

**CROSS-JURISDICTIONAL COMPARISON OF CORPORATE LAW AND PROPOSALS AFFECTING NON-PROFITS**

ISSUE	ONTARIO NON-PROFIT NETWORK PROPOSAL	EXISTING ONTARIO CORPORATIONS ACT	PROPOSED CANADA NOT-FOR-PROFIT CORPORATIONS ACT	SASKATCHEWAN' 1995 NON-PROFIT CORPORATIONS ACT	ENGLAND'S 2006 CHARITIES ACT <sup>1</sup> and 2006 COMPANIES ACT <sup>2</sup>
<b>1. INCORPORATION</b>					
Incorporation as of right?	Yes.	No – at the discretion of the government. The review causes delays in getting incorporated	Yes	Yes	Yes. Incorporated as “companies limited by guarantee” or as a community interest company (CIC) under <i>Companies Act</i> . Companies Act governs all corporations, with Parts applicable to non-profits.
Use of Name	<b>[to be discussed]</b> Only non-profits may use words in name suggesting public benefit, such as “foundation”, “non-profit”, “society”, etc. As with business corporations,	Can't be “too general” or use any word or expression that would lead to an inference that the corporation is a business corporation. Name approval is sometimes hard to get,	Name can't be deceptively misdescriptive, or otherwise prohibited	Name can't be deceptively misdescriptive, or otherwise prohibited	

<sup>1</sup> [http://www.opsi.gov.uk/acts/acts2006/ukpga\\_20060050\\_en\\_1](http://www.opsi.gov.uk/acts/acts2006/ukpga_20060050_en_1)

<sup>2</sup> [http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga\\_20060046\\_en.pdf](http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf)

<p><b>2. <u>SCOPE, POWERS AND RESTRICTIONS</u></b></p>	<p>should be self-policing, with no need for review on application for incorporation – subject to change if Director determines it contravenes rule.</p>	<p>and causes delays</p>			
<p>Constrain use of Act to corporations pursuing public benefit – includes charities, and other public benefit non-profits, such as advocacy organizations, ineligible for charitable registration with CRA<sup>3</sup></p>	<p>Yes</p>	<p>No – available to all corporations which decide to carry on activities “without the purpose of gain for its members” and agree that “any profits or other accretions to the corporation shall be used in promoting its objects”</p>	<p>No – intended to be used by all federally incorporated non-profits</p>	<p>No – covers both “charitable” corporations (carrying on activities that are primarily for the benefit of the public ) and “membership corporations” being non-profits that do not solicit or receive donations or government funds and/or are primarily for the benefit of its members</p>	<p><i>Charities Act</i> regulates charities ( the definition is somewhat broader than Canada’s)<sup>4</sup> through Charity Commission (role is similar to CRA), test of “public benefit<sup>5</sup>: Social enterprise (CIC) is governed by the <i>Companies Act 2004</i> “a new type of company, designed for social enterprises that want to use their profits and assets for the public good”<sup>6</sup>.</p>
<p>Powers of a “Natural Person” – no need to establish that corporation has the power to carry on activities it chooses</p>	<p>Yes</p>	<p>No – can only act within the objects approved, and ancillary objects in <i>Act</i></p>	<p>Yes</p>	<p>Yes</p>	
<p>Constraint on business revenue</p>	<p>Emphatically no</p>	<p>No, but First Ministry Discussion Paper suggested that as an option</p>	<p>No</p>	<p>No</p>	

<sup>3</sup> Mutual benefit organizations, like non-profit golf and sailing clubs, day care centres, and trade organizations could be subject to the proposed *Act* if they agree that their assets on dissolution be paid to another non-profit. The *Co-operative Corporations Act* may be more suited to them, as it contemplates benefits potentially flowing to members as the primary activity of the organization.

<sup>4</sup> Section 2

<sup>5</sup> Section 3, giving Charity Commission authority to define on a case-by-case basis.

