Recent Changes to Federal and Provincial Statutes Affecting Charities*

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This article will consider the substantive (and some administrative) changes to the *Canadian Corporations Act* and the *Ontario Corporations Act* since the introduction of the business corporation acts. Some brief references will also be made to changes in regulations, except for those changes relating to such purely administrative matters as fees and forms.

The *Canada Corporations Act*

Most of the amendments made since 1971 have related to such matters as the titles of the courts having jurisdiction. By Sections 35 and 36 of Chapter 26 of the 1985 Statutes, certain changes were made to the rights and duties of those authorized to make inspections pursuant to Section 114 and, in Sections 85 to 87 of that chapter, the minimum age for incorporators and directors was reduced from 21 to 18.

The regulations under this *Act* are concerned, for the most part, with the matters of fees and forms and, of course, reference should always be made to the most up-to-date version.

In addition to the *Act* and regulations, there exists a substantial (both in size and effect) compendium of Directorial policy which affects nonshare capital corporations. This material has been in existence for some time in various editions and the current version became effective in April of 1988. It must be remembered that the policy does not have legislative authority—the result of this is that, while the policy allows (or in some cases, even directs) that bylaws contain certain provisions, there is no guarantee that any such provisions are effective or accomplish the intended effect. For example, the business corporations acts specifically authorize the creation of an Executive Committee to which the powers of the board may be delegated, but no such provision appears in the *Canada Corporations Act*; however, such a provision is allowed by the policy. This raises the question: If an executive committee so "authorized" by the policy made a decision, would it have the same effect (or, indeed any effect) as if the same decision had been made by the board of directors?

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In April of 1988, Industry Canada published lists of the portions of its (then) policy which would not be amended, the portions which would be amended, and the portions which would be deleted because of lack of statutory authority, in each case giving reasons for not changing, changing, or deleting. The reasons are as interesting as the individual provisions.

A. Sections of the Policy Which Would Not Be Amended

Alternate Directors

There were some requests to allow alternate directors, especially in national organizations with regional representation. Consideration was given to the duties and responsibilities (and even liability) of directors and how these matters would be affected if alternate directors were to be allowed. The Directorate decided that, even if the provision of alternate directors was considered advisable, it should be done by legislative amendment.

Unequal Voting by Directors

This provision was again raised with respect to large organizations where some regions had many more members than others. The Directorate was concerned that unequal voting might induce some directors to take less interest in the affairs of the organization because they felt that their votes were not important. The Directorate did not consider, however, the basic corporate rule that *all* directors must make decisions in the best interests of the corporation as a whole and that, therefore, none should consider that they represent any sector of the membership which might have interests differing from those of the corporation.

Officers

Since procedural certainty may well be of more importance in the nonprofit field than in the business world, it was felt that there should be some statements in bylaws as to the powers and responsibilities of officers, rather than leaving the matter to be decided by the directors and not incorporated into the bylaws.

Executive Committee Meetings

Here again, the Directorate felt that procedural certainty was advisable. Accordingly, the bylaws will still have to give (at least some) detail about the composition, powers, and quorum of the executive committee.

Quorum

There appears to have been some concern over the use of "at least" in setting the quorum for a meeting of members or directors. Some felt that this might give the directors the power to set a larger quorum later without amending the bylaws. The final decision was to require that the bylaws continue to set out the quorum for both directors and members meetings. I suggest that the Ontario rule, which requires that at least two-fifths of the directors may constitute a quorum, is appropriate. As far as members meetings are concerned, I see nothing wrong with providing for a quorum of two – I realize that this appears

low, but, if proper notice be given, the purpose of a meeting should not be frustrated because of lack of a (large) quorum.

B. Sections of the Policy That Were Amended

Detailed Voting by Ballot (for Directors)

The bylaws may now include a provision that an absent director may vote by ballot if the matters set out in detail on the ballot are identical to the motion before the board. I find this a provision of doubtful validity because it almost encourages directors to make up their minds in advance—they would not be able to hear or take part in any discussion. The directors who vote by ballot are not counted as part of the quorum. The directors who vote by ballot must receive *all* the background material before the vote and the bylaws must specify how far in advance of the meeting this material must be received. Surely properly organized telephone meetings of directors should make this provision unnecessary.

