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

Table of Contents

Corporations Act Reform Process

The Ontario Ministry of Government and Consumer Services has undertaken a project to review and reform the Ontario *Corporations Act* (CA). The purpose of the project is to develop a new legal framework to govern the structure and activities of charities and not-for-profit corporations.

This discussion paper is the third and last in a series of papers released by the Ministry to solicit comments and suggestions regarding reform of this important legislation. The first consultation paper was released on May 7, 2007 and requested feedback on issues that included the incorporation process, structure of a proposed new act, definition of a not-for-profit corporation, classification system, and corporate powers and capacity. The deadline for submissions was September 30, 2007. A second consultation paper was released on August 22, 2007 and requested feedback on issues related to directors and officers. The deadline for submissions to this paper was December 31, 2007.

The CA provides the statutory framework governing the creation, governance, and dissolution of not-for-profit corporations, including charitable corporations. In addition, it provides the legislation under which insurance companies in Ontario are incorporated and find their basic corporate governance rules, although the consultation will not focus on insurance issues.

It should be noted that the CA is an organizational statute, not a regulatory statute. In other words, enforcement of the rights and duties under the statute lies primarily with the corporation, its directors and its members. Hence, the focus of this consultation is not on the regulation of charitable and other not-for-profit corporations.

This paper requests comments on issues related to membership, corporate finance, and other issues. The Ministry kindly requests your input, views, and feedback on the issues and consultation questions outlined in this paper.

Respondents are not restricted to consideration of only the questions listed below. We are interested in any other perspectives that you feel are appropriate.

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

Corporations Act Modernization
Ministry of Government and Consumer Services
Policy Branch
777 Bay Street
5th Floor – Suite 501
Toronto, ON M7A 2J3

business.law@ontario.ca

Statutory References

Reform of the law governing not-for-profit corporations has been on the legislative agenda of several jurisdictions in Canada and the United States over the past thirty years. Throughout this paper, reference is made to some of the jurisdictions that have implemented significant reform to their not-for-profit statutes. For comparative reasons, reference is also made to business corporation statutes.

The following is a list of the statutes, bills, and model acts that are mentioned in this consultation paper together with the abbreviation (in brackets) used for each.

Numeric references to specific sections of these sources appear in square brackets throughout the paper and relate to the source discussed in that paragraph.

Bill C-21: Canada Not-for-profit Corporations Act (Bill C-21)
In 2004, the federal government introduced successor legislation to the *Canada Corporations Act* under Bill C-21, *Canada Not-for-profit Corporations Act*. This Bill died on the Order Paper on November 29, 2005 when the 38th Parliament was dissolved. The future of this draft legislation is uncertain. However, the Bill may give a general sense as to the direction the law may take if the Bill is re-introduced in similar form in the future.

California *Corporations Code*
The California *Corporations Code* is the governing statute for corporations in the state of California, including both business corporations and not-for-profit corporations.

Ontario *Business Corporations Act* (OBCA)
The *Business Corporations Act* governs the creation, governance, and dissolution of business (share capital) corporations in Ontario.

Ontario *Corporations Act* (CA)
Provincial legislation that governs the creation, governance, and dissolution of Ontario not-for-profit corporations. The original version of the statute was enacted in 1907 (as the *Companies Act*) and was last substantially revised in 1953. Since that time, the CA has only undergone minor revisions.

Ontario Law Reform Commission (OLRC)
The OLRC was established by the Ontario government in 1964 as an independent legal research institute charged with the task of recommending legal reform in the province. Just prior to being sunset in December 1996, the OLRC produced a *Report on the Law of Charities*. This paper references the recommendations presented in the OLRC report.

Revised Model Nonprofit Corporation Act, 1987 (Model Act)
In 1987, the American Bar Association published a completely revised draft of a not-for-profit corporations law: the *Model Act*.

Saskatchewan *Non-profit Corporations Act*, *1995* (Saskatchewan Act)
This is Saskatchewan's equivalent to Ontario's CA. It governs not-for-profit corporations in the province of Saskatchewan. The first version of this statute was enacted in 1979, with significant reforms in 1995. It was viewed by the OLRC as a good Canadian example of the way in which the CA should be reformed.

I. MEMBERSHIP

1. Membership Lists

What information should be contained in membership lists and what should the requirements be for obtaining such a list?

Under the CA, any person may obtain a list of the corporation's members if it is to be used for purposes in connection with the corporation [s.307(1)]. In order to obtain such a list, an affidavit must be filed with the corporation using the form made available in section 307(2), swearing that the list will only be used for said purposes. The Act requires that the membership list be furnished to the requesting individual within ten days from the filing of the affidavit. In practice, it is normally only members who are provided with these lists since those outside of the corporation are not always able to show that they will be using the list for purposes in connection with the corporation. Payment of a reasonable fee for the membership list is also required.

It is an offence to use such a list for the purpose of sending advertising to members, or for purposes not connected with the corporation, and upon conviction bears a fine of not more than $1,000 [s.307(4)]. In addition, it is an offence to sell or purchase membership lists, punishable upon conviction of a fine up to $1,000 [s.308].

Saskatchewan *Non-Profit Corporations Act*

The Saskatchewan Act provides that a corporation shall prepare and maintain a register of members entitled to vote [s.20(1)]. On payment of a reasonable fee and on sending the corporation the required affidavit, a member, or any person where the corporation is a charitable corporation, may obtain a basic list of members containing the names and addresses of each member [s.21(3), (4)]. The list must be furnished within 10 days from receipt of the affidavit. The affidavit required must state that the list will not be used except as permitted by the Act, and can only be used to influence the voting of members of the corporation, or for matters related to the affairs of the corporation [s.21(7), (9)].

Any person who contravenes the permitted uses of the list of members is liable upon conviction for a fine of up to $5,000, to imprisonment for a term of not more than six months, or to both [s.21(10)].

Bill C-21: *Canada Not-for-Profit Corporations Act*

Bill C-21 required that corporations prepare and maintain a register of members [s.21(1)]. The Bill provided that a member wishing to view the register of members shall first make a request to the corporation accompanied by a statutory declaration [s.23(1)]. The statutory declaration was required to include a statement that the register would only be used for purposes permitted in the Bill, those being to influence the voting members, to requisition a meeting of members, or for any other maters relating to the affairs of the corporation [s.23(5), (7)].

A debt obligation holder could also make an application to obtain a list of members after receiving notice of a meeting of members at which the holder was entitled to vote [s.23(4)].

Ontario *Business Corporations Act*

The OBCA provides that upon payment of a reasonable fee and sending the statutory declaration "registered holders, beneficial owners of shares and creditors of a corporation, their agents and legal representatives and, if the corporation is an offering corporation, any other person" may require the corporation to furnish a list of shareholders. The list of shareholders sets out the names of the registered shareholders, the number of shares of each class and series owned by each shareholder and the address of each of them [s.146(1)]. The statutory declaration required must state that the list will not be used except as permitted by the Act; the list can only be used in connection with influencing the voting of registered holders of the corporation, an offer to acquire shares of the corporation, or for other matters related to the affairs of the corporation [s.146(8)].

