ONTARIO NONPROFIT NETWORK

WRITTEN SUBMISSION:
Bill 65, *An Act to Revise the Law in Respect of Not-for-Profit Corporations*

Standing Committee on Social Policy,
Legislative Assembly of Ontario

c/o Committee Clerk

Room 1405, Whitney Block, Queen's Park, Toronto ON M7A 1A2

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About ONN

The Ontario Nonprofit Network (ONN) is a network of networks that helps to build communication and coordination amongst nonprofit organizations working for the public benefit in Ontario. We support nonprofits to have the information that they need to make their voices heard and their issues addressed.

Sports and recreation, arts and culture, education and research, health, social services, environment, development and housing, and others make up the diverse and vibrant nonprofit sector in Ontario. However, prior to the creation of the Ontario Nonprofit Network (ONN), there was a significant gap in the capacity within the sector to address issues of mutual interest.

The Ontario Nonprofit Network, which formed in 2007, is a network that works to facilitate collaboration across sub-sectors and regional groups, as well as attend to the overall health of the nonprofit sector. ONN recognizes the invaluable contribution nonprofits make to the resiliency and success of Ontarian communities. ONN works to enhance this contribution by strengthening the sector's capacity to meaningfully participate in policy discussions that impact their operations.

The proposed legislation in Bill 65 is a prime example of a cross-sector, Ontario-wide issue around which ONN has convened sector leaders to better identify areas of consensus and a coherent set of recommendations to share with the network. ONN has been involved with the development of Bill 65 from the initial consultations undertaken by the Government of Ontario - helping shape a revised legislative framework that is in step with the realities and needs of Ontario's nonprofit sector. The content of this written submission is the product of the ongoing collaboration of sector leaders and legal experts convened by ONN around this issue.

215 Spadina Avenue, Suite 421

Toronto, Ontario M5T 2C7

416.642.5786

info@ontariononprofitnetwork.ca

www.ontariononprofitnetwork.ca

Bill 65: Highlights & Recommended Amendments

Purpose

The sector, government, and the public have remarkably congruent ideas about what they expect for a nonprofit corporation serving the public good, but this criteria has never been clearly spelled out in legislation. Moreover, Bill 65, Ontario's proposed *Not-for-Profit Corporations Act,* offers an unprecedented opportunity to serve the sector's needs into the future. The current draft of the Act (Bill 65), promises to deliver many important features, but changes are still needed to ensure this legislation is the best it can be for the sector and broader Ontario public. This brief serves a four-fold purpose:

(1) Provide background and context of Bill 65 and ONN;
(2) Describe highlights of Bill 65 which are broadly supported;
(3) Propose key changes required to improve the existing draft; and
(4) Provide other recommended amendments to meet the sector's needs.

1.0 Background: Why this legislation matters

It has been more than fifty-years since corporate legislation for the sector has been updated to reflect the sea-change in the nonprofit sector over that time. The nonprofit sector has grown and diversified immensely during that period. The statistics aptly speak to this; the Ontario nonprofit sector:

- Includes over 45,000 organizations[1] and employs roughly 1 million people in Ontario – 15% of the workforce;
- Benefits from the energy, time, and leadership of almost 8 million volunteers in communities across Ontario[2]; and
- Contributes approximately $50 billion in combined revenue to the economy[3], representing over 7.1% of provincial GDP – greater than auto and construction industries combined.

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[1] This data is from the 2003 Nonprofit and Voluntary Sector in Ontario (NSVO) which found 45,360 registered charities and incorporated not-for-profits in Ontario. This was re-published in a revised 2006 report, *Regional Highlights of the National Survey of Nonprofits and Voluntary Organizations* by Katherine Scott, Spyridoula Tsoukalas, Paul Roberts, and David Lasby. At the national level, charities represent 56% of all organizations – a similar break-down specific to Ontario not available although it is often assumed to be comparable.

[2] In Ontario, the overall number of volunteers is 7.8 million, comprising roughly 400,000 board volunteers and 7.4 million non-board volunteers as reported by 2003 report, *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* by Statistics Canada (revised June 2005).

[3] This $47.7 billion represents 43% of all revenues generated by all organizations across Canada – a total of nearly $112 billion.. Hospitals, Universities and Colleges account for less than 1% of all organizations but received 38% of total sector revenues in 2003. This data is from the 2003 Nonprofit and Voluntary Sector in Ontario (NSVO) re-published in a revised 2006 report, *Regional Highlights of the National Survey of Nonprofits and Voluntary Organizations* by Katherin Scott, Spyridoula Tsoukalas, Paul Roberts, and David Lasby.

