



## **REVISING THE CORPORATIONS ACT**

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

**Consultation Paper #3**

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

*April, 2008*

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## Preamble

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The *Ontario Corporations Act* is the legislation that governs how nonprofit organizations are incorporated and that sets out the framework for their corporate structure (directors, by-laws, etc.). The current act has not had a major revision for almost 50 years and badly needs updating, which the Policy and Consumer Protection Services Division of the Ontario Ministry of Government and Consumer Services (MGCS) is currently undertaking. This brief is a response to the Ministry's *Consultation Paper #3, Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations*. We are very grateful for the opportunity for the nonprofit sector to contribute to the development of modern legislation.

The world in which nonprofits, including public benefit corporations, operate today is very different from the world 50 years ago, and, as a result, nonprofit organizations themselves are very different. It is, therefore, very important that nonprofit organizations participate in any effort to modernize any legislation that affects them. However, participating in the somewhat technical exercise of developing new legislation is beyond the capacity of many nonprofit organizations. They have neither the time nor the legal expertise to focus on the legislative review. For this reason, the Ontario Nonprofit Network<sup>1</sup> has established an Expert Working Group composed of knowledgeable individuals from the nonprofit sector and of lawyers whose practice includes nonprofit organizations. The job of the Expert Working Group is to review the consultation documents; mull over and discuss the issues, and prepare concise and accessible briefs for the sector so that organizations with limited time and involvement can grasp the key issues and make their views known.

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

- supports and encourages the development of responsive and transparent public benefit organizations to serve the people of Ontario;
- does not unduly and unnecessarily add to the regulatory burden;
- does not constrain or limit the ability of public benefit organizations to accomplish their objectives and respond to a changing environment; and
- provides mechanisms by which the sector will work in consultation with the Ontario MGCS on issues covered by the Act and its regulations.

In general, it is the intention of the Expert Working Group, on behalf of ONN, to create a reasonable and fair legislative framework in which public benefit corporations can do their good work. It is crucial, to the sector, to the individuals employed there, and to society at

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<sup>1</sup> The Ontario Nonprofit Network is described in more detail in Appendix A on page 14. See Appendix B for a list of the members of the Expert Working Group.

large, that public benefit corporations are responsive to their communities, transparent in their operations and accountable to their stakeholders. With this in mind, our proposals, below, are intended to create new, revised legislation, which will serve to support, and protect, this ever-vital sector.

The Ministry's third consultation paper deals with the membership of organizations, and their rights and remedies. It also deals with by-laws, and financial reporting and the required level of disclosure.

### **Important Note regarding “PUBLIC BENEFIT CORPORATIONS”**

This following paper is in direct response to the MGCS Consultation Paper #3, and as such, follows the outline of that paper. However, the ONN's Expert Working Group is of the strong opinion that new, separate legislation is required to recognize and address the unique qualities, functions and purposes of Ontario's public benefit sector. The legislation should be titled, “Public Benefit Corporations Act.”

Public benefit corporations are exactly what this name implies. Commonly referred to as charities, or not-for-profits, or nonprofits, these organizations exist and operate precisely to serve the public benefit. While many public benefit organizations are innovative and forward-thinking, and have dramatically changed the face of the sector, the English language has not kept pace. Hence the need for a new moniker, public benefit corporation.

Public benefit corporations are different from other nonprofit groups, such as associations, unions, and clubs, which tend to exist to serve their members. While public benefit corporations will have members, their purpose is not to serve those members, but rather to provide a good or service for the broad benefit of society at large. It could be the enlightenment and strengthening of society through the arts or sports, the offering of services for disadvantaged members of society, or a program designed to protect the environment. A public benefit corporation can be identified and differentiated from other nonprofits by its commitment to devote its assets solely for public benefit.

It will be noted that in the Expert Working Group's two earlier responses to MGCS's Consultation Papers #1 and #2, the Group used ministry language, i.e. “nonprofit corporation.” Through the course of this work and after months of debate and deliberation, the Expert Working Group has come to realize that public benefit is the correct term for the corporations we include in our network. Therefore, throughout this document, we will use the term, “public benefit corporation.”