QUESTIONS

i) Who should be given access to membership lists?

ii) Should there be a requirement for an affidavit or statutory declaration to be signed in order to obtain/examine the list of members or should lists be provided upon request?

iii) Should a right of appeal to the court be provided for cases where access to a membership list is denied?

iv) What information should be included in membership lists?

OPTIONS

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

Option A: Allow any person to request a membership list, providing said person uses the list for purposes in connection with the corporation (status quo).

PROS	CONS
No apparent pros versus Option B.	i. Citizens who do not have a valid reason for wanting access to membership lists still apply for copies.
	ii. There can be confusion over the meaning of "for purposes in connection with the corporation".
	iii. There may be less privacy for members when membership lists are provided to persons outside the corporation.

Option B: Restrict access to membership lists. As per the Saskatchewan Act, access could be restricted to members, or any person where the corporation is a charitable corporation (list would still need to be used for purposes in connection with the corporation).

PROS	CONS
i. Increases privacy for members.	i. An outsider to the corporation could have a legitimate reason for requesting the list but would be automatically denied access under this option.
ii. Reduces the amount of illegitimate requests for the lists.	
iii. Reduces confusion over who has access to lists.	

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

Option A: Require an affidavit to be signed (status quo).

PROS	CONS
i. Ensures that those using membership lists are aware that there are limitations to how they may be used.	i. May not be required if legislation is drafted in a manner that sets out how the list may be used.
ii. May reduce frivolous requests from those seeking membership lists for marketing purposes.	ii. Makes the process of obtaining a membership list more cumbersome and expensive. (Providing exact wording of the affidavit in the Act may minimize costs.)
iii. Adds an additional layer of protection to ensure that lists are used properly.	

Option B: No affidavit required, but restrictions for use of membership lists set out in the Act.

PROS	CONS
i. Streamlines process for obtaining membership lists.	i. If members do not read the legislation, they may not be aware of the restrictions on how membership lists may be used.
ii. There may be expenses/ resources requirements related to coordinating the signing of affidavits.	ii. Eliminates a layer of protection ensuring that membership lists are used for appropriate purposes.

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

Option A: Include a right of appeal to the court in the Act for cases where access to a membership list is denied.

PROS	CONS
i. Provides recourse for individuals who require a membership list for valid reasons but who are denied access.	i. May encourage frivolous complaints where access to a membership list is not justified (e.g., where the list is not to be used for appropriate purposes).
ii. Helps to ensure that corporations do not restrict membership lists inappropriately.	ii. May create resource and financial difficulties for corporations involved in such court disputes.

Option B: Do not provide a right of appeal.

PROS	CONS
i. Provides the corporation with protection from frivolous complaints where access to a membership list is not justified.	i. Does not provide recourse for individuals who require a membership list for valid reasons but who are denied access.

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

Option A: Include names of members only.

PROS	CONS
i. Increases member privacy (vs. Option B).	i. May be difficult for members to communicate with one anther.
ii. May reduce the chance of personal information being circulated/sold.	ii. May render the list useless to members.

Option B: Include names of members plus additional contact information, such as e-mail or mailing addresses.

PROS	CONS
i. Facilitates collaboration and ease of communication across the organization.	i. Reduces member privacy.
	ii. Members may not want their contact information to be circulated.

Option C: Allow corporation to determine what information to include in membership lists.

PROS	CONS
i. Allows the corporation to determine what information to include based on member/ corporation needs.	i. Could still result in contact information being circulated against a member's wishes.

2. Transferability of Membership Interest

Should membership interests be transferable?

The CA provides that, subject to a contrary provision in the letters patent, membership interests are not transferable and membership ceases on the death of a member [s.128].

Saskatchewan *Non-Profit Corporations Act, 1995*

The Saskatchewan Act provides that, unless the articles or by-laws of a corporation provide otherwise, a membership interest is not transferable. Where a member dies, resigns, or is expelled, membership terminates [s.116].

Bill C-21: *Canada Not-for-Profit Corporations Act*

Bill C-21 provided that, unless the by-laws provided otherwise, memberships may be transferred only to the corporation [s.154(8)]. Where a member dies, resigns, or is expelled, membership terminates [s.156].

Ontario Law Reform Commission

The OLRC recommended that the non-transferability rule be made imperative in the case of religious and charitable corporations. For other not-for-profit corporations, non-transferability should apply where the articles or by-laws do not specify otherwise. All restrictions on the transferability of membership should be contained in the articles.

QUESTION

i) Should memberships be transferable? Should the answer vary based on the type of not-for-profit corporation (e.g., charitable, religious, etc.)?

OPTIONS

Option A: Memberships should not be transferable, unless otherwise stated in the letters patent (status quo).

PROS	CONS
i. Corporation retains its ability to determine who becomes a member.	i. Capital contributions may be lost by the member.

Option B: Memberships should be transferable without limitation (so long as the basic membership criteria are met).

PROS	CONS
i. Members' capital contributions will not be lost.	i. Corporation loses its ability to determine who becomes a member.

3. Termination of Membership and Disciplinary Measures

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

The CA does not establish any rules in respect of discipline of members or termination of membership. It only states that a membership interest terminates upon the death or resignation of a member [s.128(1)]. Directors may designate rules on termination and suspension of membership in the by-laws [s.129(1)(d)].

Saskatchewan *Non-Profit Corporations Act, 1995*

Under the Saskatchewan Act, the articles or by-laws may provide that the directors have the power to discipline a member or terminate a membership interest in circumstances described in the articles or by-laws [s.119]. Where a member is disciplined or a membership interest terminated by the directors under section 119, a member is entitled to a fair hearing before discipline or termination occurs [s.120]. Where a member feels aggrieved because of the discipline or termination, s/he may apply for relief to a court under the oppression remedy [s.121].

Bill C-21: *Canada Not-for-Profit Corporations Act*

Under Bill C-21, the articles or by-laws could provide that the directors have the power to discipline a member or terminate a membership interest in circumstances described in the articles or by-laws [s.158]. While there were no provisions included in Bill C-21 regarding the rights of members on termination, the oppression remedy, which was provided for in the Bill, could perhaps have been used for this purpose.

Ontario Law Reform Commission

The OLRC recommended that the reformed Act establish a rule that, in the absence of contrary rules in the by-laws, the board is empowered to act by resolution to terminate a membership and to discipline members. As part of that rule, there must be a requirement that the corporation treat members fairly with the minimum standards of fairness set out in the Act.

American Bar Association: *Revised Model Nonprofit Corporations Act* (1987)

The *Model Act* requires that corporations treat members fairly and in good faith upon termination of membership. It sets out standards of fairness that include giving prior written notice of, and the reasons for, termination or suspension, and allowing a member to be heard orally or in writing prior to the date of termination. A member may challenge a termination within one year of the effective date of termination [s.6.21].

California Corporations Code

The California Code provides that any suspension or termination of membership or membership rights must be done in good faith and in a fair and reasonable manner [s.5341(b)]. Fair and reasonable procedure includes setting out the procedure in the corporation's articles or by-laws, giving the member prior notice of termination and the reasons for termination, and allowing the

member to be heard orally or in writing before the effective date of suspension / termination [s.5341(c)].

QUESTION

i) Should members be entitled to certain guaranteed rights upon termination which will be explicitly set out in the reformed Act? If so, what should those rights be?

