

Making Sense of the New 'Canada Not-for-Profit Corporations Act'

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Main Goals for the Day

- To make you familiar with the key elements of the new Act.
- To provide you with knowledge and tools to prepare the documents needed to continue under the new Act, including Articles of Continuance and By-laws.

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Agenda

- Background.
- Some pros and cons of the new Act.
- Study tips.
- Incorporating or “continuing” under the new Act.
- 7 highlights of the new Act.
- Small group discussion.
- Questions & Answers.

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Agenda

- The regulations.
- The Act and charities and non-profits.
- Next steps.
- Corporation’s Canada guidance.
- By-law requirements and options in detail.
- Questions & Answers.

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Background

- A long overdue replacement for the *Canada Corporations Act Part II*.
- Approximately 19,000 non-profits and charities are incorporated under the CCA, which is outdated (1917), incomplete and inadequate.
- First appeared in 2004 as Bill C-21, then in 2008 as Bill C-62, and 2009 as Bill C-4.
- Received Royal Assent on June 23, 2009.

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Background

- Came into force on October 17, 2011.
- Act available here:
<http://www.canlii.org/en/ca/laws/stat/sc-2009-c-23/latest/sc-2009-c-23.html>
- Regulations available at: <http://gazette.gc.ca/rp-pr/p1/2011/2011-02-26/html/reg7-eng.html>
- New forms and guidance from Corporations Canada:
http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs03925.html

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Summary

Positives

- An improvement – holes filled.
- It provides modern governance principles, standards and machinery – similar to the *Canada Business Corporations Act*.
- It is comprehensive, coherent, reasonably clear, innovative and flexible.
- Improved incorporation process.

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Summary

Positives

- Expanded and clarified rights of members and potential remedies.
- Clarity as to the duties, powers, potential liabilities and standard of care for directors.
- More flexible financial review provisions.
- Includes procedural details for changes, amalgamations, winding up, etc.

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Summary

Negatives

- It is too long – 173 pages. Some details could have been moved to the regulations.
- In parts, it is very complex. For example, 22 pages are dedicated to “Debt obligations, certificates, registers and transfers.”
- Challenging to decipher in places – sequence and drafting could be improved.

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Study Tips

- Avoid getting bogged down. Focus first on parts:
 - 1. Interpretation and Application
 - 3. Capacity and Powers
 - 9. Directors and Officers
 - 10. By-laws and Members
 - 11. Financial Disclosure
 - 13. Fundamental Changes

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Study Tips

- Don't get entangled in the details of parts:
 - 6. Debt Obligations, Certificates, Registers and Transfers
 - 7. Trust Indentures
 - 8. Receivers, Receiver-Managers and Sequestrators
 - 14. Liquidation and Dissolution

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Incorporation Process

- The new Act provides for “incorporation as of right.”
- Approval of the Minister is not required.
- Electronic filing will eventually be possible, and approval of incorporation is automatic if the statutory requirements are met.
- By-laws not included in incorporation package, and not reviewed by Corporations Canada staff.
- Articles of Incorporation replace Letters Patent.
- One incorporator, not three.

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Continuing Under the New Act

- The *Canada Corporations Act* (CCA) will be repealed.
- Organizations incorporated under Part II of the CCA must apply for a certificate of continuance under the new Act by October 17, 2014 (3 years).
- Failure to do so will result in dissolution.
- No fee.

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Continuing Under the New Act

A certificate of continuance requires the filing of articles of continuance, which will be similar to articles of incorporation and issued “as of right.”

Form 4031 available on line.

Information required (s. 7):

- the corporate name;
- province or territory where the registered office is located;

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Continuing Under the New Act

Information required:

- membership classes & voting rights*;
- a purposes statement and any restrictions on activities;
- a statement of purposes;
- restrictions on the activities of the corporation, if any;
- minimum and maximum number of directors or fixed number of directors;

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Continuing Under the New Act

- a distribution on wind-up statement.
- Notices of Registered Office and Directors must also be submitted (Form 4002).
- Bylaws can be submitted with articles of continuance or later.
- Articles of continuance may be similar to current letters patent, but it is an opportunity to make revisions to update the governance documents.

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Continuing Under the New Act

- Ss. 7(3) states that “the articles may set out any provision that may be set out in the by-laws,” so the articles can be bolstered with provisions that would otherwise be in the by-laws.
- Either way, fundamental changes relating to core matters, including those listed in s. 7 and 197, require a special resolution of members (a two-thirds majority) whether those matters are addressed in the articles or the by-laws.

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Continuing Under the New Act

- The Act allows corporations to apply for continuation under provincial or territorial jurisdictions, if those laws permit.
- The Act allows entities incorporated under provincial or territorial law to continue under this *Act*, if those laws permit.
- Continuance may also be possible under the *Canada Cooperatives Act*, the *Bank Act*, *Insurance Companies Act*, *Trust and Loan Companies Act* or the *Cooperative Credit Associations Act*.

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7 Categories of Highlights

1. Soliciting & Non-Soliciting Corporations
2. Financial Reviews and Audits
3. Powers of the Corporation
4. Structural Options
5. Members
6. Directors
7. Miscellaneous

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1. Soliciting & Non-Soliciting Corporations

- A “soliciting corporation” is another name for a public benefit corporation (charities, public interest non-profits that don’t meet the test of charity).
- A “non-soliciting corporation” is a mutual benefit or member benefit corporations (industry associations for example).

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1. Soliciting & Non-Soliciting Corporations

A “soliciting corporation” is an organization that has received, in a single fiscal year, income in excess of \$10,000 in the form of (ss.2(5.1)):

- donations requested from any person who is not a member, director, officer or employee of the corporation at the time of the request;
- grants or similar financial assistance received from a government or an agency of government; or
- donations from another “soliciting corporation.”

