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THE LAW FOUNDATION OF BRITISH COLUMBIA

Consultation Paper on Proposals for a New Society Act

Prepared by the Society Act Reform Project Committee

SOCIETY ACT Reform Project BCLI

August 2007

British Columbia Law Institute

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The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its mission is to:

(a) promote the clarification and simplification of the law and its adaptation to modern social needs,
(b) promote improvement of the administration of justice and respect for the rule of law, and
(c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia, which ceased operations in 1997.

This project was made possible with the financial support of the Law Foundation of British Columbia. The Institute gratefully acknowledges the support of the Law Foundation for its work.

Society Act Reform Project Committee

The *Society Act* Reform Project Committee was formed in August 2006. This volunteer project committee will study the major legal issues related to the Act, examine the leading models for reform, and make recommendations for a new *Society Act*. Its final report is scheduled to be released in July 2008. The members of the committee are:

Margaret Mason—chair
(partner, Bull, Housser & Tupper LLP)
Colleen Kelly
(executive director, Volunteer Vancouver)
Mike Mangan
(barrister & solicitor)
Bob Kucheran
(student-at-law & ex-CEO, BC Pharmacy Association)
Ken Burnett
(partner, Miller Thomson LLP)
Murray Landa
(associate director, gift & estate planning, UBC Development Office)
Kim Thorau
(principal, Perrin, Thorau & Associates)

Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

For more information, visit us on the world wide web at:
<http://www.bcli.org/pages/projects/society/SARP.html>

Call for Responses

We are interested in your response to this consultation paper. It would be helpful if your response directly addressed the tentative recommendations set out in this consultation paper, but it is not necessary. We will also accept general comments on reform of the *Society Act*.

The best way to submit a response is to use a response booklet. You may obtain a response booklet by contacting the British Columbia Law Institute or by downloading one at **<http://www.bcli.org/pages/projects/society/SARP.html>**. You do not have to use a response booklet to provide us with your response.

Responses may be sent to us in one of three ways—

by mail: British Columbia Law Institute
1822 East Mall
University of British Columbia
Vancouver, BC V6T 1Z1

Attention: Kevin Zakreski

by fax: (604) 822-0144

by email: societyact@bcli.org

If you want your response to be considered by us as we prepare final report for the *Society Act* Reform Project, then we must receive it by **29 February 2008**.

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EXECUTIVE SUMMARY

INTRODUCTION

In July 2006, the British Columbia Law Institute commenced a major two-year project to consider reform of British Columbia's not-for-profit incorporation statute, the *Society Act* (a copy of which may be obtained online by following the links at <http://www.qp.gov.bc.ca/statreg/>). The project has two distinct phases. Over the first phase, the major legal issues related to the *Society Act* and the leading models for reform were studied. This phase has culminated in the publication of this consultation paper, which seeks the views of the public on our tentative recommendations for a new *Society Act*. The second phase will build on these tentative recommendations and on the responses that we receive from the public. This phase will conclude with the publication of the final report for the project, in July 2008. This project has been made possible by a grant from the Law Foundation of British Columbia.

THE SOCIETY ACT REFORM PROJECT COMMITTEE

Work on this project is being carried out by a volunteer project committee. The committee was formed shortly after the commencement of the project. The committee has met regularly since its first meeting, which was held in September 2006. The members of the committee are:

Margaret Mason—chair
(partner, Bull, Housser & Tupper LLP)
Colleen Kelly
(executive director, Volunteer Vancouver)
Mike Mangan
(barrister & solicitor)
Bob Kucheran
(student-at-law & ex-CEO, BC Pharmacy Association)
Ken Burnett
(partner, Miller Thomson LLP)
Murray Landa
(associate director, gift & estate planning, UBC Development Office)
Kim Thorau
(principal, Perrin, Thorau & Associates)

Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

THE STRUCTURE OF THE CONSULTATION PAPER

This consultation paper comprises two parts. Part One contains background material. It introduces the scope of this project, describes the society as a legal form, briefly discusses the history of the *Society Act*, and explains the reasons why the time is ripe for reform of the law. Part Two, which makes up the bulk of this consultation paper, contains the committee's tentative recommendations for reform. Part Two also sets out the legal issues that

gave rise to each tentative recommendation and discusses the options for reform that the committee canvassed with respect to each of those legal issues.

BACKGROUND

The Scope of the Project

Recent studies have pointed to a number of challenges facing the not-for-profit sector. These studies have identified the following as areas of concern: internal governance practices; measurement of program outcomes; fundraising; the definition of charity under federal tax legislation; financial reporting and management; and outdated organizational laws. This project focuses strictly on the last topic. This is because the other topics have, comparatively, been the subject of extensive comment elsewhere and because a modern organizational law can provide a firm foundation that will allow for progress to be made on the other fronts. The name of British Columbia's not-for-profit organizational law is the *Society Act*. The *Society Act* provides for the incorporation, organization, governance, financial affairs, amalgamation, and dissolution of societies.

What Are Societies?

A society is an incorporated not-for-profit body. The law recognizes three main units of not-for-profit activity: the unincorporated not-for-profit association; the charitable trust; and the society. Unlike the first two units, a society is formed by incorporation, which requires the filing of certain documents with a government official. Incorporation confers a number of benefits, the most important of which is status as person at law. As a result of this status, the members of a society enjoy limited liability. In this respect, societies resemble for-profit companies. There are a number of core principles that distinguish societies from companies: societies are incorporated primarily to pursue public, not-for-profit purposes; societies are restricted from distributing their assets to their members during their existence; and societies must not have share capital.

Brief History of the Society Act

The British Columbia Legislature enacted the first *Society Act* in 1920. The *Society Act* has been updated approximately every 30 years since then. New Acts appeared in 1947 and 1977. Each time the Legislature enacted a new *Society Act* the legislation grew in order to accommodate the increasing sophistication of the not-for-profit sector. The current *Society Act* is largely the 1977 Act, with some miscellaneous amendments in a few areas.

Reasons Why Reform of the Society Act is Needed Now

There are three main reasons why a new *Society Act* is needed now. First, the current *Society Act* was largely based on the 1973 *Company Act*, which was the organizational statute for for-profit companies. In 2004, the *Company Act* was repealed and replaced with the *Business Corporations Act* (a copy of which may be obtained online by following the links at <http://www.qp.gov.bc.ca/statreg/>), which now provides a streamlined and

modern legal framework for companies in this province. As a result of the repeal of the *Company Act*, not-for-profit societies are now saddled with some rather onerous provisions that no longer apply to the for-profit companies for which they were originally designed. Second, the not-for-profit sector has grown and developed in ways that could not have been foreseen in 1977. New legislation is needed to establish an adequate legal framework for this increasingly important and sophisticated sector. Third, reform initiatives are underway or have recently been completed in other jurisdictions. This development gives British Columbia an opportunity to enact both modern and harmonized legislation.

TENTATIVE RECOMMENDATIONS

The consultation paper contains 106 tentative recommendations. Most are geared to the detailed policy questions that will have to be grappled with in drafting a new *Society Act*. The tentative recommendations are grouped into 15 categories.

General Principles

The first group of tentative recommendations set out the broad themes that are implicit in the more detailed tentative recommendations that follow. In many respects, these tentative recommendations are obvious, but worth stating nevertheless. They emphasize the need to enact a new Act, to continue to have a separate statute for societies, to fine-tune rather than overhaul the core principles of not-for-profit law, to harmonize the new statute, wherever appropriate, with the procedural and administrative rules in the *Business Corporations Act*, and to focus the new statute on organizational rather than regulatory issues.

Incorporation and Naming

A streamlined incorporation procedure is an important part of every corporate statute. This point was recognized when the *Business Corporations Act* was being developed. It is now time to extend many of these procedural benefits to societies. Some distinct aspects of the current system should be preserved, such as specifying a not-for-profit purpose or purposes on incorporation and filing bylaws with the Registrar of Companies.

Constitution and Bylaws

Much of the substance of the current law relating to a society's constitution and bylaws should be maintained. In terms of form, societies should adopt a modified version of the notice of articles used by companies as a model for the society constitution.

Capacity and Powers

The committee tentatively recommends that any existing remnants of the old doctrine of *ultra vires* should be abrogated. A new *Society Act* should embrace the principle that societies are legal persons with the same capacity as an individual of full capacity.

Offices and Records

The eccentric provisions relating to offices and records currently in the *Society Act* should be revamped along the lines of the *Business Corporations Act*.

Directors and Officers

There is scope to expand and clarify the rules relating to directors in the *Society Act*. Examples of such rules include election or appointment of directors, minimum number required, residency, qualifications, vacancies, and removal. Since these rules are fundamentally procedural in nature, they should be harmonized with similar rules in the *Business Corporations Act*. In addition, a new *Society Act* should provide more clarity on the status of officers.

Duties, Liabilities, and Conflicts of Interest

The rules covering the duties and liabilities of directors and officers and conflicts of interest involving directors and officers in the current *Society Act* are skeletal and often outdated. Modernization is the theme of the tentative recommendations in this area. Obsolete rules, such as assigning personal liability to directors if a society carries on with fewer than three members for a period of time, should be repealed. New provisions, recognizing the complex environment directors and officers must operate in, should be enacted. Some examples of the provisions tentatively recommended include a limitation on liability when reasonably acting on reports prepared by officers and professionals and a dissent procedure. The provisions allowing a society to indemnify a director or an officer should be overhauled and streamlined. The committee considered recent proposals for extending immunity from personal liability to directors and officers, but declined to make a tentative recommendation in favour of this concept. Instead, the court should be empowered to relieve individual directors and officers from personal liability on a case-by-case basis. The committee also makes a number of tentative recommendations relating to the modernization of rules governing conflicts of interest, including restricting paid staff members from serving on a society's board of directors.

Members

The committee's tentative recommendations with respect to members are aimed at modernizing the law. A radical overhaul is not tentatively recommended here; rather, such topics as the definition of "member," classes of members, and dues and subscriptions should be clarified. The committee does tentatively recommend a few changes, notably with respect to the minimum number of members (which should be one). Finally, some proposals have been rejected, such as a role for unanimous members' agreements.

Meetings of Members

There are some noticeable gaps in the current *Society Act* regarding meetings of members. These are largely procedural rules. The committee tentatively recommends harmonization with the *Business Corporations Act*, which has a more fully developed set of rules.

Financial

A few financial issues directly relate to the not-for-profit character of societies, such as the prohibitions on share capital and on distributions to members during the life of the society. The bulk of financial rules are procedural and should be harmonized with procedures in the *Business Corporations Act*.

Audits

The committee tentatively recommends maintaining the current position with respect to audits. The legislation should not, as a default position, require societies to have an auditor. But the committee tentatively recommends some changes for those societies that do opt to have an auditor. First, the procedural rules governing audits of societies should be harmonized with the procedural rules governing audits of companies. Second, societies that choose to have an auditor should be required to have an audit committee of the board of directors.

Members' Remedies

The committee tentatively recommends filling in the gaps in the *Society Act*'s current repertoire of members' remedies. The two major current remedies—investigation and oppression—should be clarified and updated. To these remedies should be added remedies that have become established across the for-profit and not-for-profit corporate sectors: the derivative action and compliance or restraining orders.

Society Alterations

The current *Society Act* contains very few provisions governing fundamental transformations of a society, and those that do exist (such as the amalgamation provisions) are badly out of date. The committee tentatively recommends the enactment of modern provisions relating to amalgamations, conversions to cooperative associations, continuation into and out of British Columbia, arrangements, and extraordinary disposals of a society's undertaking.

Liquidation, Dissolution, and Restoration

The *Society Act* currently adopts its procedures for liquidation, dissolution, and restoration from the *Company Act*. The committee tentatively recommends harmonizing these procedural rules with the *Business Corporations Act*. On the important question of dis-

posal of a society's assets on dissolution, the committee is not tentatively recommending a major departure from the current system.

Miscellaneous

There are a few miscellaneous rules in the *Society Act* that should be clarified and modernized, such as the rules relating to subsidiaries and branch societies. There are also provisions that should not be carried forward in the legislation, such as those dealing with reporting societies and occupational titles protection. (The latter subject merits its own statute.) Finally, the committee tentatively recommends updating the extraprovincial registration system for societies by harmonizing it with the *Business Corporations Act*.

CONCLUSION

The committee seeks input from the public on its tentative recommendations for reform. General comments on reform of the *Society Act* are also welcome. These comments will assist the committee in carrying out the major task of phase two of this project, the drafting of a new *Society Act*.

LIST OF ABBREVIATIONS

The following abbreviations are used throughout this consultation paper.

Abbreviation		Full Citation
1920 Act	=	*Societies Act*, S.B.C. 1920, c. 83
1947 Act	=	*Societies Act*, S.B.C. 1947, c. 82
1977 Act	=	*Societies Act*, S.B.C. 1977, c. 80
ALRI Draft Act	=	Draft *Incorporated Associations Act*, being Part IV of Alberta Law Reform Institute, *Proposals for a New Alberta Incorporated Associations Act* (ALRI Rep. No. 49) (Edmonton: The Institute, 1987)
ALRI Report	=	Alberta Law Reform Institute, *Proposals for a New Alberta Incorporated Associations Act* (ALRI Rep. No. 49) (Edmonton: The Institute, 1987)
BCA	=	*Business Corporations Act*, S.B.C. 2002, c. 57
BCLI Study Paper	=	British Columbia Law Institute, *Study Paper on the Personal Liability of Society Directors and Officers* (BCLI Cons. Doc. No. 13) (July 2004)
Bill C-21	=	Bill C-21, *An Act respecting not-for-profit corporations and other corporations without share capital*, 1st Sess., 38th Parl., 2004 (1st reading 15 November 2004; died on the order paper when Parliament was dissolved on 29 November 2005)
CA	=	*Company Act*, R.S.B.C. 1996, c. 62 (repealed on the coming into force of the BCA)
Cumming Report	=	Peter A. Cumming, *Proposals for a New Not-for-Profit Corporations Law for Canada* (Ottawa: Information Canada, 1974)
Dickerson Report	=	Robert W.V. Dickerson, John L. Howard, and Leon Getz, *Proposals for a New Business Corporations Law for Canada*, 2 vols. (Ottawa: Information Canada, 1971)

Abbreviation		Full Citation
LRCBC Report	=	Law Reform Commission of British Columbia, *Report on Conflicts of Interest: Directors and Societies*, 2 vols. (LRC 144) (Vancouver: The Commission, 1995)
OLRC Report	=	Ontario Law Reform Commission, "The Nonprofit Corporation: Current Law and Proposals for Reform," in *Report on the Law of Charities*, vol. 2 (Toronto: The Commission, 1996) 451–506
QC Consultation Paper	=	Registraire des enterprises du Québec, *Propositions pour un nouveau droit québécois des associations personnifiées: Document de consultation* (Sept. 2004)
SK Act	=	*The Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2
US 2006 Exposure Draft	=	American Bar Association, Section on Business Law, Subcommittee on the Model Nonprofit Corporation Law, Proposed Model Nonprofit Corporation Act, 3d ed., Exposure Draft (2006)
US Model Act	=	American Bar Association, Section on Business Law, Subcommittee on the Model Nonprofit Corporation Law, Revised Model Nonprofit Corporation Act (1987)

PART ONE—BACKGROUND

I. INTRODUCTION

A. Background

Volunteer and not-for-profit activities are important elements of Canadian life. One study has estimated there to be 161 000 volunteer and not-for-profit organizations in Canada.[1] These bodies have enriched the social life of Canadians, who have collectively ". . . taken out a total of 139 million memberships in nonprofit and voluntary organizations, an average of 4 memberships per person."[2] They have also made a significant contribution to the Canadian economy; in terms of annual revenue, the not-for-profit sector is comparable in size to the economy of British Columbia.[3]

Much of the growth in the not-for-profit sector has taken place in the last 30 years. This time of profound change and development has also seen the emergence of a number of challenges for not-for-profit organizations. A recent report identified the broad range of these challenges, touching on the need for reform in internal governance practices, measurement of program outcomes, fundraising, the definition of "charity" under federal tax legislation, financial reporting and management, and organizational law.[4] This consultation paper will focus exclusively on the last topic.

Organizational law does not have as high a profile as some of the other items on this list.[5] It has been referred to as a "neglected stepchild."[6] One reason why this area of the law is often not first on the list of matters requiring reform is that, when it works properly, it does not appear in public view. By analogy, it functions like the operating system of a computer, which ideally works in the background and does not intrude as other tasks are

1. Michael H. Hall *et al.*, *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* (Ottawa: Statistics Canada, 2004) at 4.

2. *Ibid*. at 9.

3. Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector: Final Report* (Ottawa: The Panel, 1999) at 13 [Broadbent Commission Report].

4. Broadbent Commission Report, *ibid.* at 22–75.

5. Other law reform projects have tackled some of the items on the Broadbent Commission Report's list. *See*, *e.g.*, the *Uniform Charitable Fundraising Act* in Uniform Law Conference of Canada, *Proceedings of the Eighty-Seventh Annual Meeting* (Ottawa: The Conference, 2005) at 72, 336–420; Canada, Voluntary Sector Initiative, Joint Regulatory Table, *Strengthening Canada's Charitable Sector: Regulatory Reform: Final Report* (Ottawa: Voluntary Sector Initiative, Joint Regulatory Table, 2003).

6. *See* Robert S. Lesher, "The Non-Profit Corporation—A Neglected Stepchild Comes of Age" (1967) 22 Bus. Law 951.

carried out. In our view, the basic organizational law for the incorporation of not-for-profit bodies in this province—which is called the *Society Act*[7]—no longer serviceably fulfills this role. It requires reform in order to ensure that progress can be made on the other fronts.

B. What Are Societies?

There are three types of not-for-profit organizations: unincorporated associations; charitable trusts; and incorporated not-for-profit bodies. In British Columbia, an organization in the last group is known as a "society."[8] The subject of this consultation paper is reform of the basic legal framework for societies in this province, the *Society Act*.[9] The main difference between incorporated societies on the one hand and the two unincorporated bodies on the other is that the law considers a society to be an entity that is separate from its members. Unlike an unincorporated association or a charitable trust, a society is a legal person in its own right.[10] This theoretical difference has a number of practical implications for the ownership of property, the commencement and maintenance of legal proceedings, and liability for contractual and tortious defaults. The Broadbent Commission Report has called for law reform initiatives relating to all three legal forms.[11] And, in fact, there has been some law reform work recently carried out on trusts and unincorporated associations.[12] But when it comes to the legal treatment of the practical issues listed above, societies resemble companies more than they do unincorporated associations or

7. R.S.B.C. 1996, c. 433.

8. This name is not universally applied. In other parts of Canada, societies are called "corporations without share capital." In the United States, they are labelled "nonprofit corporations" or "not-for-profit corporations." This consultation paper favours British Columbia usage and refers to not-for-profit bodies as "societies," despite their place of incorporation. "Societies" may be contrasted with for-profit bodies, which this consultation paper refers to as "companies." Societies and companies are species of the genus "corporation." This consultation paper uses "corporation" as a collective noun to refer to both societies and companies.

9. *Supra* note 7.

10. But charitable trusts and certain unincorporated associations (such as trade unions) may have entity status for certain specific purposes.

11. *See* Broadbent Commission Report, *supra* note 3 at 74–75.

12. *See* British Columbia Law Institute, *A Modern Trustee Act for British Columbia: A Report Prepared for the British Columbia Law Institute by its Committee on Modernization of the Trustee Act* (BCLI Rep. No. 33) (Vancouver: The Institute, 2004). The Uniform Law Conference of Canada is in the midst of a project to create a modern legal framework for unincorporated associations. *See*, online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/poam2/Unincorporated_Nonprofit_Associations_Progress_Report_En.pdf>. This law reform project is being carried out in co-operation with the American National Conference of Commissioners on Uniform State Laws and the Mexican Conference of Commissioners on Uniform State Laws. *See*, online: NCCUSL Web <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=255>.

charitable trusts. The fundamental differences that flow from the fact of incorporation justify a study of the basic law governing societies in its own right.

There are a number of core principles[13] that distinguish societies from companies. Societies must not be organized primarily to pursue business or profit-making purposes.[14] Societies must not have share capital. And societies must not distribute their profits to their members during the society's existence.[15] These core principles are top-of-mind whenever anyone thinks about the basic legal framework for societies. This is appropriate, as they are an important part of the law, but it must also be appreciated that the *Society Act* consists of many more provisions, which serve to buttress and support the core principles.

C. The Society Act Reform Project Committee

In July 2006, the British Columbia Law Institute commenced a project on the *Society Act*. The project has received financial support from the Law Foundation of British Columbia. The goal of this project is to produce a new *Society Act*, one which will be more in tune with the realities of the not-for-profit sector and contemporary British Columbia.

The project is being carried out by a volunteer project committee. Margaret Mason is the chair of the committee. Ms. Mason is a partner with the law firm of Bull, Housser & Tupper LLP. Her practice focuses on trusts and not-for-profit organizations. The other committee members are Ken Burnett, Colleen Kelly, Murray Landa, Mike Mangan, Kim Thorau, and Bob Kucheran. Mr. Burnett is a partner with the law firm of Miller Thomson LLP. He has acted for numerous societies, advising them on incorporation and governance issues. Ms. Kelly is Executive Director of Volunteer Vancouver. For more than 24 years, Volunteer Vancouver has been offering board development training. The organization trains approximately 50 boards each year. Mr. Landa is Associate Director, Gift and Estate Planning at the University of British Columbia. Before taking on this position, he spent seven years as a gift planning consultant. Prior to this, he was a lawyer in private practice, beginning as a litigator, and later moving into a solicitor's practice. Mr. Mangan is a lawyer with a practice in Vancouver, who also teaches and writes. He is the co-author of the *Annotated British Columbia Society Act*[16] and, from 1999 to 2005, he served as edi-

13. *See* Harry B. Hansman, "Reforming Nonprofit Corporation Law" (1981) 129 U. Pa. L. Rev. 497 at 501–03 (listing the nondistribution constraint, the restriction on the issuance of shares, and the pursuance of public purposes as "distinguishing characteristics" of societies).

14. But societies may carry on business and earn profits, so long as these activities are incidental to their overriding not-for-profit purposes.

15. Many societies also restrict their members from receiving any property remaining on the dissolution of the society as well.

16. Mike Mangan & Susan E. MacFarlane, *Annotated British Columbia Society Act*, looseleaf (Aurora, ON: Canada Law Book, 2007).

tor of the legal textbook *Directors' Liability in Canada*.[17] Mr. Mangan also has a special interest in directors' liability issues. He has created the Board Members at Risk seminar and, at last count, has taught 1500 people about their responsibilities as directors under the *Society Act*. Ms. Thorau is currently a public policy consultant. Prior to taking on this role, she spent 10 years with government. During that time, her responsibilities included the *Society Act* and the early development of new companies legislation. Mr. Kucheran is currently a student at the Faculty of Law, University of British Columbia. Prior to attending law school, Mr. Kucheran had a long and distinguished career in the not-for-profit sector, including serving for 13 years as the Chief Executive Officer of the British Columbia Pharmacy Association. Kevin Zakreski, a staff lawyer with the British Columbia Law Institute, is the project maanger.

This consultation paper contains the committee's tentative recommendations for the policy positions that will underlie a new *Society Act*. We invite public comment on all aspects of these tentative recommendations. A draft of the new *Society Act* itself, along with commentary on its provisions, will be the subject of the committee's final report.

D. The Structure of this Consultation Paper

This consultation paper contains two Parts. The committee's tentative recommendations for a new *Society Act* are found in Part Two. Before considering where the law should be going, it is useful to take a look back at how the law developed and to sketch out the reasons why now is an appropriate time for reform.

II. A BRIEF HISTORY OF THE SOCIETY ACT

A. Introduction

British Columbia has had a *Society Act* for 87 years. Over that time the legislation has developed and grown considerably from the rather modest original Act.

B. Pre-History: Legislation Before 1920

In the nineteenth century, British Columbia enacted a stream of statutes that were intended to provide a basic legal framework for various types of societies. This approach of enacting legislation to apply specifically to what the Legislature felt to be distinct types of organizations was based largely on the British model. British law recognized a number of different types of societies, some of which were regulated under distinct statutes. The most notable example was the friendly society, which has been described as playing a dual role of providing social and convivial events and insurance for its members.[18]

17. E. Edward Siemens, *et al.*, *Directors' Liability in Canada*, looseleaf (North Vancouver: STP Specialty Technical Publishers, 1994).

18. *See* Simon Cordery, *British Friendly Societies, 1750–1914* (Houndsmills, UK: Palgrave Macmillan, 2003) at 13, 75.

This focus on conviviality and insurance is present to a greater or lesser degree in British Columbia's nineteenth-century legislation. Some statutes, such as the *Literary Societies Act, 1871*[19] and the *Industrial Communities Act, 1898*,[20] were more concerned with the organization and operation of social clubs. Other legislation, such as the *Charitable Associations Act, 1871*,[21] was more focussed on insurance matters. The Act that most closely resembled the contemporary *Society Act* in the range of organizations it covered was the *Benevolent Societies Act, 1891*.[22]

This diverse set of Acts had a number of things in common. Most importantly, all of these statutes afforded their subject organizations status as an entity separate from their members. This meant that these bodies could sue and be sued and they could own property outright. In addition, their members were afforded limited liability: members were not liable for the debts of the organization in excess of the amount of any fee levied as a condition of membership. Beyond establishing these important principles, the nineteenth-century Acts were quite modest. They provided for registration with the forerunner of the current Registrar of Companies and they set out a rudimentary legal framework for governance along typical corporate lines by forming a board of directors, appointing officers, and making bylaws.

C. The 1920 Act

In 1920, British Columbia enacted its first *Societies Act*.[23] The 1920 Act, which consolidated the four Acts mentioned in the previous section, represented a significant development in this area of the law. It abandoned the divided, sectoral approach in favour of a new attempt to see the area as a unified whole. Unfortunately, the historical record does not provide much material documenting the intentions behind this change in legislative attitude. Although the specific reasons for enacting a new *Society Act* may be lost, well-known broader social and economic trends may yield some clues. The years after World War I were a time of great upheaval. Disease (particularly the Spanish influenza epidemic), economic downturn (exacerbated by the sharp decline in industrial activity after the War), strikes, and poverty and dependence (especially among returning soldiers who had been maimed or injured) blighted Europe and North America and did not spare British Columbia.[24] Charitable activity naturally took on greater prominence in this environ-

19. R.L.B.C. 1871, no. 150. The subject matter of the Act was broader than its short title suggests. It encompassed both literary societies and mechanics' institutes.

20. S.B.C. 1898, c. 6.

21. R.L.B.C. 1871, no. 162.

22. S.B.C. 1891, c. 41.

23. S.B.C. 1920, c. 83 [1920 Act].

24. *See* British Columbia, Legislative Assembly, "Report of the Deputy Minister of Labour for the Year

ment. Here a difference between Britain and North America should be noted. While the British continued to organize charitable activities primarily through the legal form of the trust, North Americans (including British Columbians) have favoured, by a large margin, to organize their charities as corporations.[25] The greater prominence of the corporate form in the British Columbia not-for-profit sector may have played a part in the move from a British style of discrete, narrowly focussed Acts to a North American model of one unified *Society Act* applying across the spectrum of incorporated not-for-profit bodies.

At 46 sections, the 1920 Act was more than twice as long as the longest of its nineteenth-century predecessors. In addition to making the important conceptual leap of including all societies within a single legal framework, the 1920 Act also contained early forms of many provisions familiar from today's *Society Act*. The 1920 Act began by setting out a procedure for incorporation. Five or more persons could incorporate a society by completing and signing a constitution (called in those days a "declaration") setting out the overarching purposes of the society and by making bylaws dealing with the society's internal affairs. These documents were filed with the Registrar of Companies.

The 1920 Act contained the first articulation of a number of principles that have had an enduring prominence in the law of societies. A society was required to incorporate to fulfill specific purposes, which must be set out in a publicly available constitution. The permitted purposes, some of which were expressly set out in the Act, were all not-for-profit in nature.[26] A society was not permitted to have share capital.[27] It also could not declare a dividend or distribute its property to its members at any time during its existence.[28]

Ending December 31st, 1919" by J.D. McNiven in *Sessional Papers* (1920) at K1. *See also* British Columbia, Legislative Assembly, "Report of the Deputy Minister of Labour for the Year Ending December 31st, 1920" by J.D. McNiven in *Sessional Papers* (1921) at D1 ("We have also become sadly familiar with the figure of the returned soldier who may be maimed in body or broken in health—a difficult case to fit into the modern industrial machine; or who may be a 'fit' man desiring to take up again the daily duties he laid down six years ago, and finding that the old landmarks of trade and industry have disappeared.").

25. *See, e.g.*, Evelyn Brody, "Institutional Dissonance in the Nonprofit Sector" (1996) 41 Vil. L. Rev. 433 at 475 ("In general, however, American charity law has come to look quite different from English charity law because most American charities take the corporation form." [footnote omitted]); Donovan Waters, Case Comment on *Re Centenary Hospital Organization* (1989) 9:1 Philanthrop. 3 at 8 (". . . while the English texts on charity law continue to be concerned with charitable *trusts*, and the amount of English case law on incorporated charities is small (surprisingly little is reported, at least), charitable corporations in Canada probably outweigh the number of trust organizations by a considerable margin." [emphasis in original]). Approximately 84 percent of all registered charities in Canada are incorporated. *See* Hall *et al.*, *supra* note 1 at 12.

26. 1920 Act, *supra* note 23, s. 3 (1).

27. 1920 Act, *ibid.*, s. 5.

28. 1920 Act, *ibid.*, s. 5.

The 1920 Act also contained some recognition of the corporate character of societies. It provided for limited liability of members.[29] Members were required to appoint directors, who would be responsible for "conducting the business, discipline, and management of the society and its affairs."[30] The society was also required to hold an annual general meeting of members and to file an annual report (with financial statements) with the Registrar of Companies.[31]

The 1920 Act was rounded out with a number of provisions setting out discrete powers of societies. These provisions dealt with such topics as court proceedings,[32] contracts,[33] and ownership of property.[34] The 1920 Act also touched on the establishment of branch societies[35] and amalgamation.[36] Finally, the legislation provided for the dissolution of societies by incorporating by reference sections from the *Companies Act*.[37]

D. The 1947 Act

The Legislature enacted a new *Societies Act* in 1947.[38] The 1947 Act was not as radical a conceptual departure as the 1920 Act that went before it (or the 1977 Act that would replace it). Instead, the 1947 Act retained almost everything that appeared in the 1920 Act, amplified a number of key provisions, and added new sections to deal with emerging issues. As a result, the Act grew from 46 to 59 sections.

Among the changes brought in by the 1947 Act, one touched on the core not-for-profit principles of the law of societies. This was the first articulation that a society must not be incorporated "for the purpose of carrying on any trade, industry, or business."[39] The 1947 Act also introduced the concept that additional provisions in a society's constitution (those other than a society's name, objects, and location of activities) may be made unal-

29. 1920 Act, *ibid.*, s. 4.

30. 1920 Act, *ibid.*, s. 23 (1).

31. 1920 Act, *ibid.*, s. 28.

32. 1920 Act, *ibid.*, s. 8 (1).

33. 1920 Act, *ibid.*, ss. 8 (1), 20.

34. 1920 Act, *ibid.*, s. 9.

35. 1920 Act, *ibid.*, ss. 18–19.

36. 1920 Act, *ibid.*, s. 37.

37. 1920 Act, *ibid.*, ss. 35–36 (incorporating by reference ss. 181–268 of the *Companies Act*, R.S.B.C. 1911, c. 39).

38. S.B.C. 1947, c. 82 [1947 Act].

39. 1947 Act, *ibid.*, s. 3 (1).

terable.[40] Finally, the 1947 Act included for the first time the requirement for societies to maintain a register of members[41] and a Part dealing with the registration of extraprovincial societies.[42]

E. The 1977 Act

Another 30 years would pass before the legislation was amended in a significant way. In 1977, the Legislature enacted a new *Societies Act*.[43] The 1977 Act was a direct response to the passage of a new *Companies Act*[44] in 1973. In one of the debates in the Legislature the Minister responsible for the Bill that would become the 1977 Act described it as ". . . a subsidiary or a satellite, if you will, of the *Companies Act*."[45] This point is important for a number of reasons, not least of which is that it indicates that the 1977 Act was intended to be shaped by the currents of change that swept across Canadian corporate law in the late 1960s and early 1970s. During this time, many old formalistic doctrines and requirements were cast off and replaced by a new approach to fundamental questions such as incorporation, corporate powers, governance, and members' remedies. The rationale behind these changes is more fully discussed in two seminal reports commissioned by the federal government: one that dealt with companies (the Report of the Dickerson Committee);[46] and another that dealt with societies (the Report of Peter A. Cumming).[47]

The 1977 Act contained many new provisions, but only one of its changes had any significant effect on the core not-for-profit principles of societies. This was the prohibition on pursuing profit-making purposes. The prohibition continued under the 1977 Act, but it was relaxed to a degree, as the legislation expressly declared that profit-making purposes may be pursued as an "incident to the purposes of a society."[48]

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40. 1947 Act, *ibid*., s. 17.

41. 1947 Act, *ibid*., s. 32.

42. 1947 Act, *ibid*., ss. 41–50.

43. S.B.C. 1977, c. 80 [1977 Act].

44. S.B.C. 1973, c. 18, which became *Company Act*, R.S.B.C. 1996, c. 62 [CA].

45. British Columbia, *Official Reports of the Debates of the Legislative Assembly (Hansard)*, vol. 7, no. 18 (7 September 1977) at 5311 (Hon. Rafe Mair).

46. Robert W.V. Dickerson, John L. Howard, & Leon Getz, *Proposals for a New Business Corporations Law for Canada*, 2 vols. (Ottawa: Information Canada, 1971) [Dickerson Report]. The draft legislation included in the Dickerson Report formed the basis of the *Canada Business Corporations Act*, S.C. 1974–75–76, c. 33.

47. Peter A. Cumming, *Proposals for a New Not-for-Profit Corporations Law for Canada* (Ottawa: Information Canada, 1974) [Cumming Report]. Unfortunately, the Cumming Report's recommendations were never implemented at the federal level.

48. 1977 Act, *supra* note 43, s. 2 (2).

The major area of reform in the 1977 Act was corporate governance. The skeletal provisions of the 1947 Act on the rights, duties, and obligations of members and directors were greatly amplified. Notable provisions included new rights for members, such as the right to requisition a general meeting,[49] and the articulation of directors' duties to societies.[50]

Another important underlying principle of the 1977 Act was the recognition of the desirability of harmonizing the administrative and procedural provisions of the *Society Act* with those found in the statute governing companies. Corporate legislation tends to contain many such provisions that apply to corporations generally, whether the corporation is a for-profit company or a not-for-profit society. Some (but not all) of these procedural and administrative provisions in the 1977 Act were harmonized with equivalent provisions in the CA.

The trend toward longer legislation also continued with the 1977 Act, which contained 96 sections, 37 more than were found in the 1947 Act.

F. Amendments Since 1977

In large measure, the current *Society Act* is the 1977 Act. There have only been a handful of substantive amendments to the legislation since 1977. In 1985, a new Part was added to provide a legal framework for occupational titles protection.[51] In 1999, several procedural changes, particularly in connection with meetings, were made.[52] And in 2004, a few of the Act's reporting requirements and incorporation procedures were amended.[53]

G. Summary

There have been many changes to the *Society Act* since its first appearance in 1920, but most of the core principles of the statute have remained essentially unchanged. The notion

49. 1977 Act, *ibid.*, s. 58.

50. 1977 Act, *ibid.*, s. 25.

51. *Society Amendment Act, 1985*, S.B.C. 1985, c. 84.

52. *Finance and Corporate Relations Statutes Amendment Act, 1999*, S.B.C. 1999, c. 33, ss. 52–54. These changes allowed societies to adopt a system of delegate voting, voting by mail, or any other means of voting approved by the Registrar of Companies, altered the procedure for changes of name, and permitted societies to hold directors' meetings by teleconference.

53. *Society Amendment Act, 2004*, S.B.C. 2004, c. 27; *Finance Statutes Amendment Act, 2004*, S.B.C. 2004, c. 62, ss. 42–44. The changes brought in by these statutes included discontinuation of the practice of having corporate registry staff examine bylaws upon incorporation or on a change of bylaws, repeal of the requirement to file annual financial statements with the Registrar of Companies, establishment of a new scheme for public access to annual financial statements, lifting of the requirement to obtain an order from the Registrar of Companies approving the method of notifying members of a meeting, discontinuation of the need to obtain consent from the Ministry of Finance in order to incorporate a society that will operate as a social club, and repeal of the forms that were set out in Schedule A to the Act.

of incorporation to pursue public purposes, the restriction on pursuing profit-making purposes, the prohibition of share capital, and the constraint on distributing profits to members were all established by 1947. More recently has come the acceptance of the principle that societies are corporations in their own right, and should be governed by a law that is as sophisticated as the law governing companies.

III. WHY REFORM IS NEEDED NOW

A. Introduction

There are three major reasons why the time is now ripe for fundamental reform of the *Society Act*. First, reform has successfully been pursued in the for-profit sector, resulting in the CA being repealed and replaced with the *Business Corporations Act*.[54] Second, the not-for-profit sector in British Columbia has grown and developed in ways unforeseen in 1977. And third, other Canadian jurisdictions have begun to move on reforms to their equivalents to the *Society Act*.

B. Reform in the For-Profit Sector

Needless to say, the law in British Columbia has not stood still since the last major revision of the *Society Act* in 1977. The most significant development on the legal landscape (in the area of corporate law) was the enactment of a new law governing for-profit companies, the BCA.

The BCA was the result of many years' work by lawyers and others who specialize in company law. The multitude of changes brought in by the BCA are too numerous to describe in detail here. Suffice it to say that the BCA has fundamentally reformed company law in British Columbia. And, by and large, these reforms have been hailed as successful in practice.[55]

The advent of the BCA is important to societies because companies and societies are both, at law, corporations and, as a result, many of the legal issues facing them are the same. This idea was the driving force behind the 1977 Act; the government of the day explained the need for a new *Society Act* largely by referring to the enactment of the CA some four years earlier.[56]

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54. S.B.C. 2002, c. 57 [BCA].

55. *See, e.g.*, John O.E. Lundell *et al*., *British Columbia Business Corporations Act Transition Guide* (Vancouver: Continuing Legal Education Society of British Columbia, 2003) at § 1.1 ("The *Business Corporations Act*, which has been 15 years in development, will remedy many of the shortcomings and ambiguities of the *Company Act*. . . .").

56. *See* Bill 50, *Societies Act*, 2d Sess., 31st Parl., British Columbia, 1977 (explanatory note) ("The purpose of this Bill is to replace the *Societies Act*, last revised in 1947, to make it more consistent with the 1973 *Companies Act*.").

So, one of the implications of the enactment of the BCA is that it undercuts the rationale for many of the provisions in the *Society Act*. Since much of the *Society Act* was designed to be harmonized with the CA, and the CA is now repealed, this development means that the *Society Act* is in some sense obsolete. And its obsolescence is not only a theoretical problem. Societies now find themselves in the anomalous position of having to meet strict and cumbersome procedural rules that were adopted solely because, in 1977, they were the state of the art in company law. Now company law in this province has moved on, but many of the provisions that have been reformed or cast off continue to bind societies.

A few examples will show that the same divergence between the law governing societies and the law governing companies which prompted legislators to act in the 1970s has opened up again. An obvious place to begin is section 71 of the *Society Act*, which expressly preserves Part 9 of the CA and incorporates it by reference as the law governing dissolution of societies. This leaves societies with a procedure for voluntary dissolution that is less legally certain than the equivalent procedure in the BCA. It also saddles societies with a restoration procedure that requires an application to court, adding time and expense in comparison to the streamlined BCA procedure.

A further example is found in the rules governing indemnification of society directors.[57] Following the CA, the *Society Act* requires court approval before an indemnity may be paid to a director who has been sued simply as a result of occupying the office of director. The BCA has eliminated this costly requirement. Even more troubling, the *Society Act* says nothing about advancing defence costs before trial of an action, an issue that has taken on increased prominence since the 1970s and that is addressed in the BCA. Here procedural awkwardness and legal uncertainty have a direct bearing on a common complaint of the not-for-profit sector, the difficulty to recruit and retain directors.

