



August 14, 2014

Director General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor
Ottawa, Ontario
K1A 0H5

Re: Follow up to ONN Submission- The utility of SREs in the Canadian context and the extent to which current CBCA incorporation provisions and structures facilitate the creation of SREs1

Dear Director General:

Further to the Ontario Nonprofit Network's original submission on May 15, 2014, we have done further analysis and respectfully recommend changes to the Canadian Not-for-profit Corporations Act (CNCA), in place of changes to the Canadian Business Corporations Act (CBCA). These simplified amendments would create a more suitable environment for social enterprise in Canada.

Please feel free to contact me if you have any questions or would like further information at cathy@theonnc.ca or (416) 642-5786.

Sincerely,

Cathy Taylor
Executive Director

The Ontario Nonprofit Network (ONN) is the convening network for the 59,000 nonprofit organizations across Ontario. With a 7,000-strong network, ONN engages, advocates and leads with- and for- nonprofit and charitable organizations that work for the public benefit in Ontario.

August 14, 2014

To: The House of Commons Standing Committee on Industry, Science and Technology

Re: *The utility of SREs in the Canadian context and the extent to which current CBCA incorporation provisions and structures facilitate the creation of SREs*

**A Technical Paper Proposing Amendments to the CNCA:
Shaping the Canadian Not-for-profit Corporations Act (CNCA) to Support
Social Enterprise and Protect Communities**

The Ontario Nonprofit Network would like to provide the following paper to augment its previous May 15, 2014 submission to the Committee regarding social responsible enterprises.

Setting the Context: The CBCA, the CNCA, and potential policy support for social enterprises

Social enterprises currently operate as charities or as soliciting corporations under the Canadian Not-For-profit Corporations Act (CNCA). Some also make use of the Canadian Business Corporations Act (CBCA). The challenge remains, however: neither the CBCA nor the CNCA are set up to encourage, support or protect social enterprises and the communities they serve.

Social enterprise organizations have a commitment to a larger social good that makes them different from most business corporations. It also makes them different from most member-based nonprofits (associations and clubs) that are focused on the narrow needs of their members.¹ Our existing legal frameworks do not adequately meet the needs of these public benefit organizations running social enterprises.

Much conversation is underway regarding potential changes to the CBCA, which are quite complex. In the case of the CNCA, however, a few straightforward amendments would make it a supportive legislative framework for social enterprise. Should these amendments be made, the CNCA would be well positioned to become legislation of choice for organizations engaged in social enterprise activity, and an exemplar of legislation for other jurisdictions to consider. Most importantly, the amendments will provide Canadian communities with assurance that social enterprises using the CNCA have a long-term commitment to building strong, resilient communities.

¹ In Canada approximately 60% of nonprofit organizations are charities and 40% are nonprofits without charitable status. Of these, it is estimated that 25% are social enterprises providing public benefit. The remaining 15% are associations and clubs – member-focused groups like golf clubs and trade associations.

The Challenge

Under the CNCA currently, charities are always soliciting corporations. However, nonprofit organizations that are not charities (many social enterprises and member-based organizations) are only soliciting corporations temporarily - for four years after they receive grants or donations of \$10,000 or more from third parties. This means many nonprofit organizations will oscillate between being soliciting and non-soliciting corporations depending on whether they receive grants in particular periods for specific activity. On the other hand, many other social enterprises that exclusively earn their revenue will never be soliciting corporations.

No protection for communities - Under the CNCA currently, community members could purchase community bonds and help their social enterprising nonprofit obtain government grants to build a local arena. They could also support the nonprofit social enterprise to develop a thriving community sports program. The community would consider the arena “their community arena,” unaware that under the CNCA currently, the arena’s board of directors could, four years after accepting a grant, sell the arena to a private third party, wind up the nonprofit corporation and distribute the assets to the arena members (as few as 1). This does not hold with the intent of the community investment intended to be for public benefit in perpetuity.

It is problematic for communities to have social enterprises “yo-yo” in and out of being a soliciting corporation depending on when and whether they receive grants. While the assets of soliciting corporations must be transferred to a similar soliciting corporation, member-based organizations can distribute their remaining assets to members on dissolution. Moving in and out of asset lock is confusing to everyone involved, and does not accord with what members of the public would reasonably expect to be the case.

With the exception of charities, the current definition of soliciting corporation provides neither the public nor policy makers a way to identify organizations with a mission for social good from those that exist to serve only their members.

The Solution

If all charities and nonprofit social enterprises were considered permanently soliciting corporations, it would be easier to direct policy making for social enterprise, and the public would have the assurance they need that social enterprises are committed to their communities for the long haul.

