

## Summary

### **Part 9 - Directors and Officers (Sections 125 - 152)**

This Part identifies the number of directors a corporation must have, who may serve as a director, the process of appointment and duties of directors and officers.

A corporation may incorporate with only one director, but if it wishes to solicit funds from outside parties, it must have at least three, two of whom are not officers or employees of the corporation or its affiliates. Directors must be legally competent and do not, absent provisions in the by-laws, need to be members of the corporation. Directors have specific duties on incorporation. (Sections 125-128)

The Part establishes the procedures regarding the election and removal of directors, participation at meetings, matters for which directors are responsible and expenses incurred by directors. (Sections 129-141, 144-145)

One of the significant features of the Act is the provision of clearly stated duties and defences for corporate directors. Circumstances in which directors may incur personal liability are clearly established. They include insufficient consideration for the issue of debt instruments, payments to members or of indemnities contrary to the Act, and liability for employees wages in the circumstances set out in the Act, among others. Directors' defences are also established. If a director properly dissents to a resolution that would otherwise create a liability, the director will not be liable. The duties of a director to act honestly and in good faith, to avoid conflicts of interest, to exercise the standard of care that a reasonably prudent person would and to comply with the Act, the articles, by-laws and unanimous members agreements are clearly stated in this Part. Accompanying these duties is a due diligence defence. This defence establishes that exercising all care, diligence and skill that a reasonably prudent person in comparable circumstances would have exercised will relieve a director of liability. There are procedures for indemnification of directors and officers in case of a lawsuit. (Sections 142, 146-152)

It is crucial for a corporation to have good directors with a clear view of what their duties and responsibilities are. Directors are charged with the oversight of a corporation's management and, therefore, are ultimately responsible for the way the corporation is run. The provisions in this Part are in keeping with modern governance standards and, as such, should help corporations coming under the jurisdiction of this Act attract good directors who have a clear view of the role they are to fulfill. The provision of clear statements of a director's duties and a properly defined defence in situations that may result in liability are significant benefits to the new Act.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

<b>Bill Clause No.</b>	<b>Section No.</b>	<b>Topic</b>
125	125	Directors and Officers

**Proposed Wording**

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

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**Rationale**

This section empowers the directors of a corporation to manage or to supervise the management of the activities and affairs of the corporation. The directors' power to manage are governed by the provisions of the Act, the articles of incorporation of the corporation and any unanimous member agreement, if one is in place.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
126	126	Directors and Officers

**Proposed Wording**

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

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**Rationale**

This section allows a non-soliciting corporation to operate with a minimum of one director. However, a soliciting corporation must have at least three directors. (A soliciting corporation is defined as a corporation which in the current year or within any preceding period that is prescribed (3 years), requested donations, money or property from the public, received financial assistance from a government or a government agency, or accepted money or other property from a corporation or other entity which is a soliciting corporation.) It is reasonable to require soliciting corporations to have larger boards of directors to help ensure public confidence in the sector and that financial accountability and transparency are maintained. As well, existing Canada Revenue Agency (CRA) rules require a minimum of three directors for organizations who wish to be classified as charities. This provision harmonizes with the CRA requirements for charities while providing the necessary flexibility to allow one director corporations. This is particularly the case for private foundations and religious organizations. For example, a wealthy benefactor may wish to set up a corporation to administer his or her wealth according to his or her wishes. In this situation, the one member – one director corporation would be the appropriate vehicle.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
127	127	Directors and Officers

**Proposed wording**

127. (1) The following persons are disqualified from being a director of a corporation:

- (a) anyone who is less than eighteen years of age;
- (b) a person who has been found incapable by a court in Canada or elsewhere;
- (c) a person who is not an individual; and
- (d) a person who has the status of a bankrupt.

(2) Unless the by-laws otherwise provide, a director of a corporation is not required to be a member of the corporation.

(3) No person shall act for an absent director at a meeting of directors.

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**Rationale**

This section sets out the eligibility criteria for becoming a director. This provision is consistent with section 5 dealing with the qualifications of incorporators.

Under subsection 127(1), a individual under 18 years of age, a person found to be of unsound mind, an undischarged bankrupt or a corporation can not act as directors. A person found to be incapable can not act as a director as they lack legal capacity in the eyes of the law. Likewise, an undischarged bankrupt can not act as a director since their capacity over financial matters is assumed by a bankruptcy trustee. As well, the possibility of having a body corporate as a director is precluded.

Subsection 127(2) dispenses with a statutory requirement that a director must be a member of the organization for which they are acting as director. However, the by-laws of the corporation can impose a membership requirement on directors. This requirement should be a matter determined by the corporation and its members.

Subsection 127(3) bars any person from acting for an absent director at a meeting of directors.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
128	128	Directors and Officers

**Proposed Wording**

128. (1) After the issue of the certificate of incorporation, the directors of a corporation shall hold a meeting at which the directors may

- (a) make by-laws;
- (b) adopt forms of debt obligation certificates and corporate records;
- (c) authorize the issue of debt obligations;
- (d) appoint officers;
- (e) appoint a public accountant to hold office until the first annual meeting of members;
- (f) issue memberships;
- (g) make banking arrangements; and
- (h) transact any other business.

(2) Subsection (1) does not apply to a body corporate to which a certificate of amalgamation has been issued under subsection 206(4) or to which a certificate of continuance has been issued under subsection 209(5).

(3) An incorporator or a director may call the meeting by giving notice of the time and place of the meeting to each director within the prescribed period.

(4) A director may waive notice of the meeting, and attendance of a director at the meeting is a waiver of notice of the meeting, except if the director attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

(5) If all directors sign a resolution dealing with any matter referred to in paragraphs (1)(a) to (g), they are not required to hold the meeting referred to in subsection (1).

(6) A copy of the resolution shall be kept with the minutes of the meetings of directors.

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**Rationale**

This section deals with the organizational or first meeting of directors after the corporation comes into existence.

Subsection 128(1) lists the majority of business generally undertaken in the organization process in order to eliminate any doubt as to the breadth of the powers of directors at the organizational meeting. It empowers the first directors to effect all formal arrangements necessary to enable a new corporation to begin its operations.

Subsection 128(2) states that subsection 128(1) does not apply to corporations which are formed by an amalgamation of two or more existing corporations or to corporations which continue into (migrate from another jurisdiction to) the new Act.

Subsection 128(3) is self-explanatory. The prescribed period is proposed at not less than 5 days.