The replication of CA provisions in the *Society Act* even went beyond procedural and administrative matters. For example, the *Society Act* imposes personal liability for the debts of a society on the directors of a society if that society has fewer than three members for more than six months.[58] This provision has no equivalent in other Canadian not-for-profit statutes and appears to have been enacted as an analogue of an equivalent provision in the CA.[59] The BCA did not carry forward this rule, effectively making it an orphan in the *Society Act*.

Finally, another problem with the *Society Act* is that it never fully embraced the promise of modernization offered by the 1977 revision. A surprisingly large number of the Act's earliest provisions were incorporated into the 1977 Act with little or no changes. For ex-

57. *Society Act*, *supra* note 7, s. 30.

58. *Society Act*, *ibid.*, s. 24 (8).

59. CA, *supra* note 44, s. 14.

ample, the amalgamation and extraprovincial registration provisions date from 1920 and 1947 respectively. The amalgamation provision, in particular, is so far outside the mainstream of Canadian corporate law as to be useless.

These are but a few of the many examples that could have been chosen to illustrate the differences between the *Society Act* and the BCA. This theme is pursued in greater detail in Part Two of this consultation paper, where many of the committee's tentative recommendations involve considering harmonization of provisions in the *Society Act* with equivalent provisions in the BCA. This detailed approach was taken in this consultation paper in order to ensure that harmonization was carried out in a manner that would respect the essential not-for-profit character of societies. There are often persuasive reasons connected with the not-for-profit nature of societies that support enacting legislation that differs from the legislation governing for-profit companies. But what is striking about the provisions cited above is that they have little if anything to do with that not-for-profit character. Instead, they impose costs and delays on societies for reasons that have nothing to do with furthering their essential activities and missions. Harmonization with the BCA will overcome this problem in the short term by giving societies access to streamlined and modern administrative and procedural provisions, which will reduce delays and costs. Harmonization may also assist societies in the long term too. Forging a closer connection between the *Society Act* and the BCA will lend a higher degree of certainty to the law governing societies. The courts are more apt to comment on the BCA, if for no other reason than the fact there are more companies in British Columbia than there are societies. It is also hoped that tightening the link between the *Society Act* and the BCA will help to ensure that future modernizing amendments to company law will be considered for societies as well.

C. Developments in the Not-for-Profit Sector

Neglect is likely the reason for the current state of the *Society Act*. For much of the twentieth century, not-for-profit statutes like the *Society Act* were treated as backwaters of North American corporate law.[60] This neglect was the result of an attitude detected by the Alberta Law Reform Institute that legislation governing societies is not as important as legislation governing companies ". . . because the economic effect upon Alberta of decisions made by Alberta non-profit associations is not as significant as the economic effect on Alberta of decisions made by Alberta business corporations."[61]

This attitude is literally accurate, in the sense of a narrow comparison between companies and societies, but it misses the big picture of societies' contributions to the Canadian economy. A recent statistical survey of the not-for-profit sector found that ". . . nonprofit

60. *See* Lesher, *supra* note 6.

61. Alberta Law Reform Institute, *Proposals for a New Alberta Incorporated Associations Act* (ALRI Rep. No. 49) (Edmonton: The Institute, 1987) at 50–51 [ALRI Report].

and voluntary organizations report a combined volunteer complement of over 19 million that contribute more than 2 billion hours of volunteer time, or the equivalent of more than 1 million full-time jobs."[62] In 2003, the sector's revenues were $112 billion.[63] Further, the range of activities covered by societies is incredibly diverse, surpassing even the range of companies.[64] By any measure, societies make a major contribution to Canadian life.

Much of the growth in the not-for-profit sector has taken place over the last 30 years. In 1977, there were approximately 8500 active societies in British Columbia.[65] By summer 2006, when the British Columbia Law Institute began the *Society Act* Reform Project, that number had grown to 24 421 active societies.[66]

Along with growth in numbers, the not-for-profit sector has also experienced an increase in the complexity of its activities. Societies often find themselves engaged in the type of sophisticated activity that once may have seemed only to be the preserve of companies.

Although the governing statute for societies in British Columbia has been largely unchanged since 1977, this does not mean that other aspects of the legal landscape facing societies have also remained the same. That landscape has, of course, continued to develop, primarily through court decisions. While it can be difficult, and often futile, to predict how trends in jurisprudence will play out while those trends are unfolding, prominent commentators on the not-for-profit sector have noticed a shift in the courts' attitude to societies. Increasingly, the courts are holding societies to the same standards and practices that companies must meet.[67]

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62. Hall *et al.*, *supra* note 1 at 31 [footnotes omitted].

63. Hall *et al.*, *ibid.* at 54.

64. *See, e.g.*, Peter A. Cumming, "Corporate Law Reform and Canadian Not-for-Profit Corporations" (1974) 1:3 Philanthrop. 10 at 20 (". . . the uses to which not-for-profit corporations as a group are being put are considerably more varied than the uses for business corporations").

65. *See* British Columbia, *Official Reports of the Debates of the Legislative Assembly (Hansard)*, vol. 7, no. 18 (7 September 1977) at 5312 (Norman Levi).

66. Telephone call with Ruth McIver, Manager, Registries Programs—Societies and Cooperatives (31 August 2006). Even more striking, about one-third of this growth has taken place in the last seven years. *See* Anders I. Ourom, "Creating a Not-for-Profit Organization" in Anders I. Ourom & Vince Battistelli, eds., *Charities and Not-for-Profit Organizations: The Fundamentals* (Vancouver: Continuing Legal Education Society of British Columbia, 1999) 1.1 at 1.1.01 (citing figure of "about 20 000 societies" active in British Columbia).

67. *See, e.g.*, Terrance Carter & Paula Thomas, "Non-share capital corporations must apply rules as [rigorously] and fairly as those with shares" *The Lawyers Weekly* (6 April 2007) 10 (discussing court decision that, in the authors' view, "echoes other recent court decisions which insist that the corporate rules and procedures surrounding non-share capital corporations are not to be interpreted in a manner that is more lenient as compared to share capital corporations").

This combination of rapid development in many areas and stagnation in the statutory law has created frustration in the not-for-profit sector. One comment from the Broadbent Commission Report gives a sense of this frustration:[68]

> We also examined the legal framework within which voluntary organizations do their work, which is primarily within provincial jurisdiction. . . . When problems arise, they do so primarily because the laws governing the use of existing forms are antiquated and do not serve the contemporary needs of voluntary organizations; and because there is considerable, unnecessary variation in the laws across provinces. *The unequivocal message from our consultations was that this legal mess needs to be cleared up.*

D. Reform in Other Jurisdictions

At the federal level, and in many provinces, distinct not-for-profit legislation does not exist. Instead, societies in these jurisdictions are governed by a few sections in the old for-profit statute, which has been expressly preserved for societies even though it no longer applies to companies.[69] These statutes tend to pre-date the reforms in corporate law of the 1970s. They are archaic and antiquated legal frameworks for societies that make British Columbia's *Society Act* (which is largely of a 1977 vintage) look modern and sophisticated by comparison.

This situation is starting to change. A leader in this area is Saskatchewan. Its *Non-profit Corporations Act, 1995*[70] is the most advanced not-for-profit legislation currently in force in Canada. A recent federal report[71] on the not-for-profit sector resulted in a Bill being introduced in the last Parliament.[72] This Bill was not enacted; it died on the order paper when the previous minority federal government was defeated on an unrelated matter of confidence. If this Bill, or a substantially similar Bill, is taken up and passed in the new Parliament,[73] then several provinces will likely follow the federal government's lead, in the same way that many provinces have modelled their for-profit corporate legislation on

68. *Supra* note 3 at vii–viii [emphasis in original].

69. *See, e.g.*, *Canada Corporations Act*, R.S.C. 1970, c. C-32, Part II; *Corporations Act*, R.S.O. 1990, c. C.38, Part III.

70. S.S. 1995, c. N-4.2 [SK Act].

71. Industry Canada, Corporate Policy Law Directorate, *Reform of the Canada Corporations Act: The Federal Nonprofit Framework Law* (Justice and Law Series No. 100-06836) (Ottawa: Industry Canada, 2000).

72. Bill C-21, *An Act respecting not-for-profit corporations and other corporations without share capital*, 1st Sess., 38th Parl., 2004 (1st reading 15 November 2004; died on the order paper when Parliament was dissolved on 29 November 2005) [Bill C-21].

73. Although the current government has not indicated its intentions publicly, the speculation is that Bill C-21 will be brought back before Parliament in the near future in a substantially similar form.

the *Canada Business Corporations Act*.[74] In fact, there are reform efforts currently underway in Québec[75] and Ontario.[76]

In addition to these government documents and projects, there are a number of law reform reports on aspects of not-for-profit law that are worth considering. In British Columbia, both the Law Reform Commission and the Law Institute have published documents dealing respectively with directors' conflicts of interest[77] and the personal liability of directors and officers.[78] Outside British Columbia, the Alberta Law Reform Institute has produced a noteworthy report,[79] which contained draft legislation,[80] and the Ontario Law Reform Commission has also made recommendations for reform in this area of the law.[81] Even further afield, the American Bar Association's Model Nonprofit Corporation Act[82] has been very influential in the United States. (An exposure draft for a revised Model Nonprofit Corporation Act was released a little over a year ago.[83])

74. R.S.C. 1985, c. C-44.

75. *See* Registraire des enterprises du Québec, *Propositions pour un nouveau droit québécois des associations personnifiées: Document de consultation* (Sept. 2004), online: Registraire des enterprises du Québec <http://www.registreentreprises.gouv.qc.ca/documents/publications/consultation.pdf> [QC Consultation Paper]. The reform process appears to have stalled in Québec, as no action has been taken on the QC Consultation Paper.

76. *See* Ontario, Ministry of Government Services, Policy and Consumer Protection Services Division, *Consultation Paper on Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations (No. 1)* (May 2007), online: Ministry of Government Services <http://www.gov.on.ca/MGS/graphics/132791.pdf>.

77. Law Reform Commission of British Columbia, *Report on Conflicts of Interest: Directors and Societies*, 2 vols. (LRC 144) (Vancouver: The Commission, 1995) [LRCBC Report].

78. British Columbia Law Institute, *Study Paper on the Personal Liability of Society Directors and Officers* (BCLI Cons. Doc. No. 13) (July 2004), online: British Columbia Law Institute <http://www.bcli.org/pages/projects/directors/Liability_Directors_Officers_SP.pdf> [BCLI Study Paper].

79. ALRI Report, *supra* note 61.

80. Draft *Incorporated Associations Act*, being Part IV of the ALRI Report, *ibid*. [ALRI Draft Act]. The ALRI Draft Act formed the basis of a Bill considered by the Alberta Legislature. *See* Bill 54, *Volunteer Incorporations Act*, 2d Sess., 21st Leg., Alberta, 1987. Bill 54 received first reading, and then it died on the order paper. *See* William H. Hurlburt, "Towards a Reformed Non-Profit Corporations Statute" (1988) 7:3 Philanthrop. 17.

81. Ontario Law Reform Commission, "The Nonprofit Corporation: Current Law and Proposals for Reform," in *Report on the Law of Charities*, vol. 2 (Toronto: The Commission, 1996) 451–506 [OLRC Report].

82. American Bar Association, Section on Business Law, Subcommittee on the Model Nonprofit Corporation Law, Revised Model Nonprofit Corporation Act (1987) [US Model Act].

83. American Bar Association, Section on Business Law, Subcommittee on the Model Nonprofit Corporation Law, Proposed Model Nonprofit Corporation Act, 3d ed., Exposure Draft (2006) [US 2006 Exposure Draft].

Together, the SK Act, Bill C-21, the LRCBC Report, the BCLI Study Paper, the ALRI Report and Draft Act, the OLRC Report, the QC Consultation Paper, the US Model Act, and the US 2006 Exposure Draft provide a wealth of options for reform of the *Society Act*. They also provide an opportunity for harmonization, which is a goal that is receiving support from prominent voices in the not-for-profit sector.[84] Harmonization need not result in word-for-word uniformity. A better result would be a set of modern statutes that, while attuned to local issues, embodied contemporary ideas and concepts about corporate law.

Conversely, inactivity in British Columbia coupled with reform in other jurisdictions could induce not-for-profit bodies to forsake incorporation under the *Society Act* for incorporation in a jurisdiction that has a more modern legal framework, so long as those involved in the not-for-profit body were willing to register as an extraprovincial society in British Columbia and pay the fees associated with maintaining that registration.

E. Summary

A look back at the history of the *Society Act* shows a regular pattern of updating the legislation every 30 years. Since the last major changes took place in 1977, by historical standards, then, reform of the *Society Act* is due. Of course, reform of the legislation is dictated by much more than reference to historical patterns. Recent changes in the for-profit and not-for-profit sectors have left the *Society Act* an outdated, cumbersome legal framework for societies. Time will only exacerbate this situation. Fortunately, models for reform exist as do opportunities for harmonization.

84. *See, e.g.*, Letter from James M. Partks, Chair, National Charities and Not-for-Profit Law Section, Canadian Bar Association to John Twohig, President, Uniform Law Conference of Canada (28 November 2006), online: National Charities & Not-for-Profit Law Section <http://www.cba.org/CBA/sumissions/pdf/06-53-eng.pdf>.

PART TWO—TENTATIVE RECOMMENDATIONS

I. INTRODUCTION

This Part sets out the committee's tentative recommendations for a new *Society Act*. Each tentative recommendation is introduced by a brief discussion of the issues considered by the committee. The bulk of the tentative recommendations are geared toward policy matters that must be considered in drafting specific sections of legislation. The first few tentative recommendations address general principles.

II. GENERAL PRINCIPLES

A. Introduction

Certain general principles informed the work of the committee. These principles would be apparent, at least implicitly, in the more detailed tentative recommendations that follow. They are set out as tentative recommendations in their own right for two reasons. First, we wanted to provide an opportunity for public comment on some large-scale basic issues that could not be subsumed within specific policy proposals for a new *Society Act*. Second, the discussion of these general principles serves as a bridge from the overview of the broader trends in the not-for-profit scene that made up Part One to the examination of discrete, focussed legal and policy issues that will make up the vast majority of Part Two.

B. A Distinct Not-for-Profit Statute Is Still Needed

Some jurisdictions[85] have opted not to enact a separate statute governing societies. Instead, they have included societies in their for-profit legislation, adding a separate Part that contains provisions needed to preserve the not-for-profit character of societies. The rationale underlying this decision is that there are enough common elements uniting not-for-profit and for-profit corporations that enacting two statutes would be duplicative. Further, since legislation governing companies tends to be amended more frequently, societies may benefit from being grouped under a constantly updated legal framework.

One of the difficulties with this approach is that this promise of keeping abreast of emerging issues has often not been kept in practice. Many provinces that have taken this approach have left societies to be governed by statutes that no longer apply to companies.[86] The result has been that societies end up with the worst of both worlds: they are governed by a set of provisions that were originally crafted for companies and that are now wholly out of date. Implementing a decision to place societies under the BCA would also reverse

85. *See* Manitoba: *The Corporations Act*, R.S.M. 1987, c. C225, C.C.S.M. c. C225 (Part XXII applies to "corporations without share capital"); Newfoundland and Labrador: *Corporations Act*, R.S.N.L. 1990, c. C-36 (Part XXI applies to "corporations without share capital").

86. *See, e.g.,* Ontario: *Corporations Act*, *supra* note 69; Québec: *Companies Act*, R.S.Q. c. C-38.

a longstanding tradition in British Columbia of having two distinct Acts and would require many carefully calibrated drafting changes to the BCA.

The committee tentatively recommends that:

> *1. British Columbia should continue to have a Society Act as distinct legislation governing all societies in the province.*

C. A New Society Act Is Needed

The case for reform of the *Society Act* was laid out in Part One. Much of this case focussed on problems with the *Society Act* as it currently stands. These problems cannot be solved with piecemeal reforms. The necessary modernization of the legislation will require a new Act.

The committee tentatively recommends that:

> *2. The current Society Act should be repealed and replaced with a new Society Act.*

D. Refinements to Core Principles of Not-for-Profit Law

Part One of this consultation paper contained a number of references to the core principles of not-for-profit law. A relatively small group of provisions in the *Society Act* carry most of the burden in establishing a corporation as a not-for-profit society. Among the provisions that come within this small group are: the requirement to pursue not-for-profit purposes; the prohibition on pursuing primarily profit-driven purposes; the prohibition on share capital; and the prohibition on distributing profits to members during the society's existence.

As will be spelled out below, these provisions do not require fundamental transformation, though some refines may be contemplated.

The committee tentatively recommends that:

> *3. The core principles of not-for-profit law in a new Society Act should be refined, but not fundamentally transformed.*

E. Harmonization with the Business Corporations Act

Much of the modernization of the *Society Act* involves confronting the same issues that were dealt with in the development of the BCA. Some care must be taken in adapting these provisions to societies. In a few cases, they will be inappropriate. But, particularly with procedural and administrative matters, a new *Society Act* should be as close to the BCA as possible.

The committee tentatively recommends that:

> *4. Wherever appropriate, a new Society Act should be harmonized with the Business Corporations Act.*

F. Purpose of the Statute

A statute governing the organization of not-for-profit corporations should focus on a limited range of topics. It should provide for the efficient incorporation and organization of societies, set out minimum record-keeping and governance standards, deal with the powers and liabilities of directors, grant rights and remedies to members, deal with the procedural aspects of holding meetings, establish machinery for transactions that effect a fundamental change to the society (such as amalgamation), and provide for the dissolution of societies. It should not attempt to deal with regulatory issues that are best dealt with in statutes of general application.[87]

Examples of regulatory issues range from labour standards to environmental laws. These issues would also include topics such as fundraising, which have a more immediate connection to societies. The problem with placing regulatory provisions in the *Society Act* is that not all participants in the field of, say, charitable fundraising are societies. Charitable trusts and unincorporated not-for-profit associations may also be active in this area. In addition, not all societies are incorporated under British Columbia's legislation. Some may be incorporated federally. In order to have a level playing field in fundraising, equivalent provisions would have to be enacted in the organizational statutes for these other types of legal forms. This would be a difficult task, since there is no basic organizational statute in British Columbia that applies to charitable trusts or unincorporated not-for-profit associations and since British Columbia obviously cannot amend federal legislation applying to federal societies. But even if this problem were overcome, it should be apparent that regulating fundraising through a series of organizational statutes would require a great deal of duplicated legislation. In addition, if the standards varied across these statutes, then this variation may create an incentive to select one legal form over another. Finally, from the public's point of view, legal form is not the issue—the activity (in this example, fundraising) is. If legislative action is warranted, then it would be better to address the activity directly by means of a dedicated regulatory statute.

87. *See* Dickerson Report, *supra* note 46, vol. 1 at 2–3 (quoting *Ballantine on Corporations*: "The primary purpose of corporation laws is not regulatory. They are enabling acts. . . . They deal with the internal affairs of the organization, the content of the articles of incorporation, the rights of shareholders, the powers and liabilities of directors, the authorized number and variety of the shares, the holding of meetings, restrictions on corporate finance, such as the withdrawal of funds by way of dividends and share purchases, the corporate records, the authorization of organic changes such as amendments, sale of entire assets, merger and consolidation, and dissolution and winding up.").

The *Society Act* currently has some gaps in its coverage of basic organizational issues. It also contains extraneous material that should not be found in a statute of its kind.

The committee tentatively recommends that:

> *5. A new Society Act should be an organizational statute, which covers such topics as incorporation, record-keeping, corporate governance, powers and liabilities of directors, members' rights and remedies, meetings of members, fundamental transformations, and dissolution of societies, but it should not deal with regulatory matters.*

III. INCORPORATION AND NAMING

A. Introduction

Incorporation and naming provisions are primarily procedural in nature. So, the major themes in the sections that follow will be modernization and harmonization with the BCA. But a few substantive issues will also be raised and discussed. Some of these substantive issues will have a bearing on basic differences between for-profit companies and not-for-profit societies.

B. General Incorporation Procedure

1. FORMATION OF SOCIETIES

One of the main purposes of legislation like the *Society Act* is to provide an efficient means to incorporate not-for-profit bodies. The legislation should embody up to date procedures for incorporating societies and should reflect advances in technology.

The procedure for incorporation under the *Society Act* is set out in section 3. This section has changed little since the 1920 Act.[88] It contemplates five (or more) persons signing a constitution and bylaws and submitting these documents, along with a list of directors and a notice of the society's address, to the Registrar of Companies. The five (or more) signatories become the original members of the society.

This legislated procedure fails to acknowledge that the documents required to form a society are often prepared and submitted by agents, such as lawyers and notaries public. In addition, by using words such as "original," section 3 is framed in terms appropriate to paper documents, rather than electronic media.

Sections 10 to 15 of the BCA, which deal with the formation of a company, provide a model for modern incorporation procedures for societies. The BCA expressly recognizes the role of agents (called "completing parties" in the BCA) in the incorporation process.

88. 1920 Act, *supra* note 23, s. 6.

The BCA provisions were also drafted as the Registrar of Companies was implementing an online incorporation system. The benefits of this system should be extended to those persons who wish to form societies.

The committee tentatively recommends that:

> *6. A new Society Act should have provisions governing the formation of societies that are harmonized with the provisions governing formation of companies under the Business Corporations Act.*

2. FILING BYLAWS

For the most part, incorporation procedures do not raise any issues that call for special consideration in light of the not-for-profit character of societies. The one exception is the requirement to file bylaws with the Registrar of Companies—a requirement that the committee strongly believes must be retained as part of a new *Society Act*.

Under section 3 of the *Society Act*, the applicants for incorporation of a society are required to file a copy of the society's bylaws with the Registrar of Companies, who is required to maintain the bylaws as a publicly available record. Companies had a similar requirement with respect to their articles (the equivalent of a society's bylaws) under the CA. This requirement was eliminated by the BCA.

There were three reasons for eliminating the requirement to file articles. First, it afforded companies a measure of privacy. Although members of the public do have a right to inspect and copy a company's articles (upon payment of a reasonable fee), this right now must be exercised by attending at the company's records office rather than by making a request of a public registry.[89] Second, it streamlined the incorporation process. During the development of the BCA discontinuing this filing requirement was seen as an integral part of the move to online incorporation. Third, it resulted in savings for the government, which was no longer required to store copies of company articles.

In the committee's view, these reasons are more than counterbalanced by the reasons in favour of retaining the requirement to file bylaws with the Registrar of Companies. Societies are expressly incorporated to fulfill one or more public purposes, unlike companies, which are primarily formed to generate profits for private persons. This difference in purposes raises the possibility that the public could suffer harm if the bylaws of a society were lost or rendered beyond comprehension. This possibility is greater in the not-for-profit sphere, which tends to rely on a constantly changing cast of directors and officers to perform administrative tasks, than in the for-profit sphere, which tends to employ professional agents (such as law firms) to attend to its record-keeping and filing requirements.

89. *See* BCA, *supra* note 54, s. 46 (4)–(5).

As a result of their approach to administrative matters, many societies have vital corporate records in more than one location and do not have the institutional memory or capacity to ensure that a single, accurate record of the society's bylaws exists. The committee believes that it is the role of the provincial government to assist societies in this task. This assistance is needed both to foster the not-for-profit sector and to protect third parties that rely on the services provided by societies or that serve as advisors to societies.

Although the place for debating technological issues is not here, it should be possible to accommodate the filing of bylaws within a system of electronic incorporation.

The committee tentatively recommends that:

> *7. A new Society Act should continue to require the filing of bylaws as part of the process of incorporation.*

C. Incorporation for Purposes

1. Specifying a Not-for Profit Purpose

Section 2 (1) of the *Society Act* provides that a society may be incorporated for any lawful purpose or purposes. The section then goes on to list examples of the types of purposes for which a society may be incorporated.

In its approach, the *Society Act* strikes a balance between the position found in older for-profit and not-for-profit incorporation statutes, which required incorporation for a purpose or purposes set out in a limited list in the statute and reserved a discretion for the government to reject incorporation if the application did not state a purpose found in the list and the position of modern for-profit statutes, which treat incorporation as a right and do not require incorporating documents to state any purpose. The ALRI Report, which recommended a similar median position on this issue, said that the rationale for this position is ". . . primarily so that the members can know what the authorized area of activity is and so that, if necessary, they can take legal action to stop the [society] from acting for other purposes."[90]

Most Canadian not-for-profit statutes take a more restrictive position than is found in the *Society Act*. Typically, these statutes do not permit incorporation for any lawful purpose. Instead, incorporation must be for one of the purposes listed in the statute. Further, a government official (usually the equivalent of British Columbia's Registrar of Companies) is expressly authorized to examine the purposes listed on an application to incorporate and to reject applications that do not state a purpose or purposes that falls within the list. In

90. ALRI Report, *supra* note 61 at 33.

describing the process of incorporating a society in Ontario, the OLRC Report gives an example of how involved this reviewing process can be:[91]

> The fact that incorporation of a nonprofit corporation is a discretionary act has allowed for the development in Ontario of an administrative practice which has permitted government officials to impose certain restrictions on entry to the nonprofit form. The Compan[ies] Branch of the Ministry of Corporate and Consumer Affairs [now called the Ministry of Government Services] has, for a number of years, made a practice of consulting with the Office of the Public Trustee on applications for letters patent of incorporation where charitable objects are involved. . . . The Public Trustee has announced that it will oppose an application for incorporation on the basis of any one of a number of factors. . . .

(The passage goes on to list eight factors, five of which are directly related to objects and purposes.) The policy underlying this position is that incorporation itself implicitly grants state approval of the purposes pursued by a society and, therefore, the state must take an active role to ensure that incorporation is only granted to those persons who will live up to the endorsement conveyed by incorporation.

The opposing position, which would permit incorporation of a society that did not specify any purposes, has been primarily championed in law reform reports.[92] But this approach has been implemented in one not-for-profit statute currently in force in Canada, the SK Act.[93] The rationale for this position is that societies should be placed on the same footing as business corporations. In addition, supporters of this view sometimes characterize it as being necessary to root out the doctrine of *ultra vires*.[94]

The committee favours the median position of requiring societies to specify their purposes on incorporation. It is desirable because it provides the members with some fundamental information about the organization they have joined. It also will be of some assistance to societies that wish to seek registered charitable status under the *Income Tax Act*.[95] These considerations serve to differentiate societies from companies on this point, making the BCA and other modern for-profit statutes unsuitable models for reform for this issue.

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91. OLRC Report, *supra* note 81 at 477–78.

92. *See* Cumming Report, *supra* note 47, at 22 (". . . [n]ot-for-profit corporations are and should be incorporated simply as a matter of course with unlimited objects, subject to the overriding requirement and limitation that incorporation is being sought for a non-pecuniary purpose."); QC Consultation Paper, *supra* note 75 at 19 (proposal 3).

93. SK Act, *supra* note 70, ss. 5–6.

94. *See*, below, Part Two, Section V.B at 32–35.

95. R.S.C. 1985 (5th Supp.), c. 1.

The committee tentatively recommends that:

> *8. A new Society Act should allow incorporation of a society for any lawful not-for-profit purpose and should require specification of the society's purposes in its constitution.*

2. PROHIBITION ON INCORPORATION TO PURSUE COMMERCIAL PURPOSES

One of the key elements of not-for-profit legislation involves defining the relationship of societies to businesses operated for profit. Instinctively, it is readily apparent that a society that had as its primary purpose the operation of business for profit would not be appreciably different from a company. But an absolute prohibition on carrying on business would create enormous practical difficulties for many societies, which often rely on funds generated from for-profit activities to finance the carrying out of not-for-profit purposes.

The *Society Act* attempts to accommodate these two positions in two sections. Section 2 (1) (f) prohibits a society from being incorporated "for the purpose of carrying on a business, trade, industry or profession for profit or gain." Section 2 (2) qualifies section 2 (1) (f), by declaring that "[c]arrying on a business, trade or profession as an incident to the purposes of a society is not prohibited."

This approach is rather vague, but section 2 (2) has not generated much litigation. The most recent case to give any sustained consideration to when a business will be an incidental rather than a primary purpose of a society was *Shaw v. Real Estate Board of Greater Vancouver*.[96] In this case, a number of real estate agents argued that the multiple listing service of the Real Estate Board constituted an unlawful business purpose. The court reviewed the purposes set out in the board's constitution, the scope of the board's activities, and the history of the multiple listing service and concluded that there was no breach of section 2 (2).[97]

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96. (1974), 48 D.L.R. (3d) 404 (B.C.S.C.), *aff'd* (1975), 67 D.L.R. (3d) 364 (B.C.C.A.).

97. The *Shaw* court also touched on an earlier decision in *Vancouver School Teachers' Medical Services Association v. Vancouver (City of)* (1959), 21 D.L.R. (2d) 355 (B.C.C.A.). This case was primarily concerned with whether a society was carrying on business for property tax purposes, but, along the way (at 357), Coady J.A. (who gave the judgment of the court) also endorsed an argument that societies, almost by definition, will never have business purposes: "A society incorporated under the *Societies Act* is prohibited from engaging in any trade, industry or business, yet such society is of necessity authorized and entitled to carry on such business as is incidental to the objects for which it is incorporated. But whatever the activities of the society may be, these are not under the Act considered as constituting a trade, industry or business. The reason for that would appear to be that since by s. 6, the Society is prohibited from paying dividends or making a distribution of its property among the members during the existence of the society, it is not therefore carrying on business for profit, or with a view to profit, which ordinarily is the object of trade, industry or business using the terms in a commercial or mercantile sense."

Another concern is that it is unclear what the consequences of breaching section 2 (2) would be. If section 2 (2) is meant to operate in a manner similar to the *ultra vires* doctrine,[98] then a breach of it could render a society's transactions void and could cast doubt on the validity of its incorporation. A very hard line view would hold that such a society got its incorporation by fraud, and its members should be treated as, in effect, forming a partnership. This harsh view was rejected in *Trident Foreshore Lands Ltd. v. Brown*,[99] where the court noted that ". . . even if the [disputed share] transfers were in breach of section 2 (2), it does not follow that the transactions were void."[100] But the issue was not squarely raised in this case, so this conclusion may not be sustainable.

In view of these concerns, many law reform proposals have considered this balanced approach to be in need of change. The ALRI Report, for instance, recommended that societies be allowed to incorporate for business purposes, so long as societies were still restricted from distributing the profits made from business to their members. The ALRI's reasons for this recommendation indicate that they felt it was simply ratifying a state of affairs that already existed. They noted that many societies were already operating businesses "in order to raise money to fund charitable activities." The real issue, in the ALRI's view, was distribution of the profits of these businesses. A provision focussed on purposes only served to muddy the issue.[101] This approach has been implemented in the SK Act[102] and the US Model Act.[103] It was also adopted in Bill C-21.[104]

Although these concerns are real, they do not amount to a persuasive case to abandon the balanced approach to this issue. There is still some value in retaining a fundamental theoretical division between societies and companies on the question of basic purposes for forming the organization. Further, this balanced approach has been a part of the legislation since the 1977 Act, and a part of the common law of this province since before that date, and it has not caused any serious problems in practice. Although the question of when commercial activity becomes a primary rather than an incidental purpose does admit some degree of vagueness, on balance this vagueness is preferable to recognizing in the statute that societies may be incorporated solely to fulfill commercial purposes.

98. *See*, below, Part Two, Section V.B at 32–35.

99. 2004 BCSC 1365, 50 B.L.R. (3d) 141 [*Trident Foreshore* cited to B.L.R.].

100. *Trident Foreshore*, *ibid.* at para. 21.

101. ALRI Report, *supra* note 61 at 32–33.

102. *Supra* note 70.

103. *Supra* note 82, § 3.01 (a) ("Every corporation under this Act has the purpose of engaging in any lawful activity unless a more limited purpose is set forth in the articles of incorporation."). This provision is carried forward, without changes, in US 2006 Exposure Draft, *supra* note 83, § 3.01 (a).

104. *Supra* note 72.

The committee tentatively recommends that:

> *9. A new Society Act should not allow societies to be incorporated primarily for commercial purposes, but it should allow societies to pursue commercial activities as an incident to their not-for-profit purposes.*

D. Classes of Incorporation

The *Society Act* contains a rudimentary division between reporting societies and societies that are not reporting societies, which is discussed later in this consultation paper.[105] Many law reform proposals go much further than this. The OLRC Report recommended implementing a sophisticated five-fold classification scheme for societies, which would be overseen by a specially designed government regulator.[106] The SK Act contains a fundamental distinction between charitable and membership societies, which runs all the way through the legislation, affecting the application of provisions as varied as those governing access to records,[107] number of directors,[108] and dispensing with an auditor.[109] (This list only touches on a few of the sections in the SK Act that make use of this classification scheme.) The US Model Act also contains a highly influential version of this idea, dividing societies into three classes: public benefit, mutual benefit, and religious.[110]

These classification schemes are intended to be a response to the great diversity of societies in existence. The policy underlying them is that there are such vast differences between the various types of societies that the governing legislation must include two or more fundamentally different sets of provisions. The dividing line is usually drawn by reference to whether or not the society carries out charitable activities. Invariably, though, the statute expands the common law understanding of charity, catching societies that might not otherwise be considered charities.[111]

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105. *See*, below, Part Two, Section XVI.D at 135–36.

106. OLRC Report, *supra* note 81 at 460, 465–66.

107. SK Act, *supra* note 70, s. 21 (granting broader access to the records of a charitable society).

108. SK Act, *ibid.*, s. 89 (requiring at least one director for a membership society and at least three directors for a charitable society).

109. SK Act, *ibid.*, ss. 150–51 (setting a higher standard for charitable societies that wish to dispense with the audit requirement).

110. US Model Act, *supra* note 82, § 2.02 (a) (2).

111. *See, e.g.*, SK Act, *supra* note 70, s. 2 (9) (society may be deemed to be a charitable corporation if it (a) carries on activities that are not primarily for the benefit of its members, (b) solicits or has solicited donations or gifts of money or property from the public, (c) receives or has received any grant of money or property from a government or government agency in any fiscal year of the society that is in excess of 10% of its total income for that fiscal year, or (d) is a registered charity within the meaning of the *Income Tax Act*).

The difficulty with this approach is that it adds complexity to the legislation. Societies may not always appreciate which class they fall into, particularly given the expanded definition of charity that is usually a feature of classification schemes. The need for a fundamental theoretical division between classes of societies may also be questioned. Companies also show a diversity that may rival that of societies. Yet, company law statutes, such as the BCA, do not employ overarching classification schemes. Instead, these statutes tend to draw distinctions where they are needed. This approach to society legislation was also recommended in the ALRI Report.[112]

The committee tentatively recommends that:

> *10. A new Society Act should not include any overarching classification scheme; instead it should simply draw distinctions where needed.*

E. Names

1. General Provisions

Section 3 (6) of the *Society Act* incorporates by reference Division 2 of Part 2 of the BCA. In effect, the rules on corporate names in the BCA are made to apply to societies by this device. Section 3 (6) is a relatively new provision—it was introduced into the legislation in 2003.[113] Prior to 2003, the 1977 Act simply gave the Registrar of Companies the broad discretion to reject a proposed name "for a good and valid reason."

The policy of establishing clear rules for society names and harmonizing those rules has many advantages. The two most important are that this approach provides certainty and promotes administrative efficiency.

The committee tentatively recommends that:

> *11. A new Society Act should contain provisions regarding society names that are harmonized with the provisions regarding corporate names in the Business Corporations Act.*

2. Society Designation

A society designation is the equivalent of the corporate designation for companies. Under section 23 of the BCA a company must have "limited," "incorporated," or "corporation" (or their abbreviations or French equivalents) as part of and at the end of its name. In addition, a company is required to display its name (including its corporate designation) in

112. ALRI Report, *supra* note 61 at 24–25 (recommending ". . . where different treatment is desirable, it be effected by specific provisions").

113. *See Business Corporations Amendment Act, 2003,* S.B.C. 2003, c. 70, s. 284.

specified contexts.[114] A director or officer who knowingly allows a company to contravene this requirement faces personal liability for any losses suffered by a third party as a result.[115]

In theory, these rules should apply to societies by virtue of section 3 (6) of the *Society Act*. In practice, a somewhat different arrangement exists. Societies are merely encouraged to include the designation "society" or "association" in their proposed names when they incorporate.[116]

Corporate designation rules perform a valuable function. They provide some protection for the public, by alerting third parties that they are dealing with a corporate entity that enjoys the benefits of limited liability. It would be helpful to clarify the rules on this point by enshrining them in the *Society Act*. But it should be noted that a wider range of corporate designations is currently in use. In addition to "society" and "association," many societies also use "foundation," "institute," "centre," or "club." The legislation should continue to allow the use of these words as society designations. Over time, the public will come to understand that these words denote both corporate and not-for-profit status.[117]

The committee tentatively recommends that:

> *12. A new Society Act should require societies to include one of "society," "association," "foundation," "institute," "centre," or "club," or their abbreviations or French equivalents, in the society name as an indication of corporate and not-for-profit status.*

F. Pre-Incorporation Contracts

A society or a company does not come into existence until a certificate of incorporation is issued by the Registrar of Companies. Incorporators of societies and companies often fail to appreciate this fact. As a result of their misapprehension, they will enter into contractual relations with third parties on behalf of the still non-existent society or company. This oversight puts those incorporators in a tight spot. As the Cumming Report explained,

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114. *See* BCA, *supra* note 54, s. 27 (1) (requiring company "to display name in legible English or French characters (a) in a conspicuous manner at each place in British Columbia where it carries on business, (b) in all its notices and other official publications used in British Columbia, (c) on all its contracts, business letters and orders for goods, and on all its invoices, statements of account, receipts and letters of credit in British Columbia, and (d) on all bills of exchange, promissory notes, endorsements, cheques, and orders for money used in British Columbia and signed by it or on its behalf").

115. *See* BCA, *ibid.*, s. 158.

116. *See* British Columbia, Ministry of Finance, *Name Approval Request Instructions* (Fin 708B) at 2 (last revised 23 March 2007).

117. *See* ALRI Report, *supra* note 61 at 43.

"[u]nder existing common law rules, a corporation cannot ratify a contract purportedly entered into on its behalf before its incorporation. Nor can it adopt such a contract; to become bound it must renegotiate a fresh contract after incorporation."[118]

Most for-profit statutes now contain statutory provisions that reverse the common law rules. Under section 20 of the BCA, for example, a person who, before a company is incorporated, purports to enter into a contract on behalf of the company is deemed to warrant to the other parties that the company will come into existence within a reasonable time and will adopt the contract. If the company comes into existence and adopts the contract, then the person is not liable under this warranty. If one of these two steps does not occur within a reasonable time, then the person will be liable for any damages caused by a breach of that warranty.

Although this problem arises more frequently in relation to companies, it is not unknown in the not-for-profit realm.[119] There is no reason connected to the goals of fostering a vibrant not-for-profit sector that would militate against extending this protection to the incorporators of societies.

The committee tentatively recommends that:

> *13. A new Society Act should contain provisions addressing pre-incorporation contracts that are harmonized with the pre-incorporation contracts provisions in the Business Corporations Act.*

IV. CONSTITUTION AND BYLAWS

A. Introduction

A society's constitution and bylaws collectively make up its corporate charter. The corporate charter is home to fundamental information about the society. This area of the law is largely settled. It is not in need of full-scaled reform, but could use some updating.

B. Form of Constitution

The incorporators of a society must file with the Registrar of Companies a constitution in the form established by the Registrar.[120] The current form of constitution requires the inclusion of only two items: (1) a statement of the society's name; and (2) a list of the society's purposes. Nevertheless, under section 22, a society may include any other provision

118. Cumming Report, *supra* note 47 at 16 [citations omitted].

119. *See* Bill C-21, *supra* note 72, s. 15 (example of pre-incorporation contracts provisions included in a proposed not-for-profit statute).

120. *See Society Act*, *supra* note 7, s. 3 (1) (a) (i).

in its constitution, but if it does include additional provisions it must declare whether they are alterable or unalterable.

The nearest equivalent to the constitution in the BCA is a document called the "notice of articles." The name is less important here than the fact that the notice of articles calls for more information than the constitution requires. The notice of articles must contain: (1) the name of the company; (2) the full name of, and prescribed address for, each director; (3) the mailing address or delivery address of the registered office; (4) the mailing address or delivery address of the records office; (5) any translation of the company's name that it intends to use outside Canada; and (6) the authorized share structure and whether there are special rights and restrictions attached to each class or series of share. The notice of articles is a standardized form that has been adapted for use in online incorporation. It does not allow space for additional provisions.

The form of constitution used by societies has been rather consistent since it first appeared in the 1920 Act.[121] While moving to a form based on the notice of articles would not be a radical change, it would be significant. This significant change is worthwhile because it would bring with it the benefits of harmonization with the BCA and its more efficient incorporation procedure.

