Renovating the House that Law Built:

A comparative analysis of proposed changes to the governance of Nonprofits and Social Enterprises in Ontario and Quebec

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ABSTRACT
This community-based research was developed in collaboration with the Ontario Nonprofit Network. This is the second of three research reports which will compare different policy dimensions related to social enterprises and nonprofits in Ontario and Quebec. There are significant historical and socio-political contextual differences between the two provinces which are reflected in the relationship of social enterprises with government and to society-at-large. In this report a contextual comparison of Ontario and Quebec is followed by a profile of proposed changes to the legal architecture governing social enterprises and nonprofits in Ontario and Quebec. The response of the nonprofit and social economy organizations to these proposed changes is presented as is an examination of registered charities and social enterprise.

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A CONTEXTUAL COMPARISON

The most significant challenge associated with comparing Ontario and Quebec, provinces with significantly different histories and cultures, is to hold their historical and cultural context intact while also providing a basis for a legitimate comparison to be made. Rather than assuming that the same processes have to be occurring for such a comparison to be legitimate, this study uses a contextual comparison approach. A contextual comparison identifies analytically equivalent developments which may be expressed in very different terms, across different contexts (Locke & Thelen, 1998).

In this study, the analytically equivalent phenomenon which will be compared is the degree to which policies and programs support the initiation, growth, and sustainability of nonprofits and social enterprises. Five research areas will be examined: Legal and regulatory regimes; access to capital and operating funds; organizational or technical development; policy representation; and research infrastructure. This report focuses on access to capital and operating funds.

What's in a name?

There are many ways to compare the relationship of nonprofits and social enterprises in Quebec and Ontario, but one of the more revealing facets of this comparison is the actual way in which social enterprises are defined in the Quebec, and the rest of Canada.

Quebec

The following definition in Quebec is now widely accepted within the province, although Quebec, like others, went through considerable debate about the nature of social enterprises before arriving at the following definitional consensus:

Social enterprises are organizations which produce goods and services with a clear social mission which:

- Aim to serve its members or the community, rather than striving for profit;
- Are independent of the state;
- Establish a democratic decision-making process in its statutes and code of conduct, requiring that users and workers participate;
- Prioritize people and work over capital in the distribution of revenue and surplus; and
- Base its activities on principles of participation, empowerment, and individual and collective responsibility. (Neamtan, 2005, p.72).
This particular definition of social enterprise explicitly articulates its relationship to the state (independent), users and community (service and participation) and workers (democratization and participation), reflecting its desire to operate not only within the economy for social purposes, but also in society as a whole for its collective benefit. Independence from the state is liberally defined, as the Quebec provincial government is a major contract funder of social enterprises, resulting in cases where a real sense of ‘independence’ is sorely tested. For example, the technical service provision in home care contracts have defined the nature of the relationship between social enterprises and local governments, pushing broader social issues to the side - a circumstance all too familiar to nonprofit organizations in other parts of Canada.

As inclusive as this definition may appear, it excludes co-operatives and nonprofits which do not exchange their goods in the market; a distinction which is not prevalent outside Quebec.

Ontario
In Ontario, and indeed the rest-of-Canada, the definition of social economy takes on a more utilitarian and complex perspective. There is certainly no one definition which is consistently used and tend to be highly contextual. Jack Quarter has examined the contested nature of the social economy for some time and each iteration seems to reveal a new level ambiguity concerning where social enterprises end and public or private sectors activities begin (Quarter, 1992; Quarter, Mook, & Armstrong, forthcoming; Quarter, Mook, & Richmond, 2003). For example, social enterprise is also known as social business enterprises, nonprofit enterprise, social purpose business and social venture (Quarter, et al., forthcoming). Social enterprises are one but one of several forms of organization within the broader social economy. Jack Quarter and colleagues (forthcoming, p. 142) have chosen to define social enterprise as follows:

A social enterprise is a form of community economic development in which an organization exchanges services and goods in the market as a means to realizing its social objectives or mission.

Quarter, Mook, and Armstrong differentiate between social economy businesses and social enterprises. According to Quarter et al, social economy businesses earn their total revenues from the market while social enterprises earn a portion of their revenues from the market which is supplemented with substantial and extended assistance (Quarter, et al., forthcoming). The A-WAY EXPRESS Courier Service in Toronto would be one such example.
This definition and similar ones found in English Canada reflect the same focus on the production of goods and services for the benefit of individuals and their community as does the definition used in Quebec, yet it portrays an interdependent relationship with the state. Workers, when they are referenced, are more often seen as beneficiaries rather than co-creators in the social enterprise. As we will see, the growth of social enterprises is just one manifestation of the rich yet largely independent histories of social enterprises in Ontario and Quebec.

**Quebec: Defined by its History**

The history of social enterprises in Quebec is a microcosm of the very history of the province itself. Without some understanding of the nature of this history, a comparison with another province is not only superficial; it undermines the very essence of what makes social enterprises as strong as they are in Quebec. It is no coincidence that every resident author who profiles the broader social economy in Quebec either references or repeats the history of social enterprises. For this history is not one of simple economic progress or diversity, but is one of economic emancipation, independence, and nationalism.

In the early 1900s Quebec’s large natural resource manufacturing companies were largely controlled by foreign and English-Canadian capital. Francophone Quebeckers for their part, were very active in family owned businesses in industry and agriculture (Lévesque & Ninacs, 2000). The agricultural-based co-operatives and savings and credit industries (e.g. caisse populaire) emerged with the support of the Catholic Church in the 1800s. This continued until the Quiet Revolution in the early 1960s when major resource industries such as Hydro Quebec were nationalized and co-operatives flourished. As a result, Quebec has the largest concentration of co-operative businesses, unions, and crown corporations in Canada, if not North America (Ninacs, 2003). In addition, the sleeping giant of small family owned businesses prospered in a climate which recognized the value of such enterprises. Development capital investments are dominated by investments in Quebec, supporting both enterprise and the prosperity of Quebec.

These developments were supported by both the provincial and federal governments for political as well as economic reasons (Lévesque & Ninacs, 2000). Parallel to these economic initiatives in the 1970s and 1980s were a number of systemic changes to the delivery of health and social services and an active and engaged citizen’s movement, particularly in areas where there was chronic unemployment and inequality, such as the city of Montreal.¹

¹ The unemployment rate in Quebec for 1996 was 11.3 per cent, more than 40 per cent in certain areas of the province, and more than 14 per cent in the city of Montreal. In Montreal the unemployment rate in certain low-income districts was more than 20 per cent and much higher for women and youth (Mendell, 2002, p. 336).
This new sense of pride in being a Quebecer manifested itself in a number of ways, including radical unionism, the separatist movement, enactment of laws to protect the French language, and in some cases unprecedented collaboration among state, labour, private sector (including co-operatives) and non-government community organizations. According to Levesque and Ninacs (2000), when the Summit on the Economy and Employment took place in October 19962, it was rooted in a thirty-year tradition of tripartite cooperation.

The Summit on the Economy and Employment in 1996 was preceded by an event which many view as the singular turning point in catalyzing support for the social economy in Quebec. In June 1995, the Fédération des femmes du Québec3 organized a ‘Bread and Roses’ Women’s March Against Poverty. As reported by Mendell (2002, p. 322):

Hundreds of women from all regions of Quebec marched over two hundred kilometres for ten days and mobilized tremendous support throughout the province, including [that of] local, regional and provincial governments. They arrived at the National Assembly in Québec City on June 4th and presented the government with nine demands, each and all of which were to address the level of poverty among women and children and the growing number of socially excluded and marginalized communities in the province of Quebec. ... It [the March] not only forced the government to respond but also to recognize the increasing and vital role played by the women’s movement and the co-operative, associational, and community sectors in the economy.

One of the nine demands which caught the immediate attention of the provincial government was the call for an investment in social infrastructure. The government immediately agreed to make such an investment ($225 million in social infrastructure spending over five years); but even more important, the government opened up a debate on the social economy, its definition and the role of government (Mendell, 2002). A committee comprised of women’s groups and government representatives was formed and it was this committee which reported to the March, 1996 Summit and led to the creation of a subcommittee on the social economy which reported to the October, 1996 Summit on the economy and employment. It was at the October, 1996 Summit on the Economy and Employment that a two year Task Force on the Social Economy was established which in turn led to the creation of the Chantier de L’économie sociale.

Another event took place during the 1996 Summit on the Economy and Employment which has not received as much general attention, but is noteworthy nevertheless. Women’s groups rallied between the March and October summits to have another of their policies

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2 There were two provincial socio-economic summits in 1996. The first, a (national) conference on the social and economic future of Quebec, took place in March and agreed to eliminate Quebec’s deficit by 2000. To the disappointment of women’s movement representatives, this goal took precedence over any plan to fight poverty. This conflict came to a head in the October 1996 Summit on the economy and employment.

3 http://www.ffq.qc.ca/index.html
from the Bread and Roses March put on the Summit’s agenda – that is, the goal of ‘zero poverty’. When Summit delegates failed to adopt this goal, activists from community and women’s groups walked out (Ninacs, 2000; Panet-Raymond, 1999). This division between what one could term social economics and social justice continues to exist for a variety of reasons, both political and ideological. Community activists saw the social economy as yet another in a series of appropriations of the community movement by the state, in this case, as means to address unemployment. At the same time, the influence of community groups on government, particularly, in the definition and delivery of health and social services for example, has been significant and long lasting4 (White, 2002).

The social economy in general and one of its two representative organizations, the Chantier d’économie sociale, has grown from strength to strength as is illustrated by the timeline chart on pages 9 and 10. From 2003 to 2008, the Quebec government invested 8.4 billion dollars in the social economy. The second representative organization within the social economy, representing the co-operative and mutual benefit society dimensions of the social economy in Quebec is the Conseil de la coopération du Québec5. The Conseil de la coopération du Québec has a mission to foster the growth of the co-operatives in Quebec (Favreau, 2006). In November, 2008, the provincial government released a five year action plan which will address 1) a statistical portrait of the social economy in Quebec; 2) research on the social economy; 3) Labour force development within social economy enterprises; 4) The revision of the legal status of non-profit organizations; 5) the updating and development of the information portal for the social economy; and 6) support for international action concerning the social economy (Elson, 2009). At an international level, the interests of the social economy in Quebec have been represented by the Groupe d’économie solidaire du Québec (GESQ) (Le Groupe d’économie solidaire du Québec, 2009).

The social economy has been institutionalized in the province of Quebec; an institutionalization process which is as much a result of its capacity to create employment and produce social goods, as it is the product of a rich history of social and economic emancipation which was led by women and later supported in a sense of solidarity by governments, unions, and corporations.

The ultimate future of social enterprise in Quebec may depend on the extent to which these two significant representative groups embrace a broader definition of the social economy to include not only market-bases social enterprises, but also non-market mutual and nonprofit associations and cooperatives.

