MEMORANDUM

British Columbia Law Institute

Date: **14 December 2005**

To: **Arthur L. Close, Q.C.**
Executive Director

From: **Kevin Zakreski**
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Re: **Introduction to Issues for a Law Reform Project on Unincorporated Nonprofit Associations**

1. INTRODUCTION

This memorandum summarizes the existing legal background for unincorporated nonprofit associations in the common-law provinces of Canada and raises several legal issues for consideration in a law reform project on unincorporated nonprofit associations.

2. A DESCRIPTION OF UNINCORPORATED NONPROFIT ASSOCIATIONS

Lawton L.J. of the English Court of Appeal has formulated a good summary of the elements of an unincorporated nonprofit association:[1]

> . . . two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will.

The unincorporated association is the default form of nonprofit activity: it applies if no steps are taken to substitute another form, such as a corporation or a trust. It is similar, in this respect, to the partnership, which is the default for-profit form. The unincorporated nonprofit association does not have a separate legal personality apart from its members. Examples of unincorporated nonprofit association range from small-scale charities,[2] clubs,[3] neighbourhood groups,[4] and athletic teams

1. *Conservative and Unionist Central Office* v. *Burrell (Inspector of Taxes)*, [1982] 1 W.L.R. 522 at 525, [1982] 2 All E.R. 1 (C.A.).

2. *See, e.g., Yue Shan Society* v. *Chinese Workers' Protective Association*, [1944] 3 W.W.R. 497, [1944] 2 D.L.R. 287 (B.C.C.A.) [*Yue Shan Society* cited to D.L.R.].

3. *See, e.g., MacDonald* v. *Bezzo (Litigation guardian of)*, (1998) 108 O.A.C. 232, 38 B.L.R. (2d) 1 (C.A.).

4. *See, e.g., Ladies of the Sacred Heart of Jesus (Convent of the Sacred Heart)* v. *Armstrong's Point Association*, (1961) 36 W.W.R. 364, 29 D.L.R. (2d) 373 (Man. C.A.), *leave to appeal to S.C.C. refused*, [1962] S.C.R. viii.

and associations[5] to larger bodies such as political parties,[6] trade unions,[7] religious organizations,[8] and professional sports leagues.[9] Statistics Canada estimates that there are "thousands" of unincorporated nonprofit associations that are active in this country.[10]

3. A SYNOPSIS OF THE LAW IN THE COMMON LAW PROVINCES

In a 1996 report, the Ontario Law Reform Commission described the law governing unincorporated nonprofit associations that prevails in common-law Canada as ". . . poorly developed and not well understood generally."[11] The reason most frequently cited by critics in general for the poor development of the law in this area is the courts' strict adherence to a group of English cases decided in the nineteenth and early twentieth centuries. As one commentator put it:[12]

> The problems in the law regarding unincorporated non-profit associations derive primarily from the classic view that "an incorporated company is a legal person separate and distinct from the individual members of the company whereas an unincorporated company has no such separate existence and is not in law distinguishable from its members."

This characterization still holds true, but it must be qualified by a development that has occurred in the courts since the Ontario Law Reform Commission's report. The courts have begun to pull away from the classic view and to recognize that certain types of unincorporated nonprofit associations, primarily those which operate within highly developed statutory frameworks, may be recognized as distinct legal entities, even if the governing statute does not expressly confer this status. The leading example of this type of reasoning is the Supreme Court of Canada's decision in *Berry* v. *Pul-*

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5. *See, e.g., Hanson* v. *Ontario Universities Athletic Association*, (1975) 11 O.R. (2d) 193, 65 D.L.R. (3d) 385 (H.C.J.).

6. *See, e.g., Zundel* v. *Liberal Party of Canada*, (1999) 90 O.T.C. 63, 60 C.R.R. (2d) 189 (Ont. Gen. Div.), *aff'd*, (*sub nom. Zündel* v. *Boudria*), (1999) 46 O.R. (3d) 410, 181 D.L.R. (4th) 463 (C.A.).

7. *See, e.g., Orchard* v. *Tunney*, [1957] S.C.R. 436, 8 D.L.R. (2d) 273.

8. *See, e.g., S. (J.R.)* v. *Glendinning*, (2000) 191 D.L.R. (4th) 750, 49 C.P.C. (4th) 360 (Ont. S.C.J.).

9. *See, e.g., National Hockey League* v. *Pepsi-Cola Canada Ltd.*, (1992) 70 B.C.L.R. (2d) 27, 92 D.L.R. (4th) 349 (S.C.), *aff'd*, (1995) 2 B.C.L.R. (3d) 3, 122 D.L.R. (4th) 412 (C.A.).

