GARDINER ROBERTS

BUILDING AN IDEAL NON-SHARE CORPORATIONS ACT
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Summary: After decades of seeking reforms to the corporate statutes governing non-profits and charities, lawyers across the country received a mishmash of statutes, each of which has its merits and demerits. But there is not one statute that stands out as superior to all the rest, and each statute has its often jaw-dropping shortcomings. Only three current statutes – Canada, B.C. and Saskatchewan – are modern. What would a non-share capital statute look like if it was drafted by the people who actually have to use it and justify it to their clients – charity and non-profit lawyers?

INTRODUCTION

- A lot of things have happened since I first conceived of this talk. My intention was to take a lighthearted look at the current state of charity and non-profit corporate law ("**CNFP**"), maybe tell a few anecdotes about how we got here, and leave you with some suggestions about where we could strive to go in the next evolution of non-profit corporate statutes.

- We are living in very serious times. Oscar Wilde is often cited as the source of the quote "life is too important to be taken seriously", which strikes me as a useful philosophy. I thought "why not apply it to our current situation". So if you will allow me I intend to stick to my original plan. I hope you will find something in this that you can take forward to your own practices and with the corporate statutes that you live with in each of your provinces.

- I always like to start my talks with a quote from one of my two favourite people Sir Winston Churchill or Sir Arthur Conan Doyle. I couldn't find anything apropos from Sherlock Holmes, but Winston Churchill did have something cautionary to say about this:

  > Legislative Cure-alls: I do not believe in looking about for some panacea or cure-all on which we should make our credit or fortunes trying to sell it like a patent medicine to all and sundry. It is easy to win applause by talking in an airy way about great new departures in policy, especially if all detailed proposals are avoided.[1]

- I have to make a disclaimer here. These are my personal opinions. I represent only myself. The Canadian and Ontario Bar Associations, and their respective members, and particularly those of the federal and provincial Charity and Not-for-Profit bars among us, are not responsible for my opinions and do not necessarily agree with them – although personal conversations over many years convince me that much of what I say will be agreeable to some of you. Some of my suggestions might be a bit provocative and you are welcome to challenge me on them – we need a healthy dialogue on the development of corporate law in our field.

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[1] (October 5, 1946, Blackpool, *The Sinews of Peace: Post-War Speeches*, London: Cassell, 1948, p.213)

- Since this is a virtual program, it is also an environmentally friendly one: no trees have been harmed in the making of this talk and no messy greenhouse gases have been expelled from airplanes, trains or automobiles for those of you who are in attendance. And it qualifies for CPD.

- I've been at this corporate law game for a long time. I first got involved when I discovered that I enjoyed working with little-known or off-the-beaten path types of corporate law. This included legislation dealing with trust companies, mortgage and loan corporations, condominiums, fraternal organizations and religious entities, as well as special acts applicable only to a few corporations. Inevitably this led me to an interest in non-share capital corporations under the old federal and provincial corporations acts. When the CNFP Law Section of the Ontario Bar Association was formed it seemed like a natural home for me. Here I would be among a small and extremely collegial group of people working with what to most lawyers would be esoteric and archaic legislation. When government approaches were made to consult on legislative reform late in the 20th century – how long ago that seems now! – I was eager to be involved. By the time that consultations began for both the federal and provincial legislation that led to the *Canada Not-for-Profit Corporations Act* ("**CNCA**") and the *Ontario Not-for-Profit Corporations Act, 2010* ("**ONCA**") I was hooked and actively participated in consultation groups leading up to the passage of both acts. While these are the two primary acts I will focus on, I will also be referring to the other three modern acts – B.C. *Societies Act;* Saskatchewan *Non-profit Corporations Act, 1995*; and the Yukon *Societies Act*[2], which has not yet been proclaimed.

- I think it's safe for me to say that I'm in the late stages of a career in which I have worked with a variety of statutes which can be described variously as "incomprehensible, esoteric, prescriptive, patronizing, laissez-faire, archaic, incomplete and contradictory", although not all at the same time. In fact this was what attracted me to the practice of the law of non-share capital corporations – i.e., the fact that the relevant statutes were not easy to learn, and were outside the main stream of corporate practice and thus a mystery to most of my business law colleagues. In fact, when the CNCA came down one of its not so subtle purposes was to track the format and language of the CBCA so closely that any corporate lawyer and even laypeople could work with it. Fortunately for the practices of us CNFP types, that goal failed miserably. However, if the governments of the day seriously want to accomplish that, some of what I am going to propose today might actually help them to do so.

- When I was called to the bar the major corporate statutes that every lawyer in Ontario was familiar with were the *Canada Corporations Act* ("**CCA**") which applied to all federal business and non-share corporations and the *Ontario Corporations Act* ("**OCA**") which fulfilled the same role in Ontario. All the other provinces also had archaic corporate statutes, based on different models, that applied to share and non-share corporations.

- The OCA was the principal corporate law statute in the Province of Ontario from 1907 for all types of corporations. It was substantially amended in 1953 and again in 2017, but is still very much an archaic and incomplete piece of legislation. It wasn't until the first version of the Ontario *Business Corporations Act* (""**OBCA**") was passed in 1970[3] and the *Canada Business Corporations Act* ("**CBCA**") came out in 1975 that there was a substantial difference between the corporate statutes which applied to business and non-share corporations.

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[2] SBC 2015, c 18; SS 1995, c N-4.2; SY 2018, c.15

[3] The substantially revised current version, on which the ONCA is based, replaced it in 1982. The *Business Corporations Act,* R.S.O. 1970, c. 53, originally S.O. 1970, c. 25

- This was the point at which corporate law in the business world diverged from corporate law in the non-share world. It was the business corporate law that has continued to develop, while the non-share law remained mostly static until Saskatchewan, then Canada, proclaimed new statutes. The effect was that the vast majority of corporate lawyers lost their familiarity with the earlier statutes and left them as a legacy for non-share capital corporations, insurance corporations and the small number of other types of corporations which did not migrate into the business corporations acts, including, in the case of Ontario, share capital social clubs.

- The philosophy under which the federal and provincial companies branches administered the CCA and OCA also differed (and in Ontario still differs) from their business cousins.

    - When I first started to practice, the philosophy under the CCA was that if it wasn't provided for or prohibited by the Act, you could do it. Until fairly recently, the most useful text under the CCA was Wegenast's, *The Law of Canadian Companies*, published in 1931. Despite the laissez-faire attitude, you still had to have your application for incorporation and your by-laws approved and any change to your by-laws could not come into effect until it had been approved by the Minister – which meant effectively by Industry Canada (which is now Corporations Canada). However, after a while it changed its policies to the more restrictive approach that if the Act didn't provide for it, you couldn't do it, except to the extent that they approved it. They provided standard special provisions for letters patent and a form of by-law that you should use – if you wanted to use your own version or vary or add to the standard by-law, that had to be approved too. But administration was still light-handed, lax corporate practice was overlooked, audits were finessed, which I'll talk about more below, you could have *ex officio* directors and . delegate voting. Most importantly, the sector didn't suffer from an excess of corporate democracy.

    - Even in Ontario many lawyers prefer to incorporate charities under the CCA and now the CNCA, because it means not having to deal with the Ontario Public Guardian and Trustee (the "**PGT**"). That never bothered me and I chose which statute to incorporate under for other reasons. Practice under the OCA also has its patterns. While incorporation is still discretionary, for non-charities it is relatively straight-forward to have letters patent issued. There is no review of by-laws. Compliance with corporate law has generally been lightly enforced, even in the case of charities. Charities have a few more hurdles to jump than other non-share corporations. They must have their objects approved by the PGT and must include required special provisions. For an extra $100 you can have the Companies Branch process your application to incorporate in only a week. PGT approval isn't required if you use the pre-approved objects on the PGT's website. Any changes to letters patent of charities also require PGT approval.

    - We are hearing encouraging news about the possibility of the ONCA finally coming into effect as early as the beginning of next year.

- So, to come back to what I said earlier, the CNCA and the ONCA are attempts to again bring the two different types of acts – business and non-share capital corporate law into the same statutory format, so all lawyers who practice corporate law can be familiar with them. Of course this philosophy would be fine if the cultures and needs of the two corporate sectors were sufficiently similar that a one size fits all corporate philosophy could work. But they aren't. Over many decades the non-share sector has developed its own ways of dealing with corporate governance, much of it as a result of the deficiencies or omissions in the two legacy statutes, but also because of the difference in the economic expectations of their stakeholders and the underlying

philosophy of how the two different types of organizations think of themselves and their stakeholders.

REFORM OF NON-SHARE CORPORATE LAW

- Back in 2005, after several years of consultation, the federal government tabled a draft non-share capital corporations act, Bill C-21,which died on the Order Paper when Parliament was dissolved for the January 2006 Canadian federal general election. Bill C-21 represented the latest in a long series of federal initiatives to replace Parts II and III of the CCA. Our Section reviewed it and sent a brief to the government expressing significant concerns with the philosophy and contents of the bill. I can't do better than to set out some of the general comments we made at the time:

> **II. CRITIQUE OF LEGISLATIVE PHILOSOPHY**
>
> Jurisprudence and modern scholarship on the corporation regard it as a largely consensual institution and regard corporations legislation as largely default rules establishing basic governance rules.
>
> Bill C-21 appeared to be based on a number of foundational themes, which for the most part, accord with this scholarship and modern jurisprudence. These include incorporation as of right, abolition of *ultra vires* and the codification of directors' duties. However, there are a number of recurring legislative themes expressed in Bill C-21 which we believe are debatable and which we believe have lead to the introduction of statutory provisions of dubious merit. In particular:
>
> - *Governance of not-for-profit corporations is or should be essentially democratic in nature and one role of not-for-profit corporations legislation is to provide imperative rules that enhance the democratic rights of members.*
>
> This proposition is valid only for not-for-profit corporations with members who desire or need strong democratic rights. Typically this will be the case where membership represents a significant economic interest, or where a membership voice is essential to the mission of the organization, such as some advocacy organizations. Democratic rights for members in other types of organizations, however, are not appropriate at all. Large segments of the not-for-profit sector come to the legislative regime with pre-established governance norms which are not democratic or not fully democratic. There is no reason, in our submission, for a corporations statute to impose a single model of corporate governance on all types of organizations, regardless of their mission and pre-established governance norms, or to render the exercise of opting out of these norms unnecessarily complicated and uncertain. If large segments of the not-for-profit sector prefer less democratic regimes, the corporations statute should anticipate this desire by explicitly recognizing alternative governance structures. Without undue complexity, other jurisdictions have been able to draft legislation that responds to the diverse governance needs of this diverse sector.