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4 For example, from a determinant of health perspective, literacy, affordable housing, and employment programs are health programs.
5 The co-operative movement in Quebec is being researched under a separate initiative led by Ontario Co-operative Association.
Ontario: Operating in Silos

For most of their many years in office in Ontario through the 20th Century, the Conservative party blended conservative fiscal policies with more liberal social policies. With the election of Mike Harris in 1995, following terms by the Liberal and NDP parties, this changed dramatically. On the theme of creating a “common sense revolution”, Ontario politics took a sharp turn to the right, economically and socially. Neo-liberalism took hold as corporate taxes were slashed government programs and benefits to those in need were drastically reduced (Shields & Evans, 1998). At the same time as the theme of solidarity was starting to manifest itself to address high levels of unemployment in Quebec, the Ontario government’s confrontational and divisive style led to teachers’ strikes, downloading of provincial government programs to municipalities, and mandatory workfare for able bodied welfare recipients.

The increase in income inequalities in Ontario spiked during this period, particularly for the most vulnerable, a situation from which many families have yet to fully recover. Before this period of retrenchment, government transfers had made a positive impact on after-market income inequalities. After successive cuts to transfers from federal transfer programs, combined with provincial budget cuts in the mid to late 1990s, income inequalities grew and the gap between rich and poor accelerated across Canada (Elson, 2007; Yalnizyan, 2007).

Voluntary sector organizations experienced the first wave of funding cuts, loss of core funding, and increased competition which has since been institutionalized (Eakin, 2001, 2004, 2007). Most voluntary organizations continue to leap from project to project with an unpredictable impact on mission, staff, and clients. I have described this elsewhere as the transition from citizenship-based program funding to service-based project funding (Elson, 2008).

The government of Ontario has continued to view the voluntary sector in silos, developing relationships which are specific to the interests of a particular ministry, and little thought to the collective contribution of the nonprofit sector as a whole, distinct from volunteering, to the citizens of Ontario. The one exception to this rule would be the contribution of the Ontario Trillium Foundation, but as an agency of government it remains politically sensitive and cautiously progressive.

For its part, sustained representation of the voluntary sector in Ontario has been through clusters of regional alliances, such as the Pillar Nonprofit Network (London) and the Ottawa Chamber of Voluntary Organizations, but until recently there have been few attempts to coalesce around a sector-wide policy issue. This may be changing with the emergence of the Ontario Nonprofit Network and the Social Economy Roundtable, both funded by the
Ontario Trillium Foundation. The same can be said of the important first steps being taken by Social Enterprise Ontario and Social Finance Ontario, other clusters within the Ontario Nonprofit Network.

The absence of a clear, collective voice for the voluntary sector, and a muted desire by the provincial government for any on-going high-level political or policy relationship, combine to extend the status quo of two potential dance partners who operate more in isolation than connection. The silos which define the relationship continue to build connection within particular ministries, but thwart systemic changes across ministries and communities.

A Comparative Context
This research deliberately positions its comparison at a contextual level to avoid distorting this context when profiling individual policies and programs. As the two profiles above highlight, there are fundamental differences in the history, culture, and dominant language in the two provinces. Quebec’s Quiet Revolution in the 1960s manifested itself in new language laws and the nationalization of key resource industries. For its part, Ontario has had a reputation for being the centre of the dominant Canadian establishment and corporate largesse.

When the economic downturn occurred in the mid-1990s, Ottawa responded by slashing transfer payments to provinces (Guest, 1997). Ontario responded with the election of the Mike Harris government which in turn led to protests and conflicts with numerous groups, one of the most vocal and strident of which was with the Ontario Coalition Against Poverty (OCAP). In Quebec, the women’s movement in general and la Fédération des femmes du Québec in particular, led hundreds in a “Bread and Roses” March on the Quebec government and successfully brought the voice of community into the political and policy arena. Where Ontario has a fragmented policy agenda with nonprofits which varies across ministries and virtually none with the social economy; both have flourished in Quebec, particularly in the co-operative and credit union sectors. Ontario has a more decentralized and less coordinated approach than Quebec. Although Quebec definitely has stronger co-op and credit union sectors than Ontario, it is not clear that the same is true for nonprofits in Quebec.

These contextual differences are not incidental, but fundamental to understanding the cultural and political differences which support some policies and marginalize others. These insights are intended to support a contextual comparison across a number of policy areas and a more thorough understanding of nonprofits and social enterprises in both Ontario and Quebec.
Renovating the House that Law Built

Both Ontario and Quebec have reached a point of realization that their corporation acts related to nonprofit statutes are outdated, cumbersome and in need of repair. Within the last two years both provinces have issued consultation papers and invited comments on proposed incorporation changes. Proposed changes covered a wide range of topics from incorporation as a right, a classification system for nonprofits, specific quorum rules for meetings, and governance regulations. This report profiles both the proposed changes and an analysis of the responses received from representative umbrella organizations.

It is important to note that Ontario and Quebec actually operate under two distinct legal systems. Quebec is governed under a civil law code that has legal origins in Roman law as codified in the Corpus Juris Civilis between 528 and 534 A.D. (Tetley, 2000). It was subsequently expanded across Continental Europe. Eventually it divided into two streams, a codified Roman law, of which Quebec and Continental Europe are two examples; and uncodified Roman law, as used in Scotland and South Africa. “Civil law is highly systematized, structured, and relies on declarations of broad and general principles, often ignoring the details” (Tetley, 2000, p.3).

Ontario and the rest of Canada operate under a common law tradition. Common law evolved in England from the eleventh century, embedding its principles within judgements and thus establishing the importance of it traditional reliance on legal precedent. Common law thus is much more prescriptive than civil law and is the foundation for private law, the basis on which nonprofit incorporation rests. A new civil code in Quebec arouse out of the Quiet Revolution in the 1960s, dealing, along with other issues, with substantial changes to family law. The new civil code in Quebec, which came into force in 1994, gives full recognition to the human person and human rights as the central focus of all private law (Tetley, 2000).

The timing of the introduction of specific nonprofit corporation legislation is still unknown. What is clearly understood is that the Corporation Acts under which nonprofits and social enterprises in both Ontario and Quebec operate are a complex web of regulations and statutes which make it difficult for non-profits to register, change their corporate structure, amalgamate or otherwise modify their operating practices in order to sustain their long-term viability and achieve their public or mutual purpose. The two corporation acts have a profound influence on the nature, shape and size of the sector, its independence from the state and its accountability to the public. The reform of these statutes, if and when they do occur, will have a significant and long-lasting impact on non-profits and social enterprises in Ontario and Quebec and as such, it appears to be a challenge well worth the engagement.
QUEBEC’S LEGAL FRAMEWORK FOR NONPROFIT AND SOCIAL ENTERPRISE ORGANIZATIONS

A Nonprofit Organization or social enterprise can incorporate either federally or provincially, depending on the extent of its stated purpose and intended actions. Nonprofit Organizations\(^6\), including both charitable organizations and membership corporations, when incorporated federally, can pursue their activities across Canada under their name. Nonprofit Organizations are incorporate federally under the new Canada Not-for-profit Corporations Act. Applications must be submitted to the federal Minister of Industry, which in turn issues a letter of patent to the newly established corporation.\(^7\)

In Quebec, most nonprofit and social enterprise incorporations are registered in accordance with Part III of the Companies Act. The Companies Act, inspired by English and American legislation, was originally designed to regulate and serve the interests of large companies, the majority of which were created to serve the public interest. Part III, the part of the Act that deals with legal persons or associations with no share capital, was added in 1920. It was created as a copy of its Federal equivalent, the Canada Corporations Act-Part II (1917), which in turn was inspired by the UK’s Industrial and Provident Societies Act (1893) (Labrecque, 2003).

Part III of the Companies Act has become Quebec’s most important legislation governing nonprofits. It clearly defines the nature of nonprofit corporations, the procedures and mechanisms for incorporation and the provisions for operation (see Box A). A nonprofit corporation is defined as a group of at least three members (as opposed to shareholders in a For-Profit Corporation) established and operated exclusively for nonprofit purposes, meaning that its members cannot receive any financial gain\(^8\). The powers of a nonprofit corporation are limited to what is written into its purposes. Most of the provisions in Part I (Constitution of Joint Stock Companies as Legal Persons) of the Companies Act apply to legal nonprofits incorporated under Part III.

Nevertheless, Quebec’s legal and regulatory framework overseeing Nonprofit Corporations is much more diverse and complex. In addition to the Companies Act there are other fourteen general laws (see Box B), eighty-two mixed laws and around fifteen hundred private interest laws governing incorporated associations in Quebec. Mixed laws are distinct from other laws in that mixed laws also provide a mechanism for the formation of other associations. Private interest laws, on the other hand, provide for the rules of operation usually specified in the bylaws of an association. Every time an association intends to create or amend these rules, the National Assembly must enact a bill.

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\(^6\) To simplify the reading of this report, the term nonprofit will be used to represent both nonprofits and social enterprises unless otherwise specified.

\(^7\) For more information on Federal and Provincial incorporation refer to Industry Canada’s Primer for Directors of Not-for-Profit Corporations at www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00691.html (Industry Canada, 2002).

\(^8\) In Quebec, there is no distinction between the different types of nonprofit organizations incorporated under Part III of the Companies Act, and there is no equivalent of the Ontario Charities Accounting Act to distinguish between charitable and non-charitable corporations. Nevertheless, corporations that want to solicit public donations in Quebec are obliged to include certain restrictions in their letters patent.
Box A: Key Articles in Quebec’s Companies Act-Part III

**Article 218:** The enterprise registrar may, by letters patent under his hand and seal, grant a charter to any number of persons, not less than three, who apply therefor, for objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional, athletic or sporting character, or the like, but without pecuniary gain.

**Article 219:** 1° The applicants for such letters patent, who must be at least eighteen years of age, shall file with the enterprise registrar an application setting forth (a) the proposed name of the legal person; (b) the purposes for which constitution as a legal person is sought; (c) the place within Quebec where its head office is to be situated; (d) the amount to which the immovable property which may be owned or held by the legal person, or the revenue therefrom, is limited; (e) the name and the address and calling of each of the applicants, with special mention of the names of not less than three of their number, who are to be the first or provisional directors of the legal person. 2° The application and a memorandum of agreement shall be drawn up using a form supplied for that purpose or authorized by the enterprise registrar. 3° In addition, the application must be accompanied with a research report on the names of persons, partnerships or groups used and entered in the register.