## General Principle

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In general, the ONN proposes that the revised legislation be structured enough to ensure certain minimum standards in organizations that serve the larger public benefit, but flexible enough not to seem to micro-manage. Many public benefit corporations serve very particular needs in communities, and in order for them to be responsive to those needs they require flexibility in their bylaws and their organizational and board structures.

### I. MEMBERSHIP

**General Principle:** The role of members is to elect directors, whose role it is to make decisions wisely and with the best interests of the corporation in mind.

#### 1. Membership Lists

##### **Question (i): Who should be given access to membership lists?**

Access to membership lists should be restricted. As per the Saskatchewan Act, access should be restricted to members. The list would always need to be used for purposes of connection with the corporation. Access should be restricted in order to increase the privacy of members, reduce the potential for illegitimate requests for the list and to reduce confusion over who has access to the list. It is suggested, as a con to this option that an outsider with a legitimate reason for requesting the list would automatically be denied. However, the proposed revisions offer a remedy to this situation. Please see section 6, Member remedies, page 6.

##### **Question (ii): Should there be a requirement for an affidavit?**

The revised act should require a signed affidavit, which is the status quo. An affidavit will ensure that those using membership lists are aware that there are limitations to how they may be used; it may reduce frivolous requests, i.e. from those wanting to use membership lists for marketing purposes; and it adds an extra layer of protection to ensure that lists are used properly.

In addition, the revised act should add to the status quo by requiring that the content of the affidavit is not defamatory to staff, board members and others, and that the reason for requesting the list falls within matters that are of the purview of members. For instance, personnel issues would not be an acceptable reason to view the list. As well, the affidavit must state that the membership list will not be used for any purpose other than corporate governance and, if it is used for any purpose other than corporate governance, the act should impose a penalty.

**Question (iii): Should there be a right of appeal?**

Yes, please see Section 6, Member Remedies, page 6.

**Question (iv): What information should be included in the membership list?**

The following information should be included in the membership list:

- Names of members
- Contact information

Note: it is not required that the Act define the sort of contact information provided, i.e. whether email addresses or street addresses are required. Each corporation will decide, with an eye to balancing both the interests of members' privacy and corporate transparency, what is the best method to contact members, and will spell this out in their own by-laws.

## **2. Transferability of Membership Interest**

**Question: Should membership interests be transferable?**

This is another example where public benefit corporations differ from other nonprofits and illustrates why a new separate Act dedicated specifically to public benefit corporations is needed. Memberships in public benefit corporations have no financial benefit attached to them, so there is little to motivate a member to transfer their membership; whereas a membership in, say, a private club may have great monetary value, and could be sold.

No, memberships should not be transferable.

## **3. Termination of Membership and Disciplinary Measures**

**Question: Should members' rights upon discipline or termination be guaranteed in the reformed Act?**

Again, the distinction between public benefit corporations and other nonprofits is clear here, underscoring the need for new, separate legislation for public benefit groups. The question of disciplinary measures does not apply to public benefit corporations.

Regarding termination of membership, rights should be guaranteed in the reformed Act in order to ensure members are entitled to a minimum level of rights in the event of a termination. As under the Saskatchewan Act, the articles or by-laws may provide that directors have the power to terminate a membership interest in circumstances described in the articles or by-laws. Where a membership interest is terminated by the directors, a member is entitled to a fair hearing before the termination occurs. Where a member feels aggrieved because of the termination, he or she may apply for relief to a court under the oppression remedy.

## 4. Quorum at Members' Meetings

**Question: Should quorum rules be set out in the reformed Act or left up to the by-laws?**

Quorum rules are not needed in the reformed Act. Quorum rules must be set by corporations in their by-laws. There should be no proxy for members, although there is a need to allow for proxies of corporate members. In addition, there is a need for a provision in the by-laws for voting by mail or electronically.