Given the contribution and value generated by the nonprofit and voluntary sector, it is simply good public policy to support this sector through updated legislation that streamlines the incorporation process and enables nonprofits acting for the public benefit to better achieve their mission. This is also a key opportunity to create a new designation in the sector, or 'brand', that will help the people of Ontario easily identify organizations dedicated to serving the public good.

2.0 Highlights of Bill 65

Ontario nonprofit organizations that provide public benefit to the people of Ontario have been operating for fifty years under corporate legislation that does not formally recognize their work as different from organizations that exist to serve their members, such as trade associations and golf clubs. In addition, nonprofit organizations have, through the years, been diligently working to earn revenues to allow them to undertake their public purpose. The previous corporate legislation is permissive but silent on the matter of nonprofit organizations earning funds, often through 'social enterprise', to undertake their work. Bill 65 addresses both these issues clearly, and, for the first time, sets out what has been existing practice in the sector for many years. ONN is very pleased that these two critically important issues have been so well addressed in the new act.

2.1 New Designation: Public Benefit Corporation

Across the sector, funders, and public, the same core 'criteria' is identified when asked what is required of a nonprofit to fulfill the notion of public benefit:

- The organization has a public purpose and mission;
- The organization operates for the public good not personal gain.
- The organization reinvests any excess revenue in its public purpose; and
- The organization retains its assets in the public domain for the public good

Charities, the most well known of the public benefit organizations, are regulated by Canadian Revenue Agency to ensure they meet the above criteria, but the ~40% of nonprofit organizations that are not charities have no similar regulation even though they, and the public, often believe they do.

Not all nonprofits operate within the above criteria; approximately 15%[4] are 'member-benefit' corporations that will distribute their assets and remaining property upon dissolution of the corporation to its members.

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[4] This number is an informed estimate based on data from the 2003 Nonprofit and Voluntary Sector in Ontario (NSVO), which identified 2,177 'business, professional associations and unions' among Ontario's 45,360 nonprofits (~4.8%). In addition, many members-based sports clubs and facilities (e.g. golf courses) have been included in the 'sports and recreation' category, as well as nonprofit housing members-based groups in 'development and housing'. Thus, 15% is likely an accurate approximation, if on the higher end. For data, see *Regional Highlights of the National Survey of Nonprofits and Voluntary Organizations* by Katherin Scott, Spyridoula Tsoukalas, Paul Roberts, and David Lasby (2006).

Thus, the new designation **'Public Benefit Corporation' (PBC),** in Bill 65, will serve to differentiate between the two types of nonprofit corporations. Furthermore, a clear designation will enhance the public trust so critical to the sector's work. Funders and the broader public can have confidence that their investment in a local public benefit corporation will support their community for the long haul.

2.2 Supporting Social Enterprise & Earned Income

Bill 65 recognizes the ability of nonprofits **to engage in commercial activities as long as revenues are used to forward public benefit objectives**. This is a significant endorsement for social enterprise or 'earned income' activities by nonprofits, which is increasingly pertinent as more and more nonprofits in Ontario seek out alternative streams of revenue.

Reports have documented the stagnant or shrinking levels of donations and government grant funding over the last fifteen years[5], which has been felt acutely by the small and mid-sized nonprofits and charities. This squeeze has only tightened in the wake of the recent economic downturn, with increased demand for the services many nonprofits offer while facing actual and anticipated funding cuts, as documented by provincial surveys.[6] Considering the present financial environment for the nonprofit sector, it can be anticipated that more nonprofits and charities will be seeking to 'earn' more income outside traditional income streams of donations and grants. This provincial legislation reflects the realities on the ground today and will support the sector as it evolves in response to opportunities and stresses in their funding landscape.

3.0 Critical Amendments Required to Bill 65

There are three major amendments required to further strengthen Bill 65, and make Ontario a leader in nonprofit legislation. The amendments are discussed more generally here, and Appendix A provides detailed suggested wording that, for the most part, has proven effective in other legislation for similar purposes.

3.1 Defining Public Benefit Corporation

It is very important that the Public Benefit Corporation (PBC) is clearly and appropriately defined to meet its full utility. The designation will also entail certain mandatory provisions provided within the legislation.