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1. Soliciting & Non-Soliciting Corporations

- A corporation remains a “soliciting corporation” for 3 years.
- During that time, another fiscal year over \$10,000 of such funding restarts the 3 year period.
- The fiscal year end is the calculation date, and the date of the AGM is the effective date.

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1. Soliciting & Non-Soliciting Corporations

- All others are non-soliciting corporations.
- A unique distinction.
- Soliciting corporations are subject to higher corporate governance and financial accountability standards.

5 Special requirements:

1. They must have at least 3 directors, 2 of whom are not officers or employees.

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1. Soliciting & Non-Soliciting Corporations

Soliciting Corporations:

2. Must send copies of financial statements and accountants' reports to Corporations Canada.
3. On dissolution, assets must go to a "qualified donee" under the *Income Tax Act*.
4. May not utilize Unanimous Member Agreements.
5. Have different financial review options.

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1. Soliciting & Non-Soliciting Corporations

- Corporations that may move back and forth between categories should adopt the requirements of soliciting corporations from the start.

Which category will your corporation be in?

Is it likely to change?

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2. Audit Requirements

- With the CCA annual audits are mandatory.
- This is a big issue for small organizations.
- With the new Act there is some flexibility, depending on size and nature of the corporation:
 - Full Audit;
 - Review Engagement; or
 - No review.

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2. Audit Requirements

- Corporations with low gross annual revenues (less than \$50,000 for soliciting corporations and \$1,000,000 for a non-soliciting corporations) are not required to undergo an annual audit. They may choose nothing or a review engagement.
- But they may make audits mandatory in their articles or by-laws, or by ordinary resolution of the members.
- All members must consent to a decision not to appoint an auditor, and therefore have no review.

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2. Audit Requirements

- Audits must be done by qualified and independent “public accountants” - (CA, CGA, CMA).
- See Part 12 of Act for details.
- Audits are still mandatory for soliciting corporations with revenues greater than \$250,000 and non-soliciting corporations with revenues greater than \$1million.

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Type of Corporation	Gross Annual Revenues	May Dispense with Public Accountant	Review Engagement	Audit
soliciting	less than \$50K	yes	default	optional
soliciting	between \$50K and \$250K	no	optional	default
soliciting	more than \$250K	no	no	mandatory
non-soliciting	less than \$1M	yes	default	optional
non-soliciting	more than \$1M	no	no	mandatory

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3. Powers of the Corporation

- Organizations incorporated or continued under the new Act have the “rights, powers and privileges of a natural person.”
- The list of powers is gone.
- Capacity to carry out activities throughout Canada, and outside Canada.
- Activities must not be contrary to articles. The purposes language remains critical for charities – it must be exclusively charitable.

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3. Powers of the Corporation

Financial Provisions - A corporation may:

- borrow money on the credit of the corporation;
- issue, reissue, sell, pledge etc. obligations of the corporation;
- give guarantees on behalf of the corporation; and
- mortgage an interest in all or any property of the corporation.

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3. Powers of the Corporation

Financial Provisions:

- The directors may delegate these powers to a director, a committee of directors or an officer.
- Unless the articles, bylaws or unanimous member agreement say otherwise, the directors can exercise these powers without member authorization.

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4. Regional, provincial or local branch structures

- Many corporations under the old Act have established branch structures that include one or more level - regional, provincial, or local - in addition to a central office. These structures can vary substantially in terms of formality, relationships, and functions.
- Managing a branch structure can be difficult. The balance between central control and branch autonomy is a source of tension.

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4. Regional, provincial or local branch structures

- The new Act says very little about branch structures. There are just two references.
- Ss. 7(1)(c) states that a corporation's articles shall set out “the classes, or regional or other groups of members that the corporation is authorized to establish...”
- S. 44 allows “branch debt obligations registers” to be kept in places other than the registered or central office.

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4. Regional, provincial or local branch structures

- The new Act leaves it to each corporation to create its own structure as it chooses.
- Two or more levels based on region, province, or other geographic territory remain options, and relationships between levels can take a wide variety of forms.
- This likely reflects the wide range of practices currently in place and the complication of trying to craft legislative provisions that help.

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4. Regional, provincial or local branch structures

- Many corporations may simply move their current by-law language relating to structure into their new by-laws, or they may make minor modifications to it.
- Others may use the transition to the new Act as an opportunity to make substantial changes to their structures.
- This is a fundamental issue that will require careful deliberation.

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5. Members

- Significant changes in relation to the roles of members.
- Increased members' rights, access to records and legal remedies.
- A greater role for members in governance of each corporation.
- Organizational democracy is a key principle in the new Act.

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5. Members

Voting rights:

- S. 7 allows corporations to adopt classes or groups (regional or otherwise) of members, and to provide voting rights to some or all of the classes or groups.
- At least one class or group of members must be given voting rights.
- Voting members need not be the majority.

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5. Members

Part 13 of the Act allows the members in non-voting membership classes or groups to vote on some important matters. These are:

- certain amendments to membership classes, rights and conditions (s. 199);
- decisions to amalgamate or dissolve the corporation (s. 206); and
- “a sale, lease or an exchange of all or substantially all of the property of a corporation other than in the ordinary course of its activities” (s. 214).

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5. Members

- The idea that “non-voting” does not always mean non-voting is a controversial innovation.
- The merits of this change are hard to measure.
- It will certainly complicate decision-making for corporations with non-voting membership classes or groups if these situations arise.
- Determining your membership structure is a critical part of continuing under the new Act.*

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5. Members

- **Technology.** The Act allows meetings of members to be held “by means of a telephonic, and electronic or other communications facility that permits all participants to communicate adequately with each other during the meeting.” (s. 159)
- While this practice has been permitted by Corporations Canada, the old Act does not expressly authorize it.