## 5. Members' Voting Agreements

**Question: Should voting/pooling agreements be provided for in the reformed Act?**

There should be no reference to voting/pooling agreements in the reformed Act (status quo). Voting agreements must be discouraged, as they tend to result in colluding groups, which can override the wishes of members.

The MGCS consultation paper incorrectly suggests there are “no apparent cons” to allowing voting/pooling agreements. Rather, such pooling can constrain the wishes of members; as well, there is no obligation to disclose pooling agreements, which can lead to secret arrangements among member groups and, potentially, a dysfunctional membership.

## 6. Member Remedies

### (a) Compliance Orders

**Question: Should the availability of compliance orders be extended to apply in cases of non-compliance with the corporation's articles and by-laws and who should qualify to apply for such an order?**

Compliance orders are available to members or other complainants in cases of non-compliance not only with the Act, but also with the public benefit corporation's articles and by-laws. However, compliance orders do not cover a public benefit corporation's purpose.

A complainant is defined as:

- (a) a member;
- (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates;
- (c) the Director (appointed by the Minister to carry out duties of director); or

(d) any other person who, in the discretion of the court, is a proper person to make an application

**Question (i): Should the application of the compliance order be broadened?**

Extend the availability of compliance orders to cases where a corporation fails to comply with duties in addition to those set out in the Act such as those imposed by the articles or by-laws of the corporation. This will increase accountability by ensuring directors act according to articles and by-laws of the corporation and may reduce the need for more costly and time consuming remedies, such as the oppression remedy and derivative action.

**Question (ii): Who should qualify as a complainant?**

In addition to being available to members, make compliance orders available to any other complainants at the discretion of the courts. This gives parties other than members, such as former members, access to the order where there is a concern regarding a breach of duties within the corporation. Requiring leave of the court for complainants other than members can prevent abuse of the remedy by persons with no legitimate interest in the issues being raised.

**(b) Oppression Remedy**

**Question: Should the reformed Act provide for an oppression remedy?**

No, ONN is not persuaded that there is a need to provide for an oppression remedy in the reformed Act. The discussion in Consultation Paper #3 does not provide clear enough reasons to include an oppression remedy.

However, in lieu of an oppression remedy, there is a need for member protection. This protection is as follows: allow by-laws passed by directors to take effect only after, and not before, they have been approved by a majority of members attending a membership meeting. This will prohibit directors from passing by-laws without the approval of the membership and ensure that directors do not overstep the limits of their authority.

**Questions (i) and (ii): Should the oppression remedy be included in the reformed Act and, if so, should it apply to religious corporations?**

Do not include the oppression remedy (status quo). This would prevent potentially costly and time consuming processes; and there are other effective remedies, such as the compliance order, which are available to members who are aggrieved.

ONN does not have an opinion regarding whether to include or exempt religious corporations, as this is outside the purview of our expertise.

**Question (iii): Who should qualify as a complainant?**

This question does not apply, as an oppression remedy should not be included in the revised Act.

**(c) Derivative Action**

**Question: Should the derivative action be included in the reformed Act?**

ONN is very supportive of including in the reformed Act the rights of members to apply to a court to seek permission to bring an action on behalf of a corporation for breach of the directors' and officers' fiduciary duty to the corporation or for any obligation to the corporation where the corporation is not taking action to pursue its own rights.

**Question (i) and (ii): Should the derivative action be included in the reformed Act and, if so, should it apply to religious corporations?**

Yes, provide for a derivative action. This provides members of public benefit corporations similar protections to those available to shareholders of business corporations and increases accountability by ensuring directors are acting in the corporation's best interests.

ONN does not have an opinion regarding whether to include or exempt religious corporations, as this is outside the purview of our expertise.

**Question (iii): Who should qualify as a complainant?**

Make the derivative action available to complainants, as defined as:

- (a) a member of the corporation;
- (b) a director or an officer or a former director or officer of a corporation;
- (c) the Director (appointed by the Minister to carry out duties of director); or
- (d) any other person who, in the discretion of the court, is a proper person to make an application.