<sup>6</sup> <http://www.cicregulator.gov.uk/faq.shtml#one>

Capacity to carry on business activities, provided net earnings are applied for public benefit	Yes. 10% constraint should be repealed.	Qualified – may not be permitted to incorporate; Public Guardian & Trustee may object. Charities cannot own more than 10% of a business.	Yes. Constraint on owning more than 10% of a business applies to all charities operating in Ontario	Yes	Charities can use charity subsidiary corporations to operate businesses. A charity may apply to register a CIC as a subsidiary company
Ability to make loans to members and employees	?	Not prohibited - subject to distribution constraints	Yes	No – unless for employees of the corporation or any of its affiliates to enable or assist them to purchase or erect living accommodation for their own occupation; or in accordance with a plan for the purchase of securities of the corporation.	
<b>3. <u>SECURING PUBLIC BENEFIT</u></b>					
“No pecuniary gain to members”	Clarify this means distribution of surplus, or other assets, but not payment for services rendered if at or below fair market value	Baldly stated, not well understood – Ministry Discussion Paper suggests this extends to provisions of service by members for compensation	“No part of a corporation’s profits or of its property or accretions to the value of the property may be distributed, directly or indirectly, to a member, a director, or officer except in furtherance of its activities or as otherwise permitted by this Act <sup>7</sup>	“Any profits or accretions to the value of the property of a corporation shall be used to further its activities, and no part of the property or profits of the corporation may be distributed, directly or indirectly, to a member, director or officer of the corporation” Exceptions for indemnifying directors, compensation to directors (if authorized by bylaw	Share capital CICs can pay dividends to individual shareholders, subject to a cap.
“Any profits or other accretions to the corporation shall be used in promoting its objects”	<b>[to be discussed]</b> Need to be clarified – non one knows what “accretions” are. If no objects, need “public	Current wording	See above	See above	Definition of community interest that applies to CICs will be wider than the public interest test for charity - purposes could be regarded by

<sup>7</sup> S. 35(1)

<p>Robust distribution constraints – members can't receive dividends or share in the surplus or assets of the corporation during its existence and on its dissolution</p>	<p>interest” defined.</p> <p>Yes – particularly where there is revenue from government, granting agencies such as foundations, or public solicitation for, or receipt of, donations. Provision for distribution constraint to be registered against title to assets as condition of government or donor financial support.</p>	<p>No – at the option of the members, members can share equally on dissolution</p>		<p>Membership corporations distribute net assets on dissolution equally among members, unless articles state otherwise.</p> <p>Charitable corporations must distribute to other “charitable“ corporations, registered charities or government.</p>	<p>a reasonable person as being in the community or wider public interest..</p> <p>CICs have a statutory “Asset Lock” to prevent the assets and profits being distributed, except as permitted by legislation<sup>8</sup>.</p>
<p>Remedy if assets not applied for public benefit</p>	<p><b>[to be discussed]</b></p> <p>Specialized arm of government authorized to intervene to safeguard public interest – issue is ensuring sufficient resources and</p>	<p>Only for charities, by application of PGT for court order</p>	<p>Court may investigate, on application of member. Oppression and derivative action remedies available.</p>		<p>Charities: Strong role for Charity Commission, a specialized government body, with five objectives — public confidence, public benefit, compliance, charitable resources, and accountability<sup>9</sup>.</p>

<sup>8</sup> If assets are transferred out of the CIC, the transfer must satisfy one of the following requirements:

- \* it is made for full consideration (i.e. at market value), so that the CIC retains the value of the assets transferred;
- \* it is made to another asset locked body (a CIC or charity, or non-GB based equivalent) which is specified in the CIC's memorandum or articles of association;
- \* it is made to another asset locked body with the consent of the Regulator; or
- \* it is otherwise made for the benefit of the community.

<sup>9</sup> Section 7(3): Those objectives are defined as follows—

1. The public confidence objective is to increase public trust and confidence in charities.
2. The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.
3. The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
4. The charitable resources objective is to promote the effective use of charitable resources.
5. The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public.

