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**Reform of Not-For-Profit Corporations Legislation in
Ontario**

**By Terrance S. Carter, B.A., LL.B., Trade-mark Agent
Assisted by Derek B. Mix-Ross, LL.B.**

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TABLE OF CONTENTS

A. Introduction.....	1
B. First Consultation Paper.....	3
1. The Incorporation Process.....	4
2. The Structure of the OCA.....	4
3. Defining the term ‘not-for-profit corporation’.....	5
a) Not-for-profit purposes.....	6
b) Non-Distribution Constraint.....	7
4. Classification system.....	7
5. Corporate powers and capacity.....	8
C. Second Consultation Paper.....	9
1. Board Composition.....	10
a) Number of Directors.....	10
b) Qualifications of Directors.....	11
2. Term of Office.....	12
3. Directors’ Meetings.....	12
4. Resignation, Removal and Vacancies.....	13
5. Officers.....	14
6. Directors’ and Officers’ Liability.....	15
a) Duty of Care and Loyalty.....	15
b) Due diligence defence.....	16
c) Indemnification and Insurance.....	17
d) Limiting Liabilities of Directors and Officers.....	18
e) Conflict of Interest.....	19
D. Third Consultation Paper.....	20
1. Membership.....	20
a) Membership Lists.....	20
b) Transferability of Membership Interest.....	21
c) Termination of Membership and Disciplinary Measures.....	21

d) Quorum at Members' Meetings	22
e) Members' Voting Agreements	22
2. Members' Remedies	23
a) Oppression Remedy.....	25
b) Derivative Action	26
c) Dissent and Appraisal	27
3. Corporate Finance.....	27
a) Financial Review in lieu of an Audit.....	27
b) Financial Disclosure.....	28
c) Borrowing and Debt Issuance.....	29
4. By-laws.....	29
5. Self-perpetuating Boards.....	30
E. Conclusion.....	30

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A. INTRODUCTION

In the spring of 2007, the Ontario Ministry of Government and Consumer Services (“Ministry”) announced that it was undertaking a project to review and revise the Ontario *Corporations Act* (the “OCA”)¹. Currently, the OCA provides the statutory framework governing the creation, governance, and dissolution of not-for-profit corporations, including charitable corporations.² The Ministry has explained that it is planning to reform this area of the law and “develop a new legal framework to govern the structure and activities of charities and not-for-profit corporations” in Ontario.³

¹ R.S.O. 1990, c. C.38

² The OCA also applies to the incorporation and basic corporate governance rules of insurance companies in Ontario. However, the Ministry has stated that insurance issues will not be the focus of the reformation process (at least not during the public consultation stage, discussed below).

³ Ministry of Government Services, Policy and Consumer Protection Services Division, *Modernizing the Ontario Corporations Act*, online: <<http://www.gov.on.ca/mgs/en/AbtMin/198247.html>>. Efforts to reform the law governing not-for-profit corporations are occurring in other jurisdictions as well. The most recent federal initiative was Bill C-21, the *Canada Not-for-profit Corporations Act*, which proposed to replace Parts II and III of the *Canada Corporations Act*, R.S.C. 1970, c. C-32. Bill C-21 died on the order paper Order Paper on November 29, 2005 when the 38th Parliament was dissolved. At the provincial level, the British Columbia Law Institute has recently published a reform proposal: *Consultation Paper on Proposals for a new Society Act* (August, 2007), online: <http://www.bcli.org/pages/projects/society/Society_Act_Consultation_Paper.pdf>. In the United States, the American Bar Association is in the process of revising its *Model Nonprofit Corporation Act*: Task Force to Revise the Model Nonprofit Corporation Act, *Proposed Model Nonprofit Corporation Act* (3rd ed.), January, 2008, Exposure Draft (Lizabeth A. Moody, Chair), online: <<http://www.abanet.org/dch/committee.cfm?com=CL580000>>.

The primary basis for proposing reform to the OCA was the concern that the OCA is antiquated, cumbersome, and unable to meet requirements of the modern not-for-profit sector.⁴ The original version of the OCA, then called the *Companies Act*, was enacted in 1907 and has not been substantially revised since 1953. During this 50 year period where there has been no substantial change to legislation, the not-for-profit sector itself has experienced tremendous change.⁵ It is hoped that reform to the OCA will both achieve modernization of the OCA and facilitate a legal structure that equates with the actual needs of today's not-for-profit and charitable corporations. The Ministry's main goal of reform is to "create a new statute dedicated to non-profit corporations that is easily understood and that responds to the realities of the 21st century nonprofit sector."⁶

The Ministry has not officially announced any new provisions or specific changes that will be made as part of this modernization process. It has, however, generally expressed its desire to make its recommendations on reform to the Ontario Cabinet in the summer of 2008, with the hopes of introducing new legislation to the Ontario Legislature as early as the spring of 2009. As the first step of this process, the Ministry has released three consultation papers which discuss a number of areas of potential reform. These consultation papers, entitled *Modernization of the Legal Framework Governing Ontario Not-For-Profit Corporations*, invited comments and suggestions from sector

⁴ Ministry of Government Services, Policy and Consumer Protection Services Division, *Modernization of the Legal Framework Governing Ontario Not-For-Profit Corporations*, May 7, 2007 at 5 ["First Consultation Paper"]. The paper can be found online at <<http://www.gov.on.ca/MGS/en/AbtMin/132784.html>>. In December, 2007, the Ministry released a 16-page supplementary document provide some possible options for dealing with each of the main issues raised in the First Consultation Paper, along with their pros and cons. The supplementary paper is available online at <http://www.gov.on.ca/mgs/graphics/177534.pdf>.

⁵ There has also been substantial change to legislation governing for-profit corporations. Such corporations were governed in Ontario by the *Companies Act* until reformed business corporation statutes were introduced in the 1970s. Although business corporations and mining companies are now governed by the Ontario *Business Corporations Act*, old provisions dealing with them have been left in the OCA, "rendering the current state of the [OCA] archaic", and, as a result, users of the OCA "have been left trying to piece together the provisions that continue to apply today, which provisions are scattered throughout various parts of the Act": see Ontario Ministry of Government and Consumer Services, Policy and Consumer Protection Services Division, *Questions and Answers re Modernization of the Ontario Corporations Act* (December, 2007), online: <http://www.gov.on.ca/mgs/graphics/177536.pdf>.

⁶ *Ibid.*

stakeholders, as well as the general public, regarding the reform of the OCA.⁷ The consultation papers highlight the issues that have been the focus of the reform process thus far. This paper will discuss some of those issues of reform and the potential impact they will have on Ontario’s charities and not-for-profit corporations.

