or permitting such default and the company are liable on summary conviction to a fine not exceeding twenty dollars for every day during which the default continues.

(10) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee.

(11) Every company shall cause a copy of every instrument creating any mortgage or charge particulars of which are required to be delivered to the Minister under this section to be kept at the head office of the company. R.S., c. 53, s. 66.

COMMENT

1. S.68(1) (b) and (d) are irrelevant because of their applicability only to the "share capital" business corporation.

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69. (1) Where any person obtains an order for the appointment of a receiver or receiver and manager of the property of a company, or appoints such receiver or receiver and manager under any powers contained in any instrument, he shall, within fourteen days from the date of the order or of the appointment under the powers contained in the instrument, give notice of the fact to the Minister who shall on payment of the prescribed fee enter the fact in the register.

(2) Where any person wilfully makes default in complying with the requirements of this section he is liable on summary conviction to a fine not exceeding twenty dollars for every day during which the default continues. R.S., c. 53, s. 67.

70. The Minister, on evidence being given to his satisfaction that the debt, for which any mortgage or charge was created and entered on the register kept by him, has been paid or satisfied, may order that a memorandum of satisfaction be entered on such register, and shall if required furnish the company with a copy thereof. R.S., c. 53, s. 68.

71. (1) Every company shall keep a register of mortgages and enter therein all mortgages and charges particulars of which are required to be delivered to the Minister and of all other mortgages and charges specifically affecting property of the company, not being mortgages or charges to which subsection 68(1) does not apply, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and, except in the case of securities to bearer, the names and addresses, if known, of the mortgagees or persons entitled thereto unless such names and addresses, if known, are entered in a register of holders of debentures kept by or on behalf of the company.

(2) Where any director, manager, or other officer of the company wilfully authorizes or permits the omission of any entry required to be made in pursuance of this section, he is liable on summary conviction to a fine not exceeding two hundred dollars. R.S., c. 53, s. 70.

COMMENT

1. S.71(1) refers back to s.68(1) and note the comment in respect thereto.

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72. (1) The copies of instruments creating any mortgage or charge that, under this Act, are required to be delivered to the Minister, and the register of mortgages kept in pursuance of section 71, shall be open at all reasonable times to the inspection of any creditor or shareholder of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding twenty-five cents for each inspection, as the company may prescribe.

(2) Where inspection of the said copies or register is refused, any officer of the company wrongfully refusing inspection, and every director or officer of the company wilfully authorizing or permitting such refusal, is liable on summary conviction to a fine not exceeding twenty dollars, and a further fine not exceeding ten dollars for every day during which the wrongful refusal continues. R.S., c. 53, s. 71.

COMMENT

1. In s.72(1) the phrase "of any creditor or member of the company" is suitable for the not-for-profit corporation. However, because of the public character of a good many not-for-profit corporations, the right to inspection should be extended to "any person". The section is commented upon here as an example of the inappropriateness of the language of statutory provisions for business corporations as being suitable to not-for-profit corporations. The

matter was undoubtedly not thought about in making s.72(1) applicable to not-for-profit corporations but if a provision was being considered and drafted simply for such corporations it is more likely that considerations such as this would be given. At the least, there would be less chance of oversight. A similar argument might be made in respect to inspection under s.73. In any event, the present legislative approach, in seeking to make a provision from Part I applicable to not-for-profit corporations, cannot incorporate a partial deletion or partial amendment in respect to such provision.

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73. (1) Every register of holders of debentures of a company shall, except when closed in accordance with the by-laws of the company or the provisions of the debentures or the covering deed, if any, during such period or periods, not exceeding in the whole thirty days in any year, as may be specified in the said by-laws or provisions, be open to the inspection of the registered holder of any such debentures, and of any shareholder, but subject to such reasonable restrictions as the company may impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of ten cents for every hundred words required to be copied.

(2) A copy of any trust deed for securing payment of any issue of debentures shall be forwarded to every holder of any such debentures at his request, on payment in the case of a printed trust deed of the sum of twenty-five cents, or such less sum as may be prescribed by by-law of the company, or, where the trust deed has not been printed, on payment of ten cents for every hundred words required to be copied.

(3) Where inspection is wrongfully refused, or a copy is wrongfully refused or not forwarded, the company is liable on summary conviction to a fine not exceeding twenty dollars, and to a further fine not exceeding ten dollars for every day during which the refusal or neglect to forward a copy continues, and every director, manager, secretary, or other officer of the company who wilfully authorizes or permits such refusal shall incur the like penalty. R.S., c. 53, s. 72.

93. Every director of the company, and his heirs, executors and administrators, and estate and effects, respectively, may, with the consent of the company, given at any meeting of the shareholders thereof, from time to time and at all times, be indemnified and saved harmless out of the funds of the company, from and against,

(a) all costs, charges and expenses whatever that such director sustains or incurs in or about any action, suit or proceeding that is brought, commenced or prosecuted against him, for or in respect of any act, deed, matter or thing whatever, made, done or permitted by him, in or about the execution of the duties of his office, and

(b) all other costs, charges and expenses that he sustains, or incurs, in or about or in relation to the affairs thereof, except such costs, charges or expenses as are occasioned by his own wilful neglect or default. R.S., c. 53, s. 91.

98. (1) Subject to this section, it is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare his interest at a meeting of directors of the company.

(2) In the case of a proposed contract the declaration required by this section to be made by a director shall be made at the meeting of directors at which the question of entering into the contract is first taken into consideration, or, if the director is not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he becomes so interested, and, in a case where the director becomes interested in a contract after it is made, the declaration shall be made at the first meeting of directors held after the director becomes so interested.

(3) For the purposes of this section, a general notice given to the directors of a company by a director to the effect that he is a shareholder of or otherwise interested in any other

company or is a member of a specified firm and is to be regarded as interested in any contract made with such other company or firm shall be deemed to be a sufficient declaration of interest in relation to any contract so made.

(4) No director shall vote in respect of any contract or proposed contract in which he is so interested as aforesaid and if he does so vote his vote shall not be counted, but this prohibition does not apply

(a) in the case of any contract by or on behalf of the company to give to the directors or any of them security for advances or by way of indemnity,

(b) in the case of a private company, where there is no quorum of directors in office who are not so interested, or

(c) in the case of any contract between the company and any other company where the interest of the director in the last-mentioned company consists solely in his being a director or officer of such last-mentioned company, and the holder of not more than the number of shares in such last-mentioned company requisite to qualify him as a director.

(5) A director who has made a declaration of his interest in a contract or proposed contract in compliance with this section and has not voted in respect of such contract contrary to the prohibition contained in subsection (4), if such prohibition applies, is not accountable to the company or any of its shareholders or creditors by reason only of such director holding that office or of the fiduciary relationship thereby established for any profit realized by such contract.

(6) For the purposes of this section "contract" includes "arrangement" and "meeting of directors" includes a meeting of an executive committee [elected in accordance with section 96.]

(7) Nothing in this section imposes any liability upon a director in respect of the profit realized by any contract that has been confirmed by the vote of shareholders of the company at a special general meeting called for that purpose. R.S., c. 53, s. 96.

COMMENT

1. In s.98(6) the phrase "For the purposes of this section . . . "meeting of directors" includes a meeting of an executive committee elected in accordance with s.96" is irrelevant because s.96 is not made applicable to not-for-profit corporations (although s.155(2)(d) provides that a not-for-profit corporation can have such a committee).

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99. (1) The directors of the company are jointly and severally liable to the clerks, labourers, servants and apprentices thereof, for all debts not exceeding six months wages due for services performed for the company while they are such directors respectively.

(2) A director is not liable under subsection (1) unless

(a) the company has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part, or

(b) the company has within that period gone into liquidation or has been ordered to be wound up under the *Winding-up Act,* or has made an authorized assignment under the *Bankruptcy Act* or a receiving order under the *Bankruptcy Act* has been made against it and a claim for such debt has been duly filed and proved,

nor unless he is sued for such debt while a director or within one year after he has ceased to be a director.

(3) Where execution has so issued the amount recoverable against the director shall be the amount remaining unsatisfied on the execution.

(4) Where the claim for such debt has been proved in liquidation or winding-up proceedings or under the *Winding-up Act* or the *Bankruptcy Act* a director, upon payment of the debt, is entitled to any preference that the creditor paid would have been entitled to, and where a judgment has been recovered he is entitled to an assignment of the judgment. R.S., c. 53, s. 97.

Meetings of Shareholders

102. (1) An annual meeting of the shareholders of the company shall be held at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year and not more than fifteen months after the holding of the last preceding annual meeting.

(2) Where default is made in holding any annual meeting as provided under subsection (1), the court in the province in which the head office of the company is situated may, on the application of any shareholder of the company, call or direct the calling of an annual meeting of the shareholders. R.S., c. 53, s. 100.

106. Where for any reason it is impracticable to call a meeting of shareholders of the company in any manner in which meetings of shareholders may be called, or to conduct the meeting in manner prescribed by the letters patent, supplementary letters patent, the by-laws or this Part, the court in the province in which the head office of the company is situated, may, either of its own motion, or on the application of any director or any shareholder who would be entitled to vote at the meeting, order a meeting to be called, held and conducted in such manner as the court thinks fit and, where any such order is made, may give such ancillary or consequential directions as it thinks expedient; and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of shareholders of the company duly called, held and conducted. R.S., c. 53, s. 104.