- *Government should exercise a significant regulatory mandate in the governance of not-for-profit corporations and this regulatory mandate should be expressed in the corporations statute.*

  Such a proposition is susceptible to abuse unless government policy makers are absolutely clear as to the regulatory mandate for government intervention in the first place. This needs to be clear so that government actors are not drawn into interventions in the sector that serve no real purpose. In our view, for the regulatory mandate to be clear, the legislation which permits such interventions must be part of a law that is applicable to all not-for-profit organizations, not just not-for-profit corporations.

- *As much as possible, the new statute should mimic the Canada Business Corporations Act (CBCA) in form and content.*

  This proposition, if followed too closely, leads to the adoption of governance norms and remedial regimes which are entirely inappropriate for many not-for-profit organizations. Bill C-21 often fails to recognize the impact of functional differences between for-profit and not-for-profit corporations upon governance, and make appropriate accommodation based on those differences.

- *A large number of rules should be expressed as imperative ("must") and not as permissive ("may").*

  This last proposition overlooks the fact that the purpose of the corporations statute is to facilitate, not regulate, and leads to too many inappropriate imperative rules. It may not be difficult to avoid inappropriate imperative rules in practice. For example, the by-law of a particular not-for-profit corporation might establish a category of "interested party" or "non-member" who would not technically be "members" under the statute, and therefore would not have the imperative or default rights of members. Such a by-law could establish this class of "non-member" and define the entitlements of that class without any regard to the provisions of the statute governing members. To the extent that this sort of 'work-around' develops, it would be an indication that the statute's imperative rules were inappropriate or that the statute did not offer an appropriate variety of default rules. Uncertainty would result if not-for-profit corporations could not predict whether a court would respect such 'work around' governance choices. Bill C-21 does not display an adequate understanding of the diversity of governance norms currently used in the sector. The CBA Section believes it inappropriately imposes norms suitable for mutual benefit-type organizations on all types of organizations.

- Our Executive Summary concluded with the following warning:

  If the Bill is reintroduced in its current form, many professional advisors will be recommending that new incorporations be done under provincial legislation and that existing CCA clients consider continuing under provincial legislation, in order to avoid some of the uncertainties and potential problems described below. This will be of

particular importance to religious or quasi-religious organizations, but will also affect any not-for-profits in which the membership does not have a personal economic interest in the activities of the organization.

- Unfortunately, the next bill, which became the CNCA, was essentially a re-run of C-21, despite our admittedly over-the-top warning, and with almost none of our recommendations having been adopted.

- My initial reaction to the CNCA was more disappointment than welcoming. Since then I have mellowed somewhat but I still don't like large portions of the Act and consider it an opportunity missed, because the government of the day would not take the concerns of the sector and those of us who represent it seriously.

- Just one anecdote should give you a sense of what we were feeling at the time of proclamation of the CNCA: at an information session a non-lawyer got up and said, "I am the president of a national association under the CCA, the board of directors of which consists of the presidents of each of the provincial chapters. How are we supposed to do this under the CNCA which doesn't allow *ex officio* directors?" The response was, "You will just have to find a way to do it!" We all know the pretzel shaped structures we have had to create to replace the former CCA straight-line solution to that one! We still have to play a silly game of electing someone to hold an *ex-officio* position. At least the ONCA will preserve the ability to have *ex officio* directors.

- Ontario went through a similar process of consultation and reform in the first decade of this century. When the province of Ontario started consultations for the reform of the OCA in 2007 The OCA had a lot of good things in it, the sector was content with the laissez-faire approach to a lot of corporate activities, and we would simply add what was needed and fix what needed to be fixed. I'm attaching the OBA's 2007 brief as an Appendix to this paper. It is quite a good in-depth review of how to draft a new act for the sector.

- The brief was a combined effort of the CNFP and Business Law Sections and was more of a compromise than we would have preferred. The business lawyers preferred that a statute intended to modernize corporate law and facilitate the functioning of the clients of the statute, even in an area in which most of them did not practice, had to share a common philosophy with other corporate statutes, and be more prescriptive than most of us practicing in the CNFP sector would prefer. Like the CNCA brief, it had almost no effect on the final version of the statute. Our offer to draft a new act was not accepted. However, many of the suggestions in the brief have made it into my ideal act below.

- The reaction of many of us when we first saw the ONCA in 2010 was akin to shock. We had been expecting a totally different act than the CNCA. What we got was essentially a version of the CNCA that intentionally differed from it only by about as much as the OBCA differed from the CBCA. In other words pretty much the same thing with a few technical differences and one or two goodies thrown in. It is better in a few cases, worse in a few more, but "different" is not the word most of us would use to describe it. In actuality most of us who are familiar with both acts consider the ONCA to be superior to the CNCA in a number of ways, particularly after some of the amendments in 2017. However it still suffers from many of the same defects. We now have to wait to see if there are any further changes prior to proclamation. Hopefully we will have proclamation by the end of this year.

- My gut feeling is that once it is proclaimed the ONCA will be favoured over the CNCA in most cases, but there are several features in the CNCA which some might consider desirable:

- ability to have no alternative voting methods at all if you wish,
- ability to have only one director for a private charitable foundation, and
- the fact that such a foundation would not likely be a soliciting corporation.

NON-SHARE CORPORATE LAW IN CANADA TODAY

- Since the CNCA and ONCA came out we have had the new BC *Societies Act* and the new but as yet unproclaimed Yukon *Societies Act*[4], which appears to have been influenced by it. Saskatchewan also has oldest modern non-share act, the *Non-Profit Corporations Act, 1995*[5].

- The rest of the country, including Ontario, has a hodgepodge of legacy corporation legislation, some of which has been replaced for business corporations with modern legislation. Canada, B.C., Saskatchewan, Ontario, Quebec, New Brunswick and Prince Edward Island all have business corporations acts. Nova Scotia and Alberta each has Companies and Societies Acts. Manitoba has its all-encompassing Companies Act. Quebec, PEI and New Brunswick have Companies Acts. Newfoundland has a Corporations Act covering both types[6]. The three Territories each have a *Societies Act* and a *Business Corporations Act*, which I have not had an opportunity to familiarize myself with.

- The Alberta Law Reform Institute released a discussion paper with recommendations for new legislation in 2015[7]. To date no legislation has been introduced.

- Thus Canada has one federal, four provincial and one territorial relatively modern non-share corporate acts, of varying models, none of which is ideal, but each of which has some desirable and some disliked features. Two of those acts, Ontario's and Yukon's, are not yet in effect.

INTRODUCTION TO MY PROPOSED IDEAL ACT

- I'd like to tell you about what a corporate law statute applicable to non-share capital corporations with a wide variety of purposes and membership structures could look like if the CNFP bar were given the mandate to prepare it. I'm going to submit to you that much of that statute could be prepared by simply cutting and pasting from a number of existing statutes, some of which have gotten a fair amount right, with only a few blighted sections that most of us would like to remove and replace. Of course there are a few wish list items that don't currently exist in any Canadian non-share statute.

- After chatting with some of my colleagues, I have assembled an outline of what I like to call the "Ideal Non-share Capital Corporations Act". That's INCCA, pronounced "inka".

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[4] SY 2018, c.15
[5] SS 1995, c.N-4.2
[6] RSNl 1960, c. C-36
[7] http://www.assembly.ab.ca/lao/library/egovdocs/2015/alilr/9781896078632.pdf

“NON-SHARE CAPITAL” V. “NON-PROFIT” OR “NOT-FOR-PROFIT”

- I use the term “non-share capital“ rather than “not-for-profit“ or “non-profit“ on purpose. That is because corporations governed by the statute could conceivably have for-profit motives or at least be permitted to generate and retain revenues in excess of their operating costs. In some cases they would be able to distribute some of those excess revenues to their members. That may or may not make them taxable corporations. It should not be the purpose or jurisdiction of a corporate law statute to deal with the tax consequences of the revenue generation model of the corporation. That belongs to the taxing authority.

- Section 149(1) of the *Income Tax Act* sets out many different types of organizations and entities that are exempt from tax. Many of them contemplate that the organization will be operated to generate revenues in excess of their expenditures. While the vast majority of the charities and non-profits we deal with are covered in ITA s.149(1)(l), the section applies to organizations of many different types, of which corporations are only one. And it doesn’t require the corporations to be non-share.

  > Non-profit organizations 149(1)(l) a club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof unless the proprietor, member or shareholder was a club, society or association the primary purpose and function of which was the promotion of amateur athletics in Canada;

- By contrast, to name a few:

  - charities are exempt from tax under s.149(1)(f);
  - trade unions and benevolent or fraternal benefit societies fall under s.149(1)(k); and
  - boards of trade and chambers of commerce are exempt under s.149(1)(e).

  And none of those organizations are forbidden to make a profit, or to retain net revenues, etc.

- Ironically, the Saskatchewan *Non-Profit Corporations Act, 1995* does not contain a provision that corporations must have a non-profit motive. The closest it comes is a restriction on distribution is in s.30(1):

  > Property to be used to further charitable or membership activities
  > 30(1) Subject to subsection (2), any profits or accretions to the value of the property of a corporation shall be used to further its activities, and no part of the property or profits of the corporation may be distributed, directly or indirectly, to a member, director or officer of the corporation except as permitted pursuant to sections 111, 112, 169, 177, 192, 209, 212, 225 and 227.

  None of the exceptions are substantially different from the other statutes.

- B.C. (s.2(2) and Yukon (s.3(2)) each provide that a corporation cannot have as a purpose “the carrying on of a business for profit or gain”.

