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FROM NEW YORK TO SASKATOON

*Doug Surtees**

In 1969, the New York Mets won the World Series and New York State passed a new not-for-profit law. Most people in Saskatoon, Saskatchewan would have been tuned in to the first of these events while being completely unaware of the latter. Today, the Mets as World Series champions is at best a distant memory while people in Saskatoon and throughout Saskatchewan continue to be influenced by the legal work that went into creating New York's 1969 Not-for-Profit Corporation Law.

I. NEW YORK STATE'S BUSINESS CORPORATION LAW

A challenge for any jurisdiction designing a system that creates and regulates nonprofit organizations is balancing efficiency (both for the state and for the nonprofit corporation) against flexibility for and accountability of the nonprofit corporation.

New York's journey to create an entirely new legislative regime to govern nonprofit corporations began in 1956 when the New York legislature established a joint legislative committee at the request of the Committee on Corporation Law of the New York State Bar Association.¹ The joint committee "was empowered to make a comprehensive study of the body of law, statutes, decisional law and legal literature of the state pertaining in any manner to corporations organized or which may affect corporations to be organized within the State of New York."² The joint committee, being legislative in nature, recognized that it must "effect the broadest possible participation in the project by all interested groups."³

The joint committee adopted what was called a study approach, rather than a drafting approach, to legislation. That is, it chose to undertake a broad research program prior to any drafting. The joint committee began by studying the then-existing law, determining its problems, their causes, and potential solutions tried in other jurisdictions. The results of this study were circu-

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¹ Robert S. Leshner, *Revision of the New York Corporation Statutes*, 14 BUS. LAW. 807, 807-08 (Apr. 1959).

² *Id.* at 808.

³ *Id.* at 809.

lated for comment and criticism prior to any drafting.⁴ The joint committee was assisted in its work by a research advisory subcommittee that had representation from each law school in New York State.⁵

This approach to law reform was a conscious effort to create a process designed to encourage participation from all sides.⁶ The joint committee was determined to utilize that process to recommend an overall revision to the corporate law of New York. The structure of New York corporate law would change from “trunk” arrangements to a unified business corporation law.⁷ “Trunk” arrangements refer to a structure where the general corporate law is visualized as a trunk of a tree and a number of related statutes that govern specific types of corporations are visualized as branches. A single statute that would contain the law relevant to the organization of a business corporation would replace this complex structure.

New York passed its new Business Corporation Law in 1961, and it was made effective April 1, 1963.⁸ The joint committee continued to study the law and recommended some subsequent fine-tuning amendments. The joint committee also made plans to study New York’s Membership Corporations Law in order to evaluate the need for a nonprofit corporation statute.⁹ The enlightened approach taken towards reviewing and modernizing New York’s Business Corporation Law would later be applied to nonprofit corporations as well.¹⁰

⁴ *Id.* at 813.

⁵ *Id.* at 815.

⁶ *Id.* at 809.

⁷ *Id.* at 812.

⁸ Robert S. Leshner, *Introduction to Symposium on New York Business Corporation Law*, 11 *BUFF. L. REV.* 429, 429 (1961–1962).

⁹ *Id.* at 437.

¹⁰ That the Not-for-Profit Corporation Law work was seen by the committee as a continuation of the joint committee’s efforts is apparent from Chairman Warren Anderson’s foreword to the committee’s Thirteenth Interim Report. *J. LEGIS. COMM. TO STUDY REVISION OF CORP. LAW, THIRTEENTH INTERIM REP.*, 1982–83, at 7 (1969). The Committee’s Not-for-Profit work was described as “Program III” of the

Committee’s overall plan for the revision of the corporate laws of New York, Program I having been completed with the enactment of the Business Corporation Law and Program II having been accomplished by the revisions of the corporate portions of the Banking Law, Insurance Law, Railroad Law, Transportation Corporations Law, and Cooperative Corporations Law.

Id.

II. NEW YORK'S NOT-FOR-PROFIT CORPORATIONS LAW

Some jurisdictions use the term “nonprofit” while others use the term “not-for-profit.”¹¹ The New York legislation uses the term “not-for-profit.” The explanatory memoranda that accompanied the bill when it was enacted informs its readers that the term nonprofit corporation “suggests that the corporation either does not or may not earn any profit.”¹² Of course, if such a suggestion were made, it would be false. These corporations are certainly entitled to maintain their spending at a level lower than their revenue and thus show a profit. Indeed, it would be hard to imagine their long-term survival if they did not. I disagree with the joint committee’s distinction, not because of what is said, but because of what is not said. The inference in the memorandum is that the term not-for-profit does not suggest that the corporation either does not or may not earn a profit. It has been my experience that most people who have not studied the area misconstrue both terms, and most people who have studied the area do not misconstrue either term. I am comforted that Professor Howard Oleck also failed to see a distinction between the terms.¹³