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5. Members

Absentee Voting (detailed in the regulations):

3 options. The members choose the options, and include them in the bylaws.

1. voting by proxy (requirements for the form of proxy are set out in the regulations);
2. voting by mailed-in ballots; and
3. voting by telephone or other electronic means.

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5. Members

- S. 163: Members who are entitled to vote may submit membership proposals to be raised at a members' meeting.
- “A corporation shall include the proposal in the notice of the meeting...” Proposing member may have to bear costs.
- Not for personal grievances, debts, inconsequential issues, publicity efforts.
- There is a 500 word limit.

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5. Members

- S. 170 Unanimous Member Agreements (UMAs) allow the powers and duties of directors to be given to members or 3rd parties (Non-soliciting corps only).
- Directors relieved of their powers are also relieved of their duties and potential liabilities.
- Members may rescind a UMA by special resolution (2/3 vote).
- Members bound by pre-existing UMAs. If unaware of a UMA they may rescind their membership.

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5. Members

- **Access to records.** The Act gives clear rights to members to access a range of corporate records and documents, including:
financial statements, articles, by-laws, UMAs, minutes of meetings of members and committees of members and resolutions of such meetings, debt obligations issued by the corporation and registers of directors and officers.

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5. Members

- **Access membership lists.** The Act provides members with access to the list of the corporation's members, but only for the purposes of:
 - (a) an effort to influence the voting of members;
 - (b) requisitioning a meeting of members; or
 - (c) any other matter relating to the affairs of the corporation.” (ss. 23(7)).

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5. Members

- The person requesting access to the list of members must submit a statutory declaration promising to comply with these restrictions, and it is an offence to misuse this information.

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5. Members

- Members may seek court approval to commence derivative actions. *A court action against the directors and/or officers of a NPC in the name of the NPC to enforce or defend a legal right or claim.*
- Oppression remedies are available for members.
- Courts can order investigations and make various compliance orders.

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6. Directors

Clear and detailed guidance regarding:

- Duties and powers;
- Potential liability;
- Standard of care & due diligence;
- Conflicts of interest;
- Indemnification;
- Procedural matters.

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6. Directors

- **Minimum number of directors.**

Section 125: “A corporation shall have one or more directors, but a soliciting corporation shall not have fewer than three directors, at least two of whom are not officers or employees of the corporation or its affiliates.”

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6. Directors

- **Duty to manage or supervise.**

S. 124: “Subject to this Act, the articles, and any unanimous member agreement, the directors shall manage or supervise the management of the activities and affairs of a corporation.”

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6. Directors

- **“Election of directors. 128: (3) Members shall, by ordinary resolution at each annual meeting at which an election of directors is required, elect directors to hold office for a term expiring within the prescribed period.
[4 years]**
- **Staggered terms: (4) It is not necessary that all directors elected at a meeting of members hold office for the same term.”**

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6. Directors

- “**No stated terms:** (5) A director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of members following the director’s election.
- **Incumbent directors:** ...if directors are not elected at a meeting of members, the incumbent directors continue in office until their successors are elected.”

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6. Directors

- “**Appointment of directors:** (8) The directors may, if the articles of the corporation so provide, appoint one or more additional directors, who shall hold office for a term expiring not later than the close of the next annual meeting of members, but the total number of directors so appointed may not exceed one third of the number of directors elected at the previous annual meeting of members.”

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6. Directors

- **Election or appointment as director:** (9) the individual must be present, or must consent in writing or by acting as a director.
- **“Removal of directors:** 130. (1) The members of a corporation may by ordinary resolution at a special meeting remove any director or directors from office.”

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6. Directors - delegation

138. The directors may delegate powers to a managing director from among their ranks or to committees.

142. Subject to the articles, the by-laws and any unanimous member agreement:

- the directors may designate the offices of the corporation, appoint officers, specify their duties and delegate to them powers to manage the corporation.
- A director may be appointed to any office and two or more offices of the corporation may be held by the same person.

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6. Directors - liability

- Directors are “jointly and severally or solidarily” liable to restore to the corporation any money or other property that is:
 - (a) a payment or distribution to a member, director or officer contrary to the Act;
 - (b) a payment of an indemnity contrary to the Act.If they voted for or consented to the payment.

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6. Directors - liability

- Directors are “jointly and severally or solidarily” liable for up to 6 months wages payable to each employee for services performed for the corporation while they are directors:
 - if the corporation was successfully sued within 6 months and the judgment is unsatisfied;
 - if dissolution or bankruptcy proceedings have been commenced and the debts proved.

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6. Directors - liability

“Jointly and severally or solidarily” - *liability by which members of a group are either individually or mutually responsible to a party in whose favour a judgment has been awarded. One member of the group can be responsible or liability can be apportioned among some or all of the group.*

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6. Directors - liability

The new Act does not address other forms of potential liability:

- failure to remit as required by the *Income Tax Act*, CPP or EI legislation;
- tort law (e.g. negligence, personal injury, defamation);
- other statutes (Criminal Code, Environmental legislation, etc.)

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6. Directors - liability

- A director who is present at a meeting is deemed to consent to a resolution unless the director dissents.
 - Ask that the dissent be entered in the minutes;
 - Send a written dissent to the secretary before the meeting adjourns;
 - Send a dissent by registered mail immediately after the meeting adjourns.

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6. Directors - liability

- A director who votes for or consents to a resolution cannot later dissent.
- A director who was absent from a meeting has 7 days from learning of the resolution to send a dissent to the corporation by registered mail.
- The corporation may buy D&O insurance and may advance legal defense costs to directors.