Decision-Making by Consensus

The use of consensus is becoming more and more popular. The department decided that consensus could be used, provided that the bylaws defined "consensus" (it might be different for each organization) and also set out procedures as to how any matter might be decided by a vote if consensus were not reached. In the material, it was not suggested that the bylaws provide for a time within which consensus must be reached before a vote could be taken—this could be included in the definition. One problem which can arise with respect to the use of consensus is that someone who is honestly opposed to a matter may feel pressured to agree in order to reach consensus.

Meetings by Conference Call (or other electronic means)

The former policy required that all directors consent (in advance) to the holding of meetings by conference call. The new policy will require the bylaws to provide that a number of the directors (to be specified in the bylaws) consent in advance to the use of conference calls, that each director must have equal access to the means of making the call, and that the method of ensuring security be set out. The usual provisions with respect to minutes and the taking of votes will also apply. There remains the question as to whether conference calls can be allowed (the business corporations acts have specific authority permitting them). The Directorate felt that the general statutory provision requiring the bylaws to set out the method of holding meetings was sufficient to allow for telephone meetings.

Fettering Discretion

The Directorate decided that there should be no provision allowing any director, group of directors or members to restrict the powers of the board with respect to matters given to the board by statute or bylaws.

Notice of Meetings
There was considerable discussion about how notice of members meetings could be given—by individual mailed notice, by newspaper advertisement, or otherwise. The policy now allows notices to be posted in places where members usually congregate (social club premises, places of worship, etc.), by oral notice in the same type of premises if the oral notice is followed by written notice in a newsletter or, if there are more than 100 members, by advertisement in a newspaper. Electronic notice (fax or e-mail) will also be permitted.

Number of Directors
As a result of a number of submissions, the Directorate amended the policy to provide that neither a fixed number nor a fixed range for the number of directors would be required (there must be at least three). The bylaws must state how the number of directors is to be determined (by formula, by the directors, by the members, or some combination of these methods). There appears to be no requirement that the members be kept informed of the number of directors as it changes from time to time.

Auditor
The policy still requires an audit (the *Act* does not permit waiver of audit). The qualification for an auditor may vary from province to province. Unless *all* the members consent, the auditor may not be a director, officer, employee, or someone associated with such person.

Pecuniary Gain
The Directorate admitted that this was a difficult point. The policy now allows transfer of funds to a member to carry out activities of the corporation, transfer to a member charity for the same purpose, transfer to a member who is a legitimate beneficiary of the corporation's purposes, and transfer to a member or director as compensation for services but remember the *Humane Society* case in Ontario. [(1986), 60 O.R. (2d) 236 (H.C.J.). A "Case Comment" can be found at 7 *Philanthrop.* No. 3, pp. 12–16.]

Provisions Deleted for Lack of Statutory Authority

Clause Dealing with Distribution of Assets on Dissolution

Since this is not listed in Section 155(1) of the *Act*, it was determined that there was no authority for it. However, the policy will point out the CCRA requirements with respect to charitable property on dissolution.

Consent of Person Who is Stated in the Filed Bylaws to be a Member
Since there is no authority for this requirement, it has been deleted.

Written Resolutions
No reason was given for this deletion except that it has been determined that there was no authority to allow it.

Mail Ballots
The deletion of this provision should not prove to be a problem because proxies are allowed. Voting by mail ballot is not voting "at a meeting," but the use of proxies is.

Annual Meeting to be Held in Canada
Deleted, but the bylaws must contain a general reference as to the time and place of the annual meeting.

Removal of Directors
The old policy provided that this was not necessary in the case of annual elections or where the members and directors were the same persons. This modification has been removed so that all bylaws must contain a provision about the removal of directors.

Remuneration of Directors
The Directorate has determined that the minister cannot require the bylaws to provide that remuneration of the directors be not unreasonable. Keep in mind the situation with regard to the remuneration of directors of charities.