**Article 224:** The sections of Part I of this Act shall apply, with the necessary modifications, to every legal person incorporated or continued under the provisions of this Part, except the following: 3 and 4; 6 and 7; the second paragraph of 8; 11; 13 to 17; 18.1 and 18.2; 34.1; 41 to 43; 45 to 76; 79; 81; 82; 86; paragraphs a and b of subsection 2 of 91; 93; 94; 96; paragraphs j and k of subsection 3 of 98; 102; 103; paragraphs d and e of subsection 1, and subsection 2 of 104; 113; 114; 122, 123 and 123.0.1.

**Article 226:** The members shall not be personally responsible for the debts of the legal person.

**Article 227.1:** A cooperative that is liable to be dissolved under section 188 of the Cooperatives Act (chapter C-67.2) may, if the minister responsible for the administration of the Cooperatives Act has approved its continuance plan under section 259 of that Act, apply to the enterprise registrar for the issue of letters patent in order for it to continue under this Part.

Box B: General Laws Regarding the Formation of Associations in Quebec

1869 : [Loi sur les sociétés d’horticulture](https://example.com) ([Horticultural Societies Act](https://example.com))
1870 : [Loi sur les compagnies de cimetière](https://example.com) ([Cemetary Companies Act](https://example.com))
1885 : [Loi sur les clubs de chasse et de pêche](https://example.com) ([Fish and Game Clubs Act](https://example.com))
1887 : [Loi sur les clubs de récréation](https://example.com) ([Amusement Clubs Act](https://example.com))
1889 : [Loi sur les sociétés agricoles et laitières](https://example.com) ([An Act Respecting Farmer’s and Dairymen’s Associations](https://example.com))
1897 : [Loi sur les sociétés nationales de bienfaisance](https://example.com) ([National Benefit societies Act](https://example.com))
1905 : [Loi sur la constitution de certaines Églises](https://example.com) ([An Act Respecting the Constitution of Certain Churches](https://example.com))
1915 : [Loi sur les sociétés préventives de cruauté envers les animaux](https://example.com) ([An Act Respecting Societies for the Prevention of Cruelty to Animals](https://example.com))
1920 : [Loi sur les compagnies partie III](https://example.com) ([Companies Act Part III](https://example.com))
1924 : [Loi sur les syndicats professionnels](https://example.com) ([Professional Syndicates Act](https://example.com))
1950 : [Loi sur les évêques catholiques romains](https://example.com) ([Roman Catholic Bishops Act](https://example.com))
1960 : [Loi sur les corporations de cimetières catholiques romains](https://example.com) ([An Act Respecting Roman Catholic Cemetery Corporations](https://example.com))
1965 : [Loi sur les fabriques](https://example.com) ([An Act Respecting Fabriques](https://example.com))
1971 : [Loi sur les corporations religieuses](https://example.com) ([Religious Corporations Act](https://example.com))
1982 : [Loi sur les sociétés d’initiative et de développement d’artères commerciales](https://example.com) ([An Act Respecting Societies for the Development of Main Streets](https://example.com))

Source: Labrecque, 2003
Incorporating Nonprofits as a Legal Person

Nonprofits in Quebec are incorporated by letters patent (sometimes called a ‘charter’) issued by the Registraire des entreprises Quebec (Ministere du Revenu du Quebec).9 The first step for incorporation is to obtain a Name Research Report and reserve a name (optional). The report ensures that the chosen name meets all criteria prescribed by regulation and is not identical to another natural or legal person. Reserving a name ensures that the enterprise registrar will not accept a name identical to the one that is being proposed for incorporation (for a period of ninety consecutive days). Subsequently, an application for Constitution as a Nonprofit Legal Person form must be filled and submitted alongside the Name Research Report, the Name Reservation (if applicable) and the required payments.

There are particular specifications that have to be considered when submitting an application to Quebec’s Registraire des entreprises. First of all, the corporate name must not be identical to a name used by another natural or legal person, and it has to comply with Quebec’s Charter of the French Language, the provisions of section 9.1 of the Companies Act and the provisions of the Regulation Respecting Commerce and Business Language. Secondly, since the goal and justification of a legal person are found in its purposes, these have to be written out carefully and precisely. The guide for ‘Creating a Nonprofit Legal Person’ in Quebec is very specific regarding this issue:

“The purposes of the legal person must not contravene public policy statutes or public decency. They must be spelled out with precision, succinctly and without repetition, while still showing, on the one hand, that these activities are strictly non-profit and demonstrate no intention of making monetary gains for the members of the future legal person and, on the other hand, that all profit or other increases of the legal person will be used towards reaching its goals” (Registraire des Enterprises, 2007, p. 6).

Demonstrating the nonprofit nature of the legal person is key. However, it is not necessary to specify the means that the organization intends to use, nor the activities that it plans to pursue in order to realize its purposes. It does not need to specify its internal government rules either as its general regulations no longer need to be approved by the enterprise registrar.

9 For more information regarding Nonprofit incorporation in Quebec refer to www.registreenterprises.gouv.qc.ca and www.infoentrepreneurs.org
If nonprofit legal persons wish to collect funds through public fundraising or using any other mechanism, they must specify this in their application for incorporation. Additionally, if they wish to acquire shares of business corporations or borrow money and mortgage their property, they must also specifically add a provision to their incorporating document.\textsuperscript{10}

If the application is approved, The 	extit{Registraire des entreprises} issues the letters patent and files a copy with the Quebec register of enterprises. Once these letters patent are filed, the legal person is registered. A copy of the letters patent is then sent to the legal person, along with an Initial Declaration, which must be completed and returned within sixty consecutive days of the registration date.

Once the nonprofit organization is incorporated, it acquires a legal status separate and distinct from its members. Individual members are now generally shielded from liability and as a legal person it can enter into contracts and other economic and bureaucratic transactions with other entities. Incorporation allows a Québec enterprise number (NEQ) to be obtained, a number used as an identifier for companies in their communications with the enterprise registrar, or when the nonprofit corporation wants to register for various Québec government programs or services.

When a nonprofit corporation or social enterprise is registered, it is responsible for fulfilling a number of legal obligations outlined in the Act Respecting the Legal Publicity of Sole Proprietorships, Partnerships and Legal Persons. Among other responsibilities, nonprofits must update their registration information every year by producing an Annual Declaration or Information return. If they are eligible to file an income tax return, they may file both returns in one simple operation.

\textsuperscript{10} The Companies Act gives the board of directors the power to adopt a by-law in order to acquire shares of business corporations (Sect. 44, 224) and/or borrow money and mortgage the property of the legal person (Sect. 77, 224). However these by-laws must be approved by a vote of at least two thirds of the members present at a general meeting. This can be avoided however if such activities are specified in the application for incorporation (Registraire de Enterprises, 2007)
Nonprofits and Quebec’s Taxation Regime

Quebec’s nonprofit taxation regime roughly parallels the federal system. Nonprofits in the Quebec are exempt from income and capital tax if they are established and operate exclusively for not-for-profit purposes. Entitlement to these benefits is based on the organization’s purposes as stated in the letters patent and articles of incorporation. Objectives and activities are reviewed each taxation year in order to ensure continued eligibility.

A nonprofit will not be exempted from income or capital tax if its income is paid to its members or made available for their personal benefit (during regular operations or processes of dissolution, liquidation or amalgamation). However, some payments are accepted, such as salaries, wages, remuneration or fees for services, as well as amounts to cover expenses incurred for member’s attendance to meetings intended to further the objectives of the organization.

A nonprofit corporation or social enterprise with income exceeding its expenses does not necessarily lose its right to a tax exemption. However,

“Where a substantial portion of the surplus amount is capitalized each year and the balance is eventually greater than the amount the NPO reasonably requires in order to carry out its non-profit activities, profit can be considered one of the objectives of the organization. In this case, the organization is no longer exempt from income tax or the tax on capital” (Revenu Quebec, 2005, p.9).

Furthermore, nonprofits lose their right to tax exemptions if they use their surpluses for purposes unrelated to their original purposes, such as engaging in ordinary commercial activities or long-term investments.

Incorporated nonprofits have to file a yearly corporation return (Déclaration de revenus des sociétés) and must collect GST and QST and remit them to Revenu Quebec if they make taxable sales and are registered to do so. They are also required to keep detailed registers so that the amounts indicated on their returns can be verified if Revenu Québec carries out an audit.

11 For more information on Nonprofits’ Taxation Regime in Quebec refer to www.revenu.gouv.qc.ca
12 Nonprofits are required to register for the GST and the QST if their total taxable sales exceed $50,000 in the four calendar quarters that immediately precede a given quarter. NPOs whose taxable sales do not exceed this threshold are considered small suppliers and are not required to register for the GST and the QST. If an NPO’s taxable sales exceed $50,000 during a calendar quarter, the NPO loses its small supplier status immediately. An NPO that has more than one branch or division may elect to have its branches and divisions considered to be separate for GST/QST purposes (Revenu Quebec, 2005:13,14).
To become a registered charity in Quebec, as in all other provinces and territories, nonprofits must first register federally with the Charities Directorate of the Canada Revenue Agency. Once registered, they can then file an application for charity registration with Revenu Quebec. They can be registered either as a charitable organization or a public/private foundation. To preserve its registration, a charity in Quebec must:

“Devote all its resources to charitable activities or, in the case of a private or public foundation, be operated exclusively for charitable purposes. 
It must not carry on a business. However, a charitable organization or a public foundation may carry on a business related to the objectives set forth in its governing documents, or a business in which all or substantially all of the employees are not remunerated by the organization or foundation” (Revenu Quebec, 2009).

In addition, a registered charity has to file an information return and spend a specific amount for each taxation year. This amount, also called ‘disbursement quota’ corresponds to eighty percent of all gifts for which the organization issued official receipts during the previous taxation year.

CIRIEC-CANADA: Limitations of Quebec’s Nonprofit Legal Framework
The Centre for Interdisciplinary Research and Information on Community Enterprises (CIRIEC-Canada) is a nonprofit scientific association interested in all forms of community enterprises and economic activities performed in the public or general interest. Its scope of study deals with the overall structures and characteristics of the associative, community, cooperative, mutual and semi-public economies. In 2003, CIRIEC’s Working Group on the Legal Status of Associations published a series of reports addressing the different issues regarding incorporation and general legal framework of nonprofits. One particular report13 explored the different legal challenges and limitations faced by incorporated nonprofits in Quebec. The most relevant legal challenges and limitations can be summarized as follows:

A Scattered Legal Framework
The legislative framework applicable to most incorporated nonprofits can be described as a patchwork of outdated laws. Most incorporated nonprofits are regulated by part III of the Companies Act, which dates back to 1920; but as previously noted, there are fourteen general laws, eighty-two mixed laws and almost fifteen hundred private interest bills regulating nonprofit operations and modes of organization. There is no single comprehensive piece of legislation that addresses the current specificities of incorporated nonprofits in Quebec.