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6. Directors – Conflicts of Interest

S. 141 - Clear guidance on Conflicts of Interest.

- Directors and officers have a duty to disclose “the nature and extend of any interest in a material contract or material transaction, whether made or proposed, with the corporation” if he or she is a party to the contract, a director or officer, shareholder, partner or has another interest in the party.

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6. Directors – Conflicts of Interest

- Disclose promptly, do not vote on the matter.
- Members are entitled to access disclosures.
- Failure to disclose entitles members to commence court action to annul the contract.

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6. Directors – Conflicts of Interest

If:

- (a) the interest is disclosed,
- (b) the directors approve the contract and
- (c) the contract is “reasonable and fair,” the director or officer in conflict is not accountable to the corporation for profits made.

The members may “confirm” the contract by special resolution.

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6. Directors – Standard of Care

- s.148.(1) “Every director and officer of a corporation in exercising their powers and discharging their duties shall:
 - (a) act honestly and in good faith with a view to the best interests of the corporation; and
 - (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”

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6. Directors – Due Diligence

- A director is not liable if he or she relied in good faith on:
 - (a) financial statements from an officer or a written report from a public accountant; or
 - (b) “a report of a person whose profession lends credibility to a statement made by that person.” (s.149)

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6. Directors – Indemnification

- A corporation may indemnify a director for costs, charges and expenses, if the director:
 - (a) acted honestly, in good faith and in the best interests of the corporation;
 - (b) in a criminal or administrative case, had reasonable grounds to believe the conduct was lawful.
- A director “is entitled to indemnity” if successful in defense of the case.

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7. Miscellaneous

Clear guidance on corporate record keeping (s. 21):

- Articles, by-laws, amendments, UMAs;
- Minutes and resolutions of members and committees of members and directors and committees of directors;
- Registers of directors, officers, members and debt obligations.

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7. Miscellaneous

- The requirements for amalgamation, liquidation and dissolution are clear and complete.
- The powers and responsibilities of the “Director” or registrar are clear and complete.
- The role of the courts is clarified. Powers include appointing inspectors to investigate corporations.

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7. Miscellaneous

- No alternate or *ex officio* directors allowed.
- Directors are not trustees for any property of the corporation, including property held in trust by the corporation.
- Subject to limitations in gifts, the articles or bylaws, a corporation may invest as its directors think fit.
- Directors to set dues, unless articles, by-laws or UMA state otherwise.

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7. Miscellaneous

- **137.** The by-laws may provide that the directors or members shall make most decisions by consensus.
- By-laws shall define the meaning of consensus and establish the manner of referring any matter on which consensus cannot be reached to a vote.

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7. Miscellaneous

- Special majorities – if the articles or a UMA require a greater number of votes of directors or members than the Act, the articles or UMA prevail.
- Corporate seals will no longer be required.

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7. Miscellaneous

- S.253. There will be a faith-based defense to derivative and oppression actions.
- 3 Criteria:
 - a religious corporation;
 - that has made a decision or acted based on a tenet of faith; and
 - it is reasonable to base the decision or act on a tenet of faith.

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7. Miscellaneous

Part III of the old Act applies to many corporations without share capital created by Special Acts of Parliament.

Part 19 of the new Act will replace Part III of the old Act. Transition will be automatic. Old Special Acts will be repealed.

Part 19 deals with: capacity of a natural person, AGMs and filings, continuing under the new Act , liquidation, name changes.

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The Regulations

- Contain details such as time limits and periods not included in the Act. Over 90 requirements relating to:
 - Corporate records and registers;
 - Electronic documents;
 - Definition of “soliciting corporation”;

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The Regulations

- Corporate names;
- Notice of meetings of members;
- Absentee voting;
- Public accountants and financial review;
- User fees.

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The Regulations

Electronic Documents:

- Members may consent to receiving notices by email.
- Some documents may be posted on web sites provided the addressee receives notice about the location of the document.

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The Regulations

Notice of Meetings of Members:

- 4 options for providing notice to members. The option or options are to be chosen by members and set out in the by-laws.
- If the by-laws do not include a valid option, then the statutory default is to send notice by Canada Post mail or personal delivery to each member, between 21 and 60 days before the meeting.

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The Regulations

Notice options:

1. sent by mail, courier or personal delivery;
2. communicated by telephone or other electronic communication means;
3. affixed to a notice board; and
4. if a corporation has more than 250 members, communicated via a publication (newspaper, or a publication of the corporation).

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The Regulations

Absentee Voting:

3 options. The members choose the options, and include them in the bylaws.

1. voting by proxy with requirements for the form of proxy set out in the Regulations;
2. voting by mailed-in ballots; and
3. voting by telephone or other electronic means.

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Group Discussion

- Do you see advantages in the new Act?
Identify three.
- Do you see problems for your corporation?
What are they and why will they be problems?

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Group Discussion

- Will you change your organizational structure as part of continuance? If so, how?
- Will you change your approach to membership classes? If so, how?
- Is election v. appointment of directors an issue for your corporation?

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The Act and Charities

- The Act is administered by Corporations Canada, part of Industry Canada.
- Charitable registration is administered by the Charities Directorate, part of the Canada Revenue Agency.
- The purposes or objects language in your current Letters Patent is critical. It must meet the test of charity. Changes must be made with care.

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The Act and Charities

- Any changes to that wording require the approval of the Charities Directorate (CD).
- Restrictive language will be needed.
- CD will review draft articles of continuance to see if changes are charitable.
- CD requires a non-profit clause and a dissolution clause that ensures remaining assets will be transferred to another charity.
- CD must receive a copy of articles.