**(d) Dissent and Appraisal**

**Question: Should the reformed Act include the dissent and appraisal remedy?**

This is another clause that does not apply to public benefit corporations—and another example of why a separate Act, dedicated to public benefit corporations, is required. The right to dissent and appraisal remedy gives members the right to obtain fair payment for their membership interests in a corporation in cases where they dissent on a shareholder vote. This is appropriate for private clubs, where a membership has monetary value. But as

the membership in a public benefit corporation has no monetary value, there is no requirement for a dissent and appraisal remedy.

## **II. CORPORATE FINANCE**

### **1. Financial Review in Lieu of an Audit**

**Question: Should certain corporations be allowed to opt for a financial review in lieu of a full audit?**

Audits are a way of promoting financial accountability and transparency within public benefit corporations; both members and the general public have an interest in ensuring the integrity of public benefits. However, audits have become increasingly complex – and the cost has skyrocketed – due in large part to the corporate scandals of the past decade and subsequent tougher business reporting requirements, such as the Sarbanes-Oxley Act of the U.S. As a result, the burden, both administrative and financial, of an audit is considerable, especially for small public benefit corporations.

In order to alleviate some of this pressure, public benefit corporations with annual incomes under an established threshold should be permitted to opt for a financial review rather than an audit. A financial review, like an audit, is performed by a public accountant, but is not as in depth or extensive as an audit. While not as thorough, a review is much more affordable, especially for small public benefit corporations.

The thresholds must be set by regulation and reviewed once every five years in consultation with the sector in order to keep pace with changing economic conditions.

**Question (i): Should the reformed Act allow corporations with certain revenue amounts to opt for a review in lieu of an audit? If so, what would be an appropriate income range for which to permit a review?**

Allow corporations with an annual income of up to a maximum amount to undergo a review in lieu of an audit. The amounts are to be set every five years by regulation in consultation with the sector.

For 2008 - 2013, the amounts are as follows: public benefit corporations with an annual income of less than \$500,000 but greater than \$100,000 can resolve to undergo a financial review in lieu of an audit, if passed by 80% of members in attendance at a members' meeting. Public benefit corporations whose revenues do not exceed \$100,000 can resolve not to conduct an audit or a review, with the consent of 80% of members in attendance at a members' meeting.

## 2. Financial disclosure

### **Question: What should the level of access to financial statements be for members?**

Directors of a corporation must provide members with the corporation's financial statements, the auditor's report, if any, and any further financial information required by the articles or by-laws. The corporation may apply to the Director for authorization to omit any item from its financial statements, or to dispense with the publication of any particular financial statement.

Members must be provided the financial statements, auditor report, and any further financial information required by the articles or by-laws with the notice of the annual meeting. The information may be delivered electronically.

### **Question (i): When should members be provided with the corporation's financial statements?**

In order to improve and increase accountability, make financial statements available to members prior to the annual meeting with the notice of the meeting. Public benefit corporations with an annual income of less than a threshold set by regulation may opt out from this rule and distribute financial statements to members at the annual meeting.

For 2008 - 2013, the threshold is \$100,000. Public benefit corporations with less than \$100,000 in annual income may opt out of the pre-meeting disclosure rule. This threshold is set by regulation once every five years, in consultation with the sector. Note: this threshold is the same as the threshold requiring public benefit corporations to conduct an audit or a review. (Please see page 9)

## 3. Borrowing and Debt Issuance

### **Question: Should directors have the power to borrow and issue debt without a specific by-law being passed?**

Unless the articles or bylaws provide otherwise, directors have the right to borrow money on the credit of the corporation and issue, reissue, sell or pledge debt obligations of the corporation.

Directors may give a guarantee on behalf of the corporation to secure performance of an obligation, and mortgage, or create a security interest in all of any property of the corporation, to secure any obligation of the corporation.

This simplifies the process of borrowing and/or issuing debt on the corporation's behalf and reduces the chance that directors would borrow/issue debt without authority.