Subsection 128(4) allows a director to waive the required notice of the meeting. It also states that a director's attendance at the meeting is considered a waiver of notice. However, attendance at the meeting is not considered a waiver of notice when the director attends the meeting to object to any business being conducted on the grounds that the meeting is not lawfully called (e.g., proper notice of the meeting was not given).

Subsection 128(5) gives statutory sanction to a practice that is frequently represented in a corporation's by-laws. It states that directors can, in lieu of having a formal meeting, sign a written resolution. The signed resolution is valid as long as it is signed by all the directors who are entitled to vote on the resolution at a meeting of directors. This practice provides flexibility to corporations and directors in that formal meetings of directors are not required to conduct business and can be replaced, from time to time, by having directors sign a written resolution.

Subsection 128(6) is self-explanatory.

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### **Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
129	129	Directors and Officers

**Proposed Wording**

129. (1) At the time of sending articles of incorporation, a notice of directors in the form that the Director fixes shall be sent to the Director.

(2) Each director named in the notice holds office from the issue of the certificate of incorporation until the first meeting of members.

(3) Members shall, by ordinary resolution at each annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of members following the election.

(4) It is not necessary that all directors elected at a meeting of members hold office for the same term.

(5) A director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of members following the director's election.

(6) Despite subsections (2), (3) and (5), if directors are not elected at a meeting of members, the incumbent directors continue in office until their successors are elected.

(7) If a meeting of members fails to elect the number or the minimum number of directors required by the articles by reason of the lack of consent, the disqualification, the incapacity or the death of any candidates, the directors elected at that meeting may exercise all the powers of the directors if the number of directors so elected constitutes a quorum.

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

(9) An individual who is elected or appointed to hold office as a director is not a director, and is deemed not to have been elected or appointed to hold office as a director, unless

(a) the individual was present at the meeting when the election or appointment took place and did not refuse to hold office as a director; or

(b) the individual was not present at the meeting when the election or appointment took place and

- (i) consented to hold office as a director in writing before the election or appointment or within the prescribed period, or
  - (ii) has acted as a director after the election or appointment.
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## **Rationale**

This section deals with the election, the appointment and the terms of directors of the corporation.

Subsection 129(1) requires that the incorporators of the corporation send to the Director Appointed Under the Act a list of first directors of the corporation at the same time as they send the articles of incorporation. The filing of the names of the first directors of the corporation provides a public record.

Subsection 129(2) states that the first directors hold office until the first meeting of members.

Subsection 129(3) states that members must elect directors, by ordinary resolution (50% plus one), and permits directors to hold office for a term not longer than three years.

Subsection 129(4) permits staggered terms for elected directors so that the continuity in the board can be assured.

Subsection 129(5) states that where a term is not stated when a director is elected, the director holds office until the close of the following annual meeting of members.

Subsection 129(6) provides that where directors are not elected at a member's meeting, the incumbent directors continue as directors until such time that new elections are held.

Subsection 129(7) permits a partial board to function, so long as there is a sufficient number of directors elected to constitute a quorum, where the election of a full board has been rendered impossible because of lack of consent, disqualification, incapacity or death.

Subsection 129(8) allows directors to appoint one or more additional directors if the articles so provide and the number of directors so appointed does not exceed one-third of the number of directors elected at the previous annual meeting. The appointed director(s) can only hold office until the next annual meeting of members. This provision provides directors the flexibility to appoint additional directors in situations where an insufficient number are elected.

Subsection 129(9) states that an individual has to consent to being a director, whether through the election process or by an appointment. This ensures that individuals are not elected or appointed as directors against their will and without their consent.

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## **Present Law**

None.

**An Act Respecting Not-for-Profit Corporations and  
Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
130	130	Directors and Officers

**Proposed Wording**

130. (1) A director of a corporation ceases to hold office when the director dies, resigns, is removed in accordance with section 131 or becomes disqualified under section 127.

(2) A resignation of a director becomes effective at the time a written resignation is sent to the corporation or at the time specified in the resignation, whichever is later.

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**Rationale**

This section codifies the events that terminate the office of a director and stipulates the effective date of resignation of a director.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
131	131	Directors and Officers

**Proposed Wording**

131. (1) The members of a corporation may by ordinary resolution at a special meeting remove any director or directors from office.

(2) A director elected by a class or group of members that has an exclusive right to elect the director may only be removed by an ordinary resolution of those members.

(3) A vacancy created by the removal of a director may be filled at the meeting of the members at which the director is removed or, if not so filled, may be filled under section 133.

(4) If all of the directors have resigned or have been removed without replacement, a person who manages or supervises the management of the activities or affairs of the corporation is deemed to be a director for the purposes of this Act.

(5) Subsection (4) does not apply to

(a) an officer who manages the activities or affairs of the corporation under the direction or control of a member or other person;

(b) a lawyer, a notary, an accountant or other professional who participates in the management of the corporation solely by providing professional services; or

(c) a trustee in bankruptcy, receiver, receiver-manager or secured creditor who participates in the management of the corporation or exercises control over its property solely for the purpose of the realization of security or, in the case of bankruptcy, the administration of a bankrupt's estate.

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**Rationale**

This section deals with members' rights to remove directors before the expiration of their term of office.

Subsection 131(1) gives members of a corporation the inherent right to remove any director from office by passing a ordinary resolution (50% plus 1). This is a statutory right that can not be qualified by the by-laws or articles of the corporation.

Subsection 131(2) is designed to protect the right of classes or groups of members with respect to the election of directors where the class or the group has the exclusive right to elect directors.

The provision states that directors elected by a class or group of members can only be removed from office through the passage of an ordinary resolution by the members of the class or group.

Subsection 131(3) establishes alternative procedures to fill a vacancy resulting from a removal of a director.

Subsection 131(4) designates the person who is managing or supervising the management of the corporation as a director should all directors be removed or resign from office. This provision ensures that the corporation has at least one person with the responsibilities and liabilities of the directors.

Subsection 131(5) exempts certain individuals from being designated or deemed a director under subsection 131(4). The exemption applies to an officer of the corporation who is taking direction from a member or other person, professionals assisting management by providing advice, bankruptcy trustees, receivers, receiver-managers, and secured creditors who participate in the management of the corporation when the corporation is insolvent or in bankruptcy proceedings.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
132	132	Directors and Officers

**Proposed Wording**

132. (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.

(2) A corporation shall immediately give notice to the members of the statement in the manner referred to in section 162.

(3) A corporation shall immediately send a copy of the statement to the Director.

(4) No corporation or person acting on its behalf incurs any liability by reason only of complying with this section.