Books

109. (1) The company shall cause a book or books to be kept by the secretary, or some other officer specially charged with that duty, wherein shall be kept recorded

(a) a copy of the letters patent, all by-laws of the company and any supplementary letters patent issued to the company and a copy of the memorandum of agreement of the company, if any;

(b) the names, alphabetically arranged of all persons who are and have been shareholders of the company;

(c) the address and calling of every such person, while such shareholder, as far as can be ascertained;

(d) the names, addresses and callings of all persons who are or have been directors of the company, with the several dates at which each became or ceased to be such director;

111.1 (1) Any person, upon payment of the costs thereof and upon filing with the company or its transfer agent such declaration as may be prescribed by regulation, is entitled to obtain from a company, other than a private company, [or its transfer agent] within ten days from the filing of such declaration a list setting out the names of all persons who are shareholders of the company, [the number of shares owned by each such person] and the address of each such person as shown on the books of the company made up to a date not more than ten days prior to the date of filing the declaration.

(2) Where the applicant is a corporation, the prescribed declaration shall be made by the president or other officer authorized by resolution of the board of directors thereof.

(3) Every person who, for the purpose of communicating to any shareholders any information relating to any goods, services, publications or securities except securities of the company, [and except securities of any other company offered in exchange for the securities of the company pursuant to a take-over bid made pursuant to sections 135.1 to 135.93 or on an amalgamation pursuant to section 137,] uses a list of shareholders obtained under this section is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both and where that person is a corporation, every director or officer of the corporation who knowingly authorized, permitted or acquiesced in the offence is also guilty of an offence and is liable on summary conviction to a like penalty.

(4) Every company [or transfer agent] that fails to furnish a list in accordance with subsection (1) when so required is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars and every director or officer of such company or transfer

agent who knowingly authorized, permitted or acquiesced in the offence is also guilty of an offence and is liable on summary conviction to a like fine, or to imprisonment for a term not exceeding six months or to both.

(5) Every person who offers for sale, sells, purchases or otherwise traffics in a list or a copy of a list of all or any of the shareholders of a company is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both, and where that person is a corporation, every director or officer of the corporation who knowingly authorized, permitted or acquiesced in the offence is also guilty of an offence and is liable on summary conviction to a like penalty.

COMMENT

1. S.111.1 is made applicable to not-for-profit corporations through s.157(1), as amended by R.S.C. 1970; c.10(1st Supp.), s.26. Two criticisms can be made in respect thereto. First, if the policy of disclosure as provided for by s.111.1 is to apply to not-for-profit corporations, it would be both purposeful and consistent to have s.111 also apply to not-for-profit corporations (the language of which is admittedly difficult to adapt to not-for-profit corporations, in particular, because s.109(2) should be made applicable to not-for-profit corporations as well to make s.111 meaningful, and much of the language of s.109(2) is in turn inappropriate and meaningless for such corporations). S.111(1) (inappropriate language being indicated by the brackets) reads as follows:

> (1) The books mentioned in section 109 [and the register of transfers and branch registers of transfers and the books mentioned in section 110] during reasonable business hours of every day, except Sundays and holidays, shall at the place or places where they are respectively kept as authorized by said section[s] 109 [and 110] be open to the inspection of shareholders and creditors of the company and their personal representatives and of any judgment creditor of a shareholder, any of whom may make extracts therefrom.

S.109(2) (inappropriate language being indicated by the brackets) reads as follows:

> The book or books shall be kept at the head office of the company [except that where the register or transfers and the books in which the particulars mentioned in paragraphs (1) (b), (c), (e) and (f) are recorded are kept by an agent appointed by the company for the purpose of recording the transfer of its shares and who has an established place of business in Canada at which the right of inspection conferred by section 111 can be exercised, such last mentioned books need not be kept at the head office of the company but may be kept at the place of business of such agent in Canada where the register of transfers is kept].

2. Secondly the language of s.111.1 is inappropriate to some extent, as indicated by the inserted brackets. Also, the comment following s.3(1) about the unsuitability of the "private company" distinction and definition for not-for-profit corporations should be noted, as s.111.1(1) makes an exception for the "private corporation".

It may be (as discussed in the comment following the s.3(1) definition of "private company") that it is desirable that most federal not-for-profit corporations comply with s.111.1 because of their public character (with little harm caused in requiring all to comply). As matters stand, the s.3(1) definition of "private company" is unsuitable as setting forth the criteria for exceptions (if exceptions are desired) to compliance by not-for-profit corporations with s.111.1. The membership type of not-for-profit corporation in respect to which activities for members are the predominant aspect and which is organized for a private purpose such as social, fraternal, professional and the like, could claim that compliance with s.111.1 should not be mandatory. However, the s.3(1) definition of "private company" (see the comment following that provision) sets forth unsuitable criteria for determining what should constitute the "private corporation". For example, it is probable that any federal

not-for-profit corporation with a private purpose of a social, fraternal, professional, or the like nature, would have many more than fifty members.

The quandary posed by this provision is illustrative of the unsuitability of making a Part I provision of the present Act which has been drafted, necessarily, for the single purpose of being suitable for the business corporation, that is, the "company with share capital", applicable to the fundamentally different not-for-profit "corporation without share capital". Because of the legislative approach utilized by the present Act the provision is the only one available to even approximate achievement of the legislative intent to realize the given policy of disclosure. Given the present legislative framework it is probably more desirable to render s.111.1 always applicable to the not-for-profit corporation, rather than never applicable.

The better approach is to have a disclosure provision such as s.111.1 applicable to the not-for-profit corporation with suitable exceptions to compliance based upon criteria determined solely upon the nature and function of the different types of such corporations (or, alternatively, an exemption mechanism analogous to that provided by s.129.3, but this would be more cumbersome and expensive). This can be accomplished only through an independent statutory enactment applying only to not-for-profit corporations without share capital (either as a completely self-contained Part II with all of the provisions contained therein that are meant to be applicable to such corporations or, more preferably, a completely separate statute for not-for-profit corporations).

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112. (1) Every company shall cause minutes of all proceedings at meetings of the shareholders and of the directors and of any executive committee to be entered in books kept for that purpose.

(2) Any such minutes if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting are evidence of the proceedings.

(3) Where minutes, in accordance with this section, have been made of the proceedings of any meeting of the shareholders or of the directors or executive committee, then, until the contrary is proved, the meeting shall be deemed to have been duly called and held and all proceedings had thereat to have been duly had and all appointments of directors, managers or other officers shall be deemed to have been duly made. R.S., c. 53, s. 110.

113. Every company that neglects to keep any book or books required by this Part to be kept by the company, is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty dollars for each day that such neglect continues. R.S., c. 53, s. 111.

Investigations

114. (1) Five or more shareholders [holding shares representing in the aggregate not less than one-tenth of the issued capital of the company or one-tenth of the issued shares of any class of shares of the company] may apply, or the Minister on his own initiative may cause an application to be made, to the Restrictive Trade Practices Commission established under the *Combines Investigation Act* (hereinafter called the "Commission"), upon reasonable notice to the company or other interested party or *ex parte* if the Commission is of the opinion that the giving of notice would in view of the allegations made by the applicants or on behalf of the Minister unduly prejudice any investigation that might be ordered by the Commission, for an order directing an investigation of the company in respect of which the application is made.

(2) Where it is shown to the Commission by the Minister or upon the solemn declaration of the applicant shareholders that there are reasonable grounds for believing that in respect of the company concerned,

(a) its business or the business of a company affiliated therewith is being conducted with intent to defraud any person;

(b) in the course of carrying on its affairs or the affairs of a company affiliated therewith, one or more acts have been performed wrongfully in a manner prejudicial to the interests of any shareholder;
(c) it or a company affiliated therewith was formed for any fraudulent or unlawful purpose or is to be dissolved in any manner for a fraudulent or unlawful purpose; or
(d) the persons concerned with its formation, affairs or management, or the formation, affairs or management of a company affiliated therewith, have in connection therewith been guilty of fraud, misfeasance or other misconduct,

the Commission may issue its order for the investigation of the company, and appoint an inspector for that purpose.

(3) An order made under subsection (2) shall prescribe the scope of the investigation, but the Commission may, from time to time on the application of the inspector or the Minister, amend its order by extending or limiting the scope of the investigation as prescribed by the Commission.

(4) Where an application is made under subsection (1) by shareholders, the applicant shareholders shall give the Minister reasonable notice thereof; and the Minister and the company or any other party who has been given notice of the application, or an authorized representative of any of them, is entitled to appear in person or by counsel to examine the application and supporting material, to cross-examine the applicants and to be heard at any hearing of the application.

(5) If the inspector considers it necessary for the purpose of an investigation ordered under subsection (2), he may investigate the affairs and management of a company that is or was affiliated with the company being investigated thereunder unless the order expressly restricts the investigation to the affairs and management of that last mentioned company.

(6) Subject to subsection (8), in any investigation under this section, the inspector appointed therefor or any representative authorized by him may enter any premises on which the inspector believes there may be evidence relevant to the matters being investigated and may examine any thing on the premises and may, for further examination, copy, or have a copy made of, any book or paper, or other document or record that in the opinion of the inspector or his authorized representative, as the case may be, may afford such evidence.

(7) Every person who is in possession or control of any premises or things mentioned in subsection (6) shall permit the inspector or his authorized representative to enter the premises, to examine any thing on the premises and to copy, or have a copy made of, any document or record on the premises.

(8) Before exercising the power conferred by subsection (6), the inspector or his authorized representative shall produce a certificate from a member of the Commission, which may be granted on the *ex parte* application of the inspector, authorizing the exercise of such power.

(9) All directors, officers, managers, employees and agents of a company, or of a company affiliated therewith, that is being investigated pursuant to this section shall, upon request, produce to the inspector or his authorized representative, on presentation by him of the written authorization of a member of the Commission to make such request, all documents and records in their custody or control that relate to the affairs or management of the company being investigated; and for the purposes of this section an auditor or banker of the company is an agent of the company.