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[5] Statistics Canada. 2007. *Satellite account of nonprofit institutions and volunteering*, 1997-2004. Cat. No. 13-015-WIE. Ottawa: Statistics Canada. http://dsp-psd.pwgsc.gc.ca/collection_2007/statcan/13-015-X/13-015-XIE2007000.pdfF. or for a discussion of these findings, see Eakin and Graham. 2009. *Canada's non-profit maze: A scan of legislation and regulation impacting revenue generation in the non-profit sector.* Pp. 7-10.

[6] See the 2009 survey results: *Hard Hit: Impact of the Economic Downturn on Nonprofit Community Social Services in Ontario*, Social Planning Network of Ontario, October 2009; or *Challenges and Opportunities for Ontario's Not-for-Profit Sector During Tough Economic Times,* Ontario Trillium Foundation, March 2009.

In Bill 65, as currently drafted, a PBC is defined as including charitable corporations, foundations, and all nonprofit corporations that receive more than $10,000 in a year in arms' length donations or government grants, gifts, or financial assistance.

***Issue**:* This current definition means many membership-based nonprofit corporations may become a PBC *automatically* if they accept a single government contract for a relatively nominal amount; in turn, many nonprofit organizations serving the public benefit but receiving no government funding will *not* be deemed public benefit corporations. This is problematic for both groups.

Upon receipt of a nominal government grant or contract, a member-benefit corporation is faced with more stringent audit provisions, an asset lock and other transparency and access obligations under the act for a period of three years. This will be enormously disruptive. On the other hand, nonprofit organizations providing public benefit without government support, that want to be seen by the community as complying with the greater transparency and accountability requirements, are not included.

The problem is one of *definition*. It is not the source of funding that creates a public benefit corporation but the **intent to serve the public** through their activities that sets them apart.

Recommended Amendment: Replace the current definition of PBC, which includes the 'test' for nonprofit corporations of having received $10,000 in a year from government or in arms' length donations, with a **self-selection** test whereby the nonprofit corporation can choose to become a PBC (with inherent provisions of the designation) or remain a non-PBC. Charities will always be PBCs. Other organizations should **have the right to opt-in** to be a PBC. In this manner, organizations must decide whether the advantages and provisions associated with the PBC designation best serve the organization's mission and structure. Once that option is exercised, there should be no ability to revoke it.[7]

3.2 Preserving Assets for the Public Good

Currently, Bill 65 only proposes a temporary, 3-year asset lock on a public benefit corporation's assets.

***Issue**:* This undermines the rationale behind the creation of the PBC designation, since a corporation can, after three years, distribute its assets among membership. The intent of a nonprofit public benefit corporation is that the work of the corporation is for the public good in perpetuity and not for a limited time period.

Recommended Amendment: Amend Bill 65 to ensure a permanent asset lock on PBCs assets to provide assurance to the public that a public benefit corporation will **always** retain its assets in the public domain. Rather than distribute profits to members upon dissolution, surplus assets should go to registered charities, another PBC, or the government – all of which are committed to the long-term interest of the communities they serve. [8]

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[7] See Appendix A, section 1 "Definition of PBC" for detailed legislative provisions.
[8] Refer to Appendix A, section 2 "Asset Lock" for detailed legislative provisions.

It is important the PBC be able to gift to another PBC (as separate from charities) because many PBCs undertake valuable activities, but do not qualify for charitable registration. These activities would be lost if the only option is gifting to charities upon dissolution. We are pleased this provision is included under s.166(1)(d)(i)(b) of Bill 65 (page 78).

3.3 Ability to Access Community Bonds with Oversight

Currently, Bill 65 does not speak to community bonds, which have been identified as a key tool that will improve nonprofits' capabilities to solicit investments from the public for initiatives, such as capital projects, that generate community benefits.

***Issue*:** Charities and nonprofits in Ontario are exempted from the Ontario Securities Commission, but this leaves them without any process of review for bond offerings. The Ontario *Co-operative Corporations Act*, however, which governs the provinces cooperatives (who are also exempt from the Ontario Securities Commission), provides for a process of **review of offering statements** that will also suit the nonprofit sector. Most importantly, it would provide better assurance to the public looking to purchase community bonds. Finally, if both sectors use the same process, it will help to build a market for these community investments.

Recommended Amendment: Include in Bill 65 enabling legislation for issuing community bonds similar to that in the *Co-operative Corporations Act.* These provisions provide a measure of protection to potential purchasers of bonds. These provisions, which provide for the use of offering statements with government oversight, can be adapted to apply to nonprofit corporations in Bill 65. In this manner, nonprofit corporations can issue community bonds and the public can be confident of the risk assessment associated with their investment decision.[9]

4.0 Other Important 'Technical' Amendments

There are other amendments to the existing content of Bill 65 which would better reflect sector practice, provide more clarity and/or streamline the legislative framework. Also included are some comments and questions regarding specific provisions in the proposed Act for consideration in clause by clause review.