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The Act and Non-Profit Status

- Compliance with the Act does not guarantee that an organization will meet the test of non-profit status in the federal *Income Tax Act*.
- Activities intended to generate a profit may be deemed taxable by the Canada Revenue Agency.

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Next Steps

Corporations Canada support:

- Model articles and by-laws.
- A step-by-step guide to transition to the Act.
- A new handbook for Not-For-Profit organizations.
- Policy guides on key topics.
- Electronic forms & reporting requirement guides.
- www.corporationscanada.ic.gc.ca

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Next Steps

Corporations Canada identifies 5 steps to the transition:

1. Review your letters patent and by-laws.
2. Prepare Articles of Continuance. (and Initial Registered Office and First Board of Directors Form).
3. Create by-laws.

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Next Steps

4. Get members' approval.
5. file the required documents with Corporations Canada.

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Next Steps

Some suggestions:

- a. Don't panic – take time and care. Start soon.
- b. Establish a transition team (board & staff).
- c. Study the Act, regulations and the support documents from Corporations Canada.
- d. How will it impact your unique circumstances?

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Next Steps

Some suggestions:

- e. Create a transition plan: (what needs to be done, who will do it, and a timeline).
- f. Integrate with your strategic planning. Consider the big questions (purposes, structure, membership – articles or continuance).
- g. Consider the fine points (by-law content).

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Next Steps

- The Act provides choices - identify them. Example: “142. Subject to the articles, bylaws and any unanimous member agreement...”
- The Act often provides a default position, but you can customize. Are your existing custom governance provisions consistent with the Act?

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By-laws under the new Act

- Corporations Canada will no longer review by-laws for compliance with the Act.
- Copies of by-laws and amendments are to be sent to Corporations Canada as part of its registry function.

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Making & Amending By-laws

- Directors may make, amend, or repeal most corporate by-laws, except major matters:
 - creating new classes or groups of members,
 - changes to the rights or member classes, or
 - changes to the requirements of membership, notices or voting practices.
- These major changes require special resolutions of members (2/3 vote).

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Making & Amending By-laws

- Changes to by-laws by the directors must be submitted to the members at the next meeting of members, where they can be confirmed, rejected or amended.
- The effective date is the date of the resolution of directors. If amended by the members, it remains effective in the form approved by the members.

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Making & Amending By-laws

- If the directors do not submit a by-law change to the members, or it is rejected by the members, the by-law change has no effect.
- Directors cannot then make a by-law change that has “substantially the same purpose or effect.”
- A member has the right to make a proposal to make, amend or repeal a by-law at an annual meeting.

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By-laws under the new Act

Less mandatory by-law content.

- Unlike the old Act, the new Act does not include a list of matters that must be addressed in the by-laws. There is greater latitude and flexibility.
- S. 152 gives broad power to corporations to adopt by-laws to “regulate the activities or affairs of the corporation.”

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By-laws under the new Act

- “activities” includes any conduct of a corporation to further its purpose and any business carried on by a body corporate, but does not include the affairs of a body corporate.
- “affairs” means the relationships among a corporation, its affiliates and the directors, officers, shareholders or members of those bodies corporate.

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By-laws under the new Act

- The old Act is thin and incomplete, and detailed by-laws are essential to fill the many gaps.
- The new Act is comprehensive and detailed, so there is less need to adopt comprehensive and detailed by-laws.

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By-laws under the new Act

- For example, s. 130(1) of the new Act states: “The members of a corporation may by ordinary resolution at a special meeting remove any director or directors from office.”
- There will be no need for this matter to be addressed in by-laws. A corporation may choose to repeat this important mechanical detail in its by-laws, but it need not.

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By-laws under the new Act

- Similarly, s. 141 of the new Act provides detail relating to conflicts of interest for directors and officers. Many corporations address conflicts of interest in their by-laws under the old Act.
- They may decide to remove those by-law sections and rely instead on the comprehensive provisions of the new Act.

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By-law Default Positions

- The new Act creates options that allow a corporation to address matters in its by-laws (or articles), or to accept the default positions stated in the Act.
- A simple illustration is ss. 126(2) which states: “Unless the by-laws provide otherwise, a director of a corporation is not required to be a member of the corporation.”

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By-laws Default Positions

- The options in the new Act take different forms and are not all as simple as ss. 126(2). They appear throughout the new Act, and can be challenging to find.
- Below are each of the options in the new Act where decisions will need to be made during the drafting of by-laws and articles of continuance.

103

Mandatory By-laws Provisions

The new Act makes just two matters mandatory for inclusion in the by-laws of all corporations:

- the conditions of membership; and
- notice of meetings of members.

104

Conditions of Membership

Ss.154(1) states: “the by-laws shall set out the conditions required for being a member of the corporation, including whether a corporation or other entity may be a member.”

105

Conditions of Membership

- Ss.154(2) states that if the articles provide for two or more classes or groups of members, the by-laws shall provide:
 - (a) the conditions for membership in each class or group;
 - (b) the manner of withdrawing from or transferring between groups, and
 - (c) the conditions on which membership in a class or group ends.

106

Notice of Meetings of Members

- s. 162(1) is not as explicit as s. 154 in terms of its mandatory nature, but it can be interpreted as requiring corporations to address notice requirements for meetings of members in their by-laws.
- See the details described in the earlier slides on the regulations (slides 79 & 80).

107

Notice of Meetings of Members

- There are options to choose from and different timing requirements for each option.
- Electronic notice will likely be a popular and efficient option.
- Care should be taken in drafting the notice provisions in the by-laws to ensure they are consistent with the relevant sections of the Act and regulations.

