

Industry Canada

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Corporations Canada

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General Duties of the Board of Directors

The board of directors is accountable to the members and is responsible for managing and supervising the activities and affairs of the corporation. Generally, the directors are elected by the members, and the members are elected by the board.

The board may appoint one of its members to act as a managing director or a number of directors to act as a committee of directors. It can then delegate to the managing director or the committee any of the powers of the directors.^[1] Directors are not, in that capacity, trustees for any property of the corporation, including property held in trust by the corporation.^[2] See [Responsibilities and Liabilities of Directors and Officers](#).

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Number of Directors

Under the NFP Act, a corporation is required to specify in its articles a fixed number of directors or a minimum and maximum number of directors.^[3] When a minimum and maximum number of directors is chosen, the precise number of directors to be elected may be established from time to time by ordinary resolution of the members. The members may also delegate this power to the directors. Generally, a corporation must have at least one director. However, a soliciting corporation must have a minimum of three directors, at least two of whom must not be officers or employees of the corporation or its affiliates.^[4]

If the members decide to change the number of directors within the number permitted by the articles, the members must pass an ordinary resolution and elect the required number of directors. It is then necessary to notify Corporations Canada of the change in directors by filing [Form 4006 – Changes Regarding Directors](#) within 15 days following the change. If the members want to increase or decrease the number of directors specified in the articles or the minimum or maximum number of directors, the articles must be amended by filing [Form 4004 – Articles of Amendment](#) and paying the \$200 fee.^[5] See [Changing the Structure or Nature of the Corporation](#).

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Electing the Directors

The general rule in the NFP Act is that directors are elected by a majority of the votes cast at an annual meeting of the members, for a term that may not exceed 4 years.^[6] See [Directors Terms and Vacancies on the Board of Directors](#).

There are only two exceptions to the general rule that the members must elect the directors of the corporation. First, the articles may permit the directors to appoint additional directors between annual meetings to hold office for a term that must expire on or before the next annual meeting of members. This is permitted as long as the total number of appointed directors is not more than one-third of the number of directors elected at the previous annual meeting.^[7] If the articles do not permit the directors to appoint additional directors, the articles must be amended by filing [Form 4004 – Articles of Amendment](#) and paying the \$200 fee.^[8] See [Changing the Structure or Nature of the Corporation](#).

The second exception allows a vacancy on the board to be filled by the directors, as long as there is a quorum on the board to participate in filling the vacancy.^[9] See [Directors Terms and Vacancies on the Board of Directors](#).

The general rule that the members must elect the directors means that it is not permissible to have *ex officio* directors (i.e., persons who hold office "ex-officio" or "as of right", without the need to be elected by members).

A person must consent to be a director of a corporation. Persons who have been elected or appointed as directors and are present at the meeting when the election or appointment took place, are deemed to have consented to serve as directors, unless they refuse. However, if they are not present at that meeting, they must either (a) consent to their election, in writing, before that meeting or within 10 days after that meeting or (b) act as a director after the election or appointment.^[10]

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Who can be a Director?

A director must meet all of the following qualifications:^[11]

- be at least 18 years old;
- not have been declared incapable by a court in Canada or in another country;
- be an individual (i.e., a corporation cannot be a director); and
- not be in bankrupt status.

The NFP Act contains several other provisions that deal with directors' qualifications. For example, although the Act does not require a director to be a member of the corporation, it allows the by-laws to provide otherwise.^[12] In the case of a soliciting corporation, the Act provides that at least two directors must not be officers or employees of the corporation or its affiliates.^[13] Another provision of the Act states that, if a corporation's by-laws contain additional qualification requirements for directors, (e.g., that each director must be a member of the corporation) these requirements must be met.

If you want to amend your corporation's by-laws to change the qualification requirements for directors, see [Changing By-laws](#).

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Directors Terms and Vacancies on the Board of Directors

The general rule in the NFP Act is that directors are elected by a majority of the votes cast at each annual meeting of members for a term that may not exceed 4 years.^[14] Therefore, the by-laws may provide a defined term of office for directors, as long as it is 4 years or less. The by-laws may also permit directors to hold staggered terms of office (i.e., all directors elected at a meeting of members need not hold office for the same term).^[15]

If a director is not elected for a stated term, that director ceases to hold office at the end of the next annual meeting of members. Furthermore, if directors are not elected at a meeting of members, the incumbent directors continue in office until their successors are elected.^[16] A director whose term has expired can be re-elected as a director, as long as the by-laws do not provide otherwise.