OPTIONS

Option A: Rights should not be guaranteed in the reformed Act but rather left for designation in the by-laws (status quo).

PROS	CONS
i. Provides corporation with greater flexibility in deciding what rights, if any, members should have upon termination.	i. Members may be terminated in an arbitrary and unfair manner.

Option B: Rights should be guaranteed in the reformed Act.

PROS	CONS
i. Ensures that members are entitled to a minimum level of rights in the event of discipline or termination.	i. Corporation loses flexibility in determining a minimum level of rights for members.

4. Quorum at Members' Meetings

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

A quorum refers to the minimum number of members of a group required to be present at a meeting to transact business legally. Directors may pass by-laws in respect of quorum requirements [s.129(1)(i)] but, where no such by-laws exist, a corporation is left without any quorum rules as these are not set out in the CA.

Saskatchewan *Non-Profit Corporations Act, 1995*

The Saskatchewan Act sets out several rules in respect of quorum. Unless the by-laws provide otherwise, a quorum exists where a majority of the members entitled to vote are present or represented by proxy [s.129(1)]. If a quorum is present at the opening of a meeting, the meeting can proceed even if a quorum is not present throughout the entire meeting [s.129(2)]. Where there is no quorum at the opening of a meeting, no business can be transacted and the meeting may be adjourned [s.129(3)]. Where a corporation has only one member, or only one member of any class of members, that member present in person or by proxy constitutes a meeting [s.129(4)].

Bill C-21: Canada Not-for-Profit Corporations Act

The quorum provisions contained in Bill C-21 were similar to those of the Saskatchewan Act. The by-laws may set a quorum for a meeting of members. If the by-laws are silent, a quorum is a majority of members entitled to vote [s.164(1),(2)]. If a quorum is present at the opening of a meeting, the meeting can proceed even if a quorum is not present throughout the entire meeting [s.164(3)]. Where there is no quorum at the opening of a meeting, no business can be transacted and the meeting may be adjourned [s.164(4)]. Where a corporation has only one member, or only one member of any class of members, that member constitutes a meeting [s.164(5)].

QUESTION

i) Should the reformed Act contain explicit rules on quorum for member meetings? If so, what should they be?

OPTIONS

Option A: No quorum rules in the reformed Act - leave it up to the by-laws (status quo).

PROS	CONS
i. Provides corporations with flexibility to determine what, if any, rules to establish to govern quorum.	i. If the by-laws are silent, there are no rules in place to govern and decisions may be made by a small number of members contrary to the wishes of the majority.

Option B: Include default quorum rules in the reformed Act that apply only when the by-laws are silent.

PROS	CONS
i. Provides a standard, guaranteed set of quorum rules while maintaining the flexibility of the corporation to override the rules if it so chooses	No apparent cons.
ii. Avoids the time and expense of devising a set of rules.	

Option C: Include quorum rules in the reformed Act that apply in all cases (cannot be overridden by the by-laws).

PROS	CONS
i. Ensures a standard, guaranteed set of quorum rules for all corporations.	i. Corporation loses its ability to create its own set of rules.
ii. Avoids the time and expense of devising a set of rules.	

5. Members' Voting Agreements

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

Voting or pooling agreements are arrangements between two or more members outlining how to vote on a certain issue. The voting rights attached to each member are exercised in accordance with the agreement.

Voting agreements allow members to exercise their power to vote on a basis different from the votes they have according to their membership interest (where different classes of membership carry different voting rights). The terms of the voting agreement sets out the members' agreement on how they will vote. For example, members may agree to pool their votes to elect certain persons as directors of the corporation, including themselves.

Voting/pooling agreements should not be confused with unanimous voting agreements. The latter are different in that they require the agreement of *all* members to restrict the powers of directors. Reference here is only to voting/pooling agreements.

The CA does not contain any provisions dealing with voting/pooling agreements. However, there is nothing preventing members from entering into these agreements privately, either orally or in writing, although the enforceability of such agreements is not clear in the absence of a statutory provision authorizing them.

Saskatchewan *Non-Profit Corporations Act, 1995*

The Saskatchewan Act allows members to enter into voting agreements [136(1)].

Bill C-21: Canada Not-for-Profit Corporations Act

There was no provision for voting agreements in Bill C-21.

Ontario Law Reform Commission

The OLRC recommended the adoption of voting agreement provisions in the reformed Act similar to those contained in the *Model Act* which requires that, for public and charitable corporations, the agreements must have a reasonable purpose not inconsistent with the corporation's public or charitable purpose.

QUESTION

i) Should the reformed Act allow members to enter into voting/pooling agreements?

OPTIONS

Option A: No reference to voting/pooling agreements in reformed Act (status quo).

PROS	CONS
i. Corporation has flexibility to determine whether to allow voting/pooling agreements (can do so in the by-laws).	i. Enforceability of these agreements is unclear if there is no provision for them in the governing act.

Option B: Allow voting/pooling agreements.

PROS	CONS
i. Provides members with additional flexibility when participating in corporate decision-making.	No apparent cons.
ii. Gives legal effect to an informal agreement.	
iii. Enhances members' rights.	

6. Member Remedies

Background

Remedies refer to the means available to members to protect themselves and achieve redress for an injustice caused by an act of a corporation or its directors. Establishing 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.

Under the current CA, remedies available to members include the right to apply to the court for a compliance order when the corporation, or one of its directors, officers or employees fails to perform the duty imposed by the Act [s.332]. Members (representing at least one-tenth of the membership) may also apply to the court for an appointment of an inspector to investigate the management of the corporation or a person to audit its books [s.310].

The CA also provides members with remedies that do not require the courts' involvement. 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 at the same meeting [s.67(1)]. Members may also require the directors to call a general meeting of all members for any purpose connected with the affairs of the corporation, provided the request is made by at least one-tenth of the voting members [s.295]. 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 [s.296].

This section deals with a) the compliance order, b) the oppression remedy, c) the derivative action, and d) the right of dissent and appraisal.

(a) Compliance Orders

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

The compliance order remedy refers to the right of members to apply to the court for an order directing the corporation or its directors to perform a duty or obligation imposed on it/them, in cases where there is a failure to comply with the terms of the corporation's governing statute, articles, or by-laws. For example, members may use the compliance order where the directors of a corporation fail to give adequate notice to members of an annual meeting of the corporation, as set out in its governing statute.

Currently, the CA allows an aggrieved member or creditor of a corporation to seek a compliance order directing the corporation, or a director, officer or employee of the corporation, to perform any duty imposed by the Act [s.332]. However, the compliance order is not available in cases where the omission relates to a provision contained in the articles or by-laws of the corporation.

Saskatchewan *Non-Profit Corporations Act, 1995*

Under the Saskatchewan Act, compliance orders are available to members or other complainants in cases of non-compliance not only with the Act, but also with the corporation's articles, by-laws, or unanimous member agreement [s.231].

A complainant is defined as,
(a) a member or registered holder or beneficial owner, and a former registered holder or beneficial owner of a security of a corporation or any of its affiliates;
(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 [s.222].

Bill C-21: *Canada Not-for-Profit Corporations Act*

Under Bill C-21, compliance orders were available to complainants in cases of non-compliance not only with the governing Act, but also with the corporation's articles, by-laws, or unanimous member agreement [s.257].