- In its statement of purposes, the CNCA doesn't mention non-profit at all:

> Purpose: s.4 The purpose of this Act is to allow ***the incorporation or continuance of bodies corporate as corporations without share capita***l, including certain bodies corporate incorporated or continued under various other Acts of Parliament, ***for the purposes of carrying on legal activities*** and to impose obligations on certain bodies corporate without share capital incorporated by a special Act of Parliament. [italics mine]

There is the usual distribution constraint in s.34(1):

> … no part of a corporation's profits or of its property or accretions to the value of the property may be distributed, directly or indirectly, to a member, a director or an officer of the corporation except in furtherance of its activities or as otherwise permitted by this Act."[8]

- The ONCA in s.8(3) provides "(3) If any of the purposes of a corporation are of a commercial nature, the articles must state that the commercial purpose is intended only to advance or support one or more of the non-profit purposes of the corporation." There is also a similar distribution constraint in s.89.

- My ideal corporation would be free to make all the profits it can and to distribute them in any way it wants – subject to an asset lock concept for public benefit and charities. The CNCA comes the closest to this model

BEST DISTRIBUTION MODEL: THE "ASSET LOCK"

- Instead of putting corporations into artificial categories based on the source and amount of funds it receives, as in the CNCA and ONCA models, under the B.C., Yukon and Saskatchewan Acts each corporation chooses its distribution model. Charitable and public benefit or membership corporations are limited in the potential recipients of their assets to similar types of entities. This is known as an "asset lock".

- In BC only a "member-funded society" can distribute its assets to its members on dissolution (ss.124, 191). Societies (everything that is not a member-funded society) can only distribute to a "qualified recipient", essentially a society, other than a member-funded society, a community service cooperative and a registered charity. The Yukon Act doesn't define "qualified recipient", which will be set out in the regulations. The B.C. and Yukon Acts define a "society" as a corporation incorporated under the Act, therefore limiting the range of possible recipients of a distribution. Sask. s.209 limits distribution of the property of a charitable corporation[9] to (a) a charitable corporation; (b) a registered charity; (c) a municipality; (d) the Government s of Canada or any province or an agency of any of those governments; or (e) any combination of the above.

  Non-registered charities under the B.C., Yukon and Sask. Acts with non-charitable purposes are not able to distribute to organizations that do not fall within the permitted group of acceptable recipients.

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[8] This constraint has been somewhat liberally interpreted in *Lash v Lash Point Association Corp.*, 2016 ONSC 6563 (CanLII),

[9] "charitable corporation" is defined in s.2(1) as "a corporation incorporated or continued pursuant to this Act to carry on activities that are primarily for the benefit of the public, and includes a membership corporation that is deemed to be a charitable corporation pursuant to subsection". The definition is much broader than the common law definition of charity.

- ONCA s.150(1)(b)(B) and 167(1)(d)(i)(B) each provide for a non-charitable public benefit corporation to distribute its assets to a registered charity, another public benefit corporation with similar purposes to its own or to certain government entities. The ONCA limits distribution for public benefit corporations (other than charities) to corporations incorporated under the ONCA.

- CNCA S.235(2) limits distribution from a registered charity, soliciting corporation or one that has been a soliciting corporation in the past 60 months to a qualified donee under the ITA ("**QD**"). While this is not a limitation to corporations under the CNCA, it excludes other soliciting corporations and non-QD corporations under other acts from participation. Note that the Ontario PGT, who claims jurisdiction over all charitable property in Ontario, regardless of the jurisdiction of incorporation, would require that the recipient charity hold the property for the same charitable purpose as the dissolved one.

- Once an asset lock is selected, with only a small exception, it is permanent. No more "yoyo" soliciting corporations, which can move back and forth over the lifetime of the corporation. Under s.193 of BC Act the only way to change from a "society" to a "member-funded society" is with a court order. Saskatchewan gives the Director under the Act discretion to allow a corporation to reclassify from "charitable" to "membership" (s.2(10)) in appropriate circumstances.

- The CNCA and ONCA don't contain a provision for conversion from SC or PBC to non-SC or PBC. Except in the case of a registered charity, a CNCA corporation can simply wait the five years after it has ceased to be a soliciting corporation (s.235(1)(c) and Reg.s.37). Under the ONCA, s.167(6), a non-charitable public benefit corporation is deemed to remain one for this purpose if it was a PBC in the three prior financial years, so can wait for three years to pass and is then able to distribute to its members. In Ontario, a provision similar to the BC one might allow the change of designation to be authorized by the PGT under the provisions of s.13 of the *Charities Accounting Act*, which has the same effect as a court order[10].

DRAFTING PRINCIPLES

- What follows is not a complete outline, but rather a checklist of the most important features that I hope you will agree would make a corporate statute that all of you would elect to work with, rather than the CNCA or any of the provincial statutes we now have.

- I am an amateur draftsman. Maybe those with more drafting expertise have already thought of what I am proposing and will have good reasons to reject it as impracticable. I am willing to listen, but the reasons had better be convincing.

- This is a high-level approach to the legislation. It is not an attempt to create a complete statute. that would be a far more difficult task. I've looked at the best features of a number of current statutes and tried to add one or two features that I think many of us would like to see. Clearly, from the point of view of language and drafting they do not integrate cohesively. That is a job for the legislative drafter.

- Some principles:

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[10] R.S.O. 1990, c. C.10. Under s.1(2) the Act applies to "Any corporation incorporated for a religious, educational, charitable ***or public*** purpose", although the PGT does not consider that the mandate of the office encompasses non-charitable purposes.

- *Cautionary*: Be careful what you wish for. A camel is a horse designed by a committee. Current non-share corporate statutes are laws designed by bureaucrats heavily influenced by business lawyers and many others not involved with our sector on a daily basis.

- *Flexibility*. There should be lots of default provisions, but the ability to substitute liberally within reason. The corporate founders craft what they want. The members have the right to make changes – in most cases.

- *Caveat emptor*. While the statute should give some protection to economic interests, anyone who becomes a member of the corporation and doesn't check the articles and by-laws in advance to see what his or her rights and obligations are, really has no reason to complain.

- *Philosophy*. Be enabling, not prescriptive or patronizing.

- *Jurisdictional.* The CNCA cannot deal directly with charities because that falls under provincial jurisdiction. This leads to the anomaly that charities are not soliciting corporations unless they satisfy the test for the source and amount of funding that any other soliciting corporation would satisfy. Provincial statutes can deal directly with the distinctions between charities and other types of corporation. Provincial laws regarding the ownership and disposal of charitable property may override some provisions of the CNCA.

- *Basic rules*: Bedrock law on certain fundamentals. What can be changed by court order, by members, by companies branch or maybe not at all.

- *Different corporate types*: There are at least three different types of organizations to fit within a unitary corporate statute

    - charities
    - other non-charitable public benefit organizations; and
    - member benefit organizations.

- Within these three groups are also divisions:

    - religious and non-religious organizations;
    - member benefit organizations with members
        - having no economic stake; and
        - with members having an economic stake,

- Some of these types are combinations – e.g., a religious organization which owns a cemetery, or a professional organization which advocates for its members, but also establishes a recognized professional designation – the member has no direct financial interest, but would have difficulty finding work if the designation is withdrawn.

- So, at least five types of entities to provide for, each of which requires at least a few exclusive provisions

- The tent is a big one and the legislation has to facilitate all of these without forcing them into a common mold on matters beyond minimum standards that all corporations must adhere to.

- *One statute for all*: Over the years a number of individuals and organizations have opined that we really need two acts, one for member benefit organizations and one for charities and public benefit organizations. Apart from the fact that it would be hard enough to get any government to agree to even one new corporations act, I'm satisfied that the differences between the two types of organizations require only a few special provisions for each type. In fact the vast majority of the new act would apply equally to all types. All of the modern acts have adopted this approach and I agree with them. The real drafting exercise is in determining and creating the special provisions.

- *Get rid of unnecessary fat:* In order to simplify our corporate statute I would get rid of extraneous material. For example, parts 6, 7 and 8 of the CNCA: debt obligations, certificates, registers and transfers and trust indentures, and receivers, receiver-managers and sequestrators, which occupy sections 37 to 123, almost 1/3 of the Act! Not only are these parts almost never of any relevance to the non-profit sector, but in most cases provincial securities legislation would supersede the provisions of the CNCA. Having them in the middle of the Act just makes the Act longer and makes it harder for unsophisticated users to find what they are looking for.

- *Forget about plain language:* Use legal terms that are common and have been interpreted by the courts wherever possible. Lawyers are trained to work with them. Rewriting them so non-lawyers can understand them will just create more work for litigators.

BASIC CONTENTS OF THE INCCA

- As of right incorporation for separate legal entity and limited liability

- Check the box format for most required or permitted components of articles of incorporation

- Natural person status and powers

- Eliminate the doctrine of *ultra vires*: the Act should provide that acts or contracts which are outside of the purposes do not affect the rights of third parties – no deemed notice of limitations. Most modern statutes do have these provisions.

- Check the box selection of distribution constraint – "asset lock" vs. distribution to specified recipients or default to members. If an asset lock, charities can only distribute to QD's, while non-charities can distribute to QD's or other corporations regardless of statute, with a satisfactory asset lock (companies branches could maintain a list of acceptable statutes).

- Eliminate the "non-profit" concept. Leave it to the taxing authorities. Membership benefit corporations should have no distribution constraints. All other types would be subject to the asset lock.

- Rules for conduct of affairs that can be either default or optional to be adopted or modified

- Directors and officers

    - Directors – qualifications, indemnification, limited by-law making, conflicts, *ex-officio* or election, facilitating meetings, removal, allowing appointment by board of up to 1/3 more directors between elections [most modern acts have reasonable provisions already]

    - Officers – corporation must have president, CEO or chair of the board– I would consider adding secretary to this list. All other positions optional. Conflict and indemnification rules would apply

    - Eliminate silly rules in CNCA/ONCA for different requirements for soliciting or public benefit corporations.