10. *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* (Ottawa: Minister of Industry, 2004) at 56. This study formally excluded unincorporated nonprofit associations from its scope "because of the substantial difficulties identifying and locating them," and was therefore only able to provide a rough estimate of the number of unincorporated nonprofit associations that are active in Canada. *Ibid.* at 7, *n.* 4.

11. *Report on the Law of Charities*, vol. 2 (Toronto: The Commission, 1996) at 507.

12. Victor Lirette, "Unincorporated Non-Profit Associations in Contract: A Need for Reform" (1983) 21 Alta. L. Rev. 518 at 519–20 (quoting *Halsbury's Laws of England*, vol. 6, 3d ed. (London: Butterworths, 1954) at 11, para. 1).

ley,[13] a case involving a dispute between two groups of members of a trade union. In *Berry*, Iacobucci J. (writing for a unanimous court) concluded that:[14]

> We now have a sophisticated statutory regime under which trade unions are recognized as entities with significant rights and obligations. As part of this gradual evolution the view has emerged that, by conferring these rights and obligations on trade unions, legislatures have intended, absent express legislative provisions to the contrary, to bestow on these entities the legal status to sue and be sued in their own name. As such, unions are legal entities at least for the purpose of discharging their function and performing their role in the field of labour relations. It follows from this that, in such a proceeding, a union may be held liable to the extent of its own assets.

The Ontario Court of Appeal has extended this reasoning to a case involving the merger of two federal political parties.[15] But Iacobucci J. has cautioned that his rejection of the classic view ". . . does not automatically extend to other unincorporated associations."[16] This comment shows the limitations of the courts' current approach to unincorporated nonprofit associations. First, the focus on specific types of associations is bound to lead to piecemeal reform. Second, the requirement that "a sophisticated statutory regime" be in place means that the courts can only build incrementally on a foundation already established by the legislature. These limitations are reasonable, particularly in view of the fact that "[t]he fundamental principle that an unincorporated association is not a legal entity is well established"[17] in the jurisprudence. But the implication of this approach is that fundamental reform of the law of unincorporated nonprofit associations can only be sought in the legislature.[18]

4. REFORM

A number of law reform bodies have studied the question of fundamentally reforming the law of unincorporated nonprofit associations. In Canada, the Ontario Law Reform Commission included a chapter on unincorporated nonprofit associations in its *Report on the Law of Charities*.[19] This report made a number of specific recommendations, but its basic approach was to recommend ". . . the enactment of a statute dealing exclusively and comprehensively with the unincorporated associ-

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13. [2002] 2 S.C.R. 493, 211 D.L.R. (4th) 651, 2002 SCC 40 [*Berry* cited to S.C.R.].

14. *Ibid.* at para. 46.

15. *Ahenakew* v. *MacKay*, (2004) 71 O.R. (3d) 130, 241 D.L.R. (4th) 314 (C.A.) (holding that common law requirement for unanimous consent to merger of unincorporated nonprofit associations not applicable to federal political parties).

16. *Berry*, *supra* note 13 at para. 51.

17. *Canadian Reform Conservative Alliance Party Portage-Lisgar Constituency Assn.* v. *Harms*, (2003) 231 D.L.R. (4th) 214 at para. 22, 2003 MBCA 112, Scott C.J. (for the court) [*Harms* cited to D.L.R.].

18. *See*, *e.g.*, *Harms*, *ibid.* (striking down rules of court allowing an unincorporated nonprofit association to bring a proceeding in its own name as lacking proper statutory authorization).

19. *Supra* note 11 at 507–34.

ation," which would ". . . set out suppletive and in one or two cases imperative norms based on or derived from the concepts underlying the contract of partnership."[20] In the United States, the National Conference of Commissioners on Uniform State Laws has promulgated the Uniform Unincorporated Association Act, which is intended to reform ". . . the common law concerning unincorporated nonprofit associations in three basic areas—authority to acquire, hold, and transfer property, especially real property; authority to sue and be sued as an entity; and contract and tort liability of officers and members of the association."[21] The basic approach of the NCCUSL Uniform Act ". . . is that an unincorporated nonprofit association is a legal entity for the purposes that the Act addresses. It does not make these associations legal entities for all purposes."[22] More recently, the California Law Revision Commission has published a series of reports that recommend fundamental statutory reform in a manner broadly similar to the NCCUSL Uniform Act, though with some significant differences in detail.[23] The California reports also addressed unincorporated nonprofit association governance, rights of the membership, and merger and dissolution, topics not included in the NCCUSL Uniform Act. Overseas, the Law Reform Advisory Committee for Northern Ireland has endorsed the NCCUSL Uniform Act.[24]

