January 30, 2019

CCA Legislative Review
c/o Financial Services Policy Division
Ministry of Finance
95 Grosvenor Street, Frost Building North, 4th Floor
Toronto, ON M7A 1Z1

Dear Sirs/Mesdames:

Re: Consultation and Review of the Co-operative Corporations Act

The Co-operative Housing Federation of Canada (CHF Canada) welcomes this opportunity to provide input on the review of the Co-operative Corporations Act.

CHF Canada is the national voice of the Canadian co-operative housing movement. In Ontario, our members include more than 550 non-profit housing co-operatives which make up 51% of the non-financial co-operatives in Ontario. Our co-ops are home to some 125,000 people, located in communities large and small all across the province.

Many areas of the consultation do not directly affect housing co-ops. However, CHF Canada supports the recommendations of the Ontario Co-operative Association (OCA) that will help create a better environment for co-op businesses to grow and thrive.

Co-operatives are community-focused businesses that balance the needs of people, planet and profit. Co-operatives are democratic, values-based and member focused.

Co-operative businesses in Ontario, including financial co-operatives, already create $6 billion in economic value for the province and employ 57,000 people full-time. We believe, however, given a level playing field, co-operatives in Ontario could do much more.

With this in mind, CHF Canada supports the following recommendations:
1. **Have the Co-operative Corporations Act take priority over social housing legislation when housing co-ops make democratic, self-determined business decisions.**

Part of the objective of the *Co-operative Corporations Act* review is to make it easier for co-operative corporations to do business in the province – to improve the business environment for co-ops and reduce red tape.

Non-profit housing co-ops in Ontario have a complex, often intrusive relationship with various levels of government that does not seem to respect the public policy benefits of the co-op model. Through their corporate structure, housing co-ops should be well-positioned to take advantage of any innovative and entrepreneurial opportunities. However, government legislation and the interpretation of legislation by government administrators can limit the effectiveness of our co-ops.

Non-profit housing co-ops in Ontario that were developed through provincial programs have witnessed many changes over the years. At one point housing co-ops were considered partners with government in delivering community social housing through agreements.

Over the years, this relationship has changed. Housing co-ops are now regulated by legacy rules carried forth in the *Housing Services Act, 2011*, which sometimes opposes the intent of the *Co-operative Corporations Act*. Currently, co-op corporate ownership under the *Co-operative Corporations Act* is often not acknowledged by the regulators.

Examples where non-profit housing co-ops are limited by government rules, programs and legislative interpretation include:

- **Capital reserves and access to capital loans**
  A series of studies have found that the capital reserves of housing co-ops administered under the *Housing Services Act* are seriously underfunded and threaten the long-term viability of the co-op housing stock. There is, however, no mechanism for a housing co-op to fully re-invest in their corporation under current social housing legislation – either by contributing additional surplus funds to its reserve or by borrowing against their equity for capital repairs.

  Under the current social housing legislation, co-ops that accumulate an operating surplus may be required to share 50% with the service manager housing regulator.

  Similarly, after the retirement of a 35-year mortgage, housing co-ops are still administratively tied to their housing regulator through legislation. They would require permission to seek refinancing to complete much-needed capital building repairs, or to use their equity to expand their business with new affordable units.

  Democratic, self-determined business decisions by housing co-ops, as set out under the *Co-operative Corporations Act*, are trumped by social housing legislation.
• **Membership**

Non-profit housing co-ops are the only form of resident-controlled social housing in Ontario. Governed by the *Co-operative Corporations Act* (not the *Residential Tenancies Act*), residents are members of their co-ops, not tenants. Co-op members elect the board of directors annually from the membership and contribute to the operation and life of the community through a range of volunteer activities. This involvement gives them a unique role in the governance of their housing and makes them direct stakeholders in its successful operation.

Under the *Co-operative Corporations Act*, an application for membership to the co-op must be approved by the directors and the applicant has to fully comply with the by-laws governing admission of members. Even within the *Housing Services Act*, co-ops are given special provisions, within certain limitations, to determine acceptance of members. However, these rules are ignored by some service manager regulators that interpret the legislation to say that housing co-ops are to accept all applications delivered through the housing access system.