Rigid and Formal Requirements
The intervention of the state is central in the incorporation process. Incorporation is not a right in itself, as the state alone has the power to grant nonprofits their legal status. According to the CIRIEC-Canada report, this system is widely criticized because it represents a clear interference in private affairs, is exposed to potential arbitrary application of the law, and can significantly delay the incorporation process (CIRIEC-Canada, 2003).

Nonprofit organizations, although incorporated under Part III of the Companies Act, are subject to most provisions of the more general Part I of the Act. This means that many measures regarding the organization and operation of for-profit companies are imposed on nonprofits. Many of these measures, however, are not always aligned with the particular size and context of nonprofit organizations. For example, the Companies Act demands that incorporated associations function with two distinct bodies, a board of directors and an assembly of members. It also requires associations to hold a general meeting every year and to obtain a majority approval during general meetings before adopting, amending or revoking bylaws and regulations. Many nonprofits are small organizations and are usually run by their members. They generally do not need an annual meeting and/or cannot cope with a dual structure that demands multiple meetings attended by the same people (CIRIEC-Canada, 2003).

Furthermore, according to Part III of the Companies Act, incorporating a Nonprofit requires three founders; a formal requirement that is inconvenient and unnecessary for many nonprofits. The law also requires incorporated association to have multiple administrators. This means they must have a functional, democratically elected Board of Directors. This specific requirement, noted the CIRIEC-Canada report, inhibits nonprofits’ freedom of organization and operation, and ignores the particular context in which nonprofits operate (CIRIEC-Canada, 2003). Moreover, mandatory elections for board members every two years ignores the fact that not all associations are intended to be democratic, and that other models might be better suited for some nonprofits. These and many other measures imposed by the Companies Act are unnecessarily formalistic and far from reflecting the reality of Quebec’s nonprofit sector (CIRIEC-Canada, 2003).
Restricted Financing
Quebec Law grants Incorporated nonprofits the right to finance their activities through mortgage-backed loans. This mechanism is rarely used though, not only because Provincial regulations regarding this issue can be misleading, but also because most nonprofit organizations have limited assets to back such loans. They can also finance their activities through grants or donations, a mechanism governed by Quebec’s Civil Code.

Article 222 of the Companies Act on the other hand, gives associations the right to demand contributions and fees from its members; however, the Act strictly prohibits associations the use of equity as a financing mechanism. Legislation does not allow incorporated associations to issue shares. This results in limited capital and assets and, as a consequence, restricted access to other forms of traditional financing. They cannot, for example, take full advantage of the Act Respecting Assistance for the Development of Cooperatives and Non-Profit Legal Persons, since the lack of preferred shares seriously inhibits their capacity to guarantee government sponsored loans (CIRIEC-Canada, 2003).

Little Control over Use of Donations
It is important that associations soliciting grants or donations for a particular purpose use these collected amounts for the purposes for which they were given. However, Quebec Law has serious limitations in relation to the protection of donations and their purposes. Basically, there are no general laws addressing the issue of donations. Regulation related to donations can be found in voluntary standards or some provisions related to fiscal or liquidation/dissolution matters. The Civil Code does have provisions on donations, foundations and trusts but they refer to individual relationships. Even though these provisions can inspire certain rules of conduct, there is still a gap in terms of laws for managing and protecting the objectives of grants within the nonprofit sector (CIRIEC-Canada, 2003).

14 Under Articles 2684 and 2685 of Quebec’s Civil Code, only a person that operates an enterprise (as defined by article 1525) can mortgage the totality of its assets. However, this is an erroneous impression, as the Loi sur l’application de la reforme du Code civil, by amending the pertinent articles, grants the borrowing capacity to legal persons even if they do not run an enterprise (CIRIEC-Canada, 2003).

15 Some Associations can issue ‘shares’ or membership cards in return for cash and/or asset contributions. However, the law does not allow them to pay dividends. This limits the capacity of Associations to offer incentives and attract investors.

16 Revenu Quebec demands Charitable Organizations to provide information regarding gifts and grants. This process acts as a form of control over the administration of donations.

17 When incorporating a Nonprofit that intends to raise funds for charitable purposes, under part III of the Companies Act it has to include a clause clearly stating that in the event of liquidation, acquired assets cannot be distributed among members, they have to be devolved upon an organization involved in a similar activity.
Limited Capacity to Change Legal Form

Quebec law strictly limits the capacity of individual and groups to transform or change their legal form. It allows for some regime changes within a particular legal form and, in fewer cases, changes in the actual legal form (see Box C). The Law does not allow individuals or groups with other legal forms to directly transform into an incorporated association. To do so, they must take a lengthier, more expensive and complex indirect route. For example, if a Contractual Association\textsuperscript{18} wishes to transform into and Incorporated Association, it must first found such an entity, then sell all of its assets and finally dissolve and liquidate the Association Contract (CIRIEC-Canada, 2003).

\begin{center}
\begin{tabular}{||l|p{12cm}||}
\hline
\textbf{Article 14:} & Transformation of a company incorporated under a General Law before 1920 into a company governed by Part I of the Companies Act \\
\hline
\textbf{Article 17:} & Transformation of a legal person without share capital (constituted under Part III of the Companies Act) into a joint stock company. \\
\hline
\textbf{Article 123:} & Transformation of a company governed by Part I of the Companies Act to one governed by Part IA \\
\hline
\textbf{Article 221:} & Transformation of Nonprofit legal persons created under any special or general Act into a corporation governed by Part II of the Companies Act. \\
\hline
\end{tabular}
\end{center}

\textsuperscript{18} An association founded by contract.
REFORMING QUEBEC’S NONPROFIT LEGAL REGIME: PROPOSED LAW OF INCORPORATED ASSOCIATIONS

In the context of a scattered and obsolete legislative framework for incorporated associations, Québec’s Registraire de entreprises initiated a process of reform through a working paper and a series of consultations in 2005. However, the preliminary proposal presented to the Provincial National Assembly was rejected. In October 2008, Québec’s Ministère des Finances submitted to the general public a revised consultation document, entitled, Reform Working Paper, Law of Incorporated Associations outlining what could be a new legal framework for incorporated associations in Quebec. This new framework is intended to replace Part III of the Companies Act, as well as other general Laws governing nonprofits in the Province.

The Working Paper divides the proposed changes into five sections:

Founding an Association
Founding an association should be a right as opposed to a privilege granted by the state. The State would have therefore no control over the objectives proposed by associations. Associations would require a minimum of two members, as opposed to three, for its formation; and their names should end with the letters I.A. (Incorporated Association) to illustrate their legal structure. Egalitarian associations would be allowed to show their difference by using the letters E.I.A. When filing a Declaration of Constitution with the Registraire de entreprises, associations should declare, besides their objective, whether or not they intend to solicit public donations.

By-laws and Membership
In the current legal regime, the power to adopt and amend by-laws belongs to the board of directors of the nonprofit. The working paper suggests that fundamental decisions would have to be made or approved by the members of the association, or the members of a certain category specified in the by-laws. Associations could determine themselves, through their by-laws, the percentage of the vote required for approving fundamental decisions, the means and mechanisms for decision making, categories of members and their different rights, and the existence of quorums and proxy voting during assemblies.

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19 ‘Incorporated Associations’ is the term used in Quebec for Incorporated Nonprofits/Nonprofit Legal Person
20 During the consultation period more than 400 briefs were submitted
22 Fish and Game Clubs Act; Amusement Clubs Act; An Act respecting societies for the prevention of cruelty to animals; National Benefit Societies Act; An Act respecting farmers’ and dairymen’s associations; and the Horticultural Societies Act.
23 In egalitarian associations members have equal rights and obligations
24 Fundamental subjects include the election of directors, changes to the association’s purposes, conditions for the admission of new members, financial obligations.
Directors and Administration
As opposed to a minimum of three directors mandated by the current legislation, the working paper suggests that a nonprofit board should be made up by one or several directors. Smaller associations could specify in their by-laws that each of its members is also a director; this would lead to the disappearance of the ‘assembly of members’ structure and a simpler administrative system. Directors should also have some liability regarding the payment of salaries to association employees if they are themselves paid for their work. Bookkeeping could be minimal, unless the association sought and received donations.

Donations
Additional regulations should be applied to associations receiving public donations. They would not be required to hold their own patrimony distinctly from that of the funds or other property donated. They would be required however, to maintain detailed accounting showing the source and use of such funds. Such information should be available to the public. In addition, associations receiving donations would be required to have at least five members and five directors, half of each should be independent from each other.

Transformation
Contrary to the current legislation, the working paper recommends that contract associations be allowed to transform and continue their existence as incorporated associations. It also proposes that a nonprofit be allowed to merge with another association without necessarily having to found a new association. Currently, to wind up associations must obtain the consent of its creditors; the Working Paper suggests abandoning this measure. It also suggests that all assets of a liquidated association which were given by third parties should be remitted to another legal person or trust with similar objectives.

25 In practice these rules would apply mainly to associations with registered charity status. These rules would not apply to subsidies granted by public organizations.
26 An exception to this rule could be made if the association is less than one year old and/or received less than $30,000 in the preceding fiscal year. In these cases they would only require three directors and three members.
Renovationg the House that Law Built:  
A comparative analysis of proposed changes to the governance of Nonprofits 
and Social Enterprises in Ontario and Quebec

Law of Incorporated Associations’ Working Paper:  
Reactions and Suggestions of Quebec’s Nonprofit Sector

The consultation process to review the legislative framework concerning incorporated 
associations in Quebec ended in March 2009. The Ministry received ninety-eight briefs 
from a wide range of stakeholders in the nonprofit sector. An in depth analysis of nine of 
these briefs from broad-based and widely recognized provincial organizations (see Box D) helps us to understand and comprehensively portray the extent and type of response of the nonprofit sector. These nine briefs were chosen based on the relevance and importance of the organization, the scope of their representation and the substantial nature of their submissions. They are intended to reflect the inclusive and diverse nature of Quebec’s nonprofit sector.

Box D: Analyzed Briefs by Organization

- Chantier de l’economie sociale
- Coalition des tables regionales d’organismes communautaires
- Conseil quebecois de la cooperation et de la mutualite
- Fonds d'emprunt economique communautaire
- Corporation de developpement economique communautaire
- Regroupement des Corporations de developpement economique communautaire
- Reseau quebecois de l'action communautaire autonome
- Table des regroupements provinciaux d'organismes communautaires et benevoles
- Societe canadienne des directeurs d'association

In general, the nine organizations welcomed the Working Paper and the consultation 
process initiated by Finances Quebec. The nine provincial organizations the Working Paper as recognition of the obsolescence of the current legal framework for nonprofits, and a step forward towards legislation which would respond to the needs and particular circumstances of the sector. Even though the provincial organizations recognized that the Working Paper included positive reforms and initiatives, they categorically reject some of the proposals and as a result, do not support the document as a whole. Furthermore, as expected, there was not an undivided position in every aspect of the Working Paper. Some proposals were unanimously accepted, some were unanimously rejected and others were subject to conflicting positions.