108

Minimalist By-laws

- It is conceivable, though not recommended, that a corporation could adopt by-laws that contain nothing but the conditions of membership in the corporation and notice of meetings of members.
- With this extreme minimalist approach, all other governance matters would be left to the Act, the regulations, and articles.

109

Optional By-law Provisions

- There are 28 matters that the new Act explicitly states can be addressed in the by-laws if the members so choose.
- For each of these matters, there is a default position in the event that the corporation decides not to address them in its by-laws.
- They appear here in the sequence in which they are found in the new Act, not on the basis of their importance.

110

1. Borrowing Powers*

Default position: s. 28 - directors can borrow money on the credit of the corporation, issue guarantees, and take other steps relating to financing the activities of the corporation.

- Directors need not get specific authorization from the members for each decision.
- Directors may, by resolution, delegate these powers to a director, a committee of directors, or an officer.

111

1. Borrowing Powers

- This section enables efficiency in the basic business of managing corporations.
- This reflects the practice among for-profit corporations, and is a sensible modernization of the law.

112

1. Borrowing Powers

- S. 28 states: “Unless the articles, the by-laws or a unanimous member agreement otherwise provides...”
- This means that the members can vary from the default position in any one of those three documents.

113

1. Borrowing Powers

- For example, the members may decide to state in the by-laws that an ordinary resolution of members is required before any mortgage is issued involving the property of the corporation.
- If the articles or by-laws are silent on this issue and the members do not enter into a UMA, then the directors will have the autonomy and flexibility described above.

114

2. Membership Dues*

Default position: s. 30 - the directors may require and set the rates of membership dues or contributions to the corporation.

- Corporations may vary from it in the articles, by-laws, or a UMA.
- Some corporations may want the members to exercise this power.

115

3. Investments

Default position: s. 33 - “subject to the limitations accompanying any gift and the articles or by-laws, a corporation may invest its funds as its directors think fit.”

- This gives directors maximum autonomy and flexibility when it comes to deciding how to invest corporate funds.

116

3. Investments

- Members can decide to limit that flexibility by adopting restrictive terms in the articles or by-laws.
- Examples of possible approaches:
 - investment in Canada savings bonds or term deposits at the local credit union;
 - An ethical or local investment requirement, or a general investment goal or strategy;
 - An investment policy or plan for annual review and approval by the members.

117

4. Lien on Membership

- S. 36 is rather obscure. It states that the articles may provide that the corporation has a lien on a membership for a debt owed by a member to the corporation. Ss. 36(3) provides that a corporation may enforce such a lien “in accordance with its by-laws.”

Default. It appears that if the by-laws are silent on this matter, such liens will be unenforceable.

118

5. Directors as Members

Default: Ss. 126(2) - directors of a corporation need not also be members.

- From a governance perspective, there is no right or wrong on this point.
- In order for a corporation to require directors to also be members, the by-laws must say so.

119

6. Statement of Directors

Default: s.131states: - “...a director is entitled to submit to the corporation a written statement giving reasons for resigning or for opposing the removal or replacement of the director if a meeting is called for that purpose.”

- This seems to be a reasonable provision for transparency and accountability. There is a choice to make whether to vary from this requirement in the by-laws.

120

7. Filling Board Vacancies*

Default: s. 132 - a quorum of directors have the power to fill a vacancy on the board of directors.

Vacancies among directors from a class of members can be filled by the remaining directors from that class.

(There are some situations where a special meeting of members must be called.)

121

7. Filling Board Vacancies

- Ss. 132(5) allows by-laws to provide that vacancies can only be filled by vote of the members or class of members.
- These mechanics must be considered carefully.
- Having the directors fill vacancies can be convenient, but for some organizations geographic or other representation on the board and the process of election by members are paramount concerns.

122

8. Meetings of Directors

- Ss. 136(1) is a somewhat puzzling short piece of drafting.

It states: “Unless the articles or by-laws otherwise provide, the directors may meet at any place and on any notice that the by-laws require.”

- This appears to mean that this subject may be addressed in either the articles or the by-laws.

123

8. Meetings of Directors

- This is a subject matter well suited for the by-laws.
- One of the options from this section is to state in the by-laws that the directors may determine the place of their meeting and the notice requirement.

124

9. Quorum of Directors*

- Ss. 136(2) empowers corporations to build the board meeting quorum into their articles or by-laws.

Default: “a majority of the number of directors or minimum number of directors required by the articles constitutes a quorum at any meeting of directors...”

125

9. Quorum of Directors

- A specific quorum number in the articles or by-laws is inflexible and could cause difficulty.
- A majority of directors then in office is the standard practice and sensible option.
- This can be achieved by relying on the default position in ss. 136(2) or by building it into the by-laws.

126

10. Content of notice of meetings of directors

- Ss. 136(3) is short but rather complicated and confusing.

Default: “A notice of a meeting of directors shall specify any matter referred to in subsection 138(2) that is to be dealt with at the meeting but, unless the by-laws otherwise provide, need not specify the purpose of or the business to be transacted at the meeting.”

127

10. Content of notice of meetings of directors

- The matters referred to in ss. 138(2) are:
 - (a) questions requiring the approval of members;
 - (b) filling a vacancy among the directors, appointing additional directors or filling a vacancy in the office of public accountant;
 - (c) the issuance of debt obligations;
 - (d) the approval of financial statements;
 - (e) the adopting, amendment or repeal of by-laws;
and
 - (f) the setting of member dues or contributions.

128

10. Content of notice of meetings of directors

- The by-law choice appears to be whether to require notices of meetings of directors to identify other issues to be dealt with at the meetings.
- The competing governance interests are informed and better prepared directors on the one hand and administrative ease and flexibility on the other.

