

### federal not-for-profit corporations face radical change

The not-for-profit (“NFP”) sector’s plea for a comprehensive, modern corporate enabling statute has finally been answered.

Part II of the *Canada Corporations Act*, last substantially revised in 1919, has long been recognized as outdated, cumbersome and filled with gaps. On June 23, 2009, Bill C-4, the *Canada Not-for-profit Corporations Act* (“New Act”) received Royal Assent. The unofficial best estimate as to when the New Act will come into force is early 2011.

The New Act will radically overhaul the regulation and governance rules affecting more than 17,000 federally incorporated NFP corporations, and the many more provincial and territorial NFP corporations that will have the option of continuing under the New Act.

The New Act and associated regulations entail a steep learning curve. It will be useful for all federal NFP corporations to become familiar with the new rules in the coming months.

#### the New Act

The New Act builds on the well-developed standards of modern corporate governance that are found in the *Canada Business Corporations Act*, the statute that governs the federal for-profit sector.

The New Act contemplates:

- a streamlined as-of-right incorporation process that will reduce the regulatory burden on the NFP sector relating to NFP incorporations and amendments,
- the ability of NFP corporations to enjoy the rights, powers and privileges of a natural person, enabling them to engage in any activity subject only to voluntary restrictions contained in their articles of continuance or articles of incorporation and other applicable laws (e.g., the *Income Tax Act* for registered charities),
- new rules on board composition, financial reporting, audit and liquidation of residual assets that are based on a corporation’s annual revenue and sources of funding,

- a new explicit standard of care for directors and new rules (and defences) for director liability,
- new governance rules that permit written resolutions in place of meetings and allow corporations to avail themselves of certain technological advances, such as teleconference meetings, improving the efficiency of meetings, and
- new rules permitting members access to certain information to both monitor director activities and enforce their rights.

The New Act is intended to be flexible enough to meet the needs of large and small corporations, while providing the accountability and transparency necessary to maintain public trust and confidence in the NFP sector.

The New Act will not affect the tax-exempt status of federal NFP corporations that have charitable status, and does not by itself play a determining role on whether a corporation qualifies as a charity or as a NFP corporation under the *Income Tax Act*.

Since the beginning of 2007, Ontario has been working on a comprehensive overhaul of its *Corporations Act*, which now governs more than 50,000 Ontario NFP corporations. We can reasonably expect that the new Ontario Act will draw liberally from the New Act. Other provinces and territories will likely follow. If there is an inordinate delay at the provincial and territorial levels in enacting modern NFP statutes, there might be some migration of NFP corporations from older provincial and territorial governance regimes to the New Act.

## what will you need to do?

When passed into law, federal NFP corporations will have three years to file articles of continuance with Corporations Canada to obtain corporate status under the New Act. Federal NFP corporations that do not file articles of continuance within the three-year period are liable to be dissolved (after being notified).

Federal NFPs will have to overhaul their letters patent (which will be replaced by articles) and by-laws to conform to the New Act and to avail themselves of the new modern rules that will foster greater efficiency and facilitate governance best practices.

NFP corporations formed under provincial or territorial laws may apply to Corporations Canada for continuance under the New Act if allowed by the laws of their home jurisdiction.

For federal Special Act corporations, the New Act must be examined closely to determine to what extent, if any, the New Act applies to them.

## how can we help?

If you would like to:

- better understand the implications of the New Act,
- continue under the New Act, to avoid dissolution,
- develop a new corporate governance framework, taking advantage of the modern rules under the New Act that facilitate governance best practices, or
- develop checklists, templates and tools to assist you in implementing governance best practices,

we would be pleased to assist.

by Wayne Gray and Lydia Wakulowsky

For more information, contact any of the lawyers listed below:

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### a cautionary note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted. © McMillan LLP 2009.