

2021 Canada Not-for-Profit Corporations Act Statutory Review

Recommendations submitted by Imagine Canada

Since the Canada Not for Profit Corporations Act (CNCA) came into effect in 2011, the portion of Canada's nonprofit sector that have engaged with this legislation are likely to have enjoyed the benefits of this modern corporate statute. The streamlined incorporation process is helpful in particular for accelerated processing timelines, and organizations and their allied professionals also benefit from access to information about CNCA corporations available on the website.

As the umbrella for Canada's nonprofit and charitable sector, we welcome this opportunity to inform the continued improvement of the Act and its framework. We would like to ground our submission in a few points about our sector's unique characteristics. The charitable and nonprofit sector in this country is incredibly diverse, touching the lives of individuals in every community with services and programs ranging from environmental conservation to animal welfare, mental health supports to sports and recreation, performing arts to international development, religious programming to education and skills training. With over 170,000 organizations, we are a major contributor to the country's economy (8.4% GDP) and workforce (2.4 million employees).¹ At the same time, nearly half of our sector's organizations are entirely volunteer-run and have no paid staff. Organizational revenue models are incredibly varied in their strategy (not limited to: earned income from sale of goods and services, membership revenues, government grants, individual donations, institutional philanthropy, and social finance) as nonprofits and charities continue to adapt to changing funding environments. Operational budgets also range considerably based on mission, locations and populations served, and organizational structure.

We are hopeful that the current review is undertaken in recognition of the sector's complexity as well as its the strained capacity of many organizations at this time, as demand continues to soar beyond the ability for organizations to meet need for their services. Our sector's pandemic recovery follows the K-shaped pattern seen in other areas of the economy: revenues have not fully returned for roughly half the sector, and those experiencing revenue shortfalls are seeing an average of 43% decline.² We are concerned about the pandemic's impact on long-term organizational sustainability: leaders are prioritizing immediate challenges over work that would build or maintain capacity, while staff are less able to focus on revenue generation. Now more than ever, nonprofits require legislation that enables mission attainment, and a regulatory environment that appreciates its unique needs and circumstances.

In the interest of providing context to frame our recommendations, we offer a brief explanation of some of the challenges we have heard from those who have some form of experience with the CNCA.

- **Structure & Terminology.** The manner in which the Act is structured, with many rules hinging on the distinction between soliciting vs. non-soliciting organizations, is not

¹ Statistics Canada. 2021. Non-profit institutions and volunteering: Economic contribution, first quarter 2021. Retrieved from: <https://www150.statcan.gc.ca/n1/daily-quotidien/210628/dq210628c-eng.htm>

² Imagine Canada. 2021. The Ongoing COVID-19 Experience of Canadian Charities. Retrieved from: <https://www.imaginecanada.ca/sites/default/files/Sector-Monitor-report-highlights-2021.pdf>

intuitive for individuals as this is not reflective of how the sector understands itself. The sector is much more accustomed to accountability mechanisms and regulatory treatment premised on registered charities vs. nonprofit corporations, the primary distinction being the charitable donations tax credit. The rules surrounding soliciting vs. non-soliciting are challenging to grasp (e.g. the 3 year rolling average; the yo-yo effect and its impact on audit requirements, size of board and the distribution of assets), and do not appear to have been designed with appreciation of the sector's funding profile.

- **Misapplication of provisions regulating business corporations.** Some of the realities affecting the operating environments of business corporations do not apply to nonprofit organizations, but the CNCA in many cases applies similar provisions despite these different conditions. These include the principle of independent directors and the rights of members (as carried over from the rights of shareholders), leading to cumbersome requirements. We would like to see the Act evolve to reflect informed consideration of what would enable and facilitate mission attainment and connection to communities served by the organization.
- **Prescriptive.** The 2021 NFP Act Statutory Review Consultation Paper identified flexibility in compliance as an objective of this legislation. The experience of nonprofit organizations and allied professionals is that the effect of the CNCA is more prescriptive than is necessary. An example of this are the rules surrounding virtual and physical meeting locations.
- **Fit within the current regulatory regime.** The regulation of charities and nonprofits by the federal government is complex. Revenue generation and distribution are already subject to detailed regulation by the CRA, and some of the wording of the CNCA is incongruent in how potentially misleading it regards the distribution rules as permitted under the Income Tax Act. When considering any changes to the CNCA, the existing legal framework to which organizations are subject should be kept in mind so as not to create complexity and inconsistency which organizations will find very difficult to navigate.
- **Accessibility.** As mentioned, the organizations that together represent Canada's nonprofit sector are incredibly diverse in terms of size, operating budget, membership, revenue profile, and mission area. Large segments of the nonprofit sector consist of organizations without paid staff, while others enjoy sophisticated membership structures and regional associations. The complexity of the CNCA in its current form is not accessible to organizations without very senior administrative staff, or individuals seeking to incorporate without the support of legal counsel.

