



REVISING THE CORPORATIONS ACT

**“Modernization of the Legal Framework Governing
Ontario Not-For-Profit Corporations”**

Consultation Paper #2

**A Brief to the Sector from
The Ontario Nonprofit Network’s
Expert Working Group**

April, 2008

Introduction

The *Ontario Corporations Act* is the legislation that governs how nonprofit organizations are incorporated and that sets out the framework for their corporate structure (directors, by-laws, etc.). The current act has not had a major revision for almost 50 years and badly needs updating. We are very grateful for the opportunity for the nonprofit sector to contribute to the development of modern legislation.

The world in which nonprofits operate today is very different from the world 50 years ago, and, as a result, nonprofit organizations themselves are very different. It is, therefore, very important that nonprofit organizations participate in efforts to modernize any legislation that affects them. However, participating in the somewhat technical exercise of developing new legislation is beyond the capacity of many nonprofit organizations. They have neither the time nor the legal expertise to focus on the legislative review. For this reason, the Ontario Nonprofit Network¹ has established an Expert Working Group composed of knowledgeable individuals from the nonprofit sector and of lawyers whose practice includes nonprofit organizations. The job of the Expert Working Group is to review the consultation documents, mull over the issues, and prepare concise and accessible briefs for the sector that so organizations with limited time and involvement can grasp the key issues and make their views known.

In preparing this brief, the Expert Working Group has reviewed the legislation and the proposed changes with a view to ensuring that the legislation:

- supports and encourages the development of responsive and transparent nonprofit organizations to serve the people of Ontario;
- does not unduly and unnecessarily add to the regulatory burden
- does not constrain or limit the ability of nonprofit organizations to accomplish their objectives and respond to a changing environment.

This document responds to the second government consultation paper and deals with many nuts-and-bolts issues of governance, including issues relating to the tenure and qualifications of directors and the relationship between directors and officers and other stakeholders, including members.

It builds upon, and remains consistent with, the key legislative characteristics described in the first ONN Brief in response to the government's Consultation Paper #1. See Appendix C for a summary of those recommendations.

¹ The Ontario Nonprofit Network is described in more detail in Appendix A. See Appendix B for a list of the members of the Expert Working Group.

General Principles

ONN believes that non-profit organizations providing public benefit have distinct and different needs than other membership or association based organizations (e.g. clubs and trade associations) and that the revised Corporations Act be dedicated exclusively to nonprofit public benefit organizations. In preparing these briefs we have only considered the needs of these corporations providing public benefit.

In general, the ONN proposes that the legislation be structured enough to ensure certain minimum standards in organizations that serve the larger public benefit, but flexible enough not to seem to micro-manage. Many not-for-profits serve very particular needs in communities, and in order for them to be responsive to those needs they may, for instance, need to structure boards in certain ways.

(1) Board Composition

(a) Number of Directors

The minimum number of directors under the CA should be three, regardless of the type of not-for-profit. Any not-for-profit organization should be able to specify in its incorporation document a minimum (no less than the required three) and a maximum number of directors, which could be changed to suit changing realities through amendments to the corporation's articles.

(b) Qualifications of Directors

Only individuals (as opposed to other organizations) should qualify to be directors. Directors should not be under 18 years of age, bankrupt, or "incapable". We agree with the note of caution in this regard from the United Ways of Ontario's response to Consultation Paper #2 – "If a person was found to be 'incapable' in the past but is no longer deemed to be so, are they now eligible to serve as a director? ...if not, we would have concerns about unreasonable impediments to, for example, consumer/survivors of mental health services on non-profit boards."²

In a similar vein, the legislation should not require that directors be members of the corporation. Because of the wide-ranging types of organizations comprising the not-for-profit sector, a model of membership as the basis for the organization may be more appropriate for some not-for-profits than others. A culture or arts board, for instance, serves primarily as a fundraising board. A social service agency may need a breadth of representation from various users of services, as would boards of organizations such as day cares. A service organization or policy institute needs board members intimately familiar with specialized policy issues.

² Response to Consultation Paper #2 (August 22, 2007), "Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations", United Ways of Ontario Council, December 21, 2007

In addition, organizations may have to range quite widely to find qualified volunteers with the required skills and time to serve as directors.

