Bill 154, *Cutting Unnecessary Red Tape Act, 2017*

Submitted to: Standing Committee on Justice Policy

Submitted by: The Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association (the "**OBA**") appreciates the opportunity to make this submission to the Standing Committee on Justice Policy (the "**Committee**") in respect of Bill 154, *Cutting Unnecessary Red Tape Act, 2017* ("**Bill 154**" or the "**Bill**"). The Bill will, if passed, ultimately amend, introduce, repeal and replace several acts, including amending the *Charities Accounting Act*, the *Corporations Act*, and the *Not-for-Profit Corporations Act, 2010*, the *Arthur Wishart Act (Franchise Disclosure), 2000*.

Our submission is organized around four of Bill 154's proposed schedules that we will address in turn, schedules 2, 7, 8 and 9.

The OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators with many policy initiatives each year – both in the interest of the profession and in the interest of the public.

This submission has been developed with input from the OBA's Charity and Not-for-profit Law Section, Business Law Section, Trusts and Estates Law Section and Franchise Law Sections. Together, these sections represent approximately 2500 members. OBA members participating in this consultation include lawyers who represent the widest possible range of clients, including charitable and other not for profit organizations, for-profit corporations, boards, management and membership groups, and who have worked closely with the provincial and federal governments on legislative reform affecting the various sectors affected by this proposed legislation.

Schedule 2 - MAG

Charities Accounting Act

The proposed amendments to the *Charities Accounting Act*[1] (the "**CAA**") authorizing charities to make social investments is a positive development in support of the charitable sector and foundations in Ontario. However, the wording of the proposed

[1] R.S.O. 1990, c. C.10

amendments raise a number of questions and issues that will need to be addressed if Bill 154 is enacted as currently drafted. Five such issues are identified below.

Classification of Investments

As a result of Bill 154, charities will generally need to categorize investment decision making into one of three categories:

(a) An investment as a prudent investor under the *Trustee Act* that is focused on a financial return;

(b) A social investment under the proposed amendments to the CAA in Bill 154 that is focused on a hybrid approach of directly furthering the purposes of the charity and achieving a financial return; or,

(c) A program related investment (a "**PRI**") under the Canada Revenue Agency (the "**CRA**") Guidance on Community Economic Development Programs (the "**CED Guidance**")[2] that permits the use of an investment vehicle to "directly further one or more of a charity's charitable purposes,"[3] and in doing so "may generate a financial return, [although] they are not made for that reason."[4] If an investment meets the CRA definition of a PRI, the value of the PRI would not be included in the asset base for the calculation of the 3.5% disbursement quota, i.e., "property not used directly in charitable programs or administration" under the *Income Tax Act*.[5] However, the disbursement would not be considered to be a charitable expenditure for purposes of meeting the 3.5% disbursement quota obligation of the charity, other than with regard to possibly including lost opportunity costs of the PRI.[6] Most importantly, if an investment by a charity constituted a PRI in the opinion of the CRA, then the charity would be required to evidence a significant degree of "direction and control,"[7] as described in the CED Guidance in order to avoid jeopardizing its charitable status.

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[2] Canada Revenue Agency, "CG-014, Community Economic Development Activities and Charitable Registration", online: https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/community-economic-developmentactivities-charitable-registration-014.html.
[3] *Ibid* at para 69.
[4] *Ibid* at para 40.
[5] RSC 1985, c 1(5th Supp), subsections 149.1(1).
[6] *Supra* note 13 at para 68.
[7] *Ibid* at para 47

It remains a question of fact to be determined in the circumstances of each case whether a trustee would have made an investment under one of the above categories, or possibly two categories, e.g. as a social investment and a PRI. However, the absence of a clear definition in the proposed amendments in Bill 154 concerning what a social investment is and what it is not could result in confusion for charities in deciding on what type of investment to embark. For example, the determination of when a social investment might cross the line and become a PRI under the CRA CED Guidance and become subject to audit by the CRA should be the subject matter of discussion and co-ordination between the Province of Ontario and the CRA with the issuance of some type of complementary guidance to assist charities. Otherwise, it is possible that the CRA could conclude that what a charity intended to be a social investment was in fact a PRI subject to the CED Guidance, but without there being adequate direction and control or an exit plan from such investment[8] as required by the CED Guidance.

Limitations on the Expenditure of Capital

Charities that hold "endowments" where there is a limitation on the expenditure of capital will need to determine whether making a social investment will contravene "the limitation or [whether] the terms of trust allow for such an investment" as required by proposed subsection 10.3(2) of the CAA.