- Rules for members (if any – see "Members" below) that can be adopted or modified

- Minimum standards for matters of principle – members meetings and voting, dissemination of information, fundamental change, discipline, remedies, winding-up; economic rights of members

- Specific rules applicable to each of the five different types of organizations that the Act must cover

    - charity

    - non-profit public benefit

    - member benefit – economic stake

    - member benefit – no stake

    - religious

    I would expect these to be minimal

- Easy to amend articles and by-laws if required

- Ability to make articles and by-laws hard to amend if required – e.g., to protect doctrine of religious corporation – see reference to *BC Societies Act* below.

- Rules for Fundamental change – see below

- Rules for import, export and winding-up

- Remedies

- Not much else

- Statement of Purposes ("SOP") should be optional

- Corporations wishing to be charities [i.e., require CRA to register] or to limit to specialize in a particular type of activity can add a SOP

- Saskatchewan Act does not require a corporation to have purposes – "purposes" are not listed as part of what must be included in the articles. 3.1(2)(b)(ii) of the regulations provides that if the corporation is to have a number name, the articles must contain "a description of the main activity of the corporation".

- **Format**: already have good models for division into subjects, subject to tweaking – CBCA, OBCA, CNCA, ONCA:

- **Topics to be covered in INCCA**

  - **Minimum Number of board members** ONCA 3: should be 1

  - **Purpose** – optional

  - **Distribution clause** – check box

    - member benefit organization can distribute assets to its members, during lifetime and on winding-up;

    - all other public benefit and charities are subject to an "asset lock" – can designate eligible recipient in articles.

    - member benefit

      - provide in articles or by-laws for members or similar organization

      - default is distribution to members

      - can change by special resolution

    - effect of charity law on charitable property – supersedes any provision of the corporate law – see, e.g., OCA s. 117.1(2):

      117.1 (2) If a provision in this Act or in a regulation made under it that applies to a corporation, the objects of which are exclusively for charitable purposes, conflicts with a law relating to charities, the law relating to charities prevails, regardless of whether it is a provision in another Act or regulation or a rule or principle of common law or equity. [also ONCA, s.5(2)]

  - **Directors & Officers** – see above under basic contents

  - **Members** – optional – check box. Default is members. Can elect for board members to be only individuals in corporation. If so, the directors are deemed to be the members.

    - Only two US states, Delaware and Kansas, require non-share corporations to have members. The vast majority either make membership optional or provide that if a corporation has no members, the directors are deemed to be the

members. In a number of states – Minnesota, New Hampshire and N. Dakota – the default is no members.[11]

- NB: it would be necessary to provide for any essential functions of members to be incorporated into the role of the directors – but apart from requiring an annual meeting of the board, appointing or dispensing with an auditor, removal of a director and who can receive distributions on winding-up, I can't think of any.

- **<u>Members voting rights</u>**

  - Multiple classes, including non-voting

  - No non-voting members to have voting rights – subject to protection for members with economic interest

  - Class voting optional – default is no – can provide for by check box in articles. CNCA and ONCA sections providing for separate class votes would then apply. Ability to select which classes can have a separate vote.

  - Protect economic and career interests for social club and other corporate members with initiation fees or purchase of interest or where membership in the corporation conveys certification or professional status.

    - Consider a protective clause that is required for any organizations whose members pay an initiation fee or for whom dismembership would result in legal inability to practice a trade or profession.

    - Dissent rights – e.g., Sask and ONCA. Right of members with economic interest to be paid out fair value of membership under limited range of conditions

    - Possible regulatory enhancement to the member discipline or termination clause under the ONCA (s.51), which sets out minimum procedural requirements. This is preferable to the CNCA, which merely requires that "If the articles or by-laws provide for such a power, they shall set out the circumstances and the manner in which that power may be exercised." (s.158). The ONCA goes on to add:

      51. Good faith requirement (2) Any disciplinary action or termination of membership must be done in good faith and in a fair and reasonable manner.

      Fair and reasonable procedure (3) For the purposes of subsection (2), a procedure is fair and reasonable if,

      (a) a member is given at least 15 days notice of a disciplinary action or termination with reasons; and

[11] https://www.harborcompliance.com/information/nonprofit-governance-by-state

> (b) the member is given an opportunity to be heard, orally, in writing or in another format permitted by the corporation's articles or by-laws, not less than five days before the disciplinary action or termination of membership becomes effective, by the person with authority to impose or revoke the disciplinary action or termination.

- Delegate voting – easy to do if non-voting members never get vote and classes never get veto rights – cf. OCA, s.130, but allow delegates to have proxies, more than one vote per delegate

- Ordinary resolution – cf. BC and Yukon:

> "ordinary resolution" means a resolution
>
> (a) passed by a simple majority of the votes cast by the voting members on that resolution, or
>
> (b) consented to in writing, ***after being sent to all of the voting members***, by at least 2/3 of the voting members; [italics mine]

Not sure how comfortable I am with this. Easy to use against minority? Definitely useful in ordinary course not involving fundamental change. Neither statute gives similar option to special resolutions – requires 100% in writing.

- Proxies – simplify contents of proxy and allow restriction to members as default

- Electronic voting – facilitate, allow for inspection of ballots whenever a proxy would be reviewable

- **<u>Meetings</u>**

  - Annual meetings

    - allow separate business meeting and election meeting

    - while corporations with membership consisting entirely of board members may not need annual meetings in principle, it seems that all US state statutes with optional membership require that the board must meet annually.

  - Special meetings – allow members to requisition – CNCA/ONCA models are good

- General
    - Generous rules for virtual and hybrid (partly in person and partly online) meetings
    - Advance notice for nominations and resolutions – check box or default?

- **<u>Audit and Financial Reporting</u>**
    - I've always been sceptical about audit requirements. Many corporate lawyers, including some who practice in our field, insist that an audit is a necessary requirement for all corporations and that there should be only limited exceptions. Audits protect the interests of the members and other stakeholders.
    - Well, under the CCA and OCA audits have always been mandatory. That didn't matter very much because neither of those acts required an auditor to be what today is known as a "chartered public accountant". So smaller and mid-sized organizations simply had what came to be described as an "amateur audit". The treasurer would prepare a set of financial statements, of varying degrees of sophistication, and then one of the members, who might be a retired bank manager or someone else with a bit of experience with financial statements would review them and advise that the accounts looked to be adequate. As long as the "auditor" didn't charge a fee, it was perfectly legal.
    - CRA has never made it a general requirement that financial statements be audited. Charities can be ordered under provincial legislation, such as the Ontario *Charities Accounting Act*, to prepare and present a set of accounts to be approved by the Court. The members or the board or funders can insist on a proper audit.
    - So it was very much a shock for thousands of CCA corporations that continued under the CNCA to discover what the new regime was, and that the availability of exemptions was only for a fairly small level of revenues and then had to be unanimously approved by the entire membership. 50,000 OCA corporations have a similar experience ahead of them, even though the base level for exemption is higher and the ability to obtain membership approval to a reduction to a review engagement or dispensing with an audit is less onerous than the CNCA – 80% of the vote at a meeting vs. 100% of all members.
    - Together with the provision of class voting rights and the extension of voting rights to non-voting members, nothing in the CNCA has done more to turn corporations with formerly extensive active memberships into corporations whose only members are their directors.
    - My default provision is no audit. A provision requiring an audit can be included in the by-laws. Or the members can resolve to require an audit for the current year, but this would have to be renewed annually. Or they can amend the by-law to require an annual audit. s. 124 of the new *Yukon Societies Act*, which is virtually identical to s. 111 of the B.C. Act, provides:

        > Appointment of accountant 124(1) A society (a) must have an accountant if the society is required to have an accountant by the society's by-laws

> or under the regulations; and (b) may have an accountant in any other case.

- Saskatchewan permits a membership corporation to dispense with an audit altogether (s.150) but, disappointingly requires audits for charitable corporations with revenues over $250,000, a reduced type of financial review similar to a review engagement between $25,000 and $250,000 and no audit or review up to $25,000 (s.151). No regulation to increase these amounts has been published.

- Corporations with large revenues and those whose members or funders, including banks and foundations, want an audit will have them. Many boards will want an audit to protect the directors against liability, or because it is a useful management tool or it makes the corporation more attractive to potential donors.

- **Distributions to members**

  - During lifetime – why not permit it in member benefit organizations – need to consider tax law and leave "non-profit" out of it.

  - On dissolution – see above re current statutory clauses

- ***Ex officio* directors** – full flexibility – permit to have full board and no elections ever. Corporations Canada's rationale that people could be made *ex officio* directors against their will or without being aware of it can easily be resolved by requiring them to consent before their position can take effect. The ONCA continues the existing provisions for *ex officio* directors (s.23(4))

- **Unanimous Member Agreement** ("**UMA**"). I've never seen one in an NFP. Our Bill C-21 comment was:

  > In our collective experience, where a not- for-profit corporation has wanted to simplify its governance structure, the flow of power has been away from the members to the directors. The need, typically, is to do away with members, not directors.

  - In addition to allowing members to assume the powers of directors, UMA's also cover voting agreements among members, which might be useful in some situations.

  - CNCA allows UMA's only in non-soliciting corporations, presumably because charitable directors are like "trustees". No valid reason I can think of for this restriction.

  - Sask (s.136(2) allows UMA's and does not restrict them to only member-benefit corporations.

  - Since they might prove useful, I would allow them.

- **Proxies**

  - Many sector organizations prefer only in-person meetings because it is the only time they can meet with their members. Many would not even want proxies – partly because non-members can hold them. Some of this thinking may disappear because of the problems of holding virtual meetings during COVID-19 times – although in most cases emergency legislation has allowed even these organizations to hold virtual meetings.

  - The CNCA permits only live, in-person voting if desired. The ONCA requires at least one additional voting method, which can be proxy or other means.

  - ONCA is the only statute which allows a corporation to limit proxies to members in the articles and by-laws s.64(1.2). I would reverse and make that the default. Check box in articles or provide in by-laws for non-member proxies

  - I would also simplify the requirements for the form and content of proxies.