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**Rationale**

This section addresses a director's right to provide a statement with regard to his/her resignation or removal from office.

Subsection 132(1) permits a director, subject to the by-laws of the corporation, to submit to the corporation a statement explaining the reasons why he/she is resigning from office or the reasons why he/she should not be removed from office if a meeting of members is called for that purpose.

Subsection 132(2) states that should a director submit a statement to the corporation, the corporation is obligated to provide notice of the statement to the members in accordance with section 162 (i.e., that members are given notice of the time and place of the special meeting, that the material provided to the members must be sufficiently detailed to allow members to make a reasoned judgement on the matter and that the text of any resolution to be submitted at the meeting be provided to the members).

Subsection 132(3) requires that the corporation, without delay, send the Director Appointed Under the Act the statement written by the director regarding his/her resignation or removal from office.

Subsection 132(4) provides immunity to the corporation or any person acting for the corporation with respect to the circulation of the director's statement, including immunity from defamation.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
133	133	Directors and Officers

**Proposed Wording**

133. (1) Subject to subsections (4) and (5), 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.

(2) If there is not a quorum of directors or if there has been a failure to elect the number or minimum number of directors provided for in the articles, the directors then in office shall without delay call a special meeting of members to fill the vacancy and, if they fail to call a meeting or if there are no directors then in office, the meeting may be called by any member.

(3) If a corporation has neither directors nor members, the court may, on the application of an interested party, make an order appointing the required number or minimum number of directors provided for in the articles.

(4) If any class or group of members has an exclusive right to elect one or more directors and a vacancy occurs among those directors,

(a) subject to subsection (5), the remaining directors elected by the class or group may fill the vacancy, except a vacancy resulting from an increase in the number or the minimum or maximum number of directors provided for in the articles for that class or group or from a failure to elect the number or minimum number of directors provided for in the articles for the class or group; or

(b) if there are no remaining directors, any member of the class or group may call a meeting of the class or group to fill the vacancy.

(5) The by-laws may provide that a vacancy among the directors shall be filled only by a vote of the members, or by a vote of the members of any class or group having an exclusive right to elect one or more directors if the vacancy occurs among the directors elected by that class or group.

(6) A director appointed or elected to fill a vacancy holds office for the unexpired term of their predecessor.

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**Rationale**

This section sets out alternative procedures for filling a vacancy of a director. The provisions are

designed to ensure the corporation has a sufficient number of directors without the provisions being used to override the members' right to elect the majority of the directors.

Subsection 133(1) permits the directors, if there is a quorum, to fill a vacancy among the directors so long as the by-laws of the corporation do not expressly prohibit it and the vacancy is not specifically attached to a class of members. Also, the vacancy can not be filled if it is due to an increase in the number or the minimum or maximum number of directors or a failure to elect the number or minimum number of directors.

Subsection 133(2) states that if there is no quorum of directors or if the minimum number of directors is not elected then the directors must forthwith call a special meeting of members so that the vacant director's seat can be filled. If the directors do not call such a meeting, any member can call a meeting of members to fill the vacancy.

Subsection 133(3) allows an interested party to petition the court, if there are no directors or members, to order the appointment of the required or minimum number of directors as provided in the articles.

Subsection 133(4) provides that if there is a vacancy among directors representing a class of members, the other directors representing that class can fill the vacancy, so long as the by-laws of the corporation do not expressly prohibit it. However, the vacancy can not be filled if it is due to an increase in the number or the minimum or maximum number of directors or a failure to elect the required number or minimum number of directors. Moreover, if there are no remaining directors representing the class of members, any member of the class can call a meeting of the class so that the vacancy can be filled.

Subsection 133(5) states that the by-laws of the corporation may provide that only the members have the right to fill a vacancy among the directors by a vote of members, whether it is filling a vacancy for a director-at-large or for a director representing a specific class of members.

Subsection 133(6) provides that a director who is appointed or elected to fill a vacancy only holds office for the unexpired term of their predecessor.

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### **Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
134	134	Directors and Officers

**Proposed Wording**

134. (1) The members of a corporation may amend the articles to increase or decrease the number of directors, or the minimum or maximum number of directors, but no decrease shall shorten the term of an incumbent director.

(2) If the members at a meeting adopt an amendment to the articles of a corporation to increase or decrease the number or minimum or maximum number of directors, the members may, at the meeting, elect the number of directors authorized by the amendment, and for that purpose, despite subsections 200(1) and 274(3), on the issue of a certificate of amendment the articles are deemed to be amended as of the date the members adopt the amendment.

(3) If a minimum and maximum number of directors is provided for in the articles, the members may, from time to time by ordinary resolution, fix the number of directors of the corporation and the number of directors to be elected at annual meetings of the members or delegate those powers to the directors. No decrease in the number of directors shall shorten the term of an incumbent director.

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**Rationale**

This section permits members to change the number of directors of the corporation.

Subsection 134(1) allows members to pass a special resolution (2/3 majority) amending the corporation's articles to increase or decrease the number of directors or to increase or decrease the minimum or maximum number of directors. In any event, no decrease in the number of directors can shorten the term of an incumbent director.

Subsection 134(2) provides that where members amend the articles to increase the number of directors, the members may elect the additional number of directors authorized by the amendment at the same meeting. This alleviates the necessity to hold two meetings, one to amend the articles to change the number of director and another to elect the additional directors.

Subsection 134(3) states that where the minimum and maximum number of directors is contained in the articles, the members, by ordinary resolution (50% plus 1), determine the number of directors and the number to be elected at annual meeting of members. Moreover, the members can resolve to delegate these powers to the directors. This permits the members to

adjust to the changing circumstances of the corporation. However, no decrease in the number of directors can shorten the term of an incumbent director.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

<b>Bill Clause No.</b>	<b>Section No.</b>	<b>Topic</b>
135	135	Directors and Officers

**Proposed Wording**

135. (1) A corporation shall send to the Director a notice, within the prescribed period and in the form that the Director fixes, setting out any change among its directors or of the address of a director.

(2) A director shall, within the prescribed period, send the corporation a notice of any change in his or her address.

(3) The court may, on the application of an interested person or the Director, make an order requiring a corporation to comply with subsection (1) and make any further order that it thinks fit.

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**Rationale**

This section ensures that timely information is available with respect to the identity of the directors of the corporation.

Subsection 135(1) requires the corporation to send the Director Appointed Under the Act, within a prescribed period (proposed at 15 days), any change in the corporation's directors and their addresses.

Subsection 135(2) obliges a director to notify, within a prescribed period, the corporation of a change in his/her address. The proposed prescribed period is 15 days.