The committee tentatively recommends that:

> *14. A new Society Act should require societies to reproduce the information required in a notice of articles (except for share structure information) in their constitutions, along with a list of the society's purposes and a statement of the disposition of the society's property on dissolution.*

C. Unalterable Provisions in Constitution

Under section 22 of the *Society Act*, if a society has additional provisions in its constitution (which may be anything other than its name and purposes), then the constitution must declare whether those additional provisions are alterable or unalterable. This distinction between alterable and unalterable constitutional provisions has existed since the 1947 Act.[122] In practice, constitutional provisions are declared unalterable primarily for two reasons. First, the provisions dealing with the disposition of the society's property on dissolution are often made unalterable in order to ensure that they will not be amended in a way that would be contrary to a registered charity's obligations under the *Income Tax Act*.[123] Second, unalterable provisions are often placed in the constitution to restrict future

121. 1920 Act, *supra* note 23, s. 6 (1), Schedule A (before 1977, the constitution was called a "declaration").

122. 1947 Act, *supra* note 38, s. 17.

123. *Supra* note 95.

boards of directors from acting in ways contrary to the original intentions of the society or to provide assurances to major donors that certain funds or issues will always be dealt with in a specified way.

In part, the options for reform on this matter are limited by the practical effects of the tentative recommendation to base the constitution form on the notice of articles. The notice of articles does not permit additional provisions and it has existing standards for the alteration of the provisions that are included on the form.[124] This gives little practical room for the idea of declaring certain provisions to be unalterable to operate. At a conceptual level as well the notion of making certain provisions unalterable may be questioned. It is not uncommon to encounter societies with archaic or impractical provisions in their constitutions that cannot be altered. In addition, this facility to create unalterable provisions in the constitution has not been a feature of any proposals for reform of not-for-profit legislation elsewhere in Canada.

The committee tentatively recommends that:

> *15. A new Society Act should not permit provisions in a society's constitution to be made unalterable.*

D. Standard Bylaws

Schedule B to the *Society Act* contains a set of standard bylaws, which serve as the default bylaws for societies that do not change some or all of them. These standard bylaws first appeared as a schedule to the 1977 Act. Including standard bylaws in the legislation or in a regulation made under the legislation fulfills a number of purposes. It makes the incorporation of societies more accessible to people who do not have the training to draft corporate bylaws and who cannot afford legal advice. It also makes the incorporation process more efficient, by ensuring that every application for incorporation will meet the requirement to have bylaws, even if the applicant takes no action to produce the bylaws. Finally, it achieves a small measure of harmonization with the for-profit legislation in this province, which contains an equivalent set of standard articles for companies.[125]

Although the content of the standard bylaws will require changes, the concept of enabling a set of standard bylaws in the legislation is sound. It provides numerous benefits, not least of which is increasing the accessibility and efficiency of the incorporation process.

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124. *See, e.g.*, BCA, *supra* note 54, ss. 127, 257 (1) (alteration of notice of articles to reflect changes in directors or prescribed addresses of directors.

125. *See* BCA, *ibid.*, s. 432 (2) (dd); *Business Corporations Regulation*, B.C. Reg. 315/2004, Table 1.

The committee tentatively recommends that:

> *16. A new Society Act should authorize default standard bylaws, which will apply to a society in the absence of any express changes that the society makes to them for its purposes.*

E. Bylaw Amendments

A special resolution of the members is required to change a society's bylaws and that special resolution only takes effect upon its being filed with the Registrar of Companies.[126] This standard is a high one, but given the fact that bylaw changes are often fundamental changes to the composition or governance of a society, it is an appropriate standard. As discussed earlier, there are compelling reasons for maintaining a public record of society bylaws.[127]

The committee recommends that:

> *17. A new Society Act should continue to require a special resolution of the members for all changes to a society's bylaws and to require that a copy of that special resolution be filed with the Registrar of Companies in order to be effective.*

V. CAPACITY AND POWERS

A. Introduction

The question of corporate capacity and powers is well settled in the for-profit realm, where it has been clear for over a generation that companies have the capacity and powers of a natural person. The issue is not as settled for British Columbia societies—there is still some debate over what role (if any) older conceptions of the corporate form should play in the *Society Act*.

B. Ultra Vires

Ultra vires means "without (or outside) authority." In corporate law, *ultra vires* refers to a doctrine that was created by judges in England in the nineteenth century.[128] The gist of the doctrine is that the powers of a corporation are limited to those expressly set out in its governing statute and corporate charter. So, if a corporation purported to act in a way that was not expressly authorized by the statute or its corporate charter, then that act was null and void. The OLRC Report has concisely described the policy underlying the doctrine: ". . . the purpose of the *ultra vires* doctrine is to protect the investors in and creditors of a

126. *See Society Act*, *supra* note 7, s. 23.

127. *See*, above, Part Two, Section III.B.2 at 21–22.

128. *See especially Ashbury Railway Carriage & Iron Co. v. Riche* (1875), L.R. 7 H.L. 653. *See generally* Leon Getz, "Ultra Vires and Some Related Problems" (1968) 3 U.B.C. L. Rev. 30.

corporation by restricting the activities of the corporation and therefore the risks presented by the corporation."[129] To make this statement compatible with the not-for-profit realm, "investors" should be replaced by "members" and "creditors" should be expanded to include "donors."

The major complaint about the *ultra vires* doctrine is that it fails to deliver on its ostensible purpose. Since an *ultra vires* transaction or contract is void, the doctrine has had the effect of invalidating what would otherwise be perfectly legal transactions or contracts. As a result, innocent third parties have had to bear losses from these invalid transactions or contracts. Further, cleverly expansive drafting of corporate objects clauses in a corporation's charter undermined the practical effectiveness of the doctrine.[130] Beginning with the major corporate reforms of the 1970s, the doctrine was abrogated for companies.[131] More recently, proposals for not-for-profit reforms have followed the for-profit statutes by implementing abrogation of the doctrine for societies.[132]

Whether or not this doctrine currently applies to British Columbia societies is open to debate. Commentators who have argued that the *Society Act* preserves the doctrine of *ultra vires* have focussed on three provisions: section 4 (1) (d), which grants a society the powers and capacity of a natural person *as may be required to pursue its purposes*; section 4 (4), which states that certain officers may issue a certificate that certifies that the intended exercise of a power is within the society's powers and that third parties may rely on this certificate; and section 32 (1), which says that a society's funds and property must be used and dealt with only for its purposes.[133] These commentators have seized on the different wording of the equivalent company law provision[134] and argued that the wording in the *Society Act* actually has the effect of preserving the judicial doctrine of *ultra vires.*[135]

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129. OLRC Report, *supra* note 81 at 467.

130. *See* Dickerson Report, *supra* note 46, vol. 1 at 26 ("[the doctrine's] effectiveness in achieving [its] purpose has been largely frustrated, however, as ingenious corporate draftsmen included every conceivable type of business in the objects clause and, by using general phrases, authorized the corporation to carry on the widest possible range of activity . . .").

131. *See* CA, *supra* note 44, s. 23. *See also* BCA, *supra* note 54, s. 30.

132. *See* Bill C-21, *supra* note 72, s. 16 (1); SK Act, *supra* note 70, s. 15 (1); ALRI Draft Act, *supra* note 80, s. 16 (1).

133. *See*, below, Part Two, Section XI.E at 92–94, for further discussion of society investment powers.

134. *See* BCA, *supra* note 54, s. 30. *See also* CA, *supra* note 44, s. 21.

135. For example, the *British Columbia Corporations Law Guide*, looseleaf (Toronto: CCH Canadian, 1997), a leading practice guide, baldly states (at ¶ 55,560) that "[u]nlike section 30 of the [BCA, which declares that a company has the rights, powers and privileges of an individual of full capacity], paragraph 4 (1) (d) does not abolish the doctrine of *ultra vires*. . . . On the contrary, that doctrine is maintained intact in the *Society Act*, with the consequent necessity, should an issue be raised as to the validity of a contract made by the society, to determine whether the transaction is authorized by the statement of purposes in the constitution, and if not, what the consequences are."

This argument was made most forcefully by two Vancouver lawyers at a Continuing Legal Education conference,[136] who reasoned that the combination of section 4 (1) (d) and section 32 (1) (investment of society's funds) "amount to a statutory restatement of the common law *ultra vires* doctrine."[137] Counterbalanced against these arguments is the fact that no court in British Columbia has ever held that the *ultra vires* doctrine has been preserved by the current version of the *Society Act*. Until there is a clear ruling on this question (or until the statute is amended), there will be uncertainty over whether the doctrine applies to societies or not.

The *ultra vires* doctrine is something of a relic in corporate law. Most lawyers, to say nothing of non-lawyers, would probably be surprised to learn that the doctrine may still have a place in the law governing societies. Given the doctrine's chequered history in the for-profit sphere, where it caused a good deal of mischief for innocent third parties and created inefficiencies in the incorporation process, an express revival of the doctrine would likely not be welcome in a modern not-for-profit statute. Nor would it be acceptable to let the current state of uncertainty persist for societies. But a few commentators have raised an argument that gives some pause. It has been suggested that the idea of incorporation for specific purposes[138] is incompatible with the concept that a corporation has all the powers of a natural person. Under this view, the *ultra vires* doctrine could come in through the back door. The ALRI Report considered this argument and rejected it. In the ALRI's view, a society could be given all the powers of a natural person and still be prohibited from exercising its powers except for the purposes stated in its constitution. The ALRI Report also recommended that a savings provision be enacted that would state that no act is invalid by reason only that it is contrary to a society's purposes.[139] The BCA has something similar to the ALRI recommendations in section 30 (which sets out the general rule that a company has the powers of an individual of full capacity) and in section 33 (which deals with restricted businesses and powers and also contains a savings provision).

The committee tentatively recommends that:

> *18. A new Society Act should abrogate the doctrine of ultra vires.*
>
> *19. A new Society Act should contain provisions dealing with the powers of a society and restrictions on its affairs that are harmonized with provisions dealing with*

136. Gordon B. MacRae & E. Blake Bromley, "Duties and Liabilities of Directors" in Josephine Margolis *et al.*, eds., *Charities and Non-Profit Organizations* (Vancouver: Continuing Legal Education Society of British Columbia, 1987) 3.0.01.

137. *Ibid.* at 3.1.08.

138. *See*, above, Part Two, Section III.C.1 at 22–24.

139. ALRI Report, *supra* note 61 at 34–35.

the powers of a company and restrictions on its business in the Business Corporations Act.

C. Corporate Powers

The *Society Act* takes two approaches to describing the powers of a society. Section 4 (1) (d) declares that a society is "a corporation with the powers and capacity of a natural person of full capacity as may be required to pursue its purposes." Section 4 (2) then proceeds to list seven specific powers that societies have by virtue of having the powers of a natural person. The second approach of naming corporate powers in a list dates back to the 1920 Act[140] and provides some implicit support to the *ultra vires* doctrine. In order to ensure that this judicial doctrine is not carried forward in interpretation of the new *Society Act*, such a list should not be included. Notably, none of the BCA, the SK Act, Bill C-21, or the ALRI Draft Act contains such a list.

The committee tentatively recommends that:

20. A new Society Act should simply say that a society has all the powers of an individual and should not contain a list of corporate powers that a society has by virtue of incorporation.

VI. Offices and Records

A. Introduction

Provisions dealing with corporate offices and records tend to be procedural and administrative in nature. For the purposes of this consultation paper, questions arising from them will invoke again and again the broader issue of harmonization with the BCA.

B. Registered and Records Offices

The requirement to have a registered office is intended to provide a place where records may be effectively served on or sent to a corporation. This requirement is important because a corporation is a legal construct—an artificial person. Unlike a natural person (a human being), a corporation can, in one sense, occupy no particular physical location (because an artificial person obviously has no body) and, in another sense, have many locations (if it has a number of places where it carries out activities). This dual nature can lead to problems both for persons who want to serve a legal notice on a corporation and for the corporation's management, who may be unaware that a notice has been served. The registered office is meant to provide a consistent, central location for the corporation to overcome these problems. The records office is meant to be a place where a corporation's records are kept and made available for inspection.

140. 1920 Act, *supra* note 23, ss. 8–12.

The *Society Act* does not use the expressions "registered office" and "records office." Instead, section 10 requires a society to have an "address for service." This address must be in British Columbia. It is the place to which all communications and notices intended for the society may be sent and at which all process may be served on the society. A notice of address—and of a change of address—must be filed with the Registrar of Companies. Under section 11, the directors must ensure that the documents of a society (including its financial records) are kept at the society's address. Section 1 gives the word "document" an expansive definition. Under the *Society Act*, a "document" means "a written instrument, including a notice, order, certificate, register, letter, report, return, account, summons or legal process." The directors of a society may resolve to keep "some of the documents" at another place or at other places in British Columbia. The resolution must specify which documents are to be kept at this other place or places and it must be filed with the Registrar.

Record keeping issues do not go to the heart of not-for-profit activity; they are the type of provisions where harmonization with the for-profit statute and recognition of modern practices and procedures are paramount concerns. The *Society Act* contains a number of eccentricities that start with its unusual terminology and run deeper. These eccentricities can be brought out in a comparison with the registered and records office provisions of the BCA.

First of all, by establishing two distinct offices, the BCA contemplates that a company's registered and records offices may be in different locations from the date of incorporation. (But the BCA expressly allows them to be at the same location and, in practice, this would be far more common than having the offices in two different locations.) This result may be achieved under the *Society Act*, but it would require a directors' resolution authorizing removal of "some of the documents" (which leaves open the question of whether all of the documents may be moved) to a location other than the society's address. The resolution has no effect until it is filed with the Registrar of Companies.

Most companies, and many societies, will employ an agent (usually a law firm) to act as their registered and records office or address for service. The BCA, unlike the *Society Act*, recognizes this reality and attempts to deal with one of the main concerns of these agents, which is being stuck with the responsibility and cost of maintaining records and dealing with legal notices after the relationship with the company ends. The BCA contains three sections designed to deal with this situation. They authorize applications to the Registrar of Companies to transfer the registered office,[141] to eliminate the registered of-

141. BCA, *supra* note 54, s. 39.

fice if no director or officer of the company can be located,[142] and to transfer the records office.[143]

The BCA allows retention of records in various formats. Records may be kept in (1) electronic form, (2) microfilmed form, or (3) paper form.[144] The *Society Act* does not directly address this issue and, it could be argued that, given the definition of "documents," a society must retain its documents in paper form. The BCA also allows a company to keep certain records at a location other than its records office, so long as those records can be produced within two business days for copy and inspection. This provision is of particular benefit to law firms and other agents that maintain a company's records office, as it facilitates off-site storage of records.

In some respects the BCA gives companies and their agents more flexibility in maintaining a records office. In other respects, the BCA imposes obligations that were not found in the CA. For example, the person who maintains the records office must note the date and time of deposit of a record on the record.[145] There is a statutory provision setting out the standard of care (or, as the legislation calls it, "adequate precautions") for the person maintaining the records office.[146] There are also detailed provisions on access to records.[147] These new obligations appeared in the BCA to fill in gaps that resulted from the withdrawal of the Registrar of Companies as a public repository for many corporate documents.

The committee tentatively recommends that:

> *21. A new Society Act should have provisions relating to registered and records offices for societies that are harmonized with the registered and records office provisions in the Business Corporations Act.*

C. Corporate Record-Keeping

The *Society Act* does not offer much guidance on corporate record-keeping practices and standards. In effect, it merely tells societies that they must keep their documents at their address for service.

142. BCA, *ibid.*, s. 40.

143. BCA, *ibid*., s. 41.

144. *See Business Corporations Regulation*, *supra* note 125, s. 11.

145. BCA, *supra* note 54, s. 44 (3).

146. BCA, *ibid*., s. 44 (4).

147. *See*, below, Part Two, Section VI.E at 40–42.

As discussed above, the *Society Act* defines the word "document" in an expansive fashion.[148] Since the definition of "document" is so wide-ranging, it is not clear exactly what documents a society is required to maintain. One approach would be to take the Act literally and try to maintain everything that is written on paper and that belongs to the society. This approach would, of course, be unworkable in practice—it would burden the society with excessive document storage costs and would quickly devolve into disorganization. So, societies are forced to fall back on reasonable interpretations of what would be good practice under the Act. For example, one practice manual suggests that the following would be acceptable:[149]

> . . . the documents required to be kept include: (a) the constitution and the bylaws; (b) certificate of incorporation; (c) any orders or notices of the Registrar of Companies or Superintendent of Financial Institutions; (d) copies of all resolutions required to be filed with, and notices required to be sent to, the Registrar; (e) copies of all written contracts entered into by the society; (f) banking records; (g) registers required to be kept under section 35 with respect to indebtedness, debentures and debentureholders; (h) accounting records; and (i) the register of members (s. 70).

Of course, this list is simply one example of good practice. It is not actually mandated by statute.

The relevant contrast, once again, is with the BCA. The BCA sets out a lengthy list of the specific records that a company must maintain in its minute book.[150] By and large, the records required to be kept under the BCA include all the records mentioned in the quotation in the previous paragraph, with the exception of banking records and the registers of indebtedness, debentures, and debentureholders (which is not required under the BCA). Ironically, the lengthy BCA list of records that must be kept in a records office places the same or even a lighter record-keeping burden on companies than the simple *Society Act* requirement to maintain all society documents at the address for service.

The detailed, specific list of records that are required to be maintained is the standard approach in modern not-for-profit legislation.[151] Some people may suggest that statutory record-keeping standards should be lower for societies than the equivalent standards imposed on companies by the BCA. The basis for this suggestion is that many societies cannot afford to retain agents, such as law firms, to maintain their records. By default, the records are kept by volunteers who lack legal training. This approach runs the risk of conferring a short-term benefit that may lead to long-term problems. There is always a danger lurking when the law applies a very light hand to defaults that are often the first sign

148. *See*, above, Part Two, Section VI.B at 35–37.

149. *British Columbia Corporations Law Guide*, *supra* note 135 at ¶ 56,640.

150. BCA, *supra* note 54, s. 42.

151. *See*, *e.g.*, Bill C-21, *supra* note 72, s. 21; SK Act, *supra* note 70, s. 20.

of organizational trouble: that trouble can quickly accelerate and result in much heavier consequences for the society.[152]

The committee tentatively recommends that:

> *22. A new Society Act should have provisions requiring societies to maintain certain specific records in a records office that are harmonized with the record-keeping provisions in the Business Corporations Act.*

D. Accounting Records

Section 36 requires a society to keep accounting records of "all its financial and other transactions." This provision first appeared in the 1977 Act and has not been substantially amended since then. The main issue here is harmonization with the BCA.

In fact, the differences between the BCA and the *Society Act* on this point are not particularly great. Like the *Society Act*, the BCA contains a statement of the basic obligation to keep accounting records, which is an undefined term in both statutes. The BCA also contains rules regarding location and access to these records.

The differences between the two statutes are: (1) under the BCA, a company only needs to keep its accounting records for a prescribed period of seven years;[153] the *Society Act* is silent on this point; (2) under the BCA, a company must retain its records at the place determined by the directors, which facilitates the company's accountants maintaining the records; under the *Society Act*, the default rule is that the accounting records must be kept at the society's address, but they may be kept at another location if the directors pass a resolution to this effect and file this resolution with the Registrar of Companies; and (3) under the BCA, a shareholder's access to the accounting records is limited to the access permitted under the articles (but the directors may authorize greater access for a specific case); it is the reverse under the *Society Act*, as the members are presumptively allowed access to all the accounting records, but the bylaws may limit this access.

There appears to be no reason to maintain different standards in the *Society Act* and the BCA. In fact, the refinements in the BCA make harmonization particularly attractive here.

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152. *See, e.g.*, Sean Condon, "Pride Society stalled over errors" *The Westender* (11 February 2007) 11 (describing how record-keeping and filing lapses led to problems in retaining government grants for society that puts on a large annual cultural festival).

153. Note that this seven-year retention period only applies for the purposes of the BCA. Other statutes, particularly the *Income Tax Act*, *supra* note 95, may prescribe different periods for retention of accounting records.

The committee tentatively recommends that:

> *23. A new Society Act should have provisions dealing with accounting records that are harmonized with the provisions dealing with accounting records in the Business Corporations Act.*

E. Inspection and Copies of Records

1. MEMBERS

The eccentricity of the *Society Act*'s record-keeping rules spills over into its regime granting access to records. In considering this regime, a distinction must be drawn between members of the society and the general public.

Under section 37, the members are granted a default right of access to inspect the "documents" of the society, after giving reasonable notice to the society. Sections 11–14 of the *Society Act Regulations*[154] contain detailed rules governing the exercise of this default right.

This right is qualified by the opening words of section 37—"unless otherwise provided in the bylaws."[155] Neither the Act nor the Regulations goes into much detail on how the members' right of access to records may be altered by the bylaws. The Regulations specifically contemplate bylaws formulating a more generous procedure for exercising the right of access than is afforded in sections 11–14.[156] No mention is made of restrictions, but on the face of it, a society should be able to restrict or even eliminate this right on the strength of section 37.

Although there is no way to know with complete certainty, most societies likely do not have bylaws that address access to records. This conjecture may safely be made because most societies adopt or borrow heavily from the standard bylaws set out in Schedule B to the Act. These standard bylaws are silent on question of access to records. In this context, silence means that the default open-access regime governs, giving members an expansive right of access to all of the society's "documents."

The *Society Act*'s approach to this issue is at odds with the approach taken in most for-profit legislation[157] and not-for-profit proposals for reform.[158] Instead of default open access to an expansively defined category of "documents," the more common approach is to

154. B.C. Reg. 4/78.

155. This point is made again in the regulations. *See Society Act Regulations*, *ibid*., s. 10.

156. *Society Act Regulations*, *ibid*., s. 15.

157. *See*, *e.g.*, BCA, *supra* note 54, s. 46.

158. *See* Bill C-21, *supra* note 72, s. 22; SK Act, *supra* note 70, s. 21.

establish mandatory access to a limited set of corporate records that a corporation must retain by law in its records office.

This approach has a number of benefits. Its application is clear and consistent, as it is not subject to variation by a corporation's charter documents. The scope of the right is clearly defined and limited to relevant corporate records rather than extended to documents generally. Finally, it ensures that members will have access to a baseline of information about the societies they have joined.

The committee tentatively recommends that:

> *24. A new Society Act should contain provisions governing a member's right of access to the society's records that are harmonized with the provisions governing a shareholder's right of access to the company's records in the Business Corporations Act.*

2. General Public

The right of the general public to inspect and copy a society's corporate records also receives eccentric treatment under the *Society Act*. The legislation is silent on this topic, except as it involves access to a society's financial statements. Amendments to the *Society Act* were made in 2004,[159] which set out detailed provisions granting the public access to a society's financial statements and establishing the remedies that would be available if that right was denied or impaired.[160] These amendments were brought in to respond to a decision to repeal the requirement to file annual financial statements with the Registrar of Companies.

This approach is out of step with the access to corporate documents afforded to the general public in the BCA.[161] The *Society Act* is silent on the public's right to inspect certain corporate documents, such as the constitution and bylaws, that are usually seen as having a public character.[162] The attention is focussed instead on access to financial information. This is primarily a regulatory matter that has particular relevance in connection with registered charitable status and societies that solicit funds from the public. (The Canada Revenue Agency, for instance, makes financial information about registered charities available to the general public.) Of course, not all societies fit this profile. Many societies never seek charitable status or solicit donations or funds from public sources. This illus-

159. *Finance Statutes Amendment Act, 2004*, *supra* note 53, ss. 42–43.

160. *See Society Act*, *supra* note 7, ss. 95–95.1.

161. BCA, *supra* note 54, ss. 46 (5), 50.

162. Copies of these documents may be obtained by the public from the Registrar of Companies.

trates the problem of including what are primarily regulatory requirements in a corporate statute meant to apply broadly to a wide variety of organizations.

The provisions of the BCA applying to companies other than public companies (and pre-existing reporting companies) strike a better balance, with the exception of one issue, which will form the subject of the next section. Adopting these provisions in the *Society Act* would also promote harmonization of administrative and procedural matters.

The committee tentatively recommends that:

> *25. A new Society Act should contain provisions dealing with the public's access to corporate records and with remedies on denial of access that are harmonized with provisions dealing with the public's access to corporate records and with remedies on denial of access for companies that are not public companies in the Business Corporations Act.*

F. Access to Register of Members

One area where the *Society Act*'s default open-access regime is particularly problematic is in relation to access to membership lists. Under section 70 a society is required to keep a register of its members, which must record (among other information) each member's full name and residential address. This information is widely acknowledged to be personal information. Since 1977, concerns about privacy and third-party access to personal information have grown significantly, giving rise to such legislation as the *Freedom of Information and Protection of Privacy Act*[163] and the *Personal Information Protection Act.*[164]

The *Society Act* effectively leaves the management of this issue up to individual societies, which can control access to the register of members by adopting appropriate provisions in their bylaws. But it is overly optimistic to expect societies to craft effective provisions and it is undesirable to have a series of varying approaches to this issue across the not-for-profit sector in British Columbia.

Modern corporate statutes tend to contain specific provisions that address access to a register of members or its for-profit equivalent, the central securities register. The provisions in the BCA[165] are an example of the modern approach. Under the BCA, a person who wishes to have access to a company's central securities register must apply in writing to that company. The application must contain an affidavit that states (among other information) that the person will only use the list for the purposes permitted by the BCA. These

163. R.S.B.C. 1996, c. 165 (among other purposes, this legislation protects the privacy of personal information in the public sector).

164. S.B.C. 2003, c. 63 (protecting the privacy of personal information in the private sector).

165. BCA, *supra* note 54, s. 49.

purposes include (1) to influence the voting of shareholders at a meeting of the shareholders and (2) to requisition a meeting.[166] Use of the information for other purposes is an offence under the BCA.[167]

The one point of departure from the BCA model concerns the scope of the provision. The BCA grants access to the public, but there are good reasons for restricting this scope in the case of societies. The membership of a society tends to be more broadly based than the shareholders of a company. There has been increasing pressure on societies to disclose this information. Often this pressure originates with marketing organizations. The mixture of commercial marketing practices with membership in a not-for-profit organization would be troubling for most people. It is something to be guarded against closely.

The committee recommends that:

> *26. A new Society Act should contain provisions granting members of a society access to that society's register of members that are harmonized with the procedure set out in the Business Corporations Act for access to a company's central securities register.*

VII. DIRECTORS AND OFFICERS

A. Introduction

The *Society Act* contains a number of procedural and administrative provisions relating to major milestones involving the society's management. These milestones include appointment or election of directors and their removal or ceasing to hold office. Most of the *Society Act*'s provisions were based on provisions in the CA. The main theme of the sections that follow is harmonization with the BCA.

B. Minimum Number of Directors

Section 24 (4) requires a society to have at least three directors. This requirement first appeared in the 1977 Act;[168] before 1977, the legislation was silent on the minimum number of directors a society was required to have.

The requirement to have a minimum number of directors is intended to promote the organization's accountability to funding bodies and the general public. As the OLRC Report put it, ". . . corporations from which the public should expect greater accountability,

166. Two other purposes are set out in the BCA, but they are not relevant to societies.

167. BCA, *supra* note 54, s. 426 (1) (c). Depending on the circumstances, an unauthorized use of information obtained from a central securities registry may also result in commission of the crime of perjury. *See Criminal Code*, R.S.C. 1985, c. C-46, s. 131.

168. 1977 Act, *supra* note 43, s. 24 (4).

such as charitable corporations, might be expected to have several continuing members and perhaps several directors, in order to heighten the nature of the responsibility of managing and distributing donated money and government grants."[169]

A few law reform proposals recommend requiring no fewer than three directors for every society. For instance, the OLRC Report took this position: "[w]e recommend that the proposed Act require a minimum of three directors in all cases. . . ."[170] Several other proposals for reform take a different approach. Bill C-21, the SK Act, and the ALRI Draft Act all require only societies classed as "charitable" or "soliciting" to have a minimum of three directors. All other societies would be permitted to have a minimum one director.[171] The rationale behind this hybrid rule is that only charitable societies should be required to meet the higher standard of accountability. In the other cases, public funds or donors' money may not be involved in the operation of the society, so it is not necessary to require those types of societies to have more than one director. The QC Consultation Paper also took this approach, noting that there are certain types of societies, such as religious corporations and foundations, which are often composed of only one person.[172]

For-profit statutes tend to require only one director. This is the rule for most companies under the BCA.[173]

As a default rule, the committee favours simply requiring one director. In most cases, societies will opt to have a larger board, but there may be instances where this is not possible. There is no empirical evidence that setting the statutory minimum number of directors at a number greater than one fosters accountability to the members and the public. It is unlikely that such evidence will ever be uncovered, as any requirement to have more than one director can be circumvented by the use of nominee directors.

The committee tentatively recommends that:

27. A new Society Act should require societies to have at least one director.

169. OLRC Report, *supra* note 81 at 480.

170. OLRC Report, *ibid*. at 494. *See also* US Model Act, *supra* note 82, § 8.03; US 2006 Exposure Draft, *supra* note 83, § 8.03 (both requiring no fewer than three directors).

171. *See* Bill C-21, *supra* note 72, s. 126; SK Act, *supra* note 70, s. 89; ALRI Draft Act, *supra* note 80, s. 41.

172. *See* QC Consultation Paper, *supra* note 75 at 26.

173. *See* BCA, *supra* note 54, s. 120. Public companies, a group that is largely made up of companies that have shares listed on a stock exchange, must have at least three directors. *See* BCA, *supra* note 54, s. 120.

C. Election/ Appointment of Directors

Section 24 of the *Society Act* addresses the procedure of electing or appointing directors. These provisions are rather skeletal, but they have proved to be serviceable. Directors of for-profit companies are usually elected at annual general meetings, but societies tend to employ a greater variety of methods for filling their boards. Some of the methods employed in practice are election at a general meeting, appointment by virtue of office (for example, in many societies all members are appointed as directors as a matter of course), appointment by members or by directors, and appointment by an external body. These methods are usually spelled out in a society's bylaws. Occasionally, they appear to infringe the wording of section 24 (1), which states that the *members* may nominate, elect, or appoint directors.

The main question for this topic involves harmonization with the BCA. Despite practical differences between societies and companies, the legislation makes use of similar terminology. The typical means societies use for selecting directors should be accommodated under the BCA. The BCA provisions[174] are more fleshed out than section 24 of the *Society Act*. The procedure for designation of first (or initial) directors is integrated with the BCA's incorporation procedures. The procedure for election or appointment of succeeding directors gives the board of directors a statutory power to appoint additional directors (up to one-third of the number of directors in office when the power is exercised) that cannot be abridged by the corporate charter. Finally, the BCA addresses the need to obtain consent from an individual who is designated, elected, or appointed a director—a topic that is not covered by the *Society Act*.

The committee tentatively recommends that:

> *28. A new Society Act should contain provisions governing the designation of first directors, the election or appointment of succeeding directors, and consent to act as a director that are harmonized with provisions dealing with directors in the Business Corporations Act.*

D. Residency

Section 24 (5) of the *Society Act* requires that at least one of a given society's directors be ordinarily resident in British Columbia. This rule was first enacted as part of the 1977 Act.[175] It was intended to enhance the accountability of societies to the government and the general public. Requiring some or all of the directors to be residents of the incorporating jurisdiction is seen as a way of guaranteeing that the society and its management is connected to that jurisdiction. In addition, it may be useful, in some cases, for at least

174. *See* BCA, *ibid.*, ss. 121–23.

175. 1977 Act, *supra* note 43, s. 24 (5).

some of the management to be physically present in the incorporating jurisdiction. For example, this may make it easier to enforce a judgment or collect a fine.

The trend in for-profit legislation is to eliminate residency requirements, or to reduce their scope. The CA required a majority of directors to be resident Canadians and at least one director to be a resident of British Columbia.[176] The BCA did away with these requirements. In a similar vein, the residency requirements in the *Canada Business Corporations Act*[177] were reduced a few years ago from requiring a majority of directors to be resident Canadians to requiring 25 percent to be resident Canadians (but, if the corporation has fewer than four directors, then at least one must be a resident Canadian).

The changes to for-profit legislation were brought in as a response to the increasingly international nature of business. There has been a shift in attitudes regarding foreign investment; the federal and provincial governments now seem to want to place as few legislative roadblocks as possible in the way of foreign businesses operating in Canada. At a more practical level, the residency requirements were often met by electing a lawyer or other agent to a company's board of directors. The only reason why the agent was on the board was to avoid a breach of the statute; the agent took no part in the management of the company. This practice—essentially compliance with the letter but not the spirit of the law—undermined the public policy purpose of the legislation. Residency requirements came to be seen as a mere formality rather than as a way of fostering a meaningful connection between a company's management and the incorporating jurisdiction.

Some of the reform proposals for not-for-profit legislation also recommend doing away with directors' residency requirements. For example, Bill C-21 did not contain any such requirements.[178] The considerations that led to reform of for-profit legislation are also cropping up in the increasingly interprovincial and international not-for-profit sphere.

The committee tentatively recommends that:

> *29. A new Society Act should not impose residency requirements on directors.*

E. Qualifications

The *Society Act* contains no provisions setting out when an individual is not qualified to act as a director. This is something of an anomaly, as the vast majority of modern for-profit statutes and not-for-profit proposals for reform clearly spell out the acts that will

176. CA, *supra* note 44, s. 109.

177. *Canada Business Corporations Act*, *supra* note 74, s. 105 (3).

178. *See also* ALRI Report, *supra* note 61 at 50–51.

disqualify a person from being a director.[179] Section 124 of the BCA is a representative example of this type of legislation. Under section 124 an individual is disqualified to act as a director if that individual is (1) under the age of 18 years,[180] (2) found by a court to be incapable, (3) an undischarged bankrupt, or (4) convicted of certain criminal offences—particularly offences involving fraud. The BCA does not purport to invalidate the designation, election, or appointment of an individual who becomes disqualified to act as a director. Instead, that individual is placed under a statutory obligation to resign the office. Under section 426 (3) of the BCA an individual who acts as a director when the individual is not qualified to do so commits and offence and, under section 428 (5), is liable to a fine of not more than $2000.

This type of legislation promotes the protection of the public and the members of a society. Its absence in the *Society Act* is puzzling. This gap should be filled.

The committee tentatively recommends that:

> *30. A new Society Act should contain provisions addressing when an individual is not qualified to act as a director of a society that are harmonized with provisions addressing when an individual is not qualified to act as a director of a company in the Business Corporations Act.*

F. Register of Directors

The *Society Act* does not require a society to maintain a register of directors. The question whether or not to include this requirement in new legislation is subsumed in the larger question of harmonization with the BCA. Section 126 of the BCA requires companies to maintain a register of directors, which must record the following information: (1) the full name and prescribed address of each director; (2) the date on which the director became a director; (3) the dates on which a former director became a director and ceased to be a director; and (4) the name of any office in the company held by the director, and the date on which the director was appointed to that office and (if applicable) the date on which the director ceased to hold that office.

Harmonization would impose an additional record-keeping requirement on societies. The requirement would not be particularly onerous. In fact, those societies that engage law

179. *See* Bill C-21, *supra* note 72, s. 127; SK Act, *supra* note 70, s. 92.

180. Since 1970, the age of majority in British Columbia has been 19 years. *See Age of Majority Act*, R.S.B.C. 1996, c. 7, s. 1 (1). But section 124 of the BCA and its predecessors have set the qualifying age to act as a director at 18 years since this rule first appeared in the CA, *supra* note 44, s. 137 (1) (a). The reason why 18 years was selected instead of 19 years for the purposes of this rule is not clear, but it is interesting to note that the 1972 exposure bill (which was the forerunner of the CA) set the qualifying age at 19 years. *See* Bill 66, *Companies Act*, 3d Sess., 29th Parl., British Columbia, 1972, cl. 137 (1) (a). This suggests that the use of 18 years in this provision is deliberate, rather than a mere slip.

firms to maintain their corporate records likely already have a register of directors in this form. Given the high turnover of directors (and members) at many societies, this register could play a useful, if small, role in preserving organizational history.

The committee tentatively recommends that:

> *31. A new Society Act should require a society to maintain a register of directors that contains the same information a company is required to have in its register of directors under the Business Corporations Act.*

G. Vacancies

The *Society Act* does not contain an express provision dealing with vacancies on the board of directors, but section 6 (1) (e) may be relevant here. It provides that the bylaws must contain provisions on "the appointment and removal of directors and officers. . . ." This section may be relied on to extend to the directors the power to appoint directors to fill any casual vacancy. Section 27 of the Schedule B bylaws does this—it authorizes the directors to appoint any *member* of the society to be a director to fill a casual vacancy between annual general meetings—when the members would elect the directors.

Vacancies are a common occurrence, so it is somewhat surprising that the *Society Act* does not set out a clearer procedure to deal with them. In contrast, the BCA contains extensive provisions for vacancies.[181] Simplifying these rules greatly, they authorize the directors to fill any casual vacancies, unless the departing director was one elected or appointed solely by the holders of a class or series of shares. The provisions also set out rules dealing with when the term of these replacement directors expires, what to do if there is no quorum, and what to do if there are no directors in office. The BCA rules are default rules—they only apply to the extent that the company's memorandum or articles do not set out different rules addressing vacancies.

The committee tentatively recommends that:

> *32. A new Society Act should contain provisions governing vacancies on a society's board of directors that are harmonized with provisions governing vacancies on a company's board of directors in the Business Corporations Act.*

H. Ceasing to Hold Office

The *Society Act* has no provisions relating to when a director ceases to hold office. Their absence amounts to another gap in the legislation that puts it at odds with modern thinking in the not-for-profit realm and with the BCA.[182] Under the BCA, a director ceases to

181. *See* BCA, *supra* note 54, ss. 130–35.

182. *See* Bill C-21, *supra* note 72, s. 130; SK Act, *supra* note 70, s. 95; BCA, *supra* note 54, s. 128.

hold office when (1) the director's term expires in accordance with the memorandum, articles, or terms of the director's election or appointment, (2) the director dies or resigns, or (3) the director is removed from office. The BCA goes on to clarify when a resignation takes effect[183] and to set out a procedure for an individual to remove himself or herself from any corporate records that record the individual as a director of the company.[184] These provisions bring a welcome clarity to the law.

The committee tentatively recommends that:

> *33. A new Society Act should contain provisions governing directors ceasing to hold office that are harmonized with equivalent provisions in the Business Corporations Act.*

I. Removal

The *Society Act* contains only one method for removal of a director. Under section 31, a director may only be removed by a special resolution of the members. This rule has been in place since the 1977 Act.[185] It sets a high hurdle for removal of directors, which has the merit of providing some protection against a capricious use of this power.

Removal is another area where the procedural rules under the *Society Act* differ from those under the BCA,[186] raising a question of harmonization. The BCA differs from the *Society Act* in two respects.

First, the statutory procedure for removing a director by special resolution is a default provision under the BCA. A company may provide for removal by a resolution passed by less than a special majority of the shareholders (under the BCA a "special majority" is a supermajority selected by the company, which must be in the statutory range of a 2/3 majority and a 3/4 majority) or by some other method, so long as the memorandum or the articles specify the resolution or method required. (Notice that the BCA does not allow a company to substitute a unanimous resolution, or some type of resolution requiring more than a special majority—this preserves the policy of providing a statutory method for removing a director in the face of provisions in the articles that purport to make it very difficult or impossible to remove a director.) In contrast, the *Society Act* provision is mandatory—a special resolution of the members must be used in all cases. Some societies have purported to authorize the board of directors to remove a director in certain circumstances

183. *See* BCA, *ibid.*, s. 128 (2).

184. *See* BCA, *ibid.*, s. 129.

185. 1977 Act, *supra* note 43, s. 31.

186. BCA, *supra* note 54, s. 128 (3)–(4).

by including provisions to that effect in their bylaws. Such bylaws are void under the *Society Act*.[187]

Second, the BCA expressly deals with situations where a director was elected exclusively by the holders of a class or series of shares. In those cases, the director may be removed only by the holders of the class or series of shares. The equivalent situation for societies—where a director has been appointed by a class of members—is not expressly covered off in the *Society Act*.

