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

A Guide for Association Staff and Volunteers

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INTRODUCTION

For the approximately 19,000 non-profit organizations and charities in Canada that are federally incorporated, the new Canada Not-for-profit Corporations Act (“the new Act”) is a fundamental change in the legal landscape. The new Act replaces Part II of the Canada Corporations Act (“the old Act”), and creates a new comprehensive legislative and governance framework. The new Act received Royal Assent on June 23, 2009, but has not yet (as of May, 2011) come into force. Staff members at Corporations Canada, the federal government office responsible for the new Act, have indicated that it should be proclaimed into force by Order-in-Council sometime in the fall of 2011. The 2011 election has caused further delay to what has been a long, slow process.

It is essential that the boards of directors and senior staff of all of the organizations incorporated under the old Act (and the handful of organizations incorporated under special Acts of Parliament) become familiar with the new Act in order to ensure that they comply with it. Failure to do so will put the organizations in jeopardy and could, in extreme cases, expose directors and officers to risk and potential liability. Once it is proclaimed into force, these organizations will have three years in order to apply to continue under the new Act. Corporations that fail to do so will be dissolved.

This guide has two purposes. The first is to provide an overview of the new Act that is practical for directors, staff, and members of those organizations continuing under the new Act. The second is to provide detailed guidance on the key documents that organizations need to prepare—articles of continuance and by-laws. Most attention will be paid to the impact of the new Act on by-laws, because each organization will have significant work to do to on its by-laws to comply with the new Act.
BACKGROUND AND SUMMARY

The new Act is a long overdue replacement of the old Act, which is woefully inadequate and full of holes. The old Act dates back to 1917 and it does not reflect the dramatic changes that have occurred since then in relation to Canada’s not-for-profit and charitable sectors. The first attempt to replace the old Act with modern legislation appeared as Bill C-21 in 2004, but it died on the order papers when a federal election was called. It reappeared briefly with minor changes in 2008 as Bill C-62, but again it died when Parliament was prorogued. In January, 2009 it came back as Bill C-4, and this time it was passed by Parliament and given Royal Assent that summer.

The new Act has been modeled in large part on the Canada Business Corporations Act, but is adapted to reflect the critical difference that not-for-profit corporations have members rather than shareholders. Note that an organization created or continued under the new Act is a “corporation.” The new Act uses that term rather than “organization” or “society” and it will be used throughout the rest of this guide.

The new Act and regulations pursuant to it are available online.¹

The new Act is a big improvement over the old. It fills the gaps with modern governance principles and machinery. It is complete, coherent, reasonably clear, and it includes flexibility and unique innovations. Specific improvements include:

- a modern incorporation process;
- clarified duties, powers, potential liabilities, and standard of care for directors;
- expanded and clarified rights and remedies for members;
- flexibility regarding audits and financial reviews; and
- comprehensive procedural details for corporate changes, amalgamations, winding up, and other important events.

¹ The new Act is available on the federal Department of Justice website or http://www.canlii.org/en/ca/laws/stat/sc-2009-c-23/latest/sc-2009-c-23.html. At the time of the writing this guide, the regulations that had not yet received final approval are available through the Canada Gazette website http://canadagazette.gc.ca/rp-pr/p1/2011/2011-02-26/pdf/g1-14509.pdf. Once the regulations receive final approval they will, like the new Act, be available on the federal Department of Justice website or at www.canlii.org.
But the new Act also has some shortcomings. The first is that it is excessively long and cumbersome. More detail could have been moved to the regulations to leave the new Act more streamlined and manageable. A second related shortcoming is that the new Act is, in places, very complex and unfriendly to lay readers. For example, 78 intricate and difficult sections are dedicated to debt obligations and trust indentures (matters that may be of little or no relevance to many organizations) before essential issues such as directors, officers, members, or by-laws are addressed. The new Act could have been organized differently and drafted with greater attention to accessibility for the members and volunteer directors who must comply with it.
STUDYING THE NEW ACT

In order for directors and staff to review the new Act without becoming bogged down in its bulk or complexity, I recommend they study it out of sequence. Some of its most complicated and least practical provisions appear early, and can be avoided. They should focus first on the key substance, which is found in these parts of the new Act:

1. Interpretation and Application
3. Capacity and Powers
9. Directors and Officers
10. By-laws and Members
11. Financial Disclosure
13. Fundamental Changes

Other parts of the new Act can be either skimmed or avoided until they are needed. These parts are low priorities and tough to read:

6. Debt Obligations, Certificates, Registers and Transfers
7. Trust indentures
8. Receivers, Receiver-Managers and Sequestrators
14. Liquidation and Dissolution.
Ten Highlights of the New Act

A Comprehensive Approach
As noted above, the new Act is voluminous and comprehensive. Unlike the old Act, it addresses most aspects of the creation, governance, and dissolution of the corporations to which it will apply. In the old Act, guidance or answers to governance questions often can not be found in the legislation. Instead, it is frequently necessary to turn to the thin case law or the administrative guidance from Corporations Canada for answers expected to be found in the incorporation legislation.

As discussed in more detail to follow, this inadequate legislation led many organizations to adopt comprehensive by-laws. The comprehensive new Act reduces the need for such detailed by-laws. Substantive provisions are now dealt with directly and coherently in the new Act. As you will see, there are still decisions to be made regarding by-law content, but the need to fill legislative gaps is greatly reduced.

Incorporating
The new Act makes it easier for new organizations to incorporate. It adopts the principle and practice of “incorporation as of right,” which means that incorporation is automatic if all of the requirements stated in the new Act are met by applicants. With the old Act, the Minister is required to approve the issuance of letters patent to applicants.

The new incorporation process involves preparing articles of incorporation in the form determined by the Director (the government official appointed under the new Act). If complete and in compliance with the new Act, the Director issues a certificate of incorporation completing the process. It is possible for one person to incorporate instead of the three people required to apply for letters patent under the old Act, and electronic filing will eventually be possible.

