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Corporations Act Modernization  
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Dear MGS,

I am pleased that MGS has undertaken a review of the Ontario *Corporations Act* (the “Act”) and prepared the consultation paper *Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations*. The world, and especially the non-profit sector, has dramatically changed since the 1950s when the Act was last revised and the Act can benefit from a review.

The non-profit and charitable sector is an increasingly important part of the Canadian society and economy. Although the economic figures cited in your consultation paper from Statistics Canada of \$112 billion dollars, 2 million employees, 19 million volunteers are impressive – it is the social impact of the sector that is vital. It is important that MGS encourage this sector and not do anything which could intentionally or unintentionally undermine the sector.

Non-profits have a choice as to whether they wish to incorporate provincially or federally. Non-profits and charities that I assist typically prefer to incorporate federally as increasingly they are operating in many provinces and internationally. Furthermore, as I will discuss below, the additional regulatory requirements unnecessarily imposed on Ontario charities make the Ontario non-profit uncompetitive with its federal counterpart.

However, as there are approximately 54,000 Ontario non-profit corporations in existence, and others may choose to use this vehicle for their non-profit and charitable activities, it is important that the legal framework be brought up-to-date to facilitate and assist non-profits in achieving their objects.

The consultation paper covers many different aspects of an Ontario non-profit corporation and this submission will restrict itself to four aspects that I consider most important:

**1) Whether “for-profit” or “commercial activities” may be undertaken by Not-for-Profit corporations**

I have tremendous concerns with part 3.1.2 of the consultation paper with respect to restrictions on for profit activities by non-profit entities.

The consultation paper provides that

“Unfair competition” might exist because of certain tax advantages that not-for-profit corporations have over their for-profit business competitors. Not-for-profit corporations also benefit from their standing and reputation as organizations that operate for the public benefit. “Unfair competition” is a legitimate concern of for-profit businesses; however, special treatment of not-for-profit corporations might be justified since the profits earned are at least partly used to subsidize the corporation’s not-for-profit activities.”

Ontario non-profit corporations should always have a not for profit or charitable purpose and a non-distribution constraint, including on dissolution or winding up of the corporation, that ensures that all of the ‘profit’ will be used by the non-profit for the benefit of its objects. So long as those elements are maintained, non-profit and charity corporations should be able to undertake “for profit”, “commercial”, or “business” activities, whether ancillary to the non-profit’s purposes or not.

Unfortunately, government cutbacks, increasing needs in the community caused by reductions in social programs, and the constant call from the business community that charities should be run more like businesses, have forced charities to be more focused, ‘business-like’ and creative in revenue generation and fundraising.

Why should it be “unfair competition” that a non-profit benefit from its standing and reputation in the same way that a socially conscious and responsible for-profit corporation benefits, or at least tries to, from its standing and reputation. Non-profits and charities are proud of what they have created in Canada.

There are some exciting examples of for-profit entities being used for social good, an example being micro-loans. Such a corporation’s goal is not to just make profit but to achieve a “triple bottom line” in which social good is achieved by the corporation. Non-profits do and should welcome this ‘competition’.

In this increasingly globalized world we see for profit corporations often acting with impunity and very little regulation of their affairs in terms of their environmental impact, involvement in countries with very poor human rights records and supporting those oppressive governments, bribery and corruption,

and grossly excessive executive compensation. The same for-profit entities who had no interest in being involved with helping vulnerable sections of the population all of a sudden show tremendous interest and are prepared to spend vast amounts of money to be involved in certain areas if they view it is profitable. Such entities are just as quick to pull out of those areas if they are no longer profitable.

How does one define a “for profit” or “commercial” activity? Unfortunately almost anything that the non-profit sector is involved with could be “profitable” and can be accomplished by “for profit” corporations. After all, if a for profit business decides it can make a profit in a particular area the non profit businesses in those areas would be competing with them. There is no reason to believe that for profit businesses cannot get involved in all the areas of charity including the relief of poverty, education, religion or other purposes beneficial to the community. If non profits are prevented from being involved in any ‘business’, ‘for profit activity’ or ‘commercial activity’ then it is conceivable that large parts of the not for profit and charitable sectors could be closed down.

I do not share the concern expressed with respect to "unfair competition". In fact, for-profit business corporations have many advantages to non profit corporations including, but not limited to, access to capital and the ability to provide in many cases no accountability or transparency of their operation and far less restrictions on their activities. For profit entities only pay tax when they have profit. Many successful corporations have little or no profit and therefore do not pay taxes. Or they have structured their affairs in such a fashion that profits are earned in tax havens and they pay taxes at very low rates and not to Ontario or Canada.