The committee tentatively recommends that:

> *34. A new Society Act should contain provisions governing the removal of directors that are harmonized with provisions governing the removal of directors in the Business Corporations Act.*

J. Officers

The *Society Act* does not contain a definition of "officer," but it does refer to "officers" in various places.[188] There is some vagueness about the exact boundaries of the "officer" category, but it is generally accepted that the class of "officers" comprises senior management positions, such as president, treasurer, and secretary. The orthodox corporate law position is that directors are strategists, responsible for formulating long-term policies, officers are tacticians, responsible for the implementation and management of those policies, and the middle management, staff, and volunteers are responsible for the day-to-day operations. Although a company or a society must have directors, there is nothing in the BCA or the *Society Act* requiring a company or a society to have officers.

In practice, few companies or societies conform to the neat divisions of the orthodox corporate law view. In most societies (and in many companies) the offices of president, vice-president, secretary, and treasurer are filled by directors. Many societies will have an executive director (sometimes called a chief executive officer) and a chief financial officer drawn from the ranks of the staff, not the directors. Since there often are people fulfilling two roles (for example, the same person might be both a director and an officer), there is a blurring of the roles in practice that tends not to be reflected in orthodox corporate legislation.

187. *See Sangam Educational and Cultural Society of B.C. v. Gounder*, [1990] B.C.J. No. 2778 (S.C.) (QL); *Downtown Eastside Residents' Assn. v. Cameron*, [1997] B.C.J. No. 15 (S.C.) (QL).

188. *See, e.g., Society Act*, *supra* note 7, s. 30 (1) (security may be required from a director or officer for faithful discharge of duties), s. 35.1 (register of indebtedness must record debts of society in excess of $5000 to a director or officer).

The *Society Act* says nothing about procedural issues involving officers. But section 6 (1) (e) requires societies to have provisions in their bylaws respecting "the appointment and removal of directors and officers and their duties, powers, and remuneration, if any."[189] This approach has led to confusion in at least one court case.[190] In that case the board of directors purported to remove the president, vice-president, secretary, and "property manager" (who were all also directors) from their respective offices. The bylaws of the society were skeletal. They authorized the board to appoint officers, but said nothing about the removal of officers. The court concluded that, in these circumstances, the officers could only be removed *as directors*—which, under section 31 of the *Society Act*, required a special resolution of the members.[191]

The BCA takes a different approach from the *Society Act*. It spells out some default standards regarding officers, which may be displaced by a company's articles. For the purposes of this consultation paper, it is worth noting that the BCA has provisions dealing with some of the procedural issues discussed above in connection with directors. These issues are: (1) appointment of officers (the default position is that the directors appoint officers); (2) qualifications (the same qualifications that apply to directors also apply to officers—that is, an individual is disqualified to be an officer if the individual is under 18 years of age, found by a court to be incapable, an undischarged bankrupt, or convicted of certain criminal offences); (3) removal of officers (the default position is that the directors may remove an officer); and (4) applications to court to remove oneself from the record as an officer.

The committee tentatively recommends that:

> *35. A new Society Act should contain default provisions governing the appointment, qualifications, and removal of officers that are harmonized with provisions governing the appointment, qualifications, and removal of officers in the Business Corporations Act.*

VIII. Duties, Liabilities, and Conflicts of Interest

A. Introduction

The duties and liabilities of society directors and officers, and conflicts of interest involving society directors and officers, are highly contested areas that have garnered a great

189. Although, interestingly, the standard Schedule B bylaws really only address the duties of various officers, and have nothing to say about the other topics. *See* Part 7; note that Part 5, which is labelled "Directors and Officers," actually only has provisions relating to directors.

190. *Lee v. Lee's Benevolent Assn. of Canada*, 2003 BCSC 1150, 36 B.L.R. (3d) 304 [*Lee* cited to B.L.R.], *aff'd*, 2004 BCCA 168, 42 B.L.R. (3d) 182.

191. *Lee*, *ibid.* at para. 49.

deal of comment over the past few years. This area of the law is noticeably in need of modernization and refinement.

B. Duties of Directors and Officers

Section 25 of the *Society Act* states the duties of a director of a society. In exercising the powers and performing the functions of a director, a director must (1) act honestly and in good faith and in the best interests of the society and (2) exercise the care, diligence, and skill of a reasonably prudent person.

Since at least *Re City Equitable Fire Insurance Co.*[192] the common law has recognized that directors owe duties to their corporations. These principles have been cast in statutory form since the late 1960s and early 1970s. As the Dickerson Report observed, the statutory provisions were intended as ". . . simply an attempt to distill the effect of a mass of case law illustrating the fiduciary principles governing the position of directors"[193] and ". . . to give statutory support to principles that are as difficult to apply as they are well understood."[194]

Section 25 contains a classic statement of these principles. It was first enacted as part of the 1977 Act.[195] Harmonization with the CA may have been a subsidiary purpose for section 25, as it is very close in expression to the equivalent provision in the CA.[196]

Since the law is well settled in this area, it is not necessary to probe the fundamental underpinnings of section 25. But it is useful to consider two refinements that are found in the BCA and in several proposals for reform of not-for-profit legislation.

The first refinement is the inclusion of an express requirement to comply with the legislation, any regulations prescribed under the legislation, and the society's corporate charter. Arguably, such a requirement is already implicit in the legislation, but it would clarify the law to follow the lead of the BCA[197] and other legislation[198] and state this proposition explicitly.

The second refinement is the imposition of these duties on society officers. Again, an argument could be made that officers are implicitly included within the scope of section

192. (1924), [1925] Ch. 407.

193. Dickerson Report, *supra* note 46, vol. 1 at 81.

194. Dickerson Report, *ibid.*

195. 1977 Act, *supra* note 43, s. 25.

196. CA, *supra* note 44, s. 118.

197. BCA, *supra* note 54, s. 142.

198. *See* SK Act, *supra* note 70, s. 109; *see also* Bill C-21, *supra* note 72, s. 149.

25.[199] Whatever the state of the law is, on principle there is no convincing reason to leave officers unmentioned. Including officers would clarify the *Society Act* and would bring it into harmony with the BCA.[200]

The committee tentatively recommends that:

> *36. A new Society Act should contain provisions setting out the duties of society directors and officers that are harmonized with provisions setting out the duties of company directors and officers in the Business Corporations Act.*

C. Limitation on Liability—Relying on Officers and Professionals

The BCA,[201] Bill C-21,[202] and the SK Act[203] specifically provide that a director has complied with the director's statutory duties if the director has relied in good faith on (1) certain financial statements and written reports, or (2) reports of certain professionals. The BCA further provides that a director has complied with these duties where the director has relied in good faith on (3) certain statements of fact, or (4) any other record, information, or representation that the court considers to provide reasonable grounds for the actions of the director. Finally, the BCA excuses a director from liability if the director could not reasonably have known that an act done by the director or authorized by resolution was contrary to the BCA.

The main issue here is harmonization with the BCA, which expressly states what documents, officials, and professionals which a director may rely on. An argument could be made that society directors have the benefit, to some extent, of this limitation on their liability by virtue of the common law.[204] Expressly stating it may give comfort to directors and officers and encourage service in the executive offices of societies. In modern thinking, directors are long-term planners and strategists. Good corporate governance requires them to supervise the day-to-day administration of the corporation, but not necessarily to involve themselves in the implementation of strategic decisions. This type of statutory safe harbour would encourage directors in fulfilling this strategic role. Extending this protection to officers would be in accord with the functions society officers usually perform.

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199. By virtue of section 25 (2), which preserves the common law duties.

200. BCA, *supra* note 54, s. 142.

201. BCA, *ibid*., s. 157.

202. Bill C-21, *supra* note 72, s. 150 (2).

203. SK Act, *supra* note 70, s. 109 (4).

204. *See Grindrod & District Credit Union v. Cumis Insurance Society Inc.* (1983), 4 C.C.L.I. 47 at paras. 8–9 (B.C.S.C.) (interpreting the leading decision in this area, *Re City Equitable Fire Insurance Co. Ltd.*, as allowing directors to rely on statements made by a manager within the manager's scope of authority), *aff'd* (1985), 10 C.C.L.I. 39 (B.C.C.A.).

To an even greater extent than in the for-profit realm, not-for-profit officers tend to play executive roles that are similar to those played by directors. In fact, in many cases, the officers are also directors.[205]

The committee tentatively recommends that:

> *37. A new Society Act should contain provisions that state that a director or an officer has complied with that director's or officer's statutory duties if the director or officer has in good faith relied on certain representations or reports by a society officer or certain professionals.*

D. Disclosure of Interests

Many consequences flow from the fiduciary duties imposed on directors and officers. One of the most significant concerns conflicts of interest. In the nineteenth century, the courts articulated very strict rules forbidding conflicts of interest. Even potential conflicts were to be avoided. As one leading case put it, no fiduciary ". . . shall be allowed to enter engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."[206] But the common law also allowed the members of corporation almost total flexibility in agreeing on the content of the corporation's articles or bylaws. As a result, ". . . draftsmen tended to employ articles which waived the obligation of each director to disclose his interest, permitted the director to vote in respect of a contract in which he had an interest, and absolved the director altogether from any duty to account for profits he made on the contract."[207]

Starting in the mid 1920s, corporate legislation began to contain explicit rules regarding directors' conflicts of interest. These rules tended to be procedural in nature. That is, rather than seeking to define and prohibit conflicts of interest, the statutory rules put in place a procedure for dealing with conflicts of interest. This procedure focussed on disclosure by the interested director to the board of directors, abstention by the interested director from voting on the resolution approving the proposed transaction, and liabilities for failure to disclose.

Conflict of interest provisions made their first appearance in the *Society Act* in 1977. Sections 27 and 28 of the *Society Act* require a director of a society who is, directly or indirectly, interested in a proposed contract or transaction with the society to disclose fully

205. *See* SK Act, *supra* note 70, s. 109 (4) (extending this safe harbour to officers).

206. *Aberdeen Railway Co. v. Blaikie Bros.* (1854), 1 Macq. 461, [1843–60] All E.R. Rep. 249 at 252 (H.L.).

207. Dickerson Report, *supra* note 46, vol. 1 at 79.

and promptly the nature and extent of the interest to each of the other directors. The board may approve the transaction, so long as the interested director abstains from voting. There is also a procedure for the members to ratify the transaction by special resolution, so long as the transaction was reasonable and fair to the society at the time it was entered into. Running afoul of these rules leaves the interested director liable to account to the society for any profits made on the transaction. These provisions were modelled on equivalent provisions in the CA.[208]

In part, the issues here relate to harmonization with the BCA. The BCA[209] has introduced significant reforms to the conflict of interest regime that was found in the CA. Rather than requiring, as a default position, that any and all interests must be disclosed, and then setting out a list of specific exceptions, as in the CA, the BCA starts out by establishing a two-part materiality test to determine whether an interest is disclosable or not: first, the *interest* must be material to the *director or senior officer*; and second, the *contract or transaction* itself must be material to the *company*. The drawback of this approach is that it leaves the decision as to whether an interest is disclosable in the hands of the interested director. The rationale for taking this approach in the BCA may be that corporate directors and senior officers,[210] to whom the provisions also apply, are expected to have the expertise necessary to make this determination. But this approach has also been applied in the not-for-profit sphere.[211] Its adoption in a new *Society Act* would represent a welcome modernization of the law.

The duty to account for profit and the approval procedure in the BCA are similar to corresponding provisions the *Society Act* and the CA, but with two notable exceptions: first, if all the directors have a disclosable interest in a contract or transaction, any or all of them may vote to approve the contract or transaction; second, unless the memorandum or articles provide otherwise, an interested director may be counted in the quorum. Another notable feature of the BCA is the provision setting out the powers of the court to make orders respecting the approval of transactions and the liability to account for profits. This provides another avenue for the review of decisions to approve or not approve contracts or transactions, as well as another avenue to protect interested directors from the liability to account.

208. CA, *supra* note 44, ss. 120 (1), 121.

209. BCA, *supra* note 54, ss. 147–53.

210. *See* BCA, *ibid*., s. 1 (defining "senior officer" to be (1) the chair and any vice-chair of the board, (2) the president, (3) any vice president in charge of a principal business unit, and (4) any officer who performs a policy making function and who has the capacity to influence the direction of the corporation, whether or not that officer is also a director).

211. *See* Bill C-21, *supra* note 72, s. 142; SK Act, *supra* note 70, s. 107.

A difficulty with applying sections 27 and 28 of the *Society Act* in practice is the vagueness of their scope. On their face, these sections only apply to "directors," but that term is defined in an open-ended way in the *Society Act*. The application of the conflict of interest provisions needs to be clarified. The BCA provides one model. Its provisions apply to directors and senior officers (both are defined terms). A different approach should be taken in a new *Society Act*, to account for differences in the for-profit and not-for-profit sectors. In many societies, all the officer positions are taken by directors. They hold their offices mainly for ceremonial reasons. But the senior staff positions, such as general manager and executive director, are often in a position to influence the direction of the society in critical ways. In addition, sometimes even outsiders are in a position to influence the society. For example, a non-director could be serving on a committee of the board of directors. That committee would be charged with making recommendations on, for example, the purchase of some item. The committee may recommend making the purchase from a business that the non-director has a financial interest in. Because the non-director is not under an obligation to disclose, the committee could make their recommendation without having any knowledge of the conflict of interest. It would be better if these persons were all obliged to disclose their conflicts before a decision is made.

One of the complaints about the *Society Act*'s conflict of interest provisions is that they can be difficult to apply to real-world dilemmas. The problem here is often framed in terms of lack of guidance. It is very difficult for statutory provisions, in and of themselves, to provide the kind of guidance that is needed in addressing what often are ethical, rather than purely legal, questions. The committee considered including a provision in a new *Society Act* that would enable and give statutory force to a code of conduct or guidelines for society directors and officers. The committee has declined to make a tentative recommendation on this matter. Developing the code of conduct or guidelines would require more time and broadly based consultation than is possible under the aegis of this project. The topic is worthy of its own law reform project—in fact, such a project was carried out 15 years ago.[212] In the absence of such a considered review of the issues, a general tentative recommendation endorsing the concept in broad terms seemed vague and not particularly helpful.

The committee tentatively recommends that:

> *38. A new Society Act should contain provisions relating to conflicts of interest involving directors, officers, senior managers, and other individuals who perform the functions of a director, officer, or senior manager or who have the capacity to influence the direction of the society that are harmonized with the conflict of interest provisions in the Business Corporations Act.*

212. LRCBC Report, *supra* note 77.

E. Indemnity of a Director by a Society

Section 30 (2)–(4) of the *Society Act* permits a society, with the approval of the court, to indemnify a director or former director of the society if the director (1) acted honestly and in good faith with a view to the best interests of the society and (2) in the case of a criminal or administrative action or proceeding, had reasonable grounds for believing his or her conduct was lawful. The purpose of this provision is to encourage service as society directors by providing a level of protection from personal liability.

The *Society Act*'s indemnity provisions were enacted in 1977.[213] They mirror provisions in the CA.[214] The key requirement in these provisions is that an indemnity may only be paid by order of the Supreme Court. This requirement was not carried forward in the BCA.[215] In part, the issue here is harmonization with the BCA. But it also goes deeper than that. The requirement to obtain a court order amounts to a sizable barrier to service as a director or officer of a society. The silence of the *Society Act* on other issues—such as advancing costs for a legal defence to a proceeding—also amount to barriers to service.

The BCA indemnity provisions differ from the *Society Act* provisions (and the CA provisions) in both procedure and scope. The procedural difference between the *Society Act* and the BCA is, as already noted, that the *Society Act* requires an application to court to approve any payment under an indemnity agreement between a society and a director and the BCA does not. Court oversight does provide an added level of protection for the interests of the society and its members. But it also adds a layer of time and expense that undermines the goals of the indemnity provisions. Among the models for reform of the not-for-profit sector, Bill C-21, the SK Act, the ALRI Draft Act, and the US Model Act all permit a society to indemnify a director or officer without court approval.[216]

The difference is scope is that the *Society Act* only refers to "directors," while the BCA expressly covers directors and officers. Given the open-ended definition of "directors" in the *Society Act*, an argument could be made that these provisions also embrace officers. But this point should not be open to debate. The law should be clear on whether officers are in or out.

Finally, the BCA contains a number of provisions relating to the payment of expenses connected with litigation and the authority to advance funds to cover expenses incurred before judgment. These provisions are more in tune with the realities of contemporary litigation, and they serve to make the BCA provision more useful in practice.

213. 1977 Act, *supra* note 43, s. 30 (2)–(4).

214. CA, *supra* note 44, s. 128 (1)–(3).

215. BCA, *supra* note 54, ss. 159–65.

216. Bill C-21, *supra* note 72, s. 152; SK Act, *supra* note 70, s. 111; ALRI Draft Act, *supra* note 80, s. 50; US Model Act, *supra* note 82, § 8.51; US 2006 Exposure Draft, *supra* note 83, § 8.51.

The committee tentatively recommends that:

> *39. A new Society Act should contain provisions relating to the indemnification of directors and officers by a society that are harmonized with the indemnification provisions in the Business Corporations Act.*

F. Immunity or Relief from Personal Liability

1. General Statutory Immunity from Personal Liability

The issue of providing a general statutory immunity from personal liability for society directors and officers has generated a great deal of discussion in recent years.[217] Like most Canadian not-for-profit statutes, the *Society Act* does not provide directors and officers with immunity from personal liability. The question is whether a new *Society Act* should extend this form of protection to directors and officers.

Legislation in other provinces provides two examples of the type of provision that could be adopted in a new *Society Act*. The SK Act contains a section geared strictly to directors and officers.[218] The core of this section is found in subsection (2), which declares that "[u]nless another Act expressly provides otherwise, no director or officer of a corporation is liable in a civil action for any loss suffered by any person." The section attaches a number of qualifiers to this declaration, but the provision remains a very strong form of protection for society directors and officers. The second example is a more broadly based immunity for unpaid volunteers of not-for-profit organizations, such as Nova Scotia's *Volunteer Protection Act*.[219] This legislation, which was modelled on American precedents,[220] is unique in Canada. The *Volunteer Protection Act* applies generally to volunteers, despite their role within an organization. Directors and officers may come within the scope of its protection, so long as they do not receive compensation (other than reasonable reimbursement or allowance for expenses actually incurred) or any money in lieu of compensation in excess of $500 per year.[221]

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217. *See, e.g.*, BCLI Study Paper, *supra* note 78; Law Reform Commission of Saskatchewan, *Report on the Liability of Directors and Officers of Not-Profit Organizations* (February 2003), online: Law Reform Commission of Saskatchewan <http://www.lawreformcommission.sk.ca/directorsfinal.htm>; Robert Flannigan, "Tort Immunity for Nonprofit Volunteers" (2005) 84 Can. Bar Rev. 1.

218. SK Act, *supra* note 70, s. 112.1. This section applies both to unpaid directors and officers and to directors and officers who receive remuneration.

219. S.N.S. 2002, c. 14.

220. *See, e.g.*, *Volunteer Protection Act*, 42 U.S.C. §§ 14501–05 (2007).

221. *Volunteer Protection Act*, *supra* note 219, s. 2 (h).

The main justification offered in favour of granting society directors and officers immunity from liability hinges on recruitment. Proponents of this type of legislation argue that individuals will not serve on society boards of directors or act as officers for societies if they face a risk of being held personally liable for decisions made or actions taken as a director or an officer. Several recent high-profile cases involving vicarious liability for sexual assaults committed by society employees have raised the anxiety of directors and officers.[222] If a significant drop in the number of individuals serving as directors or officers occurred it would affect more than just the society. People who rely on services or programs offered by the society may also suffer as a result. In the end, the public treasury may have to pay for services and programs that were once provided by societies. In contrast, legislation extending immunity from personal liability to directors and officers may encourage people to serve in these roles, resulting in a stronger and more vibrant not-for-profit sector.

Although this type of legislation was readily accepted in the United States, its adoption has been much slower in Canada. Immunity from personal liability was conspicuously absent from Bill C-21. Those who oppose this provision often point out that there is, as yet, no empirical foundation for a key claim of its supporters, which is that directors and officers are increasingly being found personally liable as a result of their roles. In addition, there is no proof that societies are finding it more difficult to recruit individuals to serve in these roles. As a broader point, opponents also argue that this type of legislation has the potential to damage the not-for-profit sector, by lowering the care and attention that directors and officers give to their duties and obligations and by creating a sense that the sector is not accountable to the public.

The committee tentatively recommends that:

> *40. A new Society Act should not contain provisions granting society directors or officers immunity from personal liability.*

2. Power for the Court to Relieve a Director or Officer from Personal Liability

The question of immunity from personal liability for society directors and officers is multifaceted. Blanket immunity may not be appropriate, but a limited power to relieve against specific instances where personal liability could be imposed is worthy of consideration.

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222. *See Bazely v. Curry*, [1999] 2 S.C.R. 534, 174 D.L.R. (4th) 45; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, 174 D.L.R. (4th) 71. It should be noted that both of these cases concerned the vicarious liability of not-for-profit organizations as employers of wrongdoing employees. In neither case was a director or an officer held personally liable. Nevertheless, both *Bazely v. Curry* and *Jacobi v. Griffiths* have generated consternation and anxiety among society directors and officers. *See Report on the Liability of Directors and Officers of Not-Profit Organizations, supra* note 217.

The *Trustee Act*[223] has long had a section that grants the court jurisdiction to relieve a trustee from personal liability.[224] The key to this section is that the trustee has to have "acted honestly and reasonably, and ought fairly to be excused for breach of trust." The provision is tailored to providing assistance for innocent breaches of trust. A similar provision was recommended in the not-for-profit corporate sphere in the ALRI Report.[225] Finally, this limited jurisdiction to relieve against personal liability has recently been incorporated into British Columbia's for-profit legislation.[226]

This jurisdiction does not extend nearly as far as the immunity provisions in the SK Act and the Nova Scotia *Volunteer Protection Act*. Its limited reach may be seen as a weakness by some, but it is also a strength. This type of provision allows for a flexible response to the difficult issues that may arise in an individual case, rather than a fundamental re-ordering of well-established principles of liability.

The committee tentatively recommends that:

> *41. A new Society Act should contain a provision granting the court the power to relieve a society director or officer from personal liability if the director or officer acted honestly and reasonably and ought fairly to be excused.*

G. Personal Liability for Directors if a Society Has Fewer than the Minimum Number of Members

Section 24 (8) imposes personal liability on the directors if a society has fewer than three members for more than six months. After that initial six-month period has expired, each director will be personally liable for every debt that the society incurs for so long as it has fewer than three members. This section has been in force since 1977[227] and its purpose is to provide a mechanism to enforce the *Society Act*'s minimum membership requirement.[228] This section is also substantially similar to a provision in the CA,[229] so harmonization with the CA was a subsidiary goal when it was enacted.

The issues here involve modernization of the law and harmonization with the BCA. Minimum membership requirements have a long history in corporate law, both for-profit and not-for-profit. Many statutes imposing minimum membership requirements contain

223. R.S.B.C. 1996, c. 464.

224. *Trustee Act*, *ibid.*, s. 96.

225. ALRI Report, *supra* note 61 at 53. *See also* ALRI Draft Act, *supra* note 80, s. 49 (4).

226. BCA, *supra* note 54, s. 234.

227. 1977 Act, *supra* note 43, s. 24 (8).

228. *See*, below, Part Two, Section IX.C at 66–68.

229. CA, *supra* note 44, s. 16.

an enforcement mechanism similar in form to section 24 (8), but all of these statutes impose personal liability on the remaining members or on the recently departed members if the membership drops below the statutory minimum. The *Society Act* and the CA are the only statutes enacted in Canada which impose personal liability on the directors in these circumstances.

This anomaly in British Columbia's legislation may be the result of when the provision was first enacted. This was in 1973, as part of a major revision of for-profit legislation in the province. One of the changes brought in by the CA was the express statutory validation of one-person companies. So, the rule in the CA was that personal liability would be imposed if a company had no shareholders. Since there were no shareholders, and since tracking down the former shareholders could prove difficult, it may have seemed natural to impose personal liability on the directors. Once the rule was established for the CA, harmonization may have dictated that the same rule apply in the *Society Act*. This was in spite of the *Society Act* requiring a higher minimum membership requirement (one-person societies are not permitted under the current legislation).

The anomalous nature of this rule is even more pronounced now, as it has not been carried forward in the BCA. Since there is no obvious connection between the number of members and the duties of the directors, removing this rule does away with a potential pitfall.

The committee tentatively recommends that:

> *42. A new Society Act should not impose personal liability on a society's directors if that society carries on without a member.*

H. Security from Directors and Officers for Faithful Discharge of Their Duties

Under section 30 (1) of the *Society Act*, a society may require a director or officer to give the society security for the faithful discharge of the director's or officer's duties. This provision first appeared in 1920,[230] and it has not substantially changed since that date. The intent of section 30 (1) is to protect the society, and anyone who has contributed funds or property to the society, from breaches of duty by a director or an officer. This section is in fact a very old provision, found in three of the four nineteenth century forerunners of the *Society Act*.[231] The wording of the provision in one of these nineteenth-century Acts indicates that the concern then may have been to guard against misappropriation of donations:[232]

230. 1920 Act, *supra* note 23, s. 24.

231. *See Industrial Communities Act, 1898*, *supra* note 20, s. 9; *Charitable Associations Act, 1871*, *supra* note 21, s. 6; *Benevolent Societies Act, 1891*, *supra* note 22, s. 10.

232. *Benevolent Societies Act, 1891*, *ibid.*, s. 10.

Officers to give security if required

10 Such societies, or branch societies, may require the officers, secretaries, treasurers, and trustees thereof, to give security for all such sums of money or other property of the society, or branch society, as may from time to time be placed in their hands or under their control, in trust, for and on behalf of the objects of the society, or branch society. . . .

It is not clear whether this provision is just a nineteenth-century relic or if it is still being used. It is readily apparent that a statutory provision is not required to allow societies and their directors and officers to enter into these types of security arrangements. But, in the absence of such a provision, a society would have little or no leverage to require a director or an officer to post security anytime during the director's or officer's term with the society.

This type of provision is not found in the BCA or any of Bill C-21, the SK Act, or the ALRI Draft Act. It likely is not being used in practice.[233] Not carrying it forward in a new *Society Act* would modernize the law by removing an obsolete provision.

The committee tentatively recommends that:

> *43. A new Society Act should not enable a society to require a director or an officer to give the society security for the faithful discharge of the director's or officer's duties.*

I. Dissent Procedure

Unlike most corporate statutes, the *Society Act* does not contain a procedure for a director who disagrees with the adoption of a resolution to record a dissent. The significance of this procedure becomes apparent when it is remembered that some board decisions can result in personal liability for the directors. A statutory dissent procedure is intended to provide protection for directors who disagree with a board decision that leaves the directors at risk of personal liability.

Examples of this type of provision are found in the BCA, Bill C-21, and the SK Act.[234] The dissent procedure applies to a director who disagrees with certain resolutions. The procedure is relatively simple. The director must vote against the resolution and (1) cause the dissent to be recorded in the minutes of the meeting, (2) put the dissent in writing and

233. In fact a situation that is nearly exactly the converse—the society agreeing to indemnify a director against personal liability—is much more common in practice today.

234. BCA, *supra* note 54, s. 154; Bill C-21, *supra* note 72, s. 146; SK Act, *supra* note 70, s. 105.

provide it to the secretary by the end of the meeting, or (3) put the dissent in writing and, promptly after the end of the meeting, mail or deliver it to the company's or society's registered office. The procedure only applies to certain types of resolutions, from which personal liability for directors may result.

The dissent procedure is actually a double-edged sword. A director who does not dissent is deemed to have consented to the resolution. The policy underlying the provision favours the active director who is aware of the business coming before the board and who asserts a position on the matter over the passive director. On the other hand, the common law, which applies to British Columbia societies since the *Society Act* is silent on this issue, favours the absent or passive director. At common law, a director who was absent from a meeting at which a decision was made may use that absence as a shield against any personal liability that may flow from that decision.[235] Since many directors in the not-for-profit sector are volunteers, there may be some small merit in the common law position. But it is outweighed by the merits on the side of the statutory provision. Adopting a statutory dissent procedure will promote diligence on boards, clarity in decision making, and good practices in corporate governance.

The committee tentatively recommends that:

> *44. A new Society Act should contain a dissent procedure that may be used by directors in relation to any resolution with which they disagree.*

J. Remuneration of Directors

A society's bylaws must contain provisions relating to the remuneration of directors. This requirement is imposed by section 6 (1) (e) of the *Society Act*. In effect, this means that remuneration of society directors will not be permitted unless the bylaws authorize it.

Directors' remuneration is receiving increasing attention in the for-profit sphere. More and more company directors are demanding remuneration as compensation for the increasing complexity of their roles and the heightened risks of personal liability. These concerns are lower in the not-for-profit sphere, but some proposals for reform have followed the more permissive approach of for-profit statutes. Both Bill C-21 and the SK Act authorize the directors to fix their own *reasonable* remuneration, unless a contrary provision is found in the society's bylaws.[236]

235. *See Re Dominion Trust Co. and Machray* (1916), 23 B.C.R. 401, (*sub nom. Re Dominion Trust Co. (Director's Case)*), 32 D.L.R. 63 (C.A.). *See also* MacRae & Bromley, *supra* note 136 at 3.1.03.

236. Bill C-21, *supra* note 72, s. 144; SK Act, *supra* note 70, s. 112.

The existing balance is preferable to this proposed change. Remuneration is permitted only if the members take steps to allow it. Otherwise, it is not allowed. This arrangement creates a safeguard against potential abuse.

The committee tentatively recommends that:

> *45. A new Society Act should prohibit directors from receiving remuneration, unless the society's bylaws specifically authorize it.*

K. Paid Staff as Directors

Currently, the *Society Act* has no provisions dealing with a paid employee of a society serving on its board. There is a longstanding view that permitting a person both to serve on a society board of directors and to draw a salary as a part of that society's staff amounts to a functional conflict of interest. The consultation paper[237] that preceded the LRCBC Report proposed "prohibiting these arrangements"[238] for this reason. This proposal garnered some support,[239] but it did not form one of the final recommendations in the LRCBC Report.

Mixing these roles creates problems in practice. A society adopting best practices for governance would avoid this arrangement. The question is whether leaving it to best practices is enough.

In the committee's view, the time is right to implement the LRCBC proposal. Legislation is needed to overcome the problems in governance and the functional conflicts of interest created by having one person fill the role of both director and paid employee.

The committee tentatively recommends that:

> *46. A new Society Act should prohibit paid employees of a society from serving on that society's board of directors and provide appropriate transitional provisions for existing paid employees who are directors.*

237. Law Reform Commission of British Columbia, *Consultation Paper on Conflicts of Interest: Directors and Societies* (LRC CP No. 71) (November 1993), online British Columbia Law Institute <http://www.bcli.org/pages/publications/lrcreports/consultation/cp71.htm>.

238. LRCBC Report, *supra* note 77, vol. 1 at 34.

239. LRCBC Report, *ibid.*

IX. MEMBERS

A. Introduction

The *Society Act* contains a relatively well-developed set of provisions applying to members. The keynote of the sections that follow will be whether those provisions require modernization in light of changing circumstances in the not-for-profit sector.

B. Definition of "Member"

Many disputes involving societies turn on the question of whether or not a person is a member of the society. The concept is fundamental to the legislation, but not a simple one to define.

The first definition of "member" in the *Society Act* appeared in 1961.[240] "Member" was defined as "a subscriber of the constitution and bylaws of a society and includes every other person who agrees to become a member, associate member, honorary member, or any other class of member by whatever name called." This rather expansive definition was narrowed somewhat in the 1977 Act to (1) an applicant for incorporation of a society who not ceased to be a member and (2) every other person who becomes and remains a member in accordance with the bylaws.[241] The current version of the *Society Act* retains the definition from the 1977 Act.

The difficulty with these two definitions is that they do not provide much certainty when a dispute arises. This difficulty is particularly apparent in the 1961 definition, which refers to associate, honorary, and other classes of members. These types of memberships, which are commonly encountered in practice, may be clearly defined in any given society's bylaws. But more often than not these individuals occupy a grey area. In some respects, they have the rights and obligations of members; in other respects, they do not.

Some proposals for reform have sought to define "member" more restrictively. One example is the functional approach to define membership that appears in American legislation.[242] This approach focuses on one key function performed by the membership of societies: election of the board of directors. The definition, in effect, sets up a bright line test: individuals who have a vote are members; individuals who do not have a vote are not members.

This approach may be overly rigid in practice. Earlier, this consultation paper noted that election is only one of several methods commonly in use for selecting boards of direc-

240. *Societies Act Amendment Act, 1961*, S.B.C. 1961, c. 57, s. 2.

241. 1977 Act, *supra* note 43, s. 1.

242. *See* US Model Act, *supra* note 82, § 1.40 (21); US 2006 Exposure Draft, *supra* note 83, § 1.40 (32).

tors.[243] Adopting this American definition of "member" could force many societies to change the methods in which their boards are selected. A more moderate approach to achieving certainty is found in the BCA, which defines "shareholder" by reference to the company's central securities register.[244] While adding this component to the definition of "member" will not clear up all practical difficulties, it should add an enhanced level of certainty to the definition.[245]

The committee tentatively recommends that:

> *47. A new Society Act should define member by reference to the society's bylaws and to the society's register of members.*

C. Minimum Number of Members

The *Society Act* does not contain a provision that directly imposes a requirement to have a certain minimum number of members. A society must begin its existence with at least five members, as at least five persons are required to sign the application to incorporate the society,[246] and these five (or more) incorporators become members of the society by virtue of the definition of "member."[247]

The *Society Act* does not require the society to have at least five members at all times, but two other sections make it very undesirable for a society's membership to drop below three persons. Under section 24 (8), if a society has fewer than three members for more than six months, each director will be personally liable for the payment of every debt of the society incurred after the expiration of the six months and for so long as the society continues to have fewer than three members.[248] And under section 61, three members is set as the requirement for a quorum at a general meeting.[249] These two provisions, in effect, establish three as the minimum number of members that a society must have at all times during its existence.

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243. *See*, above, at Part Two, Section VII.C at 45.

244. BCA, *supra* note 54, s. 1 (1).

245. As a consequence of one of the earlier tentative recommendations in this consultation paper, one element of the current definition of "member" may be dropped. Currently, an incorporator of a society becomes a member. This is out of step with modern trends in incorporation, which recognize that agents often incorporate corporations and do not necessarily want automatically to become members. *See*, above, Part Two, Section III.B.1 at 20–21.

246. *Society Act*, *supra* note 7, s. 3 (1).

247. *See Society Act*, *ibid.*, ss. 3 (1), 1.

248. *See*, above, Part Two, Section VIII.G at 60–61.

249. *See*, below, Part Two, Section X.E at 79–81.

Minimum membership requirements are as old as the limited liability corporation.[250] They were the subject of the celebrated company law case *Salomon v. Salomon & Co., Ltd.*[251] In *Salomon*, the sole proprietor of a boot-making business incorporated that business and subscribed for the vast majority of the company's shares. In order to comply with the statute's requirement that a company have at least seven shareholders, one share was issued to the proprietor's wife and to each of his children. When the company became insolvent, its creditors attacked its incorporation as a sham. The courts ultimately rejected this argument, reasoning in effect that compliance with the letter of the law was all that was necessary.[252] From this point on, minimum membership requirements for companies underwent a slow decline from meaningful device to protect the interests of creditors and the general public to mere formality.[253]

Minimum shareholder requirements are now uncommon in for-profit legislation,[254] but they do persist in the not-for-profit realm. The question, then, is whether these requirements are fulfilling their original goals of encouraging greater accountability[255] or if they are on the books simply because of neglect. Common practice does not serve as a very good guide to answering this question. Most societies will want to have a relatively large membership base, at least in comparison to the shareholder base of most companies. This fact alone should not militate in favour of setting a very high minimum number, such as 50, as this would invariably create problems in practice. There is a certain level of arbitrariness to the statutory minimum number. Most Canadian not-for-profit statutes require at least three or five members.[256] But among these jurisdictions, only British Columbia,

250. *See Joint Stock Companies Act, 1856*, (U.K.), 19 & 20 Vict., c. 47, s. 3 (requiring seven or more subscribers to the memorandum of association forming the company), s. 39 (prohibiting a company from carrying on business with fewer than seven shareholders).

251. [1897] A.C. 22 (U.K.H.L.) [*Salomon*].

252. *See, e.g., Salomon, ibid.* at 51, Lord MacNaughten ("In almost every company that is formed the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter.").

253. *See* Dickerson Report, *supra* note 46, vol. 1 at 18 ("[t]he legality of the 'one-man' corporation has been acknowledged since the landmark decision in *Sal[o]mon* v. *Sal[o]mon & Co. . .*").

254. For example, the BCA, *supra* note 54, contains no minimum shareholder requirement.

255. *See* OLRC Report, *supra* note 81 at 480 ("There may also be some utility in maintaining a requirement for several initial members and a membership roster that does not decline below a certain number. For example, corporations from which the public should expect greater accountability, such as charitable corporations, might be expected to have several continuing members and perhaps several directors, in order to heighten the nature of the responsibility of managing and distributing donated money and government grants.").

256. Canada: *Canada Corporations Act, supra* note 69, s. 154 (1) (three or more persons); Alberta: *Societies Act*, R.S.A. 2000, c. S-14, s. 3 (1) (five or more persons); Ontario: *Corporations Act, supra* note 69, s. 311 (1) (three or more persons); Québec: *Companies Act, supra* note 86, s. 218 (three or more persons); New Brunswick: *Companies Act*, R.S.N.B. 1973, c. C-13, s. 87 (1) (three or more persons);

Ontario, and New Brunswick provide any real penalties for breaching this rule. Three jurisdictions, including Saskatchewan (which has the most recently amended legislation in Canada), require no more than one member for a society.[257]

There is no evidence that requiring at least three or five members results in any greater protection for the public than requiring only one. There is no recorded case that comments on the issue of whether a higher minimum membership requirement is superior to a lower requirement. Government officials acting in the same capacity as British Columbia's Registrar of Companies in the three provinces that simply require at least one member for a society do not report any problems flowing from this provision.[258]

Another approach to this issue, which has been proposed in some law reform recommendations, would be to allow societies to operate without members.[259] This approach would enable societies to function as self-perpetuating boards of directors. It has not garnered much support in Canada, as it would be a considerable departure from the traditional conception and organization of a corporation.

The committee tentatively recommends that:

> *48. A new Society Act should require that a society have at least one member.*

D. Admission and Qualifications

1. GENERAL

The *Society Act* does not set out any qualifications that must be met to be a member of a society. Instead, section 6 (1) (a) requires a society to have bylaws that address "the admission of members." This approach can be traced all the way back to the 1920 Act.[260]

This issue is one where the *Society Act* strikes an acceptable balance. The other options would be to include provisions in the legislation, which, no matter how detailed, would

Prince Edward Island: *Companies Act*, R.S.P.E.I. 1988, c. C-14, s. 89 (three or more persons); Nova Scotia: *Societies Act*, R.S.N.S. 1989, c. 435, s. 5 (five or more persons); Yukon: *Societies Act*, R.S.Y. 2002, c. 206, s. 3 (five or more persons); Northwest Territories and Nunavut: *Societies Act*, R.S.N.W.T. 1988, c. S-11, s. 2 (five or more persons).

257. Saskatchewan: SK Act, *supra* note 70, s. 5 (1); Manitoba: *The Corporations Act*, *supra* note 85, s. 5 (1); Newfoundland and Labrador: *Corporations Act*, *supra* note 85, s. 11 (1).

258. Telephone call with Shane Lasker, lawyer, Manitoba Companies Office (24 October 2006); telephone call with Doug Laing, Director, Newfoundland and Labrador Commercial Registry (27 October 2006); telephone call with Phil Flory, Director, Saskatchewan Corporations Branch (31 October 2006).

259. *See* OLRC Report, *supra* note 81 at 486; *see also* US Model Act, *supra* note 82, § 2.02 (a) (5) (requiring a society to state in its articles whether it will have members or not); US 2006 Exposure Draft, *supra* note 83, § 2.02 (b) (4).

260. 1920 Act, *supra* note 23, s. 22 (1), Schedule B.

always run the risk of being unduly restrictive, or to leave the matter completely open, which would run the risk of uncertainty, particularly in the face of a dispute over membership. The balanced approach has the support of at least one other law reform agency.[261]

The committee tentatively recommends that:

> *49. A new Society Act should require societies to address admission of members and qualifications of members in their bylaws.*

2. MINORS

One aspect of the general subject of admission and qualification of members calls for special comment. Since the 1920 Act,[262] the *Society Act* has allowed minors to be members of societies. The current provision is section 7 (5), which provides that a person under the age of nineteen years "may be admitted as a member of a society, may be appointed to an office in the society, and is liable for the payment of a subscription as if the person were of full age." This provision overrides the general law.[263] Its purpose is to enable youth participation in societies, as a means of enriching the lives of young people and the diversity of membership in societies.

