



Submission

**The National Nonprofit Sector
Task Force on the Modernization of
Federal Not-for-Profit Corporations Law**

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Executive Summary

The National Nonprofit Sector Task Force on the Modernization of Federal Not-for-Profit Corporations Law (the “Task Force”) is pleased to provide this Submission to the Standing Committee urging adoption of much needed new framework legislation governing not-for-profit corporations in Canada.

The Task Force congratulates the Government on its introduction of *An Act respecting not-for-profit corporations and certain other corporations*.

It is submitted that the current Act is very much in need of modernization and places an undue burden on Canada’s tens of thousands of federal not-for-profit corporations. Bill C-4 (hereinafter “the Bill”) is a welcome legislative initiative. It has many strengths some of which are highlighted in Part 1 below. The Bill, however, has not benefitted from a consultation process with the organizations who will be most affected by it, once passed. This is apparent in a number of the approaches to issues which have been adopted without the benefit of consultation with not-for-profit organizations and would, if left unchanged, render those aspects of the Bill unnecessarily complex.

This Submission brings forward five areas that, in our view, require a more streamlined approach so that the Act can in fact *reduce*, and not *add* red tape for Canada’s charities and not-for-profit corporations.

Strengths of the Reform Bill

The Task Force is highly supportive of the principle of a new stand-alone legislative framework for the governance of not-for-profit corporations and other corporations without share capital.

We endorse the core organizational principle within the Bill, which is to adopt approaches that are largely consistent with the laws governing commercial corporations under the *Canada Business Corporations Act (CBCA)*, except where the nature of not-for-profit corporations clearly requires a different approach.

We enthusiastically welcome the replacement of the “letters patent” system of incorporation with an “as of right” system.

We also embrace the introduction of corporate governance standards that are, in general, consistent with modern standards and reflect a long-awaited improvement over the *status quo*.

Recommendations for Improvement

Having noted the important strengths of this Bill, the Task Force wishes to highlight five issues that, in our view, tend to undermine the Minister's stated objective, which we applaud, of reducing red tape for Canada's charities and not-for-profit corporations. These issues are set out briefly below. We have identified five significant problems but also, we think, five appropriate solutions.

1. Let Organizations determine the Voting Rights of their Members

The Problem: Many not for-profit organizations are member-based. Some have thousands of members that can join by simply clicking the "submit" button on a website.

The Bill grants voting rights to all members. We find this too comprehensive. Where members have a commercial or proprietary interest, such as in a private golf club, we agree that membership should carry a vote as a matter of law. In those rare instances, members have more in common with shareholders of a commercial corporation than members of typical public benefit not-for-profit corporations. But in the majority of nonprofit organizations, members have no such commercial or propriety interest and, in our unequivocal view, the board of directors of the organization, not government, should be accountable to the membership for the determination of the voting rights of members. The issue of voting rights of members is a dynamic issue that must be subject to periodic review and change as the mandate and nature of the organization grows and takes shape over time. The important issue of voting rights should not be rendered inflexible by the statute.

The Solution: Amend the Bill to provide that the corporation may, in its by-laws, determine classes of membership and any voting rights associated with each.

2. Eliminate the two-tier approach

The Problem: While a 2-tier approach to regulating not-for-profits on the basis of soliciting vs. non-soliciting organizations has, perhaps, some merit in theory, it is our view that it has little merit in the practical world of not-for-profits.

A two-tier approach doubles the complexity of the Bill, necessitating two sets of rules on almost every issue. The definition of soliciting is so encompassing (it applies to almost any nonprofit that gets a grant or raises any money), that the non-soliciting category is actually very small and does not warrant doubling the complexity of the Bill.

The Solution: The Task Force recommends a unitary or non-classification model in the statute. We urge the government to develop a single set of minimum or “default” standards that apply to all not-for-profit corporations, whether they fundraise from time to time or not. These statutory standards would apply to all not-for-profit corporations immediately on incorporation. Thereafter, individual organizations may choose to supplement the statutory minimums in the corporation’s by-laws. The adoption of a single or model statutory standard for all not-for-profits, in lieu of the current unnecessary 2-tier approach, would remove as much as one third of the complexity from the Bill.

3. Create a “Remedies” Section

The Problem: One of the key organizational principles of the Bill is that the legal standards should be the same for not-for-profit corporations and business corporations, except where there is a clear rationale for a different approach. In our view, the rights and remedies of members of nonprofit organizations should be different than those of shareholders in commercial corporations.

Shareholders have commercial interests in business corporations while members of not-for-profit corporations do not. Commercial interests tend to necessitate a varied and complex set of remedies, as provided for under the CBCA, whereas members of nonprofits need fewer and simpler remedies--most often their interests are addressed by simply cancelling their membership. For example, while shareholder litigation is quite common, nonprofit member litigation is not. Nevertheless, the Bill provides many sections of remedies, the majority of which e.g. the oppression remedy, do not apply to the needs and expectations of members of nonprofit organizations

The Solution: Remove the multiple references to remedies that are scattered throughout the Bill and create a single Remedies section. This section should provide that, where commercial interests are at stake, members of not-for-profits corporations can access the remedies available to shareholders under the CBCA. In the far more typical situation, where the member has no commercial stake, the remedies should be limited to select affordable and accessible remedies.

4. Shift more content from the Articles to the By-Laws

The Problem: The Bill, as amended, should be an “organizational” statute, not a “regulatory” statute. *Organizational statutes* place accountability for defining the rights and duties of the corporation on its directors and members, which, in our view, is where accountability belongs. By contrast, *regulatory statutes* prescribe the rights and duties of the corporation in great detail and limit the flexibility of organizations to respond to their diverse members and clientele. The Bill should be drafted in anticipation of use by volunteer board members and staff, most of whom are also volunteers. Access to legal counsel should be a rare event for not-for-profit corporations. This would not be the case under the Bill as currently written.