Continuing Under the Act
For organizations already incorporated under the old Act, the provisions regarding continuing under the new Act are critical. Sections 211 and 212 of the new Act enable applications in the form of articles of continuance. If the articles take the form fixed by the Director, then “on receipt of articles of continuance, the Director shall issue a certificate of continuance,” which is similar to a certificate of incorporation for a new corporation. It is continuance “as of right.”
Articles of continuance are similar to articles of incorporation, and Corporations Canada will provide precise guidance on the form they must take. The basic elements are: name of the corporation; the province where the registered office is located; membership classes and voting rights; number of directors; a purposes statement and any restrictions on activities; and a distribution on wind-up statement. A notice of the address of the registered office and the names and addresses of directors must also be provided on a separate form.

The new Act provides that from the date of continuance all property rights, legal liabilities, judgments, obligations, causes of action, or legal proceedings involving the corporation are unaffected.

Sections 211 and 212 of the new Act also allow organizations incorporated under other federal legislation, under provincial or territorial law, or even those incorporated outside of Canada to apply for continuance under the new Act if their existing incorporation legislation enables this migration. Conversely, the new Act enables migration from federal jurisdiction to provincial or territorial jurisdiction if the relevant provincial or territorial legislation permits.

Organizations incorporated under the old Act will have three years from the date the new Act comes into force to submit articles of continuance. There will be no government fee for this process. Failure to submit articles within that time may result in dissolution.

The continuance requirement is an opportunity for organizations to update their key governance provisions, such as the purposes statement, membership classes and voting rights, and by-law provisions.

**Soliciting and Non-Soliciting Corporations**

The new Act makes an innovative distinction between soliciting corporations and non-soliciting corporations. Soliciting corporations must meet higher standards in terms of governance and financial accountability.

Subsection 2(5.1) of the new Act (when read in conjunction with the time frames and dollar amounts contained in the regulations) provides that a soliciting corporation is a corporation incorporated or continued under the new Act that has received in a single financial year income in excess of $10,000 in the form of:
• donations or gifts requested from a person who is not a member, director, officer, or employee of the corporation or a family member of such a person at the time of the request;

• grants or similar financial assistance from the federal government, a provincial or municipal government, or an agency of such a government; or

• donations or gifts from another soliciting corporation.

A corporation remains a soliciting corporation for three years. During that time, another fiscal year with such income in excess of $10,000 restarts the three year period. A corporation’s fiscal year end is the date on which this calculation is to be made, while the date of the Annual General Meeting is the effective date regarding this classification.

Corporations that fall outside the definition of soliciting are non-soliciting corporations.

There are five different requirements for the two categories. Soliciting corporations must:

a) have at least three directors, two of whom are not officers or employees. Non-soliciting corporations may have as few as one director;

b) send copies of their annual financial statements and accountant’s reports to Corporations Canada;

c) ensure that on dissolution, any remaining assets are transferred to qualified donees as defined in the Income Tax Act (Canada). These are registered charities, similar listed entities, and government bodies;

d) not utilize Unanimous Member Agreements, a governance tool described below that is available to non-soliciting corporations; and

e) choose from different financial review options than non-soliciting corporations, as described in the next section and the table below.

Corporations continuing under the new Act must be attentive to the distinctions between these categories, and the potential to move between categories as their circumstances change.

Audits

Under the old Act, annual audits are mandatory. This is a hardship for small organizations, for the cost of an audit can be substantial and the practical value added by an audit can be small.
The new Act provides flexibility and clarity regarding financial review requirements. There are now three options, depending on the gross revenue and category of the corporation: a full audit, a review engagement, or no review. The draft regulations adopt the meanings and standards of audit and review engagement that appear in the “Handbook of the Canadian Institute of Chartered Accountants as amended from time to time.” Briefly, a review engagement is a less detailed, less expensive process than an audit, and may be popular with many corporations.

Audits and review engagements must be carried out by qualified and independent public accountants, which includes chartered accountants, certified general accountants, and certified management accountants.

Audits remain mandatory for soliciting corporations with annual revenue greater than $250,000, and for non-soliciting corporations with annual revenue greater than $1 million.

Corporations with lower revenue have choices to make. Soliciting corporations with less than $50,000 annual revenue and non-soliciting corporations with less than $1 million in annual revenue may choose to have no review or audit at all. All members must consent to this decision. Conversely, the members may make audits mandatory by expressly stating so in the articles, by-laws, or by an ordinary resolution.

Soliciting corporations with annual revenue between $50,000 and $250,000 may choose either a full audit or a review engagement. As noted in the following table, provided by Corporations Canada, the new Act includes default positions in the event corporations do not address this matter in their articles, by-laws, or by an ordinary resolution of the members.

<table>
<thead>
<tr>
<th>Type of Corporation</th>
<th>Gross Annual Revenues</th>
<th>No Review</th>
<th>Review Engagement</th>
<th>Audit</th>
</tr>
</thead>
<tbody>
<tr>
<td>soliciting</td>
<td>less than $50,000</td>
<td>optional</td>
<td>default</td>
<td>optional</td>
</tr>
<tr>
<td>soliciting</td>
<td>between $50,000 and $250,000</td>
<td>not possible</td>
<td>optional</td>
<td>default</td>
</tr>
<tr>
<td>soliciting</td>
<td>more than $250,000</td>
<td>not possible</td>
<td>not possible</td>
<td>mandatory</td>
</tr>
<tr>
<td>non-soliciting</td>
<td>less than $1 million</td>
<td>optional</td>
<td>default</td>
<td>optional</td>
</tr>
<tr>
<td>non-soliciting</td>
<td>more than $1 million</td>
<td>not possible</td>
<td>not possible</td>
<td>mandatory</td>
</tr>
</tbody>
</table>

The flexibility in the new Act regarding financial review is a substantial improvement over the mandatory audit requirement in the old Act.
Corporation Powers

Section 16 states that corporations incorporated or continued under the new Act have “the capacity and, subject to this Act, the rights, powers and privileges of a natural person.” This is the modern principle of corporate capacity, and it replaces the long list of powers detailed in the old Act. The text goes on to expressly empower corporations to “carry on activities throughout Canada,” and “in a jurisdiction outside Canada to the extent that the laws of that jurisdiction permit.”

Section 17 is also important, for it states, (1) “It is not necessary for a by-law to be passed in order to confer any particular power on a corporation or its directors,” and (2) “A corporation shall not carry on any activities or exercise any power in a manner contrary to its articles.”