The difficulty with enabling minors' participation in societies in this manner is that it does not fit well with the governance responsibilities of society members, directors, and officers. There have been problems in practice, particularly in cases where minors form the majority of the membership of a society. The goal of encouraging minors' participation may be supported by constituting minors as part of an advisory committee, or in some other category that has no direct role in society governance.

The committee tentatively recommends that:

> *50. A new Society Act should not contain provisions enabling minors to join and participate in societies as members, directors, or officers.*

E. Classes

1. GENERAL

The *Society Act* is largely silent on classes of membership, even though classes are frequently used in practice. The only provision that bears on classes of membership is sec-

261. *See* ALRI Report, *supra* note 61 at 46–47.

262. 1920 Act, *supra* note 23, s. 21 (2) (a).

263. *See Infants Act*, R.S.B.C. 1996, c. 223, s. 19.

tion 70 (2) (d), which merely says that if a society has decided to have classes of membership, then this fact must be reflected in its register of members.

There is some wisdom to this approach, as it would be very difficult to define and fully set out the rights and obligations of typical classes of members in the legislation. But there are steps that the legislation could take to ensure that some degree of certainty surrounds a society's classes of members. One useful step would be to require societies that choose to have classes of members to define the terms and conditions of each class in their bylaws. This approach would be analogous to what the BCA requires for classes of shares.[264]

The committee tentatively recommends that:

> *51. A new Society Act should contain provisions allowing for the creation of classes of memberships and should require a society that has classes to define the terms and conditions of each class in its bylaws.*

2. HONORARY OR LIFE MEMBERS

The *Society Act* does not mention honorary or life members by name. Yet it is very common for societies to have these types of members. Unfortunately, there is often considerable uncertainty around honorary or life members. The core idea is to extend membership to certain people based on past service to the society or standing in the community. The problems appear when other important questions—such as the rights and obligations of the honorary or life members—are not answered.

The OLRC Report recommended legislation that would allow all societies to have a class of honorary members.[265] The legislation would provide that honorary members have no voting rights and would apply even if the society does not adopt bylaws to create such a class of members.

In the committee's view, this proposal is not necessary. Honorary or life memberships may be dealt with in the same manner as any other class of membership.

The committee tentatively recommends that:

> *52. A new Society Act should not contain special provisions enabling the creation of honorary or life memberships.*

264. BCA, *supra* note 54, s. 59.

265. OLRC Report, *supra* note 81 at 486.

F. Voting Rights

The bedrock voting principle in the *Society Act* is that each voting member has a right to one vote. This principle is expressed in section 7 (1), which is an amalgam of two provisions, one old, the other new. The opening words of section 7 (1)—"a voting member of a society has only one vote"—may be traced back to the 1920 Act.[266] The remainder of the provision states that a voting member may exercise the right to vote "on every matter without restrictions," despite anything said to the contrary in the society's bylaws. This rule only appeared in 2004.[267]

The one member–one vote rule has an intuitive appeal. On an emotional level, it seems fair. But the latest articulation of it in the *Society Act* has caused difficulties in practice. Some societies have attempted to put in place complex provisions in their bylaws to work around this provision. The stated purpose of the 2004 amendment was to "clarify" the law.[268] This language implies that the amendments were passed to confirm and make explicit the existing understanding of the law on society voting rights. The broader policy question of whether this position is the best one for societies and their members should be posed. Another approach would be to constitute the one member–one vote principle as a default rule, which may be displaced by the bylaws. This approach would extend greater organizational flexibility to societies and would be in harmony with other law reform models.[269]

The committee tentatively recommends that:

> *53. A new Society Act should contain provisions establishing the one member–one vote principle as a default rule, which may be displaced by a contrary provision in a society's bylaws.*

G. Non-Voting Members

Section 7 (2) of the *Society Act* permits a society to have non-voting members, provided that their number does not exceed the number of voting members.[270] This rule first appeared in the *Society Act* in 1961.[271] It was enacted ". . . to prevent a situation arising

266. 1920 Act, *supra* note 23, s. 21 (2) (c).

267. *Society Amendment Act, 2004*, *supra* note 53, s. 4 (a).

268. *See* Bill 32, *Society Amendment Act, 2004,* 5th Sess., 37th Parl., British Columbia, 2004 (explanatory note to clause 4).

269. *See* Bill C-21, *supra* note 72, s. 154 (5); SK Act, *supra* note 70, s. 130 (1); ALRI Draft Act, *supra* note 80, s. 57 (1).

270. The Registrar of Companies has the authority to exempt a society from this requirement. *See Society Act*, *supra* note 7, s. 7 (3).

271. *See Societies Act Amendment Act, 1961*, *supra* note 240, s. 4.

where a small number of persons, by gaining status as voting members, control a society having a relatively large number of non-voting members."[272]

The issue here is whether this rationale has any contemporary relevance. The note to the 1961 amendment implies that a society would only have a small group of voting members and a large group of nonvoting members for nefarious reasons. But some societies may legitimately want to choose this structure. The legislation should have the flexibility to allow for many different forms of organization.

The committee tentatively recommends that:

> *54. A new Society Act should not require a society to have more voting than non-voting members.*

H. Dues and Subscriptions

The *Society Act* does not directly address dues or subscriptions, but it does have a few provisions that touch on the topic. Section 1 defines "subscription" broadly to include "dues." Section 7 (5) (c) makes a minor who is a member of a society liable to pay a subscription imposed by the society. Section 72 deals with the treatment of prepaid membership dues on the dissolution of a society having insurance purposes. Section 99 (2) (b) grants the Lieutenant Governor in Council the power to make regulations prescribing the minimum membership fees and dues payable to a society. (No regulation has been prescribed under this power.)

Disputes over dues and subscriptions are commonplace. One reason why these disputes recur is the vagueness and uncertainty that surround the concept in the *Society Act* and in society bylaws. One way to remedy this problem would be to enact detailed legislative provisions that directly address substantive questions about dues and subscriptions and the procedure for their payment. The disadvantage to such an approach is a perennial problem. Given the diversity of societies, legislative provisions could easily be felt as a rigid and impractical framework in some cases.

Another way to achieve a level of certainty would be to require societies to address this matter in their bylaws. In this way, a balance between certainty and flexibility could be struck. A model for the type of legislative provision that would be required here may be found in the *Strata Property Act*.[273]

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272. *See* Bill 11, *An Act to Amend the Societies Act*, 1st Sess., 26th Parl., British Columbia, 1961, cl. 4 (explanatory note).

273. S.B.C. 1998, c. 43, s. 108 (3).

The committee tentatively recommends that:

> *55. A new Society Act should contain provisions enabling societies to impose membership fees and should require societies that choose to impose membership fees to address the following issues in the bylaws:*
>
> *(a) the purpose of the membership fees;*
>
> *(b) notification of the annual amount of the membership fees;*
>
> *(c) the amount of each member's membership fees; and*
>
> *(d) the date by which the membership fees are to be paid or, if the membership fees are payable in installments, the dates by which the installments are to be paid.*

I. Transferability of Membership

Under section 9 of the *Society Act* a membership interest in a society is not transferable, except as provided in the bylaws. This default rule first appeared in the 1977 Act.[274] It is intended to reflect the fact that, for many societies, becoming a member is a personal commitment that cannot be readily transferred. Where this element of personal commitment is not in evidence, the legislation has the flexibility to allow societies to displace the default rule.

In this instance, the *Society Act* appears to have struck an appropriate balance. Forbidding transfers would be unduly restrictive; permitting them in cases where societies have not restricted them in the bylaws would be out of step with the character of most societies.

The committee tentatively recommends that:

> *56. A new Society Act should contain provisions that restrict transfers of a membership interest in a society, which may be displaced by a society's bylaws.*

J. Good Standing

The concept of "good standing" crops up in two places in the *Society Act*. Section 6 (1) (a) requires a society to have provisions in its bylaws setting out when a member ceases to be in good standing. Section 62 provides that a member cannot vote on a resolution unless that member is a voting member in good standing in accordance with the bylaws.

The words "good standing" first appeared in the legislation in the 1977 Act, but they harken back to older notions of society organization. The concept is not one that is in

274. 1977 Act, *supra* note 43, s. 9.

common use in modern not-for-profit corporate legislation. As a result, "good standing" is poorly understood in practice and creates confusion in application.

As noted, "good standing" is linked to voting in the *Society Act*. In particular, it affects eligibility to vote. Avoiding vague, general language, such as "good standing," and employing a more limited and focussed standard should assist in dispelling some of the confusion over voting disputes.

The committee tentatively recommends that:

> *57. A new Society Act should avoid the phrase "good standing" and should require societies to define when a member is eligible to vote in their bylaws.*

K. Expulsion

Disputes concerning the expulsion of members are among the most contentious of all disputes involving societies. A large body of case law, stretching back to the nineteenth century has built up around these disputes.[275] The courts have shown a large degree of restraint in dealing with cases involving the expulsion of members. They have focussed almost entirely on procedure. The main principles of this jurisprudence is that a society must adhere to any bylaws it has governing the expulsion of members, must not act in bad faith, and must provide a semblance of natural justice (primarily fair notice and an opportunity to be heard).

This common law background is important to note, because the *Society Act* takes a hands-off approach to the expulsion of members. Section 6 (2) (b) requires a society to have provisions in its bylaws addressing the manner, if any, in which a member may be expelled. This is the only provision in the legislation dealing with expulsion.

Some law reform proposals have attempted to codify these common law rules or to move beyond procedure and grant members substantive rights. The appeal of these types of reforms is that they can provide certainty to an area of the law that is in continual development. The danger is twofold. First, there is a risk that the statute will freeze the development of the law at a certain level. Second, there is a risk that the statute will force people into association. In view of these risks, the current approach of the *Society Act* is worthy of being continued.

275. *See, e.g.*, *Dawkins v. Antrobus* (1881), 17 Ch.D. 615; *Young v. Ladies' Imperial Club Ltd.*, [1920] 2 K.B. 523 (Eng. C.A.); *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, 97 D.L.R. (4th) 17.

The committee tentatively recommends that:

> *58. A new Society Act should require societies to have provisions relating to the expulsion of members in their bylaws.*

L. Unanimous Members' Agreement

A "unanimous members' agreement" is the not-for-profit analogue of a unanimous shareholders' agreement. These types of agreements are very common in the for-profit sphere. As the Dickerson Report pointed out, the common law has long been settled that shareholders may agree among themselves ". . . as to the manner in which they will cast the votes attaching to their shares. . . ."[276] But the courts restricted the scope of these agreements to matters falling within the rights and duties of shareholders. Any attempt to bind the parties in their role as directors of a corporation was not allowed.[277] Statutory reforms in the for-profit sphere have overcome this restriction.[278] Unanimous shareholders' agreements are commonly used for a number of commercial purposes.[279] These agreements come in many forms, but the key point is that some of them effect a transfer of some or all of the powers (and corresponding duties and liabilities) of a company's directors to that company's shareholders.

Recent legislation in the not-for-profit sphere has begun to follow the lead of for-profit statutes by authorizing unanimous members' agreements.[280] Proponents of adopting this concept point to the organizational flexibility that it extends to societies as a main selling point. Unanimous members' agreements may also be particularly useful in structuring a society as a private foundation.[281] But these arguments have not been universally ac-

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276. Dickerson Report, *supra* note 46, vol. 1 at 99 (citing *Ringuet v. Bergeron*, [1960] S.C.R. 472; *Motherwell v. Schoof*, [1949] 4 D.L.R. 812; *M.N.R. v. Aaron Ladies Apparel Ltd.* (1967), 60 D.L.R. (2d) 448).

277. Dickerson Report, *ibid.* ("The common law rule is generally stated to be subject to the qualification that the agreements must be for a lawful purpose, and this is generally tested by reference to whether the agreement purports to bind the parties to it not merely *qua* shareholders, but also *qua* directors." [citation omitted]).

278. *See, e.g.*, BCA, *supra* note 54, s. 137; CBCA, *supra* note 74, s. 146.

279. *See* John O.E. Lundell *et al.*, eds., *British Columbia Company Law Practice Manual*, looseleaf, 2d ed., vol. 1, (Vancouver: Continuing Legal Education Society, 2003) at § 15.1 (describing "protection of minority interests," "document[ing] the general agreement between the shareholders and the company," and " 'fill[ing] in the cracks' between the provisions of the *Business Corporations Act* and the articles of the company" in a document that is not necessarily available to the public as the primary purposes for entering into a unanimous shareholders agreement).

280. *See* SK Act, *supra* note 70, s. 136 (2). *See also* Bill C-21, *supra* note 72, s. 170 (1) (members of society that is not a "soliciting corporation" permitted to enter into unanimous members agreement that restricts the powers of directors).

281. *See* Daniel Frajman, "Modernization of corporate laws on private foundations needs to continue" *The*

cepted. The practical utility of unanimous members' agreements in the not-for-profit sphere is limited because most societies—even most small societies—will have too many members to make such an arrangement feasible. There is a sense that implementing provisions enabling unanimous members' agreements would be adopting a fundamentally commercial solution to a problem that does not really exist in the not-for-profit world.[282]

The committee tentatively recommends that:

> *59. A new Society Act should not contain provisions enabling unanimous members' agreements that restrict the powers of directors to manage or supervise the management of the society or that transfer those powers to the members or other persons.*

X. MEETINGS OF MEMBERS

A. Introduction

The provisions relating to members' meetings are largely procedural in nature. The overarching issue raised by them is harmonization with the BCA.

B. Timing of Annual General Meeting

Under section 56 (1) a society is required to hold an annual general meeting not more than 15 months after the date of incorporation. After that first annual general meeting, a society must hold an annual general meeting at least once in every calendar year and not more than 15 months after the date of the adjournment of the last annual general meeting. Section 56 (2) gives the Registrar of Companies the authority to extend the time within which a society is required to hold an annual general meeting. Provisions governing the timing of annual general meetings can be traced back to the 1920 Act.[283] These specific provisions were enacted in 1977[284] and have not been substantially amended since then.

A society must address the business conducted at an annual general meeting to avoid stagnation and to provide a measure of accountability from management to the members.

Lawyers Weekly (26 January 2007) 8.

282. *See* Canadian Bar Association, National Charities and Not-for-Profit Law Section, "Submission on Bill C-21: *Canada Not-for-profit Corporations Act*" (September 2006), online: National Charities and Not-for-Profit Law Section <http://www.cba.org/CBA/submissions/2006eng/06_48.aspx> at 10. *See also* Industry Canada, "Reform of the Canada Corporations Act: The Federal Not-for-Profit Framework Law: Thematic Summary of the Consultations: May 9 to June 19, 2002" (Summer 2002), online: Industry Canada, Corporate and Insolvency Law Policy <http://strategis.ic.gc.ca/epic/site/cilp-pdci.nsf/vwapj/theme_en.pdf/$FILE/theme_en.pdf> at 12 ("Many participants questioned the use of Unanimous Members' Agreements. . . .").

283. 1920 Act, *supra* note 23, s. 28.

284. 1977 Act, *supra* note 43, s. 56.

The timing provisions and the Registrar's discretion set out in section 56 build some flexibility into the requirement to hold an annual general meeting in order to accommodate practical considerations in organizing a meeting. Section 56 is substantially the same as the equivalent provision in the CA,[285] suggesting that harmonization is a subsidiary purpose of this provision.

Harmonization with the new for-profit legislation is the only real issue to consider here. The BCA[286] brought in a few changes to the rules governing the timing of annual general meetings. The BCA allows up to 18 months to elapse before the first annual general meeting after "recognition." ("Recognition" is a defined term that embraces incorporation, amalgamation, and continuation into British Columbia.) The period is keyed to an "annual reference date," which for the purposes of this issue would be the date of an annual general meeting (it could also be the date selected by the shareholders if the company does not actually hold an in-person meeting). Finally, the BCA also grants the Registrar of Companies the discretion to extend the time within which a company is required to hold an annual general meeting.

The additional flexibility afforded by a longer permissible period between annual general meetings would be welcomed by most societies. It is difficult to see how harmonization would produce any harm on this point.

> *60. A new Society Act should contain provisions governing the timing of annual general meetings of societies that are harmonized with the provisions governing the timing of annual general meetings of companies in the Business Corporations Act.*

C. Notice

The *Society Act* contains a rather simple and straightforward section governing the notice required to be given of an annual general meeting. Section 60 requires a society to give not less than 14 days' written notice of a general meeting "to those members entitled to receive notice of a general meeting." Those members entitled to receive notice may waive or reduce the notice period by unanimous consent in writing.

Section 60 is very close to its equivalent in the CA.[287] Both provisions date from a time when the letter was the primary means of written communication. Technology has obviously evolved in new directions since the 1970s. The BCA contains a sophisticated re-

285. CA, *supra* note 44, s. 162.

286. BCA, *supra* note 54, s. 182.

287. CA, *supra* note 44, s. 143 (requiring "21 days' notice of any general meeting of the company").

gime governing the sending of records generally[288] and the sending of notices of general meetings specifically.[289] The issue is whether this regime is appropriate for societies.

The BCA notice requirements are much more complex than their *Society Act* equivalent. Although it simplifies the BCA system considerably, focussing on three discrete issues is a useful way to grasp the differences between the two Acts.

First, the BCA takes a much more flexible approach to the notice period, by allowing a company to establish its own notice period, within a range of 10 to 21 days, in its articles. If no period of at least 10 days is set out in the articles, then a default selection of 21 days applies.

Second, the BCA expressly recognizes sending notices by the use of modern communications media. Both facsimile and electronic mail transmission are prescribed methods of sending notices of general meetings.[290]

Third, the BCA has a more generous rule for the waiver or abridgment of the period for giving notice of a general meeting.[291] Under the BCA, a person entitled to receive notice may agree (in writing or orally) to waive or abridge the notice period; under the *Society Act*, all the members entitled to receive notice must consent in writing to waive or abridge the notice period.[292]

The advantages of the BCA notice provisions are clear. The BCA system is more sophisticated, flexible, and modern than section 60 of the *Society Act*. The disadvantage is that these desirable features come at the cost of greater complexity of drafting. On balance, the positive aspects of the BCA notice provisions outweigh this negative aspect. The complexity of the BCA system may be overcome by drafting changes or by the publication of plain language guidebooks illustrating the operation of the system in a practical, hands-on way.

The committee tentatively recommends that:

> *61. A new Society Act should contain provisions respecting notice of general meetings of societies that are harmonized with the provisions respecting notice of general meetings of companies in the Business Corporations Act.*

288. BCA, *supra* note 54, s. 7.

289. BCA, *ibid*., ss. 169–70.

290. *Business Corporations Regulation*, *supra* note 125, s. 4 (a) (facsimile), (b) (electronic mail).

291. BCA, *supra* note 54, s. 170.

292. *Society Act*, *supra* note 7, s. 60.

D. Location of Meetings

Section 57 of the *Society Act* requires that a general meeting be held in British Columbia, unless the society obtains the approval of the Registrar of Companies for a meeting to be held outside British Columbia. A version of this rule has appeared in the *Society Act* since the original 1920 Act.[293] A provision of this type is intended to encourage participation at meetings of members. (Its utility has been diminished somewhat by advances in technology.) A secondary purpose of section 57 appears to have been harmonization with the CA.[294]

The BCA has adopted a new rule on location of meetings of members. Under section 166 of the BCA, the default rule is that a general meeting must be held in British Columbia. But a company may hold a general meeting outside British Columbia if its location is provided for in the articles or the articles do not restrict the company to holding its meetings in British Columbia and the location of the meeting is approved by the resolution required by the articles. (If the articles are silent on the type of resolution, then it must be an ordinary resolution of the shareholders.) And the Registrar of Companies retains the authority in all cases to approve holding a meeting outside British Columbia.

The issue is whether the *Society Act* should be harmonized with the new rule found in the BCA. The BCA is more generous and flexible on this matter than the *Society Act*. The only reason not to place societies on a similar footing would be to preserve a quality that is inherent to the not-for-profit world. This reason does not appear to be in existence here, as other proposals for reform of the law of not-for-profit societies have adopted rules similar to the one found in the BCA.[295]

The committee tentatively recommends that:

> *62. A new Society Act should contain provisions governing the location of meetings of members that are harmonized with the provisions governing the location of meetings of shareholders in the Business Corporations Act.*

E. Quorum

The quorum for transaction of business at a general meeting is set by section 61 of the *Society Act* at three members, unless the bylaws provide for a higher number. This provi-

293. 1920 Act, *supra* note 23, s. 28 (requiring every society to hold "an annual general meeting" in British Columbia). *See also* 1947 Act, *supra* note 38, s. 29 (broadening the requirement to embrace "every general meeting").

294. *See* CA, *supra* note 44, s. 169.

295. *See* Bill C-21, *supra* note 72, s. 159; SK Act, *supra* note 70, s. 122; ALRI Draft Act, *supra* note 80, s. 52.

sion dates from the 1977 Act.[296] The purpose underlying a statutory quorum requirement is to ensure that a baseline level of the membership is present at a meeting, in order to prevent any action being taken with the approval of only a small minority of members. The challenge here is to articulate a number or formula that works for the broad spectrum of societies. The *Society Act* follows the common approach of setting a low statutory number and allowing individual societies to increase it if that serves their goals.

The main problem with the *Society Act*'s approach to quorum is that it is out of step with the BCA.[297] Under the BCA, the quorum for a general meeting is (1) the quorum established by the articles, (2) if the articles are silent, two shareholders entitled to vote at the meeting, whether present in person or by proxy, or (3) if the number entitled to vote at the meeting is less than the number established by (1) or (2), then the quorum is all of the shareholders entitled to vote at the meeting, whether present in person or by proxy.

The *Society Act* is also missing some useful provisions here that are found in more up to date corporate statutes. For example, the BCA[298] provides that if a quorum is not present at the opening of a meeting of shareholders, then the shareholders (and proxyholders) who are present at the meeting and are entitled to vote may adjourn the meeting to a set time and place but may not transact any other business. The underlying rationale for this provision is to "[preclude] the practice of providing that if a quorum is not present at the opening of a meeting, the meeting shall stand adjourned to a fixed time, when the members then present shall constitute a quorum and may proceed to business."[299] But it is important to notice that the BCA version of this provision[300] is a default rule. A company may choose to override this rule in its articles.[301] So, the BCA provision actually serves the slightly more limited purpose of clarifying the rules around quorum for companies that do not address these issues in their articles.

Bill C-21 and the SK Act also provide that a quorum need only be present at the start of a meeting, and need not be present throughout it. This rule is subject to the society's by-

296. 1977 Act, *supra* note 43, s. 61.

297. BCA, *supra* note 54, s. 172.

298. BCA, *ibid*., s. 172 (2).

299. *See* Cumming Report, *supra* note 47 at 58–59.

300. *See also* Bill C-21, *supra* note 72, s. 164 (4); SK Act, *supra* note 70, s. 129 (3) (both establishing mandatory rules, unlike the BCA).

301. And, in practice, many companies do choose to override this rule. *See British Columbia Company Law Practice Manual*, *supra* note 279 at § 8.63 ("Company articles often state that if a quorum is not present within a specified time after the time appointed for the commencement of the meeting (other than a requisitioned meeting), the meeting will be adjourned to the same hour of the same day of the following week, and often go on to say that if at the adjourned meeting there is no quorum within a half hour from the time appointed for the meeting, the persons present in person or by proxy will constitute a quorum.").

laws.[302] The rationale for this provision is to clarify an uncertainty in the common law. There are conflicting court decisions here—some say that a quorum needs to be maintained throughout a meeting, others say that a quorum need only be present at the start of a meeting.[303]

The committee tentatively recommends that:

> *63. A new Society Act should contain provisions governing the quorum at a meeting of members that are harmonized with provisions governing the quorum at a meeting of shareholders in the Business Corporations Act.*

F. Participation

The *Society Act* has no specific provisions relating to the participation of members at meetings. The implication of this silence is that the legislation only contemplates one model of members' meeting, an in-person face to face meeting. While there are many benefits to this type of meeting, none of these benefits is essential to the operation of societies. Instead, the *Society Act* does not recognize other ways of holding a meeting simply because the legislation has not been amended in 30 years and thus has not kept pace with changes in technology and social attitudes. In contrast to the *Society Act*, the BCA[304] and Bill C-21[305] both enable shareholders or members to participate in (including voting) a meeting by telephone or other communications media if all the shareholders or members are able to communicate with each other. This rule is subject to the company's articles or the society's bylaws. Adapting this rule for members' meetings would make it easier and more efficient for British Columbia societies to conduct their activities.[306]

The committee tentatively recommends that:

> *64. A new Society Act should contain provisions enabling participation in a meeting of members by telephone or other communications media that are harmonized with provisions governing the participation of shareholders in a meeting in the Business Corporations Act.*

302. Bill C-21, *supra* note 72, s. 164 (3); SK Act, *supra* note 70, s. 129 (2).

303. *See* Cumming Report, *supra* note 47 at 59.

304. BCA, *supra* note 54, s. 174.

305. Bill C-21, *supra* note 72, s. 159 (4)–(5).

306. *See also Society Act*, *supra* note 7, s. 25.1 (setting out a substantially similar rule for participation in *directors*' meetings).

G. Proxies

1. General

A proxy is a record by which a shareholder or member of a corporation appoints a person as the nominee of the shareholder or member to attend and act for the shareholder or member at a meeting.[307] The *Society Act* contains a specific rule on permanent or continuing proxies (which is discussed in the next section), but it does not address the general issue of the use of proxies. The benefit of proxies is that they facilitate a form of participation at meetings by members who are not able to be physically present at meetings. This benefit is lessened by new communications technology. The committee's previous tentative recommendation regarding participation at members' meetings will likely have the effect of further reducing the practical utility of proxies. At a more philosophical level, proxies have an air of being a for-profit device that does not fit well with the ethic of public service that marks much of the not-for-profit sector. These points militate in favour of a rule restricting the use of proxies. This rule should not be mandatory, as a given society may have distinct needs that justify the use of proxies.

The committee tentatively recommends that:

> *65. A new Society Act should contain a default rule that prohibits the use of proxies, which may be overridden by a contrary provision in a society's bylaws.*

2. Permanent or Continuing Proxies

Section 63 of the *Society Act* provides that a permanent proxy, which is described as one that entitles the proxyholder to vote at more than one meeting, is void. This is a comparatively old rule, as it dates back to the 1947 Act.[308] This prohibition on permanent or continuing proxies is intended to "ensure that proxies can only be used for the purpose of voting on the questions upon which the shareholder has been given the opportunity to make up his mind. If proxies could be used at subsequent meetings, perhaps to vote on entirely different matters, the whole purpose of the system would be lost."[309]

The issue is whether the prohibition on permanent proxies should be maintained. It is out of step with the BCA, which has no equivalent.[310] It is easy to think of situations where a permanent proxy, or even a proxy that takes effect for more than one meeting, could be of considerable practical use. This imperative rule should not be carried forward in the new legislation.

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307. *See* BCA, *supra* note 54, s. 1 (definition of "proxy").

308. 1947 Act, *supra* note 38, s. 22 (4).

309. Dickerson Report, *supra* note 46, vol. 1 at 102–03, para. 308.

310. *See also* Bill C-21, *supra* note 72 (lacking ban on permanent or continuing proxies).

The committee tentatively recommends that:

> *66. A new Society Act should not prohibit permanent or continuing proxies.*

H. Voting

Nothing in the *Society Act* deals with the mechanics of voting at a general meeting. Sections 7 and 61, which both bear the heading "voting," actually deal with topics addressed earlier in this consultation paper.[311] This absence stands in contrast to the BCA,[312] which sets out a few default rules regarding voting at a meeting of shareholders. These rules relate to voting by poll or show of hands, retention of ballots on a vote taken by poll, and voting by shareholders who are given the right to vote on a specific question, but who do not otherwise have that right.

Voting at members' meetings is often fraught with confusion. Clarity, and answers to specific problems, should be found in the bylaws, but sometimes they are not. And some problems go deeper than the bylaws. A legislative intervention, at least to the extent of setting out default provisions, is needed. The BCA provides a good model for the *Society Act* on this point.

The committee tentatively recommends that:

> *67. A new Society Act should contain provisions relating to the mechanics of voting at a meeting of members that are harmonized with provisions relating to voting by shareholders in the Business Corporations Act.*

I. Resolutions

1. Special and Ordinary Resolutions

Many of the rules regarding special resolutions are found in the definition of the term, which is set out in section 1 of the *Society Act*. The definition establishes the majority and notice requirements for special resolutions. A special resolution is (1) a resolution passed at a general meeting by a majority of not less than 75 percent of votes cast if (a) all the members entitled to vote have received not less than 14 days' notice (or more than 14 days' notice, if a longer notice period is spelled out in the bylaws), specifying the intention to propose the resolution as a special resolution or (b) every member entitled to vote agrees to waive or abridge the notice period described in (b) or (2) a resolution consented to in writing by all the members entitled to vote. The supermajority requirement has fluc-

311. Section 7 establishes the one member–one vote principle. *See*, above, Part Two, Section IX.F at 71. Section 61 addresses when a member may *not* vote—because the member is not in good standing. *See*, above, Part Two, Section IX.J at 73–74.

312. BCA, *supra* note 54, s. 173.

tuated over the years. It was originally set at 3/4 of votes cast in the 1920 Act.[313] In 1947, societies were allowed to choose between a 3/4 majority (which was the default choice) and a 2/3 majority.[314] The current requirement was established by the 1977 Act.[315] Throughout this time the rules governing special resolutions in the *Society Act* have tended to follow the rules set out in the for-profit statute.

The issue here is whether the *Society Act* should be harmonized with the BCA. The BCA[316] requires notice of "at least the prescribed number of days." This prescribed number of days is (1) the period specified in the articles, if that period is at least 10 days or (2) if no period of at least 10 days is specified, 21 days.[317] The majority required to pass a special resolution is the majority specified in the company's articles, so long as that specified majority is at least 2/3 and not more than 3/4 of the votes cast. If the articles do not specify a majority within this range, then the default selection is 2/3, unless the company is one that existed before the coming into force of the BCA, in which case the majority is 3/4.[318]

In addition to the benefits of harmonizing corporate legislation, adopting the BCA rules will give societies more flexibility and control over vital corporate procedures. Harmonizing the rules governing special resolutions has one incidental effect on the rules governing ordinary resolutions. Currently, an ordinary resolution may be passed if 75 percent of the members having the right to vote on it at a meeting consent to the resolution in writing. This figure should be changed to match the range set out in the BCA for special resolutions.

The committee tentatively recommends that:

> *68. A new Society Act should contain provisions governing members' resolutions that are harmonized with provisions governing shareholders' resolutions in the Business Corporations Act.*

2. Filing Special Resolutions with the Registrar of Companies

Under section 66 a special resolution does not take effect until the society files one original and one copy of it with the Registrar of Companies. This requirement has been in

313. 1920 Act, *supra* note 23, s. 2 (definition of "extraordinary resolution").

314. 1947 Act, *supra* note 38, s. 2 (definition of "extraordinary resolution").

315. 1977 Act, *supra* note 43, s. 1 (definition of "special resolution").

316. BCA, *supra* note 54, s. 1 (definition of "special resolution").

317. *Business Corporations Regulation*, *supra* note 125, s. 3.

318. BCA, *supra* note 54, s. 1 (definition of "special majority").

place since 1920.[319] Its purpose is to ensure the existence of an accurate public record of major changes involving a society.

Earlier, the committee made a tentative recommendation to continue requiring societies to file their bylaws and amendments to their bylaws.[320] Most special resolutions will fall into this category. It is both logical and practically expedient to avoid dividing special resolutions into two classes with respect to the filing requirement.

The committee tentatively recommends that:

> *69. A new Society Act should continue to require societies to file all special resolutions with the Registrar of Companies in order to be effective.*

J. Member Proposals

Modern corporate statutes tend to contain provisions allowing shareholders or members to make proposals at general meetings. As the Cumming Report explained, these provisions respond to a deficiency in the common law:[321]

> At common law, the management of a corporation is under no obligation to make any reference in any of the documents sent out by it to any non-management view of the matters to be discussed, nor to include in a notice of meeting any proposals other than its own. . . . This places shareholders wishing to have a matter discussed at a meeting at a severe disadvantage because the meeting cannot effectively do anything not fairly comprehended by the notice of meeting.

The only remedy that a shareholder or member would have in these circumstances would be to band together with other like-minded shareholders or members and requisition a meeting.

Two issues arise in connection with proposals by members. The first is the basic question of whether such provisions should be included in the *Society Act*. Currently, there is no such mechanism in the legislation. This absence leaves members of British Columbia societies in the same position as shareholders at common law. As a result, members are deprived of a useful tool to hold management accountable. The position of the *Society Act* is out of step with modern corporate legislation. Statutes governing for-profit companies[322] and not-for-profit societies[323] have adopted provisions allowing member proposals. The

319. 1920 Act, *supra* note 23, s. 30.

320. *See*, above, Part Two, Section III.B.2 at 21–22.

321. Cumming Report, *supra* note 47 at 57 [citation omitted].

322. *See* BCA, *supra* note 54, ss. 187–91.

323. *See* SK Act, *supra* note 70, s. 127. *See also* Bill C-21, *supra* note 72, s. 163.

prime concern with member proposals is that they will grind down the conduct of members' meetings by wasting time on frivolous or vexatious issues. This danger is real, but it can be managed (and appears in practice to have been managed successfully) by building procedural safeguards into the legislation.

The second issue is the appropriate model for the new *Society Act* provisions. The natural first choice to consider is the BCA. The BCA's rules for member proposals are set out in sections 187–91. These rules are very detailed—they run to four pages of text and are difficult to summarize. Notably, they only apply to public companies. In essence, they allow a shareholder with the right to vote to submit a proposal to be considered at the company's next annual general meeting. This substantive right is supported by lengthy procedural machinery that regulates topics such as the length of time a shareholder is required to hold shares before being allowed to submit a proposal (two years continuously), the number of shares that must be held (at least 1/100 of the issued shares carrying the right to vote), and the length of the proposal (not more than 1000 words). These complex rules are a bit too much in the not-for-profit setting. Not-for-profit statutes, such as Bill C-21 and the SK Act, tend to employ a more streamlined version of these procedures. This streamlined approach is more appropriate for a new *Society Act*.

The committee tentatively recommends that:

> *70. A new Society Act should contain provisions enabling members to make proposals at a general meeting of members that are modelled on provisions governing member proposals in the federal Bill C-21 and the Saskatchewan Non-profit Corporations Act.*

K. Requisitioning General Meetings

Under section 58 of the *Society Act* the directors must convene a general meeting, without delay, on the requisition of 10 percent or more of the voting members of the society. If the directors fail to convene the meeting within 21 days of the date of delivery of the requisition, then the requisitionists or a majority of them may themselves convene the meeting, to be held within four months of the date of delivery of the requisition. If the society is a reporting society, the requisitionists must have their costs reimbursed, unless the members resolve otherwise at the meeting.

The substantive issue regarding requisitions is essentially the same as the substantive issue regarding member proposals: they address the control that the directors exercise over the agenda at a general meeting. The difference here is that the basic issue of whether to have a requisition procedure is relatively settled. The *Society Act* has had requisition pro-

visions since 1977. The main issue in this case, then, is harmonization. Section 58 of the *Society Act* was modelled on an equivalent provision in the CA.[324]

There are a number of differences between the requisition provisions in the *Society Act* and those in the BCA.[325] The BCA allows shareholders who hold at least 1/20 (five percent) of the issued voting shares of a company to requisition a meeting. This threshold is more common than the 10 percent threshold used in the *Society Act*.[326] The BCA provides a limit on the length of materials describing the business to be transacted at the requisitioned meeting (1000 words). The BCA contains detailed provisions setting out the circumstances when the directors are authorized not to call a requisitioned meeting (for example, because the business to be transacted is the subject of a general meeting that has already been called). The BCA has several advantages over the current *Society Act* procedure: the lower threshold makes this provision more accessible to minority groups, and is more in keeping with similar legislation in other jurisdictions; the BCA contains more explicit directions on how the requisition of meetings is supposed to operate; and, it describes the circumstances when the directors are not obliged to comply with a requisition, which clearly limits the potential for abuse.

The committee tentatively recommends that:

> *71. A new Society Act should contain provisions governing the requisition of a general meeting by members that are harmonized with provisions governing the requisition of a meeting by shareholders in the Business Corporations Act.*

L. Jurisdiction of the Court to Call a General Meeting

Section 59 of the *Society Act* permits the Supreme Court, on application of a member, to call or direct the calling of a general meeting if the society fails to hold a general meeting in accordance with the Act, the regulations, or the society's bylaws. Once again, the only real issue here is whether a 1977-vintage *Society Act* provision should be harmonized with the BCA.[327]

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324. CA, *supra* note 44, s. 170. The *Society Act* and the CA did differ on the threshold the requisitionists were required to cross: it is 10 percent of the voting members in the *Society Act* and five percent of the issued shares carrying the right to vote in the CA.

325. BCA, *supra* note 54, s. 167.

326. *See, e.g.*, SK Act, *supra* note 70, s. 133 (1); ALRI Draft Act, *supra* note 80, s. 60 (1); US Model Act, *supra* note 82, § 7.02 (a) (2). *But see* US 2006 Exposure Draft, *supra* note 83, § 7.02 (a) (2) (requiring "the holders of at least 10%, or such other amount up to 25% as the articles of incorporation or bylaws shall specify, of all the votes entitled to be cast on an issue").

327. BCA, *supra* note 54, s. 186.

The BCA sets out a more flexible procedure. The court may grant an order on application of a director, a shareholder entitled to vote, the company, or of its own motion—rather than simply on application of a voting member. The powers of the court are framed somewhat more broadly under the BCA: the court may order that a meeting "be called, held and conducted in the manner the court considers appropriate." Overall, the BCA is more flexible and compendious on this matter.

The committee tentatively recommends that:

> *72. A new Society Act should contain provisions granting the court jurisdiction to call a meeting of members that are harmonized with provisions governing the power of the court to call a meeting of shareholders in the Business Corporations Act.*

M. Consent to Business in lieu of Holding a Meeting

It is not clear whether the members of a society may dispense with holding a face to face meeting by consenting in writing to the business that would be transacted at the meeting. The members may pass an ordinary resolution in the absence of a meeting if that resolution has been submitted to them and at least 75 percent of the members entitled to vote on it consent to it in writing. But section 56 also appears to require an annual (face to face) general meeting of members.

This uncertainty does not exist in the BCA[328] and other modern corporate legislation,[329] which expressly declares that a corporation may consent to the business required to be transacted at a general meeting by passing resolutions in writing in lieu of holding a face to face meeting. It would be helpful to include such a provision in a new *Society Act*.

The committee tentatively recommends that:

> *73. A new Society Act should contain provisions expressly confirming that a consent resolution is as valid and effective as a resolution passed at a duly called meeting of members.*

XI. FINANCIAL

A. Introduction

Many of the provisions governing financial affairs are of importance in defining the not-for-profit character of societies. Others deal mostly with procedural and administrative is-

328. BCA, *ibid*., s. 180.

329. *See* SK Act, *supra* note 70, s. 132; US Model Act, *supra* note 82, § 7.04. *See also* Bill C-21, *supra* note 72, s. 166; ALRI Draft Act, *supra* note 80, s. 59.

sues. The full range of themes—modernization, harmonization, and simplification—is present in the discussion that follows.

B. Share Capital

Section 8 of the *Society Act* provides that "[a] society must not have a capital divided into shares." This rule can be traced back to the 1920 Act.[330] The rationale for this rule has been described as follows: "Share capital regulates the control of a business corporation. It also regulates the distribution of gains and of capital. These latter functions do not sit well with the notion of a non-profit corporation. . . ."[331] Seen in this light, the rule against share capital states one of the core principles of not-for-profit law.

But even this fundamental proposition has been questioned from time to time. For example, the ALRI Report suggested that the prohibition on societies issuing share capital should be lifted. The reasoning was that shares could be useful in some circumstances and allowing societies to issue them would not cause any harm:[332]

> Some private clubs now have share capital, however, and it is at least a convenient device for the transfer of memberships. Also, we are told that some private charitable foundations find share capital a useful device for the transfer of control from the founder to another generation of the family. No doubt, other devices could be devised to perform functions of this kind. We think, however, that people should be left as free to manage their affairs as possible, given no compelling countervailing consideration, and we do not see anything philosophically wrong with the use of this particular device so long as it is not used to distribute gains to members.