A complainant was defined as,
(a) a former or present member or debt obligation holder of a corporation or any of its affiliates;
(b) a present or former registered holder or beneficial owner of a share of an affiliate or a corporation;
(c) a former or present director or officer or a corporation or any of its affiliates;
(d) the Director (appointed by the Minister to carry out duties of director); or
(e) any other person who, in the discretion of a court, is a proper person to make an application [s.248].

Ontario *Business Corporations Act*

Under the OBCA, compliance orders are available to complainants in cases of non-compliance not only with the OBCA, but also with the corporation's articles, by-laws, or unanimous shareholder agreement [s.253(1)].

A complainant is defined as,
(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner of a security of a corporation or any of its affiliates,
(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
(c) any other person who, in the discretion of the court, is a proper person to make an application [s.245].

Ontario Law Reform Commission

The OLRC recommended that the reformed Act extend the compliance order's availability to cases where there is non-compliance with the corporation's articles, by-laws, or unanimous member agreement, as under the Saskatchewan Act.

QUESTIONS

i) Should the criteria for obtaining a compliance order be broadened to allow complainants to seek compliance with duties in addition to those set out in the reformed Act, such as duties imposed by the articles and by-laws of the corporation?

ii) Who should qualify as a complainant (that is, be entitled to apply to court for a compliance order)? Members and creditors only, or should other complainants be allowed to bring the action as is the case in business corporation statutes such as the OBCA and other not-for-profit statutes such as the Saskatchewan Act and Bill C-21?

OPTIONS

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

Option A: Allow complainants to obtain a compliance order only in cases where a corporation fails to comply with the reformed Act (status quo).

PROS	CONS
No apparent reason to restrict protection only to cases of breaches of the Act.	i. Offers no protection for members where there is a breach of the articles or by-laws of a corporation.
	ii. Less accountability than Option B.

Option B: Extend the availability of compliance orders to cases where a corporation fails to comply with duties in addition to those set out in the CA, such as those imposed by the articles or by-laws of the corporation.

PROS	CONS
i. Increases accountability by ensuring directors act according to articles and by-laws of a corporation.	No apparent reason to not expand scope of compliance order.
ii. May reduce need for more costly and time consuming remedies, such as the oppression remedy and derivative action.	

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

Option A: Restrict availability of compliance order to members and creditors (status quo).

PROS	CONS
i. Limits the amount of frivolous claims that may be brought forward.	i. Persons, such as former members, who may have a legitimate concern regarding an act or omission of a corporation have no means to take action.

Option B: In addition to being available to members and creditors, make compliance order available to any other complainants at the discretion of the court.

PROS	CONS
i. Gives other parties, such as former members, access to the order where there is a concern regarding a breach of duties within the corporation.	i. May allow persons who many not have a legitimate claim to bring forward the action resulting in legal costs and time burdens on the corporation.
ii. Requiring leave of the court for complainants other than members and creditors can prevent abuse of the remedy by persons with no legitimate interest in the issues being raised.	

(b) Oppression Remedy

Should the reformed Act provide for an oppression remedy?

The oppression 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. For example, members may be entitled to relief where directors unilaterally amend their voting rights, where there is a lack of adequate and appropriate disclosure of material information, or where there is a breach of a

members' agreement. A court can make any order it considers appropriate to remedy the injustice.

The application of the oppression remedy may not be appropriate for all types of not-for-profit corporations. For example, religious corporations have unique operating structures which may make the oppression remedy unworkable in their context. Exempting these types of corporations from application of the oppression remedy would prevent scrutiny of religious practices in court and recognize the special place of religious corporations in Canadian society.

Currently the CA does not provide members with the oppression remedy. The remedy is common in business corporation statutes such as the OBCA. In addition the remedy is provided in the Saskatchewan Act and Bill C-21.

Saskatchewan *Non-Profit Corporations Act, 1995*

The Saskatchewan Act provides that a member or other complainant may apply to the court to rectify any act or omission of the corporation which is oppressive or unfairly prejudicial to any member, security holder, creditor, officer, director, or in the case of a charitable corporation, the general public [s.225(1)]. Religious corporations are not provided with an exemption from the application of the oppression remedy.

A complainant is defined as,
(a) a member or registered holder or beneficial owner, and a former registered holder or beneficial owner of a security of a corporation or any of its affiliates;
(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 [s.222].

Bill C-21: *Canada Not-for-Profit Corporations Act*

Bill C-21 provided that a complainant may apply to the court for an order to rectify any act or omission of the corporation or any of its affiliates, or the exercise of power by the directors or officers of the corporation or any of its affiliates, that is oppressive or unfairly prejudicial to any shareholder, creditor, director, officer or member [s.251(1)]. Members of religious corporations were excluded from accessing this remedy [s.251(2)].

A complainant was defined as,
(a) a former or present member or debt obligation holder of a corporation or any of its affiliates;
(b) a present or former registered holder or beneficial owner of a share of an affiliate or a corporation;
(c) a former or present director or officer or a corporation or any of its affiliates;
(d) the Director (appointed by the Minister to carry out duties of director); or
(e) any other person who, in the discretion of a court, is a proper person to make an application [s.248].

Ontario *Business Corporations Act*

The OBCA provides that a complainant can apply to the court for an order where an act or omission of the corporation effects or threatens to effect a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation [s.248(1)].

A complainant is defined as,
(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner of a security of a corporation or any of its affiliates,
(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
(c) any other person who, in the discretion of the court, is a proper person to make an application [s.245].

Ontario Law Reform Commission

The OLRC recommended that the reformed Act provide members of a corporation with the oppression remedy in provisions similar to those found in the Saskatchewan Act. The oppression remedy should be available to members, as well as other complainants, such as present or former officers and directors, former members, or other persons determined to be appropriate by the court. The right to bring this action should be qualified in the case of religious organizations to exclude litigation of religious doctrines or tenets of faith.

QUESTIONS

i) Should the oppression remedy be included in the reformed Act?

ii) Should religious corporations be excluded?

iii) Who should qualify to bring forward the action? Members only, or should other complainants, such as former members, directors and former directors, and the government, etc. be allowed to bring the action?

OPTIONS

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

Option A: Do not include the oppression remedy (status quo).

PROS	CONS
i. May prevent potentially costly and time consuming court processes.	i. May limit members' ability to protect themselves against oppressive conduct.
ii. Other effective remedies such as a compliance order are available to members who are aggrieved.	

Option B: Provide the oppression remedy to all not-for-profit corporations, including religious organizations.

PROS	CONS
i. Offers members of all not-for-profit corporations equal protections.	i. Risk that religious doctrines and practices could be challenged in court.
ii. Gives members of not-for-profit corporations similar protections to those available to members of business corporations.	ii. Cost of litigation could bankrupt some small corporations.

Option C: Exclude religious corporations from the oppression remedy.

PROS	CONS
i. Avoids the possibility of religious doctrines and practices being challenged in court.	i. For members of religious corporations, ability to protect themselves against oppressive conduct is limited.
ii. Accommodates the unique nature of religious corporations, which are accustomed to external control and special rules that may not be consistent with conventional law.	