This will mean that the charity will need to undertake a careful inventory of their investments to determine if there is any documentation for inter vivos or testamentary gifts that may contain any limitation on the expenditure of capital (including a determination of whether the definition of capital includes realized capital gains or not) and, if there was a limitation, then either avoiding using such funds in making a social investment or, if they are going to make a social investment, then documenting why the trustees have concluded that they "expect" that the contemplated social investment will not contravene the limitation on expenditure of capital as a permitted exception under proposed subsection 10.3(2) of the CAA.

In our view, these requirements will impose an increased administrative burden on charities to ensure compliance with the legislative regime, without an appropriate degree of protection from liability in the event of non-compliance.

[8] *Ibid* at para 51.

Restrictions in Constating Documents

Proposed subsection 10.2(6) of the CAA states that the constating documents of a charitable corporation form part of the trust for purposes of a social investment, and proposed subsection 10.3(4) states that the terms of a trust may restrict or exclude the power to invest in social investments.

Therefore, where a power clause in the constating documents (such as letters patent, articles of incorporation or articles of continuance) expressly states that the property of the charity is to be invested in accordance with a specific investment power (such as a prudent investment power), the question arises whether such express investment power precludes the ability of the charity to invest in a social investment. Similarly, if a charitable corporation is incorporated in a province outside Ontario and the charity carries on operations in another province as well as in Ontario, then the question is whether the charity is permitted to make social investments in Ontario where the constating documents of the charitable corporation call for charitable funds to be invested in accordance with the trustee act of the province in which the charity was incorporated.

In our view, this requirement will, again, impose an increased administrative burden on charities to ensure compliance with the legislative regime, without an appropriate degree of protection from liability in the event of non-compliance.

Liability of a Trustee

Since Bill 154 proposes that sections 27 to 29 of the *Trustee Act* will not apply to social investments (except for subsections 27(3) and (4), dealing with mutual funds and common trust funds "with necessary modifications"), then the statutory protection from liability available to trustees with regard to prudent standard investments under subsection 27(8) of the *Trustee Act* will not be available when making social investments.

Although proposed subsection 10.4(4) of the CAA states that reliance upon "advice" does not constitute breach of trust, the language in the proposed subsection does not provide the same extent of protection as clearly stating that a trustee is "not liable for loss" as currently provided for in section 28 of the *Trustee Act*.

This loss of statutory protection should be a matter of some concern for trustees and directors of charities contemplating making social investments. In our view, the proposed amendments to the CAA should include a protection from liability provision

that is analogous to section 28 of the *Trustee Act*, such as providing that a trustee is not liable for loss if the trustee, acting in good faith, fulfills the duties set out in proposed sections 10.4(1), (2), and (3).

Social Investment Advice

Proposed subsection 10.4(1) will impose a new mandatory obligation on trustees and directors of charitable corporations that they "shall determine whether, in the circumstances, advice should be obtained […] and if so, obtain and consider the advice" before making a social investment. However, if the process to make a social investment is so nuanced that the board of a charity must consider whether they need to obtain advice (which will likely involve seeking legal advice), it raises the question about whether the proposals are in fact as practical as they should be, particularly since there is no guidance in Bill 154 concerning from whom a charity should seek advice. Remedial legislation to assist charities should be sufficiently clear on its face that lay people on the board of trustees or directors of a charity should be able to decide if they wish to pursue a particular course of action without being required to consider retaining individuals to advise them.

Schedule 7 - MGCS — *Corporations Act* Amendments

Corporations Act

We are pleased with the inclusion of relevant concepts or provisions from the Ontario *Not-for-Profit Corporations Act*[9] (the "**ONCA**") in this Bill. Our comments are primarily technical in nature and concerned with the commencement and transitional provisions set out in section 85 of Bill 154.

Transition: Incorporation of Non-share Capital Corporation

Section 29 of Bill 154 replaces current section 118 of the Ontario *Corporations Act*[10] (the "**OCA**") with:

> A corporation may be incorporated under this Part only if Part V would apply to the corporation.

[9] 2010, S.O. 2010, c. 15.
[10] R.S.O. 1990, c. C.38.

This means that, once the new section 118 is proclaimed, it will no longer be possible to incorporate a non-share capital corporation under Part III, unless it is an insurance corporation. Section 85(1) of Bill 154 provides that Schedule 7 is to come into force on a date fixed by proclamation, subject to exceptions in subsections 85(2) to 85(6). However, section 29 is not listed as one of those exceptions, which means that it will be in effect immediately upon proclamation.

If this was intended, then once the amendments to the OCA come into force, it will no longer be possible to incorporate a non-share capital corporation in Ontario until the ONCA comes into effect. We understand that this hiatus will likely be at least two years.