(10) On *ex parte* application of the inspector or on his own motion a member of the Commission may order that any person resident or present in Canada be examined upon oath before, or make production of any books or papers or other documents or records to the member or before or to any other person named for the purpose by the order of the member, and the member or the other person named by him may make such orders as seem to him to be proper for securing the attendance of such witness and his examination and the production by him of any books or papers or other documents or records, and may otherwise exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience thereof.

(11) The Chairman of the Commission may order that all or any portion of the proceedings before the Commission, or before a member of the Commission or a person named by order of a member of the Commission to examine a witness under oath, shall be conducted in private.

(12) Any person summoned pursuant to subsection (10) is competent and may be compelled to give evidence as a witness.

(13) A member of the Commission or any person named by a member of the Commission to examine a witness under oath may allow any person whose conduct is being investigated to be present at a hearing held pursuant to this section and if he is present at any hearing he is entitled to counsel.

(14) A member of the Commission or other person named by a member of the Commission to examine a witness under oath shall not exercise power to penalize any person pursuant to this section, whether for contempt or otherwise, unless, on the application of the member, a judge of the Exchequer Court of Canada or of a superior court has certified, as such judge may, that the power may be exercised in the matter disclosed in the application, and the member has given to the person twenty-four hours notice of the hearing of the application or such shorter notice as the judge deems reasonable.

(15) Every person summoned to attend pursuant to this section is entitled to the like fees and allowances for so doing as if summoned to attend before a superior court of the province in which he is summoned to attend, which fees and allowances shall be paid as part of the expenses of the investigation.

(16) Orders to witnesses issued pursuant to this section shall be signed by a member of the Commission.

(17) The Minister may issue commissions to take evidence in another country, and may make all proper orders for the purpose and for the return and use of evidence so obtained.

(18) At any stage of an investigation under this section, if the inspector is of the opinion that the matter being investigated does not justify further investigation, he may discontinue the investigation, but an investigation shall not be discontinued without the written concurrence of the Commission in any case in which evidence has been brought before the Commission.

(19) Where the inspector discontinues an investigation, he shall thereupon make a report in writing to the Minister showing the information obtained and the reason for discontinuing the investigation.

(20) In any case where an investigation made on the application of shareholders under this section is discontinued, the inspector shall inform the applicants of the decision giving the grounds therefor.

(21) On written request of the applicant shareholders or on his own motion, the Minister may review the decision to discontinue the investigation, and may, if in his opinion the circumstances so require, instruct the inspector to make further investigation.

(22) With the written concurrence of the Commission, the inspector may, at any stage of an investigation, and in addition to, or instead of, continuing the investigation, remit any documents or records, or returns or evidence to the Attorney General of Canada for consideration whether an offence has been or is about to be committed against any statute, and for such action as the Attorney General may be pleased to take.

(23) At any stage of an investigation

(a) the inspector may, if he is of the opinion that the evidence obtained discloses a circumstance alleged under subsection (2), or

(b) the inspector shall, if so required by the Minister,

prepare a statement of the evidence obtained in the investigation, which shall be submitted to the Commission and to each person against whom an allegation is made therein.

(24) Upon receipt of the statement, the Commission shall fix a place, time and date on which evidence and argument in support of the statement may be submitted by or on behalf of the inspector, and at which the persons against whom an allegation has been made in the statement shall be allowed full opportunity to be heard in person or by counsel.

(25) The Commission shall consider the statement submitted by the inspector under subsection (23) together with any further or other evidence or material submitted to the Commission, and shall, as soon as possible thereafter, report thereon to the Minister.

(26) A report of the Commission under subsection (25) shall be made public by the Minister unless in the opinion of the Commission, given in its report to the Minister, it is undesirable in the public interest or unnecessary to publish the report or any part thereof in which case the report or the part so reported upon shall not be published.

(27) In its report to the Minister under subsection (25), the Commission may, if it considers it in the public interest to do so, request the Minister to institute and maintain or settle proceedings in the name of the company whose affairs and management were the subject of the investigation and report; and the Minister is hereby vested with all necessary powers in that regard.

(28) A person who is being examined pursuant to this section is entitled to counsel.

(29) No report shall be made by the Commission under subsection (25) against any person unless that person has been allowed full opportunity to be heard as provided in this section.

(30) For the purposes of this section, the Commission or any member thereof has all the powers of a commissioner appointed under Part I of the *Inquiries Act*.

(31) A document purporting to be certified by an inspector to be a copy made pursuant to this section is admissible in evidence and has the same probative force as the original document would have if it were proven in the ordinary way.

(32) A person who

(a) fails to permit an inspector to enter upon any premises or to make any inspection in pursuance of his duties under this section, or

(b) in any manner obstructs an inspector in the execution of his duties under this section,

is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

COMMENT

1. S.114 was amended by R.S.C. 1970, c.10 (1st Supp.), s.12.

114.1 (1) Where it appears to the Minister that, for the purposes of sections 100 to 100.6, and sections 135.1 to 135.93, there is reason to inquire into the ownership of any securities of a company, the Minister or his authorized representative may require any person whom the Minister has reasonable cause to believe

(a) is interested or has been interested in those securities, or

(b) is acting or has acted in relation to those securities as the agent or financial or investment adviser of someone interested therein,

to give him any information that such person has or can reasonably be expected to obtain as to the present and past interests in those securities and the names and addresses of the persons interested and of any persons who act or have acted on their behalf in relation to the securities.

(2) For the purposes of subsection (1), a person shall be deemed to have an interest in any securities if he has any right to acquire or dispose of them, or any interest therein, or to vote in respect thereof, or if his consent is necessary for the exercise of any of the rights of other persons interested therein, or if other persons interested therein can be required or are accustomed to exercise their rights in accordance with his instructions.

(3) The Minister may

(a) forward to such person or persons as he thinks fit a copy of such part of any report made to him that relates to the ownership of any securities of a company and may cause any such report or any part thereof to be published;

(b) divulge as he thinks fit any information relating to the ownership of any securities of a company obtained by him as a result of his investigation and may cause any such information to be published; and

(c) cause to be published monthly in the periodical referred to in section 100.2, such part of such report as relates to the ownership of any securities of the company.

(4) Any person who wilfully fails to give any information required of him under this section, or who in giving any such information knowingly makes any statement that is false in a material particular is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

114.2 (1) Where pursuant to this Act a company or any officer thereof is required to file or deposit with the Department of Consumer and Corporate Affairs any report, return, record, by-law, statement or other document, or any copy thereof, and the company or officer defaults in doing so, the Minister may

(a) cause an inspection to be made of the affairs and management of the company by a person authorized by him in that behalf to determine the reasons for such default, and to report thereon to the Minister, or

(b) by notice require any company or any director thereof to make a return upon any subject connected with its default within the time specified in the notice.

(2) For the purposes of an inspection under subsection (1), the Minister may, with the approval of a member of the Restrictive Trade Practices Commission, which approval that member is hereby empowered to give upon *ex parte* application, authorize in writing any person, in this section called an "inspector", to enter and search the premises of the company in respect of whose affairs and management an inspection has been authorized, and the person in charge of such premises and all directors, officers, agents and employees of the company shall give all reasonable assistance to enable the inspector to carry out his inspection.

(3) On entering any premises the inspector shall, if so requested, produce the written authorization of the Minister to the person in charge thereof.

(4) A person who

(a) fails to permit an inspector to enter upon any premises or to make any inspection in pursuance of his duties under this section, or

(b) in any manner obstructs an inspector in the execution of his duties under this section,

is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

(5) Every director and officer of the company who knowingly authorizes or permits a default in making a return required under paragraph (1)(b) is guilty of an offence and is liable on summary conviction to a fine not exceeding fifty dollars for every day during which the default continues.

114.3 (1) No person shall be excused from attending and giving evidence and producing books, papers, documents or records in accordance with section 114 or 114.2 on the grounds that the oral evidence or documents required of him may tend to criminate him or subject him to any proceeding or penalty, but no such oral evidence so required shall be used or is receivable against him in any criminal proceedings thereafter instituted against him, other than a prosecution for perjury in giving the evidence.

(2) Nothing in sections 114, 114.2 or this section compels the production by a solicitor of a document containing a privileged communication made by or to him in that capacity or authorizes the taking of possession of any document in his possession without the consent of his client or an order of a court.

114.4 (1) The expenses of, and incidental to, an investigation, inquiry or inspection under sections 114, 114.1 or 114.2 shall be defrayed out of moneys provided by Parliament therefor, but the following persons are, to the extent mentioned, liable to pay those expenses as a debt owing to Her Majesty in right of Canada:

(a) a person who is convicted on a prosecution arising out of facts disclosed by an investigation under section 114 or who is ordered to restore property or pay damages or

compensation in proceedings brought under subsection 114(27) may in the same proceeding be ordered to pay to the Receiver General such expenses to such extent as may be specified in the order;

(b) a company in whose name proceedings are brought under subsection 114(27) is liable to Her Majesty in right of Canada for the amount or value of any sums or property recovered by it as a result of those proceedings, and the expenses are a first charge on such sums or property.

(2) For the purposes of this section, any costs or expenses incurred by the Minister in connection with proceedings brought under subsection 114(27) shall be treated as expenses of the investigation giving rise to the proceedings.

(3) Upon the recommendation of the Minister, the Commission may require any or all shareholders applying for an investigation to give such security as the Commission deems appropriate for the payment of the costs of the investigation and any resulting inquiry and inspection.