Removing the need for specific by-laws to authorize the directors to exercise a power makes corporate decision making more streamlined and efficient, while the capacity for the members to establish limits on activities and powers in the articles provides members with a substantial tool to set limits or requirements on the directors. This is a fundamental governance balance, and section 17 appears to enable corporations to work that balance out for themselves.

The new Act expressly addresses corporations’ borrowing powers. Section 28 provides that unless the articles, by-laws, or a unanimous member agreement (covered later in this guide) provide otherwise, the directors may, without authorization of the members, engage in basic business activities on behalf of the corporation, including borrowing, issuing debt obligations, giving guarantees, or mortgaging property. The directors can also delegate these powers to a director, committee of directors, or an officer.

Members

The new Act includes a range of changes in relation to the roles and rights of members, and the remedies available to them. Generally, the new Act gives members a greater role and more options in organizational governance.

Voting rights

Section 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 in their articles. This is a critical matter that requires care. At least one class or group of members must be given voting rights. But
Part 13 allows the members in non-voting membership classes or groups to vote on some important matters, such as:

- certain amendments to membership classes, rights, and conditions (section 199);
- decisions to amalgamate or dissolve the corporation (section 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 (section 214).

Note that section 199 gives some scope for the articles to limit these voting rights in some but not all situations. There is no capacity to opt out of these voting rights in relation to decisions under sections 206 or 214.

The idea that non-voting does not really mean non-voting is a controversial innovation. The merits of this change are hard to measure, but it will certainly complicate decision making for corporations with non-voting membership classes of groups if these situations arise.

**Electronic meetings and voting**

Part 10 specifically provides that meetings of members can be held “by means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting” (section 159). While this practice has been permitted by Corporations Canada, the old Act does not expressly authorize it. The new Act also enables electronic voting by members attending the meeting electronically. These are useful tools for organizations with geographically dispersed members.

**Member proposals**

Section 163 provides that a member who is entitled to vote may submit a proposal for discussion at a meeting of members. Member proposals are to be in writing and no more than 500 words, and, with some exceptions, the corporation is obligated to include such proposals in the notice of meeting that is distributed to all members. Member proposals are not to be used to advance personal grievances, debt issues, inconsequential matters, publicity efforts, or issues already considered by the members.
**Unanimous Member Agreements**

Section 170 allows all of the members of a non-soliciting corporation, or all of the members and a third party, to enter into a written agreement that restricts the powers of the directors to manage the corporation. A unanimous member agreement (UMA) allows the powers of directors to be transferred to members or third parties, such as outside managers. Directors relieved of their powers by a UMA are also relieved of their duties and potential liabilities as directors. Members may subsequently rescind a UMA by special resolution (a two-thirds vote).

Section 170 mirrors the power that is given to shareholders in modern business corporation legislation. It is unlikely to be used often by not-for-profit and charitable corporations, particularly those with substantial memberships, because unanimity is difficult to achieve.

**Records access**

The new 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.

Subsection 23(7) also provides members or their personal representatives with access to a 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.” The person requesting access to the member list must submit a statutory declaration promising to comply with these restrictions, and it is an offence under the new Act to misuse this information.

**Recourse to the courts**

The new Act explicitly provides members of a corporation with the right to apply to a court for leave to commence a derivative action—a court action against the directors and officers of the corporation in the name of and on behalf of the corporation. Members may also seek court approval to intervene in a legal action to which the corporation is already a party (Section 251). Similarly, members may seek recourse to the courts in circumstances where the actions of the corporation, its directors, or officers may be oppressive, unfairly prejudicial, or done in unfair
disregard to the interests of the members. The new Act confirms broad powers of the courts to remedy such problems (Section 253).

Somewhat surprisingly, the new Act provides faith-based defences in relation to derivative and oppression actions, in subsection 224(2). The courts are not to grant leave to bring a derivative action or make an order to remedy an oppression if the court is satisfied (a) that the corporation is a religious corporation; (b) the conduct in question is based on a tenet of faith held by the members of the corporation; and (c) it was reasonable to base the conduct on the tenet of faith.

**Directors**
The new Act provides a great deal of detail and clarity regarding the roles, duties, and potential liabilities of directors, and procedural matters for their election and removal. Here is a summary of the key new provisions:

**Directors’ duties**
Section 124 states, “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 the corporation.” This is a standard statement of basic duties that confirms the capacity for the directors to delegate and supervise rather than manage the corporation directly.

**Minimum number of directors**
Under the old Act, the minimum number of directors is three. Section 125 of the new Act varies this limit by stating that a non-soliciting corporation may have as few as one director, 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.” It will be interesting to see whether many non-soliciting corporations choose to operate with a single director.

**Election of directors**
The new Act’s treatment of this issue has generated some controversy. Under the old Act, the by-laws can contain systems for electing or appointing directors, and some corporations have adopted sophisticated appointment processes rather than elections. The new Act curtails the appointment option. Subsection 128(3) states, “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.” The draft regulations state that the prescribed period is four years.

Sections 128(8) and 132 contain what remains of the appointment option. Subsection 128(8) states, “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.”

Section 132(1) gives the directors the power to fill vacancies that may arise on the board of directors in some circumstances. It states, “…a quorum of directors may fill a vacancy among the directors, except a vacancy resulting from an increase in the number or the minimum or maximum number of directors provided for in the articles or a failure to elect the number or minimum number of directors provided for in the articles.” As described below, a corporation’s by-laws may require that vacancies on the board be filled “only by a vote of the members,” or a class or group of members (subsection 132(6)).

Section 130 is noteworthy for its confirmation that the members may, by ordinary resolution at a special meeting, remove any director or directors from office. But if that director was elected by a specific class or group of members, that director may only by removed by ordinary resolution of that class or group of members.

Part 9 contains many other important mechanical details for electing directors that are not addressed in this guide but that must be considered carefully in the governance of corporations. These are details commonly built into by-laws under the old Act that need not be restated in by-laws under the new Act. Care needs to be taken when drafting by-law provisions on topics addressed in the new Act to ensure they do not contradict the legislative provisions, for the legislative provisions prevail over the by-laws unless the legislative provisions expressly state that the by-laws may vary on the topic.