A director's term ends when he or she:

- dies,
- resigns,
- is removed from office,

- is declared to be incapable by a court,
- becomes a bankrupt, or
- has their term of office expire.¹⁷

From time to time, and for a variety of reasons, members may decide to remove a director they had previously elected. Removing a director generally requires the approval of a majority of members who cast their votes at a meeting of members called for the purpose of removing the director. At that meeting, the members may elect another director to fill the vacancy created by the removal.¹⁸ However, where a director was elected by a class or group of members that had an exclusive right to elect him or her, the director may only be removed by an ordinary resolution of that class or group of members.¹⁹

If a meeting is called to remove or replace a director, that director may submit to the corporation a written statement giving reasons for opposing his or her removal or replacement as a director. The corporation will need to give notice of this statement to the members and must also file a copy of the statement with Corporations Canada.²⁰

If a vacancy occurs on the board of directors, the remaining directors may continue to exercise all the powers of directors as long as the number of remaining elected directors constitutes a quorum (i.e., a majority of the directors, or the minimum number of directors required at a meeting, unless otherwise specified in your corporation's by-laws).²¹

A vacancy on the board may arise for a variety of reasons, including:

- a resignation;
- the removal of a director by the members;
- an increase in the number, or the minimum or maximum number, of directors provided for in the articles; or
- members not electing, from among the candidates, the number of directors or the minimum of directors required by the articles, because a candidate:
 - did not consent to act as a director;
 - did not meet the qualifications;
 - was incapable of serving as a director; or
 - died.²²

When a vacancy is filled, the director appointed or elected to fill the vacancy holds office for the unexpired term of his or her predecessor.²³

Depending on how the vacancy was created, the method of filling the vacancy may vary. Specifically:

- If a vacancy is created as a result of a director being removed from office at a meeting of the members, the members may elect another person to act as director.²⁴ If such a vacancy is not filled by the members at that meeting, a quorum of the directors may fill the vacancy after that meeting by appointing another person to be a director.²⁵
- If there is not a quorum of the directors or if a vacancy is created as a result of 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, the directors then in office must call a special meeting of members to fill the vacancy.²⁶
- If a particular class or group of members has an exclusive right to elect one or more directors, and a vacancy occurs among those directors, it may only be filled by the remaining directors elected by that class or group (except where the vacancy resulted 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). However, if there are no remaining directors elected by that class or group, any member of that class or group may call a meeting of the members of that class or group to fill the vacancy.²⁷
- However, it is possible for the by-laws to prohibit the vacancy being filled by the directors, and to require instead that the vacancy be filled 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, where the vacancy occurs among the directors elected by that class or group.²⁸

- If all of the directors have resigned or been removed and no replacement directors are elected, then a person who manages or supervises the activities or affairs of the corporation is deemed to be a director for the purposes of the NFP Act. However, this default rule does not apply to certain individuals, such as the corporation's lawyer, accountant, trustee in bankruptcy, or an officer who manages the corporation under the direction or control of a member or other person.²⁹ If a corporation does not have any directors or members, the court may appoint the required minimum of directors provided for in the articles.³⁰

Note that when there is a change of directors, the corporation must file [Form 4006 – Changes Regarding Directors](#) with Corporations Canada within 15 days of the change. See [Reporting to Corporations Canada](#).

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Directors Meetings

Most boards of directors meet on a regular basis to oversee the management and operations of the corporation. The frequency of regular board meetings varies, depending on the needs of the corporation. Directors may also need to meet occasionally to conduct special business.

Meetings of the board can be held whenever and wherever the board wishes, unless the corporation's by-laws or articles provide otherwise.³¹

In all cases, a quorum of directors must be present at directors meetings. The quorum can be set out in the articles or by-laws. If the by-laws do not specify the required quorum, a majority of the number of directors or minimum number of directors required by the articles constitutes a quorum. Despite any vacancy among the directors, a quorum of directors may exercise all of the powers of the directors.³² If a corporation has only one director, that director may constitute a meeting.³³

If a director is absent from a board meeting, it is not permissible for another person to act in his or her stead at the meeting. In other words, an absentee director may not appoint a proxy or nominee to attend the board meeting.³⁴ This should not be confused with the ability of members to appoint proxyholders to attend members' meetings, if proxy voting is permitted under the by-laws. For more information on absentee votes by members, see [The Members](#).