(4) Upon the termination of the investigation, the Commission may order that any security given pursuant to subsection (3) be returned to the applicant but if the Commission holds that the application was vexatious or malicious it may

(a) order the applicant to pay to the Receiver General any or all of the costs of such investigation and any resulting inquiry or inspection,

(b) order the applicant to pay to the company any or all of the costs that it has incurred in connection with the investigation and any resulting inquiry or inspection, and

(c) order that any security given pursuant to subsection (3) be applied toward the payment of the costs referred to in paragraphs (a) and (b), in that order, and that the residue, if any, of such security not so applied, be returned to the applicant.

(5) Any costs ordered by the Commission to be paid to the Receiver General pursuant to subsection (4) shall be a debt owing to Her Majesty in right of Canada.

COMMENT

1. Ss. 114, 114.1, and 114.2 are made applicable to not-for-profit corporations by s. 157(1). Two criticisms can be made. First, some of the language in s.114(1) is not appropriate, as indicated by the brackets added to the text of the section. Secondly, s.114.1 is not relevant to not-for-profit corporations as ss.100 to 100.6 and ss. 135.1 to 135.93 are not, of course, made applicable to such corporations by s.157(1).

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115. (1) A company may by resolution of its shareholders at any annual or special general meeting called for that purpose appoint inspectors to investigate its affairs.

(2) Inspectors so appointed have the same powers and duties as inspectors appointed by the Minister, except that, instead of reporting to the Minister, they shall report in such manner and to such persons as the shareholders by resolution may direct.

(3) Officers and agents of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Minister. R.S., c. 53, s. 113.

116. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated or by the seal of the Minister, is admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report. R.S., c. 53, s. 114.

117. (1) Every company shall cause to be kept proper accounting records with respect to all financial and other transactions of the company, and, without limiting the generality of the foregoing, shall cause records to be kept of

(a) all sums of money received and disbursed by the company and the matters in respect of which receipt and disbursement take place;

(b) all sales and purchases by the company;

(c) all assets and liabilities of the company; and

(d) all other transactions affecting the financial position of the company.

(2) The accounting records shall be kept at the head office of the company or at such other place in Canada as the directors think fit, and shall at all times be open to inspection by the directors.

(3) In case the operating accounts of the company are kept at some place outside Canada, there shall be kept at the head office of the company such comprehensive records as will enable the directors to ascertain with reasonable accuracy the financial position of the company at the end of each three months period. 1964-65, c. 52, s. 39.

COMMENT

1. S.117(1) reads "Every company shall . . ." however, the language of the interpretation provision, s.157(3) (which deals only with "the company" and "a company"), does not accomplish the obvious intent that the provision be applicable to "Every corporation". (This criticism can be made elsewhere where there is similar language, i.e. ss.68(11), 71(1), 112(1), 113 and 133(1)).

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130. (1) The shareholders of a company at their first general meeting shall appoint one or more auditors to hold office until the close of the next annual meeting, and, if the shareholders fail to do so, the directors shall forthwith make such appointment or appointments.

(2) The shareholders of a company at each annual meeting shall appoint one or more auditors to hold office until the close of the next annual meeting, and, if an appointment is not so made, the auditor in office continues in office until a successor is appointed.

(3) A person, other than a retiring auditor, is not capable of being appointed auditor at an annual meeting unless notice in writing of an intention to nominate that person to the office of auditor has been given by a shareholder of the company not less than fourteen days before the annual meeting; and the company shall send a copy of any such notice to the retiring auditor and to the person it is intended to nominate, and shall give notice thereof to the shareholders, either by advertisement or in any other mode provided by the by-laws of the company, not less than seven days before the annual meeting.

(4) The directors may fill any casual vacancy in the office of auditor, but while the vacancy continues the surviving or continuing auditor, if any, may act.

(5) The shareholders, by a resolution passed by at least two-thirds of the votes cast at a general meeting of which notice specifying the intention to pass such resolution was given, may remove any auditor before the expiration of his term of office, and shall by a majority of the votes cast at that meeting appoint another auditor in his stead for the remainder of his term.

(6) The remuneration of an auditor appointed by the shareholders shall be fixed by the shareholders or by the directors, if they are authorized to do so by the shareholders, and the remuneration of an auditor appointed by the directors shall be fixed by the directors.

(7) Where for any reason no auditor is appointed, the Minister may, on the application of any shareholder, appoint one or more auditors to hold office until the close of the next annual meeting and fix the remuneration to be paid by the company for his or their services.

(8) When an auditor is appointed under this section, the company shall give him notice thereof forthwith in writing unless he held that office immediately prior to his appointment. 1964-65, c.52, s.39.

131. (1) Except as provided in subsection (2), no person shall be appointed as auditor of a company who is a director, officer or employee of that company or an affiliated company or who is a partner, employer or employee of any such director, officer or employee.

(2) Upon the unanimous vote of the shareholders of a private company, present or represented at the meeting at which the auditor is appointed, a director, officer or employee of that company or an affiliated company, or a partner, employer or employee of that director, officer or employee may be appointed as auditor of that company.

(2.1) Subsection (2) does not apply if the company is a company to which paragraph 128(1)(b) applies, or if the company is a subsidiary of a company incorporated in any jurisdiction in Canada that is not a private company within the meaning of this Act.

(3) A person appointed as auditor under subsection (2) shall indicate in his report to the shareholders on the annual financial statement of the company that he is a director, officer or employee of the company or an affiliated company or a partner, employer or employee of the director, officer or employee. 1964-65, c.52, s.39.

COMMENT

1. S.131(2) was amended by R.S.C. 1970, c.10 (1st Supp.), s.21.

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132. (1) The auditor shall make such examination as will enable him to report to the shareholders as required under subsection (2).

(2) The auditor shall make a report to the shareholders on the financial statement, [other than the part thereof that relates to the period referred to in subparagraph 118(1)(a)(ii)], to be laid before the company at any annual meeting during his term of office and shall state in his report whether in his opinion the financial statement referred to therein presents fairly the financial position of the company and the results of its operations for the period under review in accordance with generally accepted accounting principles applied on a basis consistent with that of the preceding period.

(3) The auditor in his report shall make such statements as he considers necessary in any case where

(a) the financial statement of the company is not in agreement with the accounting records;

(b) the financial statement of the company is not in accordance with the requirements of this Act;

(c) he has not received all the information and explanation that he has required; or

(d) proper accounting records have not been kept, so far as appears from his examination.

(4) The auditor of a company shall have access at all times to all records, documents, books, accounts and vouchers of the company, and is entitled to require from the directors and officers of the company

(a) such informations and explanations,

(b) such access to all records, documents, books, accounts and vouchers of any subsidiary company, and

(c) such information and explanations from the directors and officers of any subsidiary company,

as in his opinion may be necessary to enable him to report as required by subsection (2).

(5) The auditor of a company is entitled to attend any meeting of shareholders of the company and to receive all notices and other communications relating to any such meeting that any shareholder is entitled to receive, unless waived by such auditor, and to be heard at any such meeting that he attends on any part of the business of the meeting that concerns him as auditor.

(6) A company, upon receipt, not less than seven days before a meeting of shareholders, of a written application of shareholders holding not less than ten per cent of the issued shares of the company that the auditor of the company be requested to attend the meeting, shall forthwith in writing request the auditor to attend that meeting of shareholders, and the auditor or his representative shall so attend.

COMMENT

1. In respect to s.132 see the comment following s.150(1)(b) pertaining to s.128 as to the indefiniteness of the nature of the "financial statement" required of a not-for-profit corporation.

2. S.132(2)(4) and (6) were amended by R.S.C. 1970, c.10 (1st Supp.), ss. 22(1)(2)(3).

3. The new s.132(2) is subject to the criticism made in respect thereto in considering s.128. (See the comment following s.150(1)(b)). Some of the language is irrelevant for not-for-profit corporations, as indicated by the brackets added to the text of the subsection.

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133. (1) Every company shall, on or before the 1st day of June in every year, make a summary as of the 31st day of March preceding, specifying the following particulars:

(a) the corporate name of the company;

(b) the manner in which the company is incorporated and the date of incorporation;

(c) the complete postal address of the head office of the company;

(d) the date upon which and the place where the last annual meeting of the shareholders of the company was held;

(e) the names and complete postal addresses of the persons who at the date of the return are the directors of the company; and

(f) the name and complete postal address of the auditor of the company.

(2) The summary mentioned in subsection (1) shall be completed and filed in duplicate in the Department on or before the 1st day of June aforesaid, and each of the duplicates shall be signed and certified by a director or an officer of the company.

(3) A company that makes default in complying with any requirement of this section is guilty of an offence and is liable on summary conviction to a fine of not less than twenty dollars and not more than one hundred dollars for each day during which the default continues; and every director or officer who knowingly authorized, permitted or acquiesced in any such default is guilty of an offence and is liable on summary conviction to a like fine.

(4) The Minister, or an official of the Department designated for that purpose, shall endorse upon one duplicate of the above summary the date of the receipt thereof at the Department and shall return the duplicate summary to the company and it shall be retained at the head office of the company available for perusal of, and for the purpose of making copies thereof or extracts therefrom by, any shareholder or creditor of the company.

(5) The duplicate of the said summary endorsed as required under subsection (4) is evidence that the summary was filed in the Department pursuant to this section on any prosecution under this section and the written or stamped signature of an official of the Department to the endorsement of the said duplicate shall be deemed *prima facie* proof that the said official has been designated to affix his signature thereto.

(6) A certificate under the hand and seal of office of the Minister that the aforesaid summary in duplicate was not filed in the Department by a company pursuant to this section is evidence on a prosecution under this section that such summary was not filed.