4.1 PBC Directors

One of the mandatory provisions currently found in Bill 65 is that not more than one-third of the directors may be officers or employees of a PBC or its affiliates.

***Issue**:* This regulation will cause unnecessary hardship, particularly for private foundations and small nonprofits. In the case of charities, and most nonprofit public benefit corporations who operate with volunteer Boards of Directors this regulation would require them to **hire outside officers** to replace the Board volunteers who have traditionally filled these positions. PBCs do

[9] Refer to Appendix A, section 3 "Offering Statements" for detailed legislative provisions.

not have the funds to hire outside officers and we do not know of any evidence that this added requirement and expense is warranted. This requirement will cause serious confusion and hardship for organizations relying on volunteer Board members for their governance.

Technical Solution: This regulation in subsection 23(4) of the proposed legislation should be deleted.

4.2 Standard of Financial Review

Bill 65 would lower the revenue level at which a PBC can dispense with an audit from $500,000 to $100,000.

Issue: Revised and strengthened audit standards - as a result of for-profit wrongdoing - have resulted in audits becoming more costly and complex in the nonprofit and charitable sectors. While we agree PBCs need to be accountable to their communities, this accountability must be reasonable and commensurate with the risk. We believe PBCs with **annual revenues under $500,000** should be permitted to dispense with an audit in favour of a financial statement (or 'review engagement').

This higher standard of financial review for PBCs, at a relatively low level of revenue, is an unnecessary and excessive burden for many smaller organizations. Moreover, the higher threshold is in line with the Canada Revenue Agency's recommendation to charities that an annual audit be performed if revenues surpass the $500,000 threshold.[10]

Technical Solution: Eliminate the distinctions between PBC and non-PBCs found in subsection 75(1) with respect to audit exemptions; the revenue levels that exempt audits should be consistent across both types of organization at $500,000.

4.3 Directors and Membership Status

Currently Bill 65 requires that at least two-thirds of directors of a nonprofit corporation must be members.

Issue: While this requirement currently exists under the older legislation, the Ontario *Corporations Act*, there is no policy justification for such a mandatory provision. In many instances, it has been a source of inconvenience when an organization is found offside with the law for having failed to admit directors as members or failed to have them resign over many years of operation – a common oversight.

Directors' duties (e.g. act honestly, in good faith, etc.) are the same whether the director is a member or not. In short, this regulation is inconsistent with the goal to simplify the incorporation

[10] From Charity Tax Tools website created by Imagine Canada with funding support from the Canada Revenue Agency. Available: http://charitytax.imaginecanada.ca/topics/working-cra/when-get-professional-help/when-get-professional-help. Last accessed 05 August 2010.

process. Saskatchewan, under their *Non-Profit Corporations Act* (1995), has no such provision and has not encountered difficulties resulting from directors not having to be members.

Technical Solution: This regulation in subsection 23(3) of the proposed legislation should be deleted.

4.4 Non-Voting Members

Bill 65 currently would grant non-voting members voting rights in certain circumstances. If the non-voting members represent one-third of total membership, they can block the following fundamental changes:

- Changes in membership rights
- An amalgamation
- Continuance to other jurisdictions
- An extraordinary sale, lease, or exchange of property

Typically, public benefit corporations use the 'non-voting member' category to indicate an affiliation unrelated to corporate governance or economic rights within the corporation. This can include, for example:

- Honourary members for long-term service to the corporation.
- Some professional sports organizations have a class of non-resident members, who can participate in the sport but not corporate rights.
- Some cultural institutions have non-voting members who pay a small yearly fee to access the institution for the year.
- Congregants in many churches are considered non-voting members

Issue*:* Allowing non-voting members voting rights makes sense where a member has an economic interest. However, **where non-voting members have no economic interest**, there is no policy rationale to grant these rights on fundamental change. In fact, there is concern that this legislation would enable non-voting members to vote against an increase in membership fees, which could constitute a change in membership rights. This presents a challenge of economic viability for nonprofits dependent upon membership fees to cover services to its members.