### **III. OTHER**

#### **1. By-laws**

**Question: Should standard, default by-laws be included in the reformed Act?**

By-laws are a way in which a corporation establishes rules for its governance, especially rules for conducting meetings and assigning responsibilities to directors and officers. There are a wide range of organizations hence there will be wide differences in by-laws.

To ease the burden of drafting by-laws, which can be an onerous, complex task, especially for small public benefit corporations, the Incorporators Guide, provided to the sector by the Ministry, should include a template of appropriate by-laws. This will exist outside of the Act itself, and can be used to guide newly incorporating groups as they craft their own by-laws. This tool would be especially useful to new, small public benefit corporations.

The reformed Act should provide for a default by-law that is written in consultation with the sector, provided for by regulation, and reviewed every five years.

**Question (i): Should a system of standard, default by-laws be adopted in the reformed Act?**

Adopt standard default by-laws, which will apply when the corporation's existing by-laws are silent. The standard default by-laws are to be written and reviewed every five years in consultation with the sector and are included in regulations. The standard default by-laws must not be unduly constraining.

#### **2. Self-Perpetuating Board**

**Question: Should the reformed Act prevent the possibility of self-perpetuating boards?**

Allow for a self-perpetuating board.

There is a vast diversity of public benefit corporations, just as there is a vast diversity of the needs they serve. For some public benefits, regular board changeover is appropriate; for others, having longstanding board members is also appropriate. This range must be allowed to exist, so that public benefit corporations can best serve their mandates. As well, to guard against abuse and to ensure transparency and responsiveness, the Act includes member and outsider remedies.

## Your Response

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It is really important that you write to MGCS and voice your opinion. Feel free to use any of the language in this document. You can simply write a short note saying you support ONN's position, or you can write a long, detailed response. The important thing is that your individual voices are heard. For the Ministry, broad participation in the consultation process matters, so each individual response has a huge impact. We need the Ministry to understand that the sector is paying attention and that there is broad-based support for ONN's position.

This document is the third in a series of ONN briefs on the proposed revisions to the Act. Please refer to it as such in your response to the Ministry. The first two responses can be found on the ONN website, at <http://www.ontariononprofitnetwork.ca>. You will also find there submissions from:

- United Ways of Ontario
- Ontario Bar Association submission
- Imagine Canada

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

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

Email: [business.law@ontario.ca](mailto:business.law@ontario.ca)

**Kindly also send a copy to:**

Janice Wiggins, Chair of the Expert Working Group  
[janice@volunteerlawyers.org](mailto:janice@volunteerlawyers.org)

**The deadline for your response is May 31, 2008  
PLEASE ACT NOW!**

## Where to Find More Information

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

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

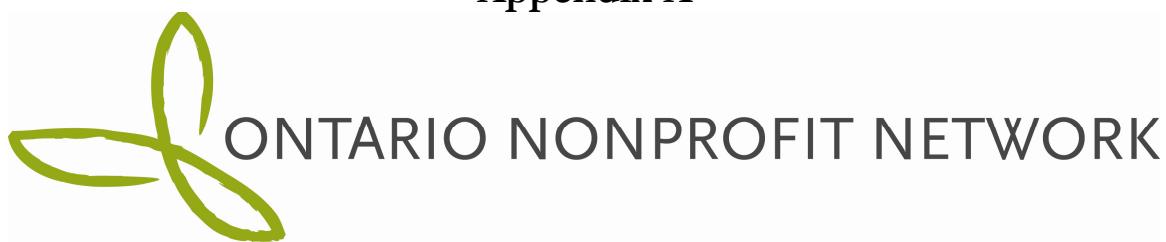
*Look for the following two documents:*

- Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations (Corporations Act, Consultation Paper 1, May 7, 2007)
- Supplementary Materials to the May 7, 2007 Consultation Paper
- Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations (Consultation Paper #2, August 22, 2007)
- Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations (Consultation Paper #3, February 28, 2008)

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

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

## Appendix A



### About the Ontario Nonprofit Network

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

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

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

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

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

## Appendix B

### ONN Expert Working Group Members

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