129

10. Content of notice of meetings of directors

- Corporations not content with the default position might consider including something like this in their by-laws:
“All notices of meetings of directors shall include an agenda identifying the matters to be considered at the meeting. With the consent of directors, matters may be added to an agenda at a meeting and considered by the directors.”

130

11. Electronic participation in board meetings*

Default: ss. 136(7) allows participation in meetings of directors or committees of directors by “means of a telephonic, an electronic or other communication facility that permits all participants to communicate with each other during the meeting.”

131

11. Electronic participation in board meetings

- This provision is subject to the by-laws.
- It seems unlikely corporations will negate this option in their by-laws.
- Some may decide to expand upon it in their by-laws, perhaps by detailing the technologies they will use.
- Staying silent in the by-laws on this matter and relying on the capacity granted by the subsection appears to be a sensible option.

132

12. Consensus decision-making

- S. 137 allows consensus decision making by the members, the directors, or both.
- See slide 72.

Default: If the by-laws do not include these elements, consensus decision making cannot be used.

133

13. Designation of Officers*

Default: s. 142 - the directors have the power to “designate the offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the activities and affairs of the corporation...”

- This is subject to the articles, the by-laws or any UMA, so corporations may vary from this broad power and role for the board in these matters.

134

13. Designation of Officers

- Under the old Act the designation of offices and description of the basic responsibilities of each office must appear in the by-laws.
- Some may re-state the officer provisions from their existing by-laws in their new by-laws.
- Others may go with the default position and let the directors deal with all matters relating to offices and officers.

135

14. Remuneration*

Default: ss. 143(1) the directors may by resolution “fix the reasonable remuneration of the directors, officers and employees of the corporation.”

- Variation is possible in the articles, by-laws or any unanimous member agreement.

136

14. Remuneration

- Some corporations may want to adopt by-law language that leaves the setting of director remuneration to the members, for the practice of directors setting their own remuneration is problematic.
- But remuneration of employees is properly left to the directors (or ED/CEO) and changes to that relationship in the by-laws would complicate governance.

137

14. Remuneration

Default 2: ss. 143(2) authorizes corporations to pay a director, an officer or a member “reasonable remuneration and expenses for any services to the corporation that are performed in any other capacity.”

- This enables a director to take on a specific contractual task that is beyond the director’s duties as a director and be paid a fee for that additional work.

138

14. Remuneration

- This provision is also subject to the by-laws, so variation from it is an option.
- Charities need to be cautious when it comes to remuneration for directors, for provincial legislation varies on whether it is permissible.

139

15. Indemnification for expenses

Default: s. 144 confirms the well-established principle that directors, officers, and employees may be repaid expenses they incur on behalf of the corporation in performing their duties.

- The by-laws may vary from this position, but it would be unusual to do so.

140

16. Directors and by-laws*

Default: s. 152 - directors empowered to make, amend, or repeal any by-laws, except for fundamental changes listed in s. 197.

- See slides 94-96.
- Corporations may vary from this approach.
- Some may decide to stay with the more traditional governance approach that all by-laws require approval of the members before they take effect.

141

16. Directors and by-laws

- Careful attention must be paid to ensure that future by-law changes are completed in compliance with the approach each corporation adopts.
- Failure to pass a special resolution for a fundamental change (see s. 197 of the Act) will render that change invalid and could cause unwelcome complications.

142

17. Termination of membership*

Default: s. 156 - a membership is terminated when:

- (a) the member dies or resigns;
- (b) the member is expelled or their membership is otherwise terminated in accordance with the articles or by-laws;
- (c) the member's term of membership expires; or
- (d) the corporation is liquidated and dissolved under Part 14.”

143

17. Termination of membership

- S. 156 allows corporations to customise the termination in the articles or by-laws.
- Some corporations may want to add additional triggering events. For example:
 - the loss of a relevant professional designation,
 - termination of membership in a related organization,
 - geographic relocation.

144

17. Termination of membership

Default 2: S. 157 states that “Unless the articles or by-laws otherwise provide, the rights of a member, including any rights in the property of the corporation, cease to exist on termination of the membership.”

- Some corporations, golf clubs for example, will vary from this default position where a member is entitled to a refund of an initiation fee when membership ends.

145

18. Power to discipline members*

Default: s. 158 - If the articles or by-laws are silent on this issue, discipline of members is not an option.

- S. 158 enables corporations to build into their articles or by-laws the power for “the directors, the members or any committee of directors or members of a corporation” to discipline or terminate the membership of a member.

146

18. Power to discipline members

- It must include description of the circumstances and manner in which it may be exercised.
- Care should be taken drafting the relevant article or by-law provisions.
- They should be clear and complete and should include mechanisms to ensure basic procedural fairness, such as the right for the member subject to discipline to speak to the matter.

147

19. Place of meetings of members

- This is a simple matter. S. 159(1) states that “Meetings of members of a corporation shall be held within Canada at the place provided in the by-laws or, in the absence of such a provision, at the place the directors determine.”
- Giving the directors the capacity to decide where meetings of members will be held by staying silent on this matter in the by-laws seems sensible.

148

20. Electronic participation in meetings of members*

Default: s. 159(4) - participation in meetings of members “by means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately” is permitted.

- A person participating in a meeting this way “is deemed for the purposes of this of this Act to be present at the meeting.”

149

20. Electronic participation in meetings of members

- This provision is helpful for corporations with geographically dispersed members, and may prove handy for other corporations as well.
- It is difficult to imagine why any corporation would choose to state otherwise in their by-laws.

150

21. Cost of submitting a proposal

- Ss. 163(4) provides additional detail regarding the new power for members to make “proposals” that raise matters for discussion at a meeting of members.

Default. A member who submits a proposal shall pay any cost of including the proposal (and any supporting statement) in the notice of the meeting.”