Technical Solution: Amend Bill 65 to provide voting rights to non-voting members only where the member has an economic interest in the corporation (subsections 110(3), 115(3) and 117(4)). Where non-voting members should have a vote on changes affecting their membership class, Bill 65 can provide for a default that a fee change (to cover the cost of benefits to the class) does not trigger a class vote (subsection 104(2)).

4.5 Use of Proxies

Currently Bill 65 deems that every member entitled to a vote at a meeting of the corporation members may appoint a proxy holder to attend and act at the meeting with the authority conferred by the proxy.

Issue: Many corporations are uncomfortable with proxies as they object to the possibility that someone who is not a member of the organization can be appointed as a proxy. In other instances, proxy voting may not be appropriate for the operation of the organization. Notably, proxies are not mandatory under the *Canada Not-for-Profit Corporations Act* or the Saskatchewan *Non-Profit Corporations Act* (passed in 1995).

Technical Solution: While proxies can play an important role, the determination of whether they are allowed and who qualifies to be a proxy holder should be a decision for the nonprofit corporation. Bill 65 should be amended to recognize that subsection 64(1) applies unless otherwise provided for in the articles or by-laws and subject to restrictions contain therein.

4.6 Director's Liability

There are currently no provisions for a liability shield for directors and officers of nonprofit corporations in Bill 65.

Issue: This fails to address a longstanding concern among directors (most of whom are volunteers) who often fear the personal costs they would incur should they face litigation. Insurance is often only practical for a small subset of the ~46,000 nonprofits that will fall under this legislation. Due diligence and good faith defenses are not much assistance except late in the litigation process. A statutory limitation on liability for directors and officers would be welcome by the sector.

Furthermore, such protections would help to encourage participation in the sector and make Ontario's Act a more attractive governance structure if directors feel they may have adequate legal protection while carrying out their duties as directors of nonprofit corporations. Finally, this amendment would bring Ontario's legislation in line with the Saskatchewan *Non-Profit Corporations Act* (1995).

Technical Solution: Consider an additional subsection to subsection 46 of Bill 65 to limit the liability directors and officers are exposed to section 112(1) of the Saskatchewan Act could be used as a guide in drafting this provision.

4.7 Comments and Observations on Clause by Clause Review

Comments include page number and subsection as per Bill 65, *An Act to revise the law in respect of not-for-profit corporations*, available from the Legislature of Ontario.

Abbreviations:

Ontario *Cooperatives Corporations Act* (1990) = 'Co-op Act'

Saskatchewan *Non-Profit Corporations Act* (1995) = 'Saskatchewan Act'

Page 6 - s.1: under "Definitions", the definition of "charitable corporations" does not reflect the common-law definition of charity. Rather, Bill 65 appears to rely on a definition from s.1(2) of the *Charities Accounting Act*. This is problematic because the reference to "public purpose could result in a corporation being deemed a charitable corporation within the meaning of this Act, but not meeting the common law definition used in other Canadian jurisdictions.

Page 7 - s.1: under "Definitions", change the definition for "public benefit corporation" from a test based on 'source of funds' to one of self-selection through the corporations by-laws (see this brief's pages 4-5 for discussion).

Page 8 - Definition of "special resolution" should not include reference to 'special meeting'; a "special resolution" can be considered at an AGM or other general meeting.

Furthermore, a special resolution should always be passed by directors first, rather than revoked retroactively, as contemplated by s. 102(2) (Page 54).

Page 14 – s. 17(3): It is dangerous for a bylaw to take effect upon being passed by the board; it should await confirmation by members, as in the Co-op Act.

Page 14 – s. 18(1): Are default bylaws in place if set of organizational by-laws not adopted within 60 days of incorporation – or is there a continuance of by-laws for those transferring in to the new act?

Page 17 – s.23(3): This clause requires individual members, as a corporation with only corporate members would still have to have a second class of members who are directors. The Co-op Act deals with this by permitting directors to be qualified if they are members, directors, officers or employees of members.

Page 17 – s. 23(4): Delete this clause regarding the limitation that not more than one-third of directors may be officers or employees of a PBC or affiliates (see this brief's pages 6-7 for discussion).

Page 17 – s. 24(1): This clause states director selection is "by ordinary resolution" when it should be by ballot.

Page 17 – s. 24: There is no statement that the "first directors" are those named in the articles. Perhaps defining "first directors" as those named in the articles would suffice.

Page 18 – s. 26(1): The clause states that "members" may remove a director or directors. This should be clarified whether non-voting members are included in the implied "members".