Note:
In July of 2000 the Corporate Law Policy Directorate of Industry Canada produced a paper which indicated that (again) there is consideration being given to the drafting of a new *Canadian Corporations Act.* The paper asks a number of questions and considers several models for the new act – the *CBCA, the California Corporations Code,* the Ontario Law Reform Commission Model, the *Saskatchewan Non-Profit Corporations Act,* the Alberta draft *Act,* and others. The Directorate has organized consultations about a new act.

The *Ontario Corporations Act*

The Ontario *Business Corporations Act* was first passed in 1970. As a result, many felt that the *Ontario Corporations Act* no longer applied to what might be considered "ordinary" share capital corporations, but see Section 2 of the *OBCA:* that *Act* does not apply to several types of companies, including those whose objects are in whole or in part of a social nature, co-operative corporations, some insurance companies, and credit unions. I am not sure of the meaning of "in whole or in part of a social nature", but those who act for clubs should, perhaps, reconsider and decide which act does apply.

Unlike the situation with respect to the *Canadian Corporations Act,* there have been a number of amendments to the *Ontario Corporations Act,* none of them earth-shaking but many of them helpful to those of us who practise in the field. This article will mention and comment on those amendments passed since 1993 which affect charities and other nonshare corporations.

Section 80 has been amended to allow a corporation to indemnify officers as well as directors but the Public Guardian and Trustee (PGT) still considers any such indemnity of directors of a charity to be a benefit to the directors and

therefore not allowable without a court order (or perhaps in accordance with the regulations to be enacted under the *Charities Accounting Act*, if they ever come into force). Also see Section 133(2.1) which provides that Sections 80 and 96.1 do not apply to a corporation to which the *Charities Accounting Act* applies.

Section 96.1 now exempts a corporation from the audit requirement for any year in which the corporation has an annual income of less than $10,000 and where all the members consent in writing to the exemption. This exemption will probably have limited application because of the income limit and the requirement of written consent from *all* the members—any one member can, in effect, require an audit.

Section 118 now provides that letters patent may be issued to any corporation to which Part V applies (insurance corporations) or that has objects within the jurisdiction of the Province of Ontario. This amendment removes the specific types of objects but also removes the clause "or that are of any other useful nature". Does this deletion have any significance, i.e., does it imply that objects within the jurisdiction of the Province of Ontario may not be useful?

There is a new 119(3) which provides that, while bylaw provisions may appear in the letters patent, a provision for the election of directors in rotation may not. See subsections 287(2) and (5).

Section 124 now allows an unincorporated association to be a member. This (perhaps) ends the argument as to whether such an association is a "person" and could, therefore, be allowed to become a member.

Section 130(1) has been difficult (if not impossible) to understand (I once had to get an opinion from the Director of the Companies Branch about its meaning), so the revised subsection is welcome. The drafting of bylaws to cover the situation contemplated by the section has never been easy but now it will be less difficult.

The reason for the six-month limit after approval by the members for the making of an application for supplementary letters patent was never obvious to me. Now that limit has been removed by the deletion of Section 131(5).

The amendment to Section 132 by the deletion of the requirement to file and advertise a bylaw about the distribution of assets to a charity on dissolution may well mean that a number of organizations are no longer in technical breach of the *Act*. Is it in the public interest for the existence of such a bylaw to be advertised?

Section 133(1) now includes Section 96.1 as one which applies to nonshare corporations, but subsection (2.1) provides that it and Section 80 do not apply to a corporation to which the *Charities Accounting Act* applies.

All previous restrictions on landholding have been removed by amendments to Section 275(b) and the deletion of Section 276. Section 8(1) of the *Charities Accounting Act* still restricts the landholding power of a charity to land "for the actual use or occupation for the charitable purpose". Strictly interpreted, this could mean that no charity could rent (or own) expansion space. It is hoped that the PGT would interpret (and act on) this section with discretion and use it only to prevent a charity from becoming a "land bank". Sections of this type reflect our medieval outlook in that there are no restrictions on the acquisition of personal property, except the requirement that it be used for charitable purposes. We still refer to land as "real" property and, therefore, by implication at least, consider other property to be of lesser importance.

