

Harbour Authority Frequently Asked Questions and Answers (FAQs)

Transition to the *Canada Not-for-profit Corporations Act*

Note that these FAQs are specifically related to issues concerning Harbour Authorities. Please consult Corporations Canada's website where you will find more specific questions and answers related to the transition to the *Canada Not for Profit Corporations Act*.

<http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04973.html>

1. Who can prepare an Annual Financial Report? Are the only options a Chartered Accountant (CA), a Certified Management Accountant (CMA) or a Certified General Accountant (CGA)?

A: The annual financial report needs to be prepared by a “public accountant” as defined in the act. The criteria are:

1. the person is a member of a provincial association of accountants (CA, CMA or CGA);
2. the person has any required licence required for the type of review that they will be doing; and
3. the person must be independent of the corporation, its affiliates or the directors or officers of the corporation or its affiliates.

NOTE: If all the members (100%) of a small corporation (soliciting with less than \$50,000 in gross annual revenues or a non-soliciting with less than \$1 million in gross annual revenues) agree to NOT appoint a public accountant, then a public accountant is not appointed and there will be no "public accountant's report". However, the annual financial statements for the Harbour Authority **MUST** still be prepared.

2. How are revenues calculated when determining whether a corporation is soliciting or non-soliciting? For example, would the following Harbour Authority be considered soliciting because the total revenue is over \$10,000?

Harbour Authority ABC

Public Source—Provincial Contribution Agreement	\$ 5,000
Revenues—membership dues and user fees	\$15,000
Total Revenues	\$20,000

A: If the amount of public source funding is equal to or less than \$10,000, as in the case above, then the corporation is not a “soliciting” corporation.

3. What are the general rules with respect to resignation of directors?

A: A director ceases to hold office when he or she resigns. The resignation becomes effective at the time a written resignation is sent to the corporation or at a time

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specified in the letter of resignation depending on which time is later. A director's written reasons for resigning has to be circulated to the members and filed with Corporations Canada.

The remaining directors may continue to exercise all of the powers of the board of directors as long as the number of remaining elected directors constitutes a quorum (a majority or the minimum required by the corporation's by-laws). If the bylaws do not preclude appointments, the remaining directors may appoint a replacement to hold office for the unexpired term of the resigning director.

4. Can an officer of the corporation or an employee such as the Harbour Manager be a director?

A: The Act does not prohibit officers or employees from being directors. However, you should consider whether this makes good business sense in the context of your particular Harbour Authority. There are also other ways employees and officers can attend and participate in the proceedings of the board of directors without actually being elected to the board. For example, officers or employees can make presentations to the board on specific issues or plans or they can participate through committee work undertaken by board members.

Note: For soliciting corporations, there is a requirement that at least 2 of the directors must not be officers or employees.

5. Can a specific group have their own election to appoint a member to the board of directors of a corporation? Can there be an election process that results in an appointment?

A: Yes the articles of incorporation can provide that a specific class or group of members has the exclusive right to elect one or more directors. When a vacancy occurs among those directors, it may only be filled by the remaining directors elected by that class or group or in a special meeting called to have a vote amongst those members.

6. What are the general considerations with respect to determining who can be members of the corporation?

A: The Act provides a lot of flexibility and each Harbour Authority must determine which members and what membership conditions best suit its objectives and how it would like to conduct its business. In general, the articles are required to state the classes of members that the corporation may have, the voting rights and the bylaws set out the conditions required for being a member of those classes. A class can be very broad such as "anyone who pays a membership fee". It can be narrower such as "all commercial fishermen" in a particular location or the members of a local aboriginal band. The by-laws can also provide that corporations can be members. A very restrictive approach might be that a few named corporations would constitute the one and only class of members.

Keep in mind that members elect the directors and it is the directors that manage and supervise the affairs of the corporation.

7. Does a person have to be present at a meeting to be voted in as a director?

A: A person must either be present or they must, if they were not present, consent to hold office as a director in writing before the election or within 10 days after the election or the person must in fact act as a director after the election in order to be deemed to be a director under the NFP Act.

