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17 March 2010

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Financial and Corporate Sector Policy Branch  
Ministry of Finance  
PO Box 9418 Stn Prov Govt  
Victoria, BC V8W 9V1

Dear Mesdames and Sirs:

**Re: BC Society Act Review—Consultation**

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We are writing to respond to the Ministry of Finance's public consultation as part of its review of the *Society Act*. We would like to begin by commending the ministry for initiating this review. The *Society Act* is a focal point of the voluntary sector in this province, and its reach extends beyond the 26 000 societies in BC. Nearly every British Columbian has some contact with societies, as a member, a director, an employee, or a recipient of services of a society.

This response is informed by the British Columbia Law Institute's *Society Act* Reform Project. That project ran from June 2006 to July 2008. It was carried out by an all-volunteer project committee. The committee chair was Margaret Mason, a partner with the Vancouver law firm Bull, Houser & Tupper LLP who has been at the forefront of reform efforts in the not-for-profit sector for many years. The rest of the committee drew on a diverse range of talent from BC's legal community and not-for-profit sector: Ken Burnett (partner, Miller Thomson LLP); Colleen Kelly (executive director, Volunteer Vancouver); Murray Landa (associate director, gift and estate planning, UBC Development Office); Mike Mangan (barrister and solicitor); Kim Thorau (principal, Perrin, Thorau & Associates); and Bob Kucheran (former CEO, BC Pharmacy Association). The committee published a consultation paper in fall 2007 containing 106 proposals and carried out a six-month consultation with the public. The committee's final report, published in July 2008, contained a detailed blueprint for a new *Society Act*.

## THE NEED FOR REFORM

Before addressing the two issues raised in the stakeholder letter announcing this consultation, we would like to address briefly the basic question of why reform of the *Society Act* is necessary at this time. It is important to understand that the *Society Act* is based in large measure on the 1973 *Company Act*. When the *Society Act* was introduced in the legislature in 1977 it was described by the responsible minister as a “satellite” of the *Company Act*. The *Company Act*, of course, was repealed in 2004 and replaced with the *Business Corporations Act*. The repeal of the *Company Act* had the effect of cutting the conceptual rationale for many of the provisions of the *Society Act* out from under them. As we learned through our research and public consultation, this has had a practical impact on the operations of societies. To cite a few examples:

- The act contains an eccentric set of rules governing the amalgamation of societies, which are far outside the mainstream of Canadian law on this issue. We were advised of one case in which two long-standing societies saw their plans to amalgamate derailed when they received legal advice that cast doubts on the right of the amalgamated society to obtain the benefits of testamentary gifts that were pledged to the amalgamating societies as part of a planned giving campaign.
- The act provides little concrete guidance for directors and officers to avoid conflicts of interest, contains a cumbersome, court-based indemnification procedure, and imposes personal liability on a society’s directors if its membership drops below three members. These measures all have the effect of inhibiting the recruitment of directors and officers, contributing to a major concern of the not-for-profit sector.
- The act requires adoption of a special resolution of the members before a society can issue a debenture. As a result of the vagueness with which the term “debenture” is defined, this requirement ends up affecting all sorts of financing transactions, adding needless complications. This provision also involves the membership in making an essentially managerial decision—something that is frowned upon in contemporary theories of corporate governance.

These practical concerns, and many more like them, have a direct bearing on how we respond to the two issues posed in the stakeholder letter.

## ISSUES FOR REFORM

### (1) The Corporate Model

The first issue raised “concerns the nature of the corporate model most appropriate for societies and whether a sophisticated business law framework should be adopted.” Over the course of the *Society Act* Reform Project, the project committee considered a number of models for a new *Society Act*, based on legislation in force elsewhere in Canada or on proposals made by law-reform agencies in Canada and the United States. In the end, the com-

mittee decided on a model that would harmonize the *Society Act* with the *Business Corporations Act*.

It is important to emphasize that harmonization does not mean that the *Society Act* should be a carbon copy of the *Business Corporations Act*. The committee's process was first to identify the core elements of societies that distinguish them from business corporations. The requirement that societies be incorporated primarily to pursue public, not-for-profit purposes, the restriction on share capital, and the restriction on the distribution of profits to the members during a society's lifespan, are all important principles that are preserved in the committee's final report. Second, in reviewing the subjects that a new *Society Act* should address, the committee considered in each case whether some reason may be found in the operational or administrative realities of societies in British Columbia to justify a different approach than the one taken in the *Business Corporations Act*. When such a reason was located, the committee did not hesitate to tailor the final recommendations to its demands.

But many, if not most, of the provisions of the *Society Act* actually have little if anything to do with the not-for-profit character of societies. Instead, much of the act deals with the operational and administrative requirements of a corporation. When these rules are tied to superseded companies legislation they impose costs and delays on societies for reasons that have nothing to do with furthering societies' essential activities and missions. Harmonization with the *Business Corporations Act* 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 *Business Corporations Act* will lend a higher degree of certainty to the law governing societies. The courts are more apt to comment on the *Business Corporations Act* will overcome this problem in the short term by giving societies access to streamlined, 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 *Business Corporations Act* will help to ensure that future modernizing amendments to company law will be considered for societies as well.