B. FIRST CONSULTATION PAPER⁸

The Ministry’s first consultation paper, released on May 7, 2007, was general in nature and requested comments on broad issues relating to new not-for-profit legislation (the “new Act”). The first paper revealed that, since the OCA is an organizational statute and not a regulatory statute, the focus of the consultation process would not be on the regulation of charitable and other not-for-profit corporations, but on rules relating to their incorporation and governance. The First Consultation Paper set out the Ministry’s objectives in bringing about reform to the OCA:

- ◆ To provide more flexible and up-to-date rules for dealing with the relationship between the corporation and its directors, officers, and members
- ◆ To provide improved corporate governance and accountability
- ◆ To provide efficient means for incorporation and operation of not-for-profit corporations
- ◆ To create more comprehensive legislation that will address gaps in the current legislation
- ◆ To enable activity by a diversity of not-for-profit corporations
- ◆ To streamline operational and administrative requirements and improve the processing efficiency of applications for not-for-profit corporations.⁹

⁷ First Consultation Paper, *supra* note 4 and *infra*, notes 19 and 79. A Joint Working Group of the Ontario Bar Association Corporate Law Subcommittee, Business Law Section and the Charity and Not-for-Profit Law Section [the “OBA Joint Working Group”] prepared submissions in response to each consultation paper. The submission on the First Consultation Paper is available online at: http://www.oba.org/en/pdf/OBA_Phase3_bus_law_modernization_Paper1.pdf [“OBA Submission I”]. The submission on the Second Consultation Paper is available online at: http://www.oba.org/en/pdf/OBA_Phase3_bus_law_modernization.pdf [“OBA Submission II”]. The submission on the Third Consultation Paper is available online at: http://www.oba.org/en/pdf/Bus_Law_Phase3_Paper3_Final.pdf [“OBA Submission III”].

⁸ This section of the article is based, in part, on a *Charity Law Bulletin* written by Jacqueline M. Demczur, assisted by Dawn E. Phillips, “Comments on a Consultation Paper for Reform of the *Corporations Act* (Ontario)” (2007) *Charity Law Bulletin* No. 120, online: <<http://www.carters.ca/pub/bulletin/charity/>>.

The issues raised in the First Consultation Paper are as follows:

1. The Incorporation Process

Presently, incorporation under the OCA requires that not-for-profit organizations file an application for letters patent along with supporting documentation and a fee. The application is then reviewed by the Ministry, which uses its discretion to identify which organizations should be approved for incorporation. The First Consultation Paper recognizes that perhaps this discretion can cause government officials to impose unnecessary restrictions on applicants. Since the imposition of these restrictions runs contrary to the OCA's main objective of encouraging and facilitating not-for profit activity, this is an area where reform is likely to occur.

As an alternative to the current system, the Ministry has proposed that the new Act might provide organizations with the ability to incorporate "as of right". Under this process, applications for incorporation would be automatically approved once basic requirements for incorporation are established. This would limit the scope of the Ministry's review and would also allow the incorporation process to proceed quickly. A number of legislative models in other jurisdictions already provide for incorporation "as of right"¹⁰, and the new Act is likely to follow their example in this regard so as to facilitate, rather than regulate, not-for-profit activity.

2. The Structure of the OCA

The current OCA is difficult to navigate and as such its structure requires replacement. These difficulties have led the Ministry to propose two potential models for a new structure: The

⁹ First Consultation Paper, *supra* note 4 at 6. See also the Ministry's *Questions and Answers* document, *supra* note 5, which contained a similar but not identical list of the Ministry's intended objectives. Some of the new objectives included: to provide clarity on the right of nonprofits to engage in commercial activities; create a legal regime that encourages talented people to participate in nonprofit activities; strengthen protection of members; and strengthen protection of those who utilize or contribute to nonprofits.

¹⁰ First Consultation Paper, *supra* note 4 at 8, wherein the Ministry stated that "all business corporations statutes in Canada", as well as the not-for-profit corporations statutes of Saskatchewan, New York, and California, allow incorporation "as of right".

Ontario *Business Corporations Act* [“OBCA”]¹¹ or the *California Corporations Code* [“CCC”].¹²

Structurally, the OBCA is very logical. Section by section it follows the chronology of a corporation and the central issues that need to be addressed by corporate legislation (e.g. incorporation, membership, directors and officers, remedies). This approach was followed in the proposed *Canada Not-for-profit Corporations Act* [“Bill C-21”], which, however, was unsuccessful in receiving Parliament’s support.¹³ The OBCA’s structure, however, is designed for business corporations and could be criticized as being less suitable to the needs of not-for-profit corporations.

The CCC is what might be described as ‘divided legislation’. It contains various sections for different classes of not-for-profit corporations and in each section it addresses all things relevant to that class of corporation. While the CCC model is user-friendly, it is also quite lengthy. Additionally, under a CCC model, problems can arise in determining how the different corporations should be classified.

As can be seen, neither model is totally suitable for the new Act to fully follow. As well, there may be other potential models that are not listed in the consultation paper that might be more appropriate to utilize. It is possible that the Ministry will ultimately find that they should combine the best features of various models in order to meet the unique needs of not-for-profit organizations in Ontario.

3. Defining the term ‘not-for-profit corporation’

The First Consultation Paper queried how the term “not-for-profit corporation” should be defined in the new Act. Currently, the definition involves two separate components: not-for profit purposes and non-distribution constraints.

¹¹ R.S.O. 1990, c. B.16.

¹² Cal. Corp. Code.

¹³ Bill C-21 was introduced by the federal government in 2004 as the successor legislation to the *Canada Corporations Act*. *Supra*, note 3.

a) Not-for-profit purposes

“Not-for profit purposes” refers to the requirement that not-for-profit corporations pursue purposes other than profit or pecuniary advantage to their members. The current OCA permits a not-for-profit organization to become incorporated with any objects within the jurisdiction of Ontario¹⁴ and requires not-for-profit corporations to be carried on without the purpose of gain for its members¹⁵. What is problematic about the current OCA is that the term “gain for its members” has no clear meaning and it has been interpreted to permit the incorporation of associations that indirectly advance the pecuniary interest of their members by advancing a common interest (e.g. trade associations).

In its reform, the Ministry is considering a more clearly defined list of permitted purposes and activities. However, it may be that the Ministry will decide not to restrict the purposes or activities for which not-for-profit corporations can be incorporated. In this scenario, this would mean that the only limit that would be placed on such corporations is that they could not pursue profit for distribution to its members. The rationale for this facilitative approach is well articulated by Professor Henry Hansmann in the following quote:

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).”¹⁶

In its review of the definition of “not-for-profit corporation”, the Ministry is also considering whether there should be any restrictions on the commercial activities of such corporations.

¹⁴ OCA S. 118.

¹⁵ OCA s. 126.

¹⁶ Henry B. Hansmann “Reforming Nonprofit Corporations Law” (1981), 129 U. Pa. L. R. (497) at pp. 526-7.

b) Non-Distribution Constraint

The “non-distribution constraint” refers to the nature of not-for-profit corporations as being different from business or commercial entities, in that they do not distribute property to their members. Currently, the OCA specifies that a not-for-profit corporation must carry its operations on without the purpose of gain for its members.¹⁷ However, the wording of the OCA is not so explicit as to provide a non-distribution constraint. In fact, the OCA has been interpreted as allowing certain corporations the distribution of assets to corporate members upon dissolution. Of course, charitable not-for-profit corporations are prohibited from distributing funds to their members, which creates some confusion in relation to this aspect of the current OCA. In this regard, it is hoped that the new Act will clarify what can and cannot be distributed to members.

4. Classification system

The current OCA only provides for one broad class of not-for-profit corporations, being a class which is made up of corporations whose objects are within the jurisdiction of the Province of Ontario.¹⁸ Reform to the OCA has called into question whether Ontario not-for-profit corporations would be better served if the OCA took their diversity into account and categorized them into several different classes and regulated each class according to their common features.

The Ministry must determine if a class model is desirable and, if it is, they must evaluate a variety of different classification models that could be used. The *Saskatchewan Non-Profit Corporations Act, 1995*¹⁹ categorizes not-for-profit corporations as either charitable corporations²⁰ or membership corporations²¹, and then more stringently restricts the ability of

¹⁷ OCA s. 126.

¹⁸ OCA s. 118.