8. Can a director serve more than one 4 year term?

A: The bylaws cannot provide for a term longer than 4 years, however, the by-laws could provide for a shorter term or the term can simply expire at the annual general meeting. A corporation can also have staggered terms that expire at different times. In any event, there is nothing precluding a director from standing for more than one term or for consecutive terms. One or more rules addressing this issue could conceivably be added to the by-laws if it was thought to be appropriate in the context of a particular Harbour Authority.

9. Why are most Harbour Authorities incorporated federally and not provincially? What are the benefits to both? Is there a requirement for them to federal and could it have impacts on dissolution?

A: There is no requirement that Harbour Authorities be incorporated federally under the NFP Act. Whether there are advantages to incorporating under a provincial statute is a question that is perhaps best discussed with a legal adviser in the province in which the harbour is located.

The advantages of the NFP Act include that the corporation can operate across the country as of right, subject to provincial filing requirements and the corporate name of the Harbour Authority is protected across Canada. Incorporation and continuance fees can be lesser when compared with some provincial fees but annual filing obligations and related fees can also be higher in some cases than comparable provincial obligations.

The NFP Act is also modern in the sense that it provides for incorporation as of right, a streamlined process for amending by-laws without government approval, indemnification of directors and the purchase of insurance for directors and officers, it places directors under the same standard and duty of care as directors of a for-profit company and it permits voting by proxy, mailed-in ballots and telephone or electronic means.

10. Amalgamation - What are the processes under the new Act to amalgamate?

A: Each corporation is required to enter into an agreement which includes the following information:

- a) the provisions that are required to be included in the articles and by-laws;

- b) the name and address of each proposed director of the amalgamated corporation;
- c) the manner in which the memberships of each amalgamating corporation are to be converted into memberships of the amalgamated corporation;
- d) whether the by-laws of the amalgamated corporation are to be those of one of the amalgamating corporations and if not, a copy of the proposed by-laws; and
- e) details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated corporation.

The boards of directors must approve the agreement and submit it to the members of each corporation for approval by special resolution. Each member has a right to vote on the agreement even if not otherwise entitled to vote.

For a more detailed summary of amalgamation requirements, please follow this link to Corporations Canada website: <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05008.html#amalgamations>

For information on the details of the application: <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05165.html>

11. Member's Remedies--Who are "other complainants" that have available to them the derivative action and oppression remedies?

A: The definition of "complainant" is broad because it includes "any other person, who in the discretion of the court, is a proper person to make an application under this Part". This is in addition to other parties which are specifically named including members of the corporation, debt holders, present or former shareholders of an affiliate corporation, present or former directors and officers of the corporation and the Director appointed under the NFP Act to administer it.

A derivative action is one in which a "complainant" is permitted by a court to bring an action on behalf of the corporation and the broad definition would apply. The scope for "any other person" under the oppression remedy is arguably a bit narrower because the nature of the relief that can be granted is limited to relief from acts which are oppressive, prejudicial or unfair and only those acts when done by shareholders, creditors, directors, officers or members.

12. Are there any special rules for appointment of officers?

A: No, there are no special rules but directors are expected to appoint competent and skilled officers in accordance with their duties in the NFP Act to act in the best interest of the corporation and exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.'

13. Is a website considered “electronic means”?

A: A website can be used for notice if the procedure under Part 17 of the Act is followed. The general requirement for electronic notice is that the person to whom the notice is to be sent must consent to the electronic means of transmission, that such procedures be set out in the by-laws as required by section 267, and that the information be accessible by the addressee and be capable of being retained by the addressee for future reference.

14. What does the term "grants or similar financial assistance" mean in paragraph 2(5.1)(b) of the Act and how does it apply to determine whether Harbour Authorities are "soliciting corporations"?

A: Funding that is provided by DFO to make improvements to infrastructure owned by DFO is not considered to be financial assistance to a harbour authority and does not count towards whether the harbour authority is a "soliciting corporation" under the Act. However, funding paid to a harbour authority as a contribution under the DFO Small Craft Harbours Class Contribution Program is a government transfer payment and counts as "financial assistance". These amounts must be counted towards whether the harbour authority is a "soliciting corporation" or not. Grants or contributions from a province would also have to be counted in this way. At the moment, the prescribed amount of financial assistance received by a corporation over which it becomes a "soliciting corporation" is \$10,000.