Subsection 135(3) empowers any interested person or the Director to force the corporation to file the notice of the change in directors required under subsection 135(1). This is important because, under subsection 270(2), a former director is deemed to continue to be a director until the notice of change is filed with the Director.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
136	136	Directors and Officers

**Proposed Wording**

136. A director is entitled to attend and be heard at every meeting of members.

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**Rationale**

This section is self-explanatory. It ensures that the directors have the ability to keep the members informed of the affairs of the corporation.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
137	137	Directors and Officers

**Proposed Wording**

137. (1) Unless the articles or by-laws otherwise provide, the directors may meet at any place and on any notice that the by-laws require.

(2) Subject to the articles or by-laws, a majority of the number of directors or minimum number of directors required by the articles constitutes a quorum at any meeting of directors, and, despite any vacancy among the directors, a quorum of directors may exercise all the powers of the directors.

(3) A notice of a meeting of directors shall specify any matter referred to in subsection 139(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.

(4) A director may waive notice of a meeting of directors, and attendance of a director at a meeting of directors is a waiver of notice of the meeting, except if the director attends a meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

(5) Notice of an adjourned meeting of directors is not required to be given if the time and place of the adjourned meeting is announced at the original meeting.

(6) If a corporation has only one director, that director may constitute a meeting.

(7) Subject to the by-laws, a director may, in accordance with the regulations, if any, and if all the directors of the corporation consent, participate in a meeting of directors or of a committee of directors by means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting. A director so participating in a meeting is deemed for the purposes of this Act to be present at that meeting.

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**Rationale**

This section deals with meetings of directors. Specifically, it contains provisions on the location of meetings of directors, what constitutes a quorum of directors, what the notice requirements are and whether meetings of directors can be held through electronic means.

Subsection 137(1) states that a meeting of directors can be held anywhere as long as there is no restrictions of the meeting place in the by-laws of the corporation.

Subsection 137(2) provides that, subject to the corporation articles or by-laws, a quorum for a meeting of directors is a majority of directors or the minimum number of directors as required by the articles. Moreover, as is standard practice in corporate law, a quorum of directors can exercise all the powers of the directors.

Subsection 137(3) requires that the notice of meeting specify any matter mentioned in subsection 139(2) to be dealt with at the meeting. However, unless the by-laws of the corporation otherwise provide, the notice of meeting does not have to explicitly specify the purpose of the meeting or the business to be dealt with at the meeting.

Subsection 137(4) allows a director to waive the required notice of the meeting. It also states that a director's attendance at the meeting is considered a waiver of notice. However, attendance at the meeting is not considered a waiver of notice where the director attends the meeting to object to any business being conducted on the grounds that the meeting is not lawfully called (e.g., proper notice of the meeting was not given).

Subsections 137(5) and (6) are self-explanatory.

Subsection 137(7) provides that directors may participate in a meeting of directors or of a committee of directors by means of a telephonic, electronic or other communication facility to the extent that such means permit all participants to communicate adequately with each other, in accordance with the regulations, if any. This allows directors to conduct meetings using modern communication methods.

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### **Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
138	138	Directors and Officers

**Proposed Wording**

138. (1) The by-laws may provide that the directors or members shall make any decision by consensus, including a decision required to be made by a vote, except a decision taken

- (a) by a resolution referred to in subsection 181(1);
- (b) by special resolution; or
- (c) by a vote if consensus cannot be reached.

(2) By-laws that provide for consensus decision-making shall define the meaning of consensus, provide for how to determine when consensus cannot be reached and establish the manner of referring any matter on which consensus cannot be reached to a vote.

(3) A decision made by consensus in accordance with this section is deemed to satisfy any requirement under this Act for the taking of a vote.

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**Rationale**

This section deals with decisions made by consensus among the directors or the members.

Subsection 138(1) allows the by-laws of the corporation to provide for consensus decision making by the members or the directors. However, a vote must be taken where an auditor is appointed under subsection 181(1), for any decision requiring a special resolution (2/3 majority) and where a consensus can not be reached.

Subsection 138(2) requires that the by-laws of the corporation define consensus. The by-laws also have to describe the means of referring any matter to a vote if consensus is not reached.

Subsection 138(3) states that a decision made through a consensus process is valid and is deemed to satisfy the requirements under this Act for the taking of a vote. This provision gives effect to consensus decisions made by the directors and the members.

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**Present Law**

None

**An Act Respecting Not-for-Profit Corporations and  
Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
139	139	Directors and Officers

**Proposed Wording**

139. (1) Directors of a corporation may appoint from their number a managing director or a committee of directors and delegate to the managing director or committee any of the powers of the directors.

(2) Despite subsection (1), no managing director and no committee of directors has authority 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 31.

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**Rationale**

This section deals with the authority of directors to delegate the exercise of their powers to a committee of directors or to a specific director.

Subsection 139(1) establishes the general authority of directors to delegate the exercise of their powers.

Subsection 139(2) declares that there are certain board responsibilities that are sufficiently important to warrant the attention of all directors and therefore can not be delegated.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

<b>Bill Clause No.</b>	<b>Section No.</b>	<b>Topic</b>
140	140	Directors and Officers

**Proposed Wording**

140. An act of a director or an officer is valid despite an irregularity in their election or appointment or a defect in their qualification.

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**Rationale**

This section makes it explicit that a director's or officer's action is not void because of some internal irregularity in the director's or officer's election or appointment or defect in his/her qualification, thus preventing prejudicing an individual who deals with the corporation.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

<b>Bill Clause No.</b>	<b>Section No.</b>	<b>Topic</b>
141	141	Directors and Officers

**Proposed Wording**

141. (1) A resolution in writing, signed by all the directors entitled to vote on that resolution at a meeting of directors or of a committee of directors, is as valid as if it had been passed at a meeting of directors or committee of directors.

(2) A copy of every resolution referred to in subsection (1) shall be kept with the minutes of the meetings of directors.

(3) Unless a ballot is demanded, an entry in the minutes of a meeting to the effect that the chairperson of the meeting declared a resolution to be carried or defeated is, in the absence of evidence to the contrary, proof of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

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**Rationale**

This section provides statutory clarity to a practice that is frequently included in the by-laws of a corporation: that written resolutions can be employed to conduct business and a formal, in-person meeting of directors can be dispensed with. This is particularly useful for corporations with a small number of directors. It adds flexibility and eases record keeping.

Subsection 141(1) declares that in order to be valid, a written resolution of the directors or of a board committee requires the signature of all directors entitled to vote.