That said, there is no evidence of a pent-up demand among societies to use share capital. There is also a danger that removing the restriction on share capital could erode the not-for-profit character of societies.

The committee tentatively recommends that:

> *74. A new Society Act should continue to restrict societies from having capital divided into shares.*

C. Distributions to Members

Section 2 (2) of the *Society Act* provides that "a society must not distribute any gain, profit or dividend or otherwise dispose of its assets to a member of the society without receiving full and valuable consideration except during a winding up or on dissolution and then only as permitted by section 73." (Section 73 permits only the assets of a society that

330. 1920 Act, *supra* note 23, s. 5.

331. ALRI Report, *supra* note 61 at 46.

332. ALRI Report, *ibid.*

does not have a charitable purpose to be paid out to the members on a winding up or dissolution.) This provision implements a fundamental policy feature of not-for-profit law. It is the main mechanism for ensuring that the society's property and funds are applied to further its purposes rather than to enrich its members. The provision has been a part of the legislation from its first enactment in British Columbia.[333]

The policy of preventing the distribution of a society's assets[334] to its members during the society's existence is fundamental to the not-for-profit legal form and should be preserved in a new *Society Act*. The more controversial question is whether exceptions should be permitted to this basic rule. Currently, the *Society Act* does not spell out any exceptions.[335] But this formulation does not mean that all distributions to members are outlawed. Instead, a reader must reconcile this rule with other provisions of the Act that contemplate distributions to members. For example, the *Society Act* contains a number of provisions allowing organizations with insurance purposes to operate as societies.[336] These societies tend to be either fraternal societies or mutual benefit societies, both of which offer a limited range of benefits to their members.[337] Another example is a member successfully suing the society and obtaining a monetary award from the court.[338] In addition, there are a number of exceptions to the rule that have developed out of practical necessity in the absence of an express statutory foundation. For example, a society with purposes that involve the relief of poverty among its membership should be able to pursue these purposes despite this rule.[339] Expressly setting out these exceptions to the general rule would clarify the legislation.

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333. 1920 Act, *supra* note 23, s. 5.

334. The general term "assets" is more accurate in this context than the limited terms "profit or gain," which appear to have been imported into the legislation by analogy with the for-profit concept of paying a dividend on shares.

335. But notice the general language in s. 2 (2) implying that a distribution to a member is acceptable if the society receives "full and valuable consideration."

336. *See, e.g.*, *Society Act*, *supra* note 7, s. 14. *See also Financial Institutions Act*, R.S.B.C. 1996, c. 141, ss. 190–200.

337. *See* Craig Brown, *Insurance Law in Canada*, looseleaf, vol. 1 (Toronto: Thomson Carswell, 2002) at 2-6–2-7 ("Fraternal societies are organizations licensed to enter into non-profit contracts of life, accident and sickness, disability or funeral insurance with their members or members' families. . . . Mutual benefit societies are non-profit organisations such as trade unions licensed to provide limited sickness and funeral benefits for their members only."). *See also Financial Institutions Act*, *ibid.*, s. 193.

338. *See*, below, Part Two, Section XIII at 103–114, for further discussion of members' remedies.

339. *See* OLRC Report, *supra* note 81 at 465; ALRI Report, *supra* note 61 at 26 ("an association established to help refugees should be able to help a refugee who is a member of the association"). *See also*, below, Part Two, Section XI.I at 97–100, for further discussion of financial assistance.

The committee tentatively recommends that:

> *75. A new Society Act should restrict societies from distributing assets to their members during the society's existence, except for:*
>
> *(a) payment of reasonable compensation for goods, services, or other valuable benefits provided by a member;*
>
> *(b) providing financial assistance consistent with the society's constitution, by-laws, and the Society Act;*
>
> *(c) payment of a benefit by a society with insurance purposes; and*
>
> *(d) payments made pursuant to an order of the court.*

D. Financial Statements

The *Society Act* contains a number of provisions applying to financial statements. Sections 39 and 40 relate to providing financial statements to members and approval of financial statements by a society's directors. Under section 51 the financial statements of a society must be amended if facts come to the attention of an officer or director which would have required a material adjustment to the financial statement presented at the last annual general meeting.

Sections 39 and 40 contain references to the distinction between reporting societies and societies that are not reporting societies. This dimension of these provisions (the establishment of different standards for different societies) is discussed later in this consultation paper.[340] Apart from being a prime illustration of the distinction between reporting and non-reporting societies, these provisions are mainly procedural in nature. They only really raise the question of harmonization with the BCA.[341]

Section 39 of the *Society Act* is almost identical to a provision in the CA.[342] The BCA has no exact equivalent. Under BCA, section 185 (1) (c) must "produce and publish" the financial statements on or before the annual general meeting date.[343] "Publish" is a defined term that means, in part, place before an in-person general meeting and deposit in the company's records office (this latter option is important when the shareholders pass a consent resolution in lieu of actually holding an annual general meeting). The sharehold-

340. *See*, below, Part Two, Section XVI.D at 135–36, for further discussion of the reporting society concept.

341. BCA, *supra* note 54, ss. 185, 197–201, 216.

342. CA, *supra* note 44, s. 195.

343. In contrast, section 39 (1) of the *Society Act* only requires *reporting* societies to provide their financial statements to the members before an annual general meeting. The vast majority of societies are not reporting societies.

ers have a right to inspect certain records that a company is required to keep in its records office, including financial statements.[344]

Part 6, Division 2 of the BCA is the equivalent of section 40 of the *Society Act*. There are some differences here too: (1) under the BCA financial statements must be approved by the directors before publication, but that approval need only be confirmed by the signature of one director (as opposed to two, under the *Society Act*); (2) the BCA sets out a procedure for companies to waive the requirement to produce and publish financial statements. A waiver is effective if (1) all the shareholders of the company (that is, those who do *and* those who do not ordinarily have the right to vote) unanimously consent to it or (2) the Supreme Court orders it.

These provisions are ripe for harmonization. The BCA is broadly similar to the *Society Act* in this area, but it offers somewhat greater flexibility.

The committee tentatively recommends that:

> *76. A new Society Act should contain provisions relating to financial statements that are harmonized with the financial statements provisions in the Business Corporations Act.*

E. Investment

Historically, not-for-profit legislation has restricted the power of societies to invest their funds. The *Society Act* is no exception to this position. Section 32 governs the use and investment of a society's funds and property. Subsection (1) contains the general rule that a society's funds and property must be used only for its purposes and in accordance with its bylaws. Subsection (3) sets out a special rule for investments. A society may invest its funds in investments authorized by its constitution or bylaws. A society may also make unauthorized investments, so long as the investment is in accordance with the *Trustee Act*.[345]

Section 32 supports the general policy of incorporation for public purposes other than the making of profits. The fact that the limitation on use of funds and on investment powers is imposed on the society (rather than the directors and officers—that is, the individuals

344. *See* BCA, *supra* note 54, s. 46 (3).

345. *See Trustee Act*, *supra* note 223, ss. 15.1–15.6. The key provision in this group of sections is section 15.1 (1), which authorizes a trustee to ". . . invest property in any form of property or security in which a prudent investor might invest, including a security issued by an investment fund as defined in the *Securities Act*." Sections 15.1–15.6 were enacted by *Trustee Investments Statutes Amendment Act, 2002*, S.B.C. 2002, c. 33, which came into force on 28 February 2003. Prior to this date, section 15 of the *Trustee Act* set out a list of authorized investments for trustees.

who actually make decisions on the use of funds) indicates that it is intended in part to shore up the notion that a society does not have all the powers of a natural person.

Section 32 also provides a measure of accountability to the public—especially those members of the public who may have donated funds to the society. As the Cumming Report put it, "[t]here is always an expectation on the part of the public that the [society] will be held responsible for the use of such monies in accordance with the intended purpose similar to that responsibility commonly understood to be demanded of someone who is a trustee."[346] This analogy between a society and a trust is given further support by subsection (3), which in effect imposes the investment standards trustees are held to on the directors of a society.

The question for this consultation paper is whether this historical restriction on society investment powers continues to make sense today. Some law reform proposals have questioned the need to limit the investment and spending powers of societies. For example, the Cumming Report recommended that legislation expressly declare that all societies are not bound by the investment standards imposed on trustees.[347] (The Cumming Report noted that this legislative declaration would not give societies completely a free hand, as they would still be bound to pursue their not-for-profit purposes, which would rule out an investment strategy purely designed to realize profits.) This recommendation was implemented in Bill C-21, which provides that "[s]ubject to the limitations accompanying any gift and the articles or bylaws, a corporation may invest its funds as its directors think fit."[348]

Apart from the broader philosophical implications of curbs on society investment, there are practical issues to consider. Restrictions on investment limit the ability of society management to respond to changing circumstances. This can have significant consequences, including the potential to undermine decisions and transactions made in good faith. This possibility was at the crux of a noteworthy critique of section 32 by two Vancouver lawyers.[349] The heart of their criticisms was an illustration drawn from practice:[350]

> We were once consulted by a charity which was incorporated under the *Societies Act* in British Columbia in the 1940's as a religious organization to carry on missionary work of a very specific nature. In the 1950's a donor gave them property to start summer camps for children. Gradually the camp ministry became the total focus of their activities, even though it could not be considered an authorized activity by even the most liberal interpretation of the society's purposes. Consequently, by the 1980's they had a million dollar property and hundreds

346. Cumming Report, *supra* note 47 at 33.

347. Cumming Report, *ibid*. at 34.

348. Bill C-21, *supra* note 72, s. 34.

349. MacRae & Bromley, *supra* note 136.

350. *Ibid*. at 2.1.33.

> of thousands of dollars of annual income devoted to an excellent charitable program which was totally *ultra vires.* One would not want to be a director of that organization in the event of a law suit against the Society on behalf of a child who became a quadr[i]plegic as a result of a diving or skiing accident at the camp.

Finally, the recent changes to the *Trustee Act* had the effect of making the *Society Act*'s investment rules into circular logic. A society may now make unauthorized investments, so long as they are the type of investments that a prudent investor would make. By invoking this standard, section 32 gives little assistance to society management.

The committee tentatively recommends that:

> *77. A new Society Act should not restrict how a society uses its funds or makes its investments.*

F. Deposit Accounts

Section 33 of the *Society Act* requires a society to maintain at least one account with a savings institution.[351] This provision was first enacted in 1977.[352] In that earlier version of the provision a society was required to maintain a deposit account with a "chartered bank, credit union, or trust company." This list was amended to the current "savings institution" in 2004.[353] The intent of section 33 is to impose a small measure of financial discipline and regularity on societies.

It is difficult to see the utility of section 33. Most societies would have a deposit account for commonsense reasons. If a society did not, then it is not clear who would enforce this section or what the consequences of breaching it would be. No other Canadian not-for-profit statute imposes a similar requirement. Section 33 adds little to the administration of societies. It should not be carried forward.

The committee tentatively recommends that:

> *78. A new Society Act should not contain a requirement that a society have at least one deposit account at a savings institution.*

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351. "Savings institution" is a defined expression that means "(a) a bank, (b) a credit union, (c) an extra-provincial trust corporation authorized to carry on deposit business under the *Financial Institutions Act*, (d) a corporation that is a subsidiary of a bank and is a loan company to which the *Trust and Loan Companies Act* (Canada) applies, or (e) the B.C. Community Financial Services Corporation established under the *Community Financial Services Act*." *See Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29.

352. 1977 Act, *supra* note 44, s. 33.

353. *Financial Institutions Statutes Amendment Act, 2004*, S.B.C. 2004, c. 48, s. 142 (in force 31 December 2004).

G. Borrowing

1. General

Section 35 of the *Society Act* governs borrowing by societies. Subsection (1) incorporates by reference Division 8 (trust indentures), Division 9 (debentures), and Division 10 (receivers and receiver-managers) of Part 3 of the BCA. This approach has been used since the 1977 Act, which incorporated by reference equivalent provisions from the CA.[354] Section 35 was updated on the repeal of the CA and the coming-into-force of the BCA. This approach has not caused difficulties in practice and is consistent with the broader theme of harmonizing the *Society Act* with the BCA.

The committee tentatively recommends that:

> *79. A new Society Act should contain provisions on trust indentures, debentures, and receivers and receiver-managers that are harmonized with provisions on trust indentures, debentures, and receivers and receiver-managers in the Business Corporations Act.*

2. Authorization of Debentures by Special Resolution

Section 35 (3) of the *Society Act* prohibits a society from issuing a debenture,[355] unless it is authorized by a special resolution. The intent of this provision is to provide an added level of oversight before a debenture may be issued.

The question for this section is whether this additional level of oversight is necessary. The BCA, Bill C-21, and the SK Act are all silent on what type of resolution is needed to authorize the issuance of a debenture. As a result, it is the directors who would have the authority to deal with this matter, as it would come within their general grant of authority to manage or supervise the management of the affairs of the corporation.

This position is superior to the current position of the *Society Act*. As a matter of corporate governance, it is not appropriate to ask the members to approve a financial transac-

354. 1977 Act, *supra* note 43, s. 35.

355. *See Society Act*, *supra* note 7, s. 1 (defining "debenture" by incorporating the definition in the BCA). BCA, *supra* note 54, s. 1 defines "debenture" to "include an instrument, secured or unsecured, issued by a corporation if that instrument is (a) in bearer form or in registered form, (b) of a kind commonly dealt with on securities exchanges or markets, or commonly recognized in any area in which it is issued or dealt in as a medium for investment, and (c) evidence of an obligation or indebtedness of the corporation, but does not include negotiable secured promissory notes maturing within a year after the date of issue." This definition is not particularly helpful. By using the word "includes" it is open-ended. A debenture is commonly understood as any long-term unsecured debt obligation, issued under a type of written agreement called an indenture.

tion; this issue should be left to the directors. Section 4 (2) of the *Society Act* contains a general grant of authority to societies to borrow funds and give security. There is no reason to qualify this general power.

The committee tentatively recommends that:

> *80. A new Society Act should not require societies to obtain a special resolution in order to issue a debenture.*

H. Register of Indebtedness

Section 35.1 of the *Society Act* requires societies to maintain a register of their indebtedness to a director or an officer, or an associate[356] of a director or an officer. The register is a written record that contains the name of the creditor, the date the debt was incurred, the amount, the interest rate, and the due date. This requirement only applies to debts in excess of $5000. Contravening this provision is expressly declared to be an offence.

As is the case for all provisions of this type that require societies to create and maintain certain registers, the purpose of this specific provision is to promote good record-keeping practice and to ensure that members have ready access to certain information about the society that is felt to be important. Section 35.1 is almost identical to a provision that appeared in the CA,[357] so harmonization is a subsidiary purpose here. Notably, the *Society Act* was amended[358] when the CA was repealed and, as a result, was deliberately not harmonized with the BCA on this point.

The main issue here is whether the time is right to harmonize the *Society Act* with the BCA. Section 35.1 provides little assistance in practice. In all likelihood, it is ignored in the majority of cases where it would apply. The BCA did away with a similar requirement for companies, presumably to reduce some of the regulatory burden on them. A similar

356. The *Society Act* does not contain a definition of "associate." It is defined in section 192 of the BCA, *ibid.*, but only in connection with the liability of insiders and the financial assistance disclosure rules. Section 1 of the CA, *supra* note 44, contained a definition of "associate" that is slightly different from the one in section 192 of the BCA. The CA definition of "associate" defined the term to mean "if used to indicate a relationship to a person (a) a corporation of which that person beneficially owns, directly or indirectly, shares that carry more than 10% of the voting rights attached to all shares of the corporation for the time being outstanding carrying voting rights that are at that time capable of being exercised, (b) a partner of that person, (c) a trust or estate in which that person has a substantial beneficial interest or for which that person serves as trustee or in a similar capacity, (d) a spouse, son or daughter of that person, or (e) a relative of that person or of that person's spouse, other than a relative referred to in paragraph (d), who has the same house as that person."

357. CA, *ibid.*, s. 75.

358. *See Business Corporations Amendment Act, 2003, supra* note 113, s. 287.

rationale would apply to societies and a similar benefit would flow to them if this requirement were not carried forward.

The committee tentatively recommends that:

> *81. A new Society Act should not require societies to maintain a register of indebtedness.*

I. Financial Assistance

1. GENERAL

The *Society Act* has never contained provisions specifically addressing financial assistance given by a society to certain individuals, such as directors, officers, or members. This absence is somewhat unusual, since laws regarding financial assistance have been a feature of most corporate statutes in the British Commonwealth until very recently.

Simplifying this topic greatly, the issues here arise from two fundamental principles. First, a corporation is a separate legal person and therefore should be able to use its property as it sees fit. Second, a corporation could be effectively controlled by one individual or a group of individuals, but it would clearly be undesirable and unfair to allow those individuals to use the corporation's property wholly for their own personal benefit, to the exclusion of others—such as minority shareholders, creditors, or employees.

Corporate statutes have tended to focus on a few discrete issues involving financial assistance. For instance, most Canadian and Commonwealth statutes prohibit a company from giving a loan or other type of financial assistance for the purpose of purchasing shares issued, or about to be issued, by the company. The historical origins of this prohibition go back to the period just after World War I. Speculators in the United Kingdom caused great public concern by purchasing shares in a company using the company's own credit, taking control of it, and then distributing its profits without regard to any business rationale for doing so.

Canadian statutes have tended to go even further than English and other Commonwealth statutes in prohibiting financial assistance. Many Canadian statutes contain a version of a provision that prohibits financial assistance in circumstances where the company is insolvent or would be rendered insolvent by the transaction. In British Columbia, the CA also prohibited the giving of financial assistance directly or indirectly by loan, guarantee, the provision of security or otherwise in certain specific circumstances.[359]

These provisions in the CA caused great consternation among corporate lawyers and the business community because, in practice, it is rather difficult to prove a negative (that is,

359. CA, *supra* note 44, ss. 102–03.

that a given transaction can go ahead without contravening the financial assistance rules because the transaction will not render the company insolvent). The CA financial assistance provisions ultimately had the effect of deterring otherwise legitimate commercial transactions. Attempts to fix the provisions by fine-tuning the balance between the two fundamental principles referred to above arguably only made things worse, as the provisions grew to be incredibly convoluted.

One of the big selling points of the BCA was that it did away with the CA's financial assistance provisions. The BCA made a clean break with the traditional Canadian approach to financial assistance. The BCA expressly authorizes companies to give financial assistance in all circumstances.[360] (Of course, other statutes, such as the *Fraudulent Conveyance Act*[361] or the *Bankruptcy and Insolvency Act*,[362] may prohibit certain transactions.) Instead of prohibiting a transaction, the BCA only requires that the company disclose it, usually by means of depositing a description of it in the company's records office, where it may be inspected by shareholders or former shareholders. (This description considerably simplifies the BCA's disclosure scheme. It is actually a very detailed attempt to balance the rights of shareholders to know the details of certain transactions with the commercial necessity to keep other transactions confidential.) The thinking appears to be that shareholders, creditors, and others can take the necessary steps to protect their interests, so long as they are armed with the knowledge of financial assistance transactions involving company insiders. The BCA provisions have been generally well-received; there is no indication (yet) that they have resulted in abuses by insiders.

For the purpose of this consultation paper, the question is whether a new *Society Act* should follow the BCA, adopt a more restrictive model, or carry on without mentioning financial assistance.

Having no provisions relating to financial assistance does not mean that financial assistance would be acceptable in all circumstances. There are common law rules that would apply in the absence of a statutory provision. These rules, which are vague and ill-defined, appear to involve subjecting the transaction to a best-interests test. (A transaction that was in the best interests of the society would be acceptable.) In addition, other provisions of the *Society Act*, such as the prohibition on distribution of assets to members, may curb some financial assistance transactions. The problem with this approach is that it would not catch all financial assistance transactions. And the uncertainty of the common law rules makes it hard to find a firm footing. In practice, there may be few financial assistance transactions or there may be many taking place just under the radar. The absence of any provision in the *Society Act* that restricts a society from giving financial assistance

360. BCA, *supra* note 54, s. 195.

361. R.S.B.C. 1996, c. 163.

362. R.S.C. 1985, c. B-3.

could lead some people to believe that giving financial assistance is acceptable in all but the most outrageous of cases.

The BCA approach appears to have proved its merits in the for-profit realm. But adopting it as a model for *Society Act* provisions does raise questions about its suitability for the not-for-profit realm. Adopting the BCA provisions could be seen as courting greater commercialization of the not-for-profit realm. Expressly allowing financial assistance transactions could also undermine the not-for-profit character of societies.

The last option is to include general provisions in the *Society Act* restricting financial assistance. This is the best solution to a difficult problem. It is most in keeping with the norms of the not-for-profit sector.[363] Having express rules will also bring certainty to this area of the law. The danger is that this approach will degenerate into a repeat of the experience under the CA. This risk may be reduced by avoiding the trap that the CA fell into when it was amended to include a convoluted series of exceptions to the general rule. Other British Columbia statutes have employed a clearer version of financial assistance rules than was adopted in the CA. For example, the provisions of the *School Act*[364] relating to companies formed by school boards were recently amended[365] by adding the following sections:

Financial assistance restricted

95.412 A company must not give financial assistance to a person, directly or indirectly, by way of loan, guarantee, the provision of security, or otherwise, unless there are reasonable grounds for believing that, or the directors are of the opinion that, the giving of the financial assistance is in the best interests of the company.

When loans and guarantees prohibited

95.413 (1) Without limiting section 95.412, a company must not give financial assistance to a person, directly or indirectly, by way of loan, guarantee, the provision of security, or otherwise, if

(a) at the time of the giving of financial assistance the company is insolvent, or

(b) in the case of a loan, the giving of the loan would render the company insolvent.

363. *See* SK Act, *supra* note 70, s. 27; ALRI Draft Act, *supra* note 80, s. 76.

364. R.S.B.C. 1996, c. 412.

365. *Business Corporations Amendment Act, 2003, supra* note 113, s. 259 (in force 29 March 2004).

(2) The court, on the application of a director of a company, may declare that, in view of all the circumstances, the company is insolvent, or that the proposed giving of financial assistance would render the company insolvent.

Contract enforceable

95.414 Despite a contract to which a company is a party being made in contravention of section 95.412 or 95.413, a good faith lender for value without notice, or the company, may enforce the contract.

These provisions do not necessarily have to be copied directly into a new *Society Act*, but they may serve as a model of what is needed to address financial assistance in a new *Society Act*.

The committee tentatively recommends that:

82. A new Society Act should contain general provisions restricting financial assistance.

2. DIRECTORS

This general discussion of financial assistance raises one specific subsidiary issue. This question is whether financial assistance from a society to its directors should be permitted at all. Given the power that directors have to manage or supervise the management of the society, and the duties that come with that power, the committee has concluded that financial assistance to directors cannot be justified in any context. A mandatory rule is needed to ensure that it does not take place, with one exception: indemnification of a director by a society.[366]

The committee tentatively recommends that:

83. A new Society Act should contain a specific rule that prohibits financial assistance to directors in all circumstances, except for cases of indemnification.

XII. AUDITS

A. Introduction

Audit provisions are largely procedural in nature. For the purposes of this consultation paper, they raise the issue of harmonization with the BCA. Two aspects of the audit process are singled out for more extended discussion: the requirement to have an audit and audit committees.

366. *See*, above, Part Two, Section VIII.E at 57–58.

B. Audits—Requirement

Section 41 (1) of the *Society Act* provides that a reporting society must have an auditor. A society that is not a reporting society may choose whether or not to have an auditor. The vast majority of societies are not reporting societies. For them, the decision whether or not to have an auditor is not dictated by statute.[367] This hands-off approach to an audit requirement has been a part of the *Society Act* since 1920.[368]

Audits promote financial accountability and integrity. Most corporate statutes take a position that differs from section 41 of the *Society Act*. For example, under the BCA, the starting position is that all companies must have an auditor. (By contrast, the starting position in the *Society Act* appears to be that a society that is not a reporting society will not have an auditor; that is, a society must pass a resolution to appoint an auditor, but if it does nothing, it will not have an auditor.) But any given company may waive this requirement by passing a unanimous resolution. (A unanimous resolution is a resolution consented to in writing by *all* the shareholders of the company—whether or not their shares ordinarily carry the right to vote). Waivers are permitted for the same reason why most societies are given a choice whether or not to appoint an auditor: the costs of an audit may be onerous in some cases and there may be no real need to engage an auditor. Practically, the BCA makes it possible for small companies to waive the requirement to have an auditor, but it becomes progressively more difficult to obtain a waiver by unanimous resolution as the company grows in size. Waivers under the BCA are only valid for one financial year.

Some proposals for reform of the not-for-profit sector have picked up on requirements similar to those found in the BCA. For example, both Bill C-21[369] and the SK Act[370] require the members of a society to appoint an auditor in each financial year. In both cases, provision is made to waive this requirement on somewhat more generous terms than the unanimous resolution required under the BCA.[371]

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367. Of course, the absence of a legislative audit requirement does not mean that societies have a free hand in deciding whether or not to have an auditor. For many societies, this decision will be guided by the views of funding bodies and others.

368. 1920 Act, *supra* note 23, s. 22 (1) and Schedule B, item (6).

369. Bill C-21, *supra* note 72, s. 180.

370. SK Act, *supra* note 70, s. 149.

371. *See* Bill C-21, *supra* note 72, s. 181 (if a society's annual revenues were below an amount that would have been set by regulation, then the society could have waived this requirement, so long as all the members of the society consented to this waiver); SK Act, *ibid.*, ss. 150–51 (For a membership society, not less than 2/3 of the members—including those members not ordinarily entitled to vote—must consent to the resolution required. A charitable society, on the other hand, may only waive the requirement if its revenues were less than $250 000 in the previous fiscal year, but it must appoint another qualified person to conduct a review of its financial statements. If the charitable society's revenues in the previous fiscal year were less than $25 000, then it may waive the requirement to appoint

The difficulty with these types of audit requirements is that they may saddle many societies with expensive and time-consuming new obligations. Although none of these provisions is framed in strictly mandatory terms, they do make obtaining a waiver rather difficult. Societies tend to have broader and more dispersed membership compared to the shareholders of a typical private company. It is accordingly much more difficult for them to obtain a unanimous resolution or a resolution requiring the assent of a high percentage of voting and non-voting members. A requirement that societies obtain these kinds of resolutions each year in order to waive the audit requirement will likely not be met in many cases, forcing some societies to submit to audits when it makes no financial sense.

The committee tentatively recommends that:

> *84. A new Society Act should not require societies to appoint an auditor.*

C. Audits—General Provisions

The *Society Act* contains a handful of provisions that relate to audits of reporting societies.[372] These provisions are incomplete and, in the main, restate requirements that were found in the CA.[373] Worse, on their face they (for the most part) only apply to the small class of reporting societies.

The gaps and out of date rules currently found in the *Society Act* do little to assist societies that decide to engage an auditor. What is needed is a comprehensive legislative framework that lays down a set of largely procedural rules, dealing with such topics as the appointment, qualifications, independence, remuneration, and removal of auditors. As well, it would be useful to sketch out auditors' basic rights and duties. This framework exists in the BCA.[374] It is readily adaptable to societies.

The committee tentatively recommends that:

> *85. A new Society Act should have general provisions on audits that are harmonized with the audit provisions in the Business Corporations Act.*

D. Audit Committee

One aspect of the rules regarding audits deserves special comment. There is a trend in corporate legislation to require companies to have independent audit committees, which

an auditor or other qualified person. In both cases, the resolution must be consented to by not less than 80% of the members—including those members not ordinarily entitled to vote.).

372. *Society Act*, *supra* note 7, ss. 41–55.

373. CA, *supra* note 44, ss. 178–99.

374. BCA, *supra* note 54, ss. 202–20.

will give some additional protection to shareholders.[375] The BCA requires all public companies to have an audit committee.[376] In the not-for-profit sector, best practices in the area of audits recommend the use of an audit committee.[377] The committee favours enshrining this principle in legislation, both to harmonize the *Society Act* with the BCA and to extend the protections inherent in an independent audit committee to those societies that choose to engage an auditor.

The committee tentatively recommends that:

> *86. A new Society Act should require all societies that decide to engage an auditor to form an audit committee.*

XIII. MEMBERS' REMEDIES

A. Introduction

The *Society Act* has only a very limited set of members' remedies. This puts it odds with the mainstream of corporate law as it has emerged in Canada after the early 1970s. Expanding the provisions setting out members' or shareholders' remedies was part of a sort of grand bargain. The reformed corporate statutes of the 1970s did away with most of the formalistic requirements that had acted as a check on management. This gave management more scope to act—both for the benefit and potentially for the detriment of the corporation. Coupled with the statutory changes, there was also a withdrawal of highly involved and intrusive government oversight of corporations. The idea was to make corporate legislation self-enforcing. Granting more expansive remedies to shareholders would ". . . obviat[e] the need for sweeping administrative discretion and harsh penal sanctions, and, at the same time, forc[e] resolution of the issues before the courts, which have the procedures, the machinery and the experience to enable them better than any other institution to deal with such problems."[378] The current *Society Act* was only partly transformed in the 1970s. It contains a mix of members' remedies and formalistic checks. As these checks (and government oversight) have eroded in practice, there has been more pressure brought to bear on the few members' remedies in the legislation. This pressure could be alleviated by enshrining a modern, comprehensive set of members' remedies in the legislation.

375. *See* BCA, *ibid.*, ss. 224–26.

376. BCA, *ibid*., s. 223.

377. *See, e.g.*, Broadbent Commission Report, *supra* note 3 at 25; Donald J. Bourgeois, *Charities and Not-for-Profit Administration and Governance Handbook* (Markham, ON: Butterworths, 2001) at 9, 27.

378. Dickerson Report, *supra* note 46, vol. 1 at 158.

B. Investigations

Section 84 of the *Society Act* governs investigations of societies. Under section 84, the Registrar of Companies is obligated to report to the Minister of Finance if it appears that the affairs of a society fall within certain specified types of conduct. Upon receiving this report, the minister may decide to appoint a person to investigate into the affairs and conduct of the society. The bulk of section 84 has not changed since it was enacted in 1947.[379] The offence provision in subsection (5) is a relative newcomer to the section. It was enacted in 1977.[380]

The Cumming Report contains a helpful description of the policy goals that legislation like section 84 is intended to achieve. The statutory investigation system ". . . is designed to serve two purposes. First, it is a valuable weapon in the armoury available to members as protection against mismanagement. . . . [Second,] there is a particular public interest in the proper conduct of corporate affairs in respect to charitable corporations. . . ."[381]

A new *Society Act* should continue to have investigation provisions, as they are an important legislative safeguard for both the interests of the society's membership and the interests of the general public. Investigations are also a useful tool for rooting out mismanagement. So the question for this consultation paper is not whether or not to have investigation provisions but rather what shape those provisions should take.

Section 84 has two major problems that hamper its use. First, under section 84 the Minister of Finance is authorized to appoint an investigator. Modern statutes are more likely to grant this authority to the courts.[382] Courts are generally better placed than ministries to engage in the type of decision-making that this section requires. Second, section 84 only authorizes the appointment of an investigator on the report of the Registrar of Companies. Again, most modern statutes allow a member to apply to court for an order appointing an investigator.[383] This fulfills one of the purposes of the provision, which is to function as a tool for members to combat mismanagement.

The BCA has modern provisions on investigations.[384] Under the BCA, a shareholder may apply to court for an order to appoint an investigator. The BCA provisions also contain more helpful detail governing the course of an investigation of a company. But the BCA contains two rules that may not be appropriate in the not-for-profit realm. First, a share-

379. 1947 Act, *supra* note 38, s. 51.

380. 1977 Act, *supra* note 43, s. 85 (5).

381. Cumming Report, *supra* note 47 at 84.

382. *See, e.g.*, SK Act, *supra* note 70, s. 214 (2).

383. *See, e.g.*, SK Act, *ibid.*, s. 214 (1).

384. BCA, *supra* note 54, ss. 248–55.

holder or shareholders may only apply to court if they hold in the aggregate at least 1/5 of the issued shares in the company. The rationale for this threshold requirement is to spare a company's management from vexatious investigations. This rationale may be appropriate in a for-profit setting, but it could also be onerous if it were applied to societies. Shares in a company and memberships in a society are not exactly parallel. In most cases, it would be much more difficult to get 1/5 of the membership of a society to agree to apply to court (especially in cases where they have no financial interests at stake) than it would be to get shareholders holding 1/5 of the issued shares of a company (which could be in the hands of as little as one person) to do the same. The involvement of the courts in the process also should have the effect of reducing frivolous or vexatious applications. Second, the BCA does not make provision for the Registrar of Companies to apply to court. Again, this decision makes more sense in the for-profit than in the not-for-profit realm. As the Cumming Report pointed out: [385]

> Because the interest of a member is non-pecuniary, he does not have the immediate self-interest of the shareholder of the business corporation. The member may well be less motivated than the shareholder to take action. It is therefore essential that the Registrar be able to initiate an investigation of the not-for-profit corporation.

Several proposals for reform of the not-for-profit sector have provisions that both avoid the threshold requirement for commencing an application (for example, 1/5 of the membership consenting to the application) and allow the Registrar of Companies (or its equivalent) to sustain an application.[386] These proposals serve as a better model for the investigation provisions in a new *Society Act*.

The committee tentatively recommends that:

> *87. A new Society Act should contain provisions allowing a member or the Registrar of Companies to apply to court for an order to appoint a person to investigate a society.*

C. Derivative Actions

A derivative action is a court proceeding brought by members or shareholders on behalf of a corporation. These proceedings are called "derivative actions" because the cause of action "derives" from the corporation. To understand the nature of derivative actions and why they are significant it is necessary to set out the historical background from which derivative actions arose.

385. Cumming Report, *supra* note 47 at 84.

386. *See* Bill C-21, *supra* note 72, ss. 240–47; SK Act, *supra* note 70, ss. 214–21; ALRI Draft Act, *supra* note 80, ss. 93–103.

It is a fundamental principle of corporate law that corporations (either for-profit companies or not-for-profit societies) are entities separate from their shareholders or members. This basic principle has some far-reaching consequences. One of these consequences has to do with who enforces a corporation's rights when wrongs are done to it. Since the nineteenth-century English decision in *Foss v. Harbottle*,[387] the position of the common law has been that only the corporation, and not its members or shareholders, can sue in the name of the corporation. The rationale for this rule is that the corporation is a legal entity that is separate from its members or shareholders, and its affairs are managed by a board of directors.[388]

Stated simply, the rule in *Foss v. Harbottle* seems like nothing more than a commonsense proposition. The difficulties with the rule usually crop up in cases involving mismanagement. In most instances, the mismanagement will cause harm to the corporation, but not necessarily to the members or shareholders personally. Since the directors get to decide whether or not to commence proceedings on behalf of the corporation, the dissatisfied members or shareholders are put in the unhappy position of having to convince the directors effectively to sue themselves.

So, a strict application of the rule in *Foss v. Harbottle* would have the effect of shutting down legitimate claims involving mismanagement.[389] In response to this concern, the courts have carved out a number of exceptions to the rule. It is now settled that a member or shareholder may sustain a proceeding if the actions complained of are: (1) actions that are *ultra vires*—that is, outside the scope of the corporation's powers or affairs, as set out in its corporate charter;[390] (2) actions amounting to a fraud on a minority group of members or shareholders; (3) actions that cannot be ratified by an ordinary resolution—for example, because the action requires authorization by a special resolution; or (4) actions that affect the member's or shareholder's personal rights.

Since the *Society Act* does not contain provisions authorizing derivative actions, the rule in *Foss v. Harbottle* and these specific exceptions continue to apply to societies.[391] The initial question, then, is whether a new *Society Act* should authorize derivative actions.

387. (1843), 2 Hare 461, 67 E.R. 189 (Ch.).

388. *See Hamilton v. Bell*, 2006 BCCA 243, [2006] 6 W.W.R. 1 at para. 11.

389. And, it should also be pointed out, the rule is not restricted to claims involving mismanagement. It applies equally to claims against third parties.

390. *See*, above, Part Two, Section V.B at 32–35, for further discussion of the doctrine of *ultra vires.*

391. The rule also applies to other types of British Columbia corporations. *See McGauley v. British Columbia* (1989), 39 B.C.L.R. (2d) 223 (C.A.) (cooperative associations); *Ang v. Spectra Management Services Ltd.*, 2002 BCSC 1544, [2002] B.C.J. No. 2506 (QL) (strata corporations).

Practitioners and academics have harshly criticized both the rule in *Foss v. Harbottle* and the exceptions to the rule.[392] They have brought forward a number of criticisms over the years. First among these criticisms is that the rule and its exceptions are overly formalistic. For example, a shareholder who could frame a rather trivial instance of mismanagement as an *ultra vires* act could sustain a proceeding, whereas gross mismanagement, if it could not be placed within one of the categories of exceptions, could not form the basis of a proceeding. Second, the exceptions can be extremely difficult to apply in practice. There are a number of old cases that show the courts struggling to decide where a shareholder's personal rights end and the rights of the corporation begin. These specific criticisms are convincing. The *Society Act* should authorize derivative actions, so members and directors of British Columbia societies are not left with the navigating the outdated and convoluted common law rules on this point.

The form of the proposed derivative action should also be considered. The approach taken in most modern statutes has been to preserve the substance of the rule in *Foss v. Harbottle* (corporations and their members or shareholders are still considered to be separate persons at law), but to streamline the procedure that a shareholder or member must employ to commence and sustain an action on behalf of the corporation. British Columbia reformed its rules for for-profit companies with the enactment of the CA in 1973.[393] The BCA provisions also adopt this approach of streamlining procedure.[394] Under the BCA, a shareholder or director still has to apply to court for leave to sue in the name of the company. But instead of applying the old formal common law exceptions to the rule in *Foss v. Harbottle*, the court is directed to consider if (1) the shareholder or director made reasonable efforts to get the directors to commence or defend the proceeding, (2) notice has been given to the company and any other affected person, (3) the shareholder or director is acting in good faith, and (4) it is in the best interests of the company for the proceeding to be commenced or defended. If the shareholder or director can meet these tests, then the action may proceed. The key substantive point to bear in mind here is that the action is *on behalf of* the company or, to use the language of the BCA, commenced to enforce a right, duty, or obligation owed to the company or to obtain damages for a breach of a right, duty, or obligation owed to the company. The shareholder or director who has actual carriage of the action does not receive damages or any other remedy personally if the action is successful. There is a high degree of procedural similarity between the BCA and the major not-for-profit models for reform.[395]

392. *See, e.g.*, Dickerson Report, *supra* note 46, vol. 1 at 161 (". . . we have relegated the rule [in *Foss v. Harbottle*] to legal limbo without compunction, convinced that the alternative system recommended is preferable to the uncertainties—and obvious injustices—engendered by that infamous doctrine").

393. CA, *supra* note 44, s. 201.

394. BCA, *supra* note 54, ss. 232–33.

395. *See* Bill C-21, *supra* note 72, s. 244; SK Act, *supra* note 70, ss. 223–24; ALRI Draft Act, *supra* note 80, ss. 125–26; US Model Act, *supra* note 82, § 6.30; US 2006 Exposure Draft, *supra* note 83, §§ 7.40–7.48.

The committee tentatively recommends that:

> *88. A new Society Act should contain provisions enabling a member or director of a society to sustain a derivative action in the name of the society.*

D. Compliance or Restraining Orders

Unlike most corporate statutes, the *Society Act* does not contain a provision that allows a member to apply to court for an order directing management to comply with the statute, the regulations, or the corporation's charter, or an order restraining management from committing a breach of the statute, the regulations, or the corporation's charter. The question here is whether it should.

An example of such a provision is found in the BCA.[396] The BCA allows a shareholder (or any other person whom the court considers to be appropriate) to apply to court for a compliance or a restraining order. The provision sets out the circumstances in which such an application may take place. If a company or any director, officer, shareholder, employee, agent, auditor, trustee, receiver, receiver manager, or liquidator contravenes or is about to contravene a provision of the BCA or the *Business Corporations Regulation* or the company's memorandum, notice of articles, or articles, then an order may be sought. The court is authorized to make any order it considers appropriate in the circumstances, including an order (1) directing the person to comply with or refrain from contravening the provision, (2) enjoining the company from disposing of or receiving property, rights, or interests, or (3) requiring compensation be paid to the company or other party to an impugned contract. An applicant's rights under this provision are expressly declared to be in addition to any other legal rights that the applicant may have.