(7) Companies incorporated after the 1st day of March in any year are not subject to the provisions of this section until the 31st day of March of the following year.

(8) Where a summary in respect of an earlier year has not been filed with the Department or where the annual fees are in default, the summary required under subsection (1) may not be filed until the summary in respect of the earlier year has been filed or until the annual fee has been paid, as the case may be.

(9) Where a company has for two consecutive years failed to file in the Department the summary required under subsection (1), the Minister may, notwithstanding paragraph 150(1)(c), give notice to the company that an order dissolving the company will be issued unless within one year after the publication of the notice in the *Canada Gazette* the company files a summary in respect of those two years.

(10) The notice under subsection (9) shall be given by registered mail to the company or by publication of the notice in the *Canada Gazette*.

(11) One year after the publication of notice in the *Canada Gazette,* if the company has not filed a summary for the two years in respect of which it was in default, the Minister may, by order published in the *Canada Gazette,* declare the company dissolved, and thereupon the company is dissolved, and section 33 applies *mutatis mutandis* thereto.

(11.1) For the purpose of distributing the assets of a company dissolved by order under subsection (11) among shareholders or creditors, the affairs of the company may be wound up under the *Winding-up Act,* upon an application to a court of competent jurisdiction, by a director, shareholder or creditor of the company or the Attorney General of Canada, for an order winding up the company under that Act, as a company described in paragraph 10(a) of that Act.

(12) Where a company is being wound up or where a company is being administered by a trustee in bankruptcy, the liquidator or trustee, as the case may be, shall annually, without fee therefor, give notice of the winding-up or bankruptcy to the Department in lieu of the summary required under subsection (1). R.S., c.53, s.125; 1964-65, c.52, s.40; 1967-68, c.9, s.7.

COMMENT

1. S.133(1)(e) was amended and s.133(1)(f) was added by s.23(1) R.S.C. 1970, c.10 (1st Supp.). S.133(3) was also amended by R.S.C. 1970, c.10 (1st Supp.).

Evidence

138. (1) All books required by this Part to be kept by the company are, in any action, suit or proceeding against the company or against any shareholder, evidence of all facts purporting to be thereby stated.

(2) Nothing in this section limits the meaning or effect of section 112. R.S., c.53, s.129.

139. Proof that any letter properly addressed containing any notice or other document permitted by this Part to be served by post was properly addressed and was put into a post office with postage prepaid, and of the time when it was so put in, and of the time requisite for its delivery in the ordinary course of post, is sufficient evidence of the fact and time of service. R.S., c.53, s.130.

140. A copy of any by-law of the company under its seal and purporting to be signed by any officer of the company shall, as against any shareholder of the company, be received in evidence as *prima facie* proof of such by-law in all courts in Canada. R.S., c.53, s.131.

141. In any action or other legal proceeding, the notice in the *Canada Gazette* of the issue of letters patent or supplementary letters patent under this Part is *prima facie* proof of all things therein contained, and on production of such letters patent or supplementary letters patent or of any exemplification or copy thereof certified by the Registrar General of Canada, the fact of such notice and publication shall be presumed. R.S., c.53, s.132.

142. Except in any proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling letters patent or supplementary letters patent issued under this Part, such letters patent or supplementary letters patent, or any exemplification or copy thereof certified by the Registrar General of Canada, are conclusive proof of every matter and thing therein set forth. R.S., c.53, s.133.

143. Proof of any matter that is necessary to be made under this Part may be made by oath or affirmation or by statutory declaration before any justice of the peace, or any commissioner for taking affidavits, to be used in any of the courts in any of the provinces of Canada, or any notary public, each of whom is hereby authorized and empowered to administer oaths and receive affidavits and declarations for that purpose. R.S., c.53, s.134.

Procedure

144. Any summons, notice, order, document or proceeding requiring authentication by the company may be signed by any director, manager or other authorized officer of the company, and need not be under the seal of the company. R.S., c.53, s.135.

145. In the absence of any other provision in this Part or in the by-laws, notices to be served by the company upon its shareholders may be served either personally or by sending them through the post, by registered mail, addressed to the shareholders at their places of abode as they appear on the books of the company. R.S., c.53, s.136.

146. A notice or other document served by post by the company on a shareholder shall be deemed to be served at the time when the registered letter containing it would be delivered in the ordinary course of post. R.S., c.53, s.137.

147. Any description of action may be prosecuted and maintained between the company and any shareholder thereof. R.S., c.53, s.138.

148. In any action or other legal proceeding, it shall not be requisite to set forth the mode of incorporation of the company, otherwise than by mention of it under its corporate name as incorporated by virtue of letters patent, or of letters patent and supplementary letters patent, as the case may be. R.S., c.53, s.139.

Offences and Penalties

149. Every one who, being a director, manager or officer of a company, or acting on its behalf, commits any act contrary to the provisions of this Part, or fails or neglects to comply with any such provision, is, if no penalty for such act, failure or neglect is expressly provided by this Part, liable, on summary conviction, to a fine of not more than one thousand dollars, or to imprisonment for not more than one year, or to both, but no proceeding shall be taken under this section without the consent in writing of the Minister. R.S., c.53, s.140.

150. (1) Notwithstanding any other provisions in this Act where a company
(a) fails for two or more consecutive years to hold an annual meeting of its shareholders,
[(b) fails to comply with the requirements of section 128], or
(c) defaults in complying for six months or more with any requirement of section 133,
the company is liable to be wound up and dissolved under the *Winding-up Act* upon the application of the Attorney General of Canada to a court of competent jurisdiction for an order that the company be wound up under that Act, which application may be made upon receipt by the Attorney General of Canada of a certificate of the Minister setting forth his opinion that any of the circumstances described in paragraphs (a) to (c) apply to that company.

(2) In any application to the court under subsection (1), the court shall determine whether the costs of the winding-up shall be borne by the company or personally by any or all of the directors of the company who were knowingly responsible for the company's failure or default as described in subsection (1). 1964-65, c.52, s.42.

COMMENT

1. S.150(1)(b) is irrelevant because s.128 is not made applicable to not-for-profit corporations by s.157(1). S. 128 was amended by R.S.C. 1970, c.10 (1st Supp.) s.20; as was s. 150(1)(b) by R.S.C. 1970, c. 10 (1st Supp.), s.25. The new s. 150(1)(b) eliminates the reference to s.129 but retains the reference to s.128. As s.150(1)(b) continues to be made applicable to not-for-profit corporations by s.157(1) it may be that s.128 is intended to apply to such corporations although s.128 is not mentioned in s.157(1), and therefore the legislative

intent is not realized. If s. 128 is to be made applicable to not-for-profit corporations, this is a significant addition to the provisions of Part I of the present Act made applicable to such corporations. If s.128 is not intended to apply to not-for-profit corporations, then this confusion caused by s. 150(1)(b) referring to s.128 should be resolved by deleting s.150(1)(b) from the list of sections made applicable to such corporations by s.157(1).

2. If s.128 is intended to be applicable to not-for-profit corporations (and from a policy standpoint, it is arguable that it should be) there are two comments to be made. First, s.128(1) refers to "the financial statement and . . . the auditor's report" which are only made meaningful by reference to ss.118 through 127. However, these provisions are not made applicable to not-for-profit corporations. (Ss.118 to 127, as enacted, are admittedly inappropriate for such corporations). Although s.132 sets forth the requirement of an audit and auditor's report, the "report" is to be based "on the financial statement" and, as mentioned, the present Act does not specify the nature of the "financial statement" for the not-for-profit corporation.

3. From the standpoint of practice, the general principles set forth in the *Canadian Standards of Accounting and Financial Reporting for Voluntary Organizations,* 1967, (Appendix "B" to this report) are often followed by auditors of the larger federal not-for-profit corporations.

4. Although s.117 is made applicable to not-for-profit corporations, it does not refer to "financial statement" or an "auditor's report".

5. The latter part of the "private company" exception in s.128(3)(b) pertaining to "personal corporations" is, of course, irrelevant for not-for-profit corporations.

6. Secondly, the language of s.128 is generally unsuitable for not-for-profit corporations, in particular, the language of the exceptions (as provided by s.128(3)(b) for "a private company whose gross revenue . . ." and as provided by s.128(5)) is not suitable for not-for-profit corporations, some of which do not have a public character such that compliance with s.128 perhaps should not be required. However, the criteria established by s.128(3)(b) is unsuitable. (See the comment following s.111.1. The points made in respect thereto can also be made in respect to s. 128).

7. Section 129 should perhaps be made applicable to not-for-profit corporations for the benefit of its catch-all language and to further the policy of disclosure. However, it is difficult to make s.129 applicable to not-for-profit corporations without suitable "exception" provisions for such corporations based upon suitable criteria turning upon their functional nature.

8. If s.128 is intended to be applicable to not-for-profit corporations s.129.2 should also be made applicable, and also perhaps s.129.3(1)(c), although the criticisms made in respect to the "private corporation" distinctions in the comment to s.111.1 are also applicable here.

Fees and Regulations

151. (1) The Governor in Council may establish, alter and regulate the tarrif of fees to be paid on application for any letters patent or supplementary letters patent under this Part, on filing any document, on any certificate issued under this Act, on making any return under this Act and on the making of any search of the files of the Department respecting a company.

(2) The amount of any fee may be varied according to the nature of the company, the amount of the capital stock of the company, or other particulars, as the Governor in Council deems fit.

(3) No steps shall be taken in the Department toward the issue of any letters patent or supplementary letters patent under this Part, and no by-law, return, prospectus or other document may be filed or deposited in the Department and no certificate may issue therefrom under this Part, until after all fees therefor are duly paid. R.S., c.53, s.141; 1967-68, c.9, s.9.