Nonprofit enabling legislation must balance many competing values. To do so, the joint committee organized its plan to modernize New York’s law into phases. These phases facilitated wide consultation by presenting the bar, state and federal agencies, user groups, and the public with an opportunity for input at the appropriate phase of development.¹⁴ After the initial exploratory phase there were four other phases to the committee’s work: organization, research, drafting, and legislation.¹⁵

The organizational phase included retaining the subcommittee structure, which had been used in the previous review of business law. Subcommittees and advisory committees included connections to the New York State Bar Association, the Association of the Bar of the City of New York, the American Bar Association, state departments and agencies, as well as foundations.¹⁶ In addition, the joint legislative committee staff attempted to make other

¹¹ I must admit that I have never been one to see a distinction between the terms. Therefore, I shall use the terms interchangeably throughout this Article.

¹² N.Y. NOT-FOR-PROFIT CORP. LAW, memorandum no. 1, art. I (2004).

¹³ HOWARD L. OLECK & MARTHA E. STEWART, NON PROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS 11–12 (6th ed. 1994).

¹⁴ *Id.* at 15–18.

¹⁵ J. LEGIS. COMM. TO STUDY REVISION OF CORP. LAW, *supra* note 10, at 15.

¹⁶ *Id.* at 15–17.

groups affected by the change in law aware of the process.¹⁷

In the research phase, the joint committee produced eighty-two research reports¹⁸ and undertook studies on particular topics.¹⁹ The joint committee received a large number of comments²⁰ and placed a high value on the comments it received, saying: "We are not able to overstate the value of these comments to our staff work. They represented a broad experience in the field. In many cases they represented the views of specialists who had access to information which was unavailable from ordinary sources."²¹

During the drafting phase, the joint committee continued to receive input. It circulated the draft legislation "to as many interested persons as we could locate."²² In addition to receiving comments,²³ the joint committee held three advisory conferences, which were open to every member of the advisory groups.²⁴

Finally during the legislative phase, the joint committee held two public hearings on the proposed legislation. Even at this stage, amendments to the bill were made.²⁵ By facilitating broad participation by a wide range of groups with an interest in the subject, the joint committee ensured that a diversity of viewpoints would come to light and a studied, appropriate balance amongst competing interests would be reached. Perhaps this is why the basic approach to regulating nonprofits developed in New York was so appropriate in a place like Saskatchewan, a Canadian province of a million people spread over a quarter of a million square miles, which is different from New York in so many ways.

New York began its review of nonprofit law in 1963.²⁶ At the time, New York law permitted the incorporation of membership corporations, which allowed incorporation for any lawful business purpose.²⁷ As a result, it was not possible to form a nonprofit cor-

¹⁷ *Id.* at 17. "Most of the special types of groups affected by the proposed law have been either formally or informally contacted by our staff." *Id.*

¹⁸ *Id.* at 31-33.

¹⁹ *Id.* at 34-35.

²⁰ *Id.* at 18. "Space will not permit the reproduction or even the listing of the many constructive comments which our committee has received on our various research and drafting materials." *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 36-45.

²⁴ *Id.* at 18.

²⁵ *Id.*

²⁶ Robert S. Leshner, *The Non-Profit Corporation—A Neglected Stepchild Comes of Age*, 22 *BUS. LAW.* 951, 956 (July 1967).

²⁷ *Id.* at 953.

poration for a business (or profit) purpose.²⁸

III. CANADA'S NOT-FOR-PROFIT CORPORATIONS ACT

In Canada, it is possible for nonprofit corporations to incorporate either provincially or federally. The Canadian government, like New York State, reviewed its business corporation law and subsequently set its sights on modernizing the provisions that facilitated the incorporation of federal nonprofit corporations. What was then known as the Department of Consumer and Corporate Affairs (now Industry Canada) published a two-volume report in 1974 called *Proposals for a New Not-for-Profit Corporations Law for Canada*.²⁹ It was authored by Professor Peter Cumming. Volume One explained the rationale for the specific recommendations, and Volume Two was the proposed legislation.

