Supplementary Report on Proposals for a New Society Act

A Response to the Ministry of Finance's Discussion Paper on Society Act Reform (2011) prepared for the British Columbia Law Institute by Members of the Society Act Reform Project Committee

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The British Columbia Law Institute was created in 1997 by incorporation under the provincial *Society Act*. Its strategic mission is to be a leader in law reform by carrying out:

- the best in scholarly law reform research and writing; and
- the best in outreach relating to law reform.

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Introductory Note

Supplementary Report on Proposals for a New Society Act

The Ministry of Finance's public consultation on proposals for *Society Act* reform has given the BCLI the opportunity to revisit topics considered in its *Society Act* Reform Project. Our response to the ministry's proposals is contained in this report, which is a supplement to our 2008 *Report on Proposals for a New Society Act*. While we agree with the general direction of the ministry's proposals, we also affirm the recommendations that we made in our 2008 report. Those recommendations provide alternative approaches to some of the ministry's proposals. We believe that pursuing these alternative approaches will provide an even greater benefit for British Columbia and its not-for-profit sector.

On behalf of the board of directors for the BCLI, I would like to thank the members of the *Society Act* Reform Project Committee who participated in the preparation of this supplementary report. This supplementary report enjoys the full support of the BCLI's board.

D. Peter Ramsay, QC
Chair,
British Columbia Law Institute

April 2012

Society Act Reform Project Committee

The *Society Act* Reform Project Committee was formed in August 2006. This volunteer project committee studied the major legal issues related to the *Society Act*, examined the leading models for reform, and made recommendations for a new *Society Act*. The committee's final recommendations, in the form of draft legislation, were contained in its *Report on Proposals for a New Society Act*, published in July 2008.

The members of the committee active in preparing this supplementary report were:

Margaret Mason—chair
(partner, Bull, Housser & Tupper LLP)

Colleen Kelly
(executive director Vantage Point)

Murray Landa
(associate director, gift & estate planning, UBC Development Office)

Ken Burnett
(partner, Miller Thomson LLP)

Bob Kucheran
(barrister & solicitor and ex-CEO, BC Pharmacy Association)

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

For more information, visit us on the World Wide Web at:
http://www.bcli.org/bclrg/projects/society-act-reform-project

SOCIETY ACT Reform Project BCLI

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INTRODUCTION

From June 2006 to July 2008 the British Columbia Law Institute carried out its *Society Act* Reform Project, with the assistance of an all-volunteer project committee made up of leaders in the not-for-profit field. The project concluded with the publication of the *Report on Proposals for a New Society Act*,[1] which contained the committee's final recommendations in the form of a draft new *Society Act*.

Earlier this year, interested project-committee members met to consider the Ministry of Finance's December 2011 *Discussion Paper*, issued as part of the ministry's *Society Act* Review. This response to the *Discussion Paper*, cast in the form of a supplementary report to the 2008 report, is the product of the committee's deliberations. It has been approved by the BCLI's board of directors, along with the committee members who are listed near the beginning of this supplementary report.

We would like to begin by thanking the ministry for this opportunity to participate in a thoughtful and well-designed consultation on reform of the *Society Act*. We are in agreement with the substance of most of the proposals in the *Discussion Paper*. There are a few areas where we respectfully disagree with the *Discussion Paper*. But overall we share the goal of advancing practical reforms that will lead to the enactment of a modern *Society Act* in the near future.

This supplementary report contains two parts.

The first part notes the correspondence between many of the ministry's proposals and the BCLI's recommendations in its *Report on Proposals for a New Society Act*. It is presented as a chart, linking proposals with their substantive equivalents in a section of the draft legislation in the BCLI report. This format allows for a summary of the large number of areas in which the ministry's proposals appear to be essentially similar to an earlier recommendation found in the BCLI report. Needless to say, we agree with these proposals.

Following the chart, there is a discussion of a number of proposals that we feel call for more extended comment. This commentary is directed either at amplifying our support for some proposals or at discussing our choice of a different approach to the subjects addressed in other proposals.