Subsection 141(2) is self-explanatory.

Subsection 141(3) specifies that an entry in the minutes of a meeting to the effect that the chairperson declared that a resolution is adopted or rejected is evidence of this decision, without it being necessary to prove the number of votes for or against the resolution.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
142	142	Directors and Officers

**Proposed Wording**

142. (1) A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of committees of directors, the nature and extent of 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.

(2) The disclosure required by subsection (1) shall be made, in the case of a director,

- (a) at the meeting at which a proposed contract or transaction is first considered;
- (b) if the director was not, at the time of the meeting referred to in paragraph (a), interested in the proposed contract or transaction, at the first meeting after the director becomes so interested;
- (c) if the director becomes interested after a contract or transaction is made, at the first meeting after the director becomes so interested; or
- (d) if an individual who is interested in a contract or transaction later becomes a director, at the first meeting after the individual becomes a director.

(3) The disclosure required by subsection (1) shall be made, in the case of an officer who is not a director,

- (a) immediately after the officer becomes aware that the contract, transaction, proposed contract or proposed transaction is to be considered or has been considered at a meeting;
- (b) if the officer becomes interested after a contract or transaction is made, immediately after the officer becomes so interested; or
- (c) if an individual who is interested in a contract or transaction later becomes an officer, immediately after the individual becomes an officer.

(4) If a material contract or material transaction, whether entered into or proposed, is one that, in the ordinary course of the corporation's activities, would not require approval by the directors or members, a director or officer shall, immediately after they become aware of the contract or transaction, disclose in writing to the corporation, or request to have entered in the minutes of meetings of directors or of committees of directors, the nature and extent of their interest.

(5) A director required to make a disclosure under subsection (1) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction

- (a) relates primarily to the director's remuneration as a director, an officer, an employee, an agent or a mandatary of the corporation or an affiliate;
- (b) is for indemnity or insurance under section 152; or
- (c) is with an affiliate.

(6) For the purposes of this section, a general notice to the directors declaring that a director or an officer is to be regarded as interested, for any of the following reasons, in a contract or transaction made with a party, is a sufficient declaration of interest in relation to the contract or transaction:

- (a) the director or officer is a director or an officer, or acting in a similar capacity, of a party referred to in paragraph (1)(b) or (c);
- (b) the director or officer has a material interest in the party; or
- (c) there has been a material change in the nature of the director's or the officer's interest in the party.

(7) The members of the corporation may examine the portions of any minutes of meetings of directors or of committees of directors that contain disclosures under this section, and of any other documents that contain those disclosures, during the usual business hours of the corporation.

(8) A contract or transaction for which disclosure is required under subsection (1) is not invalid, and the director or officer is not accountable to the corporation or its members for any profit realized from the contract or transaction, because of the director's or officer's interest in the contract or transaction or because the director was present or was counted to determine whether a quorum existed at the meeting of directors or of the committee of directors that considered the contract or transaction, if

- (a) disclosure of the interest was made in accordance with this section;
- (b) the directors approved the contract or transaction; and
- (c) the contract or transaction was reasonable and fair to the corporation when it was approved.

(9) Even if the conditions of subsection (8) are not met, a director or an officer, acting honestly and in good faith, is not accountable to the corporation or to its members for any profit realized from a contract or transaction for which disclosure is required under subsection (1), and the contract or transaction is not invalid by reason only of the interest of the director or officer in the contract or transaction, if

- (a) the contract or transaction is approved or confirmed by special resolution at a meeting of the members;
- (b) disclosure of the interest was made to the members in a manner sufficient to indicate its nature and extent before the contract or transaction was approved or confirmed; and
- (c) the contract or transaction was reasonable and fair to the corporation when it was approved or confirmed.

(10) If a director or an officer of a corporation fails to comply with this section, a court may, on application of the corporation or any of its members, set aside the contract or transaction on any terms that it thinks fit, require the director or officer to account to the corporation for any profit or gain realized on the contract or transaction or make any order that the court thinks fit.

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## **Rationale**

This section stipulates the conditions that must be adhered to by a director or officer who has an interest in a contract with the corporation. Moreover, it declares that, if the director or officer fulfils these conditions, the contract is not void and the director/officer has no liability to account for any profit the director/officer may make under the contract. The overriding criterion is that the contract must be fair and reasonable to the corporation so that directors/officers do not mutually benefit by approving one another's contract with the corporation.

Subsection 142(1) requires directors and officers to provide written disclosure for any interest they have or may have with respect to a contract with the corporation.

Subsections 142(2) to (4) set out when a director or an officer, as the case may be, must make the required disclosure.

Subsection 142(5) requires the director or officer to abstain from voting on the contract for which a disclosure of interest has been made except for a contract related to the director's/officer's remuneration, insurance or indemnification under section 152 or with an affiliated corporation.

Subsection 142(6) permits an interested director or officer to give a general notice to the corporation, thus rendering it unnecessary to issue a new notice each time a contract is entered into with a party in which the director/officer has a material interest.

Subsection 142(7) allows members, during usual business hours, to examine the portion of the minutes of meetings of the directors or any committee of directors that contain a disclosure of conflict of interest or any other document that contains a disclosure of a conflict of interest by a director or an officer.

Subsection 142(8) states that if the director or officer makes the required disclosure, abstains from voting on the contract and the contract is reasonable and fair to the corporation, then the contract is not invalid and the interested director/officer is not accountable for any profit realized from the contract in which the director/officer has an interest.

Subsection 142(9) provides for member approval of interested director or officer contracts or transactions as an alternative method of confirming the validity of a contract, notwithstanding non-compliance by the director or officer with the avoidance standards as set out in subsection 142(8).

Subsection 142(10) allows the corporation or a member to apply to the court to have a contract set aside, if a director or officer fails to disclose any interest they have or may have with respect to a contract with the corporation. The court may set the contract aside on any terms it deems fit.

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## **Present Law**

*Canada Corporations Act:*

98. (1) Subject to this section, it is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare his interest at a meeting of directors of the company.

(2) In the case of a proposed contract the declaration required by this section to be made by a director shall be made at the meeting of directors at which the question of entering into the contract is first taken into consideration, or, if the director is not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he becomes so interested, and, in a case where the director becomes interested in a contract after it is made, the declaration shall be made at the first meeting of directors held after the director becomes so interested.

(3) For the purposes of this section, a general notice given to the directors of a company by a director to the effect that he is a shareholder of or otherwise interested in any other company or is a member of a specified firm and is to be regarded as interested in any contract made with such other company or firm shall be deemed to be a sufficient declaration of interest in relation to any contract so made.

