ONTARIO NONPROFIT NETWORK

Liability and insurance issues facing the Ontario nonprofit sector in the wake of COVID-19

Briefing note (August 2020)

Summary

Access to affordable insurance coverage has become a major issue across a diverse range of nonprofits in Ontario. The Ontario Nonprofit Network (ONN) is asking the Ontario government to provide "Good Samaritan" protection from COVID-related liability for nonprofits that have followed all emergency orders and public health guidance.

Background

The nonprofit sector contributes $50 billion to Ontario's GDP and employs a million workers, with volunteers providing the equivalent contribution of another 400,000 jobs each year. Nonprofits have barely survived the first phase of the pandemic only to find themselves struggling to operate or re-open because of skyrocketing insurance costs, COVID-related exclusions, and an excessive burden of liability falling on volunteer boards of directors. Since June, ONN has heard from organizations in a wide variety of areas, from sports to mental health to neighbourhood centres, that their ability to operate is threatened by challenges related to securing COVID-related liability insurance.

Nonprofits are governed by volunteer boards of directors who are ultimately responsible for managing risk. The threat of a lawsuit without adequate insurance coverage is keeping nonprofit leaders up at night since insurance providers began creating COVID-related exclusions or even denying coverage outright. Furthermore, funders (both public and private) usually require evidence of insurance coverage before signing agreements. The roll-out of much needed emergency community support funding is hampered by challenges nonprofits face in securing insurance.

This is a provincial issue that has been addressed in other jurisdictions through a ministerial order or legislation. The solution is for the Ontario government to provide "Good Samaritan" protection to our sector, making nonprofits- and their directors, officers, employees, and volunteers- not liable for COVID-related damages if they operate in accordance with emergency orders and public health guidance. With a more favourable regulatory environment, nonprofits will be able to participate fully in Ontario's economic recovery.

Insurance issues

Issues that the sector has told ONN they are facing include:
- **Significant cost increases** -some are seeing premiums doubled; 25 - 75% increases are common.
- **Pandemic-related exclusions/riders** - many insurance providers will not cover COVID-related claims.
- **Expensive "buyback" provisions** at the time of renewal that cover claims from the peak of the pandemic.
- **Complete denial of insurance coverage/renewal** for some nonprofits.

Aside from increasing costs and risks for nonprofits, these issues are creating secondary challenges:

- **Recruitment and retention of volunteer boards of directors**, who may be concerned about inadequate insurance coverage- causing some boards to resign en masse.

- **Barriers to flowing emergency funding to nonprofits** - Non-governmental funders have identified the inability to secure affordable insurance as a barrier to flowing funding quickly to nonprofits during the crisis, including the federal $350 million Emergency Community Support Fund.

- **Potential headaches for government ministries who rely on nonprofits to deliver their services -** Insurance challenges may have ripple effects for the 14+ provincial ministries that provide funding through transfer payment agreements to up to 15,000 nonprofits that deliver services on behalf of the Ontario government. Even for small agreements, the Province typically requires evidence of $2 million in liability insurance as well as any other insurance that a "prudent person" might carry. ONN has been informed that Ontario Health regional offices (former Local Health Integration Networks, LHINs) are surveying organizations with whom they hold agreements to determine what insurance challenges they are facing.

Organizational options

Insurance providers can change the conditions of coverage at the time of policy renewal. Attempts to insert retroactive clauses in existing insurance contracts, however, are not acceptable. Nonprofits should report this to the Financial Services Regulatory Authority of Ontario at 416-250-7520 (toll free 1-800-668-0128) or file a complaint online.

Nonprofits facing cost increases or exclusions are encouraged to shop around for insurance coverage, talk to their provincial associations, or consider group insurance options like ONN's. It is important to shop around. During the COVID-19 crisis, ONN's procurement partner, Roundtable Procurement Services, is offering free purchasing support to nonprofits across Canada.

Policy recommendations

ONN recommends that the Ontario government take measures to provide "Good Samaritan" protection to our sector, making nonprofits – and their directors, officers, employees, and volunteers – not liable for

COVID-related damages if they operate in accordance with all applicable emergency orders and public health guidance.