- By-laws or an ordinary resolution of members can provide otherwise.

151

21. Cost of submitting a proposal

- The decision to make when drafting by-laws is whether to:
 - a) stay silent and go with the default position or
 - b) craft a by-law provision that states the corporation will pay all or part of this cost.
- It is a relatively minor issue, but may be worth some deliberation.

152

22. Quorum for meetings of members*

Default: ss. 164(2) - “If the by-laws do not set out such a quorum, the quorum is a majority of members entitled to vote at a meeting.”

- This is a high quorum requirement, and for most corporations it is impractical.
- A lower quorum should be established in the by-laws to reduce the risk of meetings of members failing due to lack of quorum.

153

22. Quorum for meetings of members

- Ss. 164(1) of the Act states that if the by-laws do establish the quorum, it must comply with the regulations.
- S. 70 of the draft regulations requires that the quorum set in the by-laws “shall be a fixed number of members, a percentage of members or a number or percentage of members that is determinable by a formula.”

154

22. Quorum for meetings of members

Default 2: ss. 164(3) states “If a quorum is present at the opening of a meeting of members, the members present may, unless the by-laws otherwise provide, proceed with the business of the meeting, even if the quorum is not present throughout the meeting.”

- This flexibility is practical, and to vary from it in the by-laws may result in a complication at a future meeting of members.

155

23. Voting at meetings of members*

Default: ss. 165(1) and (2) - voting at a meeting of members is by show of hand unless a ballot is demanded by a member entitled to vote.

S.165(3) enables more sophisticated voting methods – “...by means of a telephonic, an electronic or other communication facility, if the corporation makes available such a communication facility.”

- This allows technology at the meeting of members.

156

23. Voting at meeting of members

- Ss. 165(4) addresses voting by members participating in a meeting of members by electronic means rather in person.

Default: the same technologies can be used.

- The regulations state that such voting systems must a) enable the votes to be gathered and verified, and b) permit tallying of the votes without the corporation being able to identify how each member voted.

157

24. Requisition of meetings of members

Default: S. 167 and the regulations – 5% of voting members have the power to require the directors to call a meeting of the members to deal with business of the corporation.

- The by-law issue to be considered is whether the organization wants to lower the percentage of voting members needed to requisition such a meeting.
- The by-laws cannot set a higher percentage.

158

25. Absentee voting*

- Default: s. 171 – if the by-laws allow absentee voting, member not present at a meeting (in person or electronically) can vote. If the by-laws are silent, it is not permitted.
- S. 74 of the draft regulations provides substantial detail regarding voting by: a) proxy, b) mail in ballot or c) means of a telephonic, electronic or other communication facility.

159

25. Absentee voting

- S. 171 - if the by-laws provide for absentee voting by members, the by-laws “shall set out procedures for collecting, counting and reporting the results of any vote.”
- If corporations want to be able to utilize these voting options, they will need to craft by-law language to fit their circumstances after studying s. 171 and the details in the regulations.

160

26. Financial statements

Default: S.172 of the Act and s. 79 of the regulations describe what must appear in a corporation's financial statements.

- S.172 provides that the by-laws (or the articles or a UMA) may require the directors to provide additional financial information on the corporation's operations.
- Most corporations will likely be content with the basic reporting. Some may add more requirements in their by-laws.

161

27. Access to financial statements

Default: s. 175 - specifies that a corporation must send its members a copy, a summary or other reproduction of the financial statements mentioned in s. 172.

- There is a minor decision to make under ss. 175(2). As an alternative, the by-laws can allow the corporation to give notice to members that the financial statements can be accessed at the corporation's office or will be mailed on request.

162

28. Documents in electronic or other form

Default: s. 267 - widely enables the use of electronic documents by corporations (e.g. notices, records).

- It also makes it possible for the by-laws to, in effect, disable the use of electronic documents, and require the use of traditional documentation.
- It would appear an impractical step to narrow options this way in the by-laws.

163

Committees

- The old Act requires corporations to include provisions in their by-laws to address the appointment, removal and powers of committees of directors.
- Each corporation has flexibility under the old Act to establish committees, so long as it does so in a manner consistent with its by-laws.

164

Committees

- The new Act does not explicitly state that committees must be addressed in a corporation's by-laws.
- It is possible with the new Act for the by-laws to be silent on the issue of committees, and for the directors or members to establish them by resolution.

165

Committees

- The new Act refers to both committees of members and committees of directors.
- Committees of directors are more commonly used than committees of members. Both can be utilized under the new Act.

166

Committees

- S. 194 names an audit committee as something a corporation may have.
- It sets out some requirements of such a committee, including its make-up and duty to review the financial statements of the corporation before they are approved by the full board of directors.
- No other committees are specified in the new Act.

167

Committees

- The new Act affirms the capacity of the board of directors to establish other committees and delegate powers to them.
- But not major board responsibilities listed in ss. 138(2) - filling vacancies on the board, submitting questions to members, issuing debt obligations, adopting or changing by-laws, setting dues.

168

Committees

- Many corporations may simply cut & paste current by-law provisions relating to committees into their new by-laws.
- Audit, executive, and human resources committees are commonly established this way, and their membership, mandate, powers, and reporting requirements are often detailed in the by-laws.

169

Committees

- In my view, it is good practice to provide clarity in the by-laws in relation to the core standing committees of the board, and to state that the directors may, by resolution, create and set the terms of reference for other committees as they deem prudent.

170

Conclusion

- The new Act is an improvement. The holes in the old legislation have been filled.
- It will require study, board, staff and member education and some hard work.
- It creates an opportunity to re-visit and strengthen your approaches to governance and your constitutional documents.
- Check the Next Steps slides again.
- Good luck!

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