(4) No director shall vote in respect of any contract or proposed contract in which he is so interested as aforesaid and if he does so vote his vote shall not be counted, but this prohibition does not apply

(a) in the case of any contract by or on behalf of the company to give to the directors or any of them security for advances or by way of indemnity,

(b) in the case of a private company, where there is no quorum of directors in office who are not so interested, or

(c) in the case of any contract between the company and any other company where the interest of the director in the last-mentioned company consists solely in his being a director or officer of such last-mentioned company, and the holder of not more than the number of shares in such last-mentioned company requisite to qualify him as a director.

(5) A director who has made a declaration of his interest in a contract or proposed contract in compliance with this section and has not voted in respect of such contract contrary to the prohibition contained in subsection (4), if such prohibition applies, is not accountable to the company or any of its shareholders or creditors by reason only of such director holding that office or of the fiduciary relationship thereby established for any profit realized by such contract.

(6) For the purposes of this section “contract” includes “arrangement” and “meeting of directors” includes a meeting of an executive committee elected in accordance with section 96.

(7) Nothing in this section imposes any liability upon a director in respect of the profit realized by any contract that has been confirmed by the vote of shareholders of the company at a special general meeting called for that purpose.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

<b>Bill Clause No.</b>	<b>Section No.</b>	<b>Topic</b>
143	143	Directors and Officers

**Proposed Wording**

143. Subject to the articles, the by-laws and any unanimous member agreement,  
(a) the directors may 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, except powers to do anything referred to in subsection 139(2);  
(b) a director may be appointed to any office of the corporation; and  
(c) two or more offices of the corporation may be held by the same person.

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**Rationale**

This section allows directors, subject to the articles, the by-laws or any unanimous member agreement in place, to appoint officers of the corporation and delegate to them the power to manage the corporation.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

<b>Bill Clause No.</b>	<b>Section No.</b>	<b>Topic</b>
144	144	Directors and Officers

**Proposed Wording**

144. (1) Subject to the articles, the by-laws and any unanimous member agreement, the directors of a corporation may fix the reasonable remuneration of the directors, officers and employees of the corporation.

(2) Subject to the by-laws, a director, an officer or a member may receive reasonable remuneration and expenses for any services to the corporation that are performed in any other capacity.

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**Rationale**

This section permits the directors, subject to the articles, the by-laws or any unanimous member agreement in place, to fix their own remuneration and that of officers and employees of the corporation. It should be noted that this power is exempted from the interested director provisions under subsection 142(5).

Subsection 144(1) addresses the remuneration of directors, officers and employees of the corporation. It leaves it up to the corporation, through its members and/or directors, to determine what the appropriate remuneration levels will be. It does not require remuneration so corporations can, if they wish, rely on volunteers.

Subsection 144(2) makes essentially the same provisions except that it addresses remuneration for activities other than the individual's duties in relation to their position within the corporation. For example, the provision of services to the corporation such as transportation, maintenance or snow removal.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

<b>Bill Clause No.</b>	<b>Section No.</b>	<b>Topic</b>
145	145	Directors and Officers

**Proposed Wording**

145. Unless the by-laws of the corporation otherwise provide, a director, an officer or an employee may receive indemnification for their expenses incurred on behalf of the corporation as a director, an officer or an employee.

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**Rationale**

This section is self-explanatory and provides that directors, officers and employees may be reimbursed for expenses they incurred on behalf of the corporation, unless the by-laws otherwise specify.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
146	146	Directors and Officers

**Proposed Wording**

146. (1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a debt obligation under subsection 29(1) for a consideration consisting of property or past services are jointly and severally, or solidarily, liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the debt obligation had been issued for money on the date of the resolution.

(2) Directors of a corporation who vote for or consent to a resolution authorizing any of the following are jointly and severally, or solidarily, liable to restore to the corporation any money or other property so paid or distributed and not otherwise recovered by the corporation:

- (a) a payment or distribution to a member, a director or an officer contrary to this Act; or
- (b) a payment of an indemnity contrary to this Act.

(3) A director who has satisfied a judgment rendered under this section is entitled to contribution from the other directors who voted for or consented to the unlawful act on which the judgment was founded.

(4) A director liable under subsection (2) is entitled to apply to a court for an order compelling a member or other recipient to pay or deliver to the director any money or other property that was paid or distributed to the member or other recipient contrary to this Act.

(5) On an application under subsection (4), a court may, if it is satisfied that it is equitable to do so, order a member or other recipient to pay or deliver to a director any money or other property that was paid or distributed to the member or other recipient contrary to this Act and make any further order that it thinks fit.

(6) A director is not liable under subsection (1) if the director proves that they did not know and could not reasonably have known that a debt obligation was issued for a consideration less than the fair equivalent of the money that the corporation would have received if the debt obligation had been issued for money.

(7) An action to enforce a liability imposed by this section may not be commenced after two years from the date of the resolution authorizing the action complained of.

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## **Rationale**

This section imposes a statutory liability on directors when they take actions contrary to specified provisions of the Act. It also contains provisions which allow a director who has paid a judgement to recover money from other parties involved in the actions leading to the judgement.

Subsection 146(1) imposes a statutory liability, in favour of the corporation, on directors who voted for or consented to the issuance of a debt obligation in exchange for property or past services and the value of the property or past services is less than the corporation would have received if the debt obligation had been issued for money.

Subsection 146(2) imposes a statutory liability, in favour of the corporation, on directors who vote for or consent to a payment to a member, director or officer which is contrary to the Act or a payment of an indemnity contrary to this Act

Subsection 146(3) states that where a judgement has been satisfied by a particular director, that director has the right of a director to recover contributions from the other directors who did not dissent to the unlawful act.

Subsection 146(4) allows a director to apply to court for an order to recover from a member or another recipient any money or property to which they are not entitled to under this Act.

Subsections 146(5), (6) and (7) are self-explanatory.

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## **Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
147	147	Directors and Officers

**Proposed Wording**

147. (1) 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.

(2) A director is not liable under subsection (1) unless

(a) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the debt has been proved within six months after the date of the assignment or receiving order.

(3) A director, unless sued for a debt referred to in subsection (1) while a director or within two years after ceasing to be a director, is not liable under this section.

(4) If execution referred to in paragraph (2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

(5) If a director pays a debt referred to in subsection (1) that is proved in liquidation and dissolution or bankruptcy proceedings, the director is entitled to any preference that the employee would have been entitled to, and if a judgment has been obtained, the director is entitled to an assignment of the judgment or the employee's rights as declared in the judgment.

