Submission on Proposed Regulations for *Canada Not-for-profit Corporations Act*

NATIONAL CHARITIES AND NOT-FOR-PROFIT LAW SECTION
CANADIAN BAR ASSOCIATION

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500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | info@cba.org | **www.cba.org**

PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Charities and Not-for-Profit Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Charities and Not-for-Profit Law Section of the Canadian Bar Association.

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Submission on Proposed Regulations for *Canada Not-for-profit Corporations Act*

I. INTRODUCTION

The National Charities and Not-for-Profit Law Section of the Canadian Bar Association (CBA Section) commends Industry Canada on its initiative to modernize the legal framework governing federally incorporated not-for-profit corporations and supports its efforts to implement a regulatory regime more in keeping with contemporary practices for their oversight. However, the CBA Section recommends changes to the proposed regulations to make them less ambiguous and more fair.

CBA is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. CBA seeks to improve the law and enhance the administration of justice. The CBA Section represents lawyers from across Canada who advise or serve on the boards of charitable and not-for-profit organizations. The CBA Section welcomes the opportunity to participate in consultations on the proposed regulations for the new *Canada Not-for-profit Corporations Act* (CNCA).

The proposed changes are intended to make the regulations easier for Industry Canada to administer and to minimize the compliance burden placed on federal not-for-profit corporations constituted or operating under the legislation. It is our view that clarifying and streamlining some proposed provisions will better achieve the government's purposes. The changes CBA proposes are also in keeping with the evidence-based, cost effective and accessible approach to regulation promoted by the government.[1]

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1 *Cabinet Directive on Streamlining Regulation* (Ottawa, 2007) accessed on August 18, 2010 at: http://www.tbs-sct.gc.ca/ri-qr/directive/directive01-eng.asp.

II. BACKGROUND

Any cost-benefit analysis of the proposed regulations or assessment of their potential to promote efficiency and effectiveness needs to be grounded in a thorough understanding of the characteristics of Canada's not-for-profit sector.

Many not-for-profit corporations, especially those constituted primarily for public rather than member benefit, have very few staff or financial resources available to meet compliance requirements. Research indicates that about 42% of Canadian not-for-profit corporations have revenues of less than $30,000. Further, about 21% of these corporations have revenues above $30,000 but less than $100,000. About 16% of them have revenues above $100,000 but less than $250,000, 8% have revenues above $250,000 but less than $500,000 and about 5% have revenues above $500,000 but less than $1,000,000. Only approximately 6% have revenues above $1,000,000 but less than $10,000,000. Finally, only one percent have revenues over $10 million.[2] Some 54% of these organizations have no paid staff, and another 26% have fewer than 5 employees.[3]

Not-for-profit corporations frequently rely heavily or exclusively on volunteers.[4] Research indicates that often mid-size corporations face greater capacity problems than either very large or very small organizations.[5] For example, they may lack administrative systems and technology. Such capacity constraints may be one reason underlying a finding in a 2009 study that more than 35% of registered charities use cash rather than accrual accounting.[6]

The capacity issues raised by the modest revenues and staffing of many of these corporations are well-recognized, and steps have been taken by some government bodies to recognize this in their regulatory approach. For example, the Canada Revenue Agency has acknowledged the need to reduce the compliance burden related to maintaining charitable registration in light of

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2 *Highlights of the National Survey of Nonprofit and Voluntary Organizations* (Statistics Canada: Ottawa, 2004) at p. 22.

3 *Ibid*, p. 36.

4 *Ibid*, p. 33.

5 *Ibid*, p. 45.

6 S.M. Ayer, M. Hall and L. Vodarek, *Perspectives on Fundraising* (Imagine Canada: Toronto, 2009) at p. 6.

the limited capacity typical of many small and rural charities.[7] The CBA Section recommends that a number of provisions of the proposed regulations be modified to better reflect the capacity challenges faced by many not-for-profit corporations. In particular, the CBA Section is strongly of the view that the proposed $10,000 threshold for becoming a soliciting corporation should be raised, in order to protect small not-for-profit corporations that receive modest grants from being subject to additional regulatory burdens.

III. SPECIFIC CHANGES

The CBA Section recommends seven changes to the proposed regulations.

1. Clarify corporate records provisions in sections 2(1)(c), 2(2)(c), and 2(3)(c) of the proposed regulations.

The section is concerned that the current language does not sufficiently clarify that members, directors and officers are effectively consenting to the use of their email address for a variety of statutory purposes, including its inclusion on the corporate register and the receipt of notice of meetings of members by electronic means under section 63 of the proposed regulations. This should be made clear, given legitimate privacy concerns related to email addresses, and the frequency with which personal email addresses may change. The CBA Section therefore recommends that in sections 2(1)(c), 2(2)(c), and 2(3)(c), the words "receiving information or documents by electronic means" be deleted, and replaced with the words "the use of this information in accordance with the provisions of *the Act*".

2. In Section 15, provide discrete tests for corporations constituted for public benefit, and for corporations constituted for member benefit.