As not-for-profits, we are seeking an organizational statute that provides us with a model statutory code of good practice upon incorporation, which the organization may choose to supplement in its by-laws with a more customized or detailed approach. Currently the Bill provides that many of the rules governing the organization must be in the articles of incorporation rather than the by-laws. This is a serious issue. An amendment to the Articles generally requires engaging a corporate solicitor to draft the amendment and file the amended Articles in Ottawa. By contrast, amendments to the by-laws can be executed wholly by the Board as it determines necessary from time to time.

The Solution: Amend the Bill to provide that more matters can be dealt with by the Board in the organization’s By-laws rather than in the Articles of Incorporation.

5. Reduce Red Tape

The Problem: We have pointed to four areas that render the Bill more complex. Canada's charities and not-for-profits are governed by volunteer boards and, as a matter of funding and practice, have few or no paid staff. They rarely have in-house corporate counsel or funds to access corporate solicitors. In this context, it is essential that the Bill as amended serve as a clear and straightforward legislative instrument that can be read and interpreted and used by volunteer directors and staff without repeated need for legal advice. As currently drafted, we believe that the Bill does not meet that test. Fortunately, it is also our view that the Bill can be greatly streamlined without any negative impact on its content or merits.

The Solution: The Bill has 20 Parts and 375 sections. Parts 6, 7 and 8 of the Bill should be removed in their entirety. The issues that they address --debts, trust indentures and receivership-- arise only in exceptional circumstances. These issues can be better dealt with by a statutory reference to the relevant provisions of the CBCA, which are subject to much more frequent legislative updates and common law interpretations. References to CBCA provisions, rather than including those provisions in the Bill itself, would not only greatly shorten the Bill but ensure that the intention of maintaining parallel approaches under the two statutes is met. Otherwise, it is highly possible that the law governing not-for-profits would almost immediately be out of step with the laws governing business corporations, defeating one of the important purposes of the Bill.

Conclusions

The *Canada Corporations Act* is more than a half-century old and can no longer be considered effective framework legislation for Canada's nonprofit corporations. The Task Force recommends passage of a new Canada Not-for-Profit Corporations Act, an organizational statute drafted as companion legislation to the *Canada Business Corporations Act*. These two statutes should be harmonized, except where there is a clear and compelling case for different measures.

The Task Force has identified five issues that go to the practicality of application of the draft legislation by nonprofits and their volunteer boards and staff. It has also recommended an effective solution for each issue.

The Task Force wishes to thank the Government of Canada for having moved forward with this important legislative reform initiative, and urges the Committee to consider our recommendations for improvement to the draft.

Appendix 1

The National Nonprofit Sector Task Force

The Task Force was convened by Imagine Canada under its Sector Collaboration Framework to address legislative reform initiatives related to framework legislation governing Canadian not-for-profit corporations. Task Force members included:

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Appendix 2

Canada's Not-for-Profit Sector

Canada's not-for-profit sector is a critical contributor to our national economy. It is comprised of more than 161,000 corporate entities, including 81,000 not-for-profit corporations and 80,000 registered charities¹. Of these, approximately 50,564 are incorporated under the federal Act.² The sector employs over 2 million fulltime equivalent workers across Canada (two thirds in paid positions and the remainder as volunteers) who constitute 12% of the economically active population of Canada. In fact, the not-for-profit sector workforce employs almost as many workers as the country's entire manufacturing sector. Not-for-profit organizations contribute 6.8% annually to Canada's gross domestic product (GDP). When volunteer hours are included, this figure rises to 8.5% of GDP.

Not-for-profit organizations raise \$8.9 billion in donations from 22.2 million donors and attract 11.8 million volunteers who contribute almost 2 billion hours of volunteer time annually.³ In Canada, as elsewhere, not-for-profit corporations encompass health charities, day-care centres, environmental and international development groups, food banks, places of worship, hobby associations, hospitals, opera companies, private schools, social clubs, sports clubs, symphonies, trade associations, and youth groups. These organizations fill

All data in this brief are drawn from the following sources: ¹ Hall, M. H., de Wit, M., Lasby, D., McIver, D., Evers, T., Johnston, C., et al. (2005). *Cornerstones of community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* (Catalogue no. 61-533-XPE). Ottawa: Statistics Canada; Hall, M. H., Barr, C., Eswaramoorthy, M., Sokolowski, S. W., & Salamon, L. (2005). *The Canadian nonprofit and voluntary sector in comparative perspective*. Toronto: Imagine Canada; and, Strategic Counsel (2005). *A Report to Infrastructure Canada (The Cities Secretariat) -- National Overview of Findings from a National Survey on the Quality of Life in Canadian Communities*. Retrieved February 4, 2009 from <http://www.infc.gc.ca/altformats/pdf/2005-03-eng.pdf>

² Statistic provided by the Companies and Personal Property Security Branch of the Ministry of Government Services, Ontario.

³ Hall, M. H., Lasby, D., Gumulka, G., & Tryon, C. (2006). *Caring Canadians, involved Canadians: Highlights from the 2004 Canada Survey of Giving, Volunteering and Participating* (Catalogue no. 71-542-XPE). Ottawa: Statistics Canada.

important gaps that are unmet by governments and business corporations. They provide opportunities for citizen engagement, and cater to special needs among the homeless, persons with disabilities, immigrants and other minorities. They ensure that there is a voice on important public issues and work to protect fundamental human and democratic rights.