A much more limited version of this idea appeared in the CA.[397] The CA provision only authorized the court to issuing compliance or restraining orders to companies that had express restrictions on their business or powers. Since few for-profit companies have these restrictions, the CA provision was rarely used. The expanded BCA provision has not had much time to build up a body of case law.

The concept of authorizing the court to issue compliance or restraining orders is not distinctly tied to for-profit companies. This type of provision could also be of use for societies. Bill C-21, the SK Act, and the ALRI Draft Act all contain provisions that are similar to the one found in the BCA.[398]

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396. BCA, *supra* note 54, s. 228.

397. CA, *supra* note 44, s. 27.

398. Bill C-21, *supra* note 72, s. 257; SK Act, *supra* note 70, s. 231; ALRI Draft Act, *supra* note 80, s. 133. *See also Strata Property Act*, *supra* note 273, s. 165.

The ability to apply for a compliance or a restraining order would be even more helpful in the not-for-profit setting than it is in the for-profit setting. For example, this remedy could be used if a board of directors was ignoring the society's purposes. This remedy could also be used for cases of non-compliance that did not amount to mismanagement. In fact, section 85 of the *Society Act* already contains some of the elements of this remedy, but it does not go nearly far enough, as a comparison with the BCA or the major proposals for not-for-profit reform show.

The committee tentatively recommends that:

> *89. A new Society Act should contain provisions authorizing the court to make a compliance order or a restraining order.*

E. Oppression Remedy

There is no section in the *Society Act* that expressly grants a member the right to apply to court for a remedy from oppressive or unfairly prejudicial acts. But society members do have access, after a fashion, to a corporate oppression remedy. The path to this remedy is rather convoluted. Section 71 (1) of the *Society Act* incorporates by reference Part 9 (Dissolution and Restoration) of the CA, as though Part 9 of the CA had not been repealed. Under section 271 (1) of the CA, a member (among others) may apply to court to wind up (terminate) a society, on the ground that it is just and equitable to wind up the society. Under section 272 of the CA, the court, in hearing such an application, may, instead of winding up the society, make an order under section 200 of the CA, which is the oppression remedy section of the CA.[399]

The question for this section is whether it is appropriate for a new *Society Act* to contain the oppression remedy. Since one of the options for reform is to reject the oppression remedy, it is important to set out some background on the oppression remedy and to consider the common law, as it would apply if an oppression remedy were not included in a new *Society Act*.

Disputes are bound to occur whenever people gather themselves together to pursue a common purpose. Within a corporation, a majority group of members or shareholders has considerable power to harm the interests of a minority group. Aggrieved minority members or shareholders invariably turned to the courts for a remedy. The position of the common law, however, was to keep the courts out of these disputes, except in the most

399. *See Whittal v. Vancouver Lawn Tennis & Badminton Club*, 2005 BCCA 439, 43 B.C.L.R. (4th) 280 at para. 25, Ryan J.A. (for the court) ("It is common ground that s. 71(1) of the *Society Act*, R.S.B.C. 1996, c. 433, permits members to advance claims for oppression under s. 200 of the *Company Act*, R.S.B.C. 1996, c. 62.").

extreme cases. Chief Justice McEachern provided a good summary of the common law in *Nystad v. Harcrest Apartments Ltd.*:[400]

> At common law, the court was reluctant to intervene in corporate affairs. Nineteenth century corporate theory was based on freedom of contract: the articles of a company [*i.e.*, the equivalent to the bylaws of a society] were a contract and only there, or in a very limited statute, could the party's rights be found. Generally, majority rule free from the scrutiny of the court was the governing principle, regardless of the potential unfairness to minority shareholders.
>
> There were, however, limits to this tolerance and the court developed a limited common law remedy for oppression. The court imposed a duty on the majority to act bona fide in the best interests of the company, including the minority shareholders. The application of this principle was narrowed by requiring the impugned conduct to be directed specifically at the minority. The court also ignored a ratification by shareholders of some wrong to the company where the wrongdoers had committed a fraud on the minority. Fraud in this context usually involves some taking of the corporation's property and giving it to the majority. Finally, the court also used its statutory power to wind up a corporation where it was "just and equitable" to do so. Before the court would do this, there had to be oppressive conduct—a lack of probity and fair dealing, a treating of the company's assets as the wrongdoer's own, or harsh, unfair conduct.

Some proposals for reform have recommended not including an oppression remedy in the not-for-profit statute. The reason for excluding this remedy is due its perceived economic rationale and commercial character. For instance, the ALRI Report said that:[401]

> . . . the economic interests of members in [societies] are characteristically less great than the interests of shareholders in business corporations, and the division between ownership and control is characteristically less, so that the need for protecting the personal interests of members is less. We think that on the whole, the need for protection is not substantial enough to outweigh the degree of interference with corporate proceedings which is involved in the oppression remedy. . . .

This proposal would leave this area to be governed by the common law. But the common law position has two major problems. First, the tight restrictions that the courts imposed on when they would act meant that minority members or shareholders often had to suffer patently unfair treatment without the hope of obtaining a remedy. Second, and even more troubling, when a suitably extreme case did reach the courts, the remedies available were limited to one—a winding up of the corporation. In a winding up, the corporation's debts are paid off, any remaining assets are distributed to the shareholders or members (or, if the corporation has a charitable purpose, distributed to its designated beneficiaries), and the corporation's existence is terminated. This extreme result can be worse for all concerned (including the aggrieved minority) than the oppressive conduct that caused the problem in the first place.

400. (1986), 3 B.C.L.R. (2d) 39 at 42–43 (S.C.) [citations omitted].

401. ALRI Report, *supra* note 61 at 63–64.

These problems with the common law have prompted statutory reforms in many jurisdictions. Since 1960, British Columbia has had a statutory oppression remedy that applies to for-profit companies.[402] That provision has developed into section 227 of the BCA, which contains the current version of the oppression remedy. Under the BCA a shareholder (or any other person who the court considers to be an appropriate applicant) may apply to court if (1) the affairs of the company are being or have been conducted, or the powers of the directors are being or have been exercised, in a manner that is *oppressive* to one or more of the shareholders or (2) some act of the company has been done or is threatened to be done, or some resolution of the shareholders has been passed or is proposed, that is *unfairly prejudicial* to one or more of the shareholders. The italicized words set out the two tests for obtaining a remedy under this section. They are distinct tests: an applicant only has to show one or the other, not both. Case law has described "oppressive" conduct as conduct that is burdensome, harsh, or wrongful, or that lacks probity or fair dealing. Unfairly prejudicial conduct has been described as conduct that limits or injures a shareholder's rights or interests in a way that is unfair, unjust, or inequitable.[403] So, it is still only extreme conduct that will result in a remedy for an aggrieved shareholder. The courts have even pointed out that "prejudicial" conduct is acceptable, since the section requires an additional element of "unfairness."[404] The main advance over the common law is in terms of remedies. The court is no longer limited to ordering the winding-up of the company. Under the BCA, the court now has a wide jurisdiction to "make any interim or final order it considers appropriate." For good measure, the statute goes on to list 18 examples of the types of orders that may be made.

The extension of the oppression remedy to not-for-profit societies has been more controversial than, say, the extension of the derivative action. This controversy springs from the fact that the oppression remedy was crafted mainly to be of service in economic disputes. The Dickerson Report expected that the remedy ". . . will be invoked most frequently—but not always—in respect of a corporation the shares of which are held only by a relatively small number of persons . . ." in the following types of cases: ". . . where dominant shareholders appoint themselves to paid offices of the corporation, absorbing any profits that might otherwise be available for dividends; the issue of shares to dominant shareholders on advantageous terms; or the repeated passing of dividends on shares held by a minority group."[405] Since these situations are not relevant for societies, reformers have justified adopting an oppression remedy in legislation governing societies on the basis of

402. *See Companies Act Amendment Act, 1960*, S.B.C. 1960, c. 8, s. 15.

403. *See* Stephen Antle, Stephen T.C. Warnett, & J. Tracy Li, "And Now For Something Slightly Different: The British Columbia Oppression Remedy," in Scott A. Turner *et al.*, eds., *Shareholders' Remedies* (Vancouver: Continuing Legal Education Society of British Columbia, 2006) 2.1 at 2.1.5–2.1.6.

404. *Ibid.* at 2.1.6.

405. Dickerson Report, *supra* note 46, vol. 1 at 162.

the other rationale for the remedy. This other rationale is to uphold the reasonable expectations of the parties. So, for example, the Cumming Report reasoned that an oppression remedy is necessary in legislation governing societies ". . . to protect the member's reasonable expectations in the fulfillment of his non-pecuniary interest through the corporation's activities."[406] This rationale has been accepted by the drafters of Bill C-21 and the SK Act, both of which contain an oppression remedy.[407]

The economic aspect of the oppression remedy does not make it the best fit with the not-for-profit sector, but, on balance, there is more to be gained by including the oppression remedy as part of full complement of members' remedies than by leaving it out. Inclusion would modernize the law by enacting a considerable advance over the current common law position, particularly in respect of remedies. Including an oppression remedy in a new *Society Act* also promotes harmonization with the BCA and with some of the leading proposals for reform of the not-for-profit realm. Further, the oppression remedy has become part of the legal landscape for societies in British Columbia. Not including it in a new *Society Act* would be felt as a step backward.

The committee tentatively recommends that:

> *90. A new Society Act should contain provisions allowing a member or other person that the court considers appropriate to apply to court for a remedy from oppressive or unfairly prejudicial acts.*

F. Right of a Member to Dissent from Fundamental Changes to a Society

The *Society Act* does not contain a provision allowing a member to dissent from a fundamental change to the society. This right is commonly set out in corporate statutes, particularly for-profit statutes. The question is whether it should be included in a new *Society Act*.

The idea underlying the dissent remedy is a simple one. Where there has been a fundamental change in the direction of a corporation, one that a person in a minority position strongly disagrees with, sometimes the best solution is for that person to leave the corporation. Majority decisions will not always rise to the level of oppressive or unfairly prejudicial conduct or mismanagement that would support a derivative action. But a minority member or shareholder may still feel aggrieved by certain fundamental transactions, such as a change in the objects or purposes that a corporation wishes to pursue or a decision to amalgamate with another corporation. Having made the decision to leave, the problem is now a financial one for the person with a minority interest. That person may have a considerable amount of money invested in the membership interest or shares in the corpora-

406. Cumming Report, *supra* note 47 at 88.

407. Bill C-21, *supra* note 72, s. 251; SK Act, *supra* note 70, s. 225.

tion. But there is usually no market available in which to sell the minority interest. As a result, the person faces an unappealing choice: either stay on through a fundamental change that the person profoundly disagrees with or leave and suffer what may be a significant monetary loss.

Legislation has created a remedy for this problem. The remedy allows a shareholder or member to give the corporation a notice of dissent. The dissent may only be given in certain limited circumstances. These circumstances involve the proposal of a transaction that would result in a fundamental change in the direction of the corporation—such as amalgamation with another corporation or continuation under the laws of another jurisdiction. The dissent triggers a process that is intended to result in the corporation buying out the minority interest at a value that is determined to be the equivalent of its fair market value (if there were a market for the interest). Disputes over the valuation of the minority interest are referred to court.

As may be expected, this problem arises more frequently in the for-profit realm than in the not-for-profit realm. Sections 237–47 of the BCA constitute an example of the dissent remedy in a for-profit statute. But one of the not-for-profit models for reform also contains a dissent remedy. This remedy is found in the SK Act.[408] Under the SK Act's provisions, a member of a membership society (that is, a member who may have a share of the society's residual property on winding up—not a member of a charitable society) may give a notice of dissent if the society is subject to a an order that affects that member in a reorganization under the SK Act or the *Bankruptcy and Insolvency Act*[409] or if the society resolves to: (1) change its constitution to add, change, or remove restrictions on the transferability of memberships; (2) change its constitution to add, change, or remove any restrictions in the society's activities; (3) amalgamate with another society; (4) be continued under the laws of a jurisdiction outside Saskatchewan; or (5) sell, lease, or exchange all or substantially all of its property. (In addition, if a membership society has classes of members, a member of a class that is affected by a change to the society's constitution that adds, changes, or removes any provisions relating to that class may dissent.) Giving a dissent sets in motion a highly choreographed procedure that is aimed at producing a fair value for the member's interest in a reasonable period of time. If the society and the dissenting member cannot agree on a fair value for the membership interest within the statutory timeframe, then the dispute is resolved before the court.

The dissent remedy can clearly only have very limited application in the not-for-profit sector. An instance where it could apply would be a private club, such as a golf club, that had organized itself as a society. Since the remedy really only protects economic interests

408. SK Act, *ibid*., ss. 177–81.

409. *Supra* note 362.

it is not relevant to the vast majority of disputes involving members and societies. The other members' remedies should adequately cover the field.

The committee tentatively recommends that:

> *91. A new Society Act should not contain provisions allowing a member to dissent from a fundamental change to the society.*

XIV. SOCIETY ALTERATIONS

A. Introduction

A society alteration is a transaction that results in a fundamental change in a given society's characteristics. Examples of society alterations are amalgamation with another society or conversion into a company. The *Society Act* has some rather out of date provisions and some major gaps in this area. The theme in the discussion that follows is modernization.

B. Amalgamation

The rules governing amalgamation under the *Society Act*, which are found in section 17, are very old. A section governing amalgamation has been a feature of the legislation since the original Act.[410] This section has been amended, in small measure, in 1947,[411] in 1977,[412] and in 2004.[413] Remarkably, the substance of section 17 has changed little since 1920. This is even more remarkable when one realizes that amalgamation provisions appeared in the *Society Act* 40 years before their first appearance in British Columbia's for-profit legislation.[414]

Amalgamation under Canadian law has been described as "a legal means of achieving an economic end."[415] Amalgamating corporations desire to fuse together or "create a homogeneous whole" without terminating "the continued existence of the constituent [corporations]."[416] This result cannot be achieved without great difficulty (if it is possible to achieve it at all) at common law, so statutory provisions are necessary to facilitate the

410. 1920 Act, *supra* note 23, s. 37.

411. 1947 Act, *supra* note 38, s. 40 (adding the exception for societies with insurance purposes).

412. 1977 Act, *supra* note 43, s. 17 (reorganizing the section and adding subsection (2)).

413. *Society Amendment Act, 2004*, *supra* note 53, s. 17 (amending references to schedules and specific forms to references to forms established by the Registrar of Companies).

414. *See Companies Act Amendment Act, 1960*, *supra* note 402, s. 14.

415. *R. v. Black & Decker Manufacturing Co. Ltd.* (1974), [1975] 1 S.C.R. 411 at 420, 43 D.L.R. (3d) 393, Dickson J. (for the court) [*Black & Decker* cited to S.C.R.].

416. *Black & Decker*, *ibid.* at 421.

amalgamation of corporations. The issues for this consultation paper are threefold: (1) should amalgamation provisions be a part of a new *Society Act*? (2) if amalgamation is included in a new *Society Act*, should the current model be retained? (3) if the current model is not retained, what model should be adopted in a new *Society Act*?

The first issue raises the basic question of whether procedures governing amalgamation are necessary in the not-for-profit setting. From time to time, some commentators have questioned their appropriateness in this sphere. For example, a leading textbook notes that "[p]ractically . . . amalgamation of [societies] is a rare phenomenon, the more popular approach being for [societies] to abandon their charter and start a new organization."[417] In a similar vein, the ALRI Report took the initial position that ". . . amalgamation machinery was unnecessary."[418] These comments raise a number of points. First, amalgamations are complex transactions. In most (if not all) cases, they require legal advice. Second, the primary reason for an amalgamation is economic. Amalgamation yields a number of economic benefits, particularly in respect of taxation, that cannot be achieved by using other means to combine corporations. The implicit rationale for not including amalgamation provisions in legislation governing societies is that societies would never want to enter into such sophisticated, profit-driven transactions. The flaw in this rationale is that there will always be some societies that *do* want to amalgamate. This decision need not be taken solely for economic reasons; the societies may simply think that combining forces will afford them with a better means to achieve their purposes. And, having made this decision, they may want the legal certainty that comes with following a procedure that is spelled out in the governing statute. So, the policy question comes down to whether or not to create amalgamation procedure for the handful of societies that might want to use it.[419]

Since the *Society Act* has included amalgamation procedures from its inception in 1920, the consensus on the basic policy question in this province has, in all likelihood, been resolved in favour of including amalgamation provisions. But the nature of amalgamation under the current *Society Act* provisions is open to debate. Under most Canadian corporate statutes, amalgamation operates in the manner described in the leading Supreme Court of Canada case on the topic:[420]

> The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be.

417. R. Jane Burke-Robertson & Arthur B.C. Drache, *Non-Share Capital Corporations*, looseleaf (Toronto: Thomson Carswell, 2004) at 7-2.

418. ALRI Report, *supra* note 61 at 59.

419. In its final recommendations, the ALRI Report, *ibid.*, concluded (at 59) that amalgamation procedures were required. Burke-Robertson & Drache, *supra* note 417, at 7-2, also endorsed using statutory amalgamation procedures over informal methods of combination.

420. *Black & Decker*, *supra* note 415 at 422.

This result comes about by virtue of the governing statute; there is nothing inherent in the nature of amalgamation that dictates it. (In fact, most American and British corporate lawyers would be surprised to learn that amalgamation typically works this way in Canada.) The challenge here is that the *Society Act* appears to proceed on a different model. Rather than continuing the former societies into one surviving society, the *Society Act* declares that the former societies are "dissolved," refers to the amalgamated society as a "new" society, and adopts the procedures used for the incorporation of a society to the constitution of the amalgamated society. In another context, these types of features were held to take an amalgamation of British Columbia Special Act corporations out of the Canadian mainstream, resulting in retroactive statutory liability that would have ordinarily attached to an amalgamating corporation not flowing through to the amalgamated corporation.[421] Section 17 of the *Society Act* could be seen as representing a deliberate policy choice to have amalgamation of societies operate in this eccentric manner. But it is more likely that the markedly different legal landscape of the 1920s, drafting clumsiness, and benign neglect account for the current articulation of the *Society Act*'s amalgamation provision. Even if it were the result of a deliberate policy choice, it would not be worth preserving. The concept that amalgamating societies dissolve into a new society is not only out of step with contemporary corporate law, it creates innumerable problems in practice.[422]

Once the broader policy questions regarding the inclusion and underlying philosophy of the amalgamation provisions are answered, there still remain a vast number of smaller policy issues. Most of these issues are procedural. They can best be illustrated by means of a chart comparing section 17 of the *Society Act* with the amalgamation provisions found in typical modern corporate statutes.[423]

Society Act (s. 17)	**BCA** (ss. 269–87)	**Bill C-21** (ss. 202–08)	**SK** (ss. 168–73)	**ALRI** (ss. 83–87)
Amalgamation agreement				
• not required	• required (unless short form amalgamation); must include	• required (unless short form amalgamation); must include at		

421. *See British Columbia Hydro & Power Authority v. British Columbia (Environmental Appeal Board)*, 2003 BCCA 436, 17 B.C.L.R. (4th) 201. *See especially* Newbury J.A.'s comment at para. 55: ". . . the statutory dissolution of B.C. Electric . . . could leave no doubt that it did not 'live on' in any sense—formal, substantive, or metaphysical."

422. For example, consider a gift made in a will to an amalgamating society. Many societies rely on such gifts as an important part of their fundraising plans. But if the amalgamating society is "dissolved," then the gift fails. There is no saving provision in the legislation to convert the gift to the amalgamating society into a gift to the new society.

423. *See* BCA, *supra* note 54, ss. 269–87; Bill C-21, *supra* note 72, ss. 202–08; SK Act, *supra* note 70, ss. 168–73; ALRI Draft Act, *supra* note 80, ss. 83–87.

Society Act (s. 17)	BCA (ss. 269–87)	Bill C-21 (ss. 202–08)	SK (ss. 168–73	ALRI (ss. 83–87)
	at least o names and prescribed addresses of individuals who will become directors o manner of exchanging shares o any details necessary to perfect amalgamation o articles and form of amalgamation application	least o mandatory information for articles and bylaws o names and addresses of proposed directors o manner of converting memberships o (SK) if any membership interests will not be converted and if member is entitled to dissent, acknowledgment that such members are to receive the fair value of their membership interests o if bylaws of an amalgamating society will be adopted or, if not, copy of new set of bylaws o any details necessary to perfect amalgamation		
Authorization required from corporation				
• special resolution (of voting members)	• resolution passed by special majority of voting and non-voting shareholders; and • separate special resolution of any class or series affected by amalgamation; or • if short form amalgamation, either directors' resolution or special resolution of (voting) shareholders required	• special resolution (all members—both voting and non-voting—have right to vote); and • separate special resolution of a class of members if certain class rights are affected; or • if short form amalgamation, only a directors' resolution is required		
Statutory declaration from a director or an officer				
• not required	• required if application is made without court approval; must declare o company has either entered into amalgamation agreement or is using short form procedure o company has given notice to creditors o no serious objection by a creditor o not aware of any court order, or application for a court order, that amalgamation not proceed	• required; must declare o reasonable grounds for believing that each amalgamating society can pay liabilities as they come due and realizable value of assets greater than liabilities o reasonable grounds for believing that no creditor will be prejudiced *or* adequate notice has been given to all known creditors and there are no serious objections		

Society Act (s. 17)	BCA (ss. 269–87)	Bill C-21 (ss. 202–08)	SK (ss. 168–73	ALRI (ss. 83–87)
Notice to creditors				
• not required	• not required, if a director or an officer can swear to reasonable grounds for believing that no creditor will be materially prejudiced by the amalgamation • if director or officer cannot so swear, then notice is required o if court approval is sought, to all creditors who have sent written notice to registered office must be given at least 14 days' notice of date, time, and place of hearing and are entitled to be heard o if court approval is not being sought, to each known creditor of amalgamating corporations who has a claim that exceeds $1000 *and* amalgamating corporations must publish a notice in a newspaper that is distributed generally in the place where the company has its registered office	• not required, if a director or an officer can swear to reasonable grounds for believing that no creditor will be materially prejudiced by the amalgamation • if director or officer cannot so swear, then adequate notice is required • "adequate notice" for the purposes of the statute defined as o notice in writing sent to each known creditor with a claim exceeding the prescribed amount (ALRI: $1000) o notice published once in a newspaper that is published or distributed in place where corporation has its registered office o each notice must state that the corporation intends to amalgamate with one or more specified corporations and that a creditor may object		
Dissent by shareholder or member				
• not allowed	• allowed—if long form amalgamation • not allowed—if short form amalgamation	• (Bill C-21 and ALRI) not allowed • (SK) allowed—if long form amalgamation • (SK) not allowed—if short form amalgamation		
Approval given by				
• Registrar of Companies	• Supreme Court or • Registrar of Companies (N.B. amalgamating companies may choose one method or the other)	• Registrar of Companies		
Short form amalgamation				
• not available	• vertical (amalgamation of holding company with one or more subsidiaries) and • horizontal (amalgamation of two or more subsidiaries of	• (Bill C-21 and SK) vertical (amalgamation of holding society with one or more wholly-owned subsidiaries) and • (Bill C-21 and SK) horizontal		

Society Act (s. 17)	BCA (ss. 269–87)	Bill C-21 (ss. 202–08)	SK (ss. 168–73	ALRI (ss. 83–87)
	the same holding company)	(amalgamation of two or more wholly-owned subsidiaries of the same holding body corporate) • (ALRI) not available		
Amalgamation involving a society with a charitable purpose				
• allowed	• not applicable	• (Bill C-21) allowed • (SK) allowed, but if one of the amalgamating societies is a charitable society, then the amalgamated society must be a charitable society • (ALRI) society with constraints on the distribution of income or property to a member, director, or officer during its existence and on dissolution may only amalgamate with a society that has the same constraints		
Amalgamation involving a foreign entity				
• not allowed	• allowed	• not allowed		
Effect of amalgamation				
• after issuance of certificate of incorporation to new (amalgamated) society, the former societies are dissolved, and all property and rights of the former societies pass to and vest in the new society • amalgamation does not adversely affect the rights of a creditor of a former society and the new society is liable for all debts and obligations of the former societies • on production of the required evidence, an estate or interest in land of a former society must be registered in the name of the new society, without liability for fees calculated according to the value of the estate or interest	• amalgamating corporations continue as one amalgamated company as of date and time amalgamation application is filed with Registrar of Companies and o property, rights, and interests of each amalgamating corporation continue as property, rights, and interests of amalgamated company, o amalgamated company continues to be liable for the obligations of each amalgamating corporation, o an existing cause of action, claim, or liability to prosecution is unaffected, o a legal proceeding by or against an amalgamating corporation may be continued by or against the amalgamated company, and	• amalgamating societies continue as one amalgamated society as of the date shown on the certificate of amalgamation and o property of each amalgamating society continues as property of amalgamated society, o amalgamated society continues to be liable for the obligations of each amalgamating society, o an existing cause of action, claim, or liability to prosecution is unaffected, o a civil, criminal, or administrative proceeding pending by or against an amalgamating society may be continued by or against the amalgamated society, and o a conviction against, or ruling, order, or judgment in favour of or against, an amalgamating society may be enforced by or against		

Society Act (s. 17)	BCA (ss. 269–87)	Bill C-21 (ss. 202–08)	SK (ss. 168–73	ALRI (ss. 83–87)
	○ a conviction against, or a ruling, order, or judgment in favour or against, an amalgamating corporation may be enforced by or against the amalgamated company, *but* • the amalgamation does *not* constitute an assignment by operation of law, a transfer, or any other disposition of the property, rights, or interests of an amalgamating corporation to the amalgamated company	the amalgamated society		

This chart gives a sense of how the law on amalgamating societies needs to evolve in British Columbia. There is not much difference between the provisions of the BCA and those of Bill C-21, the SK Act, and the ALRI Draft Act. In order to promote harmonization of British Columbia corporate law, the BCA is the favoured model for amalgamation under a new *Society Act*.

The committee tentatively recommends that:

> *92. A new Society Act should contain provisions governing amalgamation of societies that are harmonized with the amalgamation provisions in the Business Corporations Act.*

C. Conversion

1. SOCIETY TO COMPANY

A society may apply to the Registrar of Companies to be converted into a (for-profit) company under the BCA by virtue of section 74 of the *Society Act*, so long as the society does not have a charitable purpose. Section 74 can be traced back to the 1977 Act.[424] The provision was amended slightly in 2006.[425] The purpose of this section is to provide a relatively streamlined procedure to societies that make the decision to carry on as a for-profit company. This facility results in a considerable savings in time and money over the alternative, which would be a series of transactions aimed at dissolving the society and re-constituting it as a company.

424. 1977 Act, *supra* note 43, s. 74.

425. *Finance Statutes Amendment Act, 2006*, S.B.C. 2006, c. 12, s. 79 (modernizing the organization of the provision and dispensing with the requirement for the Minister of Finance to consent to the conversion).

The issue to be considered here is not the procedure of conversion (which is likely as streamlined as it is ever going to be), but rather the merits of the underlying policy. There are three options to consider. Conversions could not be permitted. This is the position of most not-for-profit Acts in Canada, including the SK Act and Bill C-21. On the other hand, conversions could be allowed for all societies. This approach was proposed in QC Consultation Paper, where liberalization of Québec's currently very restrictive laws on this point was touted as being "just and equitable" toward the different forms of organizing individuals.[426] A registered charity, of course, would have to deal with the negative tax consequences of conversion to a for-profit company, but the underlying theory is that the statute should be flexible enough to leave this decision to the charity's membership. The third approach is essentially a compromise position, which would allow only non-charitable societies to convert into for-profit companies. The *Society Act* has taken this position since 1977.

The conversion of a not-for-profit entity to a for-profit entity would create all kinds of difficulties in practice. Even more troubling is the message sent at the theoretical level. It could serve to erode the clear differences between the not-for-profit and the for-profit spheres. There is a possibility for abuse here that could harm the not-for-profit sector with the general public. Since the provision is rarely used, its absence likely will not be felt by the vast majority of societies.

The committee tentatively recommends that:

> *93. A new Society Act should not contain provisions allowing a society to convert itself into a company.*

2. Society to Other Not-for-Profit Entity

This issue is a corollary of the previous issue. Why should societies be limited to converting themselves to a for-profit company? It is anomalous that a conversion to a for-profit company is currently allowed under the *Society Act*, while conversions to other entities that have historic ties to the not-for-profit sector are not.

Other not-for-profit legislation takes a more generous approach to conversion. Under Bill C-21,[427] for example, a federal society would have been authorized to apply for continu-

426. QC Consultation Paper, *supra* note 75 at 39 [BCLI translation].

427. Bill C-21, *supra* note 72, s. 211 (2). The Acts specified were the *Bank Act*, S.C. 1991, c. 46, the *Canada Cooperatives Act*, S.C. 1991, c. 1, the *Cooperative Credit Association Act*, S.C. 1991, c. 48, the *Insurance Companies Act*, S.C. 1991, c. 47, and the *Trust and Loan Companies Act*, S.C. 1991, c. 45.

ance under other federal statutes. A similarly generous approach to conversion is employed in the US 2006 Exposure Draft.[428]

The options in British Columbia are somewhat more limited than at the federal level or in the United States. In fact, at present, the only other entity with ties to the not-for-profit sector is the cooperative association.[429] These longstanding ties[430] make is acceptable to provide for the conversion of societies into cooperative associations. In addition to including provisions to implement this tentative recommendation in a new *Society Act*, the Legislature should also consider amending the *Cooperative Association Act* to permit cooperative associations to convert into societies.

One other point is worth mentioning. Currently, the default form of collective not-for-profit activity is the unincorporated not-for-profit association. The law of British Columbia treats these associations as agglomerations of individuals rather than as entities with distinct legal status separate from their members. As a result, it is not appropriate at this time to recommend that a new *Society Act* contain provisions authorizing the conversion of societies into unincorporated not-for-profit associations. But the law in this area may be changing. The Uniform Law Conference of Canada is currently engaged in a project to create a harmonized legal framework for unincorporated not-for-profit associations in North America.[431] One of the conclusions of this project may be to recommend legislation conferring entity status on unincorporated not-for-profit associations. If this should come to pass, then the Legislature should consider amending the *Society Act* to authorize conversions of societies into unincorporated not-for-profit associations and *vice versa*.

The committee tentatively recommends that:

> *94. A new Society Act should contain provisions allowing a society to convert itself into a cooperative association.*

428. US 2006 Exposure Draft, *supra* note 83, § 9.50 (authorizing conversion of a society into a domestic unincorporated entity or a foreign unincorporated entity—if the laws of the foreign jurisdiction permit it). The term "unincorporated entity" embraces a range of organizational forms—from unincorporated not-for-profit associations to partnerships, limited liability companies (LLCs), and business trusts.

429. *See Cooperative Association Act*, S.B.C. 1999, c. 28.

430. It is possible, through rather rare, for a cooperative to be a registered charity. *See* Richard Bridge, "Co-operatives and Charity Law" (February 2003), online British Columbia Co-operative Association <http://www.bcca.coop/pdfs/Co-opCharityLaw.pdf> at 3 (noting that, as of the date of the paper, there were approximately 10 000 active cooperatives in Canada and of these 375 had registered charitable status).

431. *See supra* note 7.

D. Arrangements

This topic is mainly about harmonization with the BCA. The BCA contains a wide-ranging power for a company to propose and carry out fundamental changes to its makeup and affairs which may affect creditors, shareholders, and other persons.[432] There is really no limit on the types of arrangements that may be proposed, but implementing an arrangement requires the company to obtain the consent of a majority (at least—sometimes a special majority is required) of affected shareholders, creditors, and other persons and to obtain the approval of the court.

The appeal of harmonization in this case is rather clear. The arrangement provisions are enabling. They give societies enhanced flexibility to respond to challenges in trying circumstances. Court oversight limits the possibility that this power could be abused. Finally, there is nothing to indicate that arrangements are incompatible with societies, as these types of provisions are found in modern not-for-profit legislation.[433]

The committee tentatively recommends that:

> *95. A new Society Act should contain provisions governing arrangements with members, creditors, or other persons that are harmonized with provisions regarding governing arrangements in the Business Corporations Act.*

E. Disposal of Undertaking

This topic is primarily concerned with modernizing the law. A "disposal of the undertaking" of a corporation is the sale, lease, exchange, or disposal by any other means of all or substantially all of the corporation's property. The *Society Act* is silent on this issue, which means that British Columbia societies are governed by the common law. "The common law position," as summarized in the Cumming Report, "appears to be that the directors have complete powers to dispose of the entire undertaking of a [society] without consulting the shareholders or members."[434]

The vast majority of modern corporate statutes have modified the common law rules. The approach taken is consistent in its broad outlines. The legislation confirms the authority of the directors to dispose of the undertaking of the corporation if the transaction takes place in the ordinary course of the corporation's business (the word used in for-profit statutes) or in the ordinary course of the corporation's activities (the word used in not-for-profit statutes). But if the transaction is an extraordinary transaction, then it must be authorized

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432. BCA, *supra* note 54, ss. 288–99.

433. *See* SK Act, *supra* note 70, s. 183. *See also* Bill C-21, *supra* note 72, s. 214.

434. Cumming Report, *supra* note 47 at 74. The Cumming Report cited as authority for this proposition the British Columbia case *Daniel v. Gold Hill Mining Co.* (1899), 6 B.C.R. 495 (S.C.).

by a special resolution of the shareholders or members. This is the key point of the statutory reforms. The legislation gives the shareholders or members a say in whether the corporation should make an extraordinary disposition of all or substantially all of its property.

There is considerable potential for mischief inherent in the common law rules. The *Society Act* should be brought into line with other corporate statutes on this point.

A subsidiary issue concerns the model for the *Society Act* provisions. The BCA contains one form of provisions governing the disposal of a corporation's undertaking.[435] The other form is found in some of the major not-profit-models for reform.[436] These models agree on the main points, but they have a few differences in detail. In general, the BCA is less restrictive than the not-for-profit models. The main differences are found in the following topics:

- **Voting.** Under the not-for-profit models all members (both voting and non-voting) are allowed to vote on the special resolution. Under the BCA, non-voting shareholders do not have the right to vote.
- **Application to certain transactions.** The BCA sets out a number of situations where the requirement to obtain a special resolution does not apply (for example, it does not apply if the disposition is by way of a security interest or a lease with a term that does not exceed three years). These exceptions are not found in the not-for-profit models.
- **Application to transactions with related corporations.** Under the BCA, it is not necessary to obtain a special resolution for transactions with related corporations (for example, a wholly owned subsidiary). The not-for-profit models do not contain these exceptions.

There are virtues to both positions. As a general point, it is better for practical reasons to avoid differences in detail between the *Society Act* and the BCA, unless those differences have a firm grounding in not-for-profit principles that must be preserved. No such principles are at stake here.

The committee tentatively recommends that:

> *96. A new Society Act should contain provisions governing the power to dispose of a society's undertaking that are harmonized with provisions governing the disposal of a company's undertaking in the Business Corporations Act.*

435. BCA, *supra* note 54, s. 301.

436. Bill C-21, *supra* note 72, s. 212; SK Act, *supra* note 70, s. 176 (3)–(10); ALRI Draft Act, *supra* note 80, s. 90.

F. Transfer of Incorporation

Transfer of incorporation is commonly referred to as "continuation." It involves two aspects. A corporation incorporated in British Columbia may be continued under the laws of another jurisdiction. This is called "continuation out." On the other hand, a corporation incorporated under the laws of another jurisdiction may be continued under the laws of British Columbia. This is called "continuation in." (These transfers of incorporation are also sometimes called "exporting" and "importing" a corporation.) Continuation is a statutory transaction; legislation is necessary to effect it. The *Society Act* does not permit continuations. The question is whether a new *Society Act* should?

Corporations seek to transfer their incorporation to another jurisdiction for a variety of reasons. In the not-for-profit realm, a continuation is often effected to reflect a shift in the location of the majority of a society's membership. Some other reasons for continuing a corporation include (1) to facilitate an amalgamation, (2) to take advantage of the availability of a preferred corporate name, and (3) to exploit variations in corporate legislation.[437] Because of the way in which continuation provisions have been framed in Canadian corporate legislation, it is difficult to see anyone using them to further a fraudulent or malicious purpose.[438] Instead, the continuation provisions act as time- and money-savers for those few corporations that want to use them, as these corporations could often achieve the same results by employing a complex, awkward, and, ultimately, costly set of alternative transactions. For this reason, most modern corporation statutes, both for-profit[439] and not-for-profit,[440] contain provisions enabling the transfer of incorporation.

The committee tentatively recommends that:

> *97. A new Society Act should contain provisions permitting the continuation of societies out of British Columbia and the continuation of foreign not-for-profit bodies into British Columbia.*

437. *See British Columbia Company Law Practice Manual*, *supra* note 279, vol. 1 at § 11.104.

438. Despite the transfer of incorporation into a new legal frameworks, the laws governing continuation are uniform in declaring that no new corporation results from the process and that the continued corporation remains liable for all debts and obligations incurred before continuation.

439. *See* BCA, *supra* note 54, ss. 302–11.

440. *See* SK Act, *supra* note 70, ss. 174–75. *See also* Bill C-21, *supra* note 72, ss. 209–11; ALRI Draft Act, *supra* note 80, ss. 58–59.

XV. LIQUIDATION, DISSOLUTION, AND RESTORATION

A. Introduction

Liquidation, dissolution, and restoration involve questions that are primarily procedural in nature and that raise the broader matter of harmonization with the BCA. But there is one exception here. The topic of disposal of assets on dissolution goes to the heart of the not-for-profit nature of societies.

B. Dissolution—General Principles

Section 71 of the *Society Act* deals with the dissolution of societies, and its approach to this issue is a little unusual. Instead of setting out provisions to govern the dissolution of societies, section 71 instead directs readers to the CA. Even though the CA has been repealed, section 71 expressly preserves the dissolution rules in Part 9 and makes them applicable to societies through incorporation by reference.

The *Society Act* has actually relied on incorporating dissolution provisions from British Columbia's for-profit legislation since the original Act was passed in 1920.[441] But when the BCA came into force, its dissolution provisions were not made applicable to the *Society Act*. The question here is whether retaining the CA provisions[442] is better for societies or whether a new *Society Act* should be harmonized with the BCA.[443] This question may be answered by comparing the CA and the BCA.

Part 9 of the CA contains 40 sections. Although it simplifies things greatly to reduce the range of those sections to a few topics, it is possible to reduce Part 9 to three major subjects.

- **Cancellation (CA, sections 256–57).** Under Part 9, the Lieutenant Governor in Council (this is essentially the cabinet of the provincial government) can declare a society to be dissolved. This power has apparently only been used in connection with one society. Much more relevant is the power of the Registrar of Companies to declare a society to be dissolved. This power—which is sometimes in the CA called "striking off the register"—may be exercised in connection with a number of listed administrative defaults. The most important of these defaults is failing to file an annual report in two consecutive years. The purpose of these provisions is punitive.
- **Dissolution by request (CA, section 258).** Under section 258, a society may ask the Registrar of Companies to strike it off the register. The request must be author-

441. 1920 Act, *supra* note 23, s. 36.

442. CA, *supra* note 44, ss. 256–96.

443. BCA, *supra* note 54, ss. 314–39, 422–24.

ized by an ordinary resolution of the members. And it must be accompanied by an affidavit of two or more directors, proving the disposition of the society's assets and that it has no debts or liabilities. The purpose of this section is to provide a simple and expedient method to dissolve a society that is no longer carrying on activities and that has no outstanding debts or liabilities.

- **Winding up (CA, sections 267–96).** The bulk of Part 9 is concerned with winding up.[444] These provisions would be used to terminate a society that was still active and had outstanding debts and liabilities. This procedure involves the engagement of a third party to act as liquidator. Winding up requires authorization by a special resolution of the members. Before that resolution is considered, the majority of directors must swear an affidavit stating that they have made a full inquiry into the society's affairs and are of the opinion that it will be able to pay its debts in full within the winding up period (which may not exceed 12 months). The winding up may or may not take place under court supervision. This procedure is intended to protect the rights of creditors, members, and others as the society's assets are liquidated and it is dissolved.

Simplifying matters again, it is apparent that the BCA covers similar topics with different terminology.