Several jurisdictions have enacted statutes that carry out the type of fundamental reform contemplated in these law reform agency reports. In Canada, Québec has a division in its *Civil Code* dealing with unincorporated nonprofit associations.[25] Eleven American jurisdictions have enacted the NCCUSL Uniform Unincorporated Nonprofit Associations Act.[26] California has implemented most of the recommendations in the reports of the California Law Revision Commission.[27]

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20. *Ibid.* at 508.

21. "Prefatory Note" to the *Uniform Unincorporated Nonprofit Association Act* (1996), online: NCCUSL Web <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uunaa96.htm> at 1.

22. *Ibid.* at 3.

23. *Unincorporated Associations*, 33 Cal. L. Revision Comm'n Reports 729 (2003); *Unincorporated Association Governance*, 34 Cal. L. Revision Comm'n Reports 231 (2004); *Nonprofit Association Tort Liability*, 34 Cal. L. Revision Comm'n Reports 257 (2004).

24. *Unincorporated Associations* (Rep. No. 14) (Belfast: The Stationery Office, 2004) at 24.

25. Arts. 2267–79 C.C.Q. The provisions that inspired specific recommendations in the Ontario Law Reform Commission's report are cited in the discussion in Part 5. Arts. 2267–79, in full, are attached as an appendix.

26. Alabama: Ala. Code §§ 10-3B-1–10-3B-18 (1975); Arkansas: Ark. Code §§ 4-28-501–4-28-517 (2005); Colorado: Colo. Rev. Stat. §§ 7-30-101–7-30-119 (2005); Delaware: Del. Code tit. 6, §§ 1901–1916 (2005); District of Columbia: D.C. Code §§ 29-971.01–29-971.15 (2005); Hawaii: Haw. Rev. Stat. §§ 429-1–429-13 (2004); Idaho: Idaho Code §§ 53-701–53-717 (2005); Texas: Tex. Bus. & Com. Code §§ 252.001–252.017 (2005); West Virginia: W. Va. Code §§ 36-11-1–36-11-17 (2004); Wisconsin: Wis. Stat. §§ 184.01–184.15 (2005); Wyoming: Wyo. Stat. §§ 17-22-101–17-22-115 (2005). Two states have recently introduced bills to enact the NCCUSL Uniform Act: Connecticut: H.B. 5970, Gen. Assembly, Jan. Sess. (Conn. 2005); Oklahoma: S.B. 874, 50th Leg., 1st Sess. (Okla. 2005).

27. 2005 Cal. Stat. 116.

5. THE MAIN LEGAL ISSUES

(a) Introduction

In the sections that follow, this memorandum raises, in a very inclusive way, the legal issues that may be relevant to a law reform project on unincorporated nonprofit associations. After briefly setting out how an issue is characterized in the common law jurisprudence or academic commentary, it then touches on recommendations for reform of the law in connection with the issue, which are found in the major law reform studies by the Ontario Law Reform Commission, the National Conference of Commissioners on Uniform State Laws, and the California Law Revision Commission.

(b) Legal Status

The question of the legal status of unincorporated nonprofit associations is less a legal issue in itself and more the origin of all the issues that follow. Most of the issues discussed below turn on the classic view that unincorporated nonprofit associations have no independent legal status—they are not bodies recognized by the law as being separate from their members. The law took a curious course to reach this conclusion. For a long period—roughly from the late sixteenth to the late eighteenth centuries—unincorporated nonprofit associations in England were generally suppressed. The rationale for this suppression varied: early on it was based on concerns about seditious groups and meetings; later, unincorporated groups came to be seen as an abuse of the Crown prerogative to issue licenses to corporate bodies; and still later, unincorporated bodies were caught up in the wider concerns over the harm caused to investors in the speculative bubble involving joint-stock companies.[28]

After active suppression waned, cases involving unincorporated nonprofit associations began to reach the courts. Very early on, the courts showed some signs of treating unincorporated nonprofit associations as a species of partnership.[29] But the courts soon changed course, adopting the classic view of unincorporated nonprofit associations as having no legal status.[30]

One of the implications of the classic view is that, as the legal issues noted below arose, they were resolved in accordance with rules already formulated under a more-established branch of the law. As a result, there is no distinct law of unincorporated nonprofit associations in the same way that there is a distinctive and well-developed law of corporations or partnerships or trusts. Instead it is better to view this area as comprising various rules—which have mainly been drawn from the law of agency, the law of contracts, and the law of trusts—that have been applied to legal issues arising in cases involving unincorporated nonprofit associations. This gives rise to a fundamental ques-

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28. *See* Keith L. Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (Sydney: Law Book, 1986) at 11–16.