Page 18 – s. 27: Regarding the concept of an entitled "statement giving reasons" by the director resigning or opposed to their removal – the circulation requirement in s.27(2), where the

"corporation shall immediately give members a copy of the statement", needs further fleshing out similar to s.56 for proposals. Otherwise, there is significant potential for abuse.

Page 19 – s. 28(2): Is there a legal need to have some meetings of members described as "special"? A meeting can be described as a simple "meeting" in this instance.

Page 19 – s. 29: This clause proposes an interesting concept that a "person who manages or supervises management" is deemed to be a director if no directors are in office. Does that place responsibilities on that person that would be unacceptable - liability for wages, remittances, etc.? Per s. 21 (Page 16), the directors "shall manage or supervise management". This raises a question as to who that person referred to in s.29(1) is then.

Page 22 – s. 35(1): A resolution approved by majority of directors by emails should also be permitted, unless any director objects.

Page 23 – s. 40(1): Currently, damages to employees for wrongful dismissal are not directors' personal liability. However, with the terms "all debts", it is implied that this could fall under directors' personal liability. Delete "all debts" and limit the liability to unpaid wages and vacation pay.

Page 28 - s.64: Consider additional clause to limit the liability of directors and officers (see this brief's pages 9 for discussion).

Page 32 – s. 51(5): Consider whether the appeal from a member's discipline or membership termination should be to the membership first rather than the court, as in the Co-op Act.

Page 35 – s. 56: Clarify in the clause that a member's proposal may only be for a matter within the jurisdiction of the members' meeting to decide.

Page 38 – s. 60: Clarify in the clause that a requisition may only be for a matter within the jurisdiction of the members' meeting to decide.

Page 39 – s. 64: Bylaws should be able to exclude proxies (see this brief's pages 8-9 for discussion), and establish the maximum number than any one person may hold.

Page 40 – s.65: Consider deleting the mandatory solicitation of proxies in the clause. Many non-profits are uncomfortable with proxies generally, and would not like them used more commonly.

Page 44 – s. 75: Given the significant and rising costs of audits for corporations, the exemptions from audit or review engagement requirements are now too low (see this brief's page 7 for discussion).

Page 48-9 – s. 88: The concept of distribution of "the fair value of membership" to a member on termination of membership is novel and problematic. This option should only be available on dissolution of corporations other than public benefit corporations. Otherwise, how would a

corporation finance such a distribution? The Co-op Act has a provision for the repurchase of member's shares/member loans, but at the option of the co-operative, over five years, and even then, only if the co-op can afford it.

In addition, consider adding a more robust distribution constraint for PBCs. At a minimum include this in the clause, from the Saskatchewan Act:

> *Any profits or accretions to the value of the property of a corporation shall be used to further its activities.*

Page 49 – s. 91(1)(i): This clause, which implies that directors have access to quarterly financial reports only, proposes is a significant change; previously, directors were able to inspect all of the financial records of the corporation. While not often used, this was an effective tool for directors who are suspicious of wrongdoing. Is there a reason why this clause limits access to only quarterly reports?

Page 50 – s. 94(1): This clause would give creditors the right of access to information. Is this necessary?

Page 51 – s.96: This clause creates the obligation to collect – and keep – a written consent to serve from every director and officers. This is onerous and unlikely to be followed; it should only apply where the officer or director was not present at the meeting where they were elected/appointed.

Page 54 – s. 103(1): This clause specifies an "annual meeting" where, in fact, such a resolution as described ("proposed amendment") can be passed at any members' meeting; delete "annual" from the clause.

Page 55 – s. 104(2): Ensure this clause does not enable non-voting members to trigger a vote over an increase in membership fees to cover costs of benefits to this class (see this brief's page 8 for discussion).

Page 79 - s. 166(6): The implication of the definition of "public benefit corporation" in s.1 and the deeming effecting of s.166(6) is that a corporation that becomes a PBC during its fiscal year will not be PBC the following fiscal year, unless it again satisfies the test (source of funds) – otherwise, there is no provision by which a PBC can cease to be a PBC.

In addition, as pertinent to this clause, restrictions on distributions to its members will disappear after three fiscal years, even if the corporation received significant government funds, which it still retains in the form of surplus capital assets. This should be changed in order to ensure that a corporation permanently remains a PBC, and its assets remain in the public domain for perpetuity.

Page 88 – s. 186(7): For non-public benefit corporations, this clause entitled dissenting members to a payment of fair value if they disagree with certain actions. Is this reasonable and necessary?