152. The Governor in Council may, from time to time, prescribe forms and make, vary or repeal regulations for carrying out the purposes of this Part. R.S., c.53, s.142.

PART II
CORPORATIONS WITHOUT SHARE CAPITAL

153. This Part applies to all corporations incorporated under it and to all corporations incorporated under section 7A of the *Companies Act Amending Act, 1917,* or to which supplementary letters patent have been issued under subsection (5) of that section and all corporations incorporated under section 8 of the *Companies Act,* chapter 27 of the Revised Statutes of Canada, 1927, or to which supplementary letters patent have been issued under subsection (5) of that section of that Act. R.S., c.53, s.143.

154. (1) The Minister may by letters patent under his seal of office grant a charter to any number of persons, not being fewer than three, who apply therefor, constituting the applicants and any other persons who thereafter become members of the corporation thereby created, a body corporate and politic, without share capital, for the purpose of carrying on, without pecuniary gain to its members, objects, to which the legislative authority of the Parliament of Canada extends, of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like objects.

(2) Nothing in this Part shall be construed to authorize the corporation to issue any note payable to the bearer thereof or any promissory note intended to be circulated as money or as the note of a bank, or to engage in the business of banking or insurance. R.S., c.53, s.144; 1964-65, c.52, s.43; 1966-67, c.66, s.1.

155. (1) The applicants for such letters patent, who shall be of the full age of twenty-one years and have power under law to contract, shall file in the Department an application signed by each of the applicants and setting forth the following particulars:

(a) the proposed name of the corporation;
(b) the purposes for which its incorporation is sought;
(c) the place within Canada where the head office of the corporation is to be situated;
(d) the names in full and the address and calling of each of the applicants; and
(e) the names of the applicants, not less than three, who are to be the first directors of the corporation.

(2) The application shall be accompanied by the by-laws, in duplicate, of the proposed corporation, which by-laws shall include provisions upon the following matters:

(a) conditions of membership, including societies or companies becoming members of the corporation;
(b) mode of holding meetings, provision for quorum, rights of voting and of enacting by-laws;
(c) mode of repealing or amending by-laws with special provision that the repeal or amendment of by-laws not embodied in the letters patent shall not be enforced or acted upon until the approval of the Minister has been obtained;
(d) appointment and removal of directors, trustees, committees and officers, and their respective powers and remuneration;
(e) audit of accounts and appointment of auditors;
(f) whether or how members may withdraw from the corporation; and
(g) custody of the corporate seal and certifying of documents issued by the corporation.

(3) The applicants may ask to have embodied in the letters patent any provision which could under this Part be contained in any by-law of the corporation. R.S., c.53, s.145; 1964-65, c.52, s.44.

156. Any existing corporation without share capital created by or under any Act of the Parliament of Canada, for any of the purposes or objects set forth in section 154, may apply

for the issue of letters patent creating it a corporation under this Part, and upon the issue of such letters patent the provisions of this Part and those provisions of Part I, enumerated in section 157, apply to the corporation created thereby. R.S., c.53, s.146.

157. (1) The following provisions of Part I apply to corporations to which this Part applies, namely:

(a) sections 3 and 4, section 5.6, section 6, sections 9 to 12 and section 15;
(b) section 16 (except paragraph (1) (r) thereof) and subsections 20(1), (3), (4) and (5);
(c) sections 21 to 24, subsection 25(2), paragraph 25(3)(b), sections 27 to 33, section 43, sections 65 to 73, sections 93, 98, 99, 102 and 106;
(d) paragraphs 109(1)(a) to (d); and
(e) sections 111.1, 112 to 117, sections 130 to 133 and sections 138 to 152.

(3) In construing the sections of Part I made applicable to corporations under this Part, "the company" or "a company" means a corporation to which this Part applies; "shareholder" means a member of such corporation. R.S., c.53, s.147; 1964-65, c.52, s.45; 1966-67, c.66, s.2; 1967-68, c.9, s.10.

COMMENT

1. It is suggested that consideration be given to amending s.157(1) (in view of the comments made in respect to the particular provisions for which amendments are suggested) so as to give some immediate, although limited, improvement to the federal not-for-profit corporation law within the existing statutory framework and legislative approach. The suggested amendments, italicized for emphasis, would result in s. 157(1) reading as follows:

157. (1) The following provisions of Part I apply *mutatis mutandis* to corporations to which this part applies, namely:

(a) section *1,* section 3 (except *paragraphs* defining "the company", "equity share" and "private company" of subsection (1) thereof) section 4, section 5.6, section 6, sections 9 to 12 and section 15;
(b) section 16 (except paragraph (1)(r) thereof) and subsections (1), (3) and (4), and paragraphs (*a*) and (*b*) of subsection (5) of section 20;
(c) sections 21 to 24, subsection 25(2), paragraph 25(3)(b), sections 27 to 33, section 43, sections 65 to 67, section 68 (except paragraphs (*b*) and (*d*) of subsection (*1*) thereof), sections 69 to 73, section 93, section 98 (except paragraph (*b*) of subsection (4) thereof), sections 99, 102 and 106;
(d) section 109 (except paragraphs (*e*) and (*f*) of subsection (1) thereof); and
(e) sections 111 and 111.1, sections 112 to 114 [*omitting s. 114.1*], section 114.2 to 117, section 128 [if it is intended that this section apply to not-for-profit corporations], section *129*, section 130, section 131(1), sections 132, 133 and 138 to 152. [If section 128 is not intended to be made applicable to not-for-profit corporations, *section 150(1)(b)* should be excepted from section 157(1)(e)].

2. It is suggested also that consideration be given to amending s.157(3) to read as follows:

(3) In construing the sections of Part I made applicable to corporations under this part,
(a) "the company", "a company", and "*every company*", mean a corporation to which this Part applies; and
(b) "shareholder" means a member of such corporation.

PART III

SPECIAL ACT CORPORATIONS

158. Sections 102, 133 and 150 apply to any corporation without share capital incorporated by Special Act of the Parliament of Canada for the purpose of carrying on, without pecuniary gain to its members, objects, to which the legislative authority of the Parliament of Canada extends, of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like objects. 1964-65, c.52, s.46; 1966-67, c.66, s.3.

159. (1) A corporation referred to in section 158 may apply for letters patent under Part II if at the time of its application the corporation is carrying on its affairs, and the Minister may issue letters patent continuing it as a corporation under Part II and thereafter Part II applies to the corporation as if it had been incorporated thereunder.

(2) Where a corporation applies for letters patent under this section, the Minister may, by the letters patent, limit or extend the powers of the corporation, name its directors and change its corporate name, if the applicants so desire.

(3) Sections 9 and 10 apply in respect of the issue of letters patent authorized under this section. 1966-67, c.66, s.3.

PART VI

PROVISIONS OF GENERAL APPLICATION

217. In this Part
"corporation" means a corporation to which Part II applies. R.S., c.53, s.209.

219. (1) The persons to whom this section applies are: directors of a company or corporation; managers of a company or corporation; officers of a company or corporation; persons employed by a company or corporation as auditors, whether they are or are not of the company or corporation.

(2) Where in any proceeding for breach of or non-compliance with this Act or breach of or non-compliance with the letters patent, supplementary letters patent, Special Act, or by-laws of a company or corporation, against a person to whom this section applies, it appears to the court hearing the case that the person is or may be liable in respect of such breach or non-compliance, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for such breach or non-compliance, that court may relieve him, either wholly or partly, from his liability on such terms as the court may think fit.

(3) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any such breach or non-compliance, he may apply to the court, as defined in subsection 3(1), of the province in which the head office or the principal place of business of the company or corporation is situated, for relief, and the court on such application has the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for such breach or non-compliance had been brought.

(4) Where any case to which subsection (2) applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant ought in pursuance of that subsection to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge may think proper. R.S., c.53, s.211.

APPENDIX "B"

CANADIAN STANDARDS OF ACCOUNTING AND FINANCIAL REPORTING FOR VOLUNTARY ORGANIZATIONS

January, 1967

To the President, Board Members, Executive
Directors and Auditors of Voluntary Organizations

The variation in accounting standards and the lack of uniformity of financial reporting among voluntary organizations in Canada have been a source of concern for some time. Accordingly, in the fall of 1965, our four organizations sponsored a Steering Committee to examine the reporting requirements in Canada and to review the U.S. publication "Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Agencies" to determine its applicability to Canada. (This U.S. publication, produced jointly by the National Social Welfare Assembly and the National Health Council, may be obtained from the latter at 1790 Broadway, New York, N.Y. 10019.)

The Steering Committee endorses the standards recommended in the U.S. publication with some modifications in terminology which are encompassed in this Brochure. The Brochure sets forth the broad principles that are felt to be desirable but does not deal with details of accounting and record keeping techniques. This detailed information is already provided in the U.S. publication and it is recommended as an excellent source of information for agency accountants and auditors who wish to study the problems in depth.

It is hoped that the Steering Committee recommendations set out in this Brochure, which we commend to your use, will provide the basis for further development of good accounting standards and clear financial disclosure for voluntary organizations in Canada.