29. *See Fells* v. *Read*, (1796) 3 Ves. Jun. 70, 30 E.R. 899.

30. *See Lloyd* v. *Loaring*, (1802) 6 Ves. Jun. 773, 31 E.R. 1302 at 1305, Eldon L.C. ("It is singular, that this Court should sit upon the concerns of an association, which in law has no existence; and in that case, that this Court should be ancillary to their agreements as to their toasts, &c.").

tion—the extent to which these rules should be displaced by extending legal status to unincorporated nonprofit associations for certain purposes.

(c) Formation

The formation of an unincorporated nonprofit association is governed by the law of contract. The only limitations that are imposed here are limitations already existing in the law of contract. So long as there is an intention to create legal relations, the contract may be written or oral. The unincorporated association may be formed for any nonprofit purposes, as long as they are not illegal purposes.[31] No government-imposed formalities or registration requirements must be met.

The main difficulty under this heading for law reformers has involved preserving this flexibility while capturing the concept of the foundational contract in statutory language. The Ontario Law Reform Commission recommended adopting language similar to article 2267 of the Québec Civil Code:[32]

> **2267.** The contract by which an association is established may be written or verbal. It may also arise from overt acts indicating the intention to form an association.

California has also gone down this road by adding these definitions to its Corporations Code:[33]

> **18008.** "Governing document" means a constitution, articles of association, bylaws, or other writing that governs the purpose or operation of an unincorporated association or the rights and obligations of its members.
>
> **18010.** "Governing principles" means the principles stated in an unincorporated association's governing documents. If an association has no governing documents or the governing documents do not include a provision governing an issue, the association's governing principles regarding that issue may be inferred from its established practices. For the purposes of this section, "established practices" means the practices used by an unincorporated association without material change or exception during the most recent five years of its existence, or if it has existed for less than five years, during its entire existence.

A subsidiary issue is the extent to which legislation should require compliance with any formalities in the formation of an unincorporated nonprofit association. For example, the Ontario Law Reform Commission proposed requiring that the formation contract be dated.[34] The Commission also recommended making registration of the unincorporated nonprofit association's name mandatory.[35]

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31. *See* Jean Warburton, *Unincorporated Associations: Law & Practice* (London: Sweet & Maxwell, 1986) at 1 ("A number of people who conspire together to burn religious paintings will not be an unincorporated association . . . because the agreement between them will be void for illegality.").

32. *Supra* note 11 at 511–12.

33. Cal. Corp. Code §§ 18008; 18010, as am. by 2005 Cal. Stat. 116.

34. *Supra* note 11 at 512.

35. *Ibid.* at 513–14. The inspiration for this recommendation is an equivalent requirement for businesses carried on

The difficulty with such recommendations is their enforcement. If they are enforced by providing that noncompliant groups are not unincorporated nonprofit associations for the purposes of the statute, then they detract from the default character of this legal form. If they are enforced by way of a fine, then such fines will likely fall on the types of small groups with few resources that the statute is designed to assist.

(d) Definition

There is some overlap between statutory provisions regarding the formation of an unincorporated nonprofit association and a statutory definition of "unincorporated nonprofit association." But there are at least two reasons why a statutory definition may be useful in addition to provisions addressing formation. First, as the Ontario Law Reform Commission pointed out, it will often be necessary for the statute to refer to "the association" or the like, if only out of drafting convenience.[36] Second, it may be necessary to carve certain bodies or relationships out of the purview of the statute. The NCCUSL Uniform Act contains a statutory definition that fulfils both purposes:

> "Nonprofit association" means an unincorporated association, other than one created by a trust, consisting of [two] or more members joined by mutual consent for a common, nonprofit purpose. However, joint tenancy, tenancy in common, or tenancy by the entireties does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.