The amendments to Section 277 no longer require the filing of notice and advertisement of a change in the address of a head office. While this removes another technical offence, it might have been appropriate to require some filing of notice of a change of head office because it could be several months before the corporation was required to file the usual return and, until that return is filed, the public might have difficulty in finding the corporation.

Section 278 has been deleted, so that social clubs no longer have to obtain prior permission to move their head offices.

Section 279 now makes a corporate seal optional.

Telephone meetings of directors are now allowed by Section 283 (3.1). Many organizations have been using telephone meetings for years and (usually) confirming and ratifying "decisions" made on the telephone at the next regular meeting of the board.

Directors' and officers' liability insurance is the subject of subsections (5) and (6) of Section 283. Subsection (5) gives corporations the power to purchase the insurance and subsection (6) takes that power away from charities unless they comply with the regulations under the *Charities Accounting Act* (if there ever are any) or get a court order. The practice is not clear—is it necessary to get a new court order each time the insurance is renewed or will one court order do forever? What happens if the board is increased—is a new court order required? The problem can be resolved if the directors pay for the insurance themselves or somehow arrange other coverage at no cost to the charity.

Because of the amendments to Section 285 it is no longer necessary to file or advertise a change in the number of directors of a corporation—another case of removing a technical requirement which was probably more observed in the breach than in the observance.

The amendments to Section 287 now allow the bylaws to provide for the election of directors other than annually and for the election and retirement of directors in rotation.

The former restriction to the first year of a corporation's existence in Section 298 with respect to signed resolutions has now been removed. This may legitimize what many corporations have already been doing.

Section 304(3) now allows a corporation to keep its records at some location other than its head office, provided that they are electronically accessible at the head office during normal business hours.

Section 318 has been replaced and now includes in considerable detail what actions and other matters can survive the dissolution of a corporation and the effect of such actions.

Section 322 provides for the automatic escheat to the Crown of any undisposed property of a dissolved corporation but there are provisions relating to the use of the property to satisfy debts of the corporation or to carry out a power of sale procedure.

New Section 326.1 now gives the Minister (not the Lieutenant-Governor) the power to set fees and prescribe forms.

Regulations

Most of the regulations cover such matters as forms and fees, but the following deserve special mention:

- 625/93 contains special provisions about corporate names;
- 177/94 sets out certain requirements for the continuation of a corporation in another jurisdiction;
- 38/94 removes the requirement for a NUANS search on application for revival of a corporation but the consent of the PGT is required;
- 563/98 sets out the extra fee payable for fast incorporation;
- 43/00 contains specific requirements for corporations using the word "veteran".

Preapproved Objects

The PGT and the Ministry have settled on certain "preapproved" charitable objects clauses. If a preapproved object is used, no prior clearance of the application by the PGT is required. In addition, the preapproved objects have received, at least, provisional approval by the Charities Directorate of the Canada Customs and Revenue Agency. This could mean faster than usual granting of charitable registration under the *Income Tax Act*—subject, of course, to appropriate statements of activities, budget and other supporting material.

Legislation in Provinces Other Than Ontario

What follows are brief comments on the incorporation of nonprofit corporations in the other provinces of Canada with, in most cases, specific reference

to whether the incorporation is as of right or in the discretion of some issuing authority. [This is, of course, only a guide. Readers should also seek legal advice from those with local expertise.]

Alberta
So long as the application conforms to the rules and regulations, incorporation seems to be as of right. Corporations may use a standard set of bylaws—or use their own, provided that such bylaws contain the required provisions.

British Columbia
If the Registrar approves of the application then incorporation seems to be as of right.

Manitoba
The consent of the Minister is required before incorporation. I interpret this as not being incorporation as of right.

New Brunswick
The Minister may agree to incorporation—not as of right.

Newfoundland
Incorporation seems to be as of right but certain conditions must be met.

Nova Scotia
Provided the Registrar approves, incorporation is as of right.

Prince Edward Island
Seems to be as of right. A nonprofit organization can have a numbered name.

Quebec
The Minister must be satisfied before incorporation can take place.

Saskatchewan
Seems to be incorporation as of right.