- 1. Rename the Soliciting Corporation the Public Benefit Corporation.** *Public Benefit Corporation* is a better description of both charities and nonprofits serving the public good. *Public Benefit Corporation* puts the focus where it needs to be – on the social good, whereas the title *Soliciting Corporation* instead emphasizes raising money. The term Public Benefit Corporation also provides a clear category for policy making regarding social enterprise.
- 2. Allow nonprofit corporations that are not charities to OPT-IN to be a Public Benefit Corporation. This opt-in would be non-revocable.** Organizations that are not seriously

committed to the public good will not commit to being a Public Benefit Organization in their articles and will not opt-in to the distribution constraint.

- 3. Strengthen the non-distribution constraints on Soliciting (Public Benefit) Corporations.** The non-distribution constraints should clearly prevent abuse of the corporate form by ensuring assets remain in the public domain.

Technical Wording

In May 2014, ONN made a submission to the House of Commons Standing Committee on Industry, Science and Technology regarding: *The utility of SREs in the Canadian context and the extent to which current CBCA incorporation provisions and structures facilitate the creation of SREs*². In that brief, ONN identified four key criteria that should define a Soliciting Corporation:

- a. The organization must have a **public purpose** and mission;
- b. The organization operates for the **public good and not personal gain**;
- c. The organization **reinvests excess revenue** in its public purpose; and
- d. The organization **retains its assets in the public domain** for the public good

The suggested amendments to the CNCA that follow would ensure all four of these objectives are present without the need for a regulator and the associated financial and time commitments required to make regulation effective.

STRENGTHEN PROTECTION FOR COMMUNITIES IN PUBLIC BENEFIT CORPORATIONS

<p>Change the name Soliciting Corporation to Public Benefit Corporation</p>
<ul style="list-style-type: none"> · Provide an “opt-in” option to a clear and permanent definition of Public Benefit Corporation. · AMEND subsections 2(5.1) definition of a Soliciting Corporation and replace with Public Benefit Corporation (PBC) which permits nonprofits to choose to be public benefit corporations · Repeal subsection 2(6) <p><u>2. (5.1) “public benefit corporation” means,</u></p> <p style="margin-left: 2em;">(a) a charitable corporation, and</p> <p style="margin-left: 2em;">(b) a non-charitable corporation, the articles of which provide that the corporation is a public benefit corporation for the purposes of this Act</p>

² The House of Commons Standing Committee on Industry, Science and Technology (the "Committee") conducted a statutory review of the CBCA in 2009–10. In June 2010, the Committee published a report that recommended that the Government consult on four issues: (1) rules relating to disclosure of executive compensation, (2) rules applicable to shareholder voting and participation rights, (3) rules regarding the holding and transfer of shares and insider trading, and (4) **rules applicable to the incorporation of socially responsible enterprises.** [...] *Submissions are invited on the utility of SREs in the Canadian context and the extent to which current CBCA incorporation provisions and structures facilitate the creation of SREs*

The definition of public benefit corporation draws 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.

· **Ensure for all Public Benefit Corporations a robust non-distribution constraint, including successor obligations.**

New section 34.1

34.1(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 corporation; 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.197(1)(k) 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. Superintendent of Financial Services of Ontario, a decision of the Superior Court of Justice, dated April 5, 2005.

About ONN

Organized in 2007, the Ontario Nonprofit Network (ONN) is the convening network for the 59,000 nonprofit organizations across Ontario. ONN engages, advocates and leads with - and for - nonprofit and charitable organizations that work for the public benefit in Ontario. As a 7,000-strong provincial network with a volunteer base of 300 sector leaders, ONN brings the diverse voices of the nonprofit sector to government, funders and the business sector to create and influence systemic change. Approximately 25% of all Canadian nonprofit organizations are in Ontario.

Background on the Nonprofit Sector

Public benefit organizations – from arts and culture, sports and recreation, newcomer settlement, housing, faith groups and many more – reach almost all Canadians. Core nonprofit organizations (without hospitals, universities and colleges) generate \$35.6 billion or 2.5% of GDP. The core nonprofit sector is one of the fastest growing sectors of the economy with an annual growth rate of 7.1%, nearly doubling from 1997-2007. Contrary to common perception, 45.6% of the core nonprofit sector's revenue comes from sales of goods and services, and an additional 15.9% comes from membership fees. Government transfers from the three levels of government comprise only 19.7%, with charitable donations at 14%, and 4.8% other.³ In Ontario, 88% of socially responsible businesses are operated by charities and nonprofits, 3% by cooperatives and 9% as for-profit corporations (4% of for-profit companies operate for a charity, with 5% as independent for-profit companies).⁴

³ *Imagine Canada; adapted from the Satellite Account of Non-profit Institutions and Volunteering published by Statistics Canada in 2009.*

⁴ *Inspiring innovation: The Size, Scope and Socioeconomic Impact of Nonprofit Social Enterprises in Ontario.* 2012, Canadian Community Economic Development Network