An alternative approach could be to draw on the *Partnership Act*, which contains a statutory definition,[37] a provision expressly excluding certain relationships,[38] and a set of rules for courts to apply in assessing contested cases.[39]

(e) Membership

The rules respecting membership are governed by the law of contract. If the contract of formation does not address questions such as admission into, suspension of, or termination of membership, then a unanimous decision of the members is required to take action.[40]

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as sole proprietorships or partnerships. *See, e.g., Partnership Act,* R.S.B.C. 1996, c. 348, section 81 (1).

36. *Ibid.* at 513.

37. *See, e.g.,* the British Columbia *Partnership Act, supra* note 35, section 2.

38. *See, e.g., ibid.,* section 3.

39. *See, e.g., ibid.,* section 4. The Ontario Law Reform Commission took another approach and simply recommended adopting a provision based on section 5 of Ontario's *Partnerships Act,* R.S.O. 1990, c. P.5 ("Persons who have entered into partnership with one another are, for the purposes of this Act, called collectively a firm, and the name under which their business is carried on is called the firm name.").

40. *See* Ontario Law Reform Commission, *supra* note 11 at 512 ("Given its foundation in contract, the admission of new members to an association would, in theory and in the absence of a contrary provision, require the consent of all existing members to be bound by any new admission.").

Article 2268 of the Québec Civil Code varies this rule, by setting out a presumption in favour of "allow[ing] the admission of members other than the founding members."[41] Québec also has provisions protecting the voting,[42] access to information,[43] and withdrawal[44] rights of members. California has more-detailed provisions protecting members' voting rights.[45] These provisions define a quorum for the purposes of a vote and they contain requirements for notice of a vote. California's legislation also contains extensive provisions respecting termination and suspension of members, including a procedure for suspension or expulsion of members whose membership carries "a property right" or "an important, substantial economic interest."[46]

The Québec and the California legislative provisions operate as supplements to any provisions contained in the unincorporated nonprofit association's contract of formation.

(f) Governance

The common law has had little to say about the standard of care that the managers of an unincorporated nonprofit association must meet in managing the association.[47] The scope of a manager's duties and potential liability is unclear. In response to this uncertainty, the California Law Revision Commission proposed enacting a clear and detailed code setting out the duties of management:[48]

> The proposed law would fill the gap in existing law by adding a default standard of care for a director of an unincorporated association. The proposed standard is based on existing standards applicable to similar entities, whether incorporated or unincorporated. It would require that a director act "in good faith, in a manner the director believes to be in the best interests of the association, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." An unincorporated association would be allowed to impose a stricter standard of care, but could not set a more lenient standard.

The proposed provision also extended a limited immunity from liability, if a manager could prove that he or she had met the statutory standard.[49]

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41. The Ontario Law Reform Commission recommended the enactment of a substantially similar provision: *ibid.*

42. Art. 2272 C.C.Q.

43. Art. 2273 C.C.Q.

44. Art. 2276 C.C.Q.

45. Cal. Corp. Code § 18330, as am. by 2005 Cal. Stat. 116. *See also Unincorporated Association Governance*, *supra* note 23 at 239; 249–50.

46. Cal. Corp. Code §§ 18310; 18320, as am. by 2005 Cal. Stat. 116. *See also Unincorporated Association Governance*, *ibid.* at 238; 246–49.

47. *See Unincorporated Association Governance*, *ibid.* at 237.

48. *Ibid.* (footnotes omitted). *See also ibid.* at 245–46.

49. *Ibid.* at 237–38.

The Ontario Law Reform Commission also concluded that "[s]ome effort should be made at this stage in the development of the law to formulate explicitly the duties of prudence and loyalty owed by the fiduciaries of the association."[50] Their recommendation was to adopt standards similar to the ones developed for nonprofit corporations.[51]

These types of recommendations may prove to be controversial. It is interesting to note that this is one of the few places where the California legislature did not adopt a recommendation of the California Law Revision Commission. In place of the Commission's detailed recommendation, the legislature simply enacted a vague statement of intent.[52]

(g) Property

An unincorporated nonprofit association cannot hold property, because it is not a legal entity. Property used by the unincorporated nonprofit association is, in most cases, actually owned by a member or several members in trust for the entire membership. Often, the members are able to anticipate any problems and put the appropriate legal structures in place. But this system of holding property has caused real problems when an outsider makes a gift of property, purportedly, to the unincorporated nonprofit association. Commentators, such as the Ontario Law Reform Commission, have noticed that the courts have had to develop a complex set of categories in order to analyze such gifts:[53]

> There are ten basic fact patterns involving gifts to associations. These may be listed, in a stylized form, as follows. The disponer may make a gift by saying: (1) "to the association," (2) "to the present members of the association," (3) "to the present and future members of the association," (4) "to the purposes of the association," (5) "to the members of the association to be held subject to the rules of the association," and (6) to (10) "to X in trust for . . ." where the object of the trust is any one of the gift destinations identified in (1) through (5).