¹⁹ S.S. 1995, c. N-4.2. (the “Saskatchewan Act”). The Saskatchewan Act governs not-for-profit corporations in the province of Saskatchewan and underwent significant reforms in 1995. The Ontario Law Reform Commission viewed the Saskatchewan Act as a good Canadian example of the way in which the OCA should be reformed.

²⁰ A “charitable corporation” is defined as a corporation that “carr[ies] on activities that are primarily for the benefit of the public”, solicits donations from the public, receives funds from the government in excess of 10% of the income for that fiscal year, or is a registered charity within the meaning of the *Income Tax Act*. (ss. 2(1) and 2(9)). Note that this definition includes a substantial number of corporations that would not be considered charitable at common law. A membership corporation is defined as a corporation that “carr[ies] on activities that are primarily for the benefit of its members” (s. 2(1)).

²¹ A membership corporation is defined as a corporation that “carr[ies] on activities that are primarily for the benefit of its members” (s. 2(1)).

charitable corporations to make fundamental changes to its object and distribution clause.²² Bill C-21 distinguished between soliciting corporations and non-soliciting corporations²³, with soliciting corporations being more heavily regulated because they are corporations that solicit funds from the public, government or other entities. The CCC classifies corporations as mutual benefit, public benefit or religious²⁴, with public benefit corporations being the most heavily regulated.

The Ministry has already proposed certain areas where different classes of corporations might be treated differently. They suggest that the distribution of assets on dissolution, the payment of remuneration to directors, and members' rights and remedies are, for example, areas where differences between not-for-profit corporations may require that organizations are regulated differently.

Distinguishing between corporations in the manner proposed may seem at first glance somewhat logical. Not-for-profit corporations can vary tremendously from one corporation to another and a regulatory system that looks to those differences may better address specific corporate needs. Yet this classification of not-for-profit corporations could also foster a regulatory regime that forces corporations to fit into a specific class description without properly considering how that exact corporation should be regulated. This is particularly of concern for religious corporations. Possibly an alternative approach to a classification system would involve having certain provisions that apply to all corporations, together with optional provisions that could be opted into in order to customize particular types of corporations depending upon their intended purposes and activities.

5. Corporate powers and capacity

Under the current OCA, a not-for-profit corporation has the capacity of a natural person and the ability to exercise its powers outside of Ontario.²⁵ The OCA, however, prescribes that a

²² See ss. 116(3), 161, and 209.

²³ A soliciting corporation is defined as one that solicits funds from public, government or other entity, and includes charities.

²⁴ "Mutual benefit" refers to organizations that primarily serve the interests of their members, and "public benefit" refers to charities that are not religious organizations. According to the First Consultation Paper, this is the classification system used in most jurisdictions in the United States.

²⁵ S. 274.

corporation's ability as a natural person can be limited by the OCA or the bylaws of the corporation. This preserves the doctrine of *ultra vires*, which declares that actions of a corporation that are beyond its power will be considered void, and as such could result in directors of the corporation being unnecessarily exposed to liability.

Many other corporate statutes that regulate both business and not-for-profit corporations have abolished this doctrine of *ultra vires*, including the OBCA, Bill C-21, and the Saskatchewan Act. Rather than making actions void if they are committed outside of corporate power, these statutes simply make the actions illegal and subject to general legal sanctions.

The Ministry has not confirmed that the doctrine of *ultra vires* will be absolutely abolished. It has, however, raised several questions, the answers to which may outline the benefits and drawbacks of maintaining this doctrine. Given the recent trend for the abandonment of the doctrine by other corporate legislation, it is expected that the doctrine of *ultra vires* will not form a part of the new Act. This would certainly be a welcome, if not long overdue, development.

The First Consultation Paper also discussed (in brief) issues such as Directors' Liability, Financial Disclosure, and Members' Remedies, but these are addressed in more detail in the Second and Third Consultation Papers (see below).

C. SECOND CONSULTATION PAPER

The Second Consultation Paper, which was released on August 22, 2007, focused on the subject of directors and officers.²⁶ The Ministry expressed that “many of the provisions in the [OCA] that govern the rights and responsibilities of directors and officers are dated and may not be entirely

²⁶ Ontario Ministry of Government Services, Policy and Consumer Protection Services Division, *Consultation Paper #2: Modernization of the Legal Framework Governing Ontario Not-For-Profit Corporations*, Consultation Paper, August 22, 2007. The paper can be found at <<http://www.gov.on.ca/mgs/graphics/166168.pdf>> [“Second Consultation Paper”].

appropriate for today’s not-for-profit corporations”.²⁷ The Ministry went on to explain that “some provisions that are common in corporate statutes and that contribute to making the governing law flexible are noticeably absent from the [OCA].”²⁸ The following sections discuss some of those provisions:

1. Board Composition

a) Number of Directors

Currently, the board of directors of a corporation must “consist of a fixed number of directors not fewer than three”.²⁹ The Ministry is reviewing this requirement. Other legislative models vary on this issue: most require a minimum of three directors for charitable corporations³⁰, but some provide a lower minimum of one director for corporations that do not solicit funds from the public.³¹ On the one hand, a board consisting of at least three directors may provide the public with more assurance that the corporation will discharge its public benefit functions, especially with respect to charitable corporations. On the other hand, such a restriction may be unduly burdensome to family and other private foundations. In that regard, the Ministry is considering whether it should adopt different requirements depending on the class of a not-for-profit corporation (if a classification system, as discussed above, is adopted).

The Ministry is also considering whether the new Act should require a minimum number of “outside” directors to sit on the board (i.e. those who are not officers or employees of the corporation or its affiliates). This latter requirement is attractive, in that it requires the management of a corporation to be accountable to a more independent board. However, others have suggested that the regulatory value of such a requirement may be minimal in the not-for-profit sector, which is generally already highly diverse.

²⁷ *Ibid.* at 5.

²⁸ *Ibid.*

²⁹ OCA, s. 283(2).

³⁰ See, for example, OBCA, s. 115(2); Bill C-21, s. 126; Saskatchewan Act, s. 89.

³¹ See, for example, Bill C-21, s. 126, and Saskatchewan Act, s. 89.

b) Qualifications of Directors

Under the current OCA, a director must be a member of the corporation, eighteen years of age, and not an undischarged bankrupt.³² No other requirements exist, although additional ones are under consideration. In this regard, the Ministry has made reference to the OBCA, which provides that a director must be a natural person and must not be “incapable of managing property”.³³ The OBCA also requires at least 25% of the directors must be resident Canadians.³⁴ Generally, these requirements should be introduced in the new Act, with the exception of the Canadian residency requirement, which may create an unnecessary limitation for foreign based charities and not-for-profit corporations that want to incorporate in Ontario.³⁵

The Ministry also made reference to the Ontario Law Reform Commission’s 1996 *Report on the Law of Charities*, which recommended that:

- “no person of unsound mind”, as adjudged by a court, should be able to serve as a director
- with respect to religious and charitable corporations, persons of unsound character, however defined, ought to be excluded or be subject to a screening requirement
- only individuals (as opposed to other organizations or corporate bodies) should be able to serve as directors.

In addition to considering new requirements for directors, the Ministry is considering whether the new Act should retain the existing requirement that all directors must be members of the corporation. This requirement was specifically excluded in both Bill C-21 and the Saskatchewan Act. It has been suggested by the OBA Joint Working Group (see

³² OCA, s. 286.

³³ OBCA, s. 118(1).

³⁴ OBCA, s. 118(1)(3).