- **Powers of dissolution and cancellation (BCA, sections 422–24).** These sections are similar to the cancellation sections under the CA. The Lieutenant Governor in Council can still cancel the incorporation of a company and declare it to be dissolved. The Registrar of Companies can still dissolve a company due to an administrative default appearing on a list in the statute, such as failure to file annual reports.
- **Voluntary dissolution without liquidation (BCA, sections 314–18).** These sections are analogous to dissolution by request under the CA. They are available to a company that (1) authorizes its voluntary dissolution by an ordinary resolution of the shareholders, (2) has no assets, and (3) has no liabilities or has made adequate provision for its liabilities. The main reform in the BCA is captured in that phrase "made adequate provision for its liabilities." A large part of these sections is taken up with defining what that phrase means. The concept was introduced into the BCA to provide additional comfort and protection for the director who must swear the affidavit that is part of this process. Under the CA, there was often an issue in practice whether the company actually had no debts or liabilities. It is always pos-

444. But note that, in practice, what the CA calls cancellation and dissolution by request are far more common. In comparison, the winding up provisions are little-used. *See* Andrew J. McLeod & Ian N. MacIntosh, *British Columbia Business Corporations Act & Commentary* (Markham, ON: LexisNexis Butterworths, 2006) at 48. Note, also, that these provisions are only available to a solvent corporation. An insolvent corporation would be liquidated under the *Bankruptcy and Insolvency Act*, *supra* note 362.

sible for a liability to appear in the future, casting a shadow over the directors' affidavit. The BCA provisions were intended to address this practical problem.

- **Voluntary liquidation (sections 319–39).** These sections are the equivalent of winding up under the CA. The broad strokes of these sections are similar to the equivalent CA provisions, but there are apparently subtle differences in the details.

The BCA gives more extensive coverage to these three main topics. The BCA provisions also appear to have been well received by practitioners familiar with this area of the law. For example, one practice guide hailed the voluntary dissolution without liquidation sections as ". . . bring[ing] a welcome degree of certainty to what is a fairly common process. . . ."[445] There is no reason to retain the old CA provisions in a new *Society Act*.

The committee tentatively recommends that:

> *98. A new Society Act should contain provisions governing dissolution of societies that are harmonized with provisions governing dissolution of companies in the Business Corporations Act.*

C. Dissolution—Disposal of Assets

Section 73 of the *Society Act* governs the disposal of any assets remaining (after payment of debts) on the dissolution of a society. The section divides societies into two types. First, there are societies with a charitable purpose. Under section 73 (1), the remaining assets of this type of society must not be distributed to the members. The constitution, bylaws, or a members' resolution may provide that the remaining assets may be transferred to a charitable institution or on trust for a charitable purpose. If the constitution, bylaws, or a members' resolution do not so provide, then the remaining assets must be transferred to the Minister of Finance. Second, there are societies that do not have a charitable purpose. For this type of society, the constitution, bylaws, or a members' resolution may provide for the disposition of the remaining assets to the members (or to another destination). If the constitution, bylaws, or a members' resolution do not make provision for the remaining assets, then they must be transferred to the Minister of Finance.

This provision is a fundamental part of not-for-profit corporate law. It is the counterpart of the rule currently found in section 2 (2) of the *Society Act*, which prohibits the distribution of any profit, gain, or dividend to a member before dissolution. Together, these two constraints on distributions make up a large part of the not-for-profit identity. Section 73 also clearly introduces the idea that different types of societies should be subject to different rules. A public benefit society—in section 73 described as a society with a charitable purpose—must not distribute its assets to a member on dissolution, but a mutual benefit society may distribute its remaining assets on dissolution to its members.

445. McLeod & MacIntosh, *ibid.*

The core of this provision must be retained in a new *Society Act*, but there are two details that should be considered here.

The first issue is how this section divides societies into two classes. The method chosen is whether or not the society has a "charitable purpose." Under section 73, a society has a charitable purpose if it has one of the following purposes:

(1) the relief of poverty;

(2) the advancement of education;

(3) the advancement of religion;

(4) any other purpose beneficial to the community.

This list corresponds, more or less, to the traditional charitable purposes that have been recognized by the courts of England since the seventeenth century.[446] The courts have had trouble drawing clear lines in cases involving charitable purposes. In part, this is because the fourth purpose is open-ended. Some commentators have suggested that another test would be more appropriate for section 73. A bright-line test would provide greater certainty. Potential bright-line tests would include using registered charitable status, a declaration made at the time of incorporation,[447] or an expanded definition of "charity."[448]

Although each of these proposals would deliver greater certainty in law, they each would also bring greater problems in practice. Registered charitable status is not permanent. A society that had been a registered charity for 20 years could lose its registered status just before dissolution and become eligible to distribute assets to its members.[449] Incorporators of societies may not appreciate the significance of a declaration, and have to start the

446. *See Statute of Charitable Uses*, 43 Eliz. I, c. 4 (1601); *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 503 (U.K.H.L.).

447. *See* ALRI Report, *supra* note 61 at 27–28. The idea is simple. The incorporators of the society would be required to place a statement in the society's constitution indicating whether any assets remaining on dissolution could be distributed to the members or not. A provision restricting the distribution of assets to members could not subsequently be altered. *See also* ALRI Draft Act, *supra* note 80, s. 5.

448. *See* Bill C-21, *supra* note 72, s. 233. In addition to societies meeting the traditional definition of "charity," this section includes any society that has (within a prescribed period of time) requested donations from the public, received a grant or similar financial assistance from any level of government or a government agency, or has accepted money or other property from an organization that has requested donations or received grants.

449. But a charity that loses its charitable status may be required to pay a revocation tax to the federal government in the amount of the fair market value of the charity's assets 120 days before revocation of charitable status, less any amount transferred to another registered charity or qualified donee.

process over again if a mistake were made.[450] And expanding the definition of "charity" could unsettle the legitimate expectations of people active in the not-for-profit sector and their legal advisors.

The committee tentatively recommends that:

> *99. A new Society Act should divide societies for the purpose of disposal of assets on dissolution on the basis of whether or not the society has a charitable purpose.*

The second issue involves the statutory default rule for distributing any assets left over after payment of debts on dissolution. Like other provisions of a similar nature, section 73 sets default rules for the disposal of a society's assets on dissolution, which only apply if the constitution, bylaws, or a members' resolution do not direct where any remaining assets are to go. Under section 73, the default rule for both types of societies is that their remaining assets will be paid to the British Columbia Minister of Finance. Other models for reform have taken a different approach.[451] The major difference is that the default rules differ with the type of society. If the assets of the society were intended to benefit the members, then the default rule is that the remaining assets are paid in equal shares to the members. If the assets of the society were intended to benefit the public, then the liquidator must apply to court for an order to distribute the remaining assets. The statutes give the liquidator a number of options for this distribution. The remaining assets may typically be paid to a registered charity, an organization pursuing similar goals as the society, a government or government agency, or any combination of these choices.

The case for change of the default rule is not persuasive. The current rule is simple to apply and is analogous to the law of escheat.[452] In the end, the default rule is rarely relied on in practice.

The committee tentatively recommends that:

> *100. A new Society Act should provide that any property remaining on dissolution after payments of society's debts should be paid to the Minister of Finance. This provision should be a default rule, which may be set aside by an express provision in the society's bylaws or by a resolution of the society's members.*

450. *See* ALRI Report, *supra* note 61 at 16 (conceding that this scenario could arise in practice).

451. *See* Bill C-21, *supra* note 72, s. 233; SK Act, *supra* note 70, s. 209; ALRI Draft Act, *supra* note 80, s. 20.

452. *See Escheat Act*, R.S.B.C. 1996, c. 120.

D. Restoration

Section 71 governs restorations of societies. As noted above, it does not contain any specific provisions applicable to societies. Instead, it preserves Part 9 of the CA, despite its repeal, and incorporates by reference its provisions for application to societies. A truncated form of restoration has existed for societies since 1925.[453] The 1925 provisions gave the Registrar of Companies the authority to restore a society for a limited period or for carrying out a particular purpose. This authority only extended to societies that had been struck off the register due to an administrative default. The current provision, which authorizes the Registrar to restore to full existence any society that has been dissolved for a period of less than 10 years, first appeared in 1977.[454]

When a corporation is dissolved, its existence is terminated. This dissolution may take place in an orderly way, which would ensure that any property of the corporation left over after the payment of its debts goes to designated beneficiaries or, in some cases, to the members. But a corporation may also be dissolved if it commits an administrative default that is set out in its governing statute. (The most common example of such a default is a failure to file annual reports with the Registrar of Companies in two consecutive years.) When this occurs, the corporation ceases to exist and ownership of its property reverts to the provincial government. These can be disastrous consequences. The restoration provisions are intended to provide a procedure to allow a corporation to remedy its administrative defaults and restore its existence and ownership of its property.

The main issue for this section is not whether or not a new *Society Act* should contain a restoration provision. Restoration is now an established part of corporate law, so there is little need to question its appearance in not-for-profit legislation. Instead, the main issue is harmonization with the BCA.[455] There are a number of significant differences between restoration under the CA[456] and restoration under the BCA.

- **Court approval.** Under the CA, a court order was required as part of the process to restore a corporation. Under the BCA, applicants for restoration have the option to apply only to the Registrar of Companies or to seek a court order.
- **Limitation period.** Under the CA, if a corporation had been dissolved for more than 10 years, then the court had no authority to order its restoration. (In these circumstances, it could only be restored by an Act of the Legislature.) Under the BCA, this 10-year limitation period only applies to corporations that were dis-

453. *See Societies Act Amendment Act, 1925*, S.B.C. 1925, c. 49, s. 3.

454. *See* 1977 Act, *supra* note 43, s. 71.

455. BCA, *supra* note 54, ss. 354–68.

456. CA, *supra* note 44, ss. 262–66.

solved before the coming into force of the BCA (which means that eventually it will be phased out entirely).

- **Applicants.** Under the CA, the liquidator, a member, a creditor, or "any other interested person" could apply for the order restoring the corporation. Under the BCA, the persons eligible to apply to the Registrar for restoration differ depending on the type of restoration. For a limited restoration (that is, a restoration that only lasts for a set period of time), any person may apply. For a full restoration, only a "related person" may apply. A "related person" is a director, an officer, a shareholder, or an heir, a personal representative, or a legal representative of a shareholder, or a person that the court determines to be an appropriate person.

The case for harmonization is clear. The provisions of the CA are more onerous than those in the BCA. There is no reason why anyone seeking the restoration of a society should have to bear costs that are not imposed on a person seeking the restoration of a company.

The committee tentatively recommends that:

> *101. A new Society Act should have provisions governing the restoration of societies that are harmonized with the restoration provisions in the Business Corporations Act.*

XVI. MISCELLANEOUS

A. Introduction

In closing, the *Society Act* contains a few eclectic provisions that cannot be grouped under the foregoing topics. Some of these provisions have a prominence in the legislation that requires discussion and comment in this consultation paper.

B. Subsidiaries

Section 34 contains the *Society Act*'s rules on subsidiaries. Subsection (1) requires the members of a society to pass a special resolution authorizing the acquisition, incorporation, or disposition of a subsidiary. Subsection (2) requires a society to file a notice with the Registrar of Companies when it incorporates or acquires a subsidiary. Subsection (4) requires a society to file a notice with Registrar if the society ceases to have control of a subsidiary. These rules were enacted in 1977.[457] The purpose of section 34 appears to be to protect the public interest by regulating subsidiaries, because subsidiaries could conceivably be used to side-step some of the limitations in the society form.

457. 1977 Act, *supra* note 43, s. 34.

It is open to question whether these restrictions are necessary. Similar rules are not found in for-profit statutes, such as the BCA. Nor are they a feature of modern approaches to the not-for-profit sector, such as the SK Act, Bill C-21, the ALRI Draft Act, or the US Model Act. One could argue that section 34 goes too far. Why is a special resolution needed here? The presumption seems to be that there is something untoward for a society to have or deal with a subsidiary. It is not clear if the Registrar of Companies ever uses the investigatory powers granted under subsection (3) or what the consequences of a failure to provide notice would be.

The committee tentatively recommends that:

> *102. A new Society Act should not regulate the acquisition, incorporation, or disposition of a subsidiary of a society.*

C. Branch Societies

Under section 18 of the *Society Act* a society may establish and maintain a branch society or societies, as long as the society's bylaws permit it to do this. Section 19 enables a branch society to be incorporated as a society in its own right under the Act. Although these provisions can be traced back to 1920,[458] there is still some confusion over the purpose and legal status of a branch society. Simply put, creating branches is a way to organize a society that, usually, has its membership dispersed throughout numerous locations. A branch society, which is not a separate legal entity, is understood to be distinct from a subsidiary, which is a separate legal entity.

Sections 18 and 19 confirm the legal effectiveness of a common method of organizing societies. In addition, sections 18 and 19 add a few procedural hurdles to using this method of organization:

- authorization to create branch societies is required in the society's bylaws;
- after establishing a branch, the society must "without delay" send a notice to the Registrar of Companies;
- the branch society's name must be the name of the society that has established it, combined with a geographical descriptor and the word "branch," unless the Registrar consents to the use of another name;
- if the branch society ceases to exist, then the society that established it must "without delay" send a notice to the Registrar; and
- a branch society that applies to become a society incorporated in its own right must include in its application to the Registrar a certificate "under the seal, if

458. 1920 Act, *supra* note 23, ss. 18–19.

> any" of the society that established it, consenting the incorporation of the branch. The certificate may contain terms and conditions and, if it does, the branch society must comply with them or obtain the consent of the society that established it to the exercise of any power that conflicts with the certificate.

These procedural hurdles add an element of formality to the use of the branch society organizational form.

The first issue to consider under this topic is the basic issue of whether or not these provisions need to exist. As the ALRI Report pointed out:[459]

> Strictly speaking, it does not seem that any statutory foundation is necessary for the establishment of a branch. If a non-profit organization wants to set up a local branch and delegate powers and responsibilities, there is nothing to stop it from doing so.

This hands-off approach is implicitly endorsed by Bill C-21 and the SK Act, neither of which contains any references to the establishment of branch societies.

The response to this view is that, even if legislation relating to branch societies is not strictly necessary, it does not necessarily cause any harm. It may be helpful for societies to have this organizational option spelled out in the legislation. This position was the one taken by the ALRI Report. Although the report does not say so, this position may be an acknowledgement that Alberta's existing legislation (like British Columbia's) contains a provision referring to branch societies[460] and removing that provision (even though it would not really change the law) could cause concerns for people in the not-for-profit sector.

Once the decision is made to have the statute recognize the branch form of organization, other issues arise. Two are worthy of consideration. First, it would be worthwhile to clarify the legal status of branch societies as being under the control of the society and not being separate entities in their own right. Second, removing the filing requirements currently in the *Society Act* would be helpful. These filing requirements do little in themselves to protect the public interest; they only add costs and delays for societies.

The committee tentatively recommends that:

> *103. A new Society Act should contain provisions confirming that societies may create branch societies, that branch societies are not separate legal entities, and that branch societies remain under the control of the society that created them. A new Society Act should not include a requirement to file notices on the creation and*

459. ALRI Report, *supra* note 61 at 162.

460. *See* Alberta *Societies Act*, *supra* note 256, s. 31.

termination of branch societies and should not include a special procedure for the incorporation of a branch society.

D. Reporting Societies

The concept of a "reporting society" is defined in section 1 of the *Society Act*. Some societies are reporting societies by virtue of the activities they carry on (such as carrying on an insurance business or operating a hospital), some societies are reporting societies because they choose to be one and have provided for it in their bylaws, and some societies are reporting societies because the Registrar of Companies has ordered them to be reporting societies under section 38. The concept first appeared in the 1977 Act. In introducing the legislation, the Attorney General of the day drew a distinction between "the small, backyard type of society" and "the large society," and cited the following examples of large societies requiring special rules under the legislation: "It will be mandatory to be a reporting society in the case of orphanages; boarding homes for minors; ownership, management or operation of a hospital; ownership or management of a social club; or any society created for the purpose of paying benefits or rendering services to its members."[461]

In fact, this distinction drew heavily on an organizational principle in the CA. That principle—the reporting company concept—has not been carried forward in the BCA. This development raises the question of whether a reporting society concept belongs in a new *Society Act*.

At present under the *Society Act*, reporting societies have special requirements primarily relating to financial issues and audits. As a result of several of the committee's tentative recommendations in these areas,[462] these special requirements would either not exist in a new *Society Act* or they would apply to all societies. The key remaining special requirements would be the mandatory audits and distinct rules for the preparation of financial statements.

The reporting company concept did not need to appear in the BCA because securities legislation was able to provide an adequate regulatory framework that would ensure that the goals of the reporting company rules would continue to be met. There is no one statute or body of law that could play this role for reporting societies. But the same principle could still be applied for reporting societies. The number of amendments would not be too large to handle. They would primarily have to be made in legislation governing specific subjects, such as insurance, hospitals, and orphanages. Further, some of these financial requirements could be imposed through administrative arrangements, rather than through

461. British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 7, no. 18 (7 September 1977) at 5311 (Hon. Rafe Mair).

462. *See, e.g.*, above, Part Two, Section XII.C (audits—general provisions) at 102.

legislation. Removing the reporting society concept from the *Society Act* would simplify the legislation and bring it into harmony with the BCA. These are worthy goals to pursue.

The committee tentatively recommends that:

104. A new Society Act should not maintain the reporting society concept.

E. Occupational Titles Protection

Sections 86–93 (Part 10) of the *Society Act* set out a framework for occupational titles protection. Under Part 10, a society that has at least 50 members in good standing and that has as one of its purposes the representation of the interests of an occupation or profession may apply to the Registrar of Companies for occupational titles protection. Section 88 sets out some specific requirements for the applicant society's bylaws. If these requirements are met, and if it is in the public interest, then the Registrar must register the society under Part 10. Upon registration, the Registrar may designate a word (or combination of words) and initials to be used to identify the society and qualified members of the society. No person other than a qualified member of the registered society may use the identifying word (or words) or initials in connection with an occupation or profession that is similar to the occupation or profession represented by the registered society. Section 90 grants the registered society a right to apply to court for injunctive relief if a person contravenes this prohibition.

The *Society Act* has featured provisions granting occupational titles protection since 1985.[463] They were enacted to fulfill two objectives: (1) to "[enable] members of a particular occupational group to protect themselves from individuals who may claim to have occupational qualifications or belong to an occupational group when in fact they do not"; and (2) to "[signal to] consumers that an occupational group and its bona fide members have status to conduct activities in the name of that group and for the purposes for which it is registered."[464]

These are worthwhile objectives. The issue is whether they need to be fulfilled within the *Society Act*. The committee understands that the process to obtain occupational titles protections is not a good fit with the other duties of the Registrar of Companies. Assessing the public interest in an application is particularly time consuming. Further the system is not integrated. Health professions have a separate system of registration and designation, which is administered by the Ministry of Health under the *Health Professions Act*.[465]

463. *See Society Amendment Act, 1985*, *supra* note 51, c. 84.

464. British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 14, no. 23 (25 November 1985) at 7107–08 (Hon. James J. Hewitt).

465. R.S.B.C. 1996, c. 183.

British Columbia is the only province that has provisions in its not-for-profit legislation that deal with occupational titles protection. It would simplify the *Society Act* if these anomalous provisions were removed. Although the design of an occupational titles protection statute is beyond the scope of this project, the committee does note that Alberta has dedicated legislation in this area that may serve as a model for reform.[466]

The committee tentatively recommends that:

> *105. A new Society Act should not include provisions for occupational titles protection. Instead, those provisions should be re-enacted as a freestanding statute.*

F. Extraprovincial Registration

Sections 75–82 of the *Society Act* deal with extraprovincial societies. An "extraprovincial society" is defined in section 1 as "a society or association, incorporated or otherwise, formed outside British Columbia . . . but does not include a society or association, incorporated or otherwise, formed to acquire profit or gain or that has a capital divided into shares."

The purpose of the extraprovincial society provisions is to bring societies that have been incorporated outside British Columbia but that have activities within British Columbia under the regulatory authority of the British Columbia Registrar of Companies with respect to certain subjects. In particular, extraprovincial societies must submit certified copies of their charter documents (their equivalents to a British Columbia society's constitution and bylaws) along with their applications to register and provide annual reports thereafter. In addition, they must appoint an attorney for service (to accept service of legal notices and documents in court proceedings). The *Society Act* has had extraprovincial registration provisions since 1947.[467] In fact, the current provisions have changed very little since 1947.

The major issue for this topic is harmonization with the BCA. Given the age of the *Society Act*'s provisions, a subsidiary issue is modernization. Part 11 of the BCA, which deals with extraprovincial companies, contained some significant departures from the scheme in place under the CA. There is no question that Part 11 allows for more efficient administration by government officials than the 60-year-old provisions of the *Society Act*. There may be a question about whether the more expansive BCA rules are too tailored to commercial entities and are therefore not appropriate for not-for-profit organizations.

The main differences between the *Society Act* and the BCA in approaching extraprovincial entities are:

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466. *Professional Occupational Associations Registration Act*, R.S.A. 2000, c. P-26.

467. 1947 Act, *supra* note 38, ss. 41–50.

- **Timing of registration.** The BCA requires an extraprovincial company to register with the Registrar of Companies within two months of beginning to carry on business in British Columbia.[468] The *Society Act* simply says that an extraprovincial society *may* apply for registration.[469] Section 75 (2) of the *Society Act* gives the Registrar the authority to require an extraprovincial society to apply for registration. This wording makes it seem as if the extraprovincial society has a choice whether or not to apply, at least until the Registrar issues an order. But in fact the penalties for non-registration under the *Society Act* would apply to any extraprovincial society that did not register. So extraprovincial societies are actually just deprived of the two-month grace period extended to extraprovincial companies.
- **Meaning of "carry on operations/ business."** The *Society Act* does not attempt to define "carry on operations," effectively leaving this matter entirely to the courts. The interpretation of the equivalent term for commercial enterprises—"carry on business"—was similarly left to the courts under the CA, and this generated a lot of litigation. The BCA attempts to define when an extraprovincial company will be deemed to be carrying on business in British Columbia.[470] Under the BCA, an extraprovincial company is deemed to be carrying on business in British Columbia if (1) its name is listed in either a telephone directory for any part of British Columbia or in a telephone directory for any place, if the listing is for a telephone number in British Columbia, (2) its name is in an advertisement in which a British Columbia address or telephone number is given for the extraprovincial company, or (3) it has a resident agent, warehouse, or office, or place of business in British Columbia. These deeming provisions should be readily adaptable to extraprovincial societies. The BCA also expressly preserves the common law tests for "carrying on business."
- **Federal societies/ companies.** The BCA acknowledges that federal companies (those incorporated under the *Canada Business Corporations Act*[471]) have a right to carry on business in any province in Canada. Accordingly, federal companies do not have to obtain a name reservation as part of their application and the Registrar of Companies has no discretion to refuse their applications for registration. The prevailing legal opinion is that federal societies (those incorporated under Part

468. BCA, *supra* note 54, s. 375 (1).

469. *Society Act*, *supra* note 7, s. 75 (1).

470. BCA, *supra* note 54, s. 375 (2)–(3).

471. *Supra* note 74.

II of the *Canada Corporations Act*[472]) are entitled to the same treatment as federal companies, but the *Society Act* does not recognize this point.

- **Penalties.** Section 81 of the *Society Act* imposes two disabilities on unregistered extraprovincial societies: they cannot maintain a proceeding in the British Columbia courts in respect of a contract made (in whole or in part) in British Columbia and they cannot acquire or hold land or an interest in land in British Columbia or register title to land under the *Land Title Act*.[473] The CA contained similar penalties for extraprovincial companies, but this approach was not carried forward in the BCA. Instead, an unregistered extraprovincial company is only subject to a fine of $100 for each day that it carries on business in British Columbia as an unregistered extraprovincial company.[474] An unregistered extraprovincial society does not appear to commit an offence and is not liable to pay a fine.

Modernization is needed in this area. Harmonization with the BCA would provide administrative benefits. But there is one matter that raises a concern. Creating an offence for failure to register could result in sizable fines being levied against a volunteer-run organization that simply did not know it had to register. The legislation will need flexibility on this point. While the committee does not wish to wade into the area of setting fines for quasi-criminal offences, it does note that two approaches to this flexibility are apparent. First, the provision could be framed as a fine of "not more than" $100 for each day in which the society is in contravention of the rule. This language would give the sentencing judge some flexibility on the exact amount of the fine. Second, the fine could be capped at a maximum amount. The ALRI Draft Act combined both these elements in its approach to this issue.[475]

The committee tentatively recommends that:

> *106. A new Society Act should contain provisions relating to extraprovincial societies that are harmonized with provisions relating to extraprovincial companies in the Business Corporations Act.*

XVII. CONCLUSION

This consultation paper is the first phase of a two-phase project. The second phase involves the preparation of draft legislation and commentary. That task will be guided by

472. *Supra* note 69.

473. R.S.B.C. 1996, c. 250.

474. *See* BCA, *supra* note 54, ss. 426 (1) (b), 428 (3); *Business Corporations Regulation*, *supra* note 125, s. 35.

475. *See* ALRI Draft Act, *supra* note 80, s. 173 (person convicted of the offence of failure to register extraprovincially is liable to a fine of not more than $5000).

the tentative recommendations set out in this consultation paper and by the responses to them that the committee receives.

LIST OF TENTATIVE RECOMMENDATIONS

The following is a list of all the tentative recommendations made by the committee in this consultation paper. Note that the numbers in parentheses following each tentative recommendation refer to the pages in the consultation paper where the tentative recommendation is discussed.

1. British Columbia should continue to have a Society Act as distinct legislation governing all societies in the province. **(17–18)**

2. The current Society Act should be repealed and replaced with a new Society Act. **(18)**

3. The core principles of not-for-profit law in a new Society Act should be refined, but not fundamentally transformed. **(18)**

4. Wherever appropriate, a new Society Act should be harmonized with the Business Corporations Act. **(18–19)**

5. A new Society Act should be an organizational statute, which covers such topics as incorporation, record-keeping, corporate governance, powers and liabilities of directors, members' rights and remedies, meetings of members, fundamental transformations, and dissolution of societies, but it should not deal with regulatory matters. **(19–20)**

6. A new Society Act should have provisions governing the formation of societies that are harmonized with the provisions governing formation of companies under the Business Corporations Act. **(20–21)**

7. A new Society Act should continue to require the filing of bylaws as part of the process of incorporation. **(21–22)**

8. A new Society Act should allow incorporation of a society for any lawful not-for-profit purpose and should require specification of the society's purposes in its constitution. **(22–24)**

9. A new Society Act should not allow societies to be incorporated primarily for commercial purposes, but it should allow societies to pursue commercial activities as an incident to their not-for-profit purposes. **(24–26)**

10. A new Society Act should not include any overarching classification scheme; instead it should simply draw distinctions where needed. **(26–27)**

11. A new Society Act should contain provisions regarding society names that are harmonized with the provisions regarding corporate names in the Business Corporations Act. **(27)**

12. A new Society Act should require societies to include one of "society," "association," "foundation," "institute," "centre," or "club," or their abbreviations or French equivalents, in the society name as an indication of corporate and not-for-profit status. **(27–28)**

13. A new Society Act should contain provisions addressing pre-incorporation contracts that are harmonized with the pre-incorporation contracts provisions in the Business Corporations Act. **(28–29)**

14. A new Society Act should require societies to reproduce the information required in a notice of articles (except for share structure information) in their constitutions, along with a list of the society's purposes and a statement of the disposition of the society's property on dissolution. **(29–30)**

15. A new Society Act should not permit provisions in a society's constitution to be made unalterable. **(29–30)**

16. A new Society Act should authorize default standard bylaws, which will apply to a society in the absence of any express changes that the society makes to them for its purposes. **(30–31)**

17. A new Society Act should continue to require a special resolution of the members for all changes to a society's bylaws and to require that a copy of that special resolution be filed with the Registrar of Companies in order to be effective. **(32)**

18. A new Society Act should abrogate the doctrine of ultra vires. **(32–35)**

19. A new Society Act should contain provisions dealing with the powers of a society and restrictions on its affairs that are harmonized with provisions dealing with the powers of a company and restrictions on its business in the Business Corporations Act. **(32–35)**

20. A new Society Act should simply say that a society has all the powers of an individual and should not contain a list of corporate powers that a society has by virtue of incorporation. **(35)**

21. A new Society Act should have provisions relating to registered and records offices for societies that are harmonized with the registered and records office provisions in the Business Corporations Act. **(35–37)**

22. A new Society Act should have provisions requiring societies to maintain certain specific records in a records office that are harmonized with the record-keeping provisions in the Business Corporations Act. **(37–39)**

23. A new Society Act should have provisions dealing with accounting records that are harmonized with the provisions dealing with accounting records in the Business Corporations Act. **(39–40)**

24. A new Society Act should contain provisions governing a member's right of access to the society's records that are harmonized with the provisions governing a shareholder's right of access to the company's records in the Business Corporations Act. **(40–41)**

25. A new Society Act should contain provisions dealing with the public's access to corporate records and with remedies on denial of access that are harmonized with provisions dealing with the public's access to corporate records and with remedies on denial of access for companies that are not public companies in the Business Corporations Act. **(41–42)**

26. A new Society Act should contain provisions granting members of a society access to that society's register of members that are harmonized with the procedure set out in the Business Corporations Act for access to a company's central securities register. **(42–43)**

27. A new Society Act should require societies to have at least one director. **(43–44)**

28. A new Society Act should contain provisions governing the designation of first directors, the election or appointment of succeeding directors, and consent to act as a director that are harmonized with provisions dealing with directors in the Business Corporations Act. **(45)**

29. A new Society Act should not impose residency requirements on directors. **(45–46)**

30. A new Society Act should contain provisions addressing when an individual is not qualified to act as a director of a society that are harmonized with provisions addressing when an individual is not qualified to act as a director of a company in the Business Corporations Act. **(46–47)**

31. A new Society Act should require a society to maintain a register of directors that contains the same information a company is required to have in its register of directors under the Business Corporations Act. **(47–48)**

32. A new Society Act should contain provisions governing vacancies on a society's board of directors that are harmonized with provisions governing vacancies on a company's board of directors in the Business Corporations Act. **(48)**

33. A new Society Act should contain provisions governing directors ceasing to hold office that are harmonized with equivalent provisions in the Business Corporations Act. **(48–49)**

34. A new Society Act should contain provisions governing the removal of directors that are harmonized with provisions governing the removal of directors in the Business Corporations Act. **(49–50)**

35. A new Society Act should contain default provisions governing the appointment, qualifications, and removal of officers that are harmonized with provisions governing the appointment, qualifications, and removal of officers in the Business Corporations Act. **(50–51)**

36. A new Society Act should contain provisions setting out the duties of society directors and officers that are harmonized with provisions setting out the duties of company directors and officers in the Business Corporations Act. **(52–53)**

37. A new Society Act should contain provisions that state that a director or an officer has complied with that director's or officer's statutory duties if the director or officer has in good faith relied on certain representations or reports by a society officer or certain professionals. **(53–54)**

38. A new Society Act should contain provisions relating to conflicts of interest involving directors, officers, senior managers, and other individuals who perform the functions of a director, officer, or senior manager or who have the capacity to influence the direction of the society that are harmonized with the conflict of interest provisions in the Business Corporations Act. **(54–56)**

39. A new Society Act should contain provisions relating to the indemnification of directors and officers by a society that are harmonized with the indemnification provisions in the Business Corporations Act. **(57–58)**

40. A new Society Act should not contain provisions granting society directors or officers immunity from personal liability. **(58–59)**

41. A new Society Act should contain a provision granting the court the power to relieve a society director or officer from personal liability if the director or officer acted honestly and reasonably and ought fairly to be excused. **(59–60)**

42. A new Society Act should not impose personal liability on a society's directors if that society carries on without a member. **(60–61)**

43. A new Society Act should not enable a society to require a director or an officer to give the society security for the faithful discharge of the director's or officer's duties. **(61–62)**

44. A new Society Act should contain a dissent procedure that may be used by directors in relation to any resolution with which they disagree. **(62–63)**

45. A new Society Act should prohibit directors from receiving remuneration, unless the society's bylaws specifically authorize it. **(63–64)**

46. A new Society Act should prohibit paid employees of a society from serving on that society's board of directors and provide appropriate transitional provisions for existing paid employees who are directors. **(64)**

47. A new Society Act should define member by reference to the society's bylaws and to the society's register of members. **(65–66)**

48. A new Society Act should require that a society have at least one member. **(66–68)**

49. A new Society Act should require societies to address admission of members and qualifications of members in their bylaws. **(68–69)**

50. A new Society Act should not contain provisions enabling minors to join and participate in societies as members, directors, or officers. **(69)**

51. A new Society Act should contain provisions allowing for the creation of classes of memberships and should require a society that has classes to define the terms and conditions of each class in its bylaws. **(69–70)**

52. A new Society Act should not contain special provisions enabling the creation of honorary or life memberships. **(70)**

53. A new Society Act should contain provisions establishing the one member–one vote principle as a default rule, which may be displaced by a contrary provision in a society's bylaws. **(71)**

54. A new Society Act should not require a society to have more voting than non-voting members. **(71–72)**

55. A new Society Act should contain provisions enabling societies to impose membership fees and should require societies that choose to impose membership fees to address the following issues in the bylaws:

(a) the purpose of the membership fees;

(b) notification of the annual amount of the membership fees;

(c) the amount of each member's membership fees; and

(d) the date by which the membership fees are to be paid or, if the membership fees are payable in installments, the dates by which the installments are to be paid. **(72–73)**

56. A new Society Act should contain provisions that restrict transfers of a membership interest in a society, which may be displaced by a society's bylaws. **(73)**

57. A new Society Act should avoid the phrase "good standing" and should require societies to define when a member is eligible to vote in their bylaws. **(73–74)**

58. A new Society Act should require societies to have provisions relating to the expulsion of members in their bylaws. **(74–75)**

59. A new Society Act should not contain provisions enabling unanimous members' agreements that restrict the powers of directors to manage or supervise the management of the society or that transfer those powers to the members or other persons. **(75–76)**

60. A new Society Act should contain provisions governing the timing of annual general meetings of societies that are harmonized with the provisions governing the timing of annual general meetings of companies in the Business Corporations Act. **(76–77)**

61. A new Society Act should contain provisions respecting notice of general meetings of societies that are harmonized with the provisions respecting notice of general meetings of companies in the Business Corporations Act. **(77–78)**

62. A new Society Act should contain provisions governing the location of meetings of members that are harmonized with the provisions governing the location of meetings of shareholders in the Business Corporations Act. **(79)**

63. A new Society Act should contain provisions governing the quorum at a meeting of members that are harmonized with provisions governing the quorum at a meeting of shareholders in the Business Corporations Act. **(79–81)**

64. A new Society Act should contain provisions enabling participation in a meeting of members by telephone or other communications media that are harmonized with provisions governing the participation of shareholders in a meeting in the Business Corporations Act. **(81)**

65. A new Society Act should contain a default rule that prohibits the use of proxies, which may be overridden by a contrary provision in a society's bylaws. **(82)**

66. A new Society Act should not prohibit permanent or continuing proxies. **(82–83)**

67. A new Society Act should contain provisions relating to the mechanics of voting at a meeting of members that are harmonized with provisions relating to voting by shareholders in the Business Corporations Act. **(83)**

68. A new Society Act should contain provisions governing members' resolutions that are harmonized with provisions governing shareholders' resolutions in the Business Corporations Act. **(83–84)**

69. A new Society Act should continue to require societies to file all special resolutions with the Registrar of Companies in order to be effective. **(84–85)**

70. A new Society Act should contain provisions enabling members to make proposals at a general meeting of members that are modelled on provisions governing member proposals in the federal Bill C-21 and the Saskatchewan Non-profit Corporations Act. **(85–86)**

71. A new Society Act should contain provisions governing the requisition of a general meeting by members that are harmonized with provisions governing the requisition of a meeting by shareholders in the Business Corporations Act. **(86–87)**

72. A new Society Act should contain provisions granting the court jurisdiction to call a meeting of members that are harmonized with provisions governing the power of the court to call a meeting of shareholders in the Business Corporations Act. **(87–88)**

73. A new Society Act should contain provisions expressly confirming that a consent resolution is as valid and effective as a resolution passed at a duly called meeting of members. **(88)**

74. A new Society Act should continue to restrict societies from having capital divided into shares. **(89)**

75. A new Society Act should restrict societies from distributing assets to their members during the society's existence, except for:

(a) payment of reasonable compensation for goods, services, or other valuable benefits provided by a member;

(b) providing financial assistance consistent with the society's constitution, by-laws, and the Society Act;

(c) payment of a benefit by a society with insurance purposes; and

(d) payments made pursuant to an order of the court. **(89–91)**

76. A new Society Act should contain provisions relating to financial statements that are harmonized with the financial statements provisions in the Business Corporations Act. **(91–92)**

77. A new Society Act should not restrict how a society uses its funds or makes its investments. **(92–94)**

78. A new Society Act should not contain a requirement that a society have at least one deposit account at a savings institution. **(94)**

79. A new Society Act should contain provisions on trust indentures, debentures, and receivers and receiver-managers that are harmonized with provisions on trust indentures, debentures, and receivers and receiver-managers in the Business Corporations Act. **(95)**

80. A new Society Act should not require societies to obtain a special resolution in order to issue a debenture. **(95–96)**

81. A new Society Act should not require societies to maintain a register of indebtedness. **(96–97)**

82. A new Society Act should contain general provisions restricting financial assistance. **(97–100)**

83. A new Society Act should contain a specific rule that prohibits financial assistance to directors in all circumstances, except for cases of indemnification. **(100)**

84. A new Society Act should not require societies to appoint an auditor. **(101–02)**

85. A new Society Act should have general provisions on audits that are harmonized with the audit provisions in the Business Corporations Act. **(102)**

86. A new Society Act should require all societies that decide to engage an auditor to form an audit committee. **(102–03)**

87. A new Society Act should contain provisions allowing a member or the Registrar of Companies to apply to court for an order to appoint a person to investigate a society. **(104–05)**

88. A new Society Act should contain provisions enabling a member or director of a society to sustain a derivative action in the name of the society. **(105–08)**

89. A new Society Act should contain provisions authorizing the court to make a compliance order or a restraining order. **(108–09)**

90. A new Society Act should contain provisions allowing a member or other person that the court considers appropriate to apply to court for a remedy from oppressive or unfairly prejudicial acts. **(109–12)**

91. A new Society Act should not contain provisions allowing a member to dissent from a fundamental change to the society. **(112–14)**

92. A new Society Act should contain provisions governing amalgamation of societies that are harmonized with the amalgamation provisions in the Business Corporations Act. **(114–20)**

93. A new Society Act should not contain provisions allowing a society to convert itself into a company. **(120–21)**

94. A new Society Act should contain provisions allowing a society to convert itself into a cooperative association. **(121–22)**

95. A new Society Act should contain provisions governing arrangements with members, creditors, or other persons that are harmonized with provisions regarding governing arrangements in the Business Corporations Act. **(123)**

96. A new Society Act should contain provisions governing the power to dispose of a society's undertaking that are harmonized with provisions governing the disposal of a company's undertaking in the Business Corporations Act. **(123–24)**

97. A new Society Act should contain provisions permitting the continuation of societies out of British Columbia and the continuation of foreign not-for-profit bodies into British Columbia. **(125)**

98. A new Society Act should contain provisions governing dissolution of societies that are harmonized with provisions governing dissolution of companies in the Business Corporations Act. **(125–28)**

99. A new Society Act should divide societies for the purpose of disposal of assets on dissolution on the basis of whether or not the society has a charitable purpose. **(128–30)**

100. A new Society Act should provide that any property remaining on dissolution after payments of society's debts should be paid to the Minister of Finance. This provision should be a default rule, which may be set aside by an express provision in the society's bylaws or by a resolution of the society's members. **(130)**

101. A new Society Act should have provisions governing the restoration of societies that are harmonized with the restoration provisions in the Business Corporations Act. **(131–32)**

102. A new Society Act should not regulate the acquisition, incorporation, or disposition of a subsidiary of a society. **(132–33)**

103. A new Society Act should contain provisions confirming that societies may create branch societies, that branch societies are not separate legal entities, and that branch societies remain under the control of the society that created them. A new Society Act should not include a requirement to file notices on the creation and termination of branch societies and should not include a special procedure for the incorporation of a branch society. **(133–35)**

104. A new Society Act should not maintain the reporting society concept. **(135–36)**

105. A new Society Act should not include provisions for occupational titles protection. Instead, those provisions should be re-enacted as a freestanding statute. **(136–37)**

106. A new Society Act should contain provisions relating to extraprovincial societies that are harmonized with provisions relating to extraprovincial companies in the Business Corporations Act. **(137–39)**

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