The work done in New York State was immensely important in influencing the Canadian federal report. Professor Peter Cumming and others involved in preparing the federal report were clearly most influenced by Robert Leshner, the chief counsel for the New York joint committee, and the New York legislation which resulted from its work. In his preface to the report dated September 1973, Professor Cumming wrote:

There is relatively little literature in respect to not-for-profit corporations, particularly in Canada, as compared with the extensive literature on business corporation law. Because of this paucity of literature in respect to not-for-profit corporations, I am particularly grateful to Mr. Robert S. Leshner, Chief Counsel to the New York Joint Legislative Committee for making available to me the comprehensive study underlying the major revisions made in the not-for-profit corporations law of New York state in 1969. Mr. Leshner also gave . . . considerably of his time, notwithstanding an extremely busy schedule, in providing personally the benefit of his views on this area of the law. An appreciation of the underlying premises in respect to not-for-profit corporations, and the origin of many of the ideas expressed in this report, came from reading Mr. Leshner's insightful article "The Non-Profit Corporation—A Neglected Stepchild Comes of Age."³⁰ This report is heavily indebted to this article. Acknowledgment in respect to Mr. Leshner's insights, ideas, arguments and language is given only generally in this preface,

²⁸ *Id.* at 953–54.

²⁹ Peter A. Cumming, *Proposals for a Not-for-Profit Corporations Law for Canada*, in 1 & 2 NOT-FOR-PROFIT CORPORATIONS LAW (1974).

³⁰ Leshner, *supra* note 26.

rather than specifically throughout this report, simply because Mr. Leshner's landmark article pervades so much of the report. The New York legislation is referred to often throughout the Commentary as it is the most recent and innovative legislation in the subject area.³¹

The draft Canada Not-for-Profit Corporations Act³² was eventually introduced into Parliament, but the bill died on the order paper when Parliament was prorogued. The Act, however, did serve as the basis for what was to become Saskatchewan's nonprofit legislation.³³ The body of work that gave rise to it, as modified over time, continues to be influential.³⁴

Prior to the passage of the Non-Profit Corporations Act, Saskatchewan had the Societies Act.³⁵ The repealed Act authorized societies to be incorporated where the society's objectives were "of a benevolent, religious, charitable, philanthropic, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting, athletic or other useful nature."³⁶

These "legitimate" objectives were narrowed down so as to expressly prohibit a society from being incorporated under the act "for the purpose of carrying on any trade, industry or business."³⁷ If a group did not fit within the Societies Act, it would require a special act of the legislature to incorporate, or else the group would have to incorporate under different legislation, such as the business corporation law or the law governing co-operatives. As in New York, the government of the day moved to legislation, which would allow incorporation as of right.

IV. INCORPORATION AS OF RIGHT

Saskatchewan allows incorporation as of right. Just like New

³¹ 1 CUMMING, *supra* note 29, at iii (citation omitted).

³² The Non-Profit Corporations Act, 1995, N-4.2 S.S. (2005).

³³ ONTARIO LAW REFORM COMM'N, REPORT ON THE LAW OF CHARITIES 1 (1996), available at <http://www.mtroyal.ca/nonprofit/lawofcharities.pdf>.

³⁴ The authors of the Ontario Law Reform Commission's 'Report on The Law of Charities' after referring to nonprofit law reform efforts in the United States and Canada said:

We have looked carefully at these developments and, in our following commentary and reform proposals, rely most heavily on the statutes in Saskatchewan, California, and New York, the proposed legislation in Alberta, as well as the American Bar Association Model Act. The Saskatchewan Act and the Model Act have been particularly influential.

Id. at 521.

³⁵ Societies Act, S-53 R.S.S. (1978) (repealed 1984).

³⁶ *Id.* § 4.

³⁷ *Id.* § 5.

York moved away from a requirement for judicial and later administrative discretionary approval,³⁸ Saskatchewan also simplified the process of incorporation. Under the reformed legislation, the nonprofit corporation is merely seen as a vehicle. Like New York, Saskatchewan rejected the outdated belief that simply because a nonprofit corporation existed, members of the public would believe the organization was certified or sanctioned by the state as having met some sort of superior altruistic rating. The Department of Consumer and Corporate Affairs (Canada) Report makes the interesting observation that the only justification for believing a nonprofit corporation has met some sort of state screening test is the old-fashioned requirement for permitting incorporation after a state representative exercises a discretionary power to grant incorporation.³⁹ In other words, removing the discretionary power of state officials to grant incorporation also removes the reason for anyone to believe the mere existence of a nonprofit corporation is evidence of its altruistic nature.⁴⁰ This approach to the nonprofit corporation separates the existence of the corporation from tax and other benefits that may or may not accrue to the nonprofit corporation and from naming restrictions which may also be in place.⁴¹

This approach has received some criticism. In speaking of the then-new New York Types C and D corporations, Professor Oleck said, "The utter confusion of charitable and profit-making motives and operations, that they are sure to encourage, will be a nightmare for state and federal regulatory agents."⁴² He also said that "[o]ne provision [of the new act] eliminates from New York's statute one of its best features respecting non-profit organization law—the requirement of scrutiny by a judge."⁴³ Later, Professor Oleck toned down his language, although he still referred to the New York statute as "radical"⁴⁴ and said the provision for Type C (mixed profit/nonprofit) corporations "approves, in effect, the view that nonprofits may be simply another means for taking

³⁸ See NORMAN I. SILBER, *A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE NONPROFIT SECTOR*, at 136–38 (2001).