³⁵ In this regard, it is notable that this requirement is not currently imposed under the OCA, CCA, or Saskatchewan Act, nor was it proposed in Bill C-21.

note 7, *supra*) that this requirement is unnecessary and should be left to particular organizations to impose in their own by-laws, if they so desire.³⁶

2. Term of Office

The current OCA provides that a director's term of office shall be for one year. However, a corporation's by-laws may provide for a different term, and there is no limit on the length that may be stipulated in the by-laws for a director's term of office.³⁷ This can be problematic if a corporation allows directors to sit for lengthy periods of time, or indefinitely, without being accountable by election to a membership constituency. As such, the Ministry is considering whether regular elections and/or a maximum term of office for directors should be required in the new Act. Other corporate statutes, such as the OBCA³⁸ and the Saskatchewan Act³⁹, impose a three-year limit on the term of directors before an election must be held. This initiative toward increased accountability is generally warranted and as such, similar provisions will hopefully appear in the new Act.

3. Directors' Meetings

Most modern corporate statutes set out rules regarding directors' meetings. The current OCA, however, provides very little on the matter of meetings of directors, other than provisions on quorum, place, and electronic or telephone meetings. The Ministry is considering the inclusion of a "comprehensive set of rules governing the calling and conduct of directors' meetings".⁴⁰ One area under review for the new Act is the requirement that notice be given to members of the board of directors in advance of a directors meeting. The current OCA does not contain any rules in this regard, and the Ministry has looked to other models, such as the OBCA, for guidance. The OBCA requires that notice of a directors' meeting be sent at least 10 days in advance of the meeting, and must specify the time and place of the meeting, as well as the

³⁶ OBA Submission II, *supra* note 7 at 7. The OBA Joint Working Group observed that there are "no strong reasons from a regulatory perspective to impose [the requirement that all or some of the directors be members of the corporation]" and noted that "the inadvertent breach of such requirement could lead to unnecessary legal complexity". The OBA Joint Working Group also observed the unnecessary complexity that arises where all the members of an NFP corporation are themselves corporations, requiring the establishment of a second class of membership to permit individual directors to qualify.

³⁷ OCA, s. 287.

³⁸ OBCA, s. 119(4).

³⁹ Saskatchewan Act, s. 93(3).

⁴⁰ Second Consultation Paper, *supra* note 26 at 11.

general nature of the business to be transacted at the meeting.⁴¹ It also provides that a director may waive his or her notice of a meeting “in any manner”, as does the Saskatchewan Act.⁴² These notice provisions should be followed in the new Act, so as to bring uniformity to this area of the law for both business and not-for-profit corporations. However, organizations should be able to adopt different rules, if they so desire, to accommodate other types of notice typically used in the not-for-profit sector, such as oral, newspaper, newsletter, and website communications, provided that such communication is made in a comprehensible manner.

The new Act may also allow directors to transact business through the use of written unanimous resolutions, in place of meeting in person. Such practice is already allowed under the OBCA⁴³ and the Saskatchewan Act⁴⁴, as well as the American Bar Association’s *Revised Model Nonprofit Corporation Act* (1987) (the “ABA Model Act”)⁴⁵. The Ministry explained that permitting resolutions in place of a meeting would allow “organizations to avoid the cost and expense of holding meetings while still ensuring participation in decision making”.⁴⁶

4. Resignation, Removal and Vacancies

Under the current OCA, members may remove a director by a two thirds vote before the expiration of his or her term and may, by majority vote, elect a replacement for the remainder of the term at the same meeting.⁴⁷ The OBCA, Saskatchewan Act, and Bill C-21, all only require an ordinary resolution (i.e. majority vote) to remove directors.⁴⁸ The new Act may follow these statutes and allow for the removal of directors by ordinary resolution.

The new Act also provides that, when a director has resigned, the remaining directors may fill the vacancy for the term of office if there is a quorum.⁴⁹ If there is no quorum, the directors (or a member if there are no remaining directors or the directors fail to call the meeting) are

⁴¹ OBCA, s. 126.

⁴² Saskatchewan Act, s. 101(6).

⁴³ OBCA, s. 129(1), (2).

⁴⁴ Saskatchewan Act, s. 104.

⁴⁵ ABA Model Act, s. 8.21.

⁴⁶ Second Consultation Paper, *supra* note 26 at 13.

⁴⁷ OCA, s. 67(1).

⁴⁸ See OBCA, s. 122; Saskatchewan Act, 96(1); and Bill C-21, s. 131(1).

⁴⁹ OCA, s. 288(2).

required to hold a members' meeting to fill the vacancy.⁵⁰ However, other than these provisions, the current OCA contains no rules governing the resignation of directors. The new OCA may address some of those issues, such as the rights of a director upon resignation/removal, as well as when a director is allowed to resign. For example, the OBCA provides that directors who resign or are removed have the right to present their reasons for resignation or for opposing their removal to a meeting of shareholders.⁵¹ The Ontario Law Reform Commission's *Report on the Law of Charities* recommended a similar model for a reformed Act. The OBCA also addresses the timing of a resignation, and expressly permits a director to resign at any time, unless he or she is an initial director. Initial directors may not resign before the first shareholders meeting, unless a successor has been elected.⁵² Similar provisions are found in the Saskatchewan Act.⁵³

5. Officers

The current OCA contains very few provisions with respect to officers. It requires the election of a president and the appointment of a secretary⁵⁴, and provides that the corporation may, by special resolution, elect a chair of the board of directors who may be assigned any or all of the duties of the president or other office.⁵⁵ The president and chair must be both directors and members of the corporation.⁵⁶

The Ministry is reviewing whether the new Act should provide for the appointment of specific officers and whether officers should be required to be directors. The ABA Model Act, for example, requires a president, treasurer, and secretary, unless otherwise stipulated. It also sets out their duties, required standard of conduct, provisions governing their resignation and removal, their contract rights, and matters related to their indemnification and insurance.⁵⁷ The

⁵⁰ OCA, s. 288(3).

⁵¹ OBCA, s. 123(2).

⁵² OBCA, s. 119(2).

⁵³ Saskatchewan Act, s. 95.

⁵⁴ OCA, ss. 289(1),(2).

⁵⁵ OCA, s. 290.

⁵⁶ OCA, s. 291.

⁵⁷ Second Consultation Paper, *supra* note 26 at 16.

OLRC recommended that the reformed OCA contain similar provisions, and as such they are being considered by the Ministry during this process.⁵⁸

6. Directors' and Officers' Liability

The current OCA is particularly outdated and in need of reform with respect to the issue of directors' and officers' liability. The current OCA sets out no duty of care, standard of care, or defences applicable to the directors and officers of not-for-profit corporations. The current lack of attention that this topic receives under the OCA opens directors and officers to personal liability in a number of ways and thus serves as a deterrent to individuals who might otherwise wish to accept a director or officer position within a not-for-profit corporation. Indeed, the Ministry notes that the not-for-profit sector often experiences difficulty in recruiting and retaining qualified individuals to fill the positions of directors/officers.⁵⁹

To address these concerns, the Ministry will be required to create a liability regime that takes into account the need for directors and officers to be treated fairly, while still being accountable to those who suffer losses as a result of the actions of a director, officer, or corporation. The Ministry has given consideration to reforming the OCA in this regard, as discussed below.

a) Duty of Care and Loyalty

At common law, as fiduciaries, directors and officers owe the corporation a duty of care and a duty of loyalty. However, the OCA is silent on these fiduciary duties and the standard of care that directors and officers must follow. The Ministry has suggested that this uncertainty and lack of clarity should be remedied in the new Act, and since the OBCA's provisions dealing with these issues are already well known and understood in Ontario, "[the OBCA's provisions'] adoption into the reformed Act has the benefit of familiarity and clarity" and would also "result in harmonization of directors' duties with business corporations."⁶⁰

⁵⁸ *Ibid.*

⁵⁹ First Consultation Paper, *supra* note 4 at 23.