(6) A director who has satisfied a claim under this section is entitled to contribution from the other directors who were liable for the claim.

---

**Rationale**

This section imposes a statutory liability upon directors for unpaid wages, if the wages were unpaid while they were directors. It also contains provisions which allow a director(s) to recover money from other directors should the director(s) pay the unpaid wage debts. The liability

imposed on directors is separate from any liability imposed under provincial employment standards legislation.

Subsection 147(1) imposes a statutory liability, which is joint and several, on directors for unpaid wages. The liability is capped at 6 months of wages.

Subsection 147(2) provides for a limitation period (6 months) with respect to the liability of directors for unpaid wages.

Subsection 147(3) states that a director can be sued for unpaid wages while he/she is a director or within 2 years of ceasing to be a director.

Subsection 147(4) stipulates that directors are liable for any unsatisfied debt of unpaid wages not paid by the corporation.

Subsection 147(5) clarifies that if a director pays a debt for unpaid wages, the director is entitled to any preference or right the employee would have received in a bankruptcy or liquidation proceeding or if a judgement is rendered.

Subsection 147(6) sets out the right of a director to recover from the other directors where that director has paid a claim for an employee's unpaid wages.

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### **Present Law**

#### *Canada Corporations Act:*

99. (1) The directors of the company are jointly and severally liable to the clerks, labourers, servants and apprentices thereof, for all debts not exceeding six months wages due for services performed for the company while they are such directors respectively.

(2) A director is not liable under subsection (1) unless

(a) the company has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part, or

(b) the company has within that period gone into liquidation or has been ordered to be wound up under the Winding-up Act, or has made an authorized assignment under the Bankruptcy Act or a receiving order under the Bankruptcy Act has been made against it and a claim for such debt has been duly filed and proved,

nor unless he is sued for such debt while a director or within one year after he has ceased to be a director.

(3) Where execution has so issued the amount recoverable against the director shall be the amount remaining unsatisfied on the execution.

(4) Where the claim for such debt has been proved in liquidation or winding-up proceedings or under the Winding-up Act or the Bankruptcy Act a director, upon payment of the debt, is entitled

to any preference that the creditor paid would have been entitled to, and where a judgment has been recovered he is entitled to an assignment of the judgment.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
148	148	Directors and Officers

**Proposed Wording**

148. (1) A director who is present at a meeting of directors or of a committee of directors is deemed to have consented to any resolution passed or action taken at the meeting unless

- (a) the director requests a dissent to be entered in the minutes of the meeting;
- (b) the director sends a written dissent to the secretary of the meeting before the meeting is adjourned; or
- (c) the director sends a dissent by registered mail or delivers it to the registered office of the corporation immediately after the meeting is adjourned.

(2) A director who votes for or consents to a resolution is not entitled to dissent under subsection (1).

(3) A director who was not present at a meeting at which a resolution was passed or action taken is deemed to have consented to the resolution or action unless, within the prescribed period after becoming aware of the resolution or action, the director

- (a) causes a dissent to be placed with the minutes of the meeting; or
- (b) sends a dissent by registered mail or delivers it to the registered office of the corporation.

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**Rationale**

This section makes it clear that it is not a defence to personal liability for a director to not show up for a board meeting. The only way a director can avoid responsibility for any resolution or action taken at a board meeting is to have his/her dissent recorded.

Subsection 148(1) states that an abstaining or dissenting director must have his/her dissent recorded in the minutes or request that it be so recorded. The abstaining or dissenting director can also send a written dissent to the secretary of the meeting before the meeting is adjourned or send a written dissent to the corporation immediately following the adjournment of the meeting.

Subsection 148(2) denies a director who votes for or consents to a resolution to have his/her dissent to the resolution recorded.

Subsection 148(3) stipulates that a director who is absent from a meeting is deemed to have consented to a resolution passed at the meeting unless, within the prescribed period (7 days) of

becoming aware of the resolution, the director causes his dissent to be recorded in the minutes of the meeting or sends his/her dissent to the corporation.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
149	149	Directors and Officers

**Proposed Wording**

149. (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.

(2) Every director and officer of a corporation shall comply with this Act, the regulations, the articles, the by-laws and any unanimous member agreement.

(3) Every director of a corporation shall verify the lawfulness of the articles and the mission of the corporation.

(4) Subject to subsection 170(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or an officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach of this Act or the regulations.

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**Rationale**

This section clarifies the standard of duty and care that directors and officers owe to the corporation and represents the general principles underlying the fiduciary relationship between the directors and officers, and the corporation. It is the statutory standard for corporate governance to be followed by boards of directors.

Subsection 149(1) states that directors of a corporation are expected to act honestly and in good faith with a view to the best interests of the corporation, and they would be expected to exercise the care, diligence and skill of a reasonably prudent person. This is the common duty of directors in corporate law. This standard is well defined and understood by Canadian courts. It will ensure that directors actively participate in the duties of the board, pay proper care and attention to them and ensure that they are acting for the good of the corporation.

Subsection 149(2) is self-explanatory.

Subsection 149(3) imposes a duty on directors to ensure that the corporation's articles and mission are lawful.

Subsection 149(4) states that directors can not, by way of a contract provision or through the articles or by-laws of the corporation, relieve themselves from a duty to act or from liability that arise in accordance with this Act or its regulations. However, where there is a unanimous member agreement in place (members assume the powers and responsibilities of the directors), the directors are relieved of their duty to act and from liability to the extent that their responsibilities as directors have been taken over by the members as set out in the unanimous member agreement.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
150	150	Directors and Officers

**Proposed Wording**

150. (1) A director is not liable under section 146 or 147, and has complied with his or her duties under subsection 149(2) and (3), if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance

in good faith on

(a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the public accountant of the corporation fairly to reflect the financial condition of the corporation; or

(b) a report of a person whose profession lends credibility to a statement made by that person.

(2) A director has complied with his or her duties under subsection 149(1) if the director relied in good faith on

(a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the public accountant of the corporation fairly to reflect the financial condition of the corporation; or

(b) a report of a person whose profession lends credibility to a statement made by that person.

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**Rationale**

This section provides a due diligence defence for directors against liability which arises in specific situations. The due diligence defence provides that directors meeting the standard of duty and care should not unfairly face liability.