Finally, we note that the committee's proposal to harmonize the *Society Act* with the *Business Corporations Act* was put out to public consultation, where it commanded solid support from the respondents to the consultation paper. A few respondents did express the concern that the *Business Corporations Act* is too lengthy and complex a model for the *Society Act*. The gist of this concern is that the *Business Corporations Act* contains a large number of provisions that address issues that societies rarely (if ever) encounter. The existence of these provisions may frustrate society executives and members and form a sort of barrier to access to the features of the *Society Act* that address issues they encounter more frequently. While it is true that societies will only rarely undertake some of the more complex transactions (such as amalgamation, conversion, or transfer of incorporation) enabled by the new *Society Act*, this is not the same thing as saying that societies will *never* undertake these complex transactions. Without comprehensive and modern statutory provisions ena-

bling these types of transactions, some societies will find their legitimate plans and designs to be frustrated. On balance, it is worthwhile to accept some complexity and length in exchange for greater flexibility, scope, and utility.

## **(2) Regulatory Provisions**

The second issue raised in the stakeholder letter “concerns the extent to which the Act should contain regulatory provisions or other rules that constrain the operation of societies.” After correctly noting that “most corporate statutes are non-regulatory in nature,” the stakeholder letter goes on to cite some examples of regulatory provisions that currently exist in the *Society Act* and poses the question of whether a new *Society Act* should contain similar controls, even tighter controls, or less-restrictive controls.

The consultation paper for the *Society Act* Reform Project discussed this issue both in general terms and in connection with specific examples. In general, the committee recommended that a new *Society Act* hew to the corporate-law mainstream and limit the number of regulatory provisions it includes. Regulatory provisions are almost always better located in a dedicated regulatory statute. In the case of a corporate statute such as the *Society Act*, it should be noted that the legal form of the organization being regulated often has little to do with the substance of the regulations at issue. Regulations contained in a new *Society Act* would only apply to societies. This might be acceptable if societies were the only players in the not-for-profit sphere in British Columbia, but they are not. Regulatory provisions that apply only to societies could create an artificial incentive to organize not-for-profit activities in this province using another legal form, such as an unincorporated not-for-profit association, a charitable trust, a not-for-profit corporation organized under federal legislation or the laws of another province, or (possibly in some cases) a for-profit corporation. Attempting to co-ordinate an effective regulatory regime across a range of organizational statutes would invite a number of dangers, such as gaps in coverage and varying standards. Further, any proposed regulatory provisions are bound to be controversial in comparison to the procedural modernization that is a necessary element of reform of the *Society Act*. Societies should be able to obtain the benefit of that modernization as soon as possible; it should not be tied up with difficult policy choices over suitable regulatory models.

This general approach to regulatory provisions in the *Society Act* commanded overwhelming support in the public consultation that the BCLI ran in connection with the *Society Act* Reform Project. Not a single respondent took issue with it. In addition to the general question of regulatory provisions, the consultation paper also proposed relocating or discontinuing a number of specific provisions in the current act dealing with investment, deposit accounts, and occupational titles protection. These proposals also obtained widespread support in the public consultation.

## CONCLUSION

For the reasons cited in this response, we urge the ministry to proceed with reforms to the *Society Act* based on the model created in the *Society Act* Reform Project Committee's *Report on Proposals for a New Society Act*.

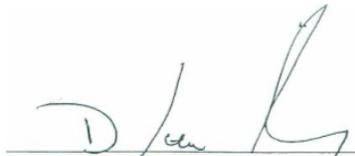
Yours sincerely,

**BRITISH COLUMBIA LAW INSTITUTE**

by:



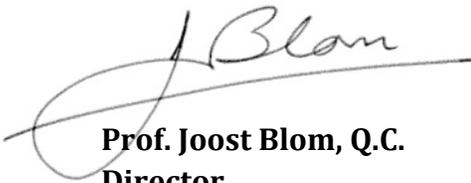
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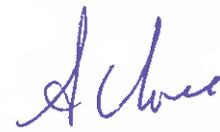
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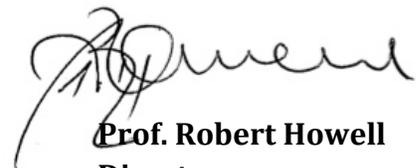
**Arthur L. Close, Q.C.**  
Director



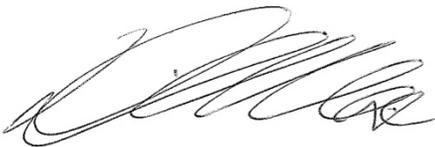
**Lorne A. J. Dunn**  
Director



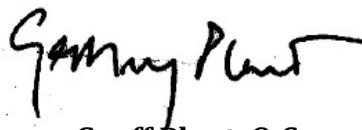
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