³⁹ I CUMMING, *supra* note 29, § 49, at 13.

⁴⁰ *Contra* SILBER, *supra* note 38, at 17.

⁴¹ See The Non-Profit Corporations Regulations, 1997, N-4.2 Reg. 1 S.S. §§ 7, 8 (2005).

⁴² HOWARD L. OLECK, *NON-PROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS* 46 (3d ed. 1974).

⁴³ *Id.* at 48.

⁴⁴ OLECK & STEWART, *supra* note 13, at 11.

profit; a most doubtful policy.”⁴⁵

In creating a system for the establishment of nonprofit corporations, there is a legitimate state concern for adding in safeguards to ensure that the nonprofit corporation does not distribute profit to members as if they were shareholders. This is because at least part of that profit exists due to benefits conferred on the nonprofit organization by its nonprofit status. The purpose in conferring these benefits is presumably to increase the capital available for the nonprofit corporation to reinvest in achieving its purpose. Where nonprofit corporations have a public benefit purpose, we all benefit. Similarly, many jurisdictions, including New York and Saskatchewan, appear to believe that the societal benefit in permitting groups to pool their capital and work together for their mutual benefit justifies encouraging these types of nonprofit corporations in the enabling legislation. Arguably, the same belief justifies extending tax deductions to business corporations for capital reinvested in their business pursuits. The integrity of the nonprofit corporation enabling legislation requires that the legislation both prohibit the payment of profits to members and possess an effective mechanism to enforce that prohibition. The larger the nonprofit sector is, the more important this becomes. The re-thinking of what it means to be a nonprofit corporation would require a re-conceptualizing of the state’s enforcement mechanism or supervisory technique.

Enabling legislation that only permits the incorporation of nonprofit corporations to carry out certain listed purposes requires the significant exercise of discretionary power by a state official. Under the former Societies Act, a society could be incorporated where it had “objects of a benevolent, religious, charitable, philanthropic, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting, athletic, or other useful nature”⁴⁶ provided it not be for the “purpose of carrying on any trade, industry or business.”⁴⁷ Enabling legislation that permits incorporation as of right, provided some minimal requirements and basic procedure are followed, can dramatically reduce the discretionary power exercised by state officials at the incorporation stage. This increases the efficiency and ease of use of the incorporation system, as well as the flexibility available to incorporators. The Saskatchewan legislation goes further than its New York counterpart and im-

⁴⁵ *Id.* at 94.

⁴⁶ Societies Act § 4.

⁴⁷ *Id.* § 5.

bues nonprofit corporations with the powers and privileges of a natural person.⁴⁸ Provided that the state's legitimate goal of adding safeguards to ensure that nonprofit corporations do not distribute profits to members as if they were shareholders can still be met, these are very positive developments. This objective can be achieved more effectively by imposing obligations on those charged with managing the affairs of nonprofit corporations and by clearly stating the rights and powers of those affected by the activities of nonprofit corporations.

By emphasizing control during a nonprofit corporation's operations, the legislation focused attention on the true prohibition. Our common concern regarding nonprofit corporations is not to apply special regulations governing how profit may be earned, but only to govern how that profit—once earned—may be used. Leshner urged that certain types of expenditures by nonprofit corporations should be subject to limitations. First, Leshner urged that there should be a provision to allow the identification of members and real parties in interest, and a basic prohibition against generally distributing profits to members.⁴⁹ Second, he identified six other areas where he felt expenditures could be used in a way contrary to the nature of a nonprofit corporation.⁵⁰ These expenditures include improper loans to insiders, payments for debt or other special payments, compensation of directors and officers, incidental benefits to insiders, improper benefits to outsiders, and distribution of assets on dissolution.⁵¹ Although there may well be room for improvement, these matters are largely regulated by rules governing disclosure by directors,⁵² their duty of care,⁵³ and their personal liability for improper payments.⁵⁴ Directors and members are only entitled to reasonable remuneration under the legislation.⁵⁵ Recently, the Canada Revenue Agency posted annual returns of registered charities on its web site.⁵⁶ These annual returns make some information readily accessible to everyone in the world, including a list of directors, basic financial information, as well as the salary ranges of the five highest-compensated positions with the

⁴⁸ Non-Profit Corporations Act § 15.

⁴⁹ Leshner, *supra* note 26, at 970.

⁵⁰ *Id.* at 970–72.

⁵¹ *Id.*

⁵² Non-Profit Corporations Act § 107.

⁵³ *Id.* § 109.

⁵⁴ *Id.* § 105.

⁵⁵ *Id.* § 112.