- **Fundamental change**: One of the interesting things about the BC Act – *I'm not sure how much I like how it is drafted, because it's confusing* – is the fact that there is a provision that says nothing in the by-laws can be made unamendable:

  > s.17(5): Even if the by-laws of a society identify a provision of the by-laws as being unalterable, the society may alter the provision in accordance with this Act. [*i.e., by special resolution*]

  I was ready to get worked up over that, until I discovered that ss.11(4)-(5) of the BC Act permit the by-laws to increase the percentage required for a special resolution from 2/3 right up to 100%, thereby making possible the very thing prohibited by s.17(5). This is an extremely important provision, since under the B.C. Act the "constitution", equivalent to articles under the CNCA, only contains the name and the purposes and nothing else is allowed. Most other acts permit the inclusion in the articles of special provisions, which can be open-ended in some cases, and allow the inclusion of anything that the act requires or permits to be in the by-laws. Although this increases the complexity of the articles, I prefer the greater flexibility in incorporating fundamental provisions into the articles. I recognize that the procedure for change is generally the same as for by-laws, but the greater degree of formality this provides is valuable to organizations that need it.

  The standard list of fundamental change items to be covered in the INCCA is handled reasonably well in the CNCA, with the exception of non-voting and class members being given veto powers.

  - Amendment of articles

  - Amendment of by-laws

  - Amalgamation

  - Extraordinary Sale, Lease. Exchange

  - Continuance in

- Continuance out
- Reorganization
- Arrangement

- **By-law Amendments** Under the CCA and OCA amendments had to be initiated by a board resolution and then confirmed by the members, with or without variation. Some required a simple majority and some a 2/3 majority. However, modern corporate practice almost universally permits such amendments to be initiated by and approved at the membership level with no board involvement. I'm ambivalent about this. I have been consulted by members wanting to amend the by-laws against board opposition and by boards wanting to stave off member-initiated amendments. Currently I am leaning towards the good old-fashioned way. Any by-law change worth having should generally have board support. In most cases it is the board that initiates the change. My compromise would be to make this a check the box alternative on incorporation.

- **Remedies** – CNCA is a relatively good model. May need refinement and clarification in areas of member discipline – too many cases ending up in the courts, creating rights where none intended to exist. Unlike the CNCA, B.C. or the Yukon Acts, the ONCA (s.189) and Sask (s.177) both provide a right to dissent and receive compensation for the value of a membership. If this concept is tied in to memberships where the member has an economic interest in the corporation, then it is useful. The statute should provide for:

  - Investigation
  - Derivative Action
  - Oppression Remedy
  - Dissent
  - Just & Equitable Winding-Up
  - Compliance and Rectification Orders
  - Quasi-Criminal Penalties for Egregious Conduct

- **Religious exemptions** – in general I like these. To paraphrase a former prime minister 'There's no place for the state in the houses of worship of the nation'.

  - CNCA ONCA both grant religious exceptions to some remedies. Sask, B.C., Yukon have no special provisions
  - Three provisions in the CNCA exempt religious corporations from the application of the following remedies in certain circumstances:

    - s. 224(2) – just and equitable winding-up;
    - s. 251(3) – derivative action; and
    - s. 253(2) – oppression remedy.

  Each of the three sections provides that the court may not make an order of the type provided for under the applicable subsection (1) if the court is satisfied that

- the corporation is a religious corporation;
- the complained-of act or omission, the conduct or the exercise of powers, or the decision of the directors is based on a tenet of faith held by the members of the corporation; and
- it was reasonable to base the act or omission, the conduct or the exercise of powers, or the decision on a tenet of faith, having regard to the activities of the corporation.

"Religious corporation" is not defined and the language of the CNCA opens up the possibility that courts will feel empowered to examine and pass on the validity of religious principles in determining whether a corporate action falls within the "tenet of faith" shield. At the very least, the court will have to determine both the nature of the particular religious organization's beliefs and credos, as well as the extent to which such principles were reasonably applied. It is in the area of "reasonableness" that we can perhaps expect to see activist judges assert that certain "Canadian" or "Charter values" or Charter rights override religious beliefs. We already have an example of this at the highest level in the two Trinity Law School decisions.[12] We can also see the effect of having no statutory religious exemptions in the very recent BC case of *Bains v. Khalsa*[13].

- ONCA s.183(3) provides that the court is not to grant an order in a derivative action if it is satisfied that it is dealing with a "religious corporation". The term is not defined and there are no other guidelines for the court, which arguably could result in a broader range of rejection of complaints – since the court is not directed to consider the validity or religious attributes of the impugned action. Arguably the exception should also extend to oppression and just and equitable winding-up. And in all cases, there should be some restriction when the membership right being taken away is an economic one.

- **Dissolution** – distributions – see discussion of asset lock above

- **Boilerplate**: Every statute must contain a set of administrative provisions, dealing with the requirements for corporate records; government filing and procedural requirements; provisions for voluntary and court-ordered dissolution; use of electronic methods of communication, record-keeping; regulation making authority. These are necessary and rarely controversial. Most statutes handle them competently.

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12 *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293; *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, [2018] 2 SCR 453

13 *Bains v Khalsa Diwan Society of Abbotsford*, 2020 BCSC 181 (CanLII), <http://canlii.ca/t/j58ps>

APPENDIX A

LIST OF MODERN NON-SHARE CAPITAL STATUTES

CANADA *Canada Not-for-Profit Corporations Act*, SC 2009, c 23

ONTARIO *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15

B.C. ***Societies Act*** SBC 2015, c 18

SASK *Non-profit Corporations Act, 1995*, SS 1995, c N-4.2

YUKON *Societies Act*, SY 2018, c.15

GARDINER ROBERTS

APPENDIX B

REPUBLISHED WITH KIND PERMISSION FROM WAYNE GRAY

ONTARIO BAR ASSOCIATION SUBMISSION TO MINISTRY OF GOVERNMENT SERVICES

Phase III Business Law Modernization Consultation

> In a misguided effort to meet the perceived needs of different types of nonprofit organizations – needs that, as it turns out, either have no legitimate basis, or could better be met through a well-designed cooperative corporation statute – nonprofit corporation law is today weak and fragmentary. In some cases, as with the Model Act, the law has tended to follow the lowest common denominator approach, applying to nearly all types of nonprofits the same minimal standards that have been thought appropriate for those organizations toward which the law should be most permissive. In other cases, as with the New York and California statutes, the law has proceeded to apply different standards to different types of nonprofits, with only slightly more satisfactory results.
>
> I have suggested here, in contrast, that nonprofit corporation law should be both unitary and rigorous. All nonprofit corporations should be held to the same strict standards of fiduciary conduct toward their patrons. So long as nonprofit corporations are held to such standards, there should be no restrictions on the purposes that they may serve. There should be, in particular, no provision for special standards applicable to organizations that are classified as charitable, and the appeals that have been made, sometimes prominently, for a separate organizational law of charities should be rejected.[14]

What follows is the joint response of the Corporate Law Subcommittee, Business Law Section and Charities and Not-for-Profit Law Section, Ontario Bar Association ("**OBA**") on the Phase III Business Law Modernization Consultation Paper dated May 7, 2007 (the "**Consultation Paper**") prepared by the Ministry of Government Services ("**MGS**"), Policy and Consumer Protection Services Division.

Before addressing the specific contents of the Consultation Paper, the joint working group (the "**JWG**") wants to take a moment, first, to applaud the efforts of MGS in tackling this important, badly-needed area of corporate law reform and the efforts of its staff in preparing an excellent initial Consultation Paper.

Second, the JWG thought it worthwhile to suggest an alternative approach to modernization of the law governing nonshare corporations.

The implicit direction of the initial Consultation Paper, and the contemplated consultation papers that will follow it, is that MGS will engage in the widest possible consultation process with a large and diverse stakeholder group and that out of this will emerge a clear vision for a new Act. The JWG has several concerns with the likelihood of success with this approach. One is that the consultation process is likely to become so wide and the issues so numerous that the process will lack focus or direction. Further, such a consultation process, if it is ever concluded, will take an extraordinary amount of time - given the vast terrain and the diversity of the not-for-profit ("**NFP**") sector. In any case, the consultation process will result in prolonging the day when Ontarians can finally benefit from badly-needed new legislation.

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[14] Henry B. Hansmann "Reforming Nonprofit Corporations Law", (1981), 129 U. Pa. L. R. 497 ("**Hansmann**") at pp. 622-3. See, also, Professor Hansmann's earlier work, Henry B. Hansmann "The Role of Nonprofit Enterprise (1980), 89 and, for a rare Canadian study on reforming nonprofit corporate law, see Baz Edmeades 'Formulating a Strategy for the Reform of Non-Profit Corporation Law – An Alberta Perspective (1984), 22 Atla. C. Rev. 417.

Ontario should not assume that it must start from scratch in building its new nonshare corporations statute. Rather, it can build on the considerable work and experience close at hand that has preceded this new Ontario initiative.

The JWG thought that the alternative to the widest possible consultation process is to focus on developing a model statute for discussion purposes. The starting point would be either Bill C-21, *Canada Not-for-profit Corporations Act* ("**Bill C-21**")[15] or the *Saskatchewan Non-profit Corporations Act, 1995* (the "**SK Act**").[16] While not serving as the base model statute, additional, useful concepts for the new Act could be drawn from the American Bar Association *Revised Model Nonprofit Corporation Act* (1987) (the "**ABA Model Act**"). Using a combination of these statutes as models or supplementary sources, the JWG would be prepared to draft, for discussion purposes, an Ontario statute that would serve as the focal point for further discussion. We expect that the vast majority of the issues relating to nonshare corporations law would be uncontentious. Focus on a draft statute would enable the uncontentious matters to be settled while, at the same time, focusing attention on the handful of contentious or debatable items.