Notice of board meetings must be provided to the directors according to the by-laws. However, the notice need not specify the purpose of or the business to be transacted at the meeting unless the meeting:

- involves a matter that requires member approval;
- fills the vacancy of a director or public accountant;
- appoints additional directors;
- issues debt obligations;
- approves financial statements;
- adopts, amends or repeals by-laws; or
- establishes members' contributions or dues.³⁵

Directors may conduct business through signed resolutions instead of holding meetings, provided that the resolutions are signed by all directors. These signed resolutions have the same effect as they would have if they were adopted at a meeting of the board of directors.³⁶ This way of conducting the business of the corporation can be very useful for small corporations with only one or a few directors. See [Organizing Resolutions of Directors](#).

It is also possible for one or more directors to participate in a meeting by telephone or electronically, as long as the corporation's by-laws permit it and all participants in the meeting can communicate fully. The method of holding these meetings would also have to comply with any detailed requirements set out in the NFP Regulations.³⁷ At this time, no regulations dealing with such requirements have been made.

It is possible for the by-laws to include a provision allowing the directors to make decisions by consensus, even when the NFP Act otherwise requires a vote. Such by-laws must not only provide a clear definition of what is meant by "consensus", they must also explain how to determine when a consensus cannot be reached. A decision made by consensus is deemed to satisfy any requirement under the NFP Act for the taking of a vote. However, if the board cannot reach a consensus, the by-laws must contain a process for referring such matters to a vote.³⁸

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Appointing Officers

Officers are appointed by the directors to assist the directors and to carry out certain specified functions. Officers can occupy any position that the board wants them to fill (e.g., president, secretary or any other position). It is important to note that the NFP Act defines "officer" to include any individual so appointed by the board, as well as the following persons: the chairperson of the board of directors; the president; a vice-president; the secretary; the treasurer; the comptroller; the general counsel; the general manager; a managing director; or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices.³⁹

Not only can the board appoint any director or member to be an officer, the board can also appoint a person who is not a member or director of the corporation to be an officer. Two or more offices may be held by the same person.⁴⁰

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Responsibilities and Liabilities of Directors and Officers

The law imposes a wide range of duties and liabilities on directors and officers because the scope of authority of the corporation's management is very broad. In general, these duties and liabilities reflect the position of trust that directors and officers hold in relation to the corporation and its members. While many of the duties and liabilities of directors and officers are prescribed under the NFP Act, others are set out in other federal and provincial/territorial statutes. For example, under the *Income Tax Act* (Canada), directors are jointly and severally liable to pay employee income tax deductions which the corporation fails to remit for two years following ceasing to be a director. In another example, under the *Canadian Environmental Protection Act, 1999*, directors are required to take reasonable care to ensure that the corporation complies with the provisions of the Act dealing with air and water pollution, as well as with those involving proper storage and disposal of toxic substances.

Standard of Care

Directors and officers are required to exercise at least the level of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. They are also required to act honestly, in good faith and in the best interests of the corporation, rather than in their own personal interest. This is known as an *objective* standard of care.⁴¹ In other words, when a court must determine whether a director or officer has breached his or her duty to the corporation, it will test the person's actions against those of a reasonably prudent person.

In meeting this duty, directors and officers may rely in good faith on reports prepared by professionals. Directors (but not officers) may also rely on the corporation's financial statements prepared by the corporation's public accountant.⁴²

Duty to Comply

Directors and officers are required to comply with the NFP Act and its regulations, the articles, the by-laws and any unanimous member agreement.⁴³ Directors are also subject to additional duties under the NFP Act. For example, directors are required to remain informed about the corporation's activities and to ensure the lawfulness of the articles and the purpose of the corporation.⁴⁴

Liability

As part of the role they play in the corporation, directors bear a degree of financial responsibility for their decisions and actions. For example, a director who votes for or consents to a resolution authorizing any of the following is liable to repay the corporation any money or other property so paid or distributed:

- a payment or distribution to a member, a director or an officer contrary to the NFP Act, and/or
- a payment of an indemnity (i.e., an obligation to pay for any loss or damage that has been or might be incurred by another individual) contrary to the NFP Act.⁴⁵

In addition, where a corporation encounters financial difficulties, its directors are liable to the employees for up to six months' of unpaid wages while they are directors and for the two years after their directorships ends.⁴⁶

Conflicts of Interest

One of the basic aims of the NFP Act is to prevent conflicts between the interests of the corporation and those of the directors or officers. For example, directors and officers must disclose in writing any personal interest they may have in a material contract with the corporation. If a director or officer fails to make such a disclosure, the corporation or a member may apply to a court to request that the contract be set aside and that the director/officer repay any profits or gains realized from the contract.⁴⁷