⁵⁶ Canada Revenue Agency, http://www.cra-arc.gc.ca/tax/charities/online_listings/canreg_interim-e.html (last visited Jan. 30, 2006).

charity. Fundamental to the legislation are rules facilitating member access to information,⁵⁷ including the use of corporate profits to further corporate activities.⁵⁸

The previous legislation in both New York and Saskatchewan required five incorporators and saw the state exercising supervisory discretionary power over the process. New York made it easier to incorporate by reducing this supervisory control, and Saskatchewan built upon this approach. By permitting incorporation as of right, Saskatchewan no longer requires a discretionary or quasi-judicial oversight role. Under the reformed approach in Saskatchewan, any natural person who is of age, of sound mind, and who is not bankrupt may incorporate a nonprofit corporation by merely signing and delivering correctly completed articles of incorporation to the appropriate official.⁵⁹ The articles of incorporation provides the most basic information relating to the nonprofit corporation: the corporation's name; the location of its registered office; the classes and subdivisions of membership; a description of their distinctive features; the conditions on which a membership interest may be transferred (if permitted); the number of directors; whether the corporation is a membership or a charitable corporation; any restrictions on its activities; and the identity of the person entitled to the property of the corporation upon winding-up.⁶⁰

The Saskatchewan legislation strives to achieve efficiency and flexibility by adopting the same philosophical approach as the New York legislation. Efficiency is achieved for the state by creating a nonprofit regime that is self-regulating to the greatest possible extent. Efficiency is created for the nonprofit corporation by creating a system which emphasizes predictability and ease-of-use. In this regard, Saskatchewan's implementation of two basic types or classifications can be considered a substantial refinement of New York's four types, the selection of which still requires the exercise of judgment. Saskatchewan's two possible classifications, while not mutually exclusive, have the advantage of being ascertainable by answering one basic question: Are the corporation's activities primarily for the benefit of its members or the public?

The New York statute moved the nonprofit corporation away from being defined by its lack of business purpose and toward be-

⁵⁷ Non-Profit Corporations Act § 21.

⁵⁸ *Id.* § 30.

⁵⁹ *Id.* § 5.

⁶⁰ *Id.* § 6. Winding-up is another term for "liquidation and dissolution of the corporation." *Id.*

ing defined by its function. The New York statute was re-conceptualized, recognizing that, to use a cliché, “form follows function.” The wide consultations undertaken by the joint committee resulted in an approach that was determined to accommodate all legitimate functions of nonprofits. What was seen as legitimate was broadened; the critical feature was not this broadening, however, but rather the way in which the matter would be determined. Under the previous approach—which, to some extent, still exists in New York—the nature of an activity would be characterized as legitimate or not. This can lead to difficult distinctions. Under the modern Saskatchewan approach, for example, a nonprofit corporation that chooses to limit its own activities is constrained from pursuing lawful activities, making it possible for a nonprofit corporation to operate a restaurant, an office building, or a gas station.

By allowing incorporation as of right, the powers of nonprofit corporations could be widened. Accountability is achieved by facilitating a more clearly defined system of duties, liabilities, and powers primarily between directors and members. With a better method of ensuring accountability after incorporation, it becomes possible to widen the powers of a nonprofit corporation while still being reasonably assured that the state’s overall objectives can be met. This was done in Saskatchewan, where nonprofit corporations were given, in relevant respects, the rights and powers of a natural person. Nonprofits can exercise those powers beyond Saskatchewan’s borders to the extent permitted by the laws of the other jurisdiction.⁶¹ Competing with business corporations and earning a profit is no longer seen as taboo for nonprofit corporations. This philosophy proved a good fit in Saskatchewan, with its long history of cooperative development and Crown corporations.⁶² Some Crown corporations have historically been granted monopolies, while others regularly compete with private business.⁶³

V. CATEGORIZING BY TYPE

Creating a statute with sufficient flexibility for nonprofits to organize themselves is efficient for the state. In New York, this took the form of delineating types of nonprofit corporations that could be formed. Four types of nonprofit corporations are set out,

⁶¹ *Id.* § 15.

⁶² A Crown corporation is a state-owned company or enterprise.

⁶³ See generally PAT REDIGER, *THE CROWNS: A HISTORY OF PUBLIC ENTERPRISE IN SASKATCHEWAN* (2004).

each of which was appropriate for different nonprofit activities and carried different obligations and rights.⁶⁴ So, in theory, the potential incorporator simply selects the type that best corresponds to the purpose for which it wished to incorporate. If the potential incorporator wanted to form for a non-business purpose, such as athletics or a professional association, it would form a Type A corporation. If it wished to form for a non-business purpose such as cultural or literary purpose, it would form a Type B corporation. If it wished to form for a business purpose it would form a Type C corporation. Finally, if the formation of the corporation is authorized by another corporate law of New York, it might form a Type D corporation.⁶⁵ This innovative scheme of delineating by type was seen as a central feature of the New York legislation.