Some quick highlights of each of Bill C-21, the SK Act and the ABA Model Act are outlined below:

Model	**Comments**
Bill C-21	Most complete and recent effort at a legislative model in Canada. A federal statute that is likely to be influential on provincial legislative developments in the area. Would have to be customized to fit provincial level of legislative jurisdiction. Modelled upon the *Canada Business Corporations Act* (the "**CBCA**"),[17] which in turn has served as a model for other Ontario corporate legislation such as the *Business Corporations Act* (the "**OBCA**")[18] and the *Credit Unions and Caisses Populaires Act, 1994* (Ontario).[19] Does not adopt a classification system. In particular, does not differentiate between (1) charitable or public benefit corporations, and (2) membership or mutual benefit corporations. Instead differentiates between corporations on the basis of whether the corporation (1) solicits funds from the public or obtains funds from government sources (called in Bill C-21 "soliciting corporations") or does not seek or obtain funds from such "public sources" (which may for convenience be called "non-soliciting corporations"). The application of certain rules differentiates between soliciting and non-soliciting corporations. Not much differentiation for religious corporations, which Bill C-21 does

[15] Bill C-21 died on the Order Paper on November 29, 2005 when the 38th Parliament was dissolved for the January 2006 Canadian federal general election. Bill C-21 represents the latest in a long series of federal initiatives to replace Parts II and III of the *Canada Corporations Act*, R.S.C. 1970, c. C-32, which currently governs federal nonshare corporations.
[16] S.S. 1995, c. M-4.2.
[17] R.S.C. 1985, c. C-44.
[18] R.S.O. 1990, c. B.16.
[19] S.O. 1994, c. 11.

	not attempt to define. The Canadian Bar Association ("**CBA**") saw many good features in Bill C-21, including, for example, flexibility in providing notices to members and audit exemptions.[20] Criticisms from the CBA and others included: the distinction between soliciting and non-soliciting corporations and the effort to regulate the fund-raising activities of federal corporations; alleged excessive use of mandatory (rather than permissive) rules on all corporations; excessive focus on members rights, powers and remedies, including the dissent and appraisal remedy and the statutory oppression remedy; and perhaps too-close overall adherence to the CBCA as a model.
SK Act	The most modern enactment in Canada at the provincial level. Work to customize legislation to provincial legislative jurisdiction has been done. Has been in operation for more than 10 years. Few, if any, difficulties encountered. Does not employ the distinction between the soliciting corporations and non-soliciting corporations. Makes a distinction between charitable corporations (like public benefit corporations) and member corporations (like mutual benefit corporations). No separate recognition for religious corporations. Made many significant innovations, including, audit exemptions for small corporations and immunity of directors, officers, employees or agents from most liabilities (other than fraud or criminal misconduct so long as, in the case of director or officer, he or she was acting in good faith).[21] Flexibility in providing notices to members – which could be further developed to take into account subsequent technological and communications advances such as the use of electronic mail and Internet websites. Reads like the *Business Corporations Act* (Saskatchewan) (the "**SBCA**")[22] except with the substitution of members for shareholders. However, like the OBCA, the SBCA is closely modelled on the CBCA.

[20] See Canadian Bar Association, "Submission on Bill C-21, *Canada Not-for-profit Corporations Act*" (CBA, National Charities and Not-For-Profit Section, CBA: September, 2006).
[21] SK Act, s. 112.
[22] R.S.S. 1978, c. B-10.

ABA Model Act[23]	Unlike any other corporate statute in Canada. Uses terminology, concepts and an organization that are largely unfamiliar to Canadian lawyers and the lay public, that may entail a steep learning curve and make it inappropriate as the base model. However, it could be tapped as a rich source of concepts. Now 20 years old and, given the ongoing efforts at revision, is dated. Reflects significant American scholarship and expertise at that time. Classifies corporations into mutual benefit, public benefit and religious. Provides definitions for public benefit corporations. Religious corporations are a subset of public benefit corporations. Mutual benefit corporations form the residual category. Calls for a large quasi-regulatory and enforcement role for the state attorney general (which has not been the norm in Ontario to date).

We recognize that no matter which model one starts with substantial customization is required. For example, given the advent of the *Securities Transfer Act, 2006* (Ontario),[24] there is no need to replicate sections 38-104 dealing with transfers of debt obligations in Bill C-21 nor Division VI (ss. 33-68) of the SK Act. Likewise, there would be no need for Part 7 of Bill C-21 or Division VII of the SK Act on trust indentures because Part V of the OBCA applies to all issuers of debt obligations issued under a trust indenture for which a prospectus has been issued under the *Securities Act* (Ontario).[25] Nor would there be any need for Part 8 of Bill C-21 or Division VIII of the SK Act on receivers and receiver-managers because these are covered at the provincial level under Rule 41 of the Ontario *Rules of Civil Procedure*.[26] Nor would there be any need for Part III of the SK Act (ss. 252-263) on the registration of extra-provincial corporations because of the combined effect of the *Business Names Act* (Ontario)[27] and the *Extra-Provincial Corporations Act* (Ontario),[28] governing Canadian domestic and foreign corporations respectively.

Having made these general comments, this submission now comments on the specific questions posed in the Consultation Paper, following the numbering sequence set out in the Paper.

1. Incorporation Process

Should Ontario move from a letters patent system to a system of incorporation "as of right"? If so, how should the system of incorporation "as of right" operate? What basic legal requirements would have to be met for an incorporation application to be accepted under the "as of right" system? How should the "as of right" system apply to charitable corporations?

Ontario should adopt an incorporation "as of right" system. Like corporations formed "as of right" under the OBCA, incorporation should only be subject to name approval. We note that Bill C-21, the SK Act and the ABA Model Act each provide for incorporation "as of right".

The new Act should be a facilitative document focused on primarily procedural rather than substantive matters. The new Act should not be primarily regulatory.

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[23] Currently under revision. See footnote 4.
[24] S.O. 2006, c. 8 (in force as of January 1, 2007).
[25] R.S.O. 1990, c. S.5.
[26] R.R.O. 1990, Reg. 194.
[27] R.S.O. 1990, c. B.17.
[28] R.S.O. 1990, c. E.27.

Like the OBCA, the new Act should abolish the *ultra vires* doctrine as it applies to nonshare corporations. Except to the extent otherwise provided in the articles, a nonshare corporation should have the corporate power and capacity of a natural person. A corporation's articles could set out limits on the corporation's permitted activities or powers. However, if a corporation strayed beyond its permitted activities and purposes as stated in its constating document, this should not affect the validity of contracts or transactions involving third parties. Instead, contravention could give rise to, for example, an action by a member to obtain a compliance or restraining order to ensure that the corporation adheres to its stated activities or goals.

The new Act must give incorporators the option to include restrictions on the activities or objects in a corporation's articles. For example, a charitable corporation is required to restrict its permitted activities and powers in its constating documents (whether letters patent or articles of incorporation) in order to effect its charitable purposes and to obtain recognition as such from The Canada Revenue Agency ("**CRA**").[29]

The incorporation form should direct applicants for incorporation of a charitable or public benefit corporation (many of whom will be seeking incorporation without the benefit of legal advice or advice from lawyers who do not specialize in the formation of nonshare corporations) to check out the website of the Public Guardian and Trustee (the "**PGT**") to ensure that, in addition to incorporation, the corporation obtains approval for its intended charitable purpose.[30]

2. Structure of the New Act

Should the new Act follow the structure of the OBCA, the provisions proposed in Bill C-21, the *California Corporations Code* or another structure?

The new Act should not reintegrate NFP corporations with the OBCA – the situation that prevailed in Ontario before 1971. That is, there should continue to be a separate statute, the OBCA, to deal with business corporations.

Ontario should provide for the following statutory regimes that are clearly differentiated on the basis of for whose benefit the profits or gains of the corporation may accrue:

Type of Corporation	**Defining Characteristics**	**Governing Statute**
Business corporation	Profits and surplus assets accrue to the benefit of shareholders (who are the residual risk-takers in the enterprise). Current profits paid to shareholders as dividends. Net surplus on liquidation/dissolution paid to shareholders as liquidation distribution.	OBCA (provincial); CBCA (federal).

[29] Under the *Income Tax Act* (Canada), a charity may not only qualify for tax-exempt status on its income but may also qualify to issue receipts that entitle donors to obtain federal and provincial tax credits on their own income tax liabilities.

[30] In formulating a new Act, it is critical that MGS ensure that the new Act is not at odds with other relevant legal regimes affecting NFP corporations, including, in particular, the federal tax system and the provincial regime for regulating the activities of charities.

Cooperative corporation	Members entitled to only a maximum fixed rate of return. Surplus profits and assets accrue in favour of patrons (usually customers or suppliers, depending on the articles). Surplus profits and net assets on liquidation/dissolution paid to patrons as patronage dividends.	*Co-operative Corporations Act* (Ontario) ("**OCCA**");[31] *Canada Cooperatives Act* (federal).[32]
Charitable or public benefit corporation; and certain membership or mutual benefit corporations who are willing to restrict the distribution of profits and surplus assets to members on current basis and on liquidation/dissolution.	Members not entitled to either current distribution or distribution of any surplus assets on liquidation/dissolution. On liquidation/dissolution, surplus assets must, in accordance with letters patent (or articles) be paid to organizations carrying on similar activities – *cy-prés* jurisdiction.	Ontario: currently, Part III and various sections in Part II of the *Corporations Act* (Ontario) ("**OCA**"), [33] which would be in whole or in part superseded by the new Act. Federal: currently, Parts II and III of the OCCA; Bill C-21 would have replaced these Parts of the OCCA.

What is still not fully settled is whether the new Act should attempt to treat membership corporations that may distribute surplus assets to their members on a liquidation/dissolution within the same legislative regime governing corporations that cannot make any distributions to members either currently or on liquidation/dissolution. One option is to include these membership corporations (examples include golf, tennis and curling clubs, which for convenience we might call "**true membership corporations**") in the new Act. Another approach is to not mix these fundamentally different types of corporations within the same statute but to confine the new statute to NFP corporations that cannot distribute profits or surplus assets to members (which for convenience we might call "**pure NFP corporations**") and the new Act dealing with nonshare corporations.[34] In this later case, true membership corporations would either be left behind in the OCA or given the option to convert into a business corporation under the OBCA, a cooperative corporation under the OCCA or a nonshare corporation under the NFP Act.