CHF Canada and the co-op sector supports an innovative and entrepreneurial approach that is enabled by the *Co-operative Corporations Act* and allows housing co-ops to:

• Operate with more financial independence and flexibility, while maintaining their social purpose;
• Focus on effectively managing their affordable housing portfolios and fostering healthy communities;
• Foster innovation, so they can continue to meet their members’ evolving needs and, where possible, increase the supply of affordable housing.

2. **Keep the provincial regulatory oversight and power to investigate complaints.**

CHF Canada believes it is vital that the Province maintain regulatory oversight of the Act and the power to investigate complaints. While there have been few investigations over the last four years, they do serve an important role. They protect the public interest and maintain trust in the regulatory system. For non-profit co-ops, this oversight role is more important due to the ownership structure and the need to protect co-op assets for the benefit of future members and the general public. Co-op members and the public at large need to understand that the non-profit rules for co-ops in the Act will be enforced.

Several years ago, FSCO played an important role when some housing co-op members at Bridlewood Co-op in Essex attempted to evade rules in the CCA. The investigation by FSCO and subsequent court cases prevented them from profiting from their membership in the co-op. The investigation helped to maintain the integrity of the Act as well as protect the government’s investment, keeping the units in Ontario’s affordable housing stock.
We have attached to this submission correspondence from CHF Canada’s Ontario Region solicitor. It outlines issues raised in the Bridlewood case as well as more general oversight and investigation concerns.

3. **Ensure changes to the Act meant to support a better eviction process for housing co-ops are not undermined by short-staffing at the LTB.**

A new eviction system for housing co-ops came into force on June 1, 2014. The new law made changes to the Co-operative Corporations Act (CCA) and the Residential Tenancies Act (RTA). These changes allow housing co-ops to use the Landlord and Tenant Board (LTB). The co-op housing sector lobbied for and welcomed these changes. While some evictions must still use the superior court system, the overwhelming majority of cases now go before the LTB. The new system was supposed to result in less legal costs and more timely results for both the co-op and the household in question. However, due to a shortage of LTB adjudicators, some co-ops have been frustrated by the lack of timely results.

This bottleneck may be a result of the LTB, but it makes the system within the CCA appear inefficient and the former court-based system look somewhat more appealing. The co-op sector continues to support the eviction framework that is provided in the Act. The government should ensure the LTB is properly staffed so the process can work as intended.

4. **Mandate capital reserve studies for Ontario housing co-ops.**

For non-profit housing co-ops and non-profits developed under Canada Mortgage and Housing Corporation (CMHC) programs, a lack of asset management planning is the chief cause of mortgage defaults. There is a risk that, as their operating agreements end and regulators no longer require asset management planning or capital reserve contributions, some federal co-ops could end up unable to support the cost of repairs and improvements. Without capital reserve studies to help them properly plan or sufficient reserves to support major repairs or replacements, their viability would be at risk.

Half of Ontario’s housing co-ops are federal co-ops. The Province cannot afford to lose these important affordable housing units and housing co-op members cannot afford to lose their homes.

Like the Condominium Corporations Act, we believe the Co-operative Corporations Act should include a requirement that all non-profit housing co-ops undergo periodic building condition assessments, update capital replacement plans and set aside appropriate reserves to support major repairs and replacements.

There are many similarities between non-profit housing co-ops and condominiums. Chief among them is that the board of directors are comprised of residents, or condominium owners, who are not necessarily experts in property management. While they may serve on the board with the best of intentions, the directors may be unaware of the best practices for property management and the risk to the buildings created by failing to sufficiently plan for the long-term management of their
As mentioned earlier, there are many areas of the review and consultation that do not directly affect non-profit housing co-ops. In these areas, CHF Canada supports the recommendations of OCA and the greater co-op sector. There are, however, a few areas where CHF Canada’s support for changes to the Act for most co-ops is contingent on exemptions for non-profit housing co-ops. Two specific issues are the greater co-operative sectors’ efforts to seek changes to the audit requirements and the “50 per cent rule” for co-ops. It is imperative that the current rules are maintained for non-profit housing co-ops.

Below we explain the importance of these exemptions.