**Delegation**

Section 138 empowers the directors to appoint one of the directors to serve as managing director and to delegate powers to that person. Similarly, the directors can appoint a committee of directors and delegate powers to them. Section 138 lists the limits on the authority of a managing director or managing committee established this way. Section 142 is also important, as it allows
the directors to designate the offices of the corporation, appoint officers, specify their duties, and delegate to them powers to manage the activities and affairs of the corporation. Appointments under this section need not be directors, but can be staff.

**Director liability**

The new Act provides some helpful guidance on the fundamental issue of the potential personal liability of directors for their actions on behalf of the corporation. This is an issue over which there is considerable confusion and worry among some directors. The new Act does not address all situations from which personal liability can arise. These include tort law (e.g., personal injury), criminal law, and a range of other statutes and regulations. See Hugh Kelly’s guide *Duties and Responsibilities of Directors of Not-for-profit Organizations* for a thorough analysis of the potential for personal liability.

The new Act explicitly states in subsection 146(1) that “Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months’ wages payable to each employee for services performed for the corporation while they are directors.” Section 145 states that the directors are similarly liable personally to restore to the corporation any money or other property that is paid or distributed to a member, director, or officer contrary to the new Act.

“Jointly and severally, or solidarily” liable means that directors are individually or mutually responsible for an obligation or debt, and a court may assign liability to one director or apportion it among some or all directors. The new Act allows a director who has paid a claim brought successfully against the directors to recover respective shares from other directors found liable for the claim.

Section 147 confirms the established principle that directors may avoid potential personal liability if they formally dissent to a decision made by their board colleagues. The section provides that a director who is present at a meeting will be deemed to have consented to a resolution unless the director (a) requests a dissent be entered in the minutes, (b) sends a written dissent to the secretary during the meeting, or (c) delivers or sends by registered mail a written dissent immediately following the meeting. A director not present at a meeting will have seven

days after becoming aware of a resolution or action to deliver or send by registered mail a dissent to the decision in question.

**Standard of care**

Section 148 is important, and worthy of repeating here. It states,

“(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.”

This is the modern objective standard of care, and meeting it is the best protection for directors against potential personal liability. The question becomes “Did the director pass the *reasonably prudent person* test?” It replaces the subjective standard under the old Act in which courts inquire as to whether a director’s actions were sufficient given that particular director’s level of experience and knowledge.

Section 149 provides that directors will not be personally liable if they relied in good faith on the financial statements prepared by an officer, a written report of the corporation’s public accountant, or “a report from a person whose profession lends credibility to a statement made by that person.” This is the due diligence defence for directors.

Section 151 addresses the capacity of corporations to indemnify (promise to pay or cover) present and former directors and officers or others acting on the corporation’s behalf against costs and expenses, including settlements or judgments, and to advance funds for that person’s defence. Indemnification is only available if the person in question acted honestly and in good faith with a view to the best interests of the corporation or, in the case of criminal or administrative proceedings, had reasonable grounds to believe his or her conduct was lawful. Indeed, the new Act provides that a person who meets these requirements is entitled to an indemnity from the corporation. It also authorizes, but does not compel, corporations to purchase directors’ and officers’ liability insurance.
Conflicts of interest
The new Act contains clear and complete provisions in relation to conflicts of interest for directors and officers. They are found in section 141, which describes when a conflict of interest exists, the duty to disclose a conflict (including the timing and method of disclosure), and the requirement that a director not vote on a matter where the director is in a conflict. It defines a conflict of interest as “any interest that the director or officer has in a material contract or material transaction, whether made or proposed with the corporation, if the director or officer (a) is a party to the contract or transaction; (b) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or (c) has a material interest in a party to the contract or transaction.”

The section confirms that with proper disclosure and approval of the contract or transaction in question by the other directors, such contract or transaction is valid if it is “reasonable and fair to the corporation.” In the absence of these elements, the director in conflict is accountable to the corporation or its members for any profit realized from the contract or transaction.

The section goes on to expressly provide members with a right to access disclosed documents and portions of minutes of meetings that include disclosures. It also describes the process for the members to approve or confirm, by special resolution, a contract or transaction where the disclosure requirements were not met by the director or officer. If the director or officer in conflict acted honestly and in good faith, makes full disclosure to the members and the contract or transaction is reasonable and fair to the corporation, then the director or officer in conflict will not be accountable to the corporation for profits realized. Finally, the section enables members to have recourse to the courts to set aside a contract or transaction and hold the director or officer in conflict accountable to the corporation for profits.

Record Keeping
Section 21 makes it clear what records corporations must keep, including articles, by-laws, amendments, UMAs, registers of members, directors, officers and debt obligations, minutes of meetings and resolutions of members and committees of members, directors’ minutes and resolutions, and financial records. The section details where and for how long these records must be kept. Section 22 provides details about if and how members and creditors may access various records. This is practical detail that is inadequate in the old Act.
Miscellaneous

The new Act includes other interesting and relevant details and consequences such as:

- clear and complete amalgamation, liquidation, and dissolution provisions;
- clear and complete powers and responsibilities of the Director (the public official given regulatory responsibilities under the new Act);
- description of the role and power of the courts to appoint inspectors to investigate corporations and for the courts to remedy problems;
- a prohibition of *ex officio* and alternate directors;
- the express statement that directors are not trustees for any property of the corporation, including property held in trust by the corporation;
- corporate seals are not required;
- explicit authorization for directors and members to utilize written resolutions; and
- a corporation’s articles or a unanimous member agreement may create special majorities that require a greater number of votes than the new Act requires.
THE REGULATIONS

As noted above, the regulations are, at the time of writing, still in draft form. Final approval will occur in conjunction with the Order-in-Council that brings the new Act into force.