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

Option A: Make the oppression remedy available to members only.

PROS	CONS
i. Limits the amount of frivolous claims that may be brought forward.	i. May prevent complainants (other than members) with legitimate claims from having recourse.

Option B: Make the oppression remedy available to other complainants (in addition to members), such as former members, directors and former directors, the government, or any other person at the discretion of the court, etc.

PROS	CONS
i. Provides recourse to complainants (other than members) who may have legitimate claims.	i. May allow persons who many not have a legitimate claim to bring forward the action resulting in legal costs and time burdens on the corporation.

(c) Derivative Action

Should the derivative action be included in the reformed Act?

The derivative action refers to the right of members to apply to a court to seek permission to bring an action on behalf of the corporation for breach of the directors' and officers' fiduciary duty to the corporation or for any other obligation to the corporation where the corporation is not taking action to pursue its own rights. For example, members may apply to court where directors pay excessive salaries or give away corporate assets.

The application of the derivative action may not be appropriate for all types of not-for-profit corporations. For example, religious corporations have unique operating structures which may make the derivative action unworkable in their context. Exempting these types of corporations from application of this remedy would prevent scrutiny of religious practices in court and recognize the special place of religious corporations in Canadian society.

Currently the CA does not provide members with the derivative action. It is common to provide the derivative action in business corporation statutes such as the OBCA. In addition, it is found in the Saskatchewan Act and Bill C-21.

Saskatchewan *Non-Profit Corporations Act, 1995*

The Saskatchewan Act provides that a member or other complainant can apply to the court to bring an action on behalf of the corporation, or intervene in an action involving the corporation in order to prosecute, defend or discontinue the action [s.223(1)]. In order to bring an action or intervene in an action, the member must be acting in good faith, and give reasonable notice to the corporation that he or she intends to apply to the court if the directors do not take action themselves [s.223(2)]. Religious corporations are not provided with an exemption from the application of the derivative action.

A complainant is defined as,

(a) a member or registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates;
(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 [s.222].

Bill C-21: *Canada Not-for-Profit Corporations Act*

Bill C-21 provided that a complainant can apply to the court to bring an action on behalf of the corporation, or intervene in an action to which the corporation is a party, for the purpose of prosecuting, defending or discontinuing the action [s.249(1)]. The court must be satisfied that the complainant is acting in good faith, and in the interests of the corporation, and that he or she has given adequate notice to the directors of the corporation of his or her intent to apply to the court if the directors do not act themselves [s.249(2)]. Religious corporations were excluded from accessing this remedy [s.249(3)].

A complainant was defined as,
(a) a former or present member or debt obligation holder of a corporation or any of its affiliates;
(b) a present or former registered holder or beneficial owner of a share of an affiliate or a corporation;
(c) a former or present director or officer or a corporation or any of its affiliates;
(d) the Director (appointed by the Minister to carry out duties of director); or
(e) any other person who, in the discretion of a court, is a proper person to make an application [s.248].

Ontario *Business Corporations Act*

The OBCA provides that a complainant may apply to the court to bring an action on behalf of the corporation or any of its subsidiaries, or intervene in an action the corporation is involved in, for the purpose of prosecuting, defending, or discontinuing the action [s.246(1)]. The complainant must give fourteen days notice to the directors of the corporation of his or her intent to apply to the court, and the court must be satisfied that the directors of the corporation will not bring, diligently prosecute, defend or discontinue the action; and that the complainant is acting in good faith and in the best interests of the corporation [s.246(2)].

A complainant is defined as,
(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner of a security of a corporation or any of its affiliates,
(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
(c) any other person who, in the discretion of the court, is a proper person to make an application [s.245].

Ontario Law Reform Commission

The OLRC recommended that the reformed Act include a derivative action, in provisions similar to those found in the Saskatchewan Act. As in that statute, the derivative action should be available to other complainants in addition to members. The right to utilize the derivative remedy should be qualified in the case of a religious organization to prevent scrutiny of religious doctrines or tenets of faith in a court of law.

American Bar Association: *Revised Model Nonprofit Corporations Act* (1987)

According to the *Model Act*, the derivative action remedy is available to any director, or any member or members with at least five percent of the corporation's voting power, or fifty members, whichever is less [s.6.30]. In order for a proceeding to be brought forward, the complainant must demonstrate why action could not be obtained from the corporation's directors.

QUESTIONS

i) Should the derivative remedy be included in the reformed Act?

ii) Should religious corporations be excluded?

iii) Who should qualify to bring forward the action? Members only, or should other complainants, such as former members, directors and former directors, and the government, etc. be allowed to bring the action?

OPTIONS

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

Option A: Do not include a derivative action (status quo).

PROS	CONS
i. Avoids potentially unnecessary and costly challenges to decisions made by the corporation.	i. Less accountability for directors.
ii. Other effective remedies such as a compliance order are available to members who are aggrieved.	ii. Fewer protections for members when directors act outside of corporation's best interests.

Option B: Provide for a derivative action for all not-for-profit corporations, including religious organizations.

PROS	CONS
i. Gives members of not-for-profit corporations similar protections to those available to shareholders of business corporations.	i. Possibility that corporations could become tied up in court proceedings when decisions are challenged.
ii. Increases accountability by ensuring directors are acting in the corporation's best interests.	ii. Cost of litigation could bankrupt some small corporations.
	iii. Risk that religious doctrines or practices could be challenged in court.

Option C: Exclude religious corporations from the derivative action.

PROS	CONS
i. Avoids the possibility of religious doctrines and practices being challenged in court.	i. For members of religious corporations, ability to take action to protect interests of corporations is limited.
ii. Accommodates the unique nature of religious corporations, which are accustomed to external control and special rules that may not be consistent with conventional law.	

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

Option A: Make the derivative action available to members only.

PROS	CONS
i. Limits the amount of frivolous claims that may be brought forward.	i. May prevent complainants (other than members) with legitimate claims from having recourse.

Option B: Make the derivative action available to other complainants (in addition to members), such as former members, directors and former directors, the government, or any other person at the discretion of the court, etc.

PROS	CONS
i. Provides recourse to complainants (other than members) who have legitimate claims.	i. May allow persons who many not have a legitimate claim to bring forward the action resulting in legal costs and time burdens on the corporation

(d) Dissent and Appraisal

Should the reformed Act include the dissent and appraisal remedy?

The right to dissent and appraisal remedy gives members the right to obtain fair payment for their membership interests from the corporation in cases where they dissent on a shareholder vote on a certain matter of fundamental imporance. For example, where a member strongly objects to a decision to amalgamate with another corporation and wishes to withdraw, he or she may issue a notice of dissent, and have any membership fee or interest in the corporation repurchased by the corporation. In the case of a dispute between the corporation and a member regarding the value of a membership interest, members could be given the right to appeal to the court to determine the fair market value of the interest.

The right to dissent and appraisal may be of no value in the case of a charity where members have no financial interest in the corporation; however, for members of golf or social clubs who pay a great deal of money for their memberships, the remedy may offer significant financial protection.

The current CA does not provide members of not-for-profit corporations with the right to dissent and appraisal remedy. The remedy is common in business corporation statutes such as the OBCA. In addition, it is provided in the Saskatchewan Act.