“If the New York Not-for-Profit Corporation Law is destined for primacy in its field,” one of its authors wishfully conjectured, much of the credit would be due to the “careful and imaginative drafting” of section 201:

For the first time, it provides the state with a rational and well-balanced system of laws expressing a legislative philosophy which cannot fairly be labeled too permissive or too onerous. It bridges frustrating gaps that could not be spanned under the old law, codifies and clarifies the rights and duties of members and their managers, polishes and sharpens the state’s tools designed to protect the public interest, gives elbow room to the imaginative social planner, and provides for greater financial flexibility while maximizing fiscal responsibility.⁶⁶

The proposed Canadian legislation drafted as part of the Consumer and Corporate Affairs (Canada) Report in 1974 simplified and built upon this “well-balanced system of laws.” The recommendation from this report was to have two types of federal nonprofit corporations: charitable and membership.⁶⁷ The “business purpose” language was no longer used. A charitable corporation was a corporation that operated for public benefit, and a membership corporation was a corporation that operated for member benefit. In both cases, the incorporation had to be for a “non-pecuniary purpose,” which was defined as a purpose other than making a

⁶⁴ N.Y. NOT-FOR-PROFIT CORP. LAW § 201 (McKinney 2005).

⁶⁵ *Id.*

⁶⁶ SILBER, *supra* note 38, at 134 (quoting FRANK WHITE ET AL., NEW YORK CORPORATIONS, at § 201.01 (1994)).

⁶⁷ 2 CUMMING, *supra* note 29, at 3.

profit for the benefit of its members. In addition, there were restrictions on transferring corporate property to members and directors.⁶⁸ Although laid out in a complicated manner, these restrictions basically required that in the case of winding-up a charitable corporation, the surplus assets must be distributed to Canadian organizations having similar goals.⁶⁹ Distribution of surplus property of a membership corporation being wound-up was to be done equally among the membership interests.⁷⁰

The Saskatchewan legislation further simplified these two types of memberships. In Saskatchewan, a nonprofit corporation is either a membership corporation, incorporated “to carry on activities that are primarily for the benefit of its members” or a charitable corporation, incorporated “to carry on activities that are primarily for the benefit of the public.”⁷¹ Restrictions on distributing corporate assets are dealt with elsewhere in the legislation.

The two types of nonprofit corporations possible in Saskatchewan are much more efficient for potential incorporators to use than New York’s system, which recognizes four types of corporations. Each type of Saskatchewan corporation comes with its own obligations and entitlements. Potential incorporators need only know that their planned activities are to be primarily for their members’ benefit or the public’s benefit to choose a corporation type. Unfortunately, the Saskatchewan legislature retained the confusing names for the two types of nonprofit corporations as described in the Consumer and Corporate Affairs (Canada) Report. Both charitable corporations and membership corporations have members. This leads to confusion among members of the public and indeed among members of the corporation. Also, charitable status in Canada—the ability to issue charitable tax-deductible receipts—is regulated under federal income tax law, not provincial nonprofit law. Therefore, a charitable nonprofit corporation may or may not be a registered charity. Nonprofit corporations that are not registered charities cannot issue tax-deductible charitable donation receipts. Of course, any nonprofit corporation—or business corporation for that matter—can issue a receipt for money received, and this may be deductible as a business expense by the donor. It is unfortunate that more accurate names like “member-

⁶⁸ *Id.* § 2.02(1), at 5; §§ 17.19(1),(2), at 60–61.

⁶⁹ *Id.*

⁷⁰ *Id.* § 17.19(6), at 61.

⁷¹ Non-Profit Corporations Act § 2(1).

benefit corporation” and “public-benefit corporation” were not used. These names would have been less confusing to the public.

The New York legislation began the move toward defining the nonprofit corporation by purpose rather than by activity. The limiting feature of the New York statute is the comparatively narrow definition of purpose it used. As Norman Silber wrote, “Each ‘type’ reflected a category of nonprofit endeavor that federal tax law and prior experience suggested was distinguishable.”⁷² By focusing on a list of comparatively narrow purposes, however, the New York statute has not made as much improvement as it might have over its categorization by activity. By using a broad purpose test—member-benefit or public-benefit—Saskatchewan has built upon what New York began.