Our recommendations are organized according to categories outlined in the Consultation Paper as follows:

A. Audit and financial reporting obligations

Nonprofit organizations have very narrow profit margins by design. Many organizations struggle year after year with administrative expenses as the funding environment continues to favour project-based funding over core operating support, and as donations and funders are motivated by the principle of very low overhead costs. The provisions in the CNCA related to financial reporting obligations often result in considerable cost to organizations that could be put to better use in mission attainment, or furthering the organization's purpose.

The current pandemic context has highlighted an ongoing struggle with the distinction between soliciting and non-soliciting corporations. The government has provided financial support to the sector as part of its emergency pandemic response. We hear that organizations are seeking legal counsel in considering whether these supports may have triggered the more onerous requirements of a soliciting corporation, meaning that a significant portion of the support will be required to fund audit costs - particularly as these requirements will last three years.

An organization's membership should be free to determine what level of financial review best suits them. In many cases, third parties including government funders will also require an audit.

Recommendation:

Remove the requirement for mandatory audit. Permit members the statutory right to vote for the appointment of a public accountant or to require that an audit or review engagement be undertaken.

In the alternative, increase the threshold for the lowest of the three categories (from \$50,000 to \$150,000), and permit members to waive appointment of public accountant by special resolution, 2/3rd vote.

B. Voting Rights of Non-Voting Members

The mandatory voting rights of non-voting members as protected within the CNCA is unique among nonprofit corporate statutes across Canada.

In the nonprofit sector, membership is commonly viewed as the expression of an organization's relationship to the communities served by its mission area. There are many reasons why a nonprofit organization would have members, and would seek to form different categories of members. The current provisions pose challenges for organizations that become caught

between a) the duty to ensure compliance and b) the need to expand, strengthen or evolve community engagement for mission purposes.

For instance, an organization specializing in urban food security might have an active membership category, consisting of volunteers, food security professionals and clients of the organization's programming. It might also have a category of student members that are non-voting to ensure information flow and awareness building is maintained with emerging or future professionals and volunteers. As it grows, the organization might seek to create an additional category of non-voting members that are growers, farmers, or other suppliers for purposes of low-touch engagement with the organization's work. Under the current provisions, the students and growers may be permitted a vote on even fundamental changes, or have potential veto rights for decisions made by the organization.

One can see how nonprofit membership engagement differs greatly from the relationship between a public company and its shareholders (we understand the latter is the basis for this provision). In addition to the incalculable possibilities for membership structuring in the nonprofit world, many organizations must abide by funders requirements that program users/clients be members. Other organizations are required for insurance purposes to ensure their participants are members (e.g. sports leagues). One can imagine a scenario where minors or other forms of dependents are afforded voting rights on fundamental issues.

Under the current provisions, organizations endure an administrative burden in needing to keep and protect more individual information than is necessary. Depending on an organization's bylaws, the provision and need for majority quorum may result in an inability to hold meetings and vote on fundamental decisions. Compliance with this area of the CNCA has created an unlevel playing field among organizations: those who can afford legal support to understand the rules and design workarounds are more likely to be in compliance with the rules, and be confident in their ability to hold valid members meetings.

Above all, this area of the CNCA has led to many organizations restricting or redefining their membership categories to ensure compliance. This narrowing of formal membership engagement does not serve the organization's objectives toward mission attainment and connection to community.

Recommendations:

1. Remove the rights of non-voting members to vote in any circumstances.
2. Remove the rights of separate classes of voting members to have a separate class vote on matters of fundamental change.
3. Clarify that the words "class" and "group" share the same meaning.