In our view, section 29 should be added to the exceptions in section 85(5) of Bill 154, which will come into force at the same time as the ONCA in order to eliminate the gap in timing.

Transition: Continuation of Social Company

Subsection 4(1) of Bill 154 provides, in part, as follows:

> 2.1 (1) A social company that was incorporated or continued under this Act shall, no later than the fifth anniversary of the day subsection 4 (1) of Schedule 7 to the *Cutting Unnecessary Red Tape Act, 2017* comes into force, apply, pursuant to a special resolution, to be continued, …

We assume that the intention is for this section only to come into effect when the ONCA is in force. It seems that the reference to Schedule 7 is in error and the reference should be to Schedule 8.

Accordingly, we request that the reference to Schedule 7 be changed to Schedule 8

Timing of Proclamations

By virtue of section 85 of Bill 154, certain provisions of Schedule 7 will come into effect on a date to be fixed by proclamation (those provisions not specifically enumerated in subsections 85(3)-(5). These generally do not include the provisions establishing substantive changes to corporate law. The latter changes will come into effect either immediately on Royal Assent (those provisions set out in subsection 85(3)); or on the 60th day after Royal Assent (those provisions set out in subsection 85(4). There does not seem to be any explanation or statement of policy for the staged implantation of the amendments. For example:

- under subsection 85(3), section 58(1), providing that directors need not be members, and section 35(1), dealing with pre-incorporation contracts, would be in force on Royal Assent;
- under subsection 85(4), section 33(1), providing for corporations to have the capacity of a natural person, and section 36(1), providing a standard of care for directors, will not come into effect until 60 days after Royal Assent.

This could lead to confusion among existing corporations wishing to update their by-laws as to when various provisions will apply or can be amended.

We would therefore recommend that the provisions in subsections 85(3) and 85(4) all be proclaimed in force on the same date.

Schedule 8 - MGCS — *Not-for-Profit Corporations Act, 2010* Amendments

Not-for-Profit Corporations Act, 2010

We are pleased that the transition provisions in Schedule 8 have been re-drafted from Bill 85, *Companies Statute Law Amendment Act, 2013* to include the matters listed in the OBA's submission on that Bill. We have two comments regarding the content of this Bill.

Restated Articles

Our first comment relates to the ability to restate the articles of incorporation of a continued corporation to include all of the matters deemed to have been transferred from the by-laws to the articles and all of the matters deemed to have amended existing provisions of the letters patent and by-laws, or inserting additional provisions, so that the articles and by-laws are deemed to be in compliance with the ONCA.

It is not clear from the provisions of section 24, establishing new section 109(1), which allows the directors to apply for restated articles without requiring member approval, and section 52, setting transitional provisions in section 207, that it is possible to obtain restated articles under subsection 109 without having to amend the articles with the requisite approval by special resolution under subsection 207(4).

Subsection 207(4) appears to deal with two different transitional issues:

- Clause (4)(a) apparently refers to matters which are not deemed by the ONCA to be included in the articles and which would therefore require a special resolution and articles of amendment. Once the articles have been amended, the new provision could be added to restated articles.

- The purpose of clause (4)(b) is not entirely clear. Since it does not refer to articles of amendment, it implies that a corporation with a fixed number of directors in its letters patent or special resolutions may pass a special resolution to establish a minimum and maximum number of directors without having to obtain articles of amendment. If this is the case, once such a special resolution has been passed, it should be possible to obtain restated articles under Subsection 207(5) which include the new board composition. We are not aware of any other provision in letters patent or special resolutions to which clause (4)(b) might apply.

Finally, subsection 207(5) does refer to section 109 and sets out what may be included in restated articles.

Amendments to sections 109 and 207 will help clarify that it is possible to have an up-to-date set of articles, without having to go through a members approval process, unless it is necessary to establish a floating number of directors. Subsection 207(4)(a) would then be limited to amendments to the articles to insert provisions which are not deemed to be in effect by any other provision of the ONCA.

We have several recommendations to address this situation:

1. Amend section 109 by adding at the beginning, "Subject to section 207";

2. Amend subsection 207(4)(a) to clarify that articles of amendment are only required if a matter to be included in the articles is not deemed to have been included by another provision of the ONCA; and,

3. Amend subsection 207(4)(b) to confirm that a corporation may pass a special resolution to change from a fixed to a floating number of directors, that such special resolution is then deemed to be included in the articles, and that such change will come under the provisions of subsection 207(5).

Corporations Sole

New subsection 4(1.1) provides that the ONCA does not apply to any corporations sole, except as is prescribed.