As the Commission noted, in the vast majority of cases, the disponer's intention is best expressed by categories (1) and (6). But using these words will result in the gift being struck down, as the unincorporated nonprofit association is not a legal entity capable of holding property in its own name. Further, most of the other categories also have problems connected with them that may result in a gift being void. As a result, under the current law, some careful planning and drafting is required to make an effective gift that will carry out the disponer's intention.[54]

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50. *Supra* note 11 at 532.

51. *Ibid.* at 533.

52. Cal. Corp. Code § 18300, as am. by 2005 Cal. Stat. 116 ("It is the intent of the Legislature to enact legislation relating to the governance of unincorporated associations.").

53. *Supra* note 11 at 514. *See also* Paul Matthews, "A Problem in the Construction of Gifts to Unincorporated Associations" (1995) 59 Conveyancer 302 at 302–03 (finding six categories).

54. Ontario Law Reform Commission, *ibid.* at 515.

The Commission recommended overcoming these difficulties by making a ". . . recommendation that the proposed statute provide that, in the usual course, the property of an association is held by the members of the association, according to the rules of the association, that it is available in priority to satisfy the claims of creditors of the association, and that, subject to the condition regarding the registration of a declaration, it may be held in the name of the association."[55] The NCCUSL Uniform Act goes somewhat further down this line by extending legal status to unincorporated nonprofit associations with respect to dealings with property:

> **Section 4. Real and personal property; nonprofit association as legatee, devisee, or beneficiary.**
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> (a) A nonprofit association is a legal entity separate from its members for the purposes of acquiring, holding, encumbering, and transferring real and personal property.
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> (b) A nonprofit association in its name may acquire, hold, encumber, or transfer an estate or interest in real property.
>
> (c) A nonprofit association may be a beneficiary of a trust or a contract, a legatee, or a devisee.

Section 5 of the NCCUSL Uniform Act allows an unincorporated nonprofit association to file a "statement of authority" to deal with real property. This document would list the authorized agents of the unincorporated nonprofit association for the purposes of dealing with its real property.

(h) Liability of Members

The liability of members is primarily dealt with under the law of agency. As one commentator has observed, this reliance on the law of agency makes determination of liability highly fact-specific and, as a result, often difficult to predict:[56]

> The application of an agency analysis constitutes explicit recognition of the contextual dependence of the liability question. The task of the court is to identify the true principal, the real actor to whom liability should be assigned given the specific control arrangements within the association. . . . The difficulty, if it can be called that, is the very contextuality that justifies the analysis in the first place. . . . There are no pre-established status liability rules, as there are in other legal forms, to simplify the determination of who is to be regarded as the principal. This fact dependence, which is a characteristic of the law of agency generally, may make it difficult in some circumstances for lay members of associations to appreciate their potential contractual and tortious liability *ex ante*. It might also create difficulties for creditors, who must identify and pursue only the true principals.

This analysis is applied to cases involving both contractual liability and vicarious liability for a tort committed by a member. In most cases, it means that the management of the unincorporated nonprofit association will be held liable for contractual or tortious defaults. But the facts of any given case may point to a broader section, or even all, of the membership being liable.

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55. *Ibid.* at 523.

56. Robert Flannigan, "Contractual Responsibility in Non-profit Associations" (1998) 18 O.J.L.S. 631 at 632. *See also* Robert Flannigan, "The Liability Structure of Nonprofit Associations: Tort and Fiduciary Liability Assignments" (1998) 77 Can. Bar Rev. 73.

Law reform in this area has endeavoured to provide clarity and certainty by formulating status liability rules and by affixing liability on the unincorporated nonprofit association where appropriate. The Ontario Law Reform Commission, for example, recommended:[57]

> . . . a statutory suppletive rule which establishes, so far as contractual liability is concerned, a reciprocal agency relationship among the members of the executive and which makes the executive agents of the association, thereby engaging civilly the association's property. For tort liability, the suppletive rule should provide that only the common fund is vicariously liable for the torts committed by the association's agents in the course of their agency.

The NCCUSL Uniform Act goes one step further and simply declares, in section 6 (a), that "[a] nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities in contract and in tort."