For non-profit registered charities that are regulated by CRA they are restricted to carrying on a “related business” except when substantially all (usually seen as 90%) of the persons working on the business are volunteers. As CRA regulates the types of business activities that a registered charity can undertake there is no need for Ontario to codify in the Act restrictions as to what activities a non-profit or a charity can undertake.

Those who feel that running a non-profit provides unfair competition are welcome to create and run their own non-profit or charity. There are those who, like myself, will gladly assist them with the long and cumbersome process of incorporation and obtaining charitable status and the education about disbursement quotas, CRA restrictions on activities including only being involved with a related business, restrictions on activities abroad and on advocacy and political involvement.

Though it is apparently outside the scope of your review I would also suggest the Ontario Charitable Gifts Act which places restrictions on the business and investment activities of charities, specifically most charities are not allowed to hold onto more than 10% of an interest in any business, should be repealed. Ontario is the only province in Canada that has such a restriction. With the Charitable Gifts Act more sophisticated charities can employ complicated

structures to avoid the application of Charitable Gifts Act, while other smaller charities may be unaware of the restriction, or are simply encumbered by the restriction, or simply ignore the Charitable Gifts Act.

## **2) Overlap between The Public Guardian and Trustee (PGT) and CRA**

In the consultation paper it refers to the "...the necessity to provide ever-increasing protection to the charitable contributions of donors, volunteers on not-for-profit boards, and broader remedies for members." I agree that it is vital to maintain the reputation and integrity of the non-profit sector including by vigorous enforcement against non-profits and charities who are involved with criminal, fraudulent or improper activities.

There is considerable duplication by the PGT of the regulation of charities that is handled on the federal level by the Charities Directorate of CRA. For example, the Ontario Ministry of Government Services has had and continues to have an administrative policy of requiring that letters patent involving charitable objects receive the prior consent of PGT unless certain sample objects are used. This policy is cumbersome and adds a significant amount of time to the application process and secondly adds a substantial cost for the potential charity that is starting out. It is my view that requiring the consent of the PGT in the incorporation process does not provide any greater protection to the public and makes little sense as CRA will not register a charity unless it considers the objects and activities of the charity to be completely charitable. Time and resources could be better spent by the PGT using their powers under the Charities Accounting Act to investigate and put out of business 'charities' that are clearly shams. Greater coordination between the CRA and PGT in enforcement would be productive.

I therefore recommend that the administrative policy of requiring the prior consent of the office of public guardian and trustee with respect to charities objects should be eliminated.

In the event that the new or revised Corporations Act still maintains the cumbersome requirement of PGT pre-approval of object clauses I would suggest that the list of pre-approved sample object clauses prepared by PGT be dramatically increased, enhanced and updated. As well PGT should continue to coordinate with CRA so that CRA would be prepared to accept any of the sample PGT objects. The pre-approved object clauses are particularly helpful to the applicants who do not obtain legal advice when incorporating, and I understand that is approximately 50% of the new non-profits incorporated in Ontario.

## **3) Audit Exemption**

I commend MGS for recently changing the Ontario *Corporations Act* to raise the annual income limit allowed for audit for Ontario non-share capital corporations, from \$10,000 to \$100,000, so long as all members of the corporation consent in

writing. This will substantially reduce the unnecessary burden placed on very small non profits to comply with the requirement of the Ontario *Corporations Act*. Having strong financial controls is important but requiring very small charities to pay for audited financial statements is not cost effective. As many small non-profits were not complying with such a requirement it was also encouraging disrespect for the law.

#### **4) Mirror Federal Act**

The recently proposed Canada Not-for-Profit Corporations Act provided a potential model act for Canadian non-profits. Unfortunately this act died on the Order Paper in 2005 following the dissolution of parliament prior to the last federal election. As MGS is contemplating this review will go into 2008 and a new Ontario Act may not be passed until 2009, if at all, it could be valuable for MGS to coordinate with Industry Canada so that the new Ontario act could be similar to a new federal non-share capital corporations act. Many volunteers in Canada serve on more than one board of directors and consistency between the federal and Ontario acts would simplify their understanding of their roles and ensuring that their non-profit or charity is compliant with corporate legislation.

I encourage MGS to continue on this daunting challenge of redrafting the Ontario Corporations Act.

Respectfully submitted,

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