Subject to the qualification above, the new Act would apply to all Ontario nonshare corporations formed under the new Act or any special act of the Provincial Legislature. The new Act should contain all of the corporate law rules that apply to nonshare corporations (except to the extent otherwise provided in the special act). In that way, the new Act would become the default statute for Ontario nonshare corporations.

The new Act should follow the same logical structure as depicted in the OBCA, following the life of a corporation: incorporation; finance; membership; members' meetings and proxies; directors and officers; fundamental changes; liquidation and dissolution; and remedies.

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[31] R.S.O. 1990, c. C.35.
[32] S.C. 1998, c.1.
[33] R.S.O. 1990, c. C.38.
[34] One advantage of this approach is that it would provide clarity of purpose for, and eliminate confusion within, the new Act and the corporations governed by it.

3. Definition of a Not-for-profit Corporation

3.1 Not-for-profit Purpose

3.1.1 Classification of Purposes

Should the new Act clarify the permitted purposes of NFP corporations? If so, how? Should the new Act contain a list of permitted purposes of NFP corporations? If so, what should be included in the list of permitted purposes? Should the new Act prohibit certain purposes of NFP corporations? If so, what purposes should NFP corporations be prohibited from undertaking? If a classification system is adopted in the new Act, should permitted purposes of NFP corporations be tied to the definitions of other various classes?

> Restricting the purposes for which nonprofits can be incorporated serves no obvious need that could not be better served by other means. Moreover, to the extent that the statutory restrictions actually limit the scope of nonprofit activity, they might well cause unnecessary harm. The service sector of our economy is growing rapidly, both in absolute terms and as a fraction of the nation's total economic activity…. A restrictive, and particularly a conservative, approach to nonprofit incorporation might therefore inhibit the development of these services, or push them inappropriately into the proprietary or governmental sectors.
>
> The wiser course would be to permit nonprofit corporations to be formed for the purpose of undertaking any activity whatever (consistent, of course, with the nondistribution constraint and the criminal law). At the same time, however, one should realize that this liberal approach to incorporation makes it all the more important that appropriate measures be taken to assure that all nonprofits adhere to their fiduciary duties.[35]

The new Act should not set out a list of permitted purposes. Rather, a nonshare corporation should be permitted to carry out any purpose other than the pursuit of profit for distribution to its membership. It would clarify matters if the new Act referred not to NFP corporations but instead to nonshare corporations since the distinctive characteristic of corporations formed under the new Act is that they would not have shares and, therefore, would not be able to pay dividends or, on liquidation/dissolution, distribute their residual assets to members.[36] Avoiding the NFP term would be less confusing to a lay audience if the Act includes corporations that can distribute profits or surplus assets to members.[37]

3.1.2 For-Profit Activities

Should the new Act regulate for-profit or commercial activities undertaken by NFP corporations? Should for-profit or commercial activities be regulated through a non-commercial purpose

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[35] Hansmann, *supra*, footnote 1 at pp. 526-7.

[36] This formulation assumes that the new Act would cover pure NFP corporations and would not attempt to provide for true membership corporations. If true membership corporations are to be included in the new Act, then they would be precluded from making current distributions to members but would not be precluded from distributing residual assets to members on a liquidation/dissolution. In any case, if the new Act covers public benefit corporations and true membership corporations, then the new Act would provide that public benefit corporations cannot make distributions to members either on a current basis or on liquidation/dissolution.

[37] If, however, the new Act were confined to pure NFP corporations, then its name should reflect that focus.

constraint, the mandatory use of a subsidiary to carry out for-profit activities, a restriction on the size of the for-profit undertaking or by another method? If the for-profit or commercial activities are regulated, should certain NFP corporations be entitled to exemptions where their activities are for the benefit of an entire community (*e.g.* aboriginal economic development corporations)?

The new Act should not seek to regulate the for-profit or commercial activities undertaken by a nonshare corporation. The new Act is not the place to set out such regulation. As well, it is difficult in practice to make a valid distinction between nonprofit activities and for-profit activities carried out by an NFP corporation that are used to subsidize or fund its nonprofit activities. A museum gift shop may be carried out by an NFP museum for profit. However, the profits serve to subsidize the cost of keeping the museum operational. For these and other reasons, it is difficult to draw a meaningful line between the for-profit and nonprofit activities of NFP corporations.

A fortiori, an NFP should not be required to use a subsidiary to carry on for-profit activities. There is no reason to force NFP corporations to operate part of their activities through subsidiaries.

3.2 Non-Distribution Constraint

Should the current provisions governing the distribution of assets during the life of the corporation be clarified by codifying existing practices? Should the current provisions governing the distribution of assets upon the dissolution of a corporation be clarified by codifying existing practices? Should the new Act model its non-distribution constraint on the SK Act, proposed provisions in Bill C-21, the Ontario Law Reform Commission ("OLRC") recommendation or another model?

Non-distribution constraints are the core of what must be required of NFP corporations.

A charitable corporation will be required to state (in its articles if not in its governing statute) that it is carried on for the purpose otherwise than gain for its members and, upon dissolution, its assets will be distributed to other organizations for charitable purposes. No part of a charitable corporation's assets will be ever be distributable to members. The same rules apply to all other mutual benefit corporations. This should be codified in the new Act.

With respect to members or mutual benefit corporations, a distinction must be made between true membership corporations (as defined above) and other types of membership corporations where members have no reasonable expectation of receiving a distribution of surplus assets on a liquidation or dissolution. For a true membership corporation, query whether there is a solid rationale to allow distributions to members on liquidation/dissolution but to preclude such distributions when, for example, a member dies, is expelled or otherwise terminates his or her membership.

If the intention is to include all types of nonshare corporations within the new statute, a method of classifying the corporations becomes necessary. One option is to leave the choice to the incorporators. Under this option, incorporators would check the box to elect the default rules applicable to public benefit corporations or the default rules applicable on liquidation to mutual benefit corporations. All public benefit corporations would be able, in their articles, to elaborate or narrow the list of organizations carrying on similar activities to which assets may be distributed. In the case of charitable corporations, the list would be narrowed to other charitable organizations.

If the new Act were not to try to cover true membership corporations, then there would be no compelling reason to differentiate between public benefit and mutual benefit corporations. For all NFP corporations,

residual assets would never be distributed to the members but instead would be distributed to organizations carrying on similar activities to those of the liquidating corporation.

4. Classification System

Should a classification scheme be developed for the new Act? If a classification scheme were developed, which classification system would be appropriate for the new Act: SK Act, proposed revisions in Bill C-21, Alberta *Volunteer Incorporations Act* (Bill 54), OLRC Recommendation, *California Corporations Code* or ABA *Model Act* or another model? Should organizations be allowed to self-designate their classification? In what areas should different classes of corporations be subject to different rules?

There were two schools of thought within the JWG. Some think that new Ontario Act should not follow Bill C-21 but should develop a classification system. Others are of the mind that the new Act should reflect a unitary or non-classification model, perhaps applying different rules on the basis of whether the corporation seeks funding from government or the public at large (as Bill C-21 would do).

Adherents to a classification system think that the new Act should classify corporations as follows: public benefit; membership; and religious. To avoid confusion with the classification of charities under Canadian tax law and the provincial statutory and common law in relation to charities, the term "public benefit corporation" would be used rather than "charitable corporation" (as under the SK Act). Charitable status is obtained as a result of criteria outside of the corporate statute itself. However, being a public benefit corporation would be a first step to becoming recognized as a charitable corporation. The differentiation between these three classes of corporations would lie in the different governance and default rules that apply to each class.

Classification	**Characteristics and Comments**
Mutual Benefit (or Member) Corporations	A corporation primarily intended to promote the interests of its members. Subject only to restriction against distributing profits to members before liquidation/dissolution. May include quasi-economic interests such as golf, tennis and curling clubs. Found in ABA Model Act and the SK Act.
Public Benefit (or Charitable) Corporations	Incorporation as a public benefit corporation is intended as a necessary, but not sufficient, condition to becoming recognized as a charity by CRA. Cannot distribute profits to members before or upon on liquidation/dissolution but rather must, on liquidation/dissolution, distribute surplus assets to another charitable organization. Found in ABA Model Act and the SK Act.
Religious Corporations	A subset of a public benefit corporation. However, subject to certain relaxed rules and protections against intrusive actions by regulators, courts and members. Found in ABA Model Act and, to a much lesser extent, in Bill C-21.

For example, religious corporations require, as a minimum, perpetual existence and limited liability. If a religions corporation chooses to incorporate under the new Act, some other rules applicable to public

benefit corporations could be optional (or even replaced with other rules), but all religious corporations would have basic mandatory or default rules.[38]

Mutual benefit corporations involve a quasi-economic interest that would lead to a different set of default rules for them. For example, in a mutual benefit corporation, members could opt-in to the oppression remedy or dissent and appraisal rights. A golf, tennis or curling club is an example of a member organization that has a quasi-economic interest. The CBA is an example of a member organization that represents the collective professional (including economic) interests of its members yet also carries out public interest activities by advancing proposals for improvement of legislation generally. However, membership in the CBA entails no economic interest *per se* in the net revenues or surplus assets of the organization.

Classification might have to depend entirely on self-designation. Since defining the categories is difficult, if not impossible, there may be no practical alternative to self-designation and this, coupled with inclusion of true membership corporations, may weaken the rules applicable to pure NFP corporations. The more disparate the types of nonshare corporations included within the purview of the new Act, the greater the flexibility that must be built into the applicable rules and the less reliance that can be placed on mandatory rules.