The regulations contain lots of details not included in the new Act. There are over 90 requirements relating to these topics:

- Corporate records and registers
- Electronic documents
- Definition of “soliciting corporation”
- Corporate names
- Notice of meetings of members
- Absentee voting
- Public accountant and financial review
- User fees

Corporations continuing under the new Act should become familiar with the regulations. They are relevant to the preparation of articles of continuance and by-laws and to subsequent operations.
ARTICLES OF CONTINUANCE

A critical document for existing corporations incorporated under the old Act is called the articles of continuance. For new entities this document is called the articles of incorporation. The articles of continuance or incorporation replace the letters patent and must comply with section 7 of the new Act, which lists these required basic elements:

“(a) the name of the corporation;
(b) the province where the registered office is to be situated;
(c) the classes, or regional or other groups, of members that the corporation is authorized to establish and, if there are two or more classes or groups, any voting rights attaching to each of those classes or groups;
(d) the number of directors or the minimum and maximum number of directors;
(e) any restrictions on the activities that the corporation may carry on;
(f) a statement of the purpose of the corporation; and
(g) a statement concerning the distribution of property remaining on liquidation after the discharge of any liabilities of the corporation.”

Of these required elements (c), the member structure and voting rights, is potentially the most complicated and challenging, and should receive substantial attention from each continuing corporation.

Most corporations continuing under the new Act will likely produce articles that just meet these basic minimum requirements. But subsection 7(3) states that “the articles may set out any provision that may be set out in the by-laws,” so it is possible to bolster the articles by adding provisions that would otherwise appear in the by-laws. There appears to be no practical advantage to doing so, as section 197 states that a fundamental change relating to core matters, including those listed in section 7 and others, requires a special resolution of members (a two-thirds majority) regardless of whether those matters are addressed in the articles or the by-laws.
**BY-LAW CHANGES**

**Corporations Canada will no longer review by-laws**

Subsection 155(2) of the old Act includes a list of provisions that must be included in the by-laws of entities incorporated under that Act. Corporations Canada thoroughly reviewed the by-laws of applicants for incorporation, as well as proposed amendments to the by-laws after incorporation to ensure compliance with subsection 155(2). The mandatory by-law matters under the old Act are:

(a) the conditions of membership;

(b) mode of holding meetings, the quorum, rights of voting;

(c) method of repealing or amending by-laws;

(d) appointment and removal of directors, trustees, committees and officers, and their respective powers and remuneration;

(e) audit of accounts and appointment of auditors;

(f) whether or how members may withdraw from the corporation; and

(g) custody of the corporate seal and certifying of documents issued by the corporation.

Under the old Act, by-laws or by-laws revisions that do not pass review by Corporations Canada are rejected and do not take effect.

Under the new Act, Corporations Canada will no longer review by-laws. The new Act requires corporations to file by-laws and amendments with Corporations Canada within 12 months of adoption by the members, but this is a record-keeping function and not a compliance review. It will be left to each corporation to determine whether its by-laws are consistent with the new Act and regulations. This reduces the administrative burden on Corporations Canada, and removes their staff from the difficult, subjective, and sometimes contentious task of assessing by-laws and revisions proposed by corporations.

**By-law Process Clarified**

The new Act clarifies and makes more flexible the process for making or changing by-laws. Section 152 empowers the directors to, by resolution, make, amend, or repeal any by-laws
(except for fundamental changes listed in section 197, which require a special resolution of the members). Changes made by the directors become effective as of the date of the resolution of directors.

Section 152 requires the directors to submit the by-laws, amendments, or repeals to the next meeting of members where they can be confirmed, rejected, or amended by ordinary resolution of the members. Upon rejection by the members, a by-law, amendment, or repeal made by the directors is of no effect. Directors may not re-introduce a by-law that has been rejected by the members.

As outlined below, this approach to by-law making and changing is a default position in the new Act. A corporation may, in its articles, by-laws, or a UMA, vary from it and adopt different procedures for this core function. Some may opt for the approach that by-laws and revisions to them only take affect after receiving approval by special resolution of the members.

**By-law Content**

Section 152 gives broad power to corporations to adopt by-laws to “regulate the activities or affairs of the corporation.” Section 2 includes these definitions:

- “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.

The new Act does not include a list of mandatory by-law content, like section 155(2) of the old Act. The new Act makes just two matters mandatory for the by-laws. As a result, by-laws may range from minimal to substantial. These deliberations and decisions on by-law content will be central to the transition to the new Act.

**Less need for comprehensive by-laws**

A closely related theme arises from the greater governance substance in the new Act compared to the old Act. The old Act is thin when it comes to specific direction as to how organizations are to regulate their activities and affairs. In practice, the many gaps in the legislation have been filled by organizations adopting comprehensive by-laws.
The new Act includes far more substance and detail, which leaves much less to be dealt with in the by-laws. The new Act is clear and conclusive on many matters. For example, subsection 130(1) states, “The members of a corporation may by ordinary resolution at a special meeting remove any director or directors from office.” There will no longer be a 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.

Similarly, section 141 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.

Elsewhere in the new Act options are created that allow a corporation to address matters in its by-laws or articles, or to accept the default positions stated in the new Act. A simple illustration is subsection 126(2) which states, “Unless the by-laws otherwise provide, a director of a corporation is not required to be a member of the corporation.” If a corporation wants to require directors to be members it must expressly vary from the default position stated in the new Act by saying so in the by-laws.

The options in the new Act take different forms and are not all as simple as subsection 126(2). They also appear throughout the new Act, and they can be challenging to find. This guide attempts to identify each of the options where decisions need to be made during the drafting of by-laws and articles of continuance or incorporation for new corporations.

**Mandatory By-law 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.

Subsection 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.”

Membership is clearly of fundamental importance and will be tightly defined in some by-laws. For example, in some corporations, membership might be available only to those with a particular professional designation. In other corporations, membership might be open to any individuals or organizations who apply, pay a fee, and are accepted as members.
Section 154(2) goes on to state 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.

Section 162(1) is not as explicit as section 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. Notice of meetings of members is an important element of governance, because it is fundamental to member participation and internal organizational democracy.

The regulations contain substantial detail on this topic, including manners of giving notice and timing requirements. The regulations refer to delivering notice to members and debt obligation holders by mail, courier, personal delivery, telephonic, electronic, or other communication facility, by posting notice on a notice board in a place frequented by members, and if a corporation has more than 250 members, communicated via a publication (newspaper, or a publication of the corporation). It also specifies different timing requirements for the different methods of notice. Electronic notice will likely be a popular 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 new Act and regulations. If the by-laws do not include a valid option, the statutory default is to that notice must be sent by Canada Post mail or personal delivery to each member.