⁶⁰ Second Consultation Paper, *supra* note 26 at 18.

The OBCA requires directors and officers to “act honestly and in good faith with a view to the best interests of the corporation” and to “exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”⁶¹ A director is liable for any action or resolution passed at a meeting he or she attends, or any passed resolution he or she becomes aware of when not in attendance, unless he or she registers a dissent.⁶² Hopefully, these provisions will be followed in the new Act so that the law in Ontario is clear and consistent in this area.

The Ministry is also considering a recommendation made by the Panel on Accountability and Governance in the Voluntary Sector to modify the OBCA’s standard of care to include a subjective element.⁶³ In other words, the position and background of a director/officer would be taken into account in determining whether they acted as a “reasonably prudent person”. This may provide additional protection to volunteer directors who may be inexperienced and particularly vulnerable to liability, but may also place a higher burden on other officers and directors who have more experience.

b) Due diligence defence

As mentioned earlier, there is no provision in the current OCA that provides directors with a due diligence defence. A due diligence defence is one that would “restrict liability to circumstances where the directors did not perform as he or she could reasonably have been expected to perform”.⁶⁴ The new Act may include a provision which would “clarify that the defence, which is already found in the common law, is specifically applicable to directors of not-for-profit corporations”⁶⁵ The Ministry has also looked to “good faith reliance defences” contained in other corporate statutes for guidance, such as the OBCA’s, which absolves a director from liability if he or she relied in good faith on experts.⁶⁶ Adopting such a defence in the new Act would be an important development in the not-for-profit sector, as

⁶¹ OBCA, s. 134(1).

⁶² OBCA, s. 135(1), (3).

⁶³ Panel on Accountability and Governance in the Voluntary Sector, “*Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector*” (February, 1999), online: http://www.vsf-fsbc.ca/eng/publications/1999/building_strength.pdf.

⁶⁴ Second Consultation Paper, *supra* note 26 at 19.

⁶⁵ *Ibid.*

⁶⁶ OBCA, s. 135(4).

it protects directors who act reasonably, and also, in the words of the Ministry, “may aid in the recruitment and retention of qualified directors.”⁶⁷

c) Indemnification and Insurance

Currently, the OCA allows not-for-profit corporations to indemnify their directors and officers for costs, charges, and expenses arising out of the legal actions brought in respect of any act made or permitted by them in or about the execution of their duties.⁶⁸ The OCA also allows not-for-profit corporations to purchase liability insurance for the benefit of directors and officers, except where the liability relates to the person’s failure to act honestly and in good faith with a view to the best interests of the corporation.⁶⁹

The Ministry is reviewing these provisions and considering whether they should be maintained, expanded, or excluded from the new Act. The OBCA, CBCA, Bill C-21, and Saskatchewan Act all allow corporations to purchase insurance to cover directors and officers, and all allow corporations to indemnify directors and officers, provided they acted honestly and in good faith.⁷⁰

One area of potential reform for the new OCA relates to the ability of charitable corporations to purchase insurance for their directors. Currently, a charitable corporation may not purchase insurance for its directors unless the corporation complies with the *Charities Accounting Act* or its regulations, or the corporation, director or officer obtains a court order authorizing the purchase. Ontario Regulation 4/01, which is incorporated by reference by s. 283(6) of the OCA, imposes additional restrictions on charities’ ability to purchase liability insurance, and creates unnecessary uncertainty for boards of charitable corporations.⁷¹ It is hoped that the new Act will state unequivocally that all not-for-profit corporations, including those which are charities, may purchase liability insurance for their directors and officers.

⁶⁷ *Ibid.*

⁶⁸ OCA, s. 80.

⁶⁹ OCA, s. 283(5), (6).

⁷⁰ OBCA, s. 136(1), (3), (4.2), (4.3); CBCA, s. 124; Bill C-21, s. 152; Saskatchewan Act, s. 111(1), (4), (5).

⁷¹ See OBA Submission II, *supra* note 7 at 11. The OBA Joint Working Group also recommended that, as a consequential change, Ontario Regulation 4/01 should be repealed.

d) Limiting Liabilities of Directors and Officers

The Ministry is considering whether it should limit the personal liabilities of directors and officers in the new Act. The current OCA does not provide directors or officers any immunity, shields, or limits on personal liability, although corporate statutes in other jurisdictions have.⁷² The Ministry has commented on the “pros and cons” of adopting such a regime in the new Act. On the one hand, limiting director and officer liability “could allow individuals to act without care or diligence when managing the affairs of a corporation”.⁷³ Conversely, exposing individuals, especially volunteers, to personal liability is “seriously inhibiting the willingness of capable individuals to serve as directors”.⁷⁴ In this regard, the Ministry is considering whether volunteer directors and officers should be shielded from liability differently than remunerated directors.⁷⁵

Many statutes in other jurisdictions limit the personal liabilities of directors and officers of not-for-profit corporations in certain situations, but vary in their approach to this issue. For example, the Saskatchewan Act relieves directors from personal liability, but only if they were acting in good faith at the time of the act or omission giving rise to the loss.⁷⁶ A different approach is found in Virginia, which does not grant directors immunity from personal liability, but places a limit on the amount of their liability (\$100,000.00). This limited liability does not apply, however, where the officer or director “engaged in a wilful misconduct or a knowing violation of the criminal law”.⁷⁷ The Ministry will have to determine which of these statutes it should follow if it decides to shield directors and

⁷² Some of these jurisdictions include Saskatchewan, Nova Scotia, Virginia, as discussed in this section of the paper, The Ministry noted in the Second Consultation Paper, *supra* note 23 at 23, that “many [U.S.] states protect volunteer directors of not-for-profit organizations from a suit by the corporation for breach of fiduciary duty, although in some cases, protection against breach of fiduciary duty applies only when the director serves without compensation. As well, some statutes contain limits and/or caps on personal liability for directors and officers.”

⁷³ Second Consultation Paper, *supra* note 23, at 22.

⁷⁴ *Ibid.*

⁷⁵ Nova Scotia’s *Volunteer Protection Act*, S.N.S. 2002, c. 14, provides a possible model. Under that legislation, volunteers who perform services for not-for-profit corporations without compensation are shielded generally from personal liability. The immunity is subject to a number of exceptions, including “wilful, reckless or criminal misconduct or gross negligence” by the volunteer (s. 3(1)).

⁷⁶ Saskatchewan Act, s. 112.1. Note that this general immunity does not extend to loss caused by fraud or criminal conduct, and directors remain liable for certain statutory liabilities. See also the CCC, which protects directors who are not compensated from personal liability for any “negligent act or omission occurring (1) within the scope of that person’s duties as a director... (2) in good faith; (3) in a manner that the person believes to be in the best interest of the corporation; and (4) is in the exercise of his or her policymaking judgment” (s. 5047.5).

⁷⁷ Virginia Code, s. 13.1-870.1.

officers, in whole or in part, from personal liability in the new Act, or if it should adopt a new approach altogether.

