



Strengthening Canada's Communities – Des communautés plus fortes au Canada

Creating an Ontario Not-for-profit Corporations Act

A member's response to "Modernization of the Legal Framework
Governing Ontario Not-for-Profit Corporations"
for the Ministry of Government and Consumer Services – Policy and
Consumer Protection Services Division

May 30, 2008

BACKGROUND

The Canadian CED Network (CCEDNet) is a member-driven not-for-profit charitable organization made up of community-based organizations, co-operatives, social enterprises, practitioners, active citizens, researchers, and other organizations involved in community economic development (CED). We work to strengthen CED in urban, rural, northern and Aboriginal communities across Canada, and contribute to better social, economic and environmental conditions at the local level. CCEDNet has a regional office in Ontario that focuses on issues and opportunities on the provincial level.

CED is local action to create economic opportunities and better social conditions, particularly for those who are most disadvantaged. CED is an approach recognizing that economic, environmental, and social challenges are interdependent, complex, and ever-changing and that effective solutions are rooted in local knowledge and led by community members. CED promotes holistic responses addressing problems at individual, community, and regional levels, recognizing that these levels are all interconnected.

EXECUTIVE SUMMARY

We would like to congratulate the Ontario government for realizing the need for an updated Corporations Act and proactively working towards necessary revisions. However, we are disappointed that the consultation process has not been well publicized and has not included many important voices within the not-for-profit sector. We encourage the Ministry of Government and Consumer Services (MGCS) to take the time to review all submitted responses and to continue seeking the input of those who have not been included in current and previous discussions. This statute is of great importance, both to the way in which not-for-profit organizations operate and incorporate in the province and to the public perception of the value of their work in terms of employment, economic development, and services.

CCEDNet has reviewed many of the responses and briefings of other involved organizations and key players and have engaged our Ontario members in developing our own response. We support organizations like the Ontario Nonprofit Network (ONN), who feel that the Ontario Corporations Act (OCA) needs to reflect its purpose in its name by becoming the Ontario Not-for-profit Corporations Act (ONCA), much as business incorporation is guided by the Ontario Business Corporations Act (OBCA). We also believe, in line with the Ontario Bar Association and Imagine Canada, that the ONCA should be analogous with the OBCA except where provisions do not reflect the needs and realities of the not-for-profit sector.

CCEDNet is also very interested in the proposal of the ONN to create a Public Benefit Corporations Act distinguishing public benefit corporations from other not-for-profits like trade associations, clubs, and chambers of commerce. The needs of public benefit corporations are unique enough to warrant a separate statute that would help remove barriers that exist for other not-for-profits, equalize competition with other businesses, help maintain public trust, and place no limits on their ability to collect earned revenue. The current timeframe for modernizing the OCA is not long enough to develop such a statute but we encourage the MGCS to explore this idea further through an open consultation process with engaged and concerned not-for-profit organizations.

RECOMMENDATIONS

1. Incorporation Process

CCEDNet supports the process of incorporation "as of right," equivalent to incorporation under the Ontario Business Corporations Act (OBCA). The system of letters patent is outdated and does not reflect the needs of a start-up not-for-profit.

2. Structure of an Ontario Not-for-profit Corporations Act (ONCA)

As mentioned in the Executive Summary, CCEDNet agrees with the Ontario Bar Association and Imagine Canada that the new statute be structured like the OBCA and Bill C-21 (the Canada Not-for-profit Corporations Act), created to pertain to all corporations under the act with exceptions and limitations provided in each section, and contain equivalent provisions except where deemed unfit within the context of the not-for-profit sector.

3. Definition of Not-for-Profit Corporations

a. Purpose

CCEDNet agrees with the statement under the current OCA that not-for-profits "shall be carried on without the purpose of gain for its members" and supports the suggested clarification that profits may not be distributed to members or directors through dividends or any other direct distribution. This should not preclude profit-making activities as these activities can often be essential to the work and financial stability of not-for-profit organizations. CCEDNet sees no need to list the objects of not-for-profit activity and suggests the right of organizations to self-identify.

b. Activities

CCEDNet strongly opposes the implementation of restrictions on earned revenue for not-for-profit organizations on the grounds that the not-for-profit sector already experiences barriers in meeting budget demands and that social enterprise would be unfairly and adversely affected. The ONCA, under the purpose of not-for-profit corporations, will stipulate (much as the OCA does currently) that gain cannot be distributed to members but must further the objectives of the organization. We believe that this provision is sufficient in preventing businesses seeking not-for-profit status to take advantage of tax benefits associated with not-for-profit commercial activity.

c. Non-Distribution Constraint

Following the dissolution of a not-for-profit, in accordance to the non-distribution constraint, assets will be distributed to other organizations that are furthering similar objectives to the dissolved corporation.