**The importance of the current audit rules in the CCA for non-profit housing co-ops**

A number of non-profit housing co-ops in Ontario do not currently have a regulatory relationship with government, or receive government grants or subsidies. For example, all student housing co-ops in Ontario, as well a number of housing co-ops that were developed with significant federal government investment, do not receive grants or subsidies from any level of government at this time. For these co-ops there is no legislation other than Ontario’s *Co-operative Corporations Act* that binds them to having an annual audit.

Non-profit housing co-ops need stringent audit rules, given the importance of this housing to Ontario’s affordable housing supply, the historical investment by government in these communities, and past experience where a group of residents attempted to exploit this public asset for their significant personal gain (See *Bridlewood v. CHF Canada*).

The province should also be guided by the *Condominium Corporations Act*. The Act limits the option of an audit exemption to condominiums of less than 25 units, and requires agreement to an exemption in writing by all owners. CHF Canada believes these stringent audit rules are a reflection of the unique condominium business model which is common ownership of substantial housing assets by non-specialists, similar to the situation of non-profit housing co-ops. The members of non-profit housing co-ops are similarly non-specialists who are jointly responsible for substantial housing assets, and often stewards for significant past government investment, which warrants stringent audit rules.

We believe that the *Co-operative Corporations Act* needs to be unambiguous that non-profit housing co-ops must have an audit once they are in operation and that the implication is that they remain stewards of significant public investment even after their direct financial relationship with government ends.

This is why CHF Canada supports OCA’s recommended changes to the audit requirements such that,

> “a co-operative be exempt, in respect of a financial year, from sections 124 and 125, subsections 126 (1) and (2), section 127, clause 128 (1) (b) and subsection 128 (3) of the Co-operative Corporations Act if,
• the co-operative is not required to have filed an offering statement under subsection 34 (1);
• no government grant or subsidy that the co-operative receives during the financial year has a condition requiring the co-operative to be audited; and
• a special resolution not to appoint an auditor is confirmed at the most recent annual meeting before the beginning of the financial year.”

Only if the following clause is included:

“Non-profit housing co-operatives

(2) Subsection (1) does not apply to a non-profit housing co-operative in respect of a financial year if at the end of the financial year the co-operative has more than $50,000 in capital or more than $50,000 in assets.”

Maintaining the “50 per cent” rule for non-profit housing co-ops

The primary purpose of a non-profit housing co-op is to provide the members - the residents – a form of tenure that is similar to rental housing, but offers far greater control over the housing. While there are valid reasons why some residents may not be members, such as tenants that were grandfathered in when an existing building was converted to a non-profit housing co-operative, this should remain in the minority.

Non-profit housing co-operatives represent less than 1% of the housing stock in Ontario, which means that many do not know the full rights or benefits that come with membership when they first move in. Ensuring in legislation that a non-profit housing co-op must do at least 50 per cent of their business with their members, is a protection to ensure that the resident control which is at the heart of the housing model is not undermined and that all residents have an opportunity to provide direction in the business of the co-op.

Co-op governance and member rights

Finally, we believe the timeline for this consultation is too narrow to recommend changes to co-op governance and member rights. Co-op governance and member rights are both central to what makes a non-profit housing co-op a co-op. While we believe some modernization and improvement in these parts of the legislation could be valuable, these changes cannot be made lightly. Instead, we support OCA’s request that the Act be amended so that it is reviewed every five years. If that is not possible, we request that the government allow sufficient time for a full review of the questions with the entire co-op sector. It’s important that OCA and CHF Canada have time to consult with our members and fully examine the implications of changes to co-op governance and member rights.
CHF Canada greatly appreciates that the Ministry of Finance and the Ministry of Government and Consumer Services have initiated this review of the Co-operative Corporations Act. Changes to the Act will help co-operative corporations better meet the needs of Ontarians in today’s economy and help grow our businesses. Our co-ops look forward to a modernized legislative framework and our ongoing work together to create a better, more prosperous Ontario for all Ontarians.