Indemnification by the Corporation

A corporation may want to consider putting in place some of the following methods to protect (indemnify) directors and officers of corporations from certain liabilities that could be imposed upon them. For example, a corporation could:

- purchase insurance to protect directors and officers against liabilities incurred in the exercise of their duties (often called D&O Insurance);
- agree to compensate directors and officers for losses they may suffer or costs they may incur while carrying out their duties, except if the director or officer has failed to act honestly and in the corporation's best interests; or
- advance funds to directors and officers to help them pay the costs of defending themselves in legal actions brought against them.⁴⁸

It is not permissible for a contract, the articles, by-laws or a resolution to relieve a director or officer from the duty to act in accordance with the NFP Act or the regulations, or to relieve them from liability for a breach of the NFP Act or the regulations.⁴⁹

However, members of a non-soliciting corporation may enter into a [unanimous member agreement](#) to transfer some or all of a specific director's responsibilities and powers to one or more members. In such a case, since the director's power or powers have been transferred away, he or she would not be held responsible for not exercising that power.⁵⁰ See [The Members](#).

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Remuneration of Directors, Officers and Members

The directors of a corporation are entitled to fix reasonable levels of remuneration for the directors, officers and employees of a corporation, unless the corporation's articles or by-laws provide for a different arrangement. The NFP Act also specifically permits a director, officer or member to receive reasonable remuneration and expenses for any services to the corporation that are performed in any other capacity (e.g., in the capacity of a consultant to the corporation).

In the case of a corporation that is a [registered charity](#) under the *Income Tax Act* (Canada), it is important to be aware that certain provinces prohibit the payment of remuneration to directors, whether as a director or in any other capacity. This is because of an inherent conflict of interest between the interests of the director and the interests of the corporation. If the corporation is a registered charity, it is important to look into the laws of the province or territory in which the charity operates to determine if such a restriction applies.

¹ NFP Act, s. 138.

² NFP Act, s. 32.

³ NFP Act, s. 7(1).

⁴ NFP Act, s. 125.

⁵ NFP Act, s. 133(1).

⁶ NFP Act, s. 128(3) and Regs. s.28(1).

- [7](#) NFP Act, s. 128(8).
- [8](#) NFP Act, s. 132(1).
- [9](#) NFP Act, s. 132.
- [10](#) NFP Act, s. 128(9) and Regs. s. 28(2).
- [11](#) NFP Act, s. 126(1).
- [12](#) NFP Act, s. 126(2).
- [13](#) NFP Act, s. 125.
- [14](#) NFP Act, s. 128(3) and Regs. s.28(1).
- [15](#) NFP Act, s. 128(4).
- [16](#) NFP Act, s. 128(5) and (6).
- [17](#) NFP Act, s. 129(1), 130 and 126(1).
- [18](#) NFP Act, s. 130(1), (2) and (3).
- [19](#) NFP Act, s. 130(2).
- [20](#) NFP Act, s. 131.
- [21](#) NFP Act, s. 136(2).
- [22](#) NFP Act, s. 128(7).
- [23](#) NFP Act, s. 132(6).
- [24](#) NFP Act, s. 130(3).
- [25](#) NFP Act, s. 132(1).
- [26](#) NFP Act, s. 132(1), (2),.
- [27](#) NFP Act, s. 132(4).
- [28](#) NFP Act, s. 132(5).
- [29](#) NFP Act, s. 130(4) and (5).
- [30](#) NFP Act, s. 132(3).
- [31](#) NFP Act, s. 136(1).
- [32](#) NFP Act, s. 136(2).
- [33](#) NFP Act, s.136(6).
- [34](#) NFP Act, s. 126 (3).
- [35](#) NFP Act, s. 136(1), 136(3) and 138(2).
- [36](#) NFP Act, s. 140(1). There are currently no regulations.
- [37](#) NFP Act, s. 136 (7).

[38](#) NFP Act, s. 137.

[39](#) NFP Act, s.2(1).

[40](#) NFP Act, s. 142.

[41](#) This is a lower standard than the common law *subjective* standard of care, which tests a person's actions against what may reasonably be expected from a person of his/her knowledge and experience, that applies under the CCA.

[42](#) NFP Act, s. 148(1), 149(1) and (2), 150(1) and (2).

[43](#) NFP Act, s. 148(2).

[44](#) NFP Act, s. 148(3).

[45](#) NFP Act, s. 145.

[46](#) NFP Act, s. 146.

[47](#) NFP Act, s. 141.

[48](#) NFP Act, s. 151.

[49](#) NFP Act, s. 148(4).

[50](#) NFP Act, s. 170(5).