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 reference to notice of meetings of members. With this extreme minimalist approach, all other governance matters would be left to the Act, the regulations, and articles.

**Optional By-law Provisions**

Following is a list of matters that the new Act explicitly states can be addressed in the corporation’s by-laws if the members so choose. For each of these matters, the new Act provides a default position in the event that the corporation decides not to address them in its by-laws. These matters are presented here in the sequence in which they appear in the new Act, not on the basis of their importance or other factors.
1. **Borrowing powers**

Section 28 gives the directors the power to borrow money on the credit of the corporation, issue guarantees, and take other steps relating to financing the corporation’s activities. Directors are able to exercise these powers without seeking specific authorization from the members. This section also allows the directors, by resolution, to delegate these powers to a director, a committee of directors, or an officer.

This section enables efficiency in the basic business of managing corporations. It removes the need to obtain explicit member approval for each decision to borrow or similar action. This reflects the practice among for-profit corporations, and is a sensible modernization of the law.

This flexibility for directors to borrow or delegate that power is the default position in section 28. The section begins with “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. 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. This is a form of member control that some corporations may validly decide to maintain. But if the articles or by-laws are silent on this issue and the members do not enter into a unanimous member agreement, then the directors will have the autonomy and flexibility regarding borrowing.

2. **Membership dues**

Section 30 states that the directors may require members to pay annual dues or contributions to the corporation, and the directors may set the rates of the dues or contributions. Again, this is the default position, as the section allows corporations to vary from it in the articles, by-laws, or a UMA. Some corporations may want the members to exercise this power and may build different mechanics into the by-laws.

3. **Investments**

Section 33 states, “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 default position gives directors maximum autonomy and flexibility when it comes to deciding how to invest corporate funds.
But the members can decide to limit that flexibility by adopting restrictive terms in the articles or by-laws. These limits might be specific, for example requiring investment in Canada savings bonds or term deposits at the local credit union. Alternatively, the by-laws or articles could state principles for the directors to follow, such as ethical or local investment, or a general investment goal or strategy. Another variation is a by-law that requires the directors to prepare an investment policy or plan for review and approval by the members.

4. **Membership liens**

   Section 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. Subsection 36(3) provides that a corporation may enforce such a lien “in accordance with its by-laws.” This means that corporations that wish to pursue liens on memberships will need to authorise it in the articles of continuance and include enforcement provisions in the by-laws. It appears that if the by-laws are silent on this matter, such liens will be unenforceable.

5. **Directors as members**

   Subsection 126(2) states that unless the by-laws provide otherwise, directors of a corporation need not also be members. From a governance perspective, there is no right or wrong on this point, but in order for a corporation to require directors to also be members, the by-laws must say so.

6. **Director statement**

   Section 131 states, “(1) Subject to the by-laws, 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 in the interest of transparency and accountability, but there is a choice to be made as to whether a corporation wishes to vary from this requirement in its by-laws.

7. **Board vacancies**

   Section 132 is important and practical from a governance perspective. It gives a quorum of directors the power to fill a vacancy on the board of directors, with some exceptions. The section also describes the situations where a special meeting of members needs to be called to elect a director to fill a vacancy. Further, it clarifies that vacancies among directors from a class of
members can be filled by the remaining directors from that class or, in some situations, by a vote of the members of that class.

Subsection 132(5) allows a corporation to establish in its by-laws that vacancies on the board of directors can only be filled by vote of the members or by vote of the respective class of members. Each continuing corporation will need to consider these mechanics carefully. Having the directors fill vacancies can be a convenience, but for some organizations geographic or other representation on the board and the process of election by members are paramount concerns.

8. **Director meetings**

Subsection 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 corporations can include requirements regarding the place directors shall meet and the notice for calling meetings in either the articles of continuance or 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.

9. **Directors’ quorum**

Subsection 136(2) empowers corporations to build the board meeting quorum into their articles or by-laws and it includes this default position: “a majority of the number of directors or minimum number of directors required by the articles constitutes a quorum at any meeting of directors…” A specific quorum number in the articles or by-laws is inflexible and could cause difficulty, while 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 subsection 136(2) or by building it into the by-laws.

10. **Directors’ meeting content notice**

Subsection 136(3) is short but rather complicated. It states, “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.”

The matters referred to in subsection 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 or by-laws; and (f) the setting of member dues or contributions.

The by-law choice created by subsection 138(2) is 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. 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 agendas identifying the matters to be considered at the meetings, but matters not included in the agendas provided with the notices may, with the consent of the directors, be added to the agendas and considered by the directors.”

11. **Electronic participation in board meetings**
Subsection 136(7) allows participation in meetings of directors or committees of directors to be by “means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting.”

This practical provision is subject to the by-laws. It seems unlikely that corporations might include by-law language that negates this option, even if they do not take advantage of the convenience it provides. Conversely, some corporations may decide to expand upon this provision in their by-laws, perhaps 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.

12. **Consensus decision making**
Section 137 allows the by-laws of a corporation to adopt a system of consensus decision making for the members, the directors, or both. If such a system is adopted, the by-laws must define the meaning of consensus, provide a way to determine when consensus cannot be reached, and establish the manner of referring matters to a vote if consensus cannot be achieved. If the by-laws do not include these elements, consensus decision making cannot be used.
13. **Designation of officers**
Section 142 gives the directors 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…”

The section is subject to the articles, by-laws, or any UMA, so corporations may decide to vary from this broad power and role for the board in relation to these matters. Under the old Act Corporations Canada insists that the designation of offices and description of the basic responsibilities of each office must appear in the by-laws. Many corporations continuing under the new Act may decide to continue with this approach—if it has been working for them—simply by carrying over the officer provisions in their existing by-laws into their new by-laws. Others may choose to go with the default position and let the directors deal with all matters relating to officers.

14. **Remuneration**
Subsection 143(1) empowers the directors to “fix the reasonable remuneration of the directors, officers and employees of the corporation.” The default position is that a resolution of the directors is sufficient for this task, but this section includes the phrase “subject to the articles, by-laws or any unanimous member agreement,” so variation is possible.