C. Virtual Meetings

Organizations are increasingly utilizing virtual communications technology to perform operations and governance duties, and engage with members across the country. At the same time, the use of virtual technology can incur costs particularly for organizations with large membership and board directors are best placed to determine proper expense allocation for meetings.

The requirement that members meetings be held at a “place” provided by either the bylaws or directors’ determination may not be congruent with the organization’s need or preference to hold an entirely virtual meeting without a natural location. It is preferable that a virtual meeting be deemed to occur at the registered office.

Recommendations:

1. By default, permit meetings to be held entirely through the use of virtual technology and eliminate the reference to “place”. Or, provide that “place” of a totally virtual meeting is deemed to be the registered office address of the corporation.
2. Allow the board directors to determine whether a meeting will be held virtually or at a physical location, or a combination of the two.

D. Electronic Voting

The CNCA should allow for greater flexibility in facilitating member input. Attendance at meetings can be challenging with different time zones, schedules, and levels of interest in formal engagement. Many organizations are reluctant to use absentee votes as a workaround due to the complexity of those rules, the associated costs, and concerns over potential error or misuse.

Finally, the requirement that electronic voting be anonymous *to the corporation* is challenging and can be resource intensive. Bylaws may permit voting by secret ballot by request.

Organizations and their members should be provided with more options for engagement outside of formal membership meetings, and this includes the ability to hold stand alone votes outside of member meetings (though allowing for this to be prohibited in the by-laws for organizations where this might not apply).

Recommendation:

1. We support recommendation 16 of the Canadian Bar Association’s Charities and Not-for-Profit Law Section’s 2019 Submission:

The CBA Section recommends adding language to section 165 that clearly authorizes a corporation to conduct, at the board's discretion, a vote of members at any time, and not necessarily in connection with a meeting of members. For example, a new section might read:

Unless the by-laws otherwise provide, the directors of a corporation may determine to conduct a vote of the voting members at any time, and that vote may be held, in accordance with the regulations, if any, by means of a mailed-in ballot or electronic voting.

2. Eliminate the requirement that electronic voting be anonymous to the corporation.

E. Board composition

There are efforts underway within the nonprofit sector to build awareness among organizations around equity, diversity, inclusion and anti-racism principles and activity both within the organization and in how it carries out its mission. This includes capacity-building across a range of indicators that include senior leadership and board composition. This topic led to numerous submissions to the Senate's recent (2018-19) committee study of the charitable sector.³ A year later, Senator Ratna Omidvar, co-chair of the Senate Special Committee, published an open letter calling on sector leaders to begin collecting and publishing data on diversity within the sector.⁴

The sector has a long road ahead in building leadership and governance bodies that are diverse, or representative of the communities served by their organizations. Due to very fundamental differences between the sectors, this road will look different in the nonprofit sector as compared to the public share corporate sector. Public policy and regulatory treatment toward the aim of greater equity must factor in the breadth of mission areas and different strategies employed by boards and leadership in working with equity-seeking communities. Organizations that serve religious minorities, Black communities or Indigenous populations may carry preference for board and leadership composition that would not necessarily qualify as diverse, depending on the criteria used to determine diverse composition.

³ Canada, Parliament, Senate. Special Senate Committee on the Charitable Sector. (2019) Catalyst for Change: A Roadmap to a Stronger Charitable Sector. 42nd Parl, 1st session. Retrieved from the Parliament of Canada website: [A Roadmap to a Stronger Charitable Sector: Report of the Special Senate Committee on the Charitable Sector](#)

⁴ Omidvar, Ratna. 2020. Open Letter to Directors, Executive Directors, and CEOs of Canadian Charities and Non-Profits. The Philanthropist. Retrieved from: <https://thephilanthropist.ca/2020/06/open-letter-to-directors-executive-directors-and-ceos-of-canadian-charities-and-non-profits/>

Recommendation:

1. Engage the nonprofit sector in a series of roundtable discussions to determine the most appropriate role for government partnership in building effective diversity, equity and inclusion capacity in leadership and governance.
2. Prioritize the engagement of equity-seeking groups and communities for this discussion.