At least two of the required three directors should not be officers or employees of the corporation

(2) Term of Office

The maximum time period for a director to remain in office before an election is required should be three years. The organization's by-laws may specify lesser terms; if the by-laws don't specify, the default should be three years. If elections don't occur when scheduled, incumbent directors should continue to serve until their successors are elected. Unless restricted by by-laws, there should be no maximum consecutive terms of office.

(3) Directors' Meetings

(a) Notice of Meetings

The reformed Act should permit meetings of directors to be called on the notice provisions required in the organization's bylaws. Directors may waive the notice of a meeting in any manner, and attendance at a meeting fulfills the requirements of waiving notice. The Saskatchewan Non-Profit Corporations Act could serve as a model in this area.

(b) Resolution in Lieu of Meeting

The Act should provide for a resolution to be signed by all directors in order to be considered as a resolution passed at a meeting of directors.

(4) Resignation and Removal

Organizations should be allowed to remove directors by majority vote. In the case of directors elected by a single class of members, a majority vote by that class of members should cause the removal of that/those directors. If a replacement director is not elected by the members (or class of members) at the time of removal, the remaining directors should decide whether to replace the resigned director before the next election of directors.

Directors should be permitted to resign at any time, and submit to the corporation written reasons for the resignation.

The minimum required number of directors should not be allowed to resign until their successors have been elected/appointed.

(5) Officers

The Act should require the corporation to have, at a minimum, a president (who is also a director) and a treasurer.

(6) Directors' and Officers' Liability

(a) Duty of Care and Loyalty

The Act should require the same duty of care and loyalty required of directors of for-profit organizations: to act honestly and in good faith, with a view to the best interests of the corporation; and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This objective test is more appropriate than a test that involves subjectivity and a higher standard of care required of some directors

(b) Due Diligence Defence

The reformed Act should mirror other legislation, including the Ontario Business Corporations Act, that absolves directors from liability if they relied, in good faith, on information from experts such as accountants, lawyers, accountants, engineers, appraisers and others whose profession confers credibility. Such information and advice can also serve as a defence if it comes from staff of the organization.

(c) Indemnification and Insurance

Under the reformed Act, not-for-profit organizations should continue to be allowed to purchase liability insurance to cover the indemnification of people acting in their capacity of directors or officers.

(d) Limiting Liabilities of Directors and Officers

In order to ensure that directors and officers are not unduly discouraged from serving the interests of the community through service to not-for-profits, the Saskatchewan model would be the ideal one for Ontario to follow. Directors and officers should not be personally liable in civil actions resulting from their good faith activities as directors and officers. Directors remain liable for defined statutory liabilities.

(7) Conflict of Interest

The reformed Act should mirror other frameworks, such as the Saskatchewan Non-Profit Corporations Act, in defining conflict of interest on the part of directors and officers, and requiring certain actions in those cases. A director or officer should be required to disclose, in writing, the fact that he or she is a party to a contract, has a material interest in a contract, or has an interest in any other material transaction of the corporation. Furthermore, directors or officers with a conflict of interest should not be permitted to vote on resolutions dealing with such transactions.

Your Response

If you agree with the recommendations contained in this brief you only need to write a brief note indicating your agreement and mail it to the Corporations Act Modernization Unit at the address below.

If some of these recommendations do not suit your organization's circumstance please write to the address below explaining your concerns. We are very interested in better understanding the sector's special needs and interests and would ask you to copy the ONN Expert Working Group in your correspondence with the government.

Please respond by May 31, 2008 electronically or in writing, to:

Corporations Act Modernization
Ministry of Government Services
Policy Branch
777 Bay Street
5th Floor – Suite 501
Toronto, ON M7A 2J3
(416) 326-8877

Email: business.law@ontario.ca

Please also send a copy to:

Janice Wiggins, Chair of the Expert Working Group
janice@volunteerlawyers.org

Where to Find More Information

If you want to delve more deeply into this issue, the consultation documents can be found on the Government of Ontario website at:

<http://www.gov.on.ca/MGCS/en/AbtMin/132784.html>

Look for the following two documents:

- Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations (Corporations Act, Consultation Paper 1, May 7, 2007)
- Supplementary Materials to the May 7, 2007 Consultation Paper

Coming Soon

The Ontario Nonprofit Network is in the process of setting up a website (www.ontariononprofitnetwork.ca) which will include the ONN's Expert Working Group's briefs, important sector news, and links to the United Ways of Ontario submission and the Ontario Bar Association submission.