The functions of the Charity Commission are—

1. Determining whether institutions are or are not charities.
2. Encouraging and facilitating the better administration of charities.
3. Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement therein.
4. Determining whether public collections certificates should be issued, and remain in force, in respect of public charitable collections.
5. Obtaining, evaluating and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its objectives.
6. Giving information or advice, or making proposals, to any Minister of the Crown on matters relating to any of the Commission's functions or meeting any of its objectives.

	expertise				Appeals from its decisions go to another body – the Charity Tribunal
Membership Transferable	No	Not addressed	Only if bylaws so provide	Only if bylaws so provide	Community Interest Companies: The CIC Regulator is able to investigate complaints from stakeholders and has powers to act if it is found that a CIC is not working in the interest of the community or that the profit/asset lock is not being observed. These powers will include the ability to change the directors or wind up the company.” <sup>10</sup>
<b>4. <u>CHARITY REGULATION</u></b>					
Should charities be regulated by the Act, in addition to regulation by Public Guardian & Trustee and Canada Revenue Agency?	No – that’s primarily Canada Revenue Agency’s job	Ontario’s Public Guardian & Trustee must approve objects before a charity can incorporate	No	No	<i>Charities Act</i> regulates charities, which are commonly trusts, or incorporated under <i>Companies Act</i> as companies “limited by guarantee”
<b>5. <u>GOVERNANCE</u></b>					
Notices of meetings	<b>[to be discussed]</b> Notice must be individual and may be electronic, at option of	If charity, may be given by notice in a newspaper; otherwise, must be individual, can provide for			

<sup>10</sup> “Currently companies that do not have charitable status find it difficult to ensure that their assets are dedicated to public benefit. There is no simple, clear way of locking assets to a public benefit purpose other than applying for charitable status. The Community Interest Company will help to meet the need for a transparent, flexible model,”<sup>10</sup> administered by the Regulator: “The Government expects the Regulator to be a “light touch regulator” who will encourage the development of the CIC brand and provide guidance and assistance on matters relating to CICs. <http://www.cicregulator.gov.uk/faq.shtml#three>

	recipient, per bylaws	electronic notice in bylaws			
Directors must be members of the Corporation <sup>11</sup>	Not necessarily – an option only, for insertion in bylaws	Yes	Not necessarily – an option only, for insertion in bylaws		
Flexible Number of Directors	Yes – Between minimum of three and maximum in articles, set by members, or, with member authority, by board	No – number must be fixed - at least three, changed by “special resolution”	Yes – Between minimum of three (one for non-soliciting corporations) and maximum in articles, set by members, or, with member authority, by board	Yes – changed by members and amendment to articles	
Provision for <i>ex officio</i> directors	Yes	Yes			
Notice may be sent to members electronically	Yes, at member’s option	No	As stated in the bylaws		
Voting by Members – to elect/remove directors, approve bylaws, fundamental changes (amalgamation, dissolution, for example)	<b>[to be discussed]</b>	May be classes of members with one vote each, no vote, or multiple votes per member	Same as existing Ontario	One member one vote, unless otherwise stated in Articles	
Proxies	Permitted - optional	Mandatory		Only if articles provide	
Mail-in ballots	Permitted – optional (essential for organizations that have far-flung memberships)	No – decisions must be made “in a meeting”	Permitted - optional	Permitted – if articles or bylaws provide	
Remedy if stalemate – quorum too high, membership not ascertainable, etc.	Yes <b>[to be discussed]</b> . Should be readily available without undue cost. – modelled on the Canada & Saskatchewan provision	No	If for any reason it is impracticable to call a meeting of members of a corporation in the manner in which meetings of those members may be called, or to conduct the meeting in	As in Canada	

<sup>11</sup> This becomes an issue for second-tier organizations that have, as their only members, organizations – currently, on Ontario, the cumbersome work-around is to create a second class of members who are the individuals selected by the organizational members to serve as directors

Effective date of Bylaw	[consider requiring member approval for validity – as in co-operatives]	Upon approval of directors, ceases to have effect if not confirmed by members at next annual members' meeting	the manner prescribed by the bylaws and this Act, or if for any other reason the court considers appropriate, the court, on the application of a director, a member entitled to vote at the meeting or the Director, may order a meeting to be called, held and conducted in any		
<b>6. <u>DIRECTOR'S DUTIES AND LIABILITY</u></b>					
Director's Duty of Care	Yes – as in <i>Business Corporations Act</i> : act honestly and in good faith with a view to the best interests of the corporation; and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.	No duty stated – common law standard applies	As in ONN proposal <sup>12</sup>	As in ONN proposal <sup>13</sup>	
Due diligence defence <sup>14</sup>	Yes	No	Yes <sup>15</sup>		