It is submitted that the new Act should provide protection for directors and officers from personal liability, provided that the individual acted in good faith. This “good faith” defence should apply in situations in which the director/officer relied in good faith on other directors and officers, and should require that the individual acted with reasonable due diligence.

e) Conflict of Interest

The new Act may include more provisions dealing with conflicts of interest of directors, and possibly officers, of not-for-profit corporations. Currently, the Act requires a director to disclose a situation in which he has a direct or indirect interest in a contract with the corporation. This provision does not apply to officers. The Ministry is considering whether to add further requirements to these current provisions. The OBCA, for example, requires both directors and officers to disclose their conflicts of interest, and must do so in writing or have it entered into the minutes of a meeting of directors. In addition, a director involved in a conflict of interest is not permitted to attend the directors’ meeting where the contract or transaction is being considered, unless the transaction meets certain criteria. The OBCA provides a good model in this regard and could be included in the new Act, to be applied to both directors and officers. In addition, as suggested by the OBA Joint Working Group, the Ministry may want to consider specifying in the new Act that a director who is in a position of conflict may still impart any valuable information he/she has about a contract or transaction being considered by the Board, provided that the director can not be present in the meeting at the time of any discussion or vote.⁷⁸

The Ministry is also considering whether the conflict of interest rules in the new *Act* should be expanded beyond contracts to also apply to other types of conflicts of interest. An extended definition of conflict of interest, which, for example, would include not only contracts but also transactions, would be desirable.

⁷⁸ See OBA Submission II, *supra* note 7 at 12.

D. THIRD CONSULTATION PAPER

The Third Consultation Paper was released on February 28, 2008, and it was announced that this would be the final discussion paper to be released by the Ministry for public comments and suggestions.⁷⁹ The Third Consultation Paper discussed more specifically the options that the Ministry was considering with respect to each suggested area of reform in the new Act. In addition, the potential “pros and cons” of each option were discussed. The Third Consultation Paper focussed on issues relating the rights of the corporation’s members, as discussed below.

1. Membership

a) Membership Lists

The current OCA allows any person to obtain a list of a corporation’s members, provided they swear an affidavit in the prescribed form that the list will only be used for purposes in connection with the corporation.⁸⁰ There are some concerns about privacy and the possible illegitimate uses of membership lists under these provisions, and as such the Ministry is reviewing different options under the new Act. Areas of review include:

- Access: Currently, the list could be accessed by any person if they use it for purposes in connection with the corporation, but the new Act may restrict access to members only.
- Affidavit: The new Act could require a person to sign an affidavit before accessing the membership list, or it could remove this requirement and set out restrictions on the use of membership lists in the legislation itself.
- Right of appeal: The Ministry is considering whether it should grant individuals a right of appeal to the court in cases where access to the membership list is denied.
- Information to be included in the membership list: The list could include the names of members only, or it could include additional contact information. Alternatively, the new Act could allow each corporation to decide what information should be included on their membership lists.

⁷⁹ Ontario Ministry of Government and Consumer Services, Policy and Consumer Protection Services Division, *Consultation Paper #3: Modernization of the Legal Framework Governing Ontario Not-For-Profit Corporations*, February 28, 2008 at 2 [“Third Consultation Paper”]. The paper can be found at <<http://www.gov.on.ca/mgs/graphics/132791.pdf>>.

⁸⁰ OCA, s. 207.

For privacy reasons, unlimited access to membership lists may be problematic. The OBA Joint Working Group suggested limiting access to membership lists to members who pay a reasonable fee and sign an affidavit affirming that the list will only be used for matters relating to the affairs of the corporation.⁸¹

b) Transferability of Membership Interest

The OCA provides that membership interests are not transferable and membership ceases on the death of a member, unless the letters patent provide otherwise.⁸² The Ministry is considering whether these provisions should be replicated in the new Act, or whether a membership interest should be transferable, without limitation.

c) Termination of Membership and Disciplinary Measures

The Ministry is reviewing whether the new Act should guarantee rights to members of the corporation in the event they are terminated from membership, or whether such rights should be left for the corporation to designate in their own by-laws (as is the case under the current OCA⁸³). Other statutes guarantee certain rights to members being disciplined or terminated, including: the right to be treated fairly and in good faith by the corporation⁸⁴, the right to be given prior written notice of and the reasons for termination⁸⁵, the right to a fair hearing⁸⁶, the right to apply for relief to a court under the oppression remedy⁸⁷, and/or the right to challenge a termination within a certain time frame.⁸⁸

The termination or suspension of one's membership rights in a not-for-profit corporation may not result in a significant economic loss, as it would in a business corporation context. However, as observed by the OBA Joint Working Group, such termination can often result

⁸¹ OBA Submission III, *supra* note 7 at 5. With respect to the appeal option, the OBA Joint Working Group felt that a specific right of appeal was not necessary and could instead be included in a general compliance order provision. The OBA Joint Working Group also recommended that the membership list contain each member's name and allow them to designate with their preferred address for communication (i.e. e-mail or physical mail).

⁸² OCA, s. 128.

⁸³ OCA, s. 129(1)(d).

⁸⁴ CCC, s. 5341(b); ABA Model Act, s. 6.21.

⁸⁵ ABA Model Act, s. 6.21.

⁸⁶ Saskatchewan Act, s. 120.

⁸⁷ Saskatchewan Act, s. 121.

⁸⁸ ABA Model Act, s. 6.21.

in significant damage to a person’s reputation, and it is therefore “important to offer some protection against unwarranted reputation damage and enshrine some minimal fairness standards within the New Act, leaving it to the individual corporation to decide whether and to what extent to expand those minimum rights as it deems appropriate”.⁸⁹ As a minimum standard to be included in the new Act, the OBA Joint Working Group recommended the provisions of the CCC, which require that any suspension or termination of membership rights be made in good faith and in a fair and reasonable manner.⁹⁰ This involves setting out the suspension/termination procedure in the corporation’s articles or by-laws, giving a member prior notice of suspension/termination and the reasons for suspension/termination, and providing a member the opportunity to be heard orally or in writing before the effective date of the suspension/termination.⁹¹

d) Quorum at Members’ Meetings

A “quorum” refers to the minimum number of members of a group required to be present at a meeting to transact business legally. Under the current OCA, directors may pass by-laws in respect of quorum requirements, but where no such by-laws exist, a corporation is left with no guidance as the OCA does not contain any “default” quorum rules.⁹² The Ministry will need to decide whether the new *Act* should include explicit rules on quorum for member meetings, and if so, whether those rules will be mandatory or optional for corporations who want to create their own set of rules. Given the diversity of not-for-profit corporations and the variety of their memberships, it may be prudent for the new Act to allow corporations to create their own set of rules relating to quorum, but provide default rules that would apply where the corporation’s by-laws are silent.

e) Members’ Voting Agreements

Another area of reform being considered by the Ministry relates to voting agreements, which are not addressed in the current OCA. Voting or pooling agreements are agreements

⁸⁹ OBA Submission III, *supra* note 7 at 8-9.

⁹⁰ CCC, s. 5341(b).

⁹¹ CCC, s. 5341(c). The OBA Joint Working Group specifically recommended that an oral hearing not be mandatory under the new Act, given the financial burden this requirement could impose on certain not-for-profit corporations. See OBA Submission III, *supra* note 7 at 8.