To be clear, the sector is not looking for protection from litigation if nonprofits have been negligent and have not followed public health guidelines. We are looking to the Ontario government to protect nonprofits that have acted in good faith as they re-open and follow public health guidelines.

A more favourable regulatory environment would reduce the chances that a nonprofit would have to stop delivering programs and services in order to redirect funds to fighting expensive, costly lawsuits. Even if a nonprofit were eventually cleared of wrongdoing, a lengthy court battle could bankrupt many organizations.

"Good Samaritan" protection - precedents from Ontario

Over twenty years ago, the Ontario government passed the [Donation of Food Act](#) to ensure that those who donate food to food banks and other nonprofits were not held liable for damages related to the consumption of that food. This legislation enabled restaurants and shops to make better use of surplus food and for food banks to distribute that food, as long as they did so in good faith.

Secondly, after SARS in the early 2000s, the Ministry of Health made [changes to the Health Protection and Promotion Act](#) to offer "Good Samaritan" protection to health professionals.

Precedents from other jurisdictions

- In British Columbia, the sport sector has been provided with a [liability exemption](#) that may be renewed for up to a year after the end of the state of emergency. See: [BC ministerial order](#).

- Several state legislatures in the USA have introduced measures to protect nonprofits and other small businesses that have followed public health guidelines.

  - Governors in two states have issued executive orders ([Arkansas](#) and [Alabama](#)) and legislators in a dozen have enacted or are considering liability legislation. [Oklahoma](#), [Utah](#), and [Wyoming](#) passed laws that limit claims against certain defined entities for exposure to or contraction of COVID-19 that may have stemmed from being on-site.

  - The North Carolina [COVID-19 Recovery Act](#) gives liability protections to health care facilities, health care providers, and volunteer organizations; a separate bill awaiting the Governor's signature would extend the immunity to individuals, nonprofit board members, and volunteers.

  - Legislation in [Georgia](#), [Minnesota](#), Mississippi ([H.1783](#)/[S. 3049](#)), and [Pennsylvania](#) would extend protections explicitly to nonprofit organizations and for-profit businesses. A measure in [South Carolina](#) covers "any for profit or [nonprofit] business entity." [Louisiana](#) lawmakers would go the furthest to apply protections only for nonprofits, including religious institutions, leaving out for-profit businesses.

- A federal bill (HEALS Act) was introduced in the US Congress on July 27 that provides liability protection for both for-profits and nonprofits. The HEALS Act would temporarily limit liability for personal injuries arising from alleged COVID-19 exposure at a school, college, nonprofit, church, or business. Organizations must have made reasonable efforts to comply with applicable public health guidelines, and not engaged in willful misconduct or grossly negligent behavior.

Media coverage

- On July 5, the [London Free Press](#) broke the story of nonprofit challenges with COVID-related insurance and the potential impact on Ontario communities.
- On July 10, [Northern Ontario Business](#) published an op-ed by Charles Cirtwill of the Northern Policy Institute that called for Good-Samaritan exemptions or government backstops to ensure insurance is affordable and accessible for community groups.
- On July 29, the [Hamilton Spectator](#) published a column outlining legal concerns from youth sports leagues related to COVID-19 and the lack of insurance coverage.
- On August 4, 2020, the [Flamborough Review](#) covers another soccer club forced to put programming on hold because of insurance issues.

Next steps

Communities and government need nonprofits to participate in the re-opening of the economy, but they cannot without adequate insurance. If the Ontario government waits until the fall Legislative session to act, it will be too late for many organizations. Nonprofits are already reducing programming because of insurance issues and some may close.

ONN will continue to advocate for the Ontario government to address the issue immediately. Nonprofits are encouraged to write to their local MPP and/or Cabinet ministers, as well as media contacts if they are affected by this issue. For key messages, see our [Action Alert](#).

About ONN
The ONN is the independent nonprofit network for the 58,000 nonprofits in Ontario, focused on policy, advocacy and services to strengthen the sector as a key pillar of our society and economy. We work to create a public policy environment that allows nonprofits to thrive. We engage our network of diverse nonprofit organizations across Ontario to work together on issues affecting the sector and channel the voices of our network to government, funders, and other stakeholders.