Sincerely,

Harvey Cooper
Deputy Executive Director,
CHF Canada Ontario Region

Attachments:
• January 23, 2019 letter from B. Lewis, M.A., J.D. Re: Investigation under Consultation Paper on Co-operative Corporation Act
January 23, 2019

Mr. Harvey Cooper, Executive-Director
Co-operative Housing Federation of Canada
Ontario Region
720 Spadina Avenue, Suite 313
Toronto, Ontario M5S 2T9

Dear Harvey:

Re: Investigations under Consultation Paper on Co-operative Corporations Act

The consultation paper on the CCA the suggests the possibility of aligning the CCA with other business law statutes and asks if government should still play a role in enforcing whether CCA requirements are met. It says on page 14:

Given that little to no regulatory enforcement action by FSCO has been required, it may be preferable to adopt an enabling approach in the CCA similar to that found in other business law statutes, to clarify that the responsibility for addressing complaints would fall solely to members and a co-op’s internal governance mechanisms, as opposed to relying on an external government regulator.

In my view it is vital that an external government regulator remain involved—at least with respect to non-profit housing co-operatives, which are about half the co-ops in Ontario and which are specially regulated under sections 171.1 to 171.25 of the CCA.

The basis of shareholder control in business corporations is that the shareholders have the ultimate financial interest in the business and assets of the corporation. They are the ultimate owners and they should have the right and obligation to take whatever extraordinary steps may be needed.

This is not so in the case of non-profit housing co-operatives. All of them have benefitted from substantial public subsidies or support. The members have a financial and personal interest in the operation of the co-op, but they are not the ultimate owners. The assets of a non-profit housing co-op must be used for partially public purposes during its existence and on dissolution must go to other non-profit housing co-ops or charities.

Therefore, there is a conflict of interest in the role of co-op members, directors and officers. On the one hand, it is appropriate that they operate the housing in a cost-effective way in the interest of reducing costs to the existing membership. On the other hand, they are custodians of the assets of the co-op for the benefit of future members and the general public. Most important, they are not personally entitled to the value of those assets.
It is important that there be an understanding that the non-profit rules in the CCA will be enforced. This understanding currently exists in part because of the experience of Bridlewood Co-op where FSCO and the Co-operative Housing Federation of Canada withstood a series of attempts by the co-op members to take personal ownership of the assets at less than half their value. It may be that the strong action by FSCO and CHF Canada on Bridlewood is the reason why there have not been later complaints about similar abuses.

It is instructive to consider FSCO’s role in the Bridlewood situation.

(a) In 1996 or earlier some co-op members conceived the ideal of selling the co-op units to the members at book value of about $44,000 each, although the market value would be $100,000 to $125,000. The total loss in value of the public interest in continuing the housing as a co-op would be about $8,000,000 to $10,000,000.

(b) FSCO become involved and certain undertakings were given by the co-op to FSCO to keep it aware of any possible move towards a sale.

(c) The matter first came to court and Bridlewood’s position was rejected in the case of Bridlewood Co-operative Inc. v. Ontario (Superintendent of Financial Services) [2005] O.J. No. 1922.

(d) Despite this, the co-op continued its efforts and an investigation was launched by FSCO. There followed a decision in Co-operative Housing Federation v. Bridlewood et al, 2011 ONSC 3898, in which the court relied on the report of the investigation. It states at paragraphs 8 and 9:

Consequently the Superintendent appointed an inspector under section 148 of the Act to investigate and report on the affairs and management of Bridlewood. … The Superintendent has concluded that Bridlewood’s fundamental problem is one of governance that needs to be addressed by the court.

(e) Ultimately, a receiver was appointed and the property sold to a non-profit corporation sponsored by CHF Canada.

In the Bridlewood situation member involvement was important because one courageous member—only one—tipped off FSCO and CHF Canada as to what was going on in the early 2000’s. All the other members had been convinced that what was being proposed was right. He alone kept to the basic understanding on which the co-op had been founded. He had left the co-op by 2010 and enforcement was entirely outside the membership.

It seems clear that without FSCO’s involvement Bridlewood Co-op would now be privately owned and a significant public asset would have disappeared without compensation to the public. Although one member had a major role in preserving the asset, this cannot normally be expected.

Yours truly,

Delivered by e-mail

B. Lewis