1. (BCLI Rep. no. 51) (Vancouver: The Institute, 2008), online: British Columbia Law Institute <http://www.bcli.org>.

PART ONE: COMPARATIVE CHART

Ministry of Finance Proposal	BCLI Report	Comments
I.A (1) *allow incorporation by one person*	s. 8	—
I.A (2) *allow electronic filing of documents at the corporate registry*	s. 302	• s. 302 is an enabling provision, allowing the issue of filing records to be dealt with in the regulations; the committee's working assumption was that the relevant regulation would treat societies on the same footing as companies and allow for electronic filing
I.A (3) *recognize pre-incorporation contracts*	s. 18	—
I.A (4) *remove the doctrine of "ultra vires"*	s. 27	—
I.A (5) *allow special resolutions to proceed by 2/3 vote*	s. 1 "special majority" ss. 271, 331	• the definition of "special majority" provides for a 2/3 vote as its default choice; ss. 271 and 331 are transitional provisions that set out a procedure for existing societies to opt into the lower voting threshold for passage of a special resolution
I.A (6) *remove ability to adopt unalterable provisions but allow for high voting thresholds*	s. 183 s. 1 "exceptional resolution"	

Ministry of Finance Proposal	BCLI Report	Comments
I.A (7) *remove requirement for special resolution to authorize debentures*	—	• this proposal was implemented in the BCLI report simply by not including a requirement for a special resolution to authorize a debenture
I.A (8) *provide detailed list of records to be kept*	s. 38	—
I.A (9) *allow records to be kept outside of BC*	s. 39	• in addition to this provision, the BCLI report contains a number of additional provisions on the administration of a records office for a society (see ss. 40–45); the ministry should consider adopting these provisions for a new *Society Act*
I.A (10) *remove restrictions on non-voting members*	s. 126	• s. 126 is an enabling provision, allowing societies to have different classes of members; it implements the proposal by not including a restriction on the number of non-voting members a society may have
I.A (11) *allow AGMs to be held outside province or by electronic means*	ss. 99, 107	—
I.A (12) *allow AGMs to be deferred*	s. 114	—
I.A (13) *allow members' proposals*	s. 118	—
I.A (15) *add qualifications for directors and officers*	s. 56	—

Ministry of Finance Proposal	BCLI Report	Comments
I.A (16) *remove directors' liability for low membership*	—	• this proposal was implemented in the BCLI report simply by not including a provision imposing liability on directors when a society's membership drops below a set level
I.A (17) *allow societies to indemnify directors and officers*	ss. 91–98	• the society should also be authorized to purchase and maintain directors and officers insurance coverage
I.A (18) *make directors liable for improper payments*	s. 86	—
I.A (19) *provide defence of due diligence for directors and officers*	ss. 89, 165	—
I.A (20) *allow for administrative restoration*	ss. 255–69	—
I.A (21) *provide clearer process for amalgamations*	ss. 189–99	—
I.A (22) *allow for other reorganizations as appropriate:* *(a) amalgamations with foreign societies* *(b) court-approved arrangements* *(c) disposal of the undertaking*	(a) ss. 200–03 (b) — (c) s. 204	• although the BCLI report did not recommend court-approved arrangements for societies, we agree with this proposal and think that such a provision could prove to be useful in exceptional cases
I.A (23) *provide new remedies for societies and members:* *(a) compliance and restraining orders* *(b) oppression relief* *(c) orders to correct records* *(d) derivative actions* *(e) orders appointing an investigator*	(a) s. 159 (b) s. 158 (c) s. 161 (d) s. 163–64 (e) ss. 168–75	—