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 of a corporation is properly left to the directors (or the CEO/ED), and changes to that relationship in the by-laws would complicate governance.

Subsection 143(2) provides additional detail by specifically authorizing 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.” For example, this enables a director to take on a specific contractual task for the corporation that is beyond the director’s duties as a director and be paid a fee and expenses for that additional work. This provision is also subject to the by-laws, so variation from it is an option.

Charities need to cautious when it comes to remuneration for directors because provincial legislation varies on whether it is permissible.
15. **Indemnification for expenses**

Section 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 is unusual to do so.

16. **Directors and by-laws**

As mentioned above, section 152 clarifies and improves the process for making or changing by-laws. It empowers directors to make, amend, or repeal any by-laws, except for fundamental changes listed in section 197. Directors must submit the by-laws, amendments, or repeals to the next meeting of members where they can be confirmed, rejected, or amended by the members. Section 152 begins with “Unless the articles, the by-laws or a unanimous member agreement otherwise provides,” so corporations may vary this default power and process. Some may decide to stay with the more traditional governance approach that all by-laws require approval of the members before they take effect. There is no right or wrong approach to this matter, but careful attention must be paid to ensure that future by-law changes are completed in compliance with the approach the corporation adopts. Failure to pass a special resolution for a fundamental change will render that change invalid and could cause unwelcome complications.

17. **Membership termination**

Section 156 states that “Unless the articles or by-laws of a corporation otherwise provide, a membership is terminated when (a) the members 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.”

This section allows corporations to customise the termination provisions in the articles or by-laws. Some corporations may want to add further triggering events; for example, the loss of a relevant professional designation, termination of membership in a related organization, or geographic relocation.

Section 157 also deals with termination: “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 (e.g., golf clubs) will vary from this default position where a member is entitled to a refund of an initiation fee when membership ends.
18. **Disciplining members**

Section 158 empowers corporations to build into their articles or by-laws the power to authorize “the directors, the members or any committee of directors or members of a corporation” to discipline or terminate the membership of a member. If this power is built into the articles or by-laws, it must include description of the circumstances and manner in which it may be exercised. Corporations that decide to take advantage of the power to discipline should give careful thought to the drafting of 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 to speak to the matter.

19. **Place of meetings of members**

Subsection 159(1) of the new Act is quite simple: “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.” It seems sensible to give the directors the capacity to decide where meetings of members will be held, so staying silent on this matter in the by-laws seems a reasonable choice.

20. **Electronic participation in meetings of members**

Subsection 159(4) states that “unless the by-laws state otherwise,” 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 Act to be present at the meeting.” This provision is essential 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 its by-laws.

21. **Costs of including a proposal**

Subsection 163(4) provides additional detail regarding the new power for members to make proposals that raise matters for discussion at a meeting of members. It provides that the member who submits a proposal shall pay any cost of including the proposal (and any supporting statement by the member) in the notice of the meeting “unless it is otherwise provided in the by-laws or in an ordinary resolution of the members present at the meeting.”
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.

22. Quorum for meetings of members
Subsection 164(1) states that the by-laws may establish the quorum for meetings of members, and if the by-laws do establish the quorum, they must comply with the regulations. Section 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.”

Subsection 164(2) provides this default position: “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.

There is another choice to be made regarding quorum. Subsection 164(3) provides that “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.

23. Voting
Sections 165 deals with the fundamental issue of voting at meetings of members. It creates a default position that should work well, but again this section includes the phrases “subject to the by-laws” and “unless the by-laws otherwise provide” which will allow variation. Subsections 165(1) and (2) confirm the standard practice that voting at a meeting of members is by show of hand unless a ballot is demanded by a member entitled to vote.

Subsection 165(3) enables more sophisticated voting methods. It says, “Despite subsection (1), unless the by-laws otherwise provide, any vote referred to in that subsection may be held, in accordance with the regulations, if any, entirely by means of a telephonic, an electronic or other communication facility, if the corporation makes available such a communication facility.” Section 71 of the draft regulations provides this additional detail regarding these voting facilities.
They must a) enable the votes to be gathered and verified, and b) permit tallying of the votes without the corporation to identify how each member or group of members voted.

These alternatives to a show of hand or old-fashioned paper ballot may be helpful to corporations with large numbers of members attending meetings of members. Subsection 165(4) addresses voting by members who are participating in a meeting of members by electronic means rather than in person. It too allows voting by means of telephonic, electronic, or other communication facility. Similarly, the draft regulations also 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.

24. **Requisition of a meeting of members**
Section 167 deals with the capacity of voting members to require or requisition the directors to call a meeting of the members to deal with corporation business. The by-law issue to consider is whether the organization wants to lower the percentage of voting members needed to requisition such a meeting from the 5 percent identified in the Regulations. Section 167 provides that requisition may be triggered by a lower percentage of members if that percentage is set out in the by-laws. The by-laws cannot set a higher percentage. The default position of 5 percent seems reasonable.

25. **Absentee voting**
Section 171 is also important for member voting. It deals with members who are not in attendance (in person or electronically) at meetings of members. This section allows corporations to specify in their by-laws that absentee voting is permissible and that some or all of the voting methods described in the regulations may be used. Section 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.

The issue of absentee voting by members requires careful attention when it comes to drafting by-laws, for the default position (in the event that the by-laws are silent) is that these voting methods cannot be used. If corporations want to use these voting options, they need to craft by-law language to fit their circumstances after studying section 171 and the details in the regulations.
26. **Financial statements**
Section 172 addresses the financial reporting that the directors must ensure occurs at each annual meeting of the corporation. This is central to director accountability and good governance. This section refers to details in the regulations, and section 79 of the draft regulations lists what must appear in the financial statements. Section 172 provides that the by-laws (or the articles or a UMA) may require the directors to provide further financial information on the corporation’s operations than listed in the regulations. Most corporations will likely be content with the basic reporting required by the regulations, but some, perhaps with complex financial circumstances, may customize their annual financial reporting requirements in their by-laws.