4. Classification System

Classification can help delineate exceptions and limitations but can be detrimental if proper definitions are not used. CCEDNet, as stated in the Executive Summary, would like to see the idea of a Public Benefit Corporations Act discussed further. The definition of *public* is very important in this circumstance, as would be the classification of other not-for-profits if they are to be included in the same statute. CCEDNet otherwise supports Imagine Canada's recommendation that no classification system be used and that in the event a classification system is adopted, organizations have the right to "self-designate".

5. Corporate Powers and Capacity

CCEDNet concurs with the treatment of corporations as "natural persons" and believes that deeming otherwise would create an undue disadvantage for not-for-profits. The capacity of a corporation should continue to be governed by the principle of ultra vires. The statute should be changed to allow the conference of powers to corporations and their directors without the necessity of passed bylaws, much like the OBCA and Bill C-21.

6. Directors' and Officers' Liabilities

a. Duty of Care and Loyalty

Again, CCEDNet believes that the ONCA should mirror the provisions outlined in the OBCA by not identifying a difference in standard of care between directors or officers according to their qualifications. In the experience of many not-for-profit organizations, directors and officers can be difficult to secure and varying a person's liability in relation to their credentials creates an unreasonable disincentive. Instead, directors and officers should "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

b. Due Diligence Defence

CCEDNet agrees with the suggestions of Consultation Paper #2 to include a due diligence defence for directors similar to those drawn in the OBCA and Bill C-21. This includes the expectation of directors to carry on their duties as would a suitably sensible person (as outlined above) and "include relying in good faith on reports of professionals and, in the case of directors, reliance on financial statements."

c. Indemnification and Insurance

CCEDNet believes not-for-profit corporations should be permitted to indemnify and/or purchase liability insurance for their officers and directors as is provided for in the OBCA and Bill C-21

d. Limiting Liabilities of Directors and Officers

The Saskatchewan Non-Profit Corporations Act provides a model of which CCEDNet approves. Directors should not be personally liable in any civil action arising from an act or omission connected with a director or officer's responsibilities, provided that their actions were made in good faith. This immunity should not apply in cases of fraud or criminal misconduct.

7. Board Composition

a. Number of Directors

The minimum number of directors should remain at three. A change in the number of directors should require a special resolution of the members.

b. Qualification of Directors

CCEDNet is content with the current provisions that a director must be a member of the corporation, be eighteen years of age or older, and not an undischarged bankrupt. Further stipulations on the capability or the "soundness of mind" of a director should be left to voters' discretion as some organizations may chose to have on their board persons with previous mental health problems, developmental disabilities, etc., which should be permissible as arranged within a corporations objectives.

8. Term of Office

The ONCA should adopt the current OBCA and Bill C-21 provisions of a maximum three-year term of office and that in the event an election is not held when it is supposed the incumbent(s) retain responsibilities until elections are properly held. Corporations should have the right to stipulate shorter terms of office before elections are required.

9. Directors Meetings

a. Notice of Meetings

CCEDNet agrees with the Ontario Nonprofit Network's (ONN) advocacy for the Saskatchewan Non-Profit Corporations Act as a model in this section. Corporations can stipulate in their bylaws how a meeting should be called. Furthermore, directors may waive the notice of a meeting in any manner, and attendance at a meeting fulfills the requirements of waiving notice.

b. Resolution in Lieu of Meetings

A resolution in writing signed by all directors should be as valid as a resolution passed at a meeting of directors and would need to be kept with the minutes of the proceedings of the directors. This would follow the provisions outlined in the OBCA.

10. Resignation and Removal

CCEDNet agrees, again, with the ONN in allowing members to remove a director before the expiration of his/her term with a majority vote. Directors can decide whether to hold another election prior to the next election to replace the removed director(s). A director can resign at any time with a written notice stating reasons for resignation. Resignation should not be allowed in the instance that the number of directors would drop below the minimum, unless successors have already been elected.

11. Officers

The ONCA should only require as a minimum that the corporation have a president (who must be a director) and a treasurer.

12. Conflict of Interest

The ONCA should adopt a similar outlook as the OBCA and Bill C-21 in this matter. Directors and officers must disclose the *nature* and *extent* to which they have an interest in any material contract with the corporation, requiring immediate disclosure no later than the first meeting following awareness of the conflict of interest. If a director or officer fails to comply the corporation or any of its members may rightfully apply to court to set aside the contract or transaction and to order an account of any profits earned as a result of the contract or transaction.