Ministry of Finance Proposal	BCLI Report	Comments
I.B (1) *require a society's purposes to be stated in its constitution*	s. 10	—
I.B (2) *require bylaws to be filed at the corporate registry*	s. 8 (3) (d) (ii)	—
I.B (5) *prohibit financial assistance*	ss. 121, 123	• the act should carve out an exception to the prohibition on financial assistance to directors, allowing societies to indemnify a director—see proposal I.A (17)
II.A (1) *remove registrar's ability to require society to alter purposes before incorporation*	—	• this proposal was implemented in the BCLI report simply by not carrying forward a provision vesting the registrar with this discretionary power
II.A (2) *remove requirement for registrar's approval of constitutional changes*	s. 178	—
II.B (1) *retain restriction on distribution of profits or other assets to members*	s. 10 (2)	• the ministry should consider adopting the limited exceptions to this rule provided for in the BCLI report: reasonable compensation for goods, services, or other valuable benefits; financial assistance consistent with the act and the society's constitution; payment of a benefit by a society with insurance purposes; and payment under a court order
II.D (8) *audited financial statements would be optional for all societies*	s. 138 (1)	—

Ministry of Finance Proposal	BCLI Report	Comments
II.D (9) *remove the concept of "reporting society"*	—	• enabling legislation for reporting societies was not carried forward in the BCLI report
III (1) *require the registration of extraprovincial societies*	s. 276	—

PART TWO: DISCUSSION OF SPECIFIC PROPOSALS

Transition Costs

We strongly agree with the point made on page 2 of the *Discussion Paper* that reform of the *Society Act*[2] should avoid imposing unnecessary transition costs on societies.

Harmonization with the Business Corporations Act

The *Discussion Paper* notes on page 5 the differing approaches taken by the ministry and the BCLI committee to the issue of harmonization of the *Society Act* with the *Business Corporations Act*.[3] We continue to stand behind our approach to this issue. At the time our project was being carried out the *Business Corporations Act* was relatively new. The act seemed to represent the direction in which the government was moving with corporate policy. Harmonization of the *Society Act* with the *Business Corporations* appeared to be a practical way to advance the goal of modernizing the *Society Act*.

That said, we are not strongly opposed to the approach the ministry has decided to take. In fact, given the substance of provisions that the *Discussion Paper* has proposed to adopt, it appears that the two approaches will lead to largely the same result.

I.A (10) Restrictions on Non-voting Members/One Member–One Vote

We agree with the main thrust of this proposal, which involves doing away with an anomalous *Society Act* provision requiring that a society's voting members always outnumber its non-voting members.

But we are concerned by the characterization of the one member–one vote rule as being "fundamental to the democratic nature of societies." While it is true that the majority of societies do operate in accordance with this rule, it should not be forgotten that many societies employ different systems of voting. For example, some societies use delegate voting. This is an indirect form of voting that may be used to ensure geographical or interest-group diversity on a society's board of directors. Delegate voting is acceptable under the *Society Act* as it now stands. In fact, the current act contains a few references to delegate voting, but it lacks any substantive provisions that would be of assistance to societies that adopt this form of voting.

2. RSBC 1996, c. 433.

3. SBC 2002, c. 57.

It's not clear from the proposal how existing voting systems that don't measure up to the one member–one vote rule would be treated under a reformed *Society Act*. In our view, the reformed act should not rigidly insist on societies adopting a one member–one vote system. Instead, it should recognize the range of voting systems actually in use and, ideally, provide clarity and support for systems such as delegate voting.

I.A (14) Allow Proxy Voting

We agree that proxy voting at members' meetings should be permitted, but our recommendations called for a different default choice for societies on proxy voting. The BCLI report recommended that a society that wanted to have proxy voting must enable this choice by including appropriate provisions in its bylaws. If the society's bylaws were silent on proxies, then the society would not have proxy voting.

While there are some advantages to proxy voting, there are also some drawbacks to having this system in place. Proxies can be used by a single-issue voter to dominate a meeting, by collecting proxies from members who are indifferent to that issue. In addition, proxies may be seen as a rather old-fashioned solution to issues of attendance that may be addressed by telephone or electronic voting. In our view, it is worthwhile for societies to consider how proxy voting will affect members' meetings. This can be accomplished by making proxy voting a conscious choice, requiring enabling provisions in a society's bylaws.