(i) Capacity to Sue and Be Sued

An unincorporated nonprofit association lacks the capacity to sue or be sued in its own name. A commentator has explained the consequences of this lack of status:[58]

> Lacking party status, the unincorporated association may sue or be sued only in a representative action, namely, when one or more of its members is sued on behalf of all the other members of the association. A judgment obtained against an unincorporated association is thus a nullity.

Interestingly, at one time the Rules of Court permitted associations to sue and be sued in their own name. In British Columbia, for example, the *Supreme Court Rules* defined "corporation" to include an association. This definition was in force until 1943.[59] But recent case law suggests that a similar revision to the Rules of Court would not be permitted today.[60] So proceedings must be commenced and maintained by or against one or more members of the unincorporated nonprofit association as representatives of all the members.[61] Representative actions can be an awkward way of proceeding, as they contain some procedural traps for the unsophisticated or unwary.

In order to reform this area, the Ontario Law Reform Commission recommended authorizing the courts to adopt rules similar to those in place for partnerships.[62] Section 7 of the NCCUSL Uniform Act, on the other hand, contains a statutory statement that unincorporated nonprofit associations be

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57. *Supra* note 11 at 529.

58. Alan M. Minsky, "Unincorporated Associations" (1993) 14 Adv. Q. 197 at 198 (footnote omitted).

59. *See, e.g., Supreme Court Rules, 1925*, O. 71, M.R. 1041. *See also Yue Shan Society, supra* note 2 at 290, O'Halloran J.A. (dissenting).

60. *See Harms, supra* note 17.

61. *See, e.g.*, British Columbia *Supreme Court Rules*, Rule 5 (11)–(12).

62. *Supra* note 11 at 531.

considered separate legal entities for the purposes of instituting, defending, intervening, or participating in a proceeding.

(j) Merger and Dissolution

Absent a different rule set out in the contract of formation, the traditional common-law rule requires a unanimous vote of the members in order to authorize an unincorporated nonprofit association to merge with another association or to be dissolved. The application of this rule can result in an obvious practical problem: each member holds a veto over the proposed merger or dissolution. The common law also has numerous theoretical difficulties. As the California Law Revision Commission observed, in other contexts merger of entities is the subject of clear statutory rules. The absence of such rules for unincorporated nonprofit associations leaves some doubt about whether mergers are permissible. If they are permissible, then questions still arise about the proper procedure to follow.[63] Another commentator has observed that ". . . the law relating to dissolution of such associations is in a most unsatisfactory condition":[64]

> The cases are contradictory and, even when they have managed to reach common conclusions, their reasoning has often been sparse and confusing. The area is a difficult one. Unincorporated associations reside on the shifting interface of the law of contract and the law of trusts, and one's answers to the proprietary questions posed by their dissolution must necessarily reflect one's assumptions about the proper relationship between these two conceptual receptacles of English law.

The Ontario Law Reform Commission recommended enacting a statutory provision that would alter the traditional common law rule. The statutory provision would allow mergers and dissolutions upon the agreement of a "special majority."[65] The Commission did not define "special majority"; in corporate law, it usually means either a two-thirds majority or a three-quarters majority. The Commission also intended the statutory rule to be subject to any special rule expressly contained in the contract of formation, and for it not to apply to charitable or religious unincorporated nonprofit associations.[66]

The California Law Revision Commission recommended the enactment of a detailed code to govern mergers and dissolutions. The merger provisions expressly authorize mergers with other entities: the provisions are not limited to mergers between unincorporated nonprofit associations alone. The recommendations generally allow a merger to be approved by a majority of the unincorporated nonprofit association's management committee and a majority of the members, unless the contract of formation calls for a special majority. If the merger results in the members becoming personally liable for an obligation of the merged entity, however, then all the members must authorize the merger. The recommendations also set out a detailed default procedure for mergers.

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63. *Report on Unincorporated Association Governance*, *supra* note 23 at 239.

64. Brian Green, "The Dissolution of Unincorporated Non-Profit Associations" (1980) 43 Mod. L. Rev. 626 at 626.

65. *Supra* note 11 at 533.

66. *Ibid*. at 533–34. Charitable and religious bodies would be subject to a specially designed "corporate *cy-près* rule."

The Commission also recommended authorizing dissolution by any of the following methods:

(a) If the association's governing documents provide a method for dissolution, by that method.

(b) If the association's governing documents do not provide a method for dissolution, by the affirmative vote of a majority of the voting power of the association.

(c) If the association's operations have been discontinued for at least three years, by the board or, if the association has no incumbent board, by the members of its last proceeding incumbent board.