27. **Financial statements access**
Section 175 of the new Act specifies that the corporation must provide its members with a copy, a summary, or other reproduction of the financial statements mentioned in section 172. There is a minor decision to make under subsection 175(2), which allows the by-laws to provide that instead of sending financial statements or a summary to members, the corporation may give notice to members that the financial statements can be accessed at the corporation’s office or will be mailed to the requesting member.

28. **Documents in electronic or other form**
Section 267 is found in Part 17, and addresses and widely enables the use of electronic documents by corporations. Section 267(a) 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.

**Other By-law Matters**

**Committees**
The old Act requires corporations to include provisions in their by-laws to address the appointment, removal, and powers of committees of directors. It does not force corporations to adopt a particular committee structure or to assign specific roles and responsibilities to committees. Instead, each corporation has the flexibility to establish committees, so long as it does so in a manner consistent with its by-laws. The new Act takes a somewhat different approach to committees.
One difference is that the new Act does not explicitly state that committees must be addressed in a corporation’s by-laws. It is possible for the by-laws to be silent on the issue of committees, and for the directors or members to establish them by resolution.

A second difference is that the new Act refers to both committees of members and committees of directors. Committees of directors are more commonly used than committees of members, and both are mentioned in the new Act and can be used.

A third difference is naming an audit committee as something a corporation may establish, but it is not mandatory. If it is established, an audit committee “shall be composed of not less than three directors, a majority of whom are not officers or employees of the corporation or any of its affiliates,” and shall review the financial statements of the corporation before they are approved by the full board of directors (section 194).

No other committees are specified in the new Act, but it affirms the capacity of the board of directors to delegate most powers to committees, except the major board responsibilities listed in subsection 138(2) to:

“(a) submit to the members any question or matter requiring the approval of members;

(b) fill a vacancy among the directors or in the office of public accountant or appoint additional directors;

(c) issue debt obligations except as authorized by the directors;

(d) approve any financial statements referred to in section 172;

(e) adopt, amend or repeal by-laws; or

(f) establish contributions to be made, or dues to be paid, by members under section 30.”

Many corporations continuing under the new Act will likely build detailed reference to various committees into their new by-laws. This may involve simply cutting and pasting current by-law provisions relating to committees into the new by-laws, perhaps with minor modification. 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. By-
laws may also expressly enable the board of directors to establish other committees and delegate functions to them.

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

**Regional, provincial, and local branch structures**

Many corporations incorporated 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.

The following examples briefly illustrate some of the options.

- A single corporation incorporated under the old Act that establishes offices in each province or major city and tightly controls all of the activities of each office through delegation of tasks and reporting requirements. This is the most centralized approach.

- A single corporation incorporated under the old Act as with the first example, but with a system of director elections based on regional, provincial, or local representation.

- Separately incorporated organizations in each province that have their own boards of directors, staff, and offices that take on tasks delegated to them by the national or central board of directors or agreed upon by the various parties.

- A central corporation incorporated under old Act that has as its members separately incorporated regional, provincial, or local organizations rather than individuals. With this decentralized approach, branches can maintain control of the central corporation by electing its directors (or appointing under the old Act) and by assigning functions to the central corporation as the members decide. For example, the member organization may decide to maintain autonomy on a wide range of operational matters, but assign to the central corporation a narrow role, such as federal government relations or national fundraising campaigns.

There is no right or wrong approach to structure. But adopting and successfully managing a branch structure can be difficult, for the balance between central control and branch autonomy
tends to be a constant source of tension and challenge for many corporations that operate over a large geographic area.

The new Act says even less about branch structures than it does about committees. There are just two references:

- Subsection 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...”

- Section 44 allows corporations that issue debt obligations to maintain “branch debt obligations registers” in places other than the registered or central office.

The new Act leaves it to each corporation to create its own structure as it deems appropriate. 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 create specific legislative provisions that add value. This brief approach in the new Act appears to be sensible, though clearer authorization to continue or to create structures that do not otherwise violate the Act would be helpful.

The articles of continuance must identify the basic elements of the structure, including membership classes and voting rights, and the structural details should be built into the by-laws. Many corporations may simply transfer their current by-law structure language into their new by-laws, or they may make minor modifications to it. Other corporations may use the transition to the new Act as an opportunity to make substantial changes to the nature and function of their structures. This is a fundamental issue that will require careful deliberation by corporations continuing under the new Act.
CONCLUSION

The transition to the new Act will require attention, care, and effort on the part of directors and staff in the corporations to which it will apply. The governance principles and practices they build into their articles of continuance and by-laws are critically important.

Here are the five recommended steps to continuing under the new Act as summarized by Corporations Canada:

1. Review your letters patent and by-laws.
2. Prepare articles.
3. Create by-laws.
4. Get members’ approval.
5. File the required documents with Corporations Canada.

Some additional practical tips to complete this work are:

- Start the process early. Begin by studying the new Act in the sequence described above, reviewing the regulations and supporting materials from Corporations Canada, and identifying potential complications and key decisions. The three-year transition period allows plenty of time for those corporations that do not procrastinate.

- Create a transition team. A working team of key staff and directors should be assigned the task of working through the details and making recommendations to the board and ultimately the members. Outside help may be worthwhile either on the transition team or in an advisory capacity.

- Create a transition plan. The transition team should be assigned the task of developing a plan with a timeline and assignment of responsibilities.

- Recognise that each corporation is unique. Standard articles and by-laws will not capture these unique qualities.

I recommend that the work involved in transitioning to the new Act be viewed as a constructive opportunity to re-examine and renew the purposes, governance, and other fundamentals of the corporation. It should also be recognised as an opportunity to sharpen the understanding and
skills of directors and staff. These are all valuable outcomes that are in addition to the more complete and coherent modern governance regime contained in the new Act.
ABOUT THE AUTHOR

Richard Bridge is a lawyer based in Nova Scotia’s Annapolis Valley. His primary area of practice is charity and non-profit law. His clients are a wide range of charitable organizations, foundations, non-profit organizations and philanthropists across Canada.

Other areas of work include co-operative development and public sector organizations and issues. Richard has worked internationally and has created courses and taught in these areas at the University of Victoria Law School and the British Columbia Institute of Technology. He has given public workshops and training sessions in every province in Canada.

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