Section 15 deals with dispensing with the filing requirement of an individual or class of corporations. In our view, additional guidance about the criteria that will be used to determine 'public interest' is needed to help corporations assess their position under s. 285 and other sections of the *CNCA* using this term. Such criteria could either be specified in the regulations or in separate guidance. Because many not-for-profit corporations do not have the resources to access legal counsel, it is imperative that these criteria be as transparent as possible. Separate tests could be provided respecting prejudice to the public interest and relating to prejudicing member interest.

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[7] Canada Revenue Agency, *Small and Rural Charities: Making a Difference for Canadians* (Canada Revenue Agency: Ottawa, 2009) at pp. 13-17.

3. In Section 16(a) and 16(b), calculate soliciting corporation provisions based on the corporation's fiscal year rather than the annual general meeting.

The CBA Section recommends that the words "to the third annual meeting of members following that date" in 16(a) be struck and replaced with "to six months after the end of the third subsequent fiscal year", and that the words "the first annual meeting of members following the last fiscal year" be struck and replaced with "six months after the end of the last fiscal year." It is our view that dating changes from the annual meeting will result in confusion and that the better approach is to calculate soliciting corporation status based on the corporation's fiscal year, and then allow a six month period for the organization to make any required adjustments to its corporate structure arising from a change in its status.

4. In Section 16(d) and section 37, increase the prescribed threshold for becoming a soliciting corporation.

The prescribed amount of $10,000 related to becoming a soliciting corporation is too low. Both in terms of transfers among not-for-profit corporations and from government, $10,000 represents a very modest grant or contract — often requiring the authorization of mid-level or junior, rather than senior, staff. A more appropriate figure would be $50,000, or alternatively the lesser of $50,000 and 50% of a corporation's total revenues. Such a contribution would frequently be used for a specific small-scale project or for the immediate purchase of goods or services (for example, computer equipment or software), as it typically does not represent a meaningful amount with respect to staffing costs. This would reduce the possibility of modest-size corporations becoming soliciting corporations, and being subject to the resulting compliance obligations and their attendant costs, merely owing to their having received a small one-time grant.

5. In Section 74, make using proxies more attractive.

The section sets out prescribed methods of voting for the purposes of CNCA s.171(1) and the parameters for use of proxies. Under Regulation 74(1), a corporation may adopt any of the prescribed methods in its by-laws. If it adopts proxies pursuant to Regulation section 74(1)(a), then the use of proxies must comply with the provisions of Section 74(2). Many not-for-profit corporations do not want to permit proxies and would not provide for them in their by-laws.

However, for organizations which would consider the use of proxies, we recommend changes to s.74(2) which, in our view, would encourage corporations to adopt them. In the preamble, delete "who are not required to be members" and insert "who may, if the by-laws so provide,

be required to be members". The language in the draft is a significant reason for many organizations not adopting the use of proxies. Also, add the following as paragraph (h):

> The directors may by resolution fix a time not exceeding forty-eight hours, excluding Saturdays and holidays, preceding any meeting or adjourned meeting of members before which time proxies to be used at that meeting must be deposited with the corporation, and any period of time so fixed shall be specified in the notice calling the meeting.

This will address the concern that someone may attend a meeting without prior notice with several proxies and attempt to push through a significant resolution or make changes to the board.

6. In Section 80(1) and 80(2), make the threshold for soliciting corporations $100,000 rather than $50,000.

In these sections, amounts related to becoming a designated corporation and triggering use of a public accountant are prescribed. We support the $1,000,000 threshold provided in the legislation for non-soliciting corporations. As noted above, many mid-size organizations struggle more with capacity challenges than either very large or very small corporations. Assuming audit fees of $5,000-10,000 annually, a corporation with revenues over $100,000 devoting five to ten percent of its income to a public accountant rather than to its core mandate is more justifiable than a corporation with $50,000 in revenue devoting twice that much. High administrative costs incurred by charities or non-profit corporations have been subject to criticism in the media.[8]

7. In Section 84, increase the threshold for review engagement to $500,000 from $250,000.

This section deals with the prescribed amount for a soliciting corporation that is not a designated corporation being eligible for a review engagement rather than a full audit**.** The default requirement at this revenue level is for an audit by a public accountant, and a review engagement may only be selected by a super-majority vote of members. Many corporations will therefore end up commissioning a full audit. Only about 8% of not-for-profit corporations have revenues between $250,000 and $499,999. Close to half of those will have four or fewer paid staff, and even where well-staffed will typically have limited administrative capacity, so increasing the threshold would significantly alleviate the compliance burden on a small

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[8] See, for example, R. Cribb, "The high cost of sports charities", *The Toronto Star*, April 24, 2010 accessed on August 17, 2010 at: http://www.thestar.com/news/investigations/article/800061--star-investigation-the-high-cost-of-sports-charities

corporation while leaving corporations with more substantial income still subject to the provision.

IV. CONCLUSION

The changes proposed by the CBA Section, with respect to the membership registry, the criteria used for *CNCA* s. 285 dispensations, thresholds and proxy voting eligibility, would significantly improve the draft regulations. The changes proposed would make them less ambiguous and would better take into account sector capacity and practice. These changes would lessen the administrative burden on government and streamline the administrative requirements imposed on not-for-profit corporations. They also accord both with the broad policy goals of the legislation and with the government's commitment to streamlined, evidence-based and cost-effective regulation.