<sup>12</sup> S. 149

<sup>13</sup> S. 149

<sup>14</sup> Per s. 135 of Ontario *Business Corporations Act*, a director is not liable if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on,

(a) financial statements of the corporation represented to him or her by an officer of the corporation or in a written report of the auditor of the corporation to present fairly the financial position of the corporation in accordance with generally accepted accounting principles;

Conflict of interest	No liability if disclosure – provisions of Canada proposal should be considered	No liability if disclosure	No liability if disclosure - extensive provisions, and it was reasonable and fair to the corporation at the time it was approved. Members may access minutes of directors containing director's disclosures <sup>16</sup>	No contract is voidable if disclosure and it was reasonable and fair to the corporation at the time it was approved	
Directors serve without compensation, except for reasonable expenses	Yes – required for all corporations governed by the <i>Act</i> . Non prohibition for directors and officers being compensated for services other than as a director or officer.	Not required <sup>17</sup> – but imposed as a condition of charitable registration with CRA, and by PGT, through arrangement between it and Ministry, as part of the review of application for incorporation. PGT goes further than CRA required, forbidding directors of charities to be paid for services to the charity outside of their service as directors	Directors' compensation not prohibited by proposed Act, but articles or bylaws may prohibit <sup>18</sup>	Reasonable compensation payable to directors (if authorized by articles)	The decision as to how much an individual director is paid will be a matter for each CIC to decide itself. The Government does not wish to hold back the development of the sector by setting artificial limits. Stakeholders will be able to go to the regulator if they consider remuneration levels are inconsistent with a CIC's community benefit aims. There will be some additional reporting requirements on

(b) an interim or other financial report of the corporation represented to him or her by an officer of the corporation to present fairly the financial position of the corporation in accordance with generally accepted accounting principles;

(c) a report or advice of an officer or employee of the corporation, where it is reasonable in the circumstances to rely on the report or advice; or

(d) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by any such person.

<sup>15</sup> S./ 140

<sup>16</sup> S.142-3

<sup>17</sup> Per s. 126(2) of the Ontario *Corporations Act*, nothing prohibits a director from receiving reasonable remuneration and expenses for his or her services to the corporation as a director or prohibits a director or member from receiving reasonable remuneration and expenses for his or her services to the corporation in any other capacity

<sup>18</sup> S. 144

Directors and officers indemnified against liability for their acts and omissions	Yes – to same extent as directors of business corporations– <b>[to be discussed: should the standard be higher?]</b>	Yes, except for charities - – protection is limited to that authorized by a court, or under the <i>Charities Accounting Act</i>	Yes – to same extent as directors of business corporations <sup>19</sup>	Yes – to same extent as directors of business corporations	directors' pay.
D&O Insurance can be purchased?	Yes – to same extent as directors of business corporations	Yes, but not where director failed to act honestly and in good faith with a view to the best interests of the corporation. Directors of charities – only to the extent authorized by a court, or under the <i>Charities Accounting Act</i>	Yes		
<b>7. <u>ACCOUNTABILITY AND TRANSPARENCY</u></b>					
Ability of members to requisition members' meeting to remove directors	Five percent of members to sign requisition	Five percent of members to sign requisition	Any member may make a “proposal” to an annual meeting, that presumably might include the removal of directors  Prescribed number of members can requisition meeting <sup>20</sup>	As in Canada	
Corporate records open to inspection by members, security holders and donors	Yes – provided discretion in directors to keep portions of directors' meeting minutes/decisions confidential where indicated	Yes – members and creditors only; only directors have access to directors' meeting minutes or decisions, and accounting	Yes – by members and creditors; only directors have access to directors' meeting minutes or decisions, and accounting records. Discretion in Director to	Yes – members only; only directors have access to directors' meeting minutes or decisions, and accounting records	