I.B (3) Future-Dated Filings

The BCLI report did recommend that future-dated filing, which is permitted under the *Business Corporations Act*, be extended to the *Society Act*. That said, we were aware that the option would likely be rarely used, and do not object to the ministry's proposal and its operational rationale.

I.B (4) Member Access to All Records

The BCLI report contained a more nuanced approach to this issue (see s. 42). The report recommended that, as a baseline, members would be allowed access to specific corporate records that a society would be required to keep at its records office. This baseline level of access would actually permit members to have access to the bulk of a society's corporate records. The report's draft legislation would not extend to members access to the society's register of members, to minutes of a meeting of directors or a committee of directors, to resolutions passed by directors or a committee of directors, or to written dissents by directors. If a society wished to allow

members access to these records, it could do so by adopting an enabling provision in its bylaws.

We are of the view that this approach corresponds to the mainstream approach that prevails in Canadian corporate law, both for for-profit[4] and not-for-profit corporations.[5] This approach respects the division of tasks that is at the heart of corporate governance. Directors are subject to a statutory and common-law duty to manage or oversee the management of societies, a duty that does not apply to members. In carrying out this duty, confidentiality is often needed to ensure that decisions are taken only after a full and searching debate. Opening up this process would likely inhibit that debate. Membership lists, the other main document that would not be presumptively open to members' access, contain personal information, such as members' residential addresses. It is for this reason, that the BCLI report only allows access to a members' list for limited purposes and upon compliance with a detailed procedure (see s. 44).

The *Discussion Paper* proposal is consistent with the position under the current *Society Act*, but we are of the view that it would not represent the best approach for a new *Society Act*. A mandatory position of open access is open to abuse. This proposal would also put British Columbia's legislation at odds with reformed not-for-profit legislation elsewhere in Canada.

In reviewing this proposal, we have interpreted it as being linked to proposal I.A (8). The proposal would grant members a right of access to all corporate records that a society will be obliged to keep at its records office. If the proposal is meant to be taken literally as granting members access to *all* society records, then it raises even more concerns. This would extend its scope to documents such as society contracts and accounting records. Allowing members access to these records as a matter of course would place the *Society Act* even further outside the corporate-law mainstream and would create even more opportunities for abuse. For example, large, broadly based societies could find themselves confronted with sweeping requests for records that could require a great deal of time, expense, and expertise to address. Complex issues relating to privacy and third-party rights could also arise. The *Freedom of Information and Protection of Privacy Act*,[6] which applies to public access to government records, contains extensive provisions that address privacy, third-party rights, and costs (among other issues). If a pure open-access regime is contemplated

4. *See Business Corporations Act*, *ibid.*, s. 46.

5. *See Canada Not-for-profit Corporations Act*, SC 2009, c. 23, s. 22.

6. RSBC 1996, c. 165.

for societies, then the ministry should carefully examine the *Freedom of Information and Protection of Privacy Act* and consider the need to adopt equivalent provisions under the proposed regime.

I.B (6) Require Yearly AGMs

The BCLI report recommended following the *Business Corporations Act* and allowing the members of a society to waive the holding of an annual general meeting. Allowing societies the leeway to waive the holding of an AGM could prove to be useful in some cases, for example where the society is a foundation, or where it essentially operates as a self-perpetuating board of directors.

I.B (9) Directors

We generally agree with the proposal to maintain the current act's approach to determining directors. But we note here that many society directors attain their offices through means other than an election at a members' meeting. It would be beneficial for societies if the ministry considered providing some clarity on delegate voting, external appointments of directors by a society's stakeholders, and *ex officio* appointments of directors.

I.B (10) Conflict of Interest Disclosure

The BCLI report adopted the materiality test for disclosures of conflicts of interest, and we agree with the ministry's proposal to adopt the test. The BCLI report also recommended adopting much more of the *Business Corporations Act*'s approach to conflicts of interest than the ministry is willing to propose. We continue to support our recommendations, which in many cases are directed at giving the courts more tools and greater flexibility to deal with conflicts of interest.