J. R. M. WILSON, F.C.A.
President, The Canadian Institute of Chartered Accountants

BERNARD M. ALEXANDER, Q.C.
President, the Canadian Welfare Council

HERBERT R. BALLS
Chairman, Community Funds and Councils of Canada

GORDON A. MacDOUGALL, F.C.A.
Chairman, National Agency Review Committee

CANADIAN STANDARDS OF ACCOUNTING AND FINANCIAL REPORTING FOR VOLUNTARY ORGANIZATIONS

INDEX

[Note: the page numbers have been changed from those of the original publication for the purpose of this report]

Objectives

1. Good accounting standards will benefit a voluntary organization in improved planning and better budget control.

2. Improved financial reporting will disclose the financial position and operating results of an organization in a uniform and readable way so that they may be understood by the donors, the general public and government agencies.

Applicability

3. The recommended standards are intended to apply to items that have a material effect on the operating results or the financial position of an organization. Volunteer organizations that perform a single service function may retain a simple and unsophisticated accounting system and yet conform to the standards. It is recognized that some of the suggestions for disclosure in financial reporting will not be applicable to smaller organizations.

Accounting Standards

4. The accounting system should provide proper control for management and be able to produce informative groupings for financial reporting. The accounting standards recommended are as follows:

5. THE ACCRUAL BASIS OF ACCOUNTING should be used for all financial reporting. Under this method all support from the general public is recorded at the time it is pledged; revenue is recorded when earned and expenses are recorded when incurred. Accrual accounting does not necessarily require that an organization change its customary method of bookkeeping, because for smaller organizations, the accounts can be adjusted for preparation of annual financial statements. Reporting financial transactions for the year on the receipts and disbursements basis is not acceptable as this merely discloses the change in the bank balances during the year, not necessarily the results of the operations for the year.

6. FUND ACCOUNTING should be used where it is appropriate to segregate the accounts into categories for Operating Section, Property and Equipment, Endowments and Trusts and Held in Custody for Others. Fund accounting means the use of accounting procedures in which a self balancing group of accounts is provided for each category.

7. FUNCTIONAL DISTRIBUTION of expenses should be used when an agency performs more than one function or activity. In addition to recording expenses by type of expense, such as salaries, printing and telephone, they should be allocated by programmes, fund-raising and administrative activities. Such a distribution will aid the Board and management to review its budget and to assess whether the expenses are effective in terms of value received. It will also give more meaningful information for financial reporting.

8. RELATED ACTIVITIES that are intended to be self supporting such as camp operations, cafeteria operations or sale of pamphlets should be recorded in a separate group of accounts. If the related activities are major undertakings in relation to the total activities of the organization the financial transactions should be disclosed in a separate statement.

9. FIXED ASSETS purchased should be recorded at cost in the Property and Equipment Section of accounts. The funds for their purchase could arise from special donations or grants or from appropriation of Operating Section funds. Donated assets should be recorded at fair market value at the time they were donated. If the cost or donated value is not known or is difficult to obtain, fixed assets should be recorded at the current appraised or insured value.

10. FIXED ASSETS purchased could be charged to Operating Section expense at the discretion of the Board, provided the cost is not significant to the overall budget. This would allow the cost of equipment such as typewriters and items of office furniture to be charged to expense for the year. It would not allow such a charge when the purchase represents a substantial increase in the amount of equipment or the complete refurnishing of the offices.

11. FIXED ASSETS with a relatively short life that are used for revenue producing purposes that are intended to be self supporting may be purchased out of a replacement fund created by an appropriation of Operating Section funds. This will enable an organization to provide for the replacement of these assets out of the income derived from their use. The funds appropriated should be transferred to Property and Equipment Section and shown as unexpended funds. When replacements are purchased out of these funds the cost should be charged to Property and Equipment fixed assets. Depreciation on these assets should not be charged to the Operating Section because an appropriation has already been made.

12. DEPRECIATION of fixed assets should not be recorded as a charge to Operating Section expense. If it is considered desirable to record the reduction in value of fixed assets through use or obsolescence, depreciation should be recorded as a reduction of Equity in Property and Equipment.

13. RECEIPTS ISSUED FOR TAX PURPOSES should be numbered and recorded in a way that permits a check on their authenticity in accordance with government regulation and provides good accounting control.

FINANCIAL REPORTING

14. The following disclosure is recommended for the annual reporting of voluntary organizations. The sample statements included herein show the form of the financial statements for both large and small organizations. The sample statements cannot provide for all the varying circumstances in voluntary organizations and are not intended to restrict the terminology to that shown. In general, terms that have a commercial connotation have been avoided in favour of alternatives that seem to be more appropriate for voluntary organizations.

15. STATEMENT OF FINANCIAL ACTIVITIES—OPERATING SECTION (Example 1)
This statement shows the financial transactions for the year of the normal activities of the organization. It includes categories for support from the general public, grants and revenue. The expenses are grouped by function. The net result for the year is the increase or decrease in the assets of the Operating Section.

16. BALANCE SHEET (Example 2) segregates the accounts into the following sections where they exist:
    a. *Operating Section* to include the assets and liabilities pertaining to normal activities and generally involving the use of unrestricted and unappropriated resources. It also includes funds for Operating Section activities which were restricted by the donor such as grants for research or specific projects; and funds designated by the Board for specific activities. Cash for restricted or designated purposes should be segregated from other Operating Section cash.
    b. *Property and Equipment* to show the cost or donated value of fixed assets and any unexpended funds that are to be used for the purchase of property or equipment.
    c. *Endowments and Trusts* to segregate donations that the donor has specified must remain in trust. The income from such endowments is normally available for Operating Section activities unless otherwise specified by the donor. This section also includes any funds designated by the organization's Board to function as endowment.
    d. *Held in Custody for Others* to keep separate any assets that are the property of someone else and are in the care of the organization.

17. ANALYSIS OF FUNCTIONAL EXPENSES—OPERATING SECTION (Example 3)
    In this analysis each type of expense is distributed to the function for which it was incurred, such as programme, campaign, administration.

18. STATEMENT OF CHANGES IN OPERATING SECTION—
    APPROPRIATIONS FOR SPECIAL PURPOSES (Example 4)
    STATEMENT OF CHANGES IN EQUITY IN PROPERTY AND EQUIPMENT (Example 5)
    STATEMENT OF CHANGES IN ENDOWMENTS AND TRUSTS (Example 6)
    These statements account for all changes in the balances for the year where such changes are too numerous to be disclosed on the balance sheet. The statements of changes in Appropriations for Special Purposes and for Endowments and Trusts should be clearly distinguished between:
    a. Endowments with restricted uses designated by the donors, and
    b. Funds set aside for special purposes by the Board that may be restored by a succeeding Board.

19. SUMMARY OF FINANCIAL ACTIVITIES (Example 7)
    The purpose of this summary is to show on one schedule the financial activities in all of the sections during the year. It shows the total support, whether direct or indirect and restricted or unrestricted; all grants and revenue; and in total, all operating expenses and capital expenditures.

20. SMALL AGENCIES
    Examples A and B show financial statements for a small agency that performs only one service function.

21. STATEMENTS REQUIRED
    Examples 1 and 2 (or A and B in the case of small agencies) are necessary for all organizations. Example 3 is desirable where an analysis of functional expenses would disclose useful information. Examples 4, 5 and 6 are necessary when an organization has assets that must be segregated into separate funds. Example 7 is optional and could be included with the financial statements or shown separately in the President's or Treasurer's report.

22. COMPARATIVE FIGURES

The prior year's figures should be shown on the Statement of Financial Activities—Operating Section; Balance Sheet; Analysis of Functional Expenses—Operating Section; and Summary of Financial Activities.

23. CONSOLIDATED FINANCIAL STATEMENTS

The use of consolidated or combined financial statements should depend on the form of the organization, the degree of control by the central body and the mobility of resources from one division or branch to another. Financial statements should be presented in consolidated form if the national organization has full control of funds and authority over activities of its branches. Financial statements should be prepared for each branch to report to the public that supports it if branches are autonomous units. However, consolidated or combined financial statements should not be used as a means to conceal information.

24. TABULATION OF HIGHLIGHTS

The tabulation of financial and statistical highlights for a five year period would add interest to the annual report. The tabulation should be accompanied by comments to make sure that there is a proper interpretation of the highlights presented and to provide a better understanding of the activities of the organization.

A Canadian Voluntary Organization
Statement of Financial Activities
Operating Section—General
for the Year Ended December 31, 1966

	1966 $	1965 $
Support from the General Public		
Received directly—		
Contributions	7,200	7,000
Special fund-raising events (less expenses of $9,000; 1965—$7,000)	13,500	12,000
Bequests	400	1,700
Total received directly	21,100	20,700
Received indirectly—		
Collected through local member units	2,000	1,900
Allocated by United Appeals	40,000	39,000
Total received indirectly	42,000	40,900
Total support from the general public	63,100	61,600
Grants		
Government (specify)	14,000	15,000
Other	1,000	—
Total grants	15,000	15,000
Revenue		
Membership dues	700	700
Fees from services	20,000	19,500
Sales to public (less expenses of $20,000; 1965—$23,000)	6,000	7,000
Investment income	4,500	4,000
Miscellaneous	300	300
Total revenue	31,500	31,500
Total Support, Grants and Revenue	109,600	108,100
Expenses		
Programme services—		
Public education	9,400	8,600
Home care	61,600	62,500
Rehabilitation	8,900	7,500
Recreation	7,400	6,000
Total programme services	87,300	84,600
Campaign	1,400	1,000
Management and administration	12,600	12,500
Payments to affiliated organizations	7,000	6,000
Total Expenses (Example 3)	108,300	104,100
*Net Result for the Year— Increase before Appropriations by the Board	1,300	4,000
Deduct Appropriations—		
To Property and Equipment (Example 5)	1,500	1,500
To Appropriations for special purposes	—	1,000
**Net Result for the Year—(Decrease) Increase In General Balance (Example 2)	(200)	1,500