<sup>19</sup> S. 152

<sup>20</sup> S. 167

Access to membership lists	Yes, constrained for purposes of corporate governance only <b>[Query - Is a statutory declaration sufficient? Consider the proposed Canada provision – s. 23(7) prohibits use for any purpose other than an effort to influence members’ voting, requisitioning members, or any other matter relating to the affairs of the corporation]</b>	records  Yes, constrained for purposes of corporate governance only <sup>21</sup> ; by requiring a statutory declaration to that effect	refuse access, if detrimental to the corporation, or any member  Yes, constrained for purposes of corporate governance only - requires a statutory declaration to that effect <sup>22</sup>	Yes - Director may grant an order exempting the supplying of the list if detrimental to the corporation	
Annual report, including financial report, required to be sent to members, security holders and donors	Yes, at option of recipient, electronically  If donors, also to Corporations Branch Director, available for public inspection	Members entitled to have it placed before them at annual meeting	Financial statements sent to members annually  If soliciting, also to Corporations Branch Director	Financial statements sent to members annually – at least 15 days prior to annual members’ meeting	
Audit of financial statements required	Yes unless annual income is less than that fixed by regulation and all members, security holders and donors consent	Yes unless income less than \$100,000 per year and all members consent	Yes - if soliciting and annual revenue greater than \$250,000; option for “review engagement” if between \$250,000, and \$50,000; if \$50,000 or less, default is “review engagement”  If non-soliciting, yes, if	Yes – if “charitable corporation” and annual revenue greater than \$250,000; members may decide by 80% majority on review engagement” if between \$250,000, and \$25,000; if \$25,000 or less, members may opt by 80% majority not to audit or	

<sup>21</sup> Per s. 306(3) of the Ontario *Corporations Act*: “Purposes connected with the corporation include any effort to influence the voting of ... members at any meeting of the corporation and ...any other purpose approved by the Minister.

<sup>22</sup> See s. 23

Option of volunteer audit committee	Yes, if members agree by majority vote at a members' meeting	Yes, if members agree by majority vote at a members' meeting	annual revenues greater than \$1,000,000, otherwise default is "review engagement"	review "Membership" corporation's members may decide by 2/3 majority vote at a meeting to dispense with audit	
<b>8. CAPITALIZATION</b>					
Securities Regulation	<b>[to be discussed]</b> None, provided that a risk disclosure statement must be delivered if purchase of security exceeds \$X	None – provided constraints complied with <sup>23</sup>	None – securities regulation is within provincial jurisdiction	None – provided constraints complied with	
Investment Restrictions	No – policies to be established by Board of Directors, approved by membership. Avoidance of conflict of interest	Charities duty to invest prudently. No restrictions on non-charities	No	"Charitable corporation" may invest its funds only in financial instruments in which trustees are by law permitted to invest.  Subject to the limitations contained in any gift and the articles or bylaws, a membership corporation may invest its funds	

<sup>23</sup> Non-profit corporations are exempt from prospectus disclosure and dealer registration requirements, under existing provincial securities regulation if organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not for profit in a security of its own issue if

(a) no part of the net earnings benefit any security holder of the issuer, and

(b) no commission or other remuneration is paid in connection with the sale of the security.

In British Columbia, as risk disclosure statement is required if the offering exceeds

Borrowing power	<b>[to be discussed]</b> Unless constrained by articles or bylaw	Only if authorized by bylaw	Unless constrained by articles or bylaw	as its directors think fit Unless constrained by articles or bylaw	
Corporate Finance	Consider provisions similar to Canada proposal	Minimal – badly needs to be updated	Extensive provisions – see Parts 5, to 8 (s. 28 to 124) of the proposal	Division VI to VIII contain extensive provisions	CICs allowed to issue suitably capped investor shares. The Government intends that the cap should be set at a level which will allow CICs to access investment, without undermining their focus on community benefit <sup>24</sup> .

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<sup>24</sup> The Cap has three elements:

- \* The maximum dividend per share limits the amount of dividend that can be paid on any given share. Currently, the limit is 5% above the Bank of England base lending rate.
- \* The maximum aggregate dividend limits the total dividend declared in terms of the profits available for distribution. Currently, the limit is 35% of the distributable profits.
- \* The ability to carry forward unused dividend capacity from year to year to a limited extent. Currently the limit is 5 years.