VI. REGULATION

Nonprofit corporations of the same type will vary tremendously in size, complexity, and sophistication. Think of nonprofit corporations that contribute to the quality of life in your own community. Chances are you will be able to identify small volunteer organizations like the local Home and School Association or Community Association, as well as very large complex organizations like Easter Seals and the Red Cross. Nonprofit organizations vary in size and complexity in much the same way as business corporations. To be efficient, a nonprofit enabling act must accommodate a wide variety of organizations. The previous Saskatchewan Societies Act was simple and short. It contained only fifty-five sections which covered a total of thirteen pages.

The result of such an overly brief enabling act was that incorporators had to create their own rules of governance and organizational structure. This was typically done by bylaws. Since bylaws were for many purposes the only document that set out the basic rules—and since the state was exercising more hands-on administrative functions—bylaws had to be filed with the incorporating documents.⁷³ Amendments to the bylaws are not effective until filed.⁷⁴ In keeping with reducing the supervisory role of the state—where this could be done without compromising accountability—the modern Saskatchewan legislation does not require the filing of bylaws. Simplifying the administrative framework—and relying on members and directors to govern their own affairs within

⁷² SILBER, *supra* note 38, at 134.

⁷³ Societies Act § 9.

⁷⁴ *Id.* § 13(1).

prescribed limits—led to removing the requirement to file bylaws—or to even to have them at all. This is more efficient for the state, and also for the nonprofit corporation. The federal legislation in Canada still requires the filing of bylaws for federally incorporated nonprofit corporations.⁷⁵ Some less sophisticated nonprofit corporations may be unaware of this or may simply forget to file changes. This will lead to confusion about which bylaws are effective at a given time.

Like the New York legislation, Saskatchewan's legislation seeks to provide an overall framework establishing the powers, obligations, and liabilities of directors and members. Directors' duties and members' interests and rights would have to be spelled out in a much more systematic manner if the legislation is to create a nonprofit regime which is self-regulating to the greatest possible extent.

Prior to modernization, the Saskatchewan legislation largely left the matter of defining directors' duties to the organization itself. The Societies Act contained only the basic statement that "the directors shall conduct the business and affairs, and may exercise all the powers, of the society."⁷⁶ Otherwise, the content of directors' duties was largely left to common law or the society's bylaws. Although the common law is of course still applicable, the modern Saskatchewan legislation, like the New York legislation, spells out specific responsibilities and liabilities of directors. This change in perspective on nonprofit corporations is well-described in the Leshler article so influential to Professor Cumming.⁷⁷ The ability of nonprofit corporations to act in an expanded sphere of activity—and the increased ability to raise capital—puts great responsibility on directors and officers. Leshler urged consideration of holding directors and officers of nonprofit corporations to a duty of care comparable to that of directors of business corporations with one exception.⁷⁸ Recognizing that directors of nonprofit corporations often provide a public service, Leshler concluded that "the duty of the director of the nonprofit corporation should be less exacting lest the public-spirited citizen refrain from assuming the responsibility as director."⁷⁹ Saskatchewan adopted a "business-like" duty of care when it modernized its legislation. Every director and officer is required to comply with the legislation, the incorporating docu-

⁷⁵ Canada Corporations Act, C-32 R.S.C. 155(2) (1970).

⁷⁶ Societies Act § 36(2).

⁷⁷ Leshler, *supra* note 26.

⁷⁸ *Id.* at 969.

⁷⁹ *Id.*

ments, the organization's bylaws, any unanimous member agreement, and must "(a) act honestly and in good faith with a view to the best interest of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."⁸⁰ It is interesting to note that, in 2003, Saskatchewan amended its legislation to limit the civil liability of directors and officers where they were acting in good faith, provided their act or omission did not constitute a provincial or federal offense and the loss, which would otherwise give rise to liability, was not caused by their criminal or fraudulent misconduct. This change would seem to bring Saskatchewan's legislation in line with Leshner's 1967 recommendation.

Members' interests were not well-delineated in the older legislation. The modern Saskatchewan legislation does a much more thorough job. Membership typically brings with it rights, not obligations. Generally, a member's liability is limited to the extent of the membership interest. Members hold what might be thought of as a supervisory power resulting from their associational interests⁸¹ and rights to access information,⁸² requisition a membership meeting,⁸³ make proposals,⁸⁴ and remove directors.⁸⁵ In the case of charitable corporations, a right to access a "basic list" of the names and addresses of the membership is conferred on the public generally.⁸⁶ Any person may request it, and it must be furnished.⁸⁷ Members provide the supervision which requires others to fulfill their obligations.

For Leshner, the corporate commercial world provided guidance on how to govern nonprofit corporations. He reasoned that these concepts could be adapted for the new purpose of modernizing nonprofit corporate governance. Even in the 1960s, the corporate world recognized that there were certain locations within the corporate framework where particular decisions should be made. Visualizing these points as a ladder, Leshner listed them as follows:⁸⁸

⁸⁰ Non-Profit Corporations Act § 109.