*Alternative wording, "Net Revenue before Appropriations by the Board"
**Alternative wording, "Net (Expense) Revenue for the Year"

A Canadian Voluntary Organization
Balance Sheet as at December 31, 1966

ASSETS

	1966 $	1965 $
Operating Section		
Cash	700	—
Pledges receivable	4,200	2,800
Grants receivable (name the level of government or other organizations such as a foundation, if the amount is significant)	1,500	1,500
Supplies for sale or use—at cost	2,000	1,200
Prepaid expenses	3,200	1,900
Cash reserved for special purposes	5,100	7,500
	16,700	14,900
Property and Equipment		
Fixed Assets—		
Land—at donated value	7,500	7,500
Building and contents— at cost, less accumulated depreciation		
Residence	150,000	152,000
Rehabilitation centre	70,000	73,500
Library at 1962 replacement value per insurance appraisal, less accumulated depreciation	6,700	7,000
Construction in progress at cost (note)	20,000	—
	254,200	240,000
Unexpended Funds—		
Cash	1,000	400
Advance to Operating Section	—	1,200
Guaranteed investment receipts	19,400	3,000
Pledges receivable—1966 campaign	15,000	—
	35,400	4,600
	289,600	244,600
Endowments and Trusts		
Cash	3,600	4,900
Investments—at cost or market value on date received (quoted value 1966—$102,000; 1965—$94,600)	101,400	95,100
	105,000	100,000
Held in Custody for Others		
Cash	3,200	2,900
	414,500	362,400

NOTE: It is expected that the total cost of construction in progress will be $49,500, of which $29,500 has not yet been expended or recorded in the accounts.

A Canadian Voluntary Organization
Balance Sheet as at December 31, 1966

LIABILITIES AND EQUITY

		1966 $	1965 $
Operating Section			
Accounts payable and accrued liabilities		6,700	1,900
Advance from Property and Equipment Section		—	1,200
Deferred revenue—donations and other revenue relating to future operations		1,500	700
*Balance—Operating Section—General:			
Balance—beginning of year	3,600		
**Decrease for the year (Example 1)	(200)		
Balance—end of year		3,400	3,600
Appropriations for special purposes (Example 4)		5,100	7,500
		16,700	14,900
Property and Equipment			
Equity in Property and Equipment (Example 5)		254,200	240,000
Unexpended Funds—			
Accounts payable		3,500	—
Unexpended Funds (Example 5)		31,900	4,600
		35,400	4,600
		289,600	244,600
Endowments and Trusts			
Endowments and Trusts (Example 6)		95,000	85,000
Funds functioning as endowment (Example 6)		10,000	15,000
		105,000	100,000
Held in Custody for Others			
Owing to others		3,200	2,900
		414,500	362,400

*Alternative wording, "Surplus—Operating Section"
**Alternative wording, "Net expense for the year"

A Canadian Voluntary Organization

Analysis of Functional Expenses
Operating Section—General
for the Year Ended December 31, 1966

Type of Expense	Programme Services		
	Public Education	Home Care	Rehabilitation
	$	$	$
Salaries	3,000	46,000	7,800
Employee Benefits	—	1,000	200
Total employee compensation	3,000	47,000	8,000
Conferences	300	300	—
Medical	—	3,000	600
Memberships	—	—	100
Miscellaneous	—	—	—
Occupancy	—	7,200	—
Postage and stationery	2,000	—	—
Printing	3,500	—	100
Repairs and replacements	—	4,700	—
Supplies	200	1,800	100
Telephone	400	—	—
Travel	—	—	—
	9,400	64,000	8,900
Deduct expenses financed by special funds—			
Special purposes (Example 4)	—	2,400	—
Building campaign (Example 5)	—	—	—
	—	2,400	—
(Example 1)	9,400	61,600	8,900
Payments to affiliated organizations			
Total—Operating Section—General			

NOTE: The headings for programme services and the type of expense are examples only and are not intended to be a standard classification.

Example 3

Total	Campaign	Management and Administration	Building Campaign	Total	1965
$	$	$	$	$	$
60,800	1,000	10,200	1,500	73,500	70,500
1,200	—	300	—	1,500	1,200
62,000	1,000	10,500	1,500	75,000	71,700
1,200	—	200	600	2,000	1,600
3,600	—	—	—	3,600	3,400
100	—	200	—	300	—
400	100	600	300	1,400	1,300
7,200	—	300	—	7,500	7,500
2,000	200	200	400	2,800	2,600
3,600	100	100	200	4,000	3,800
5,000	—	—	—	5,000	4,500
3,300	—	100	—	3,400	3,200
800	—	200	200	1,200	1,000
500	—	200	—	700	500
89,700	1,400	12,600	3,200	106,900	101,100
2,400	—	—	—	2,400	—
—	—	—	3,200	3,200	3,000
2,400	—	—	3,200	5,600	3,000
87,300	1,400	12,600	—	101,300	98,100
				7,000	6,000
			(Example 1)	108,300	104,100

Example 4

A Canadian Voluntary Organization

Statement of Changes in Operating Section Appropriations for Special Purposes for the Year Ended December 31, 1966

	Staff Training Program	Group Medical Program	Camp Project	Total
	$	$	$	$
Balance—Beginning of Year	4,000	2,000	1,500	7,500
Appropriations	—	—	—	—
Expenses (Example 3)	1,400	1,000	—	2,400
Balance—End of Year	2,600	1,000	1,500	5,100

(Example 2)

Example 5

A Canadian Voluntary Organization

Statement of Changes in Equity in Property and Equipment for the Year Ended December 31, 1966

	Un-expended Funds	Property and Equipment
	$	$
Balance—Beginning of Year	4,600	240,000
Support		
Building campaign (less campaign expenses of $3,200)	44,200	—
Income from guaranteed investment receipts	800	—
Transfers from—		
Operating Section (Example 1)	1,500	—
Endowments (Example 6)	5,000	—
	56,100	240,000
Purchase of property and equipment	24,200	24,200
	31,900	264,200
Depreciation	—	10,000
Balance—End of Year (Example 2)	31,900	254,200

NOTE: It is expected that the total cost of construction in progress will be $49,500, of which $29,500 has not yet been expended or recorded in the accounts.

A Canadian Voluntary Organization

Statement of Changes in Endowments and Trusts for the Year Ended December 31, 1966

	Medical Research	General	Funds Functioning as Endowment
	$	$	$
Balance—Beginning of Year	10,000	75,000	15,000
Gifts and bequests	—	10,000	—
Income from investments (if any)	—	—	—
	10,000	85,000	15,000
Transferred to Property and Equipment (Example 5)	—	—	5,000
Balance—End of Year (Example 2)	10,000	85,000	10,000

NOTE: The income from endowments would be included as "Investment income" in the Operating Section—General (Example 1) unless otherwise specified by the donor.

A Canadian Voluntary Organization

Summary of Financial Activities
Showing Support Received and Expenditures Incurred
for the Year Ended December 31, 1966

	Operating Section		Property and Equipment	Endowment and Trusts	Total	1965
	General	Special Purposes				
	$	$	$	$	$	$
Support Received						
General public	63,100	—	44,200	10,000	118,100	66,600
Grants	15,000	—	—	—	15,000	15,000
Revenue	31,500	—	800	—	31,500	31,500
Total support	109,600	—	45,000	10,000	164,600	113,100
Expenditure	108,300	2,400	24,200	—	134,900	116,900
	1,300	(2,400)	20,800	10,000	29,700	(3,800)
Other Transactions						
Interfund transfers	(1,500)	—	6,500	(5,000)	—	—
Additions to property and equipment	—	—	24,200	—	24,200	12,800
Depreciation	—	—	(10,000)	—	(10,000)	(8,000)
Net result for the Year—Increase (Decrease) in Balances	(200)	(2,400)	41,500	5,000	43,900	1,000
	Example 1	Example 4	Example 5	Example 6		

FINANCIAL STATEMENTS
FOR
SMALL AGENCIES

Example A

A Small Agency

Statement of Financial Activities
Operating Section—General
For the Year Ended December 31, 1966

	1966	1965
	$	$
Support		
Allocated by United Appeal	11,000	10,300
Grant from city	1,000	1,000
Membership dues	104	72
Bazaar	221	—
Investment income	330	128
Total support	12,655	11,500
Expenses		
Salaries	8,500	7,400
Programme supplies	250	190
Purchase of equipment	175	725
Office supplies and telephone	205	240
Rent, light, heat and janitor	3,150	3,005
National office dues	150	150
Total expenses	12,430	11,710
*Net Result for the Year Increase (Decrease) in General Balance	225	(210)
Balance—Beginning of Year	590	800
Balance—End of Year (Example B)	815	590

*Alternative wording, "Net Revenue (Expense) for the Year"

A Small Agency

Balance Sheet as at December 31, 1966

ASSETS

	1966	1965
	$	$
Operating Section		
Cash	1,400	—
Accounts receivable	105	—
Due from city	—	1,000
	1,505	1,000
Endowments		
Investments—at cost or market value on date received (quoted value 1966—$9,625; 1965—$5,100)		
Bonds	5,250	5,250
Common stocks	4,300	—
	9,550	5,250
	11,055	6,250

LIABILITIES AND EQUITY

Operation Section		
Bank advance	—	160
Accounts payable	690	250
	690	410
*Balance—operating section (Example A)	815	590
	1,505	1,000
Endowments		
Balance—Beginning of Year	5,250	5,500
Gift	4,300	—
	9,550	5,500
Loss on sale of investment	—	250
Balance—End of year	9,550	5,250
	11,055	6,250

*Alternative wording, "Surplus"

NC

Keep.