13. Membership

a. Membership Lists

CCEDNet is content with the current provision on this matter. Access to membership lists (member name and contact information - phone and/or email and/or mailing address) should be restricted to members but may be obtained for purposes associated with the corporation. An affidavit must be filed with the corporation and a reasonable fee paid before the list can be made available, which should happen within ten days of filing the affidavit. A fine would be applicable for anyone using a membership list outside of the objectives of the corporation.

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b. Transferability of Membership Interest

Membership should not be transferable in public-benefit corporations. (see response by the ONN)

c. Termination of Membership and Disciplinary Measures

No disciplinary measures should apply for public benefit corporations. (see response by the ONN). Akin to the Saskatchewan Non-Profit Corporations Act, articles or bylaws may provide directors with the power to terminate a membership interest. A member is entitled to a fair hearing before 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.

d. Quorum at Members' Meetings

Quorum rules should be detailed in a corporation's bylaws, including the allowance of proxies and voting methods (i.e. by mail, electronically, in person, etc.).

e. Members' Voting Agreements

CCEDNet agrees with the assertion of the ONN that no reference should be given to voting/pooling agreements in the ONCA. Voting/pooling agreements can cause internal conflict and secrecy that is damaging for public benefit not-for-profits.

f. Member Remedies

Again, CCEDNet agrees with the ONN in that compliance orders should be available to members or other complainants in cases of noncompliance not only with the Act, but also with the corporation's articles and bylaws.

A complainant must be:

- (a) a member or former 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.

g. Oppression Remedy

CCEDNet believes, along with the ONN, that an oppression remedy is not necessary but that bylaws passed by directors should only take effect after, not before, they have been approved by a majority of members attending a membership meeting.

14. Corporate Finance

a. Financial review in Lieu of an Audit

The ONCA should adopt a similar provision to the Saskatchewan Non-Profit Corporations Act. Charitable corporations with an annual income of less than \$250,000 but greater than \$25,000 could opt to undergo a financial review in lieu of an audit, if passed by 80% of the members. Charitable corporations whose revenues do not exceed \$25,000 can resolve not to conduct an audit or a review, with the consent of 80% of voting members. Membership corporations are not required to undergo an audit or review if consented to by a majority of members.

b. Financial Disclosure

The ONCA should stipulate that the corporation's directors present financial statements to members prior to the annual meeting, unless the annual income is less than \$250,000, in which case the statements must be presented at the annual meeting. The statements for the period must include a statement of profit and loss, a statement of surplus, a balance sheet, and the auditor's report, if applicable. In addition to financial statements, corporations are required to keep proper

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books and accounting records with regard to all financial and other transactions of the corporation. This includes records of:

- (a) all sums of money received and disbursed by the corporation;
- (b) all sales and purchases of the corporation;
- (c) the assets and liabilities of the corporation; and
- (d) all other transactions affecting the financial position of the corporation.

These records should be open for inspection by any director during regular business hours. Records should be kept at the corporation's head office or at another location providing that they can be accessed for inspection at the head office via computer or other electronic technology.

c. Borrowing and Debt Issuance

Similar to the OBCA and Bill C-21, directors of corporations under the ONCA should be able to borrow and issue debt without a specific bylaw needing to be passed.

15. Bylaws

Bylaws should be created by the corporation itself and not provided through a system of standard, default bylaws. Instead, the Incorporators Guide, provided by the MGCS, should include a template of suitable bylaws that could be adopted by a corporation.

16. Self-Perpetuating Board

Given the diversity of not-for-profit organizations and differences in operations a self-perpetuating board should be allowed.

CONCLUSION

CCEDNet is excited by the Ontario government's initiative to modernize the Corporations Act. We feel that this is a great opportunity to build stronger relationships between the government and the not-for-profit sector while also developing a more supportive environment for not-for-profit organizations. However, we are disappointed that throughout the last year of consultations, discussions have not been made more open and visible to the public, particularly to those who work within the current guidelines of the Ontario Corporations Act. CCEDNet encourages the Ministry of Government and Consumer Services to not rush the process of creating a statute that will meet the current needs of not-for-profit corporations and to continue to engage practitioners and organizations in the sector on healthy and appropriate policy amendments. We would also like to express interest in the continued exploration of a Public-Benefit Corporations Act in Ontario that would recognize the unique needs, concerns, and operations of organizations that have as their mandate the provision of necessary public goods and/or services.

We thank you for your time in reviewing our recommendations and the recommendations of so many others and hope that you will take our counsel into consideration as you move forward on this vital endeavour.