27 All the submitted briefs can be found at http://www.finances.gouv.qc.ca/en/page.asp?sectn=2&contrm=259
Unanimous Approval
All the nine organizations agree with the Working Paper in that the possibility of founding an association should be a right as opposed to a privilege granted by the state and that the incorporation process should be kept simple and accessible. They also fully agree with the proposal of increasing the power of members to make fundamental decisions regarding their own association. Many organizations go a step further and suggest additional topics that could potentially be considered as ‘fundamental’, and therefore, could be controlled by members. Examples include the adoption of membership policies, the election or dismissal of administrators, the adoption of strategic and action plans, and the ratification to changes in bylaws. However, according to the Corporation de developpement economique communautaire de Quebec, it is important to consider that if powers are taken from directors and given to members, this process should be accompanied by a removal of the liabilities for such decisions.

Almost Unanimous Approval
Almost all the nine organizations, except the Reseau quebecois de l'action communautaire autonome, supported the proposal of including whether or not an association intends on soliciting public donations in their declaration of constitution. According to the Chantier de l'economie sociale, incorporating associations should also declare their intent to solicit investments for capitalization. Most organizations agree with the proposal of giving associations the capacity to self determine their different administrative and decision-making processes (voting ratios, quorums, decision-making mechanisms, use of proxies in meetings, categories of members and their rights). It was only the Coalition des tables regionales d'organismes communautaires that was opposed to the idea of an association self determining the quorums for its meetings and in some cases, as suggested by the Working Paper, having no quorum at all.

Unanimous Rejection
All the analyzed organizations unanimously rejected the idea of founding an association with a minimum of two members. They all believe that the current legislation that requires at least three members to found an association is appropriate. Furthermore, they feel that three members is not a strict requirement and that, as expressed by the Regroupement des Corporations de developpement economique communautaire, the inability to find more than two members speaks volumes of the relevance of the association. They all also reject the idea that, as with business corporations, associations could incorporate with the possibility of having only one director in their board. They all stressed that having at least three people
contributes to good governance, sound management, accountability and democratic practices. For small organizations wishing to simplify their management structure, the *Chantier de l'économie sociale* and the *Regroupement des Corporations de développement économique communautaire* suggested that their boards simply delegate management responsibilities to one person.

Another proposal that was rejected was the idea of distinguishing and labeling egalitarian associations. All organizations basically feel that such a division does not add value to the Incorporated Association concept, that it creates confusion and that it could potentially foster an unnecessary hierarchical structure. The *Chantier de l'économie sociale* suggested adopting an approach in which the obligations of associations are determined based on their mission, activities and funding sources.

**Almost Unanimous Rejection**

All the surveyed memoires presented to *Finances Quebec*, except the one submitted by the *Société canadienne des directeurs d'association*, categorically rejected the proposal of association directors being liable for the payment of employee salaries when they are themselves remunerated for their work. The *Regroupement des Corporations de développement économique communautaire du Québec*, for example, believes that a director’s automatic liability in terms of deductions and taxes is already a problem and that the possibility of being personally sued in such cases seriously hinders the capacity to recruit a voluntary board member. The coalition proposed instead to exclude directors from any liability except in cases of gross negligence or fraud. For the *Table des regroupements provinciaux d'organismes communautaires et bénévoles* the provisions included in the Civil Code are adequate and sufficient.

The Working Paper suggested that small organizations could simplify their administration by specifying in their bylaws that every member is also a director. As a result, the Assembly of Members structure would disappear. All the organizations, except again the *Société canadienne des directeurs d'association*, rejected this proposal. All the organizations basically thought that such a proposal went against the democratic principles of associations and seriously undermines transparency and accountability.
Conflicting Positions
There are three main propositions in the Working Paper that generated substantial debate within Quebec’s nonprofit sector. The first proposition stated that the property of a liquidated association which was given by third parties should be remitted to another legal person. Organizations like the Table des regroupements provinciaux d’organismes communautaires et benevoles and the Societe canadienne des directeurs d’association generally agreed with this proposal. On the other hand, organizations like the Chantier de l’économie sociale and the Reseau quebecois de l’action communautaire autonome rejected any possibility of sharing accumulated assets regardless of their sources (member or external). Furthermore, they believe that surrendering assets upon dissolution to another legal person with similar goals should be mandatory.

Another proposal which generated debate was the idea that associations should make public all the documents and information related to the donations they receive and how they use them. The Chantier de l’économie sociale and the Regroupement des Corporations de developpement economique communautaire recognized that the proposal is pertinent because increased transparency is extremely important. However, they also felt that too much transparency could have a negative impact, particularly for associated social economy enterprises whose competitiveness could be affected by excessive transparency. They proposed the creation of mechanisms to protect sensitive information and that these mechanisms be applied to associations receiving government grants as well. The Corporation de developpement economique communautaire suggested that making information regarding donations available to the public should not be mandatory. They argued that the fact that an association may or may not publish its financial statements is in itself an indicator of transparency. If supervision is required, it should be carried out by an ombudsman present in every region of the Province.

The third contentious issue was the proposed idea of additional rules for associations receiving donations. The Chantier de l’économie sociale and the Societe canadienne des directeurs d’association agreed with this proposal. The Corporation de developpement economique communautaire argued that additional rules are important, but that the proposed measures in the Working Paper do not guarantee the effective use of donations. On the contrary, the Coalition des tables regionales d’organismes communautaires and the Reseau quebecois de l’action communautaire autonome argued that additional measures would not be necessary as they propose that all nonprofits should be automatically recognized as charities. This latter point raises an interesting jurisdictional issue as to date provinces have exercised little or none of their constitutional jurisdictional powers over charities.
Table 1: Summary of Proposed Changes to the Law of Incorporated Associations and General Position of the Analyzed Nonprofit Organizations

<table>
<thead>
<tr>
<th>Proposed Change</th>
<th>Analyzed Organization’s Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Founded an Association</td>
<td></td>
</tr>
<tr>
<td>Constitution as a right</td>
<td>Unanimous Approval</td>
</tr>
<tr>
<td>Two People to Form and Association</td>
<td>Unanimous Rejection</td>
</tr>
<tr>
<td>Distinguish Associations soliciting donations</td>
<td>Almost Unanimous Approval</td>
</tr>
<tr>
<td>Distinguish Egalitarian Associations (E.I.A.)</td>
<td>Unanimous Rejection</td>
</tr>
<tr>
<td><strong>Bylaws and Members</strong></td>
<td></td>
</tr>
<tr>
<td>Members with decision-making powers on fundamental issues</td>
<td>Unanimous Approval</td>
</tr>
<tr>
<td>Self determination of voting ratios and majorities</td>
<td>Unanimous Approval</td>
</tr>
<tr>
<td>Self determination of categories of members and their rights</td>
<td>Unanimous Approval</td>
</tr>
<tr>
<td>Self determination of decision making mechanisms</td>
<td>Unanimous Approval</td>
</tr>
<tr>
<td>Self determination of quorum (No quorum suggested)</td>
<td>Almost Unanimous Approval</td>
</tr>
<tr>
<td>Self determination of use of proxies</td>
<td></td>
</tr>
<tr>
<td>(No proxy representation suggested)</td>
<td>Unanimous Approval</td>
</tr>
<tr>
<td>Administration</td>
<td></td>
</tr>
<tr>
<td>All members appointed as directors (no assembly)</td>
<td>Unanimous Rejection</td>
</tr>
<tr>
<td>Minimum one administrator</td>
<td>Unanimous Rejection</td>
</tr>
<tr>
<td>Directors Liable for Salaries</td>
<td>Almost Unanimous Rejection</td>
</tr>
<tr>
<td>Minimum bookkeeping</td>
<td>Almost Unanimous Approval</td>
</tr>
<tr>
<td><strong>Transformation, Dissolution, Liquidation</strong></td>
<td></td>
</tr>
<tr>
<td>Transform from contract to incorporated association*</td>
<td>Unanimous Rejection</td>
</tr>
<tr>
<td>Streamlined amalgamation*</td>
<td>Unanimous Approval</td>
</tr>
<tr>
<td>Dissolution should not depend on creditors*</td>
<td>Unanimous Approval</td>
</tr>
<tr>
<td>Third party assets remitted to other association when liquidating</td>
<td>Conflicting Position</td>
</tr>
<tr>
<td><strong>Rules on Taxation and Donations</strong></td>
<td></td>
</tr>
<tr>
<td>Additional Rules for Associations receiving donations</td>
<td>Conflicting Position</td>
</tr>
<tr>
<td>No separate accounts for own and donated assets*</td>
<td>Unanimous Approval</td>
</tr>
<tr>
<td>More directors (at least 5) if receiving donations*</td>
<td>Conflicting Position</td>
</tr>
<tr>
<td>Information regarding donations available to the public</td>
<td>Conflicting Position</td>
</tr>
</tbody>
</table>

*These proposals were not addressed by all of the analyzed organizations; most were addressed by only two or three organizations*
Associations and Share Capital

The Working Paper on reforming the law of Incorporated Associations recognized that the issue of shares is a complex and controversial subject concerning a minority of associations. Finances Quebec invited all organizations connected with this issue, particularly those in the Social Economy field, to make precise proposals on how to settle this issue. It is not surprising that during the consultation process concrete proposals for financing the Social Economy were included in the briefs submitted by the Chantier de l'économie sociale and the Conseil québécois de la coopération et de la mutualité.

For the 2005 consultation process the Chantier de l'économie sociale had originally proposed adjusting the Companies Act to permit the capitalization of associations but with certain conditions: no sharing of assets, limited return on investments, and repurchase arrangements adapted to the reality of associations. The proposal also stressed the need to ensure the democratic values of associations when considering capitalization mechanisms. At the time, community networks and the cooperative sector manifested several concerns regarding this proposition.

The Chantier’s 2009 proposal revolved around recognizing and strengthening the existing practices that have resulted as a response to the capitalization need of associated social enterprises. In recent years, two types of practices have emerged: the sale of bonds (recognized by part III of the Companies Act) and accessing patient capital (quasi-equity) through various intermediaries. The problem is that these financial products are recorded as liabilities in an association’s balance sheet. The Chantier suggested that these forms of capital should be considered part of an association’s assets as opposed to liabilities. However, such assets should not affect the democratic spirit of the associations; they should not represent a title or grant control over the association during its lifetime or during dissolution. Each association should also have strict rules to avoid conflict of interest and, when incorporating, and state their intention to seek investment in the form of capitalization.

The Regroupement des Corporations de développement économique communautaire du Québec complemented this idea by suggesting that specific mechanisms must be put in place to ensure that these new financial instruments are used primarily for the development of an association, and not for the return on investment. These mechanisms could include fixed maturity on investments, limited return on investment (low interest rate or certain percentage of annual surplus), investors reimbursed last during dissolution, and the inability to pay interest or principal if it jeopardizes the association.