I.B (11) Requiring Security from Directors and Officers

We prefer our recommendation to abolish this little-used and out-of-date provision. It is not clear to us that these arrangements would require statutory support. A director and a society could always agree to have the director post security for the performance of the director's duties. If a society relied on a legislative provision to force a director to post security against that director's wishes, in all likelihood the result would be that director's resignation from the board.

In our view, this provision serves no practical purpose. It is unlikely that it would ever be the subject of a one-off legislative amendment, so now is the appropriate time to act on repealing it.

I.B (12) Continuations

In the BCLI report, we recommended allowing societies both to continue into British Columbia and to continue out of British Columbia. We were of the view that a more liberal approach to continuations would be a time-saver and a money-saver for societies that wish to transfer their jurisdiction of incorporation—a result that still may be possible under current laws, so long as the society is willing to go through a series of awkward and complex transactions. If, for example, a British Columbia society and a Saskatchewan non-profit corporation decided that they wished to amalgamate and continue as a Saskatchewan corporation, and it were clear that the amalgamated corporation's new jurisdiction had similar protections against distribution of assets to members as are found in British Columbia, why shouldn't the law allow for this result in the most direct way possible?

A liberal approach to continuation would also be in accord with general economic and social trends (which have placed an increased emphasis on a far-reaching, global point of view) and with developments in other Canadian jurisdictions. Modern, reformed not-for-profit legislation tends to take this approach to continuation.[7]

We favour our approach to continuation over the restrictive approach proposed in the *Discussion Paper*.

II.A (3) Filing Special Resolutions

The BCLI report recommended that societies continue to have to file all special resolutions with the corporate registry. The rationale for this recommendation was that creating, in effect, two classes of special resolutions for the purposes of filing could cause confusion and administrative problems. We strongly favour this approach.

II.C Apply "Asset Lock" on Dissolution Only to Certain Types of Societies

This issue raises difficult policy considerations for a fundamental part of not-for-profit law. The BCLI report recommended two specific reforms to the current position of the *Society Act*. These reforms were (1) make it clear that, on the dissolution of a society, the prohibition on distribution of assets of a society to its members only applies to societies with *exclusively* charitable purposes, not merely *a* charitable purpose and (2) repeal the problematic definition of "charitable purpose" in the current act, allowing the *Society Act* to benefit from developments in the common-law understanding of what constitutes a "charitable purpose." We recommended these

7. *See* Saskatchewan: *The Non-profit Corporations Act*, SS 1995, c. N-4.2, ss. 174–75; Ontario: *Not-for-Profit Corporations Act, 2010*, SO 2010, c. 15, ss. 114, 116 (not in force).

limited reforms because, in our view, they would improve the legislation without unduly interfering with established practices in British Columbia. We also found that they commanded thoughtful support in the public consultation that we conducted during the *Society Act* Reform Project.

During the project, we examined options for adopting comprehensive reforms to the current system, but decided not to pursue them. While systems based on the classification of societies have some advantages, they also have important drawbacks, such as increasing the complexity of the legislation and adding to the administrative burden on societies. For these reasons, we continue to favour our recommendations for reform on this issue.

II.D (1) Three Directors for Public Societies

We favour our recommendation to set one as the minimum number of directors for all societies. Although many societies will in fact have more than one director, the baseline rule should give societies as much flexibility as possible. There may be situations in which it may make sense for certain types of public societies (such as foundations) to have fewer than three directors.

II.D (2) Director Residency Requirement for Public Societies

We prefer our recommendation to do away with director residency requirements altogether to the proposal that they be retained for public societies (which would be required to have at least one BC-resident director). In our view, this requirement is out of date. Imposing it even to a limited extent would also leave British Columbia out of step with other jurisdictions in Canada.

II.D (3) Public Access to Financial Statements of Public Societies

In our final report we decided not to carry forward in the proposed new *Society Act* a requirement that the public have access to the financial statements of a society. In making this decision, we noted that other legislation and administrative arrangements applicable to the not-for-profit sector generally provided access to the financial statements of certain societies. For example, a society that is also a registered charity must provide financial statements to the Canada Revenue Agency as part of its annual charitable return. The Canada Revenue Agency, in turn, publishes information about the charity's finances on the CRA website. The CRA can also, upon request, provide anyone with a copy of a charity's financial statements. In our view, arrangements such as these allow the public adequate access to the financial statements of a society in a way that maintains a level playing field among all participants

in the not-for-profit sector. We are not convinced that the *Society Act* needs to provide public access to the financial statements of all public societies.