Saskatchewan *Non-Profit Corporations Act, 1995*

The Saskatchewan Act provides members of membership corporations[1] with the right to dissent from an amendment of articles or resolution affecting the member [s.177(1),(2)]. A dissenting member is entitled to receive from the corporation the fair value of his or her membership interest [s.177(3)]. Only members entitled to a share of remaining property upon dissolution of the corporation can access this remedy.

In order to receive payment, the dissenting member must object in writing to a resolution, on or before the day the resolution is to be voted on, and upon learning that that the resolution has

[1] The Saskatchewan Act classifies not-for-profit corporations into membership corporations and charitable corporations. Membership corporations carry on activities that are primarily for the benefit of their members, while charitable corporations carry on activities that are primarily for the benefit of the public (and can include membership corporations that are deemed charitable).

been passed, request payment for the membership interest in writing and return his or her membership card to the corporation [s.178].

Ontario *Business Corporations Act*

The OBCA provides that shareholders with voting rights are entitled to dissent from an amendment of articles or fundamental change, and to receive the fair value of shares held [s.185(1), (4)].

In order to receive payment, the dissenting shareholder must object in writing to a resolution on or before the day the resolution is to be voted on, and within twenty days of learning that the resolution has been adopted, request in writing payment of the fair value of the shares [s.185(6), (10)].

Ontario Law Reform Commission

The OLRC recommended the reformed Act allow for the dissent and appraisal remedy only where provided by the articles, and only in the case of mutual benefit corporations[2], political corporations, and general not-for-profit corporations. In the case of mutual-benefit corporations, the remedy would require the repurchase of membership interests from those who dissent, and for the other types of corporations, the annual membership fee would be required to be paid back in the year of the fundamental change.

American Bar Association: *Revised Model Nonprofit Corporations Act* (1987)

The *Model Act* provides that a mutual benefit corporation[3] may purchase the membership of a member who resigns or whose membership is terminated according to conditions set forth in its articles or by-laws. A public benefit or religious corporation may not purchase any of its memberships [s.6.22].

QUESTIONS

i) Should the reformed Act include the right to dissent and appraisal?

ii) Should the right to dissent and appraisal be limited to certain types of not-for-profit corporations, such as private membership corporations?

[2] The OLRC recommended that a classification system be included in the reformed Act, consisting of the following classes: Religious, charities, political, mutual benefit, and general not-for-profit. Mutual benefit corporations were defined as those organized primarily for the benefit of the members.

[3] The *Model Act* classifies not-for-profit corporations into mutual benefit corporations, public benefit corporations and religious corporations. A mutual benefit corporation is one organized primarily for purposes other than religious or public benefit activities.

OPTIONS

Option A: Do not include the dissent and appraisal remedy in the reformed Act (status quo).

PROS	CONS
i. Unnecessary for most not-for-profit corporations where value of membership interest is minimal.	i. Limits protections available to members who are opposed to fundamental changes of the corporation in cases where a membership interest has significant value.

Option B: Provide for dissent and appraisal in the reformed Act.

PROS	CONS
i. Gives members of not-for-profit corporations similar protections to those available to shareholders of business corporations.	i. Some corporations may be negatively affected financially by requirement to repay membership interests.
ii. Increases accountability by ensuring directors are acting in the corporation's best interest.	ii. May involve costly process to determine value of membership interest.

Option C: Limit the right to dissent and appraisal remedy to certain types of corporations, such as private membership corporations where a membership interest may have significant value.

PROS	CONS
i. Affords an additional right to members who may have paid a great deal of money for their memberships, in cases where they disagree with a fundamental change in the corporation.	No apparent cons.

II. CORPORATE FINANCE

1. Financial Review in lieu of an Audit

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

Audits are a way of promoting financial accountability and transparency within not-for-profit corporations. Members of not-for-profit corporations as well as the general public have an interest in ensuring the integrity of not-for-profit corporations. However, the cost and administrative burden associated with undergoing an annual audit can be considerable, especially for small not-for-profits. To minimize this expense, some not-for-profit statutes permit corporations to undergo a financial review in lieu of an audit, if annual incomes fall within a given threshold.

An audit involves the analysis of a corporation's financial records and operations by a public accountant, and includes the testing of each significant item on a corporation's financial statement to provide reasonable assurance that a corporation's financial statements accurately represent its financial position. A review is also performed by a public accountant, but involves less extensive procedures, such as enquiry, discussion and analysis to provide reasonable assurance that a corporation's financial statements are plausible. A review provides a lower degree of credibility than is achieved by an audit, but is much less expensive and more affordable for small not-for-profit corporations.

The CA requires not-for-profit corporations whose annual income is $100,000 or more to undergo an annual audit [s.96(1)]. Corporations are not provided with an option to undertake a financial review in lieu of an audit.

Saskatchewan *Non-Profit Corporations Act*

Under the Saskatchewan Act, charitable corporations[4] with an annual income of less than $250,000 but greater than $25,000 can resolve to undergo a financial review in lieu of an audit, if passed by 80% of the members [s.151(1),(2)]. 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 [s.151(3)]. Membership corporations are not required to undergo an audit or review if consented to by two thirds of the members [s.150].

Bill C-21: *Canada Not-for-Profit Corporations Act*

Bill C-21 provided that corporations with annual revenues not exceeding an amount that was to be prescribed in the regulations had to conduct a review by a public accountant, unless the members pass an ordinary resolution requiring an audit. Those corporations with annual revenues exceeding the prescribed amount were required to conduct an audit [s.187(1),(2); s.188(1),(2)].

[4] For definition of charitable and membership corporations under the Saskatchewan Act, see supra note 1.

QUESTION

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

OPTIONS

Option A: No option for review (i.e., corporations with an annual income of $100,000 or more are required to conduct an audit) (status quo).

PROS	CONS
i. Increases financial accountability.	i. Audits are financially and administratively more burdensome than reviews.

Option B: Allow corporations with an annual income of up to a certain maximum amount to undergo a review in lieu of an audit.

PROS	CONS
i. Relieves smaller corporations of the higher financial and administrative burdens associated with an audit.	i. Less financial accountability for corporations who opt for a review.
ii. Increases likelihood of compliance.	ii. Difficult to determine the cut-off amount above which an audit would be required (amount selected would be arbitrary).

2. Financial Disclosure

What should the level of access to financial statements be for members?

Under the CA, the corporation's directors must present financial statements to members during 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 [s. 97(1)]. There is no requirement for financial statements to be distributed to members in advance of the annual meeting.

In addition to financial statements, corporations are required to keep proper 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 [s.302].

These records are to be open for inspection by any director during regular business hours [s. 304(1)]. Records are to 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 [s.304(2)].

Saskatchewan *Non-Profit Corporations Act*

Under the Saskatchewan Act, directors of a corporation must at every annual meeting provide members with the corporation's financial statements, the auditor's report, if any, and any further financial information required by the articles, by-laws, or any unanimous member agreement [s.142]. The corporation may apply to the Director[5] for authorization to omit any item from its financial statements, or to dispense with the publication of any particular financial statement [s.143]. Members must be provided the financial statements, auditor report, and any further financial information required by the articles, bylaws, or any unanimous member agreement not less than 15 days before each annual meeting [s.146].