28 The Corporation de développement économique communautaire de Québec, Regroupement des Corporations de développement économique communautaire and Fonds d'emprunt économique communautaire are all members of the Chantier de l'économie sociale. They all therefore participated in the consultation process that led to the Mémoire the Chantier de l'économie sociale presented to Finances Quebec in March 2009.

29 The Fiducie du Chantier de l'économie sociale is an example of such an intermediary. It was created in 2006 to provide long term capital for social economy enterprises. It is a $53.8 million patient or quasi-equity fund enabling collective enterprises to embark on long-term planning and invest in real estate. It offers long term loans for business start-ups/expansions or real estate acquisition between $50,000 and $1.5 million repayable after fifteen years.

Renovating the House that Law Built:
A comparative analysis of proposed changes to the governance of Nonprofits and Social Enterprises in Ontario and Quebec
The Conseil québécois de la coopération et de la mutualité, on the other hand, recommended a change in cooperative law, a change that responds to the particular needs of social enterprises. The Conseil specifically recommends the formation of a new category of cooperatives: social or collective interest cooperatives (coopératives sociales ou associatives d’intérêts communs). This new type of cooperative, based on examples of the cooperative movement in France and Italy, differs from other cooperatives in that its goal is not only to satisfy members’ needs, but also those of the wider community. These cooperatives are distinct because they involve multiple stakeholders, and, unlike solidarity cooperatives, they allow municipalities to become members and partially finance their activities. These new cooperatives would be covered by Quebec’s Loi sur les cooperatives and, as a consequence, would be able to address their capitalization needs through the issuance of preferred shares or participant preferred shares.30

30 Participant and non-participant preferred shares are the capitalization instruments used by cooperatives. Their general conditions (amount, rights, restrictions, repayment) are determined by the Board of Directors. Holders of preferred shares are not entitled to participate in general assemblies or be eligible for a position in the cooperative. People with participant preferred shares can attend general meetings but have no speaking rights.
REFORMING ONTARIO’S NONPROFIT LEGAL REGIME: GOVERNMENT PROPOSALS AND NONPROFIT RESPONSE

With the idea of developing a new legal framework to govern the structure and activities of charities and nonprofit corporations in Ontario, the Ministry of Government Services has undertaken a project to review and reform the Province’s Corporations Act. Starting in May, 2007, three discussion papers were released by the Ministry inviting comments and suggestions from stakeholders and from the general public regarding reform of this legislation. Table 2 summarizes the main topics covered by each consultation paper (Ontario Ministry of Government Services: Policy and Consumer Protection Services Division, 2007a, 2007b, 2008).

<table>
<thead>
<tr>
<th>Consultation Paper #1</th>
<th>Consultation Paper #2</th>
<th>Consultation Paper #3</th>
</tr>
</thead>
<tbody>
<tr>
<td>(May 7, 2007)</td>
<td>(August 22, 2007)</td>
<td>(February 28, 2008)</td>
</tr>
<tr>
<td>1. Incorporation “as of right”?</td>
<td>1. Board structure</td>
<td>MEMBERSHIP</td>
</tr>
<tr>
<td>2. Structure of the new Act</td>
<td>1.1 Number of Directors</td>
<td>1. Membership lists</td>
</tr>
<tr>
<td>3. Definition of a nonprofit Corporation</td>
<td>1.2 Qualification of Directors</td>
<td>2. Members’ voting agreements</td>
</tr>
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CORPORATE FINANCE

1. Financial review in lieu of an audit
2. Financial disclosure
3. Borrowing and debt issuance

OTHER

1. Standard by-laws
2. Self-perpetuating board

Source: Ontario Nonprofit Network

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31 The Corporations Act provides the statutory framework governing the creation, governance and dissolution of nonprofit corporations, including charitable corporations. The Corporations Act is an organizational statute, not a regulatory statute; this means that enforcement of the rights and duties under the statute lies primarily with the corporation, its directors and its members (Ministry of Government Services, 2007).

32 The full Consultation Papers can be found at http://www.gov.on.ca/mgs/en/AbtMin/STEL02_047145.html

Renovating the House that Law Built:

A comparative analysis of proposed changes to the governance of Nonprofits and Social Enterprises in Ontario and Quebec
The first consultation paper was released on early May 2007, the second one on September that same year and the third one on February 28, 2008. The Ontario Nonprofit Network, United Way, the Ontario Bar Association and Imagine Canada submitted briefs responding to each of these consultation papers (Imagine Canada, 2008a, 2008b, 2008c; Ontario Bar Association, 2007, 2008; Ontario Nonprofit Network, 2008a, 2008b, 2008c; United Ways of Ontario, 2007a, 2007b). What follows is a summary of the general position of these four organizations towards the proposed changes to the Legal Framework governing Ontario nonprofit corporations.

Modernization of the Legal Framework Governing Ontario Nonprofit Corporations: Consultation Paper #1

Incorporation ‘as of right’
All surveyed submissions recommended that the new Nonprofit Corporations Act provide for incorporation as of right for all non-share corporations. They saw no reason for the incorporation process for nonprofits to be different or more cumbersome than that of private sector business corporations. Incorporation should only be subject to name approval. However, the United Way clearly stated in their submission that in order to serve and protect the public interest corporations seeking charitable status should be under more, not less, government scrutiny.

Structure of the New Act
The consultation paper like that of its Quebec counterpart sees the structure of the Corporations Act as outdated and difficult to navigate. It proposes to structure the new legislation based either on the Ontario Business Corporations Act (OBCA) or the California Corporations Code. There was no clear consensus among the analyzed responses to the consultation paper on this issue. Imagine Canada recommended that a new Ontario Nonprofit Corporations Act should be an organizational statute, consistent with the Ontario Business Corporations Act, and harmonized with the Ontario Business Corporations Act except where there is a clear and compelling argument for a distinction.
Conversely, the Ontario Bar Association felt that the new Act should not reintegrate nonprofit corporations with the Ontario Business Corporations Act. The Ontario Bar Association suggested that there should continue to be a separate statute, the Ontario Business Corporations Act, to deal with business corporations. The Ontario Nonprofit Network clearly supported a dedicated Nonprofit Corporations Act, one that focuses exclusively on incorporation of not-for-profit and mutual benefit organizations that have public benefit objects. Their view was based, in part, on the well regarded Non-Profit Corporations Act, 1995 enacted by the province of Saskatchewan. The United Ways of Ontario argued for ease of use and comprehensibility, appeared to be more inclined towards to adopt a structure modeled after the California Corporations Code.

**Definition of Purposes**
The consultation paper asked if the new Nonprofit Corporations Act should clarify the permitted purposes of nonprofit corporations. In general all surveyed stakeholders agree that the new Act should not set out a list of permitted purposes. Rather, nonprofits should be permitted to carry out any purpose other than the pursuit of profit for distribution to its members. Most did not support the definition of nonprofit corporations based on purposes and felt that classifications and definitions of allowable purposes failed to capture the full scope and diversity of the activities undertaken by the sector.

**Distribution Constraint**
All submissions strongly support the inclusion of a clear and robust non distribution constraint in the new Act as one of the defining elements of a nonprofit corporation. The new legislation should include constraints preventing excessive compensation to staff, directors and members, and, upon dissolution, distributing assets among members. Upon liquidation/dissolution it was recommended that all surplus assets should be distributed to organizations carrying on similar activities to those of the liquidating nonprofit corporation.

**Commercial Activities**
The government’s Consultation Paper presented two options regarding regulating nonprofits commercial activity: placing some restrictions on commercial activity or placing no restriction at all on commercial activity in furtherance of nonprofit purposes. The analyzed submissions support the latter option arguing that commercial activities are an increasingly important and substantial source of funding for nonprofit corporations. Commercial activity was not seen as representing unfair competition with for-profit business. Further, according to the Ontario Bar Association, the new Act is not the place to set out such regulation.
Classification System
Due to the diversity of not-for-profit corporations in terms of membership, purposes, and sources of funding, the Consultation Paper suggested putting in place a classification system that provided for multiple classes of not-for-profit corporations. In its submission, the Ontario Bar Association describes and explains the advantages and disadvantages of adopting a classification system, while Imagine Canada and United Ways of Ontario recommend against adopting a classification scheme. In the event that the Government chooses to include a classification system in the new Act, Imagine Canada added that organizations should be allowed to self-designate their class, whether ‘public benefit corporation’ or ‘religious congregation’ for example, within any such statutory classification system.

Corporate power
In general, submissions to the Ontario government recommended that the new Act should incorporate the recommendations of the Ontario Bar Association on the corporate powers and capacities of nonprofit corporations. Nonprofit corporations should have the capacities, rights, powers and privileges of a natural person, as is the case in Quebec. The new Act should harmonize the liability standards facing directors of nonprofits with those of Ontario Business Corporations Act directors, and should eliminate the need for nonprofit corporations to pass bylaws in order to confer powers on the corporation or its directors. Like the Ontario Business Corporations Act, the new Act should also abolish the ultra vires (without authority)\textsuperscript{33} doctrine as it applies to nonprofits corporations.

\textsuperscript{33} The doctrine of ultra vires declares that if a corporation undertakes to do something beyond its power, or what it is entitled to do, then those acts are considered void. The doctrine is intended to protect investors and creditors of a corporation by restricting the activities of the corporation and therefore the risks presented by the corporation (Ontario Ministry of Government Services: Policy and Consumer Protection Services Division, 2007b).
Modernization of the Legal Framework Governing Ontario Nonprofit Corporations: Consultation Paper #2

Board Composition
Our analysis found no consensus among the four submissions in terms of the recommended minimum number of required directors for a nonprofit corporation. The Ontario Nonprofit Network suggested that the minimum number of directors under the new Act should be three, regardless of the type of not-for-profit. The United Ways of Ontario suggested that corporations receiving donations or grants should have at least three directors. Imagine Canada recommended that the new Act should fix the minimum number of directors at one, consistent with the Ontario Business Corporations Act. Opinions within the Ontario Bar Association were divided. For some, a board with at least three directors is more likely to discharge the public benefit functions than a board comprised of only one director. Conversely, others suggested that the requirements for board composition should be minimal and therefore that one director is sufficient for all types of nonprofits.

There was also no consensus on the need for a minimum number of outside directors. The Ontario Nonprofit Network and the United Ways of Ontario suggested that at least two of the required three directors should not be officers or employees of the Corporation. Imagine Canada and the Ontario Bar Association recommended that the new Act should not require outside directors. Where the submissions did find agreement was in the proposed qualifications for nonprofit directors. All submissions recommend that the new Act should prescribe the same qualifications for directors as those under the Ontario Business Corporations Act, in other words, that directors should be natural persons who are not under 18 years of age, bankrupt, or ‘mentally incapable’.

