
**THE LAW SOCIETY OF UPPER CANADA
SIX-MINUTE BUSINESS LAWYER 2008**

Toronto – June 4, 2008

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

By Terrance S. Carter, B.A., LL.B., Trade-mark Agent

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A. OVERVIEW OF PRESENTATION

- Introduction to the Ontario *Corporations Act*
- The First Consultation Paper
- The Second Consultation Paper
- The Third Consultation Paper
- Conclusion

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B. 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”)
- Currently, the OCA provides the statutory framework governing the creation, governance, and dissolution of not-for-profit corporations, including charitable corporations

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- 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
- The original version of the OCA 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
- 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” [the “new Act”]

- As the first step of this process, the Ministry has released three consultation papers for public comments, entitled *Modernization of the Legal Framework Governing Ontario Not-For-Profit Corporations*, which discuss a number of areas of potential reform
- The papers make reference to other statutes as potential templates for the new Act including:
 - *Non-profit Corporations Act, 1995* (Saskatchewan)
 - *Business Corporations Act* (Ontario)
 - The proposed *Canada Not-for-profit Corporations Act* (Bill C-21)
 - *California Corporations Code*

- C. FIRST CONSULTATION PAPER**
- Released on May 7, 2007
 - Revealed that 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
 - 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

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- The First Consultation Paper requested comments on broad issues, including:
- Should the reformed Act move to a system of incorporation “as of right” instead of by discretion?
 - What structure should the reformed Act follow?
 - Should the reformed Act contain a list of permitted purposes for not for profit corporations?
 - Should there be any restrictions on the commercial activities of not for profit corporations?

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- Should a classification system that provides for multiple classes of nonprofit corporations be included in the new Act?
- Upon dissolution, what limitations, if any, should be placed on the distribution of corporate property?
- Should nonprofit corporations be given the capacity, rights, powers, and privileges of a natural person?
- Should the *ultra-vires* doctrine be abolished?

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D. SECOND CONSULTATION PAPER

- Released on August 22, 2007
- Focused on the subject of directors and officers
- 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 appropriate for today’s not-for-profit corporations”
 - “[S]ome provisions that are common in corporate statutes and that contribute to making the governing law flexible are noticeably absent from the [OCA]”

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– The Second Consultation Paper requested comments on the following issues:

- What provisions should be included in the new Act regarding composition of the board?
- Should a limit on directors’ terms of office be set out in the new Act?
- What rules should be included in the new Act regarding notice of directors’ meetings and should resolutions be allowed in lieu of meetings?
- Should more extensive provisions be created to govern the resignation and removal of directors?

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- What provisions should the new Act contain with respect to officers?
- Should a general duty of care and loyalty, as well as a due diligence defence or good faith reliance defence for directors and officers be formulated and incorporated into a statutory provision?
- Should liability of directors and officers be limited?
- What should be included in the conflict of interest provisions of the new Act?

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E. THIRD CONSULTATION PAPER

- Released on February 28, 2008
- Final discussion paper released by the Ministry for public comments and suggestions
- Focussed on issues relating the rights of the corporation’s members as well as matters of corporate finance
- Requested comments on the following issues:
 - What information should be contained in membership lists and what should the requirements be for obtaining such a list?
 - Should membership interests be transferable?

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- Should members’ rights upon discipline or termination be guaranteed in the new Act?
- Should quorum rules be set out in the new Act or left up to the by-laws?
- Should voting/pooling agreements be provided for in the new Act?
- What members remedies should be included in the new Act?
 - Compliance Orders
 - Derivative Actions
 - Oppression remedy
 - Dissent and appraisal remedy

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- Should certain corporations be allowed to opt for a financial review in lieu of a full audit?
- What should the level of access to financial statements be for members?
- Should directors have the power to borrow and issue debt without a specific by-law being passed?
- Should standard, default by-laws be included in the new Act?
- Should the reformed Act prevent the possibility of self-perpetuating boards?

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F. CONCLUSION

- Ministry has indicated that it hopes to make recommendations on reform to the Ontario Cabinet in summer of 2008, and have the new legislation introduced to the Ontario Legislature as early as the spring of 2009
- A reform of not-for-profit corporate law is long overdue - reformation of its business counterpart began in the late 1960's
- It is hoped that this consultation process will result in a meaningful reformation of the OCA

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