(d) If the association's operations have been discontinued, by court order.

Upon a dissolution of an unincorporated nonprofit association any property remaining after payment of debts and liabilities is distributed in accordance with a trust or other conditions that apply to the property. If property remains that is not subject to a trust or other conditions, then it is distributed in accordance with the contract of formation or, if it is silent, to the members *pro rata*.[67] The recommendations of the California Law Revision Commission regarding both mergers and dissolutions have been enacted.[68]

The NCCUSL Uniform Act does not directly address either merger or dissolution. But it does contain a provision that touches on dissolution: under section 9, a person in possession or control of the personal property of an unincorporated nonprofit association that has been inactive for three years (or for a longer or shorter period expressly set out in the contract of formation) may transfer custody of that personal property to: a person named in a document of the association dealing with transfer in these circumstances; or, if such a document does not exist, to a nonprofit association or nonprofit corporation pursuing similar purposes or to a government or government agency.

6. CONCLUSION

This discussion has only been able to scratch the surface of the law regarding unincorporated nonprofit associations. There are subtleties in both the jurisprudence and the law reform recommendations that could not be addressed in a memorandum of this size. These subtleties may be pursued in greater detail as the project develops.

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67. Cal. Corp. Code § 18130.

68. Cal. Corp. Code §§ 18350 (mergers); 18410 (dissolutions), as am. by 2005 Cal. Stat. 116.

APPENDIX

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CIVIL CODE OF QUÉBEC

PRELIMINARY PROVISION

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

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DIVISION V

ASSOCIATIONS

2267. The contract by which an association is established may be written or verbal. It may also arise from overt acts indicating the intention to form an association.

1991, c. 64, a. 2267.

2268. The contract of association governs the object, functioning, management and other terms and conditions of the association.

It is presumed to allow the admission of members other than the founding members.

1991, c. 64, a. 2268.

2269. Failing any special rules in the contract of association, the directors of the association are elected from among its members, and the founding members are, of right, the directors of the association until they are replaced.

1991, c. 64, a. 2269.

2270. The directors act as mandataries of the members of the association.

Their only powers are those conferred on them by the contract of association or by law, or those arising from their mandate.

1991, c. 64, a. 2270.

2271. The directors may sue and be sued to assert the rights and interests of the association.

1991, c. 64, a. 2271.

2272. Every member is entitled to participate in collective decisions, and he may not be prevented from exercising that right by the contract of association.

Collective decisions, including those to amend the contract of association, are taken by a majority vote of the members, unless otherwise stipulated in the contract.

1991, c. 64, a. 2272.

2273. Notwithstanding any stipulation to the contrary, any member may inform himself of the affairs of the association and consult its books and records even if he is excluded from management.

In exercising this right, the member is bound not to impede the activities of the association unduly nor to prevent the other members from exercising the same right.

1991, c. 64, a. 2273.

2274. Where the property of the association is insufficient, the directors and any member administering in fact the affairs of the association are solidarily or jointly liable for the obligations of the association resulting from decisions to which they gave their approval during their administration, whether or not the obligations have been contracted for the service or operation of an enterprise of the association.

The property of each of these persons is not applied to the payment of creditors of the association, however, until after his own creditors are paid.

1991, c. 64, a. 2274.

2275. A member who has not administered the association is liable for the debts of the association only up to the promised contribution and the subscriptions due for payment.

1991, c. 64, a. 2275.

2276. Notwithstanding any stipulation to the contrary, a member may withdraw from the association, even if it has been established for a fixed term; if he withdraws, he is bound to pay the promised contribution and any subscriptions due.

A member may be excluded from the association by decision of the members.

1991, c. 64, a. 2276.

2277. A contract of association is terminated by the expiry of its term or the fulfilment of the condition attached to the contract, or by the accomplishment or impossibility of accomplishing the object of the contract.

It is also terminated by decision of the members.

1991, c. 64, a. 2277.

2278. When a contract of association is terminated, the association is liquidated by a person appointed by the directors or, failing that, by the court.

1991, c. 64, a. 2278.

2279. After payment of the debts, the remaining property devolves in accordance with the rules respecting the contract of association or, failing special rules, it is shared equally among the members.

However, any property derived from contributions of third persons devolves, notwithstanding any stipulation to the contrary, to an association, legal person or trust sharing objectives similar to those of the association; if that is not possible, it devolves to the State and is administered by the Public Curator as property without an owner or, if of little value, is shared equally among the members.

1991, c. 64, a. 2279.