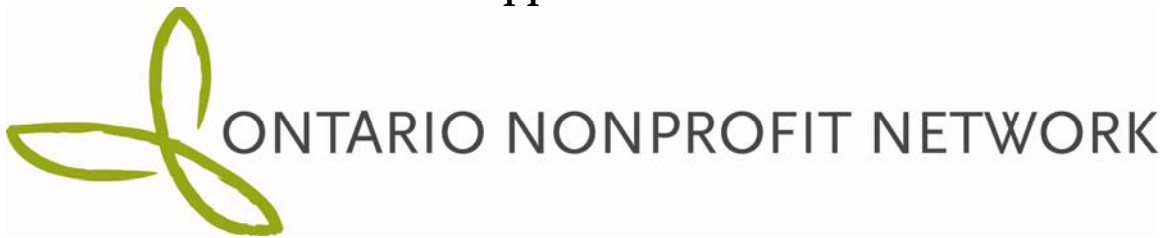
The Expert Working Group will prepare briefing notes on the third consultation document and will prepare briefing notes when the third consultation document is issued.

Make sure to visit ONN's website and sign up to receive regular information.

This legislation is critical for the sector's long-term well-being. Please participate in the consultation process by making your views known.

The greater the number of organizations who participate, the greater the likelihood we will obtain legislation that meets the sector's needs. It has been 50 years since the last major revision of this legislation and we cannot afford to miss this opportunity.

Appendix A



About the Ontario Nonprofit Network

The Ontario Nonprofit Network (ONN) is a diverse group of public benefit organizations have come together following the publication of the first consultation paper by the Policy and Consumer Protection Services Division, Ministry of Government and Consumer Services (MGCS). This paper, issued in May 2007, proposes to modernize the *Ontario Corporations Act*. Those of us who took a look at this paper soon realized that, as a sector, we were ill-prepared to participate in the very legislation that was to govern our affairs.

The timing of the release of the consultation paper coincided with a decision to form the Ontario Nonprofit Network, a loose coalition of individuals and organizations operating across the breadth of the sector, including arts organizations, social service organizations, environmental organizations, community health agencies, international service organizations, social economy organizations and others. The intent is to include in the network the nonprofit and charitable organizations working for the public good in Ontario. The very strength of our sector is its tremendous diversity. As we develop, we hope to be able to reach many organizations on a regular basis with information and, as issues arise, that those organizations most affected can provide network leadership, and that the rest of the sector can support and amplify the work of our colleagues. In this way, we hope to increase the profile and capacity of the sector to participate in public policy in Ontario in a cost-effective manner. The Corporations Act is the first of the issues we are tackling this way. It affects every single nonprofit and charitable organization in Ontario.

In coming together to address the Corporations Act, we have assembled a small working group. Individuals with a wide diversity of views and perspectives from the sector, in partnership with some legal experts in nonprofit law, have formed an Expert Working Group. This committee is charged with examining the consultation documents and legislative reform proposals from the Ministry of Government and Consumer Services, providing feedback to the Ministry, and providing the sector with advice and comments.

ONN is working collaboratively with staff at MGCS and the Ministry of Citizenship and Immigration to ensure nonprofit organizations participate in the modernization of the legislation.

MGCS has issued two consultation papers to date and recently issued Supplementary Materials to the first consultation paper.