The Saskatchewan Act also requires that corporations prepare and maintain adequate accounting records [s.20(2)]. Similar to the CA, these records must be open for inspection by the directors of the corporation but there is no requirement for members to have ongoing access [s.20(4)].

Bill C-21: *Canada Not-for-Profit Corporations Act*

Bill C-21 provided that directors of a corporation provide members at every annual meeting with the corporation's financial statements, the accountant report, if any, and any further financial information required by the articles, by-laws, or any unanimous member agreement [s.172(1)]. The Bill also provided that on application of a corporation, the Director[6] may exempt the corporation from any requirement in the Part (Part 11, Financial Disclosure) if the director believes that the requirement may cause detriment to the corporation, outweighing the benefit to the members [s.173].

Bill C-21 also included a provision that the corporation prepare and maintain adequate accounting records which shall at all reasonable times be open to inspection by the directors [s. 21(3)(7)].

Ontario *Business Corporations Act*

Under the OBCA, the directors of a non-offering corporation must provide shareholders with the corporation's financial statements before the annual meeting in the circumstances prescribed by the Act. In the case of offering corporations[7], financial statements must be provided as required by the *Securities Act* and its regulations to all shareholders who have informed the corporation that they wish to receive a copy. Other documents required to be placed before shareholders before each annual meeting are the report of the auditor, if applicable, and any further financial information required by the articles, by-laws, or any unanimous shareholder agreement. These documents must be sent 21 days in advance of the meeting for offering corporations, and 10 days in advance of the meeting for non-offering corporations. In the case of a non-offering corporation, the documents are not sent to stakeholders who have informed the corporation in writing that they do not wish to receive a copy [s.154].

[5] "Director" means the Director appointed pursuant to *The Business Corporations Act*, and includes any Deputy Director appointed pursuant to that Act

[6] Under Bill C-21, "Director" means an individual appointed by the Minister to carry out the duties and exercise the powers of the Director under the Act.

[7] "offering corporation" means a corporation that is offering its securities to the public.

Ontario Law Reform Commission

The OLRC recommended that the reformed Act impose record-keeping obligations on corporations similar to that of the current Act, modified as per the OBCA or the Model Act.

American Bar Association: *Revised Model Nonprofit Corporation Act* (1987)

The *Model Act* provides that a corporation must furnish members with its latest financial statements upon written request, unless an exception is provided in the articles or by-laws of a religious corporation [s.16.20].

The *Model Act* also provides that a corporation must maintain appropriate accounting records and that a member is entitled to inspect and copy these records [s.16.01 and s.16.02]. However, with the *Model Act*, a member must give written notice at least five days prior to the date on which he or she wishes to inspect and copy.

QUESTION

i) When should members be provided with the corporation's financial statements?

OPTIONS

Option A: Members to be provided with financial statements at the annual meeting (status quo).

PROS	CONS
i. Simplifies the process of disseminating financial records.	i. Members may not have time to review the corporation's financial statements before having to vote on related issues at the annual meeting.
ii. May be less costly than providing financial statements in advance of the annual meeting.	

Option B: Make financial statements available to members prior to the annual meeting, similar to the Saskatchewan Act. By-laws could require that financial statements be sent to members prior to the annual meeting upon request.

PROS	CONS
i. Members would have time to review the financial statements prior to the annual meeting.	i. Could create additional resource costs.
ii. Members may be better prepared to vote at annual meetings if financial statements have been reviewed in advance.	

Option C: Allow corporations to decide whether or not to provide members with access to the corporation's financial statements prior to the annual meeting.

PROS	CONS
i. Would allow organizations with limited resources to refrain from disseminating these documents in advance of the annual meeting.	i. Corporations could choose to withhold financial statements without reason, thereby hampering information flow.

3. Borrowing and Debt Issuance

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

Under the CA, directors may not borrow money or issue debt unless by-laws are in place to allow for these activities. Directors may pass by-laws,
(a) for borrowing money on the credit of the company; or
(b) for issuing, selling or pledging securities of the company; or
(c) for charging, mortgaging, hypothecating or pledging all or any of the property of the company,…to secure any securities or any money borrowed, or other debt, or any obligation or liability of the company [s.59(1)].

The CA provides that no by-law passed under the above subsection is in effect until it has been confirmed at a general meeting by at least two-thirds of the votes cast [s.59(3)].

Saskatchewan *Non-Profit Corporations Act*

Similar to the OBCA and Bill C-21, the Saskatchewan Act provides that unless the articles, bylaws, or a unanimous member agreement otherwise provide, the articles of a corporation are deemed to state that the directors of a corporation may, without authorization of the members borrow money on the credit of the corporation and issue, reissue, sell or pledge debt obligations of the corporation [s.176(1)].

This section also provides that directors of a corporation may, with some restrictions, give a guarantee on behalf of the corporation to secure performance of an obligation, and mortgage, or create a security interest in all of any property of the corporation, to secure any obligation of the corporation [s.176(1)].

Bill C-21: *Canada Not-for-Profit Corporations Act*

Bill C-21 included a provision that unless the articles, by-laws, or a unanimous member agreement otherwise provided, the directors of a corporation could, without authorization of the members,
(a) borrow on the credit of the corporation;
(b) issue, reissue, sell, pledge or hypothecate debt obligations;
(c) give guarantees to secure performance of an obligations; and
(d) mortgage, hypothecate, pledge or otherwise create a security interest in any property of the corporation to secure any obligation [s.28(1)].

Ontario *Business Corporations Act*

Unless the articles or by-laws state otherwise, under the OBCA, the directors of a corporation may,

(a) borrow money upon the credit of the corporation;
(b) issue, reissue, sell or pledge debt obligations of the corporation;
(c) give a guarantee on behalf of the corporation to secure performance of an obligation of any person; and
(d) mortgage, hypothecate, pledge or otherwise create a security interest in all or any property of the corporation, owned or subsequently acquired, to secure any obligation of the corporation [s.184(1)].

Ontario Law Reform Commission

The OLRC recommended that there be no restriction in the new nonprofit corporations legislation on the power of nonprofit corporations to borrow, or on the directors of nonprofit corporations to borrow on the corporation's behalf. The OLRC reasoned that with arm's length borrowing transactions, it can be expected that the creditor will ensure that the corporation is an acceptable credit risk, and the directors and officers should be capable of assessing the value to the corporation of the borrowing. In the case of non-arm's length transactions, the duty of loyalty and the public enforcement of the duty of loyalty are sufficient protections against borrowing transactions that might be harmful to the corporation.

The OLRC also recommended that new legislation include provisions to facilitate nonprofit corporations in issuing debt securities. One of the models that the OLRC recommended following is the Saskatchewan Act.

QUESTION

i) Should directors have the power to borrow and issue debt without a specific by-law being passed, similar to the Saskatchewan, OBCA and Bill C-21 models?

OPTIONS

Option A: By-laws for borrowing/issuing debt must be passed and approved by members (status quo).

PROS	CONS
i. Increases transparency of the financial activities being undertaken by the corporation.	i. Could lead to situations of non-compliance where directors borrow or issue debt without realizing that a by-law must first be passed.