Conclusion

Many Canadians do not realize that, after the Netherlands, Canada has the largest nonprofit and voluntary sector in the world (the United States is fifth). Ontario, in turn, is the largest provincial sector in Canada. Thus, a new *Nonprofits Corporations Act* in Ontario has the potential to be a far-reaching piece of legislation – to recognize and support the public benefit generated by thousands of organizations everyday through a modernized legislative framework. After fifty-odd years, this is a long overdue and unique opportunity.

This brief provides a comprehensive review of the proposed legislation in Bill 65 and suggests several straightforward and practical amendments that would greatly improve the utility of this legislation for nonprofits, funders, and Ontarians who volunteer with, and are served by, these organizations. Our recommendations are based on the input and feedback from sector members we've worked alongside with throughout the development of Bill 65.

The Ontario Nonprofit Network acknowledges and deeply appreciates the significant consultation with the sector undertaken by the Government of Ontario in the development of this legislation. Following on the repeal of the Ontario *Charitable Gifts Act,* and the amending of the *Charities Accounting Act* earlier this year, we have a historic opportunity to be a leader in creating a modern framework for nonprofit corporations providing public benefit in Canada.

We encourage the members of the Standing Committee on Social Policy to recognize the importance of Bill 65 for Ontario's 46,000 nonprofit organizations and to incorporate the amendments suggested in this brief into the legislation. Ontario deserves the finest piece of nonprofit legislation we can craft today to help the sector cope and adapt to the uncertainty of what the future might bring.

Thank you so very much for your work on behalf of the people of Ontario.

Appendix A

Detailed Legislative Provisions for Strengthening Bill 65 Legislation

1. Definition of PBC

For the definition of public benefit corporation, drawing on the similar definition of non-profit housing co-operative, in the *Co-operative Corporations Act* and the transitional provision contained in Section 26 of the *Co-operative Corporations Statute Law Amendment Act, 1992*.

This is what we need in the Act:

> "public benefit corporation" means,
>
> a. a charitable corporation, and
>
> b. a non-charitable corporation, the articles of which provide that the corporation is a public benefit corporation for the purposes of this *Act*
>
> The articles of a corporation are deemed to provide that the corporation is a public benefit corporation for the purposes of this *Act* if
>
> a. it has received financial assistance from the Government of Canada or Ontario, a municipality or a regional, district or metropolitan municipality or an agency of any of them, unless
>
> **b.** the corporation's articles provide that, on the dissolution of the corporation and after the payment of its debts and liabilities, the remaining property of the corporation be transferred to or distributed among the members.

This is tighter than that contained in the Bill, but reflects the reality – that most non-profits will be PBCs, and want the automatic asset lock that that status provides. Those that have opted for distribution to members on dissolution are clearly excluded.

2. Asset Lock

One of the most likely areas in which this will be an important issue is social housing projects, organized under the *Corporations Act*. Some are charities, and many are not. Many are subject to the *Social Housing Reform Act*, but some are not. The *Social Housing Reform Act* does not cover non-profit projects financed under other government programs, including Ministry of Health and Long-term Care programs, and projects financed with federal money through municipalities, such as Supporting Communities Partnership Initiative (SCPI).

These programs all rely on agreements which are normally registered on title to projects, but cease to have effect upon expiry of the funding – usually within 35 years.

Social housing is very definitely non-profit, but also may, or may not be, charitable.

Since many projects are, appropriately, designed and used as mixed-income projects, they may not be

eligible for charitable registration.

The asset lock should be:

- Relatively straightforward. Complexity causes most people to tune out. These provisions need to be readily understood by those who will be bound by them, and those who would be tempted to avoid them. The asset lock in the *Social Housing Reform Act*, for example, does tend to undue complexity.
- Readily enforceable. Any requirement that requires regular policing, and/or the expenditure of significant sums on lawyers to ensure its terms are complied with, will fail for lack of enforcement in these times of limited government means.
- Comprehensive. No loopholes that would allow circumvention.
- Flexible. No provision will catch every possibility for abuse. Ensure the ability to readily add additional safeguards

The asset lock for PBCs, again, draws on the asset-lock wording for non-profit housing co-operatives, in the *Co-operative Corporations Act.*

This is what we need in the Act:

(1) This section applies to public benefit corporations and to those other corporations articles of which provide that the corporation is subject to the provisions of this section ("asset-locked corporation").

(2) Any profits or accretions to the value of the property of an asset-locked corporation shall be used to further its activities

(3) An asset-locked corporation cannot be converted into or continued as any other kind of corporation and no attempt to do so is effective.