Essentially, the defence provides that if the directors pay proper attention to the task at hand, apply themselves to the best of their ability, and rely on others only to the extent warranted by the other party's qualifications, they will not be liable. The defence recognizes that the nature and extent of the expected precautions will vary under each circumstance. These precautions can include such things as: relying on financial statements presented to directors by an officer; putting in place appropriate controls and systems to monitor and ensure that policies are being implemented; requiring a proper review or periodic reports; and taking appropriate action when a problem is brought to the directors' attention. With respect to relying on financial statements and reports of professional, the good faith reliance defence makes it clear that these elements

continue to be part of what constitutes acting with due diligence. This defence is the standard in Canadian corporate law.

Subsection 150(1) provides a due diligence defence with respect to liability which might arise under section 146 (issuance of debt obligation at an undervalue), section 147 (unpaid employee wages) or subsections 149(2) and (3) (complying with the Act and regulations, and the lawfulness of the articles and mission of the corporation, respectively). In essence, the due diligence defence allows a director to avoid personal liability arising out of his or her duties as a director if the person can establish that he or she displayed the care, skill, and diligence in carrying out the duties of the position that a reasonably prudent person would have exercised in comparable circumstances (i.e., the director meets the required standard of duty and care).

Subsection 150(2) states that a director has met the requirements in subsection 149(1) (standard of care and duty of directors) if they rely in good faith on financial statements prepared by an officer of the corporation or by the auditor of the corporation. As well, directors can rely on reports of professionals without incurring liability. It allows directors to rely in good faith on the advice of outside experts in discharging their duties as it relates to the preparation of financial statements or other reports (e.g., engineering and environmental reports).

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### **Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
151	151	Directors and Officers

**Proposed Wording**

151. (1) An officer has complied with his or her duties under subsection 149(2) if the officer exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on a report of a person whose profession lends credibility to a statement made by that person.

(2) An officer has complied with his or her duties under subsection 149(1) if the officer relied in good faith on a report of a person whose profession lends credibility to a statement made by that person.

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**Rationale**

This section provides a due diligence defence for officers of the corporation. The due diligence defence specifies that officers meeting the standard of duty and care should not unfairly face liability.

Subsection 151(1) contains a due diligence defence with respect to liability which might arise under subsection 149(2) – complying with the Act and regulations. An officer meets the standard of care to comply with the Act and regulations, and avoid liability, if it can be established that the officer displayed the care, skill, and diligence in carrying out the duties of the position that a reasonably prudent person would have exercised in comparable circumstances (i.e., the officer met the required standard of care).

Subsection 151(2) states that an officer has acted with due diligence, and met the standard of care under subsection 149(1), if he/she relied in good faith on a report prepared by a professional.

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**Present Law**

None.

**BRIEFING BOOK**  
**An Act Respecting Not-for-Profit Corporations and**  
**Other Corporations Without Share Capital**

Bill Clause No.	Section No.	Topic
152	152	Directors and Officers

**Proposed Wording**

152. (1) A corporation may indemnify a present or former director or officer of the corporation, or another individual who acts or acted at the corporation's request as a director or an officer or in a similar capacity of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

(2) A corporation may advance money to a director, an officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the money if the individual does not fulfil the conditions of subsection (3).

(3) A corporation may not indemnify an individual under subsection (1) unless the individual

- (a) acted honestly and in good faith with a view to the best interests of the corporation or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request; and
- (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, had reasonable grounds for believing that their conduct was lawful.

(4) A corporation may, with the approval of a court, indemnify an individual referred to in subsection (1), or advance money under subsection (2), in respect of an action by or on behalf of the corporation or other entity to procure a judgment in its favour to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1), against all costs, charges and expenses reasonably incurred by the individual in connection with the action, if the individual fulfils the conditions set out in subsection (3).

(5) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in that subsection, if the individual seeking indemnity (a) was not judged by the court or other competent authority to have committed any fault or to have omitted to do anything that the individual ought to have done; and (b) fulfils the conditions set out in subsection (3).

(6) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual

(a) in the individual's capacity as a director or an officer of the corporation; or

(b) in the individual's capacity as a director or an officer, or in a similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request.

(7) On the application of a corporation or an individual or entity referred to in subsection (1), a court may approve an indemnity under this section and make any further order that it thinks fit.

(8) An applicant under subsection (7) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

(9) On an application under subsection (7), the court may order notice to be given to any interested person and the person is entitled to appear and be heard in person or by counsel.

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### **Rationale**

This section declares the scope of permitted indemnification by a corporation of its directors and officers, and specifies the required formalities of the indemnification process. The scope of permitted indemnification is very broad: it applies to former, present and nominee directors and officers; it covers civil, criminal and administrative actions against directors and officers; it applies to personal and derivative actions against the corporation; and it includes indemnification for costs, including amounts to settle or to satisfy a judgement.

Subsection 152(1) allows a corporation to indemnify its former and present directors and officers for costs, including amounts to settle an action or to satisfy a judgement, associated with civil, criminal, administrative or other proceedings.

Subsection 152(2) states that a corporation may advance funds to a director, officer or any other person. The money must be repaid if the director, officer or other persons to whom the money was given is found not to have acted honestly or in good faith with a view to the best interests of the corporation or, as the case may be, not in the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request.

Subsection 152(3) is self-explanatory and outlines the situations where a corporation is not permitted to provide an indemnification.

Subsection 152(4) identifies the situations in which a corporation may indemnify a director or officer, subject to the criteria in subsection 152(3). In these situations, the court must approve any indemnity.

Subsection 152(5) states that a former or present director or officer may claim indemnity from the corporation as a matter of right where he/she has been fully successful in defending him/herself and acted honestly and in good faith with a view to the best interests of the

corporation or, as the case may be, in the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request.

Subsection 152(6) permits the corporation to purchase insurance against liability for former and present directors and officers or any another individual who acts or acted at the corporation's request as a director, officer or in a similar capacity with another entity.

Subsections 152(7), (8) and (9) are self-explanatory.

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### **Present Law**

*Canada Corporations Act:*

93. Every director of the company, and his heirs, executors and administrators, and estate and effects, respectively, may, with the consent of the company, given at any meeting of the shareholders thereof, from time to time and at all times, be indemnified and saved harmless out of the funds of the company, from and against,

(a) all costs, charges and expenses whatever that such director sustains or incurs in or about any action, suit or proceeding that is brought, commenced or prosecuted against him, for or in respect of any act, deed, matter or thing whatever, made, done or permitted by him, in or about the execution of the duties of his office, and

(b) all other costs, charges and expenses that he sustains, or incurs, in or about or in relation to the affairs thereof, except such costs, charges or expenses as are occasioned by his own wilful neglect or default.