It is not clear whether the regulation is intended to prescribe which provisions in the ONCA are to apply to corporations sole or to prescribe certain corporations sole are to be subject to the ONCA. If the former is the intention, it is not clear which ONCA provisions would be prescribed to apply to corporations sole. If the latter is the intention, it is not clear why corporations sole are to be treated differently from other special act corporations since all corporations sole are incorporated by special act. The ONCA already has a mechanism governing how the ONCA applies to special act corporations. While there could be certain corporations sole that would desire to be exempted from the application of the ONCA, it is not clear what the rationale is in exempting the application of the ONCA to all corporations sole, rather than exempting specific ones that desire to be exempted.

We would therefore recommend revising section subsection 4(1.1) to be phrased positively so that corporations sole will be subject to the ONCA except those corporations sole prescribed by regulation.

Schedule 9 - MGCS — Registration and Other Statutes

The OBA has previously provided input and proposed changes to several business law statutes in Ontario, including comments on some of these statutes to the Business Law Advisory Committee ("**BLAC**"). We are pleased to note that many of the OBA's proposals have been incorporated into Bill 154.

The OBA's Business Law section, through its subcommittees on Corporate Law and the *Personal Property Security Act*[11] (the "**PPSA**"), has reviewed the proposed changes to the *Business Corporations Act*, the PPSA and the *Repair and Storage Lien Act*[12] and wish to commend the changes that are proposed that would modernize these statutes as set out in the various schedules under this Bill.

The OBA's Franchise Law section has also made several previous recommendations for changes to the *Wishart Act* and commentary on the recommendations of the BLAC.

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[11] R.S.O. 1990, c. P.10.
[12] R.S.O. 1990, c. R.25.

The *Wishart Act* amendments in Schedule 9 of Bill 154 largely reflect the previous OBA input, however, some comments are provided on the *Wishart Act*, below.

Arthur Wishart Act (Franchise Disclosure), 2000

Redundant Description of a Fully Refundable Deposit

Schedule 9, Section 3(1) reads as follows:

> **3 (1) Clauses 5 (1) (a) and (b) of the Act are repealed and the following substituted:**
>
> (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise, other than an agreement described in subsection (1.1); and
>
> (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise, excluding the payment of a fully refundable deposit if it,
>
> (i) does not exceed the prescribed amount,
>
> (ii) is refundable without any deductions, and
>
> (iii) is given under an agreement that in no way binds the prospective franchisee to enter into a franchise agreement.

Our concern with this amendment is that it provides an exclusion for the payment of a "fully refundable" deposit (as per 3(1)(b)) then proceeds to describe a fully refundable deposit as a deposit that "is refundable without any deductions" (as per 3(1)(b)(ii)). This description is redundant, as both "fully refundable" and "refundable without any deductions" appear to mean the same thing. The OBA suggests removing one of these descriptions.

This comment also applies to the proposed amendment to Schedule 9, Section 3(3).

Lack of Clarity in the Fractional Franchise Disclosure Exemption

Schedule 9, Section 3(6) reads as follows:

> **3(6) Clause 5 (7) (e) of the Act is repealed and the following substituted:**

> (e) the grant of a franchise to a person to sell goods or services within a business in which that person has an interest if the sales arising from those goods or services during the first year of operation of the franchise, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, do not exceed, in relation to the total sales of the business during that year, a prescribed percentage;

In our view, it is unclear how the parties to the franchise agreement will be able to anticipate what the totals sales of the business will be during the first year of operation. This will lead to uncertainty in applying this exemption. Previously, the OBA suggested to the BLAC that a solution to this would be a joint declaration at the commencement of the franchise relationship that the parties agree that this exemption would apply.

Inconsistencies in the De Minimis and Large Investment Disclosure Exemptions

Schedule 9, Sections 3(7) and (8) read as follows:

> **3(7) Subclause 5 (7) (g) (i) of the Act is repealed and the following substituted:**
>
> (i) the prospective franchisee is required to make a total initial investment, as described in the disclosure document, of an amount that does not exceed a prescribed amount,
>
> **3(8) Clause 5 (7) (h) of the Act is repealed and the following substituted:**
>
> (h) the grant of a franchise if the prospective franchisee is required to make a total initial investment, as described in the disclosure document, of an amount that is greater than a prescribed amount.

These provisions concern statutory exemption from providing a disclosure document, yet require the description of a total initial investment within the non-existent disclosure document in order to trigger the exemption. In our view, this is an inconsistency within the legislation, would not be feasible in practice, and should be corrected. If the total initial investment or the costs associated with the establishment of the franchise are to be based on the Regulations (such as section 6.1 or another section), the provisions should say so.

Conclusion

Once again, the OBA appreciates the opportunity to provide these comments. We commend the attention the Legislature has provided these matters.