Option B: Directors have the right to authorize borrowing/issuing debt subject to the restrictions set out in the corporation's by-laws, similar to the Saskatchewan and OBCA models.

PROS	CONS
i. Simplifies the process of borrowing/issuing debt on the corporation's behalf.	No apparent cons.
ii. Reduces the chance that directors would borrow/issue debt without authority.	

Option C: Directors have unlimited rights to authorize borrowing as an exercise of the natural powers of the corporation.

PROS	CONS
i. Simplifies the process of borrowing/issuing debt for directors.	i. Does not allow for the option of limiting directors' ability to borrow/issue debt, where some corporations may prefer certain limitations.
ii. Eliminates the chance that directors would borrow/issue debt without authority.	

III. OTHER

1. By-laws

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

By-laws are one way in which a corporation establishes rules for its governance, especially rules for conducting meetings and assigning responsibilities to directors and officers. They are part of the corporation's constituting or incorporating documents.

The CA establishes the directors' power to pass by-laws in respect of a list of items, including the admission of members, fees and dues of members, termination and transfer of memberships, etc. [s.129(1)]. By-laws need to be confirmed by members in order to be effective [s.129(2)].

By-laws are an important part of a corporation's constituting documents but the drafting of by-laws can be a complex task for some not-for-profits, especially those who are unable to afford legal services. In many cases, not-for-profits are left either without by-laws to govern their corporation's affairs, or with a set of inadequate ones.

One way of overcoming this problem is to include standard by-laws in the reformed Act's regulations which would apply to every not-for-profit corporation, unless the corporation adopts different by-laws. A corporation is free to create its own custom set of by-laws that would replace those in the regulations. If different classes of corporations are created, the by-laws can reflect these differences.

Saskatchewan *Non-Profit Corporations Act, 1995*

The Saskatchewan Act does not provide for standard, default by-laws. It provides that the directors may make by-laws to regulate the activities of the corporation [s.90]. To be effective, by-laws must be confirmed by members.

Bill C-21: *Canada Not-for-Profit Corporations Act*

Bill C-21 did not provide for standard, default by-laws. Like the Saskatchewan Act, Bill C-21 provided that the directors may make by-laws to regulate the activities of the corporation which by-laws must be confirmed by members in order to be effective [s.153].

Ontario Law Reform Commission

The OLRC recommended the use of default by-laws that would vary according to the type of corporation. The default by-laws could be ousted where a corporation adopts its own conflicting by-law.

QUESTION

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

OPTIONS

Option A: No standard default by-laws in the reformed Act (status quo).

PROS	CONS
No apparent pros.	i. Corporations may have no by-laws, or inadequate by-laws.

Option B: Adopt standard default by-laws.

PROS	CONS
i. Reduces the time and expense of preparing the by-laws.	i. The default by-laws may be too general to adequately cater to each corporation's needs and corporations will be required to draft their own.
ii. Ensures that every not-for-profit corporation will have a basic set of valid by-laws upon incorporation.	

2. Self-Perpetuating Board

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

Under the CA, there must be at least three members in a not-for-profit corporation [s.311]. This requirement is automatically satisfied because there must be at least three directors [s.283(2)] and directors must be members [s.286(1)]. Because members elect directors, in the case of corporations that have only three directors and no other members, the board of directors is self-perpetuating, that is, it continues to elect itself.

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. These issues may be of less concern in the case of, for example, small and private social clubs which operate for their own exclusive benefit as opposed to public benefit corporations that are established for the purpose of serving a community need. In the case of the latter, more community involvement in the operations of the corporation may be warranted although there may be necessary exceptions for some of those corporations as well.

The most obvious method of ensuring that self-perpetuating boards are not possible is to require the corporation to have a minimum number of members who cannot also be directors.

Saskatchewan *Non-Profit Corporations Act, 1995*

Under the Saskatchewan Act, directors need not be members, unless the articles provide otherwise [s.92(2)]. Although the Saskatchewan Act does not specifically acknowledge the

possibility of self-perpetuating boards, under its statutory scheme, such boards become possible where all members are the directors.

Bill C-21: *Canada Not-for-Profit Corporations Act*

Like the Saskatchewan Act, under Bill C-21 directors were not required to be members, unless otherwise provided in the by-laws [s.127(2)]. Such a statutory scheme would make self-perpetuating boards possible in the event that all members were the directors.

Ontario Law Reform Commission

In the OLRC's view, the reformed Act should acknowledge explicitly the possibility of a self-perpetuating board. In fact, the OLRC goes further to suggest that there should not be a minimum membership requirement at all, as under the *Model Act*. Such recognition would permit not-for-profits to dispense with the many cumbersome legal formalities associated with the existence of a membership.

American Bar Association: *Revised Model Nonprofit Corporations Act* (1987)

The *Model Act* allows for a self-perpetuating board. It makes it explicit that a corporation is not required to have members [s.6.03]. In such a case, the directors would be elected by the board, unless otherwise specified in the articles or by-laws [s.8.04(b)].

QUESTIONS

i) Should the reformed Act impose a requirement that all not-for-profit corporations have a minimum number of members who are not directors (that is, prevent the possibility of a self-perpetuating board)?

ii) If so, should it only apply in the case of public benefit corporations?

OPTIONS

Option A: Allow for a self-perpetuating board.

PROS	CONS
i. May be appropriate in the case of very small corporations with very few members where a self-perpetuating board could be more efficient.	i. Little or no control on the activities of the board; no mechanism for holding the board accountable.
	ii. Lack of accountability and transparency not appropriate in the case of public benefit corporations.

Option B: Eliminate the possibility of a self-perpetuating board for all types of not-for-profits (by requiring that a minimum number of voting members cannot also be directors).

PROS	CONS
i. Board of directors will be more accountable to the membership.	i. May not be appropriate in the case of small private corporations, like social clubs, which should have more flexibility in the way they are run.

	ii. Requires the corporation to have a membership and to, therefore, devise rules that govern membership, thereby adding some complexity and cost to the corporation's daily affairs.

Option C: Eliminate the possibility of a self-perpetuating board for public benefit corporations only, with exceptions where appropriate (by requiring that a minimum number of members cannot also be directors).

PROS	CONS
i. Board of directors will be more accountable to the membership which is appropriate in the case of public benefit corporations.	i. May be difficult to identify all the public benefit corporations that would need to be excepted from the rule.
ii. Provides smaller private corporations with greater flexibility that is appropriate for their type of activity.	

Please provide the Ministry of Government and Consumer Services with your recommendation(s) and the rationale for your recommendations with respect to the above-mentioned issues.

This is a public review.

All materials or comments received from organizations may be used and disclosed by the Ministry to assist in evaluating and revising existing legislation. This may involve disclosing materials, comments, or summaries of them, to other interested parties during and after the public comment period.

An individual who provides materials or comments and who indicates an affiliation with an organization will be considered to have submitted those comments or materials on behalf of the organization so identified.

Materials or comments received from individuals who do not indicate an affiliation with an organization may be used and disclosed to assist the Ministry in evaluating and revising existing legislation. However, the Ministry will not disclose personal information, such as an individual's name and contact details, unless required by law.

If you have any questions about the collection of this information, you can contact:

Access and Privacy Coordinator
Ministry of Government Services
(416) 326-8470