⁹² OCA, s. 129(1)(i).

between two or more members outlining how to vote on a certain issue. An example provided by the Ministry is an agreement between two or more members to pool their votes to elect certain persons as directors of the corporation. Currently, there is nothing preventing members of a corporation from entering into these agreements. However, the Ministry observed, “the enforceability of such agreements is not clear in the absence of a statutory provision authorizing them”.⁹³ Such a provision is included in the Saskatchewan Saskatchewan Act, and was recommended by the Ontario Law Reform Commission.⁹⁴

2. Members’ Remedies

A significant area of potential reform in the new Act, based on the Ministry’s focus on the topic in its Third Consultation Paper, relates to members’ remedies. The Ministry commented in that paper that “[e]stablishing members’ remedies increases the accountability of a corporation by ensuring that the directors act in the best interests of the corporation, and that members of not-for-profit corporations are not adversely affected by actions or decisions of the corporation.”⁹⁵ The paper defines member remedies as the “means available to members to protect themselves and achieve redress for an injustice caused by an act of a corporation or its directors.”⁹⁶

Under the current Act, remedies available to members include the following:

- Compliance orders: members can apply to the court for a compliance order when a corporation, or one of its directors, officers, or employees, fails to perform a duty imposed by the OCA.⁹⁷
- Court appointed audit: members may apply to the court for an appointment of an inspector to investigate the management of the corporation or a person to audit its books.⁹⁸

⁹³ Third Consultation Paper, *supra* note 79 at 12.

⁹⁴ The OLRC recommended provisions similar to those contained in the ABA Model Act, which require agreements made by members of public and charitable corporations to “have a reasonable purpose not inconsistent with the corporation’s public or charitable purpose”.

⁹⁵ Third Consultation Paper, *supra* note 79 at 13.

⁹⁶ *Ibid.*

⁹⁷ OCA, s. 332.

⁹⁸ OCA, s. 310.

- Removal of directors: members may remove a director by a two-thirds vote before the expiration of his/her term and may by majority vote elect a replacement for the remainder of the term.⁹⁹
- General meeting: One-tenth of the voting members of a corporation may require the directors to call a general meeting of all members for any purpose connected with the affairs of the corporation.¹⁰⁰ In addition, members (representing at least 5 per cent of the voting members) may requisition that a resolution be presented at a general meeting of members called by the board of directors.¹⁰¹

The Ministry is reviewing some of these remedies and considering whether they should be broadened or altered. For example, the compliance order remedy may be extended to apply in cases of non-compliance with the corporation's by-laws and articles (in addition to cases of non-compliance with the OCA).

The Ministry is also considering the inclusion of additional members' remedies in the new Act, and is reviewing other statutory models for guidance, including the business corporations statutes (such as the OBCA and CBCA). It may be that these statutes do not provide an ideal model for the new Act's members' remedies provisions. In the words of the OBA's Joint Working Committee:

Shareholders of business corporations have an economic interest in the corporation that drives their rights and remedies and makes maximization of shareholder welfare the overarching principle of the OBCA/CBCA. Other than for true membership corporations (*i.e.* certain NFP corporations such as membership-owned golf clubs, tennis clubs, curling clubs and other non-share social clubs the net assets of which are distributable to members on a liquidation or dissolution), members typically have a limited economic interest in the profits and residual assets of an NFP corporation. Thus, the dynamic underpinning shareholder rights and remedies in business corporations is not the same as it is for members of NFP corporations. Nor is the same economic incentive to enforce shareholder rights and remedies at work in the case of members of NFP corporations. Thus, the proposed new Act governing NFP corporations...cannot rely on self-policing by stakeholders to nearly the same extent that the principle of self-enforcement imbues the OBCA/CBCA.¹⁰²

⁹⁹ OCA, s. 67(1).

¹⁰⁰ OCA, s. 295.

¹⁰¹ OCA, s. 296.

¹⁰² OBA Submission III, *supra* note 7 at 4.

The following sections review some of the new remedies being considered by the Ministry for inclusion in the new Act:

a) Oppression Remedy

This remedy “refers to the right of members to apply to a court to seek relief from oppressive or unfair acts or omissions of the corporation”¹⁰³, and is found in the OBCA, Saskatchewan Act, and Bill C-21.¹⁰⁴ If such a remedy is included in the new Act, the Ministry will need to determine whether it should apply to all corporations, or whether certain corporations should be exempt, such as religious corporations. As observed by the Ministry, religious corporations have unique operating structures, and granting the oppression remedy to members of religious corporations, such as churches, synagogues, or temples, could place religious doctrines and practices under judicial scrutiny, which courts have found to be generally inappropriate. The Ministry must also determine whether the oppression remedy will be available to members only or to other complainants (such as former members, directors, the government, other persons at the discretion of the court, etc).

Some have suggested that granting the oppression remedy to members of not-for-profit corporations is unnecessary and even inappropriate. The oppression remedy, which is a business law concept, is based on the premise that a shareholder has individual rights and economic interests which require protection from unfair acts/omissions by a corporation. For example, a charitable, not-for-profit corporation exists not for the individual rights of its members but for its larger charitable or public-benefit purpose. Thus, the underlying rationale for the oppression remedy simply does not apply in the context of at least a charitable not-for-profit corporation.

On the other hand, members of some not-for-profit corporations, such as golf clubs and tennis clubs, may have financial interests in the residual assets of the corporation and their economic interests may be adversely affected by those in control. Thus, there may be an

¹⁰³ Third Consultation Paper, *supra* note 79 at 13.

¹⁰⁴ See OBCA, s. 248(1); Saskatchewan Act, (s. 225(1)); and Bill C-21 (s. 251).

underlying rationale for providing an oppression remedy to members of these types of corporations, if the new Act is to apply to them.

b) Derivative Action

The derivative action allows members to apply to a court to seek permission to bring an action on behalf of the corporation against the directors and/or officers for breach of their fiduciary duties owed to the corporation, or for the breach of any other obligation they owe to the corporation, where the corporation is not taking action to pursue its own rights. This remedy is also found in the OBCA, Saskatchewan Act, and Bill C-21.¹⁰⁵ Like the oppression remedy, the derivative action may not be an appropriate remedy for members of religious corporations. The Ministry will have to make a determination on this issue, and on the issue of who would qualify to bring a derivative action, under the new Act.

The concerns discussed above, though, in relation to the oppression remedy, may be less applicable to the derivative remedy, since the latter is intended not to redress individual rights but to “facilitate the enforcement of the rights and remedies of the corporation itself”¹⁰⁶. Currently, members of OCA corporations have access to the derivative action at common law. However, the common law derivative action has been found to be “seriously wanting”¹⁰⁷. As such, when the OBCA came into effect in 1971, it included a new statutory derivative action regime, which requires an applicant to obtain leave of the court to bring a derivative action, give the board advance notice of the leave application, and be acting in good faith. In addition, the action must *prima facie* appear to be in the best interests of the corporation. This regime may be extended to not-for-profit corporations in the new Act. However, with respect to religious corporations, the new Act, if it does include a statutory derivative action regime, should clearly state that the derivative remedy does not grant the court authority to make a determination of religious doctrine or tenets of faith. This would not necessarily preclude a member of a religious corporation from bringing a derivative action. It would simply require a court that agrees to hear such an action to avoid adjudicating on matters of religious doctrine and practice.

¹⁰⁵ See OBCA, s. 253(1); Saskatchewan Act, (s. 231); and Bill C-21 (s. 257).

¹⁰⁶ OBA Submission III, *supra* note 7 at 16.