(4) An asset-locked corporation shall not distribute or pay any of its property to its members during its existence or on its dissolution.

(5) Despite subsection (4), an asset-locked corporation may pay a member,

(a) amounts owed to the member including interest on a member loan or any other loan from the member at a rate not exceeding the prescribed maximum annual percentage; or

(b) reasonable amounts for goods or services provided by the member.

(6) No person shall accept compensation for the withdrawal of membership by a member of an asset-locked corporation other than,

(a) compensation for amounts owed to the member by the co-operative; or

(b) compensation for improvements made by the member to the property of an asset-locked corporation if the compensation is reasonable and is approved by the board of directors.

(7) A person who accepts compensation in contravention of this section shall pay the asset-locked corporation an amount equal to the value of the compensation or the excess compensation and that amount is a debt the asset-locked corporation may recover in a civil proceeding.

(8) An asset-locked corporation may not amend its articles to do anything described in s. 102(1)(j) or (m) or amend its articles so that the corporation is no longer an asset-locked corporation and no attempt to do so is effective.

(9) An asset-locked corporation may not amalgamate except with another asset-locked corporation.

Similar provisions in the *Co-operative Corporations Act* have been found effective to prevent a sale of assets to members: see *Bridlewood Co-operative v. Superintendant of Financial Services of Ontario*, a decision of the Superior Court of Justice, dated April 5, 2005.

3. Offering Statements

Drawing on the wealth of experience in the co-operative sector on this, as codified in the *Co-operative Corporations Act*, these provisions will both provide a measure of protection to certain potential purchasers of bonds or debentures in corporations subject to the new *Act*, and enhance the ability of those corporations to raise capital from their communities. They should be available for use by all such corporations, but be required only for corporations that are not asset-locked, where thresholds similar to those applicable under the *Co-operative Corporations Act* are exceeded.

Non-profit corporations are generally exempt from the *Securities Act*. As with co-operatives, that *Act* should be amended to provide that it does not apply to corporations under this *Act*.

The regulations should contain a number of additional exceptions to mandatory offering statements, and specify detailed offering statement content, similar to those under the *Co-operative Corporations Act* (see Appendix, below, for those regulations).

This is what we need in the Act:

(1) No corporation or person shall sell, dispose of or accept directly or indirectly any consideration for securities of the corporation where the corporation has more than the prescribed number of security holders, or where the sale or disposition of or acceptance of consideration for the securities would have the effect of increasing the number of security holders in the corporation to more than the prescribed number, unless the corporation has filed with the Minister an offering statement and has obtained a receipt for it.

(2) Subsection (1) does not apply to,

(a) the issue of securities by an asset-locked corporation; or

(b) such issues of securities as may be prescribed.

(3) A corporation that is not required to file an offering statement shall nevertheless be entitled to do so.

(4) An offering statement shall provide full, true and plain disclosure of all material facts relating to the securities proposed to be issued.

(5) An offering statement shall comply as to form and content with the requirements of this *Act* and the regulations.

(6) There shall be filed with an offering statement such documents, reports and other material as are required by this *Act* and the regulations.

(7) Where there is a material change in the facts set forth in an offering statement, whether before or after the issuance of a receipt therefor, the corporation shall, within thirty days of that change, file with the Minister a statement of such change.

(8) A corporation may, and shall if required by the Ministry, file a further offering statement revised to give effect to all previous material changes in place of the statement of material change mentioned in subsection.

(9) In this section, "material change" means a change in the business, operations, assets or liabilities of the corporation that would reasonably be expected to have a significant adverse impact on the financial position of the corporation or that might prevent the corporation from achieving the purpose of an offering but does not include a change that is prescribed by the regulations as not a material change.

(10) The Minister may in his or her discretion issue a receipt for any statement filed under this section unless it appears to the Minister that,

(a) the statement or any document required to be filed therewith,

(i) fails to comply in any substantial respect with any of the requirements of this *Act* or the regulations,

(ii) contains any statement, promise, estimate or forecast that is misleading, false or deceptive, or

(iii) conceals or omits to state any material facts necessary in order to make any statement contained therein not misleading in the light of the circumstances in which it was made; or

(b) the proceeds from the sale of the securities to which the statement relates that are to be paid into the treasury of the corporation, together with other resources of the corporation, are insufficient to accomplish the purpose of the issue stated in the statement.

(11) The Minister shall not make any determination under subsection (10) without making an order or ruling in writing and without giving the corporation that filed the statement a prior opportunity to be heard.