⁸¹ *Id.* §§ 113–21.

⁸² *Id.* §§ 20–23.

⁸³ *Id.* § 133.

⁸⁴ *Id.* § 127.

⁸⁵ *Id.* § 96.

⁸⁶ *Id.* § 21.

⁸⁷ *Id.* § 21(3)(b).

⁸⁸ Leshner, *supra* note 26, at 967.



In using the ladder-of-corporate-authority analysis, Lesher did not merely describe what would be an appropriate structure, he helped redefine the purpose and relationship of the rungs for nonprofit corporations. As a result of re-thinking what a nonprofit corporation should be, nonprofit organizations organized under statutes influenced by Lesher's work share a common development. The purpose of the statute became, in part, a way to enable an effective and efficient system that imposed the minimum necessary requirements on nonprofit corporations. Administrative supervision was no longer primarily made up of discretionary power. The possibility of raising capital through new means, such as issuing securities,⁸⁹ and the concomitant participation of debt-holders in certain decisions were envisioned as potential developments.⁹⁰ The relationship between the members of a nonprofit corporation and its directors—and the ability of the directors to rely on its executives and officers—became similar to that in the commercial corporate world. The relationship among all the rungs above employees changes when we adopt this view, as opposed to the previous view that defines a nonprofit corporation primarily by the restrictions one believes ought to be placed on its activities. The relationship with employees remains a matter outside corporate law and therefore unaffected.⁹¹

⁸⁹ Non-Profit Corporations Act § 25.

⁹⁰ See Lesher, *supra* note 26, at 968. "As the financial structures of non-profit corporations become more complex and where the source of funds, such as a government unit, assumes the position of debt holder, this rung in the ladder may become more prominent." *Id.*

⁹¹ *Id.* at 969.

Leshner described a concept of a nonprofit corporation as an efficient, effective structure within which purposes beneficial to the public or to the corporation's members could be pursued. This new way of conceiving nonprofit corporations led to a series of changes in the way restrictions on activities, liabilities, and duties were viewed. The essential characteristic of the nonprofit corporation was no longer the activity undertaken by that corporation, but rather it was the use the corporation made of its profits—or what Leshner termed the “limits on withdrawals of the proceeds of operations.”⁹² His view of what was possible for nonprofit corporations led directly to major changes in New York and Saskatchewan nonprofit law. Of course, significant differences certainly exist between the laws of these two jurisdictions. Although both statutes are the result of a common philosophy, they were implemented a decade apart in different political systems and in different legal contexts. Both jurisdictions, however, share an understanding of nonprofit corporations traceable to the work of Leshner and the others who made up the joint committee at the end of the 1960s.

VII. RECONCEPTUALIZING THE NONPROFIT

It is my view that the process which began with re-thinking New York's corporate law, and then nonprofit corporation law, necessarily led to a re-conception of several components of the law. These in turn led to a new thinking about the appropriate relationship between accountability on one hand and efficiency and ease of use on the other.

Re-conceptualizing the nonprofit corporation necessarily led to addressing the issues of incorporation as of right and increased powers for nonprofit corporations. After all, if a nonprofit corporation is seen as an entity with restrictions on the use of profit, it is clearly neither intrinsically good nor bad. Since the restrictions in place safeguard against harm caused by the nonprofit corporation, there is no need to unduly restrain the creation of such corporations. The logic of incorporation by right becomes inescapable. If nonprofit corporations can incorporate as of right—and particularly if nonprofit corporations are to be distinguishable from business corporations based on the use of their funds for a certain purpose instead of their activity—the increased power of nonprofit corporations is a natural result. This also raises the issue of whether to create different types of nonprofit corporations. Given

⁹² *Id.*

the wide range of activity which would be available to nonprofit corporations, it is understandable that some form of classification would be called for by legislators.

Having considered these matters, it would be natural to address increasing efficiency and ease-of-use by reducing the state's exercise of discretionary power in supervision. As the state assumes more of a screening function, it would be consistent to reduce controls, like the required number of incorporators and documents that must be filed.

Efficiency-enhancing changes could not be considered responsibly without simultaneously looking at ways to increase accountability and flexibility. Consideration would have to be given to better defining and clarifying the duties and liabilities of directors and others responsible for the management of the corporation. The options available for a management structure would have to be clarified, including the relationships among directors, officers, and committees. It may also include the ability of the board to be bound by a unanimous members' agreement, or the ability to raise capital through certain mechanisms, such as issuing securities. Finally, it would be necessary to consider the role of members as the holders of the ultimate authority in the nonprofit corporation. It is logical that such a process would lead to a defining and clarifying of the rights of members, including self-help remedies that should be available to them. This process might look like the diagram on the following page.

RESTRUCTURING THE NONPROFIT CORPORATION