Appendix B

Expert Reference Group	Organization	Sector
Peter Alexander	Senior Policy Analyst, United Way of Toronto and representative for United Ways of Ontario	United Appeal Funder
Pat Bradley	Theatre Officer and Research Manager, Ontario Arts Council	Arts
Lynn Eakin	Funded by Metcalf Foundation to support sector organizational efforts	Nonprofit Sector Consultant
Rory Gleeson	Policy Analyst, Ontario Association of Children's Aid Societies	Child Welfare
Margaret Hancock	Executive Director, Family Service Association of Toronto	Social Services
Alyson Hewitt	Director, Social Entrepreneurship, MARS	Social Enterprise
Brian Iler	Iler Campbell LLP	Lawyer
Ted Jackson	Chair, Carleton University Center for Social Innovation	Social Enterprise
Axel Janczur	Executive Director, Access Alliance, a community health centre serving immigrants, refugees and people without status	Community Health
Laurie Mook	Director, Center for Social Economy, OISE, University of Toronto	Social Economy
David Stevens	Gowlings LLP, and Ontario Bar Association Charity Law Section	Lawyer
Janice Wiggins (Committee Chair)	Project Director of Volunteer Lawyers Service, Pro-Bono Law Ontario	Social Justice

Appendix C

Recommendations at a Glance

The first government consultation document, *Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations*, issued on May 7, 2007, sought feedback on the overall structure and framework of the new act. The following are the key principles that the Expert Working Group feels should underpin new corporate legislation for not-for-profit and charitable organizations that provide a public benefit to the people of Ontario.

1. **The revised act should focus exclusively on not-for-profit (NFP) incorporation.** While some not-for-profit corporations will also seek and obtain charitable status, the Corporations Act should not attempt any charitable regulation. Charitable registration and regulation are undertaken elsewhere and should not be included in this legislation. The revised act, however, must accommodate the needs of charities to structure and govern themselves in accordance with charitable regulatory requirements located in other statutes.
2. **In addition to a modernization of the Corporations Act, reform of charitable regulation and oversight is urgently required.** We agree with United Ways of Ontario that the status quo with regard to charitable regulation and oversight is not adequate and call for the government to undertake reform of the administration of charities as part of the modernization of legislation governing the nonprofit and charitable sector.
3. **We believe a dedicated Not-For-Profit (NFP) Corporations Act is needed.** The revised act should focus exclusively on incorporation of not-for-profit and mutual benefit organizations that have public benefit objects. This will allow for robust distribution constraints on NFP corporations and provide improved clarity for both the nonprofit sector and the public as to the true nature of a NFP corporation. “True membership corporations” (organizations that can distribute assets to members upon dissolution) should be dealt with in other legislation.
4. **Not-for-profit incorporation should be “as of right”** similar to the for-profit legislation and to Saskatchewan’s not-for-profit legislation. We believe that robust distribution limitations and disclosure requirements for not-for-profit corporations will discourage organizations without public benefit purposes from applying for nonprofit incorporation. Moreover, the Canada Revenue Agency regulates, reviews and grants tax exemption status to eligible not-for-profit corporations so there is already an existing regulatory mechanism to prevent misuse of nonprofit status to avoid taxation.
5. **Except to the extent otherwise provided in its articles, a NFP corporation should have the corporate power and capacity of a natural person.** To provide

otherwise will create an unnecessary barrier and impose constraints on not-for-profit organizations that are not imposed on for-profit corporations.

6. **The new act should not regulate or restrict the capacity of NFP corporations to earn revenues.** Revenues earned or received by a NFP corporation are directed toward meeting its public benefit objectives. As non-share capital corporations and with distribution constraints on NFP corporations, the public is assured that revenues will be used for the furtherance of the corporation's public good objectives.
7. **There should be no defined purposes for NFP Corporations beyond operating for public benefit purposes.** Classifications and definitions of allowable purposes for public benefit organizations invariably fail to capture the full scope and diversity of the activities undertaken by the sector. Moreover, the sector is known for its creativity and responsiveness to changing communities. Defining allowable purposes risks unduly stifling the sector's ingenuity.
8. **NFP legislation should have robust distribution constraints preventing excessive compensation to staff, directors, and members** with exceptions for indemnification, expenses, and remuneration of a director or member for services. Upon dissolution, the assets of the NFP corporation would be gifted to another like organization or as set out in its by-laws, keeping the assets in the public domain.

It is not too late to participate in the consultation process even though the official response deadlines have passed for Discussion Papers 1 and 2. The last official day for feedback on the Act is May 31st, 2008.

A quick response method is to copy the recommendations summarized above and add your comments under each recommendation.

To find the government consultation papers visit our website: www.ontariononprofitnetwork.ca