The contrasting view might be called "unitary". This view posits that, for the most part, the new Act should not provide for different classes of nonshare corporations. Rather, the application of the rules themselves must either provide some built-in flexibility for the different types of corporations governed by the new Act or would apply based on criteria other than classification -especially self-designated classification. For example, audit exemptions would apply based on the annual revenues of the corporation, not on the basis of classification. This solution obviates the difficult problem of defining categories. Professor Hansmann is a strong adherent to the unitary view:

> In sum, I am suggesting that only three fundamental types of corporation need to be provided for in the general corporation statutes, each of which is characterized by a different relationship between the organization and its patrons. First, for those situations in which simple individual contracts provide an adequate means by which patrons can police the producer's price and performance, there is the business corporation. Second, for situations – such as those involving natural monopoly – in which simple contractual devices are inadequate to protect the interests of patrons, but in which direct patron control over the organization is sufficient for this purpose, there is the cooperative corporation. And third, for situations – such as those characterized by contract failure – in which neither simple contractual devices nor direct patron control provide adequate and workable means by which patrons can police producers, there is the nonprofit corporation.
>
> Each of these corporate types should be covered by a separate statute and designated by a clear label. Because these corporate types represent, in a sense, ascending levels of protection for the patron, efforts to permit the less constrained corporate types to be formed under the more restrictive statutes will only confuse the purpose of these statutes and hamper their ability to function as they should. In particular, any adjustment to a nonprofit statute that permits organizations to be formed under it that are essentially cooperatives undermines the effectiveness of the nonprofit statute, just as adjusting a cooperative statute so that it can also accommodate

[38] The statements in this paragraph represent the view of some members of the JWG. It is acknowledged that the area requires further study.

ordinary joint-stock companies would severely weaken the cooperative statute, and would deprive the term "cooperative" of any coherent meaning.[39]

5. Corporate Powers and Capacity

Should NFP corporations be given the capacity, rights, powers and privileges of natural persons? If so, should the articles by a corporation be permitted to restrict its capacity, rights, powers and privileges? Should the capacity of a corporation continue to be governed by an *ultra vires* doctrine to the extent that limitations are placed on the powers of the corporation? If the new Act is not changed to provide corporations with the powers of natural persons, should the new Act specify that passage of by-laws continue to be required in order to confer powers on the corporations or its directors? Should the new Act adopt provisions similar to the OBCA and the ABA Model Act or another model to govern the capacity and powers of an NFP corporation?

Nonshare corporations should have the capacities, rights, powers and privileges of a natural person. The *ultra vires* doctrine should be abolished with respect to nonshare corporations as it has long has been abolished for OBCA corporations. Bill C-21 and the SK Act provide useful models that both abolish the *ultra vires* doctrine while, at the same time, allow a public benefit corporation to further restrict its permitted activities and powers so that it can qualify under tax legislation as a charitable corporation.

If a nonshare corporation is given the capacity and powers of a natural person, the list of implied statutory powers set out in the OCA would no longer be necessary.[40]

Under the new Act, by-laws should provide for internal regulations and should not be used to confer powers on the corporation or its directors.

For example, the power to borrow should be a default rule applicable to each nonshare corporation. A corporation would be entitled to restrict the default rule in its articles. Further, the default rule would be that the directors of a nonshare corporations have the power to borrow and grant security on behalf of the corporation unless their authority is restricted in the by-laws. The borrowing regime applicable to nonshare corporations should parallel that applicable to OBCA corporations.[41]

6. Other Issues

6.1 Directors and Officers Liability

Should a general duty of care and loyalty be formulated and incorporated into a statutory provision? What should the general standard be? Should a due diligence defence be included in the new Act? If so, what should be the scope of the due diligence defence? What should be permissible in terms of provisions relating to indemnification and liability insurance provided by NFP organizations to their fiduciaries? Should directors and officers be shielded from personal liability, subject to certain limitations? Should directors and officers liability be limited, for example, by caps on liability?

The duty of care and the duty of loyalty for directors of a nonshare corporation should be formulated to be consistent with the OBCA standard. Thus, a director or officer of a nonshare corporation should exercise the care, diligence and skill of a reasonably prudent person. Directors and officers of a non-share

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[39] Hansmann, *supra* footnote 1 at p. 597.
[40] OCA, supra footnote 19, s.23.
[41] OBCA, s. 17 and ss. 184(1) and (2).

corporation should owe their duties of loyalty and care exclusively to the corporation and not to members, creditors or third parties. Similarly, the OBCA good faith reliance defence ought to be extended to directors and officers of nonprofit corporations.[42]

Given the usual lack of a direct financial interest of directors in the activities and affairs of a nonshare corporation, it may, however, be that the liability of directors and officers under the duty of care should be made an objective-subjective standard[43] rather than the objective standard for CBCA corporations enunciated by the Supreme Court in *Peoples Department Stores (Trustee of) v. Wise.*[44]

Since directors and officers of nonshare corporations have little or no prospect for personal gain and since the corporation itself often cannot afford the premiums required to purchase policies of directors and officers liability insurance, favourable consideration should be given to shielding directors and officers from personal liability. An appropriate model might be s. 112.1 of the SK Act. Since 2003, Nova Scotia also has legislation in force shielding directors, officers and other uncompensated persons from liability.[45]

The OBCA provisions on indemnification and directors and officers insurance should likewise be mirrored in the new Act for directors and officers of Ontario nonshare corporations.

6.2 Financial Disclosure

What should be the required level of financial disclosure: disclosure to members, directors and officers; disclosure to a regulatory body; full financial disclosure to the public; partial disclosure to the public; or another level of disclosure? Should the level of financial disclosure required vary based on classification, type or size of organization?

There is a distinction between the level of audit for financial statements and the level of disclosure. The new Act should create an appropriate default rule for who is required to have an audit or who may instead rely on a review engagement for its financial statements.

Financial reporting is integral to corporate governance and is needed to ensure transparency. It may be possible, however, to give corporations the option to present full or abbreviated financial disclosure to members.

It is not practical to give every member of every nonshare corporation financial statements. Where the corporation provides for a quasi-economic interest (as is the case for true membership corporations), then sending out financial statements may be appropriate. In other cases, it may suffice to post the financial statements on the corporation's website (perhaps on a page accessed through a membership identification

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[42] Included the enhanced protections that came into force on August 1, 2007 as a result of Bill 152.

[43] See, for example, *Soper v. R.* (1997), 149 D.L.R. (4th) 297 (Fed. C.A.), which held that the standard of care on directors is inherently flexible. Rather than treating directors as a homogeneous group of professionals whose conduct is governed by a single, unchanging standard, the duty of care embraces a subjective standard which takes into account the personal knowledge and background of the directors, as well as his or her corporate circumstances (such as the corporation's organization, resources, customs and conduct). Thus, more is expected of individuals with superior qualifications. However, the Supreme Court's interpretation of the duty of care in s. 122(1)(b) of the CBCA would apply equally in this respect to s. 134(1)(b) of the OBCA. *Soper* was effectively overruled by *Peoples*, *infra* footnote 27.

[44] [2004] 3 S.C.R. 461, 244 D.L.R. (4th) 564.

[45] *Volunteer Protection Act*, S.N.S. 2002, c.14. The scope of the Nova Scotia statute differs from the SK Act in several respects. First, the Nova Scotia Act applies to only certain types of non-profit organizations formed under the *Societies Act* (Nova Scotia), municipalities, school boards, regional library boards, hospitals, *etc*. It does not cover volunteers of unincorporated organizations or volunteers of federally incorporated or extra-provincially incorporated NFP corporations. Second, it only appears to cover volunteers who receive compensation of less than $500 a year. Third, it covers employees (as well as directors and officers) subject, however, to the $500 compensation threshold.

or passcode) or, in other cases, only make the financial statements available to members upon request. Thus, the disclosure requirement should depend on the type of organization or the elected provisions of the by-laws.

The *Charities Accounting Act* (Ontario)[46] provides for financial disclosure to a regulatory body. However, the Act only applies to charities and other organizations having a public purpose.

Changes should be made to the *Charities Accounting Act* in conjunction with the new corporate statute so as to ensure legislative harmonization. For example, some matters that are now regulated under the *Charities Accounting Act* may be better addressed in an enhanced conflict of interest regime for directors and officers of nonshare corporations.

6.3 Members' Remedies

What types of remedies should members be entitled to under the new Act? Should the criteria for obtaining a compliance order under the new Act be broadened to require compliance with respect to the failure of directors to perform duties in addition to those set out in the new Act, such as duties imposed by by-laws? Should the oppression remedy be included in the new Act? Should the derivative action be included in the new Act? Should a right to dissent and appraisal with respect to members' fees be available under the new Act? Should a right to require mediation or binding arbitration be included in the new Act and, if so, in what circumstances? Should provisions be included in the new Act that provide for a fair hearing and natural justice where a corporation takes disciplinary action against a member?

Most of the remedies of members should be opt-in because there are cost repercussions from a mandatory rule. With some nonshare organizations, there may be many active members who could create havoc for the organization. Even mediation could present problems for such an organization.

If the new Act is confined to pure NFP corporations, then the dissent and appraisal remedy would be inapplicable and the oppression remedy would have marginal utility at best.

It may be possible that the Attorney General could be used as a clearing house for certain member actions against corporations. Generally, however, we do not see an increased regulatory role as a satisfactory answer to enhancing director accountability.

The derivative action requires separate analysis. The derivative action is necessary to ensure that the duties of loyalty and care owed to the corporation are enforced other than by those in control of the corporation. There is a derivative action at common law.[47] Thus, there would be some benefit in codifying the derivative action along the lines found in the OBCA.

As stated above, there would also be a need for member-initiated compliance and restraining orders to, for example, ensure that the corporation complies with any restrictions on its permitted activities and powers, to enforce the distributions constraints and to police the director's duties of loyalty and care. We recognize that nonprofit corporations, by their nature, could suffer from the lack of strong financial incentive on the part of members to hold directors and officers to account. The accountability regime for a NFP corporation is inherently weaker than for business corporations, and it would not make for good policy to assume that shareholder remedies that work well in a for-profit setting can be easily transposed

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[46] R.S.O. 1990, c. C.10.

[47] See, for example, *Farnham v. Fingolf* [1973] 2 O.R. 132, 33 D.L.R. 93d) 156 (C.A.), holding, in that case, that the derivative action is the then new OBCA displaced any derivative or representative action available at common law.

into an NFP setting. Again, this is something that requires further study. In addition to membership election and removal of directors, other membership remedies appropriate to the NFP regime must be maintained, if not enhanced.

Schedule A

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