Term of Office
The Consultation paper asked if a maximum term of office for directors should be included in the reformed Act. The analyzed submissions stated that the maximum time period for a director to remain in office before an election is required should be three years, unless restricted by the corporation’s by-laws, there should be no maximum consecutive term of office.
Directors’ Meetings
The Ontario Corporations Act does not contain any rules regarding the amount of notice that must be given, or the waiver of a notice requirement for director’s meetings. According to the Consultation Paper, including a notice requirement for directors’ meetings protects the rights of other members of the board and promotes fairness. Opinions were divided on this issue. Imagine Canada and the Ontario Bar Association recommended that the new Act should include notice provisions that are identical to those in the Ontario Business Corporations Act. The Ontario Nonprofit Network and United Ways of Ontario suggested a system based on the Saskatchewan Non-Profit Corporations Act, 1999 where notice of meetings could range between fifteen and fifty days. They all agree, however, that the resolutions in lieu of meetings should be permitted in the reformed Act, as this provision is already present in the Ontario Business Corporations Act.

Resignation and Removal of Directors
In terms of the resignation and removal of directors, analyzed submissions suggested following the Ontario Business Corporations Act regime. The Ontario Nonprofit Network proposed that organizations should be allowed to remove directors by majority vote and that directors should be permitted to resign at any time. The minimum required number of directors must be maintained until successors have been elected or appointed.

Officers
There were differing opinions among the written submissions regarding provisions for officers. Imagine Canada and the Ontario Bar Association felt, as in the Ontario Business Corporations Act, that the new Act should not provide for the appointment of specific officers. The Ontario Nonprofit network stated that the Act should require the corporation to have, at a minimum, a president (who is also a director) and a treasurer. The United Ways of Ontario went further, and suggested that charitable or soliciting corporation should be required to have a treasurer as well as president and secretary.
Directors and Officers Liability
The current Corporations Act lacks any provision that set out the duty and standard of care, and defenses against liability applicable to directors and officers. All the submissions to the second consultation paper recommended that the formulation of the duties of care and loyalty, as well the due diligence defense, should be the same as under the Ontario Business Corporations Act. They also agreed that, under the new Act, nonprofit corporations should be permitted to indemnify and purchase liability insurance for their officers and directors and that they should be exempted from personal liability, if they can demonstrate good faith and due diligence.

Conflict of Interest
In terms of Conflict of Interest, Imagine Canada, United Ways of Ontario and the Ontario Bar Association recommended that the conflict of interest provisions of the new Act should be parallel to those under the Ontario Business Corporations Act. The Ontario Nonprofit Network, recommended the framework as outlined in the Saskatchewan Non-Profit Corporations Act, 1999. All they agreed that conflict of interest rules should go beyond contracts and include other types of material transactions.

Modernization of the Legal Framework Governing Ontario Nonprofit Corporations: Consultation Paper #3

Membership Lists
In general, all the analyzed submissions suggested that the new Act should restrict access to membership lists (subject to the ability of the corporation to remove any such restrictions and provide for open access to membership lists in its by-laws). Imagine Canada and the Ontario Nonprofit Network stated that the new Act should also allow nonprofit corporations to determine themselves what information to include in their membership lists. The Ontario Bar Association favoured including the names of members plus additional contact information, such as e-mail or mailing addresses.

Transferability of Membership Interest
All submissions unanimously recommend that memberships should not be transferable unless otherwise stated in the articles of incorporation.

34 This provision includes written disclosure or an explicit notation in board minutes of a material interest (section 107). See Note i for further information of the Saskatchewan Non-Profit Corporations Act, 1995.
35 For the third Consultation Paper, the analysis does not include the United Ways of Ontario.
Termination of Membership and Disciplinary Matters
The Corporations Act does not establish any rules in respect of discipline of members or termination of membership. Imagine Canada and the Ontario Bar Association suggested replicating provisions of the California Corporations Code. The Ontario Non Profit Network suggested incorporating provisions for the termination of membership similar to those under the Saskatchewan Non-Profit Corporations Act, 1995.

Quorum at Members Meetings
Imagine Canada and the Ontario Non Profit Network both rejected the idea of setting quorum rules in the reformed Act. They each believed that Quorum rules must be set by nonprofits in their by-laws. The Ontario Bar Association felt that it was important to include quorum rules in the reformed Act (but that they would only apply when the by-laws were silent). According to the Ontario Bar Association there would be a vacuum if the by-laws failed to provide for a quorum requirement. In this case it was the Ontario Bar Association who referred to the Saskatchewan Non-Profit Corporations Act, 1995 or the Canada Not-for-profit Corporations Act (Bill C-21) as a useful model for the New Act.

Members’ Voting Agreements
There was considerable disagreement with respect to members’ voting agreements. While Imagine Canada’s submission favoured an explicit provision enabling voting agreements, the Ontario Nonprofit Network and the Ontario Bar Association both suggested that there should be no reference to voting/pooling agreements in the reformed Act. The Nonprofit Network felt that voting agreements should be discouraged while the Ontario Bar Association, felt that this such a provision was not material.

Member Remedies
All submissions suggested that compliance orders should be available to complainants, not only for alleged cases of non-compliance with the Act, but also with the nonprofit corporation’s articles or by-laws. They all supported extending a statutory derivative action to all nonprofit corporations. They rejected, however, the idea of including an oppression remedy or a dissent and appraisal remedy in the reformed Act.

36 The California Corporations Code provides that any suspension or termination of membership, or of any membership right, must be done in good faith and in a fair and reasonable manner. A ‘fair and reasonable manner’ should necessitate (i) setting out the procedure in the corporation’s articles or articles or by-laws and (ii) giving the member prior notice of termination and the reasons for such termination. (Imagine Canada, 2008)
37 The Saskatchewan Act states that the articles or by-laws of a nonprofit may provide that directors have the power to terminate a membership interest in circumstances described in the articles or by-laws. Where a membership interest is terminated by the directors, a member is entitled to a fair hearing before the termination occurs. Where a member feels aggrieved because of the termination, he or she may apply for relief to a court under the oppression remedy (ONN, 2008).
38 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 (Ontario Ministry of Government Services: Policy and Consumer Protection Services Division, 2008).
39 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 (Ontario Ministry of Government Services: Policy and Consumer Protection Services Division, 2008).
40 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 importance (Ontario Ministry of Government Services: Policy and Consumer Protection Services Division, 2008).
Corporate Finance
In terms of financial reviews, Imagine Canada and the Ontario Non Profit Network recommended that nonprofit corporations undergo a financial review in lieu of an audit where annual revenues are below a defined threshold. This threshold, they suggested, should be expressed in terms of gross revenues, not income. They also suggested such a provision should be in the regulations, not the Act, and be reviewed periodically in order to keep pace with changing economic conditions. The Ontario Bar Association recommended that each nonprofit corporation should be required to obtain an audit except where the costs of the audit are disproportionate to the likely benefits. Under the new Act, the appropriate default rule should be that every corporation is required to conduct an audit. Small nonprofits, according to the Ontario Bar Association, should be able to avoid the cost of a full audit and conduct something less than an audit, but that such an exemption should be narrow.

Under the current Corporations Act, directors may not borrow money or issue debt unless articles or by-laws are in place. All the surveyed organizations find that the need for a by-law to enable borrowing should be revoked and that, under the new Act, borrowing should be enabled by the statute, subject to a prohibition in the articles or by-laws.

Charitable Gifts Act and Charities Account Act repealed
In October 2009, a Good government Ac, 2009 (Bill 212) was introduced in the Ontario Legislature. Bill 212, which includes changes to the Charitable Gifts Act and Charities Account Act, subsequently went to committee in November and is poised to be passed. According to the Ontario Nonprofit Network and charity lawyer Terry Carter, Bill 212 brings significant reform to the regulation of charities in Ontario.

Ontario was the only province in Canada which restricted charities to owning ten percent of a for-profit business. Notwithstanding restrictions which the Canada Revenue Agency already has in place, this legislation rescinds the Charitable Gifts Act and removes the limit on owning an interest in a for-profit business. The legislation also amends the Charities Accounting Act by allowing charities to own land for as long as it is held for charitable purposes. Previously there was a time restriction on how long land could be held. This means that charities can hold land and use the income for their charitable work, even if they are not occupying the premises directly.
NONPROFIT LEGAL REGIME REFORM: COMPARISON BETWEEN ONTARIO AND QUEBEC

The analysis of the consultation papers of Quebec and Ontario reveals some important similarities in terms of the issues and topics they address. First of all, they both suggested that a new Non-profit Association Act should make incorporation a right as opposed to a privilege granted by the state. They both inquired about the possibility of establishing a classification system for nonprofits and suggested specific quorum rules for meetings. Both consultation papers extensively address issues related to nonprofit directors, specifically the required number of directors, their decision-making powers, their liabilities and their attendance at meetings.

Both consultation documents from Ontario and Quebec addressed accountability issues, but each took a slightly different perspective. Ontario’s consultation paper focused on financial reviews and audits while Quebec’s consultation paper referred more to accounting practices and public access to such information. The two sets of provincial discussion papers also addressed issues related to nonprofits and their capacity to engage in commercial activities. Ontario’s paper discusses whether nonprofits’ commercial activities should be regulated or not, while Quebec invited a discussion regarding financing nonprofit corporations by issuing shares.
There are also significant differences between the two provinces’ consultation papers. Quebec’s paper focuses more on streamlining and making the incorporation process more efficient, nonprofit transformation and liquidation processes and specific provisions for nonprofits that receiving donations (distinct bookkeeping practices, accountability and status). The Quebec consultation document called for nonprofits to self-determine their major administrative procedures and specifically proposed increasing the decision-making powers of regular members.

Table 3: Common and Exclusive Issues in Ontario and Quebec’s Consultation Papers for the Nonprofit Legal Regime Reform

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Renovating the House that Law Built: A comparative analysis of proposed changes to the governance of Nonprofits and Social Enterprises in Ontario and Quebec
Ontario’s consultation papers discussed the possible structure of the proposed new Act and the establishing a set of permitted purposes for nonprofit corporations. It also discussed the terms of office, resignation and removal of directors, as well as the possibility of appointing specific officers. Other suggestions exclusive to the Ontario consultation paper revolved around membership, particularly issues concerning transferability, lists, discipline and remedies.

The jury is still out on the timing of the introduction of specific nonprofit corporation legislation in both provinces. The diverse views expressed during the consultation process in Quebec may have dampened the provinces’ appetite for playing Solomon with provisions which would be strongly opposed when such a Bill went to committee. In Ontario, the widespread economic downturn and the underlying corporate regulatory provisions, including a proposed federal securities regulator, may have put changes to, or the development of, a new Non-profit Corporations Act on hold.