¹⁰⁷ OBA Submission III, *supra* note 7 at 16, citing R. W. Dickerson, L. Getz, J. L. Howard, *Proposals for a New Business Corporations Law for Canada: Commentary and Draft Act*, vol. 1 (Ottawa: Information Canada, 1971).

c) Dissent and Appraisal

A dissent and appraisal remedy would allow members to be reimbursed for any membership fee or interest in the corporation in cases where they dissent on a vote on a certain matter of fundamental importance (i.e. amalgamating with another corporation). This type of remedy is common in business corporation statutes, such as the OBCA¹⁰⁸, where shareholders have a financial interest in the corporation and need a method of exiting their investments rather than endure a fundamental change they do not agree with. Again, however, this generally is not true of not-for-profit corporations, where members do not have a financial interest in the assets or profits of the corporation.

The Ministry is considering including a dissent and appraisal remedy in the new Act. However, it may restrict the remedy to members of “membership corporations” in which members pay a substantial amount of money for their memberships and are entitled to a distribution of the corporation’s assets upon dissolution or liquidation (i.e. golf clubs, curling clubs, social clubs, etc.). This is the approach adopted in the Saskatchewan Act.¹⁰⁹

3. Corporate Finance

a) Financial Review in lieu of an Audit

Currently, corporations under the OCA must undergo an annual audit, unless their annual income is under \$100,000 and their entire membership consents in writing.¹¹⁰ Although audits are of great benefit to a corporation’s membership and the general public by promoting corporate accountability and transparency, they carry with them a substantial cost and administrative burden, especially for smaller corporations.

The Ministry has suggested that, in order to alleviate this burden, the new Act could continue to allow certain corporations to opt out of the audit requirements. For example, the Saskatchewan Act allows charitable corporations with an annual income of less than \$250,000 to undergo a financial review instead of an audit.¹¹¹ A review is less extensive

¹⁰⁸ See OBCA, s. 246.

¹⁰⁹ See Saskatchewan Act, s. 177.

¹¹⁰ OCA, s. 96(1).

¹¹¹ Saskatchewan Act, s. 151(1),(2).

than an audit, but is much more affordable for small not-for-profits. Furthermore, a charitable corporation with annual incomes of less than \$25,000 can resolve not to conduct an audit or a review, with the consent of 80% of the voting members.¹¹² Bill C-21 contained similar provisions.¹¹³

The OCA's current exemption from the audit requirement needs to be revised in the new Act. One area of confusion relates to the term "annual income", which is not defined. It is therefore difficult for OCA corporations to determine whether they qualify for the "under \$100,000" exemption, as the term "annual income" could be referring to gross revenue, net profit, income from donations only, or all three. In addition, the requirement that every member of the corporation must consent in writing is unnecessarily onerous. It would be extremely difficult for a charity or not-for-profit corporations with a large membership base to obtain the written consent of every member. As such, these issues will need to be addressed in the new Act.

However, the audit requirement should not be removed altogether, as it is important that not-for-profit corporations, especially those that are registered charities, remain both transparent and accountable to its members and the public with regard to maintaining proper books and records. Thus, the audit requirement will likely be the default rule under the new Act, but exceptions would need to be made for smaller corporations where the costs of an audit would likely be disproportionate to its benefits. As such, the new Act should follow the approach of the Saskatchewan Act and Bill C-21, as discussed above, and allow smaller charities and not-for-profit corporations to rely on something less than an audit (such as a review or compilation report) for their financial statements.¹¹⁴

b) Financial Disclosure

The current Act has specific requirements for financial disclosure but it does not require financial disclosure to the public or to the members of the corporation in advance of the

¹¹² Saskatchewan Act, s. 151(3).

¹¹³ Bill C-21, s. 187(1),(2); s. 188(1),(2).

¹¹⁴ A review engagement can be described as "a less rigorous level than an audit, where the accountant must be satisfied that the financial statements are plausible but does not express an opinion thereon". A compilation is a report or notice whereby the accountant, if any, "assumes no responsibility for the content or accuracy of the financial statements and expressly notifies the reader accordingly in the financial statements". See OBA Submission III, *supra* note 7 at 18.

corporation's annual meeting. Although some corporations are required to provide this financial disclosure because of Canada Revenue Agency requirements, the Ministry must determine if there is a level of financial disclosure that should be required of all not-for-profit corporations, and when members should be provided with the corporation's financial statements.

This is another area where uniformity with the business corporation statutes is desirable. As under the OBCA, financial statements should be made available to members who want them in advance of the meeting. To accommodate not-for-profit corporations that may have difficulty meeting this standard, the new Act could allow the corporation to distribute the financial statements only to those members who have expressed their desire to receive a copy, and could do so through alternative modes of communication (i.e. by posting them on a website).

c) Borrowing and Debt Issuance

The Ministry is also considering whether the new Act should grant directors the power to borrow and issue debt without having to pass a specific by-law and have it approved by at least 2/3rds of the votes cast at a general meeting (as under the current Act).¹¹⁵ The new Act could follow the OBCA model, which provides a default rule giving directors the power to borrow/issue debt. However, if the corporation so chooses, it can vary this default rule in its articles or by-laws.

4. By-laws

The Ministry has suggested that the new Act may include a set of standard, default by-laws for corporations to use, especially those who can not afford to hire lawyers to draft custom by-laws.¹¹⁶

¹¹⁵ OCA, s. 59(1),(3).

¹¹⁶ There are also areas of suggested reform that were not raised in any of the Ministry's Consultation Papers. For a discussion of some of these issues, see: the OBA Submission II, *supra* note 7 which discusses the compensation of directors of a charitable corporation in a capacity other than as a director, and OBA Submission III, *supra* note 7 at 11-12, which discusses the inclusion of provisions dealing with proxy voting, member requisitioned and court-ordered meetings, and member proposals.

5. Self-Perpetuating Boards

Finally, the Ministry is considering whether the new Act should prevent the possibility of self-perpetuating boards, which arises where a corporation consists of three directors who continue to re-elect themselves, and there are no other members. The Ministry has observed that “a self-perpetuating board may be of concern because of the possible lack of accountability of the directors and lack of transparency in their decision-making.”¹¹⁷ To address this concern, the Ministry has suggested that the new Act could require a corporation to have a minimum number of members who cannot also be directors.

E. CONCLUSION

The consultation papers discussed in this paper constitute an essential step towards the Ministry’s goal of reforming the OCA to produce a modern piece of legislation for not-for-profit corporations. The Ministry has presented several important issues in these papers and has carefully considered the questions which emerge from each of these issues. Further, in identifying these questions and providing some background, this process will foster an informed consultation with the public and with charity and not-for-profit stakeholders—asking concerned parties to think about the questions and ensuring that various possibilities for reform remain open for consideration.

It is hoped that this consultation process will result in a meaningful reformation of the OCA, which is greatly in need of modernization. A reform of not-for-profit corporate law is long overdue, considering that reformation of its business counterpart began in the late 1960’s. That wave of reformation was a major success, and resulted in making the business corporate form more accessible, “principally by discarding many incoherent English doctrines and creating a workable and responsive structures of governance”¹¹⁸. It is time for the same reforms to take place in the not-for-profit sector, so as to create a coherent legal model that ensures consistency and clarity across the board for Ontario charities and not-for-profit corporations.

¹¹⁷ Third Consultation Paper, *supra* note 79 at 34.

¹¹⁸ See David Stevens, “Corporate Reform of Non-Profit Corporations Across Canada: What the Future Holds and Why It Matters”, presented at the Canadian Bar Association’s 2008 National Charity Law Symposium (Toronto: May 7, 2008).