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Lawyers

Modernization of Ontario legislation governing not-for-profit corporations

*By Clifford S. Goldfarb
Gardiner Roberts LLP*

The *Ontario Corporation Act* (OCA) was the principal corporate law statute in Ontario from 1907, when it was first enacted, until 1971, when it was replaced for business corporations by the predecessor of the current *Ontario Business Corporations Act* (OBCA). The OCA was last substantially amended in 1953 and has had only minor revisions in the intervening years. However, it still remains the principal corporate statute governing the incorporation and status of non-share capital and non-profit corporations (NFP) in Ontario.

The other alternative most Ontario lawyers use for these corporations is the *Canada Corporations Act*, which has a similar history. The most recent attempt to replace the *Canada Corporations Act* with a more modern not-for-profit corporations act was Bill C-21, which died on the order paper in November 2005.

As part of the ongoing modernization of Ontario corporations law, which has already produced the new *Securities Transfer Act, 2006* and amendments to the OBCA, the Ministry of Government Services recently released two consultation papers on “modernization of the legal framework governing Ontario not-for-profit corporations.”

The [first consultation paper](#) was released on May 7, 2007 and was general in nature. The OCA currently governs some NFPs with share capital, such as social and golf clubs. However, the new statute is intended to apply only to non-share capital NFPs. In addition, it is not intended to be a regulatory statute. The proposed legislation will deal only with the incorporation and governance of corporations carrying on not-for-profit activities in Ontario. Other legislation exists to regulate the activities of NFPs, particularly charities, including the *Charities Accounting Act (Ontario)*, the *Charitable Gifts Act (Ontario)* and the *Income Tax Act (Canada)*.

The Business Law and Charity and Not-for-Profit Law Sections of the Ontario Bar Association have formed a joint working group co-chaired by Wayne Gray of the Business Law Section and David Stevens of the Charity and Not-for-Profit Section. The working group met on several occasions and produced a response to the first consultation paper, which was submitted to the ministry prior to the Sept. 30, 2007 deadline for submissions. Wayne Gray took responsibility for coordinating and drafting this response.



The key issues in the first consultation paper had to do with the nature of the proposed legislation. The working group recommended that the new statute be modeled on a combination of existing statutes, including the Saskatchewan *Non-Profit Corporations Act, 1995*, and Bill C-21, as well as model American legislation.

The working group then dealt with the specific issues raised in the consultation paper. The first issue was whether there should be incorporation as of right, rather than the current discretionary process. The working group's unanimous view was that incorporation should be as of right.

The working group was divided on the next area of concern raised. The working group felt the scope of the new act is problematical. Should it include all NFPs, including those in which surplus may be distributed to the membership, either during the existence or on the winding-up of the corporation? The working group suggested that consideration should be given to having such "true membership" corporations governed by another act, possibly the OBCA, leaving only "pure" NFPs under the new act.

The working group also recommended that the new act should not limit the purposes for which NFPs can be incorporated. Rather, NFPs should be permitted to be incorporated for any purpose other than the distribution of profit to their members, including commercial activities. However, if true membership corporations are included in the new act, it will be necessary to provide a method of allowing distribution of surplus assets to the members, including separate provisions for true membership corporations, on the one hand, and charities and pure NFPs which cannot make such distributions, on the other. The working group was also divided on whether the new act should contain a classification system, dividing NFPs into categories such as "public benefit," "membership," and "religious," with different default governance and other rules applicable to each category.

On the issue of capacity of such corporations, the working group was unanimously of the view that the old doctrine of *ultra vires* should be abolished and that corporations under the new legislation should have the same capacity as corporations incorporated under the OBCA. However, in order to qualify as "charitable" for income tax purposes, NFPs will have to be able to add a provision to their charter restricting themselves to charitable activities. The working group also recommended that directors and officers of NFPs should be subject to similar duties, and entitled to similar defences against liability and indemnification rights as those provided under the OBCA, with some modifications to the standard of care because directors of NFPs cannot be compensated for serving as such.

On the issue of financial disclosure, the working group recommended that the level of disclosure, type of financial statements – audited versus some lesser standard – and method of their distribution should be governed by the type of activity, whether the members have any kind of economic interest, as in true membership NFPs, and other factors. Amendments to the *Charities Accounting Act* may be required for this purpose.

The final issue raised in the consultation paper was members' remedies, such as compliance orders, oppression remedies and derivative actions. The working group recommended that most remedies should be selected on an opt-in basis at the time of incorporation, possibly based on the classification of the NFP. The consensus was that some



form of derivative action seems to be appropriate for NFPs, while other possible remedies and who should be entitled to them needs further study.

The [second consultation paper](#) was issued on Aug. 22, 2007, with a deadline for response of Dec. 31, 2007. The second paper is more specific than the first paper and focuses on governance issues, including board composition, term of office, delegation of powers, directors meetings, resignation, removal and vacancies, directors and officer's liability and conflict of interest.

The working group will be meeting to review and respond to this paper, with David Stevens acting as reporter. The Ministry of Government Services is currently planning to release a final omnibus consultation paper, which will be much more comprehensive than the two existing papers, early in 2008. Given the length of this process, it is unlikely that new legislation will be in effect before 2009.