What isn’t in doubt is that the Corporation Acts under which nonprofits and social enterprises in both Ontario and Quebec operate are a complex web of regulations and statutes which make it difficult for non-profits to register, change their corporate structure, amalgamate or otherwise modify their operating practices in order to sustain their long-term viability and achieve their public or mutual purpose. The Corporation Acts have a profound influence on the nature, shape and size of the sector, its independence from the state and its accountability to the public. The challenge to reform these statutes will have a profound and long-lasting impact on non-profits and social enterprises in Ontario and Quebec and as such, it appears to be a challenge well worth meeting.
The Income Tax Act states that, in Canada, a charity means a charitable organization or charitable foundation. Generally speaking, for a charitable organization and charitable foundation, all resources must be devoted to charitable activities and operate exclusively for charitable purposes. No part of charity income should be payable to, or be available for the personal benefit of any proprietor, member, shareholder, or trustee. An organization is a registered charity if it successfully applies to the Canada Revenue Agency for registration and is registered. A registered charity must be a charitable organization, private foundation or public foundation or a subunit of those, a resident in Canada and was either created or established in Canada. The courts have consistently reinforced the four categories of objects of the charity: relief of poverty, advancement of education, advancement of religion and any other purpose beneficial to the community not falling under the other three purposes.
There are a number of benefits\textsuperscript{50} that a charity obtains by acquiring registered charitable status. Once registered the charity will become an income tax exempt entity,\textsuperscript{51} it has the ability to issue official donation receipts\textsuperscript{52} for any gifts that it receives, are eligible to receive gifts from other registered charities and it may claim a partial rebate for any GST/HST that it pays or be GST/HST tax exempted\textsuperscript{53} on the goods and services it provides. In addition to financial benefits, a registered charity gains increased credibility within the community.

Canada Revenue Agency (CRA) proposes a list of general requirements\textsuperscript{54} that a charity must follow to maintain its charitable registration. Should a charity not following these guidelines and rules, the Canada Revenue Agency has the authority to revoke a charity’s registered charitable status.\textsuperscript{55} However, depending on whether the organization is a charitable organization, public foundation or private foundation, reasons for revocation may differ. The general list of requirements are as follows:

1. Engage only in allowable activities
   a. Carrying on its own charitable activities
   b. Gifting to qualified donees
   c. Maintain direction and control over its activities
   d. Not engage in prohibited political activities
   e. Not engage in unrelated business activities for charitable organization and public foundation or not engage in any business activities for private foundation

2. Keep adequate books and records
3. Issue complete and accurate donation receipts
4. Meet annual spending requirement (Disbursement Quota)
5. File an annual T3010 information return
6. Maintain the charity’s status as a legal entity
7. Inform the Charities Directorate of any changes to the charity’s mode of operation or legal structure

\textsuperscript{50} Canada Revenue Agency, “Advantages of registration” (April 16, 2009), 1p., online: \textless http://www.cra-arc.gc.ca/w/srinyng/rstrtn/rstrtn-eng.html\textgreater.
\textsuperscript{51} Paragraph 149(1)(f).
\textsuperscript{52} Regulation 3501(1).
\textsuperscript{53} RSC 1985, c. E-15, as amended (herein referred to as “the ETA”).
\textsuperscript{55} Section 168.
Unfortunately, among the list of general requirements to maintain registration is the problematic rule that a charitable organization\(^{56}\) or public foundation\(^{57}\) may only carry on related business activities that accomplish or promote their charitable objectives, and that a private foundation\(^{58}\) must not carry on any business activities whatsoever. Therefore to avoid revocation of registration, it is important to look at the business (related or unrelated) activities in the context of the development of social enterprises\(^{59}\) and activities encountered to generate funds to be used for charitable purposes. This problem is also a concern for non-profit organizations, not only for charities.\(^{60}\)

The term related business is described as “businesses that are run substantially by volunteers and businesses that are linked to a charity’s purpose and subordinate to that purpose”\(^{61}\) and includes “a business that is unrelated to the objects of the charity if substantially all persons employed by the charity in the carrying on of that business are not remunerated for that employment.”\(^{62}\) A business involves commercial activity, deriving revenues from providing goods or services, undertaken with the intention to earn a profit.\(^{63}\) The expression “substantially all” is interpreted by CRA as meaning ninety percent.\(^{64}\) The expression “carrying on” a business is interpreted by CRA as a continuous or regular operation.\(^{65}\) This is important because if a charity is not found to be “carrying on” a commercial activity at all, then it would not matter if the activity was related or unrelated.

Although the income from a commercial enterprise would contribute financially to accomplishing an organization’s stated charitable purpose, the CRA does not find this as an acceptable reason to consider a business as related. In addition, at no time may a charity’s assets be at risk.

\(^{56}\) Subsection 149.1(2).
\(^{57}\) Subsection 149.1(3).
\(^{58}\) Subsection 149.1(4).
\(^{62}\) Subsection 149.1(1), the definition of “related business”.
\(^{64}\) Ibid at paragraph 18.
Common law has prohibited a charity from ignoring its exclusivity requirements and conducting a related business that takes on a “substantially commercial character in its own right”, or by carrying on an activity that has become “the vehicle of a substantial commercial business”. In other words, “a charitable organization may operate a commercial enterprise, so long as the enterprise serves as a means of accomplishing the purposes of the organization, rather than an end in itself.” To determine whether a commercial venture is substantial, it is important to consider “the amount of income, the number of personnel, and the degree of commercialization of the operation and organization.”

This restrictive legislation creates great difficulties for charities in generating their own income and obtaining additional funds through their own business activities. It is important for charities to look to other methods to acquire and manage funds. There are a few short-term options already implemented in Canada that charities may take advantage of such as: permission to accumulate funds, use of non-profit organizations, use of trust, use of a share capital corporation and use of a parallel foundation.

What to do?

If a charity is only concerned with accumulating enough income to make a major purchase, such as an office building, it may apply to the CRA for ‘permission to accumulate funds’. This allows a charity to accumulate income over a time span of 3 to 10 years, by applying these funds towards meeting the charity’s disbursement quota.

Further, the non-profit organization form can be used by charities to help carry on an unrelated business, although it must do so indirectly, and within certain guidelines. A non-profit is restricted from transferring any of its funds to a registered charity if it happens to be a member of the non-profit, which in some cases might make this option untenable.

A trust is vehicle that a charity may take advantage of if it is holding a profitable asset that it cannot commercialize without carrying on an unrelated business. The charity could sell this asset to the business trust and any proceeds that the trust acquires would eventually end up back in the hands of the charity.

A share capital corporation is an option for charities that would like to carry on an unrelated business. Such a share capital corporation is treated and considered fully taxable under the Income Tax Act. Up to 75% of any proceeds earned by the share capital corporation may be donated to the registered charity. However, the amount donated will fall within the charity’s disbursement quota, and there may be control issues over the share capital corporation stemming from provincial legislation.

Lastly, a parallel foundation may be used as a means to supplement or manage an organizations income by the use of segregating funds.
Although the above vehicles will be helpful to offset the restrictive financial burden placed upon charities, a more desirable solution would be for the legislature and Canada Revenue Agency to make the necessary changes needed to allow charities to gain greater access to more funds.

It is informative to look at the current legislation and practices in the United States, United Kingdom and Australia, to see what examples Canada could take from these international sources.

The United States has developed the Program Related Investments (PRIs), which are investments made by foundations that supports one or more of the foundations charitable purposes.74 Further, the United States has enforced the Unrelated Business Income Tax (UBIT) on recognized tax-exempt charities. Unrelated Business Income Tax is an imposed tax on any unrelated business income that occurs as a means of conducting a “trade or business, regularly carried on, that is not substantially related to furthering the exempt purpose of the organization.”75

In the United Kingdom, charities are prohibited from carrying out any non-primary purpose business activities that are substantial, or that pose a risk to the charities assets, or their profits will be taxable.76 Any minor profits derived from the carrying out of business activities will be tax-exempt as long as those same profits are put in whole towards furthering the charity’s purpose.77 Unlike Canada, failure to satisfy these business requirements will not result in revocation of the charities registered status. Further, charities in the UK are able to set up a subsidiary trading company to conduct business on the charities behalf. The trading company may donate as much income to the parent charity as it would like, and any income donated will be tax-exempt as long as it is used to further the charity’s stated objectives.

In Australia, like in Canada, a charitable institution must have a purpose that is exclusively charitable. If a charity has an incidental or ancillary purpose that furthers the original charitable purpose, this is acceptable.78 There is a large range of items that are considered charitable in Australia, and that in turn would allow a charity to conduct business under more options.

Opening up Canada’s definition of what purposes will be considered as charitable would provide more opportunities for organizations to conduct related business activities that still fulfill their registered purpose.

77 Ibid.
REFERENCES


NOTES

1The Non-profit Corporations Act, 1995 sets out the rules for the incorporation and registration of non-profit organizations in Saskatchewan, and for the registration of non-profit extra-provincial corporations.

The Act provides that any one or more individuals or corporations, or combinations of individuals and corporations, may incorporate as a non-profit corporation.

It is not mandatory for non-profit organizations to incorporate. However, non-profit organizations of all types and sizes can benefit from the advantages of a corporation. For instance, the corporation may hold title to land in the name of the corporation and may apply for grants or funding from government agencies.

Amendments to the Act in June 2003 help protect people who serve as volunteer board members of non-profit corporations from personal liability for acts done in good faith. The amendments are based on a report recently released by the Law reform Commission of Saskatchewan after extensive consultations with volunteer groups in the Province. Directors and officers of non-profit corporations are not personally liable in any civil action for acts or omissions connected with their responsibilities to a non-profit corporation. However, the immunity extends only to acts done in good faith and not to fraud or profit-taking at the expense of the corporation. Directors and officers of non-profit corporations remain liable for certain statutory liabilities, e.g., unpaid tax remissions and unpaid wages.

There are two kinds of non-profit corporations:

- charitable; and
- Membership

Charitable corporation
A charitable corporation carries on its activities primarily for the benefit of the public and is usually funded by donations, grants or other public money.

Corporations are deemed to be charitable corporations if they:

- carry on activities that are not primarily for the benefit of members;
- solicit or have solicited donations or gifts of money or property from the public;
- receive or have received any grant of money or property from a government or government agency in excess of ten per cent of their total income in any fiscal year;
- are a registered charity within the meaning of the Income Tax Act (Canada).
Membership corporation
A membership corporation carries on activities primarily for the benefit of its members and may be financed by its members through membership fees, loans, member donations, commercial lenders or a combination of these (e.g., a golf or curling club, board of trade or chamber of commerce.) It does not usually solicit donations from the public or receive government grants. Source: http://www.justice.gov.sk.ca/Non-profit-Corporations-Act-1995