II.D (5) Prohibit Officers or Employees of Public Societies from Acting as Directors

The BCLI report recommended that paid staff members not be permitted to act as a director of any society. There are two features of this recommendation that we wish to highlight in connection with the ministry's proposal to prohibit officers or employees of public societies from acting as directors.

First, the BCLI recommendation would apply to all societies, not just a limited class of societies. The rationale for this recommendation was that mixing the roles of employee (or other person on the society's payroll) and director amounts to a functional conflict of interest. In our view, this functional conflict of interest arises whatever the size or sophistication of the society. It is not hard to conceive of cases in which a smaller, less sophisticated society may actually be more vulnerable to abuse flowing from having a paid staff member also serving as a director. For this reason, we continue to stand behind our recommendation to apply this provision to all societies.

Second, the BCLI recommendation defined "paid staff member." The ministry's proposal simply refers to prohibiting officers or employees from serving as directors. While the commentary on the proposal appears to make it clear that the proposal's target is individuals who are on the society's payroll, there was still enough ambiguity in the unqualified reference to officers in the body of the proposal to give us pause. Extending this prohibition to all officer positions would catch volunteer presidents, vice-presidents, treasurers, and secretaries. In our view, this would be an undesirable result, which would unduly strain the rationale for having such a provision.

II.D (7) Extension of Oppression Remedy to General Public for Public Societies

We examined the possibility of extending access to the oppression remedy to a greater range of people beyond the membership of a society. In the end, we decided that such an extended scope for the remedy was not appropriate for British Columbia and recommended that the oppression remedy be restricted to members of the society, with the court having the narrow discretion to allow an "appropriate person" to seek the remedy in limited circumstances.

We came to this decision because we were concerned about the potential for abuse if service recipients or members of the general public had the presumptive right to use the oppression remedy against societies.[8] The danger is that a disgruntled person could brandish the oppression remedy as a weapon against the society in an unrelated dispute. The threat of court proceedings could be used to force the society to choose between incurring costs to defend itself and settling the dispute.

III (2) Options for Dispute Resolution

While we support the goal of finding a faster and cheaper way to resolve disputes, we think the ministry should proceed with caution on this issue. Mediation and other forms of alternative dispute resolution are not necessarily the best means to resolve all disputes. For example, many society disputes involve member or director misconduct. Such disputes are often not going to be amenable to resolution by mediation. So requiring societies, for example, to have a mandatory-mediation provision in their bylaws could end up costing societies both time and money in some cases.

III (3) Occupational Titles Protection

British Columbia is the only province that incorporates occupational title protection in its framework statute for not-for-profit corporations. We recommended that a new *Society Act* not carry forward the occupational titles provisions. In our view, these provisions are not a good fit with the *Society Act* and they tax administrative resources that should be dedicated to societies. Occupational titles protection merits its own statute, with its own dedicated administrative support. Now, when a new *Society Act* is being designed, is the appropriate time to sever the link between this statute and occupational titles protection.

8. The language of the proposal strongly implies that the general public would have access to the oppression remedy as of right ("extend oppression remedy to protect the public in dealing with public societies"). But the commentary on the proposal wavers between describing the proposal in terms consistent with a presumptive right and those consistent with the orthodox corporate-law position that the BCLI recommended. Our comments on based on an interpretation of the proposal as creating a new, presumptive right for the general public to use the oppression remedy.

CONCLUSION

Once again, we thank the ministry for the opportunity to comment on its proposals for reform of the *Society Act*. We would be pleased to meet with ministry officials to discuss our response to the *Discussion Paper*.

We look forward to